

Dower (Mehar)

* Intro :- Pre-Islamic Arabia - marriage - not developed, sex-relationships - vague, temporary relations, men - despoiled. wives turned them out helpless and without any means - Shighar daughter/sister in return to daughter/sister of the other. 'Beena' - husband visited the wife but did not bring her home - wife was called Sadiqa & gift given to wife - Sadaq (dowry) - Sadaq is gift to wife, mehar was gift/compensation to wife's parents (baal marriage).

* Defⁿ :- Mehar - sum that becomes payable by the husband to the wife on marriage, either by agreement between the parties or by operation of law.

- Ameer Ali - Dower is a consideration which belongs absolutely to wife.

Abdul Kadir v. Salima, ^{I.L.R.(1886) 8 A.L.J. 149} Justice Mahmood has said that Dower under the Muslim law is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of marriage, and even when no dower is expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife.

* Nature of Dower

introduced by Prophet Mohammad - obligatory in every marriage - similar to donatio propter nuptias (gift/settlement made before the marriage)

1) Contract for dower v. Contract for sale (wife-product, dower-price)

Abdul Kadir v. Salima, Dower - consideration for consubial intercourse, it to exist as long dower remains unpaid = it to lien over the goods sold v/possession as long the price is paid, surrender to husband = delivery of goods

2) Dower as a consideration for conjugal intercourse
Smt. Naira Begum v. Rizwan Ali, Allahabad HC - at the claim prompt dower precedes cohabitation.

- 3) Dower - as an essential incident & fundamental feature of marriage - dower fixed / not - entitled to dower.
Hassana Bibi v. Zubaida Bibi, Dower - essential - If wrong it must be adjudged on definite principles.

* Object of Dower

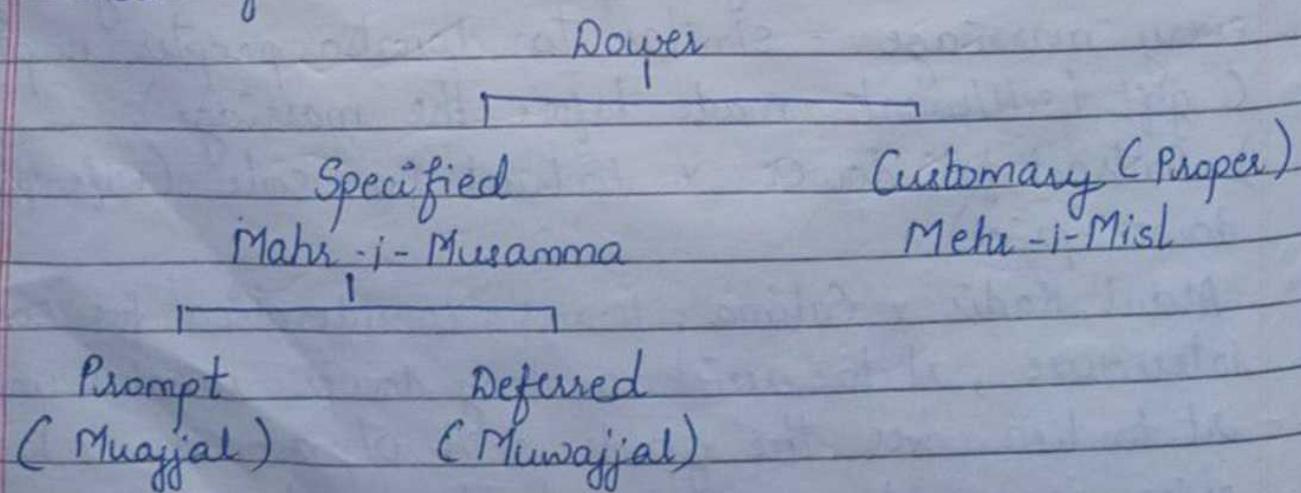
- i) to impose an obligation on the husband as mark of respect of the wife.
- ii) to place a check on the capricious use of divorce on the part of husband
- iii) to provide for her subsistence after the dissolution of her marriage, so that she may not become helpless after the death of the husband or termination of marriage by divorce.

