

CHAPTER-II

THE HISTORICAL BACKGROUND OF ISLAM AND THE STATUS OF MUSLIM WOMEN IN INDIA

2.1 Introduction:

Laws may be either territorial or personal depending upon the application of a particular branch of law upon persons. A personal law is that branch of civil laws which applies upon the persons of a particular religious-community. Thus, the Mohammedan law applies upon the Muslim sections of the Indian society. Mohammedan law is a personal law. Muslim personal law is that branch of civil law which regulates the ‘personal matters’ of an individual.

Muslim Personal law in India means “that portion of Islamic civil law which is applied to Muslims as a personal law¹. The Muslim Personal law consist of the injunctions of Quran, the Sunnat and the Ahadis introduced by the ‘Practice of Prophet (PBUH), the consensus opinion of the Jurists (Ijma), and the analogical deductions of these three known as Qiyas².

In India Persons of various religious communities live together. Therefore many personal laws are enforced in the country. Thus, in India Muslim Personal law, Hindu Law, Christian Law are prevalent and enforceable. One of the unique features of Personal law is that they are founded upon the religion which is a matter of faith and belief.

Islamic law is a branch of Muslim theology, which gives practical expression to the faith, and lays down the code of conduct in accordance with the Muslim religion, both towards God and towards other men.

¹ Aqil Ahmed, *Mohammedan Law* 1, (Central Law Agency, Allahabad, 26th Edn., 2016).

² Ibid.

According to Prophet Mohammad (PBUH) the Muslim law is commandment of God and the sovereigns in the Muslim states and it is his (Muslim's) duty to follow it literally. Islam means peace by submission and obedience to the will and commandments of God and those who accept Islam are called Muslims, meaning those who have accepted the message of peace by submission to God³.

2.1.1 Historical Background of Islam:

To understand the true nature and scope of Muslim law, it is imperative to have proper knowledge of the background, origin and the historical development of Islam in the Pre-Islamic Era. To trace the history of Pre-Islamic Arabia in the 630s before the advent of Islamic was difficult task. There were few archaeological exploration and indigenous written sources are limited. More importantly, the written sources from other traditions and oral traditions which were later recorded by Islamic scholars are taken into consideration for the study⁴. The study of history of Pre-Islamic Arabian Society is important to understand the development of the Islam in India.

2.1.2 Pre-Islamic Arabian Society:

Islam was born in Arabia; the general impression about the Pre-Islamic Arabian Society was culturally and morally as barren as its land was. The climate was very hot with burning sun in the day and cold nights. Only trees of palm and date or some herbs of the desert could be seen at distant places. The life of the people was very hard due to the nature which was not at all generous. There was no settled form of society except in the few cities like Mecca or Medina⁵. Mostly the occupations of the people of Arabia were trade and cattle breeding. No common religion was followed by the people of Arab. Some of them worshiped Idols and some of them worshipped the nature. This period was known as 'Jahiliyah' (the Days of Ignorance) because there was no religious system, no inspired prophet, and no revealed book. The obvious

³ Dr. Rakesh Kumar Singh, *Textbook on Muslim Law* 1, (Universal Law Publishing, New Delhi, 2011).

⁴ Ibid.

⁵ Dr. R. K. Sinha, *Muslim Law* 12-13, (Central Law Agency, Allahabad, 6th Edn., 2006).

reason for such ignorance was the hardest life of desert and the main task of the inhabitants to manage the means of his livelihood rather than to give time for any philosophical thinking about religion and God. There was no settled form of society, the inhabitant's keeps on moving from one place to another. So, there was no form of government or administrative control over the people. There was division of tribes and sub tribes headed by elected chiefs. Caliph or Khalifa were the head chiefs.

Before the advent of Islam, the customs and usages prevalent in Pre-Islamic Period were very peculiar; most of them were unreasonable and inhuman. It was impossible to believe that they were customs to bury alive an unwanted female child. Most of the customs were in favour of the males section of the society. The status of women was very bad. No human values were given to women and the treatment by them was not more than properties. Their status in the society was so bad that they lived like slaves. Restriction as to the number of wives was not recognized, and he can marry as many as girl he liked. Even the Arab husband had unrestricted rights to divorce his wife whenever he liked⁶.

Besides, women were leading such a miserable life in the Pre-Islamic period that even their chastity, and modesty were not respected and protected, it was sold and purchased. During the days of Ignorance, women were mortgaged to men⁷.

Another important feature of Pre-Islamic period was the severe punishment for crimes. The purpose of punishment was deterrent and retaliatory. For the commission of theft, the right hand of the thief was cut off. And for adultery, the offender was stoned to death.

Thus, from the above discussions we can have a vivid picture of the Arabian Society prior to the advent of Islam. In summary the Pre-Islamic Arabian Society was morally corrupt and barbarism.

⁶ Id.

⁷ Seema Sharma, Kanta Sharma, *Encyclopaedia of Indian Women: Women Employment* 15, (Anmol Publication, New Delhi, 2005).

2.1.3 The Advent of Islam and the Reforms under Prophet Mohammad:

Emergence of religion is indispensable for a society to regulate human behaviour where injustice, oppression and barbarism has been seen increasing day by day. Religion is the key to inculcate moral values, respect and honesty in the minds of the people of a society. Social cohesion can be done through religion. For the better formation of a civilised society, religion aids to uphold the moral ideal and values and helps to establish peace, justice, quality and prosperity in the society.

The Arabian Society during the Pre-Islamic period was also groaning injustice and barbarism. Prophet Mohammad (PBUH) appeared as a saviour to the Arabs with a new religion known as 'Islam'. Prophet Mohammad (PBUH) was born at Mecca in 571 AD. His father was Abdullah and the name of his mother was Amina. Mohammad (PBUH) was brought up by his grand father Abdul Muttalib and later on, by his uncle Abu Talib⁸. Since childhood Mohammad was a serious minded and at the age of thirteen years, he joined his uncle in his business. During his trading journey at Syria He met a rich widow, Khadija once she commissioned Mohammad (PBUH) to look after her goods. She was very impressed with the noble character of Mohammad (PBUH) and that she offered him her hand for marriage. Mohammad was 25 years old and she was 40 years old. Prophet lived with her till she died. After her death Prophet married other women who were also widow except the fourth one (Ayesha Begum). From Khadija, the Prophet had two sons and four daughters. But, only the fourth daughter Fatima survived him.

Prophet Mohammad (PBUH) spent much of his time in solitude. He was a thoughtful and religious person. He used to go to a cave of Mount Hira and spend his time for prayer and meditations. Mohammad becomes a Prophet at the fortieth Year of his age, when he received his first – Wahi or message from God. He heard a voice. The voice was of the angel Gabriel⁹. The angel departed, leaving Mohammad (PBUH) in fear

⁸ Dr. Rakesh Kumar Singh, *Text Book on Muslim Law* 5, (Universal Law Publishing, New Delhi, 2011).

⁹ Aqil Ahmed, *Text Book of Mohammedan Law* 2, (Central Law Agency, 25th Edn., 2015).

doubt and anxiety. Thus, this was the first revelation which was memorized by Mohammad. But later these revelations were written down by Mohammad (PBUH) and his followers and constitute the Holy Quran. Thus Quran is not a literary work; it is a direct revelation of the lord. So, in this way, Islam for the first time was founded in 610 AD.

Apart from being a religious Preacher, Mohammad (PBUH) was also a great social reformer. For the betterment of the society, Mohammad (PBUH) laid down new principles of life and seeks to abolish the social evils prevalent in the society. Prophet's (PBUH) wife Khadija was to obey and believe the divine messages revealed to Prophet. But unfortunately, majority of people in Mecca opposed these preaching's. Many battles were fought by the followers' against the disbelievers. But due to the personality of Prophet (PBUH) which dominated the minds of Arabs that within a short period most of them embraced Islam.

Reforms made by Prophet Mohammad (PBUH):

Prophet Mohammad (PBUH) was a great social reformer. Under his guidance many reforms have been undertaken. Prophet Mohammad (PBUH) very soon realized that co-operation and unity among the members of the society will bring the foundation of the Islamic empire. So, the first task undertaken by Mohammad was the unification of the various tribes existed during the Pre-Islamic period. There was a no systematic administration or government in the Pre-Islamic Period. Therefore, Mohammad (PBUH) tried to bring all the distinctive tribes under one nation. For the same purpose Mohammad (PBUH) formed a 'Charter 'in 622 A.D. which is popularly known as the 'Constitution of Medina'¹⁰. The purpose of the charter was to maintain the security of the community, security of women, and stable relation between the tribal communities.

