

UNIT - II

Parentage • Divorce • Maintenance & Matrimonial Remedies

Talaq • Iddat • Custody • Guardianship • Muslim Women Act 1986

Unit Structure

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Parentage, Legitimacy & Acknowledgement

Legitimacy of children, acknowledgement of paternity

02

Custody, Guardianship & Maintenance of Children

Hizanat, guardianship principles, maintenance

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Modes of Talaq & Effects

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Statutory Remedies & Maintenance

Dissolution of Muslim Marriages Act 1939, Muslim Women Act 1986, CrPC 125

Parentage, Legitimacy and Acknowledgement of Paternity

Under Muslim law a child born during the continuance of a valid marriage or within the period of iddat is presumed legitimate.

Acknowledgement of paternity (Iqrar):

- A man may acknowledge a child as his own even if the mother was not his wife at the time of birth, subject to conditions.
- The acknowledger must be of sound mind and adult.
- The child must not be known to be the child of another.
- The ages must be such that the acknowledger could be the father.
- The acknowledgement must not be repudiated by the child if adult.

Effect: The child becomes entitled to inheritance and other rights as a legitimate child.

Custody (Hizanat) and Guardianship

Custody (Hizanat) is primarily with the mother for young children.

Hanafi rules (approximate):

- Mother has custody of a male child till 7 years and of a female child till puberty.
- After that the father (or other male guardian) is entitled to custody.

The welfare of the child is the paramount consideration in modern Indian decisions. Courts may deviate from classical rules if the child's welfare so requires.

Guardianship of property is generally with the father and, after him, the father's father and other male agnates. The mother is not the natural guardian of the property under classical Hanafi law, though she may be appointed.

Modes of Talaq under Muslim Law

Talaq-ul-Sunnat

In accordance with the Prophet's tradition – Ahsan (single pronouncement in tuhr followed by abstinence) or Hasan (three pronouncements in three tuhrs).

Talaq-ul-Biddat

Instant triple talaq – three pronouncements in one sitting. Declared unconstitutional by the Supreme Court in Shayara Bano (2017) and later criminalised by statute.

Ila & Zihar

Ila – husband swears abstinence; Zihar – husband compares wife to a prohibited relative. Both can lead to constructive divorce.

Khula & Mubarat

Khula – divorce at the instance of the wife with consideration; Mubarat – mutual consent divorce.

Effects of Talaq and Iddat

On pronouncement of talaq:

- The marriage is dissolved (immediately in the case of irrevocable talaq, after the iddat period in the case of revocable talaq).
- The wife becomes entitled to deferred dower and any unpaid prompt dower.
- She must observe iddat (period of waiting) – normally three menstrual cycles or three lunar months, or till delivery if pregnant.
- During iddat the husband is liable to maintain her.
- She cannot remarry until iddat is over.
- Mutual rights of inheritance cease (except in certain revocable cases before the end of iddat).

Iddat is intended to ascertain pregnancy and to provide a period of reconciliation in revocable divorces.

Dissolution of Muslim Marriages Act, 1939

The Act gives a Muslim woman the right to obtain a decree of dissolution on specified grounds, including:

- Husband's whereabouts unknown for 4 years
- Failure to provide maintenance for 2 years
- Imprisonment of husband for 7 years or more
- Failure to perform marital obligations for 3 years
- Impotence, insanity, virulent venereal disease
- Cruelty (including unequal treatment in polygamy)
- Option of puberty
- Any other ground recognised by Muslim law

This Act significantly improved the position of Muslim women by providing judicial divorce on fault and no-fault grounds.

Instant Triple Talaq – Constitutional Position

Shayara Bano v. Union of India (2017):

The Supreme Court (by majority) declared the practice of instant triple talaq (talaq-e-biddat) unconstitutional as being arbitrary and violative of Article 14.

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

- Declares instantaneous talaq void and illegal
- Makes the pronouncement of instantaneous talaq a cognizable and compoundable offence
- Provides for subsistence allowance and custody rights

The combined effect is that instant triple talaq is no longer a valid mode of dissolving a Muslim marriage in India.

Maintenance of Divorced Muslim Women

Classical Muslim law: Maintenance during iddat only.

Shah Bano (1985): Supreme Court held that a divorced Muslim woman could claim maintenance under Section 125 CrPC beyond the iddat period if she was unable to maintain herself.

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

- Husband must provide a reasonable and fair provision and maintenance within the iddat period
- She is entitled to mahr and properties given at marriage
- If she cannot maintain herself after iddat, her children, parents or relatives are liable; ultimately the State Wakf Board may be directed to pay

Danial Latifi (2001): Supreme Court interpreted the 1986 Act to mean that the husband must make a reasonable and fair provision for the future of the divorced wife, to be paid within the iddat period, covering her needs beyond iddat.

Landmark Judgments

Mohd. Ahmed Khan v. Shah Bano Begum (1985)

Divorced Muslim woman entitled to maintenance under S. 125 CrPC; led to the 1986 Act.

Danial Latifi v. Union of India (2001)

Upheld the 1986 Act and interpreted it to require reasonable provision for the future within iddat.

Shayara Bano v. Union of India (2017)

Instant triple talaq declared unconstitutional.

Shamim Ara v. State of U.P. (2002)

Talaq must be for a reasonable cause and preceded by attempts at reconciliation; mere pronouncement not sufficient.

Key Takeaways – Unit II

- Legitimacy is presumed for children born during marriage or iddat; acknowledgement can confer legitimacy.
- Custody (hizanat) is guided by the welfare of the child; classical age rules are not rigid.
- Instant triple talaq is unconstitutional and a criminal offence.
- A Muslim wife has statutory grounds for divorce under the 1939 Act.
- Post-divorce maintenance is governed by the 1986 Act as interpreted in Danial Latifi – reasonable provision for the future must be made within iddat.
- Section 125 CrPC remains available in certain situations alongside the personal law remedies.

End of Unit – II

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Proceed to Unit-III: Hiba, Wakf & Pre-emption