* Fixation of Mehr

gold / silver so that the rights of women are fully protected in the event of fall in the value / currency

* Increase / Decrease of Dower - Husband increase after - girl on attaining puberty - relinquish Mehr (free consent - Hibe - e - Mehr)

* Kinds of Dower



1. Specified Dower - Stated in the marriage contract

- settled before / at / after marriage

- minor - guardian fix dower

Sunnis - not less than 10 dirhams (D-19R) 2019

Maliki - 3 dirhams

Shia - no min. amount

Not in a position to pay 10D - teach Quran

i) Prompt :- payable immediately after marriage on demand

- wife can refuse - conjugal domicile of husband

- if consummated - wife cannot refuse CR - ^{conditional} decree

- husband enforce conjugal rights after payment of PD

- P.O.L → 3 years (A.113 LA)

ii) Deferred - payable on dissolution of marriage ^{death} _{divorce}

- deferred payable before - if agreement

- widow relinquish st of dower at husband's _{funeral}

- vested interest

2. Customary (Proper) Dower - amount not fixed in marriage / marriage - with a condition that wife will not claim any dower - wife entitled to proper dower

- Determination of Proper Dower

a) personal qualifications of wife - age, beauty, understanding

b) social position of her father's family

c) dower given to her female paternal relations

d) Economic condⁿ of her husband

e) Circumstances of time

- Highest limit of Mehr - Sunnis - no limit

Shias - 500D. (Fatima).

* Wife's right on non-payment of Dower

1) Refusal to cohabit - man - not consummated - good defense

2) Right to dower as a debt ^(unsecured) - along with other creditors

M dies - widow, son, 2 daughters (7/32) = 700

3200 £M ^{118th} = 400 (son share - 7/16 = 1400)

3) Right to retain possession in lieu of unpaid dower -
- Rt of retention during continuance of marriage -
comes after death / divorce

- Actual Possession -

* not a mortgage

- can sue heirs

- rt of retention

← heritable } One view - personal st.
← transferable } Other view - exercised by heirs.

Eg: Muslim dies → widow & brother → (claim share pay his share of M)
↓
possession of husband's property
↓
sells property
↓
Effect - only widow's share is passed
brother need not pay share to widow

Divorce / Talak

* Intro :-

Islam - 1st religion to recognise the termination of marriage by way of divorce. - D-disliked by Prophet as it was most hateful before the Almighty God, it prevented conjugal happiness and interfered with proper bringing up of children.

* Meaning :-

- D - translated as repudiation which means to release or free from bondage of marriage.
- U/Islamic law, D/T signifies absolute unilateral power of husband to divorce wife anytime without assigning reason.

* Conditions

1. Capacity ← sound mind
puberty
2. Expressed - A divorce may be ← oral
writing ^(Talakanam), words are expressed (saheeh) or well-understood as implying divorce, no proof of intention is required. (Shia- 2 witness) <sup>(pronounced
communicated
in writing)</sup>
3. Ambiguous (kinayat) - Intention considered.
3. Presence of wife - not necessary (absence - referred by name - otherwise invalid) (effect from date of knowledge of wife)
4. Talag pronounced under voluntary intoxication - effective - Sunnis ^{void - Shias}
involuntary / forcible - not recognised - Shafi ineffective