Mohammad (PBUH) attempted to remove idolatry from the heart of the people, so as to bring unity among all to form one community. Not only religious life of people of Arabs was improved but also the social and moral life was given a new colour by the

¹⁰ William Montgomery Watt, *A Short History of Islam* 26, (One Word Publication, 1999).

reformation a made by Prophet (PBUH). Mohammad (PBUH) also tried to reduce the socio-economic inequality in the society through the prohibition of usury and the institution of Zakat and Sadaqah.

One of the most remarkable reforms done by Mohammad (PBUH) was the improvement of the condition of the females. Social evils, like female infanticide, adultery or fornication, prostitution etc. are highly condemned by Mohammad (PBUH). Abolition of female infanticide was the key step to raise the status of women. Arabian society in the Pre-Islamic Period was male dominated and patriarchal in nature. Men had absolute superiority over women. Many female children were killed by their father under social pressure and fear of Poverty. The Quran says-

“And kill ye not your children for fear of Poverty. We provide them with livelihood and you also surely killing them is a heinous sin”¹¹.

Improvements were also tried with respect to divorce matter too. Previously the right to end the marital relation was only entrusted to the husband. But, after the rise of Islam, even the wife shall have right to get separated from the husband on any reasonable grounds. Such right is known as the right to Khula. Thus, Khula means a separation of wife from her husband by paying him a certain amount.

Mohammad also attempted to improve the education system for the Muslims Community. The period of ignorance was realised by Mohammad (PBUH), so he tried to bring changes in the structure of society. He made obligatory on everyone to educate all and particularly the women section. This message is clear in the following hadith.

“Search for knowledge is compulsory upon every Muslim male and female”¹².

Another landmark reform was the improvement of the condition of the slaves. The act of freeing slaves was declared by the Quran as atonement for certain sins. Thus, in this

¹¹ *Holy Quran* 17:31.

¹² Maulana Fazlul Karim, *Al-Hadith Mishkat-ul-Masabih* 353, (Islamic Book Service (P) Ltd., New Delhi, 2011).

way, Prophet Mohammad (PBUH) seeks to bring a change over the condition of Arabia. The rapid welfare of the community began to increase the number of followers day by day. Within a short period of 23 years of his life, Mohammad was able to effect a vast improvement on the social aspect of Arabia in comparison to the condition of the Arabian Society prior to the rise of the Islam.

2.2 Historical Development of Muslim Law:

The development of Muslim law may be divided into five periods.

The First Period (622-632 AD): The period of 622-632 is called the legislative period. The development of Muslim law begins with 622 A.D. (Hejarat) and ends with 632 A.D. In 609 A.D. at Mecca, the first message of Allah came to the Prophet (PBUH). Thereafter the divine revelation communicated to Prophet (PBUH) from time to time and the same was conveyed to the people of Mecca. But as most of the people failed to believe Mohammad (PBUH), many of the revelations at Mecca were religious or spiritual and did not contain positive law (Fiqh)¹³.

In 622 A.D., Prophet Mohammad (PBUH) went to Medina, the revelation conveyed by Mohammad was easily acceptable by the people of Medina. The revelations were so enough and important that it solved each and every problem of the society. All the relevant revelations were made between 622 A.D. and 632 A.D. The object of the Prophet (PBUH) was to teach people how to act, what to do and what not to do¹⁴.

The first two sources of the Muslim law, the Quran and the Hadith are the result of the last ten years of Prophet's (PBUH) Life. Most of the legal verses of the Quran were revealed at that time and some of his most judicial decisions and traditions related to that period. The verses of the Quran are direct inspiration and the traditions are supposed to be indirect revelation. Therefore, the whole first period has rightly been called the 'Legislative Period' of Islam¹⁵.

¹³ Dr. Rakesh Kumar Singh, *Text Book of Muslim Law* 13, (Universal Law Publishing, New Delhi, 2011).

¹⁴ Ibid.

¹⁵ Ibid.

The Second Period (632-661 AD): This period is also known as the Caliphate Period. This Period lasts for 30 years. In this period the first four Caliphs of Islam are known. After the demise of Prophet (PBUH) no one is nominated to become his successor. Accordingly an election was held in which Abu Bakr was elected. In this way Abu Bakr become the first Caliph of the Muslim Community. It may be noted that Abu Bakr was the father of the youngest wife of the Prophet (PBUH). Abu Bakr was very popular Caliph. He died in 634 A.D. and after him Omar was elected as Second Caliph. Osman was the third Caliph and after him the Ali was elected as the fourth Caliph. These four Caliph were known as the rightly guided Caliphs as they were the close companions of the Prophet (PBUH)¹⁶.

After the death of Mohammad, the divine communications were in scattered form. In the second Period the scattered revelation were collected and written to give a final shape. The first collection of Quran was done by Zaid (a close companion of Prophet (PBUH)), but due to some contradictory verses, the third Caliph asked Zaid to revise and correct the Holy Quran. Thus the only authentic version of Quran now available to us is the Osman's Compilation¹⁷.

The Third Period (661-900 AD): The third Phase of development of Islamic Jurisprudence dawned with the assassination of Ali, the fourth Caliph. Ali had two sons Hasan and Hussain. After Ali's death, Hasan was made the Caliph. The regular kinship was Caliphate. Under this Period, in 750 A.D., Islamic Jurisprudence was vastly spread over and especially the Sunni Caliphate¹⁸.

The great significance of this Period was the development of Muslim law in many aspects. Firstly, the Sunnat and Ahadis of the Mohammad (PBUH) which were scattered were collected and examined. During this Period, some of the prominent traditions were by Bukhari, Muslim and Malik Ibn-Anas. Another development was

¹⁶ Ibid. 14.

¹⁷ Ibid.

¹⁸ Ibid. 15.

analogical deduction (Qiyas) and was treated to be the most scientific method of legislation¹⁹.

The Fourth Period (900-1924): One of the most glorious periods of the Islamic Jurisprudence is the fourth Period. In this period collection of traditions and Precepts were done. The most authoritative collections were done by Bukhari.

The establishment of the fourth Sunni Schools begins in this period. Abdul Kasim Ahmed of Sunnis Sect becomes the Caliph and his dynasty remained till 1517 AD. It is prominent to note here that in this period, the rise of Muslim law became stagnated. Because after the death of the Profounder of the fourth Sunni Schools, no learning or Scholar was available to propound new theories of law. The society started following those rule of law which were laid down by the four Jurists. However, some of the other scholarship started giving independent judgement known as Fatwas. Although, the Fatwas i.e. the opinions cannot be treated as rules of Muslim Law. Among the various Fatwas, Fatwai-Ailamgiri and the Fatwai Qadi Khan were very important²⁰.

The Fifth Period (1924 A.D. to Till Date): The modern Period of Islamic Law began in 1924 A.D. with the abolition of Caliphate. There was no Caliph Head to administer and execute the traditional law of Islam. In such as situation, Ijtihad (independent reasons) helped more in developing the Islamic law. The technical meaning of these terms is; exerting one's self to form an opinion in a case or as to rule of law²¹. It may be also assumed that the muftis, Maulvi or Moollah, Kazi, Mujtahid and Jurists collectively known as ulema have made contributions in the development of Islamic Law²².

Thereafter, in the field of Islamic Jurisprudence, the age of legislation came into existence. In India, the British Government had changed the system by enacting several Acts. Matter relating to family affairs, i.e. marriage, divorce, dower, gift, will,

¹⁹ Id.

²⁰ Ibid.

²¹ Ibid.

²² Supra Note 13 at P. 17.

inheritance, etc were continued to be governed by Muslim personal law. However, the Indian Penal Code, the Criminal Procedure Code, the Civil Procedure Code, the Contract Act etc were applicable to every citizens of this country irrespective of their religion²³.

After the Shariat Act, 1937, in the year 1939, the dissolution of Muslim marriages Act was passed. There were several other legislations passed by the Parliament which lays down rules of Muslim personal law. So, the present Muslim law of India, therefore, includes the traditional law, the legislative enactments and the Judicial Precedents²⁴.

2.2.1 Quran as the Foundation of Muslim Law:

The word Quran properly signifies “The reading” or “that which ought to be read” Quran is the divine communication and revelation to the Prophet (PBUH) of Islam and it is the first source of Muslim law. It is the supreme and foremost authority of Muslim law. As mentioned earlier, the first revelation (Wahi) came to the Prophet (PBUH) in 609 A.D. Thereafter, it continued till 632 A.D. in fragments for a period of 23 years. Thus it was the embodiment of the very word of God as they were communicated to the Prophet (PBUH) through Angel Gibriel²⁵.

In the present form, Quran is divided into 114 Chapters and consist of approximately 6666 verses. The Chapters were synchronised under the Personal direction of the Prophet. The verses of Quran are called Ayat and the Chapters of this Holy Book are called Sura. Thus, Quran is the fundamental source of Muslim law. Its significance is spiritual and sacred, it is the ideal law which is the direct commandment of Allah²⁶.

²³ Ibid.

²⁴ Ibid.

²⁵ Dr. Rakesh Kumar Singh, *Text Book of Muslim Law* 30, (Universal Law Publishing, New Delhi, 2011).

²⁶ Aqil Ahmed, *Text Book of Mohammedan Law* 15, (Central Law Agency, Allahabad, 26th Edn., 2016).

2.2.2 Basic Principles of Islam:

There are five fundamental Principles of Islam:

Belief in the Existence of Allah:

The belief in the existence of God and acknowledgement (Tasdiq) of the authority of Allah over all the actions of human beings is the first and the basic principle of Islam. Belief in the truth of mission started by Prophet Mohammad (PBUH) is also an essential element of Islam²⁷.

Belief in the Unity of Allah:

Belief in the Unity of God (Tawhid) is the second postulate of Islam. The principle of tawhid indicates that Allah is one. It is the principle of permanence in the world of Islam²⁸.

Belief in Mohammad (PBUH) as the Prophet:

The acceptance of the Prophet Mohammad as a messenger or Rasool of Allah is the third fundamental tenet of Islam. From time to time, Allah, in his infinite mercy, sends to people a messenger (Pagumber) to point out the path of religion on which people should treat on. He was the Apostle of God²⁹.

Belief in Akhirat:

The fourth fundamental principle of Islam is the dogma of Qayamat. There will be a day of judgement when everybody will be punished or rewarded according to his/her deeds³⁰.

²⁷ 28 Abdur Rahim, *Mohammadan Jurisprudence* 51, (Allahabad Law Agency, Faridabad, 1911).

²⁸ Dr. Rakesh Kumar Singh, *Text Book of Muslim Law* 10, (Universal Law Publishing, New Delhi, 2011).

²⁹ Ibid.

³⁰ Ibid.

Belief in Brotherhood:

The dogma of equality. The last principle of Islam in the dogma of brotherhood. In his last speech, the Prophet condemned the pride of colour or race³¹.

2.2.3 Application of Muslim Law in India:

Muslims in India are governed by their own personal law. This provision is not absolute. Some of the legislative enactments direct civil courts to apply Hindu Law to Hindus and Muslim Law to Muslims. Apart of this, Article 225 of the Indian Constitution provides that the High Courts will administer the same laws as it existed at the commencement of the Constitution³².

Extent of Application:

The rules of Mohamedan Law fall under three divisions, namely:

- (i) Those which have been expressly directed by the legislature to be applied to Mohammedans, such as rules of succession and Inheritance³³.
- (ii) Those which are applied to Mohammedans as a matter of justice, equity and good conscience³⁴.
- (iii) Those which are not applied at all, though the parties are Mohammedans such as the Mohammedan Criminal law, and the law of evidence³⁵.

The only parts of Mohammedans law that are applied by courts in India to Mohammedans are those mentioned in (i) & (ii). In other respect, general law of India will be applied.

³¹ Ibid.

³² Dr. M. A. Qureshi, *Muslim Law* 16, (Central Law Publication, Allahabad, 3rd Edn., 2007).

³³ Ibid.

³⁴ Ibid.

³⁵ Mulla, *Principals of Mahomedan Law* 1 (Lexis Nexis Publication, Haryana, 22nd Edn., 2017).

(i) Matters where Muslim law is applicable:

There are certain matters of Muslims where only Muslim law will be applicable and other enactments will not be applied. In the following cases Muslims will be governed by their personal law; marriage; dower; divorce; family matters; adoption; minority, guardianship; bastardy; succession, inheritance, female's property; wills, legacies, gifts, joint family, partition and any other religious usage or Institution³⁶.

(ii) Matters where the Provision of Muslim law will be applied as a matter of Justice, equity and good conscience³⁷:

There are certain matters where the provision of Muslim law will not be applied as a matter of Justice, equity and good conscience. But the rules that have been expressly directed by the legislature to be applied to Muslims, must be applied though they may not in the opinion of the Court confirm with the justice, equity and good conscience.

Matters where Personal law is applicable to Muslims:

Muslim law is applicable to Muslim only in the first two categories. In the matter of law of crimes and law of evidence Muslims are not governed by their Personal law³⁸.

2.2.4 Legal Status of Muslim Law in India:

Religious Pluralism is one of the unique features of India. Islam as a universal religion has always been flourished in India. To know the legal status of Muslim law in India, it is imperative to understand it under the following two heads:

Pre-British Era: Full freedom to follow one's own religion was given the rulers in the Indian kingdoms. So, the Muslims were governed by their own personal law and there was no interference by those rulers. Similarly the Muslim rulers refrain themselves from interfering with religious affairs of the Hindus, Buddhists, Jains, Sikhs,

³⁶ R. K. Sinha, *Muslim Law*, (Central Law Agency, Allahabad, 6th Edn., 2006).

³⁷ Ibid.

³⁸ Ibid.

Christians, Jews and Parsis of India. The two classifications Dar-ul-Islam and Dar-ul-Harb, were in existence in the British Period. Under this classification, when India is governed by a born Muslim could be regarded as Dar-ul-Islam. And Dar-ul-amn means country where both Muslim and Non-Muslim shared state authority in peaceful manner.

Islamic Law under British Rules:

When the Britishers occupied India, they started importing their own legal system into the country. This was an addition to the existing system of Pluralism in India. The English brought with them common law and their legislative enactments in India. And gradually under the shield of Lex Loci started imposing all sorts of British law in India. It was even addressed in the Parliament of British that India was in urgent need of code of law. Thus wide range of British Codified law was accepted in India after the recommendations of the Law Commission and the charter Acts of 1833-1853. Therefore, after the revolt of 1857, various legislation were passed, among them some are – Indian Penal Code (1860), Indian succession act (1865) and the Indian Evidence Act, (1872).

Apart of these enactments, laws which were initially connected with religion are, left untouched. Indians were left to be governed by their own religion-based laws and in other word these branches are called ‘Personal Laws ‘and this is how Muslim law emerges in India. The Anglo-Indian Courts mainly administers the Muslim Law assisted by persons having knowledge of Muslim Law. The Anglo-Indian Courts for the smooth functioning translated the legal code ‘Fatawa-e-Alamgiri work of Ithna Ashari Shia Law. Najmuddin-al-Hilli’s Sharai-ul-Islam into two volumes digests of Muhammadan Law. So in this Islamic Legal literature were made available in English translation to the Anglo Indian Courts.

The English system of compiling binding judicial decision in the form of books and digest was soon followed on Islamic law. The initial remarkable compilation of Anglo-Muhammadan” Judicial precedents was W.H. MacNaghten’s Principles and precedents of Muhammadan law (Calcutta 1825). Another notable work after a

century, appeared dinshaw Farideenji. Mulla's Principles of Muhammadan Law (Bombay 1906).

Mulla becomes frequent use in the British – Indian higher and lower courts. Although Abdur Rahim and Ameer Ali, works were there but it was not in so much in use. Mulla prepared in the form of section wise code which was accepted by the Court. Even it was clearly against the Islamic law.

Muslim law under the present Legal System:

In the seventh Schedule attached to Article 246, the constitution of India specifically mentioned about 'Personal Law' containing three lists of 'Subject Matters of laws made by Parliament and by the State Legislatures of States.