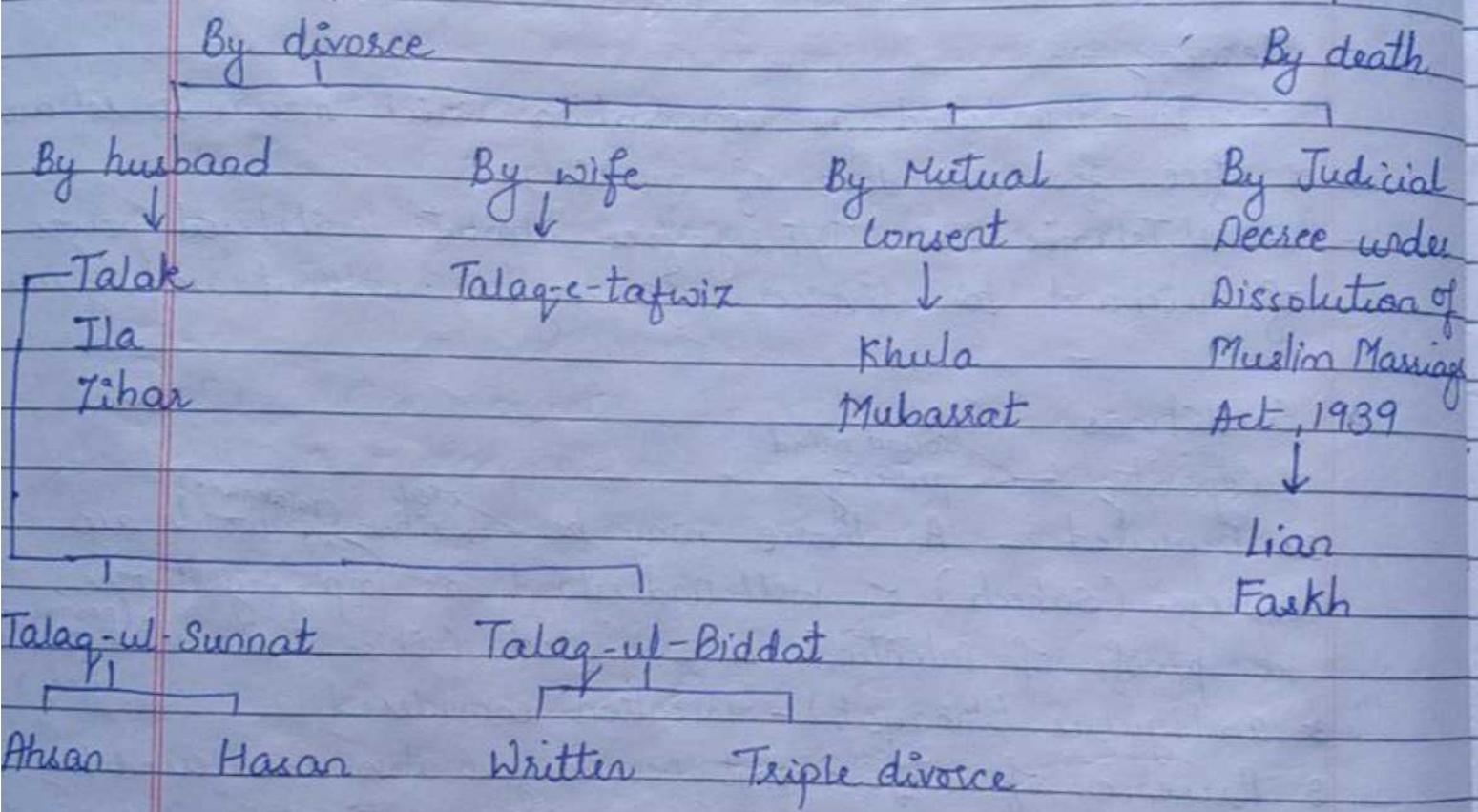
* Contingent divorce -

- Muslim husband can authorize his wife to dissolve marriage on the happening of certain contingencies.
- Contingency - reasonable
- Bachhoo v. Bismillah - husband agree to pay maintenance

within a specified time and in default the writing of deed in respect thereof operate as a divorce.

Held, a divorce may be pronounced as to come into effect not immediately but at some future time contingent on the happening of some specified future event.