In the list, entry 5 read as:

Marriage and divorce, infants and minors, adoption, will intestacy and succession, joint family and partition, all matter in respect of which parties in judicial proceedings were immediately before the commencement of this condition subject to their personal law³⁹.

2.3 Mohammedan Law and Its Sources:

Sources are the original materials from which the contents of law are to be found. It is pertinent to study the sources of Mohammedan law so as to understand the origin and development of the law. Sources of the Mohammedan law may be classified into two categories:

- a) The Primary Sources, and
- b) Secondary Sources.

³⁹ Concurrent List available at:

https://en.m.wikipedia.org/wiki/concurrent_List#:~:text=5.,subject%20to%20their%personal%20law (visited on 20th July 2019).

2.3.1 (a) Primary Sources:

These are the sources which the Prophet Muhammad (PBUH) himself directed to be the sources of Muslim law. These sources are the highest and most important in their respective order of merit. The entire Muslim Personal law is based on the Primary sources. Primary sources are also called the formal sources of Muslim law.

2.3.1 (b) Secondary Sources:

There has been development and modification in the sphere of Muslim law. Local customs, Judicial decisions and the Legislation has moulded the Muslim law to a greater extend. Therefore, local custom, legislation and judicial decisions are the secondary sources of Muslim law. Secondary sources are also called as extraneous sources.

The Primary Sources are:

- (i) **Quran:** Al-Quran is the foundation of Muhammadan Law. It has its origin in the divinity. “Qurra” is the Arabic word from which the word Quran is derived. It is the divine communication and revelation to the Prophet of Islam⁴⁰.

2.3.2 Salient Features of Quran as a Source of Law:

- (i) **Divine Origin:** Quran is compilation of the very words of God. It is of divine origin. Islam has it's believe that the words and the verses of this Holy Book are made by Almighty God and not by any human being. The words of Quran are unchangeable and its authority is unchallengeable⁴¹.
- (ii) **First Source:** Quran is the first source of Islam. The entire Muslim religion was based upon Quran. Every study of Islamic principles or the Muslim law must therefore, begin with it.

⁴⁰ Aqil Ahmed, *Text Book of Mohammedan Law* 1, (Central Law Agency, Allahabad, 26th Edn., 2016).

⁴¹ Rakesh Kumar Singh, *Text Book of Muslim Law* 32, (Universal Law Publishing, New Delhi, 2011).

- (iii) Structure of Quran: The first 'Sura' of Quran is Surat-ul-Fatiha which is the introduction to the Holy Book and consists of verses in the praise of Almighty God. Quran is in the form of verses, each verses is called Áyat. There are 6237 verses in Quran which are contained in 114 Chapters. The various chapters are arranged subject-wise and have their specific titles⁴².
- (iv) Admixture of Religion, Law and Morality: Quran is mixture of religion, law and morality. Religion, law and morality are at some places, mixed in such a manner that it is difficult to separate them⁴³.
- (v) Different Forms of Legal Rules: The Holy Quran deals with the law in different forms. Some of the Ayat removed the customs like child infanticide, unlimited Polygamy, gambling, usuary etc. Quran contains also the general injunctions which have formed the basis of important juristic inferences⁴⁴.
- (vi) Unchangeable: Quran is the most authoritative source of Muslim. The particular verse of Quran has their own specific meaning which the Courts have no power to give any other meaning to that verse⁴⁵.
- (vii) Incompleteness: Although Quran is the foundation of Muslim law but it not a complete code of Muslim Personal law. Only not more than 200 Ayats deals with legal matters and 80 Ayats deals with personal law. Thus, the Holy Quran as provides only the basic principles of Muslim Personal law⁴⁶.
- (viii) Silence of Quran: On many occasion, the Quran is found to be silent. To meet with the contemporary needs, the Quran does not provide for legal solutions⁴⁷.

⁴² Id.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

2.3.3 Sunnat or Ahadis (Traditions of the Prophet):

Sunnat or Ahadis are the traditions of the Prophet. Sunnat are the injunctions of God in the words of the Prophet. It is the second most important source of Muslim law. All the preaching's and the Practices of the Prophet formed part of Sunnat, Sunnat and Ahadis therefore differs from Quran in the sense that Quran contains the very words of God where as a tradition is the language of the Prophet. It was believed that revelations were of two kinds – Zahir and Batin. Zahir revelations are also known Manifest and it consisted of the communications which were made by the Angel Gabriel under the direction of God to Mohammad in very words of God. The Holy Quran is composed of manifest revelations. Batin revelations were also known internal revelations. The opinions of the Prophet delivered from time to time on the question on that happened to be raised before him constitute the internal revelations. The ideas and the opinions of the Prophet were inspired by the God. These Ahadis, however, were not reduced to writing during the lifetime of Mohammed. After the Dimice of Prophet (PBUH), Quran supplemented by Sunnat which has framed the whole body of Mohammad law – Civil, Criminal and Religious. The significance of Hadith or Sunnat as an important source of Muslim laws has been laid down in the Quran itself⁴⁸.

The Quran says: “Whatever the Prophet gives accept it, and whatever he forbids you abstain from it” (LIX:7).

Narrators of the Traditions: Following class of persons was recognised as Narrators:

- a) Companions of the Prophet:-The Muslims who lived during the life time of Muhammad had the closet contact with the Prophet. Their narration was treated as most reliable.
- b) Successors of the Companions:-Those Muslim who are in contact with the companion of the Prophet also made certain narrations which are second in priority.

⁴⁸ Aqil Ahmed, *Text Book of Mohammedan Law* 21, (Central Law Agency, 26th Edn., 2016).

- c) Successors of the Successors:-The Muslim who are neither present during the life of the Prophet nor during the life of any other Prophet companions, were called the Successor of the successor or of the companion. Their narration was last to be relied upon.

Thus, the practices in the society were highly based on the traditions which are the narrations of law and religion. Malik-Ibn-Anas was regarded as the first systematic collection of traditions, arranged and classified according to subjects. Imam Ibn Hanbal has collected about 80,000 traditions in his book Masnad.

2.3.4 Ijma (unanimous decision of Jurists):

When Quran and traditions are silent and could not supply any rule for the contemporary needs of the society, the law-knowing persons (Jurists) give their common opinion over the question arise. Sir Abdul Rahim opined Ijma as agreement of the Jurists among the followers of Prophet Mohammad in a particular age on a particular question of law. Ijma as a source of Muslim law has a significant importance in the sense that it has led to the development of Muslim law because, through Ijma it was possible to lay down new principles in accordance with the changing needs of the Islamic society.

The classical theory put forward the view that when Quran and traditions fails, the consensus of opinion amongst the companions of the Prophet is recognised as the best guide of law. Thus, it is the third source of law, both in the point of time and importance. The Holy Quran also ordained the importance of Ijma as a source of law as:

“Oye who believe; obey God and obey the Prophet and those of you who are in authority, and if ye have a dispute concerning any matter refer it to God and the Prophet 4:59⁴⁹ .

Essential requirements of a valid Ijma:

⁴⁹ Holy Quran 4:59.

- (i) The Consensus: Unanimous opinion of the jurist on any question of fact or law is the pre-requisite for valid Ijma. The consensus or meeting of minds of the jurist is essential to constitute valid Ijma.
- (ii) The Jurists: Jurists are the experts in the field of law, so the opinions of the experts are admissible. Certain areas of Muslim law such as the rights of the marriage, the rules of divorce, the Principles of sale etc needs the opinions of the Jurists are admissible and the views of the general public are irrelevant.
- (iii) Jurists of a Particular Period: Ijma of one Particular Period may be reversed by the Ijma of the same Period or subsequent period. But the Ijma made by the companions of the Prophet Muhammad (PBUH) is incapable of being reversed or superseded.
- (iv) Jurists to be the Muslims: Ijma to be admissible must be made by a Muslim Jurist.
- (v) Consensus on a Religious Matter: Personal matters are of two types: matter of fact and matter of law. Ijma on the matter that the text of the Quran which is with us, is the same that was revealed to the Prophet, is Ijma on point of fact.

Importance or Significance of Ijma:

Time is not static; it goes on changing, with it the life of the nation also changes. So, new laws are required to suit with the changing needs of the society. The Provisions of the Holy Quran and traditions and practices were significant only for the past and for the future society. Fyzee rightly observes, that “Quran and Sunnat look to the past; consensus and Qiyas deal with the future of Islamic Jurisprudence”⁵⁰.