* Forms / Classification of Dissolution of Marriage



* By Husband

(A) Talaq

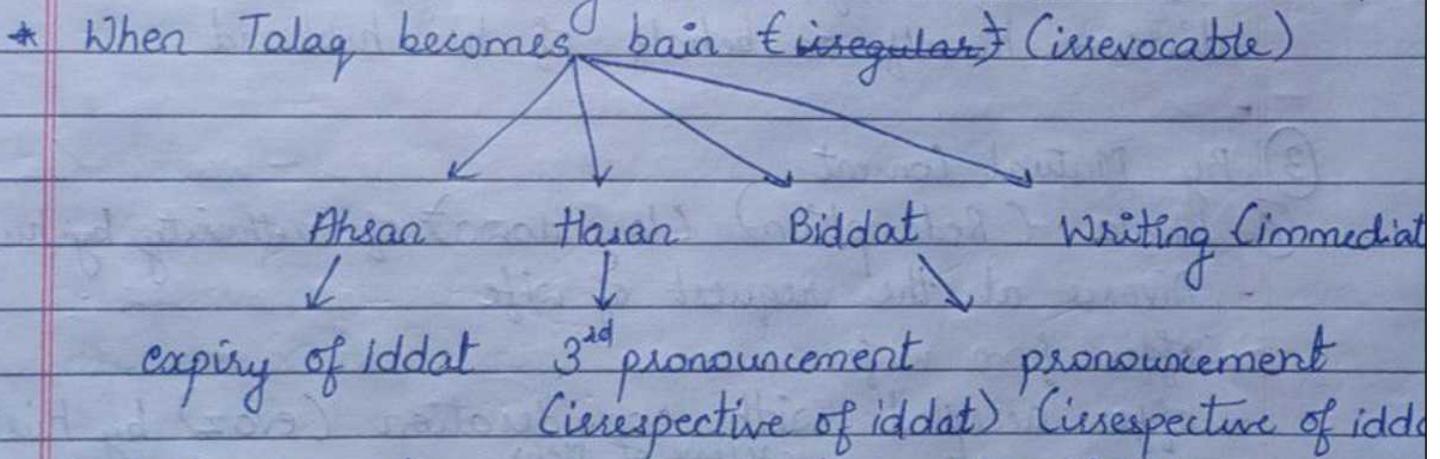
1. Talaq-ul-Sunnat - (in accordance with the traditions of Prophet)

- Ahson - most approved form - means best / very proper
- single pronouncement - single sentence of purity (tube) abstain from sexual intercourse for iddat period
- marriage not consummated - allowed in menstruation

- Hasaa - means 'good' / proper
 - triple ^{successive} pronouncement
 - menstruating wife - $\left\{ \begin{array}{l} 1P - tuhr \\ 2P - tuhr \\ 3P - tuhr \end{array} \right.$
 - non-menstruating wife - pronounce - 30 days
 - abstain from sexual intercourse for iddat period

2. Talag-ul-Biddat - disapproved / sinful / irregular - introduced by omeyyads to escape strictness of law (Hanafis) (Sunnis) - Accept, shias & Malikis - do not accept.

- three pronouncements during a single tuhr in 1/ three separate sentences
- single pronouncement during a single tuhr indicating intention irrevocable to dissolve marriage



* Rashid Ahmed v. Anisa Khatoon 1932 PC 25

G - triple talag - before witnesses, wife absent, 4 days later talagnama executed - triple divorce given - no re-marriage b/t parties. Husband & wife lived together 5 children born - G-treated wife & children - legitimate. Held as illegitimate. triple divorce effective.

(B) Ila (Vow of continence)

- Husband $\left\{ \begin{array}{l} \text{age of majority} \\ \text{sound mind} \end{array} \right.$
- swears by God / takes a vow - no sexual intercourse
- abstains from sexual intercourse
- Cancellation of Ila - resume intercourse, verbal removal, not

③ Zihar (Injurious Assimilation)

- Husband \leftarrow ^{sound mind} age of puberty
- compares wife to mother / sister / female in prohibited
- Wife \leftarrow ^{refuse intercourse} apply to court \leftarrow ^{penance} ^{free from slave} fasting 2 mths, feeding 60 poor
- if wrong doing continues - wife - claim - judicial separation

② By wife (Talaq-e-tafweez) (Delegated divorce)

- delegating power of repudiation to wife / 3rd person - T-E
- aqt. made \leftarrow ^{before} marriage - wife - liberty - to divorce herself from her husband under certain specified conditions - eg. husband marries 2nd wife / fails to maintain her
- noteworthy - wife does not divorce her husband, but divorces herself on behalf of her husband.