As a third important source of the Mohammadan law, the important importance is of twofold:

⁵⁰ A. A. A. Fyzee, *Outlines of Muhammadan Law* 28, (Oxford University Press, 5th Edn., 2009).

Firstly: The consensus of opinion of the Jurists strengthen the further explanation and clarification of Quran and Traditions.

Secondly: There are certain occasions where the words of Quran and the Traditions are not found, and then new principles of law are formulated according to the changing needs of the society.

Another significant point about Ijma is that it can easily be available for new interpretation of Islamic legal rules. It is a living source of legislation. Reform in Muslim Personal law is possible even today in the same manner as Ijma was being formed in the past.

2.3.5 Qiyas (Analogical Deduction):

Qiyas is the last primary source of Muslim law. The Arabic meaning of Qiyas means “Measurement”. Qiyas means analogical deduction from the above three sources i.e. the Quran, the Sunnat and the Ijma. Rules from the above three sources are deduced by the exercise of reason. If there was any problem before the society upon which the Quran, Ahadis and Ijma cannot be found then Qiyas are applied to get the law.

The Prophet raised his hands, and said. ‘Praise there to God, who guides the messenger of his Prophet in what he pleases’⁵¹.

Features of Qiyas:

- (i) Qiyas must be in confirmative with Quran.
- (ii) It should be in consonance with Sunnat.
- (iii) It should not change to Original (Asl).

Requirements for the Validity of Qiyas:

1. The original source from which Qiyas is deduced must be capable of being extended, that is it should not be of any special nature⁵².

⁵¹ Tyabji, *Principles of Muslim Law* 21, (N. M. Tripathi, 4th Edn., Bombay, 1968).

⁵² Aqil Ahmed, *Text Book of Mohammedan Law* 28, (Central Law Agency, 26th Edn., 2016).

2. The original order of the Quran or Hadith to which the process of Qiyas is applied should not be abrogated or repealed.
3. Qiyas should be applied to ascertain a point of law.
4. The deduction should not be in such a way that the law embodied in the text changes.

2.3.6 Secondary Sources:

In addition to the four important primary sources, there are few secondary sources which occasionally supplement the Muslim Personal law. Some of the Secondary Sources:

1. Urf or Custom.
2. Judicial Decision.
3. Legislation.
4. Justice, Equity and Good Conscience.

2.3.7 Urf or Custom:

Muslim Personal law has never recognised custom as a source of law, but it has been occasionally referred for supporting and supplementing the law. Before the advent of Islam, the inhabitants of Arabs were governed by customary laws. After the rise of Islam, Prophet Mohammad (PBUH) found many of the customs as evil and un-Islamic. But there were some customs which were tolerable, so it was sustained and continued to be followed in the society. Apart from it, there were juristic unanimous opinion and a given point of law and they formed part of Ijma. Thus, custom is not full-fledged source of Muslim law. A customary law exists in Islam either because it has got the approval of the Prophet or has been incorporated in Ijma.

Significance of Customs:

The importance of customs under Muslim law cannot be ignored even though custom is not any formal source. The minute details which are absent in the four primary sources namely Quran, Sunnat, Ijma and Qiyas can be found in the practices of

customs. In such specific cases the customs and usages became a rule in order to complete the law. On many occasions the courts in India has used the customary laws in respect of Muslim law.

In *Abdul Hussain V. Sona Dero*⁵³ the Privy Council observed that if proved, a custom would prevent over a written text of law provided the custom was ancient and in variable.

Essential requirements of Valid Customs:

- a) The practice of a custom must be universal, i.e. general prevalence in the country is important.
- b) The application of custom must be territorial.
- c) The customs to be valid must be time immemorial.
- d) Custom must be ancient and invariable.
- e) Custom to be valid must not be opposed to public policy.

2.3.8 Judicial Decisions:

The decisions laid down by the Courts are the important source of Mohammedan law. The Superior Courts decisions are binding upon the subordinate Courts. This is also known as the principle of precedents and these principles are applicable in India. Judicial decisions include the decisions of the Privy Council, the Supreme Court, as well as the decision of the High Courts in India. Judicial decisions acts as a supplementary to the sources of Mohammedan law on many occasion judicial decisions have modified the Pure Muslim Law. Judicial decisions have played remarkable role in laying down rules of Muslim law in accordance with socio-economic needs of the Muslim society. Some of the important decisions are given in *Begum Subanu V. Abdul Gafoor*⁵⁴, *Muhammad Usman V. Sainba*⁵⁵ *Umma and Hammeera Bibi V. Zubaida Bibi*⁵⁶.

⁵³ (1917) 45I.A.10

⁵⁴ AIR (1987) SC 1103.

2.3.9 Legislation:

Various enactments passed by the parliament or by the state legislature in India also governed the Muslim. Although in Islam, the firm belief is that the Almighty Allah is the Superior legislator and no other agency or authority has power to make laws in the sphere of Muslim Personal law. However, there are some important enactments which lay down significant principles of Muslim law. They are:-

- (i) The Mussalman Waqf Validating Act, 1913.
- (ii) The Child Marriage Restraint Act, 1929.
- (iii) The Muslim Personal Law (Shariat) Application Act, 1937.
- (iv) Dissolution of Muslim Marriages Act, 1939.
- (v) Muslim Women (Protection of Rights on Divorce) Act, 1986.

2.3.9.1 Justice, Equity and good Conscience:

Justice, Equity and good Conscience is also regarded one of the sources of Muslim Law. Abu Hanifa, the founder of Hanafi Sect of Sunnis formulated the principle that the rule of law based on analogy could be set aside at the option of the Judge on a Liberal construction or Juristic preference to meet the requirements of a particular case. These principles of Muslim law are known as Istihasan or “Juristic Equity”⁵⁷.

2.4 Schools of Muslim law and Sects:

During eight and ninth centuries there emerged the four school of thought or schools of Jurisprudence among the Sunnis, namely, The Hanafi, School founded by Abu Hanifa, the Maliki School, founded by Malik-ibn-Anas, the Shafi School founded by Muhammad bin Idris ash-Shafi and the Hanbali School, founded by Ahmad bin

⁵⁵ AIR (1988) Kerr 138.

⁵⁶ (1916) 43L.A. 294.

⁵⁷ Aqil Ahmed, *Text Book of Mohammedan Law* 30, (Central Law Agency, 26th Edn., 2016).

Hanbal. All the four schools of Muslim law has their own significance and they differ slightly from each other on some minor matters.

2.4.1 Sunni School:-

- (i) Hanafi School or Kufa School
- (ii) Maliki School or Medina School
- (iii) Shafi School
- (iv) Hanbali School.

Hanafi School:- The most Prominent School among the four schools of Sunni law is the Hanafi School. Abu-Hanifa was the founder of this school. He was a eminent and most famous scholar of his time and mostly known for his ability of logical reasoning and technical legal thought. So, this school of Sunni law is named after its founder Abu- Hanifa⁵⁸. This school is also called as the “Kufa School”. Kufa is the city which is known as city of learning. One of the outstanding contributions was Abu Hanifa, tried to find out the law in the text of Quran through analogical deduction. Abu Hanifa was of the view that law must be formulated according to the changing needs of the society. He was also in favour of interpreting the law in the light of Juristic equity. Later on, with certain improvements, the doctrines were developed by his two disciples Abu Yusuf and Imam Mohammad.

Characteristics of Hanafi School:

- (i) It is true that the foundation of Fiqh i.e. Islamic jurisprudence was laid down in the epoch making period of Prophet Mohammed (PBUH), but the systematic work of codification was done by Imam Abu Hanifa in the city of Kufa.
- (ii) The legal doctrines of Imam Abu Hanifa were based on Quran and Hadith. Quran has been regarded as the first and primary source for deducting the

⁵⁸ Id.

Civil and Criminal laws. Thereafter, importance was given to traditions. Imam Abu Hanifa narrated only seventeen traditions and gave more preference to Qiyas.