③ By Mutual Consent

① Khula (Redemption) (lay down of authority by husband)

- Divorce at the request of wife
- offer from wife
- offer accepted with consideration (evaz) by husband
- consideration \leftarrow ^{release of Mehar} any aqt. for husband's benefit
- consideration unpaid - divorce valid, husb. sue wife
- husband \leftarrow ^{sound mind} age of puberty (adult)

② Mubarat (Mutual Release)

- both sides desire separation
- offer from either side - accepted - irrevocable divorce

④ By Judicial Decree under Dissolution of Muslim Marriage Act, 1938

① Liar (False Charge of Adultery)

- Husb \leftarrow ^{sane} adult charges wife \leftarrow ^{sane} adult of adultery / denies

paternity of the child:

- charge - false
- ~~ch~~ false charge - opportunity to wife to move court to dissolve the marriage - regular suit
- Lian - applicable to sahih and not fasid
- Retraction - husband must admit charge of adultery
 - " - charge - false
 - husband must retract before the end of trial

(B) Judicial Rescission (Faskh) (cancellation of marriage)

- Faskh - annulment / abrogation / revocation / abolishment
- referred as takhim - power of the Kazi to annul marriage
- Duty of husband - give proper treatment to his wife
- duty of wife - obey lawful orders of husband - If both conclude that they cannot live as husband and wife, they can refer the matter to Qazi - careful examination - terminate the marriage.

- Main grounds for dissolving marriage at the instance of wife :-

- i) mass - irregular
- ii) person having option to avoid marriage - exercised the option
- iii) mass - performed within prohibited degrees
- iv) mass - by non-muslims, parties adopted Islam

* Judicial Divorce

- Before Shariat - wife sue husband for divorce on 2 grounds
 - i) Impotence of husband
 - ii) Lian
- After Shariat - Ila, Zihar
- Dissolution of Muslim Marriage Act, 1939 (S'2)
 - i) Absence of husband - whereabouts not known for 4 years
 - ii) Failure / Neglect to maintain wife - 2 years
 - iii) Imprisonment of husband - 7 years / upward

- iv) Failure to perform marital obligations - 3 yrs w/o reasonable cause
- v) Impotency of husband - at the time of marriage + continuous
- vi) Insanity, leprosy or venereal disease - insane - 2 years
- vii) Repudiation of marriage by wife - before 15, repudiate before 18, marriage by father/guardian, not consummated
- viii) Cruelty of husband -
 - habitually assaults, life miserable
 - associate with women of ill-repute
 - forces/attempt - lead immoral life
 - disposing her property - no st.
 - more wives - no equitable treatment
 - obstructs - religious profession/practice
- ix) Grounds of dissolution recognised by Mohammedan law - Ila, Zihar, Khula, Mubarat and Tafweez, Li'an

* Legal Consequences of Divorce.

- 1) Entitled to contract another marriage - woman
 - cons - iddat
 - not cons - mahr
- 2) ^{Wife at to} Dowry = marriage consummated - whole of dowry
 - prompt
 - deferred
 marriage not - half of amount.
- 3) Mutual rate of inheritance cease after divorce becomes irrevocable.
- 4) Cohabitation - unlawful, children - illegitimate
- 5) Remarriage - unlawful - halala -
- 6) Maintenance during iddat of divorce but not death

* Guardianship *

* Defⁿ :- Guardians & Wards Act defines guardian as "a person having the care of the person of a minor or of his property or of both his person and his property."

* Meaning :- Guardianship (Waliyat) connotes the guardianship of a minor.

Who is a minor - one who has not attained the age of majority i.e. 18 as per Indian Majority Act, 1875; 21 if guardian is appointed.

* Appointment of guardian

1) By Court

- When court is satisfied that it is for the welfare of minor - orders for appointing guardian $\left\{ \begin{array}{l} \text{person} \\ \text{property} \end{array} \right\}$ both, Court of

- joint guardian - S.15(D) Guardians & Wards Act, 1890
any one dies - other continues to be a guardian. If the superintendence of property of minor assumed v/court of Wards then $\left\{ \begin{array}{l} \text{guardian not appointed v/G&WA (property)} \\ \text{" " " " " (person)} \end{array} \right.$

2) State Government are also empowered to appoint Court of Wards. - constitute ward courts - regulating, constituting and working and power of Court of Wards.

3) Provisions :-

- S.6, 19, 21 G&WA, Court not interfere to appoint a guardian where guardian of minor's $\left\{ \begin{array}{l} \text{person} \\ \text{property} \end{array} \right.$ appointed under a will. - Removal of guardian - not performing his duties properly.

- S.20, Duty on guardian to deal with the ward's property carefully and honestly.

- S.21, Minor not act as guardian of other minor

- S.24, S.25, S.26, of ~~of~~ custody of child - support, health, etc

- S.27 - Duties & Limitation on powers of guardian - deal minor's property - man of ordinary prudence - approval of Court for disposing

- S.30 - Prior approval of Court for disposing minor's prop.
- S.31 - Procedure for obtaining the sanction of the Court
- S.33 - Seek advice / opinion of Court - management of ward's property
- S.41 - Ceasing to be a guardian. ← death
major
marr.
- Welfare of child to be considered.
 - age, sex & religion of minor
 - character and capacity of proposed guardian
 - nearness of kin to the minor / relations
 - wish of deceased parent

**** Kinds of guardianship.**

- 1) Guardianship in Marriage (Tahar)
- 2) Guardianship of person of the minor for custody (Hizanat)
 - 3) Guardianship of property
 - a) De facto Guardianship
 - b) De Jure Guardianship / legal / Natural
 - c) Certified Guardianship / By Court
- 1) Guardianship in marriage (Tahr)
 - essentials of marriage - attained puberty - minor - marr. contracted by guardian (jahr)
 - cannot be appointed by court / nor by a will
 - persons entitled v/Sunnis - f, ff, full brother - male relations m, maternal relations, qazi / court.
 - v/Shias - f, ff.
- 2) Guardianship of person of the minor for custody (Hizanat)

A) Mother	←	Harafi - 7Y	F Puberty	7Y
		Shia - 2Y		

, right of mother even if divorced but

- Failing her, ^①MM, ^②FM, ^③FS, ^④US, ^⑤CS, MA, PA

- Female's right to custody when forfeited

i) she leads an immoral life (adultery, prostitute)

ii) she neglects to take proper care of the child.

iii) during the subsistence of marriage, she goes and resides at a distance from the father's place

iv) she marries a person not related to the child within prohibited degrees.

B) Other male relations - ^①F, ^②GF, ^③FB, ^④CB, ^⑤FB of F, ^⑥CB of F, ^⑦Son of F & FB

- Illegitimate child - 7 years - with mother - afterwards - election

- Power of Court to interfere.

C) Husband - entitled custody of wife → puberty → mother entitled for custody.

3) Guardianship of Minor's Property -

A) Legal guardian / de jure / natural guardian

- person entitled - i) father

ii) executor (wasi) appointed by father

iii) father's father

iv) executor (wasi) appointed by ff.

- No legal guardian - Court appoint

Powers - Alienation by legal guardian $\begin{cases} \text{movable - urgent necessity} \\ \text{immovable -} \end{cases}$

i) debts of deceased - no other means of paying them

ii) minor - no means of livelihood, sale - necessary - maintenance

iii) double the price of the property obtained

iv) expenses exceed the income of the property

v) property falling into decay

vi) property - usurped, guardian fears - no chance of fair restitution

vii) legacies are to be paid, no other means of paying.

B) Guardian appointed by Court / Certified Guardian

- Absence of LG - Court appoints - CG (protect & preserve minor's property considered) - For Minor welfare - mother, will of father (is not remained)

Powers :- Alienation of immovable property with court's permission

- i) charge
- ii) mortgage
- iii) transfer by ^{sale} gift
- iv) exchange

ii) lease - ^{more than 5 yrs} _{more than 1 yr} beyond the date - ward ceases to be a minor

- (granted ^{permission} → in case of necessity / evident advantage)

- Alienation of movable property - sell / pledge goods for minor's necessities ^{food, clothing, recreation}

C) De Facto guardian

- Neither LG nor CG, puts voluntarily in charge of property
- mere custodian - no other rights.
- Who can be DFG - except father & father's father (mother, ^{bro, uncle})
- Alienation - no power - void
- Alienation of MP - allowed

D) Testamentary guardian (Quran)

- F/FF - competent to make will for son/guardian
- w/ Shia - TG - major, sane, professor of Islam, good character