- (iii) One of the first Jurists who gave more prominence to the doctrines of Qiyas or analogical deduction. According to Abu Hanifa, Qiyas are the result of casual occurrences. It is based on either Quran or tradition or Ijma.
- (iv) Imam Abu Hanifa is also famous for the principle of Istihsan which is also known as Juristic opinion. A distinctive name and prominent position was assigned to Imam Abu Hanifa for the principle of Istihsan through which the theory of law is modified in its application to actual facts.
- (v) One of the greatest contributions of Abu Hanifa was the codification of laws. He constituted a committee of some learned disciples who were Imams in their own fields. The committees headed by Abu Hanifa discuss the practical and theoretical questions and the conclusions which they agreed upon after a full and free debate were duly recorded.

Thus, Imam Abu Hanifa's best and the greatest contribution in his distinguished and well trained disciples like Imam Abu Yusuf, Imam Zafar etc.

(iii) Maliki School or Medina School:-

The second school of Islamic Jurisprudence is the Maliki School. Imam Malik, was the founder of the Maliki school of Islamic. Jurisprudence Maliki School is also known as Medina School because the school flourished in Medina City of learning.

Malik-ibn-Anas was a great scholar and was regarded as one of the authority on traditions. Imam Malik was born at Medina in the 93 A.H. (713 A.D.). He learnt traditions from Abdur Rehman, Ibn Hurmuz, Nafi Ibn Zakwan and Yahya Ibn Sayeed Imam Studied the Islamic Jurisprudence with the celebrated Jurists of Medina, Rabis Ibn Farrukh. Imam Malik dedicated his whole life for the study of Islamic Jurisprudence and hadith. Thus, Imam Malik was a pious man with an outstanding character and never bowed before any authorities and gave decisions without any bias.

Salient features of Maliki School.

1. Imam Malik gave more emphases upon traditions and usages of Medina. Imam Malik has a strong belief that the tradition of the Medina has pre pondering weight since they must have been transmitted from the times of the Prophet (PBUH)⁵⁹.
2. Another important feature of Maliki School is the agreement of Ijma. Imam Malik recognizes the authority of Ijma of the companions and the successors residing at Medina⁶⁰.
3. Imam Malik also defined Qiyas as the “accord of a deduction with the original text in respect of the Illat or effective cause of its law”. The Malikis makes the deduction either by a text of the Quran or Hadith⁶¹.
4. Imam Malik also gave prominence to juristic equity. According to Malikis the deduction of law should be based on the considerations of the public good. The doctrine of Public good is also known as Istilah⁶².
5. One of the Prominent works of Imam Malik is the Kibta-al-Muwatta. It represents the codification of the fiqh and developed in Hijaz in the theological centre Medina⁶³.

Thus, Imam Malik greatest contributions in his book ‘Muwatta’. He was a great traditionist as well as a profound jurist. He gave new shape to the traditions, usages and practices of Medina with his pious and independent character.

Imam Shafi was the founder of Shafi School of Islamic Jurisprudence. His full name was Idris Ashafi. He was born in 150 A.H. in Palestine. He was a disciple of Malik-Ibn-Anas and was related to the Prophet. Imam Shafi also relied upon the traditions of the Prophet. Imam Shafi developed his ideas and Principles in Baghdad and Cairo. He

⁵⁹ Dr. Rakesh Kumar Singh, *Text Book of Muslim Law* 19, (Universal Law Publishing, New Delhi, 2011).

⁶⁰ Aqil Ahmed, *Text Book of Mohammedan Law* 41, (Central Law Agency, 26th Edn., 2016).

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

used legal reasoning and Critical analysis to examine the traditions, so as to have a systematic rule of law. Imam Shafi was the first to incorporate useful principles of law in his book Kitab-ul-Umm. His ideas of Islamic Jurisprudence spread from Cairo to the lower parts of Egypt, Hejaz, South-East Asia. And also few parts of western coast of Indian Muslim followed the principles of this school.

Salient features of Shafi School:

1. Imam Shafi was regarded as the creator of the classical theory of Islamic Jurisprudence and was the founder of the science of usual. He also got the legacy of talents and logical reasoning as he was highly influenced by both Hanafi as well as Maliki School⁶⁴.
 2. According to Imam Shafi, Quran is the best source of Law.
- (ii). Imam Shafi formulates the doctrines of Islamic. Jurisprudence based on Holy Quran. Quran serves both purpose of providing the basic source of law as well as the raw material for legislation. Imam Shafi cited 220 Quranic verses as a specific rules of law⁶⁵.
 - (iii). Imam Shafi gave more prominence to the Traditions of Prophet's Sunna. Imam Shafi studied both the doctrine of Hanafi School as well as Maliki School. He made enormous use of Hadith found from different centres.
 - (iv). Another important feature of Shafi School was that Imam Shafi was the strong supporter of the doctrine of Ijma. In fact, the systematised and universalised the institution of Ijma for all people of all ages⁶⁶.
 - (v). Imam Shafi was first in point of time who gave regular rules for the deduction or Qiyas. According to him, Qiyas is 'the accord of a known thing with a known thing by reason of the equality of the one with the other in respect of the

⁶⁴ Id.

⁶⁵ Ibid.

⁶⁶ Aqil Ahmed, *Text Book of Mohammedan Law* 47, (Central Law Agency, 26th Edn., 2016).

effective cause of its law⁶⁷. Thus, Imam Shafi was one of the greatest jurists of Islam. He adopted the middle way to gave clear and balanced theory of law. He was a pious man who is a lover of legal learning.

Hanbali School:

Hanbali School of Islamic Jurisprudence was propounded by Imam Abu Abdullah Ahmed Ibn Muhammad Hanbal . Hanbali School was the fourth and the last school of Sunni Sect. Muhammad Hanbal was born at Baghdad in 780 A.D. Muhammad Hanbal was highly adhered to the traditions of the Prophet (PBUH). So, he was popularly known as traditionist than a jurist.

Salient Features of Hanbali School:

1. The principles of formulating the legal questions according to Imam Hanbal was based on Holy Quran.
2. Imam Hanbal made extensive use of Hadith. He tried to follow the Hadith as it is with a very little reasoning. Moreover, he accepted even the weakest Hadith in its original form.
3. Imam Hanbal accepted Ijma as a source of Muslim law. But as Imam Hanbal was highly influenced by the use of Hadith he made very less use of Ijma. However, he viewed that whenever a situation arises, necessary Ijma can be used.
4. According to Imam Hanbal use of Qiyas is merely sheer necessity. He always tried to derive law from traditional sources.
5. Imam Hanbal also favours the law of Juristic equity as a source of law. Jurist equity is also known as Istihasan under Personal law.

Thus, Imam Hanbal was a profound traditionist and a great Jurist. He devoted maximum of his time for the study of Hadith and Fiqh. He was of an independent character who wrote many famous books among which, his greatest work was the collection of traditions known as “Musnad Ahmed”.

⁶⁷ Ibid.

2.4.2 The Shia sub-Schools:

Ali, the son of Abu Talib (Paternal uncle of Mohammad) was the first Imam of the Shia community. He was the spiritual and temporal head of the community.

The main Shia Schools are:

- (i) Ithna Asharia School;
- (ii) Ismailya School; and
- (iii) Zaidya School.

- (i) **Ithna Asharia School:** The Shia sect largely followed the Ithna Asharia School. This school is also known as Imamia School. This school is subdivided into two further schools i.e. Akbari and usuli School. There were 12 Imams in the Ithna Asharia School. The followers Ithana Asharias are prevalent in Iraq, Pakistan, India and Lebanon.
- (ii) **Ismailya School:** Among the Two sons of Jafar-Sadiq Ismail and Musa-ul-Kazim. Ismail was accepted as the seventh Imam. The followers of this school are known as Ismailyas. Ismailyas are found in Syria, central Asia, Pakistan and India. The followers are also known as the 'Seveners'.
- (iii) **Zaidya School:** The descendants of Zaid were known as Zaidi. He was the son of the fourth Imam Ali Asghar. The followers of Zaidi Imams are found in Yemen in south Arabia. This school is not followed in India.

2.4.3 Motazilas:

The third sect of Muslim law is the Motazilas unlike Sunni and Shia sect. Motazilas do not have any sub-schools. Sometimes it has close connection with the Usuli School. They have no organised community. Some of the peculiar feature of Motazilas sect are Motazilar Sect strictly follow monogamy, another feature was that divorce by Talaq is not recognised under this school. At present there are very few followers of this school.

2.5 Status of Muslim Women in Pre-Islamic Period:

The status of Muslim women in Pre-Islamic Society has been discussed by many writers and scholars and their results were not unique. In the Pre-Islamic Period, the customary tribal law was existing which gave no legal recognition to women section of the society. During those days no legal rights were granted to Muslim women, they were sold and purchased for which price is paid to the guardian. No succession or Property Rights were given to them⁶⁸. Another literary sources revealed the practices of female infanticide, unlimited polygamy. Patrilineal marriage and others were also prevalent in the Pre-Islamic Period.

Due to the difference in the status of women in Pre-Islamic Arabia, there was no definite single roles played and the rights held by women prior to the advent of Islam⁶⁹. There were some instances showing women in Arabia (Nabataea Kingdom) had independent legal Personalities and in different places for example in the city of Makkah as set of rights were granted to the women sections of the society. Apart of these, some of them have held high positions of power and authority.

One of the most known custom was burying of female infants alive was highly prevalent in Pre-Islamic Arabia. The reasons were mainly two: Female infants will have more monetary burden and also the scaredness of torture by the hostile tribe to the Girl Child⁷⁰.

The Hadith in Bukhari implies that Islam improvised the status of Muslim women by the second Caliph Umar saying “we never used to give significance to ladies in the days of the Pre-Islamic period of ignorance, but when Islam came and Allah mentioned their rights, we used to give them their rights but did not allow them to interfere in our affairs”.

Book 77, Hadith 60, 5843, and Vol. 7, Book 72, Hadith 734.

⁶⁸ The Changing Status of Islamic Women in the Arab World available at: <https://www.jstor.org/stable/41857519?seq=1> (visited on 10th Aug. 2020).

⁶⁹ Ibid.

⁷⁰ Asgar Ali, *The Rights of Women in Islam* 21, C. Hurst and Company, London, 1992.

Research on the structure of family in Pre-Islamic Arabia has given not clear view so it is not easy to understand the perfect structure of the family during this phase. Overall view suggests that the nature of the family structure would mainly patriarchal. Preferences were given to have boys than girls in a family as they were regarded as superior to women. The women merely had any rights within the family; she cannot even claim the right of inheritance even if the father had died. To be precise, the so-called important role of the women in the family is to give birth to male offspring. The household activities like cleaning, washing clothes, preparing butter, wearing material for tenants, and spinning wool⁷¹. Thus, generally women in Pre-Islamic period did not have many rights.

2.5.1 Position of Women in Islamic Society:

Islam regards both the gender equal in God's vision and is anticipated to do the obligations of worship, prayers, fasting and pilgrimage to Mecca. As the Quran States: "I will not suffer to be lost the work of any of you whether male or female. You precede one from another". (Quran 3:195).

Various noble improvements were carried by Prophet Muhammad (PBUH). Muhammad tried to replace the Patrilineal System into Matrilined System in some parts of Arab, significantly in Mecca. Muhammad (PBUH) introduced many important rights like inheritance Right, Property Rights and in the matter of divorce too rights were granted, in toto basic safeguards were given to women⁷². In the 7th century, three area i.e. marriage, divorce and inheritance rights were affected for the improvement of status of women in the society. The oxford dictory of Islam suggest the emancipation in the position of women and most importantly abolishing the female infanticide and

⁷¹ Women in Pre-Islamic Arabia available at:

https://en.m.wikipedia.org/wiki/Women_in_pre-Islamic_Arabia (visited on 10th Aug. 2020).

⁷² Position of Women in Islamic Society available at:

<https://www.alastairmcintosh.com/articles/2000watt.htm> (retrieved on 20th June, 2019).

establishing women's full personhood⁷³. The Prophet also changed the previously paid bride price to the father, now become a marriage gift retained by the wife as part of her personal property. In the pre-Islamic period the consent of the women with regard to marriage was not at all significant but with the reforms of Muhammad it now became imperative to obtain the consent of the bride to the marriage. The previously restricted right to inheritance also changed, women now have inheritance rights in a patriarchal society.

In Islamic Period, due to the legislation enormous development has been seen in the status of women in comparison to the Pre-Islamic Period. Muhammad also secures the rights of women in the sphere of Education and economic area which help to improve the status in society. In the sphere of employment too women were engaged in commercial activities and various occupations. The historical studies suggest that Muhammad consulted women and weighed their opinion seriously. Women contributed significantly to the canonization of the Quran⁷⁴. Nevertheless, the status of women in pre modern Islam in general conformed not to Quranic ideals but to prevailing Patriarchal cultural norms.

As a result improvements of the status of women become a major issue in modern reformist Islam⁷⁵.

2.6: Provision of Quran upon the Status of Women:

Among the two sexes, that Allah has regarded over all creatures is the female. The Quran declares, 'And we have certainly honoured the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what we have created, with [definite] preference [Al-Isra, 17:70]⁷⁶.

⁷³ Johnes, Lindsay, *Encyclopaedia of Religion* 6224, (Detroit, Macmillan Reference, USA, 2nd Edn., 2005).

⁷⁴ Women and Islam available at:
<http://www.oxfordislamicstudies.com/article/opr/t125/e2510> (visited on 14th Aug. 2020).

⁷⁵ Ibid.

⁷⁶ Al-Isra, 17:70.

The Holy Quran declares that both in terms of reward and punishment men and women are equal. For the deeds of religious rituals and in doing Islamic duties both are equal. Quran states this clearly, ‘O man kind, indeed. We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you is the sight of Allah is the most righteous of you. Indeed Allah is knowing an Acquainted [Al-Hujurat, 49:13]⁷⁷.

The Quran also demands equality between both of them regarding their rights and duties. And due to wives is similar to what is expected to them, according to what is reasonable [AI – Baqarah, 2:228]⁷⁸.

In the verse [An Nah, 16’58-59], the Holy Quran rejects the treatment faced by women section during the Pre-Islamic period. The Holy Quran directs to deal with women in a gentle and kind way [An-Nisa 4.19]⁷⁹. Another notable provision laid down in the Quran in verse [Al-Talaq 65.6]⁸⁰ which says ‘Lodge them of where you dwell out of your means and do not harm them in order to oppress them. And if they should be pregnant, then sped on them until give birth, and if they breast feed for you then give them their payment and confer among your selves in the acceptable way.

The Holy Quran also acclaimed ‘Then, either keep [her] in a acceptable manner or release [her] with good treatment ‘[Al-Baqarah, 2:229]⁸¹.

As per the verse of Quran, Supremacy or priority does not rely upon the sex, race, colour or status. The Prophet Muhammad (PBUH) stated that the most relevant for any person who practice Islam in his God Consciousness known as Taqwa. Taqwa is the foundation of regard and importance in the eyes of Allah and not Gender⁸². So, when

⁷⁷ Al-Hujurat, 49:13.

⁷⁸ AI – Baqarah, 2:228

⁷⁹ An-Nisa 4.19

⁸⁰ Al-Talaq 65.6

⁸¹ The Status of Women in the Quran available at: <https://www.dar-alifta.org/foreign/ViewArticle.aspx?ID=129&> (visited on 14th Aug. 2020).

⁸² The Status of Women in Islam available at: <https://www.minhaj.org/english/tid/2934/The-Status-of-Women-in-Islam.html> (visited on 19th Aug. 2020).

according to the injunctions of Quran were disclosed the position of women during that phase must also be appreciated.

Another notable feature revealed from the verse of Holy Quran was that man and women are not in any competition with each other rather they are partner's life, created to complement one another in the journey of life. The role assigned to both of them is remarkable for the building of a society. And this is evident from the fact that even in heaven. Allah (SWT) created Eve (Hawwa) for Adam since one cannot exist without the other. Though men and women are equal in Islam but role played by them reflect their different personality⁸³.

2.7 Discussion:

The Chapter signifies the Historical background of India, Sources and Schools of Mohammedan law and also articulate about the status of Muslim women in Pre-Islamic as well as in the Islamic period. The injunction of Holy Quran upon the status of women also expressed in this chapter. Some of the important essence of the chapter is written below:

- Islam means tranquillity by acceptance and compliance to the bequeath and instruction of Almighty Allah and those who follow Islam are known as Muslim, meaning one who have believed the communication of peace by submission to Almighty Allah.
- Islam took its birth in Arabia, the society of Pre-Islamic Arabia was unproductive and inherits. Inhabitants of Pre-Islamic Arabia were leading a vigorous life because of the climate which was not magnanimous. Except Mecca and Medina, no settled society prevailed in those days. Mostly people were occupants of merchants and stock breeding.
- In Pre-Islamic Arabia no common religion was followed. This period was known as Jahaliyah Period i.e. the days of ignorance where people hardly aware of any systematic Pattern of life style. The inhabitants keeps on moving

⁸³ Al-Imran (3:36).

from one place to another, there was no definite settled society. Tribes and sub tribes are divided headed by Caliph or Khalifa.

- The Practice and traditions in Pre-Islamic period was strange and unusual, many of them are barbaric and cruel. Burying unwanted female child was in practised. Women were treated not more than properties.
- There was no diminution as to the number of wives one can marry. Even the power to pronounce divorce was unrestricted. Women were living a downhearted life. Instance of mortgaging women to men were also visible.
- The Holy Prophet Muhammad (PBUH) appeared as a rescuer and liberator to the people of Arabia with a new religion known as 'Islam'. Most of His time was spent in seclusion in cave of Mount Hira. Muhammad becomes Prophet at the age of forty and wahi's were revealed by Angel Gabriel to him, thus in 610 AD. Islam was founded. Muhammad (PBUH) was a great social revolutionizer for the refinement of the society. The Holy Prophet (PBUH) ascribed new proportion of life and pursued to abolished the social evils widespread in the society.
- Regrettably the sermons of Prophet (PBUH) were opposed by the people of Mecca several conflicts occurred between the followers and disbelievers. Nevertheless, the charismatic personality of Prophet (PBUH) drives the intellect of Arabians and in a short period of time most of them embraced Islam.
- Several Reforms were done by Holy Prophet (PBUH) some of them are integration of tribes, security of community and women, cordial relation between the tribal groups, removal of idolatry, abolition of infanticide, adultery prostitution, and freeing of slaves.
- Reforms were made with respect to the institution of divorce. The one sided power of the husband to pounce talaq was curtailed and powers are entrusted to women to separate their husband by means of talaq.

- Reforms were also made for the development of educational system. It was made obligatory on every one to educate all most importantly the Muslim women.
- The Chapter also made an analysis of development of Muslim law into five periods. The first period (622-632 AD) is which the divine revelation were made to Holy Prophet (PBUH) from time to time. The people of Mecca failed to believe the revelation although it was Medina. Quran and the Hadith, the two sources were the result of last ten years of Prophet's life.
- The Second Period (632-661) known as Caliphate Period. After the demise of Holy Prophet (PBUH) no one is nominated as his successor. Divine communications were done in scattered form. Zaid, close companion of Prophet (PBUH), collected the scattered revelation. The authentic version of Quran available is the Osman's Compilation.
- The third Period (661-900 AD), was the development period of Muslim law. The scattered Sunnat and Ahadis were collected and examined. In this period Qiyas (Analogical deduction) considered as scientific method of legislation.
- The fourth Period (900-1924) considered as magnificent period of Islamic Jurisprudence. The foundation of four schools of Sunni School are laid down in this period.
- The fifth period (1924 AD to till date) begins the modern period of Islamic law. Caliphate System was abolished Ulema comprising of Muftis, Moolah and Jurist made significant benefaction in the development of Islamic law. Thereafter, the Britishers made several changes by enacting laws. Apart from Shariat Act, 1937 and Dissolution of Muslim Marriages Act 1939, the parliament also passed legislation to the governance of Muslims in India.
- The Seventh schedule attached to Article 246, of the constitution of India specifically mentioned about 'Personal Law'.

- The chapter also make an analysis of Mohammedan law and its sources. There are mainly two sources of Mohammedan law. They are primary and secondary sources. The primary sources are Quran, Sunnat or Ahadis, Ijma and Qiyas and the secondary sources consist of Urf or custom, Judicial Decision, Legislation and Justice, equality and good conscience.
- All-Quran is the foundation of Mohammedan law, consist of divine communication to the Holy prophet (PBUH) of Islam.
- Sunnat and Ahadis are the Preaching's and Practices of Holy Prophet (PBUH). The whole structure of Mohammedan law – civil, criminal and religious is founded upon the Ahadis of Prophet (PBUH). Malik-Ibn-Anas was the initiator to systematise the collection of traditions.
- Unanimous decisions of Jurists known as Ijma has its significance in the sense that it has led to the development of Muslim law. Ijma is the opinion of the Jurist on any matters upon which there is no injunctions mentioned in the Holy Quran and in the Sunnat and Ahadis of Prophet (PBUH). Consensus among all the jurists is essential for constituting Ijma.
- The Last primary source of Muslim law is Qiyas. Qiyas are the analogical deductions, and its Arabic meaning is measurement. Where Quranic provision, Ahadis and Ijma cannot be founded to any matter, than Qiyas will be applied as a solution to the matter. However, Qiyas must be in consistent with Quranic injunctions.
- Dealing with the secondary sources of Mohammedan law, it has been found that custom was not an important source of Mohammedan law, nevertheless it has been utilized as supplementary source in rare occasion. The practice of custom must be universal, territorial, time immemorial, ancient and must not oppose to public policy.
- Judicial decisions are the decisions of Supreme Courts, High Courts and subordinate courts. This is used as precedents and applicable in India. Some of the

landmark judgements are Shah Bano Begum V. Mohd. Ahmed Khan, Begum Subanu V. Abdul Gafoor.

- Legislations are the important sources of Mohammedan Law. Muslims in India are also governed by the various legislations enacted by parliament of India.
- Justice, Equity and good conscience is also one of the sources of Muslim law. To meet with certain exigencies Juristic Preference is attached under Mohammedan law.
- Schools of Muslim Law and Sect has also been discussed under this chapter. There are Sunni School, Shia School and Motazilla. The Sunni School shall comprise of Hanafi School, Maliki School, Shafi School and Hanbali School. The Shia Sub-Schools are –Ithna Asharia School, Ismailiya School and Zaidya School.
- Abu Hanifa was founder of Hanafi School. He was popular for the principle of Istihsan i.e. juristic opinion – Under his guidance codification of law was done. The legal doctrines of Imama Abu Hanifa was founded on Quran and Hadith.
- Imam Malik was the propounder of Maliki School flourished in the city of Madina. He dedicated most of his time for the study of Islamic Jurisprudence and Hadith. He emphasis more upon traditions and usages of Medina. Malik's prominent contribute on was his book 'Muwatta'.
- Imam Shaif was the founder of Shafi School. He formulates the doctrine of Islamic Jurisprudence based on Holy Quran. He made large use of Hadith and a strong supporter of doctrine of Ijma.
- Hanabali School was propounded by Imam Hanbal. He was also highly influenced by the use of Hadith. Ijma according to him may be used in an exigencies and regarding Qiyas he viewed it as a sheer necessity.
- Ithna Asharia School largely followed by the Shia sect. The practitioners of this school are founded in Iraq, Pakistan, India and Lebanon.

- Ismailiyas are founded in Syria, Central Asia, Pakistan and India.
- The descendants of Zaid are the followers of Zaidya School. It was mainly followed in South Arabia.
- Motazila is the third sect of Muslim law. Motazilas do not have any sub-schools. There are few followers of this school.
- One of the important aspects of this chapter is the discussion upon the status of Muslim women in Pre-Islamic period as well as in the Islamic period. In Pre-Islamic Period, no rights are granted to women, the practices of Female infanticide, unlimited polygamy, patrilineal marriage are prevalent in the Pre-Islamic period.
- Dominance of Patriarchy, boundless power of male, miserable conditions of women are highly visible in the Pre-Islamic period.
- After the advent of Islam, many patriarchal norms and culture were abolished. Some sorts of powers were also granted to women section of the society. The Holy Prophet (PBUH) was very kind and liberal towards women. Previously restricted right to inheritance was also changed. Women were given right to divorce their husband by means of Khula. Mahr becomes her exclusive right. Even women's consent becomes mandatory for the purpose of marriage.
- The Quranic injunction provides many verses in favour of women. The Holy Quran ordains equality of men and women. Surah Nisha (4:19) and Sural Al-Baqarah (2:229). In the eyes of Allah there is no gender inequality between men and women.