

# **FAMILY LAW I**

## **SOURCES OF MUSLIM LAW**

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# What is muslim law?

- ▣ Muslim law is a religious law which is **expression of God's Command for Muslims**, in application constitutes a system of **duties imposed upon muslims** by virtue of their religious belief.
- ▣ Generally **Shariat Law** term is used alternatively for Islamic law or muslim law.
- ▣ The concept of *Sharia* however is not confined to legal norms, but conveys a more holistic picture.
- ▣ *Sharia* does not simply represent religious laws, but covers a wide range of secular laws and ordinances.

# SOURCES OF MUSLIM LAW

## ANCIENT

1. **Quaran**
2. **Sunnah**
3. **Ijmas**
4. **Qiyas**

## MODERN

1. **Customs and Usages**
2. **Precedents**
3. **Legislation**
4. **Equity, Justice and Good Conscience**

# Ancient Sources

## 1. **Quaran:**

- ▣ Muslims consider the 'Quran' as the basis of their law.
- ▣ They believe that the 'Quran' is the one, that shows the truth as distinguished from falsehood, and the right from the wrong.
- ▣ It is the most fundamental and sacrosanct source of muslim law.
- ▣ It is the **Holy book** for the Muslims. It contains express revelations of the Prophet which came to him through angel Gabriel.

- ▣ According to the Muslim belief, the *Qur'an* is the sacred book which was revealed from Allah to the Prophet Muhammad from 610 to 632 A.D, amounting to a period of 23 years.
- ▣ The *Qur'an* contains **114 chapters**, which are called *suras* in Arabic. The suras contain **6666 verses**, which are called *ayats* in Arabic.

# Contd..

- ▣ There are a total of 200 verses related to legal rulings in the *Qur'an* and these may be classified as follows:
  1. **70 verses on family and inheritance law**
  2. 70 verses on obligations and contracts
  3. 30 verses on criminal law
  4. 20 verses on procedure

- ▣ The *Qur'an* is aimed at establishing basic standards for Muslim societies and guiding these communities in terms of their rights and obligations.

## 2. Sunnah:

- ▣ It means “way, course, rule, mode, or manner, of acting or conduct of life”
- ▣ It includes traditions and customs of **Prophet Muhammed**
- ▣ This was as a result of traditional stories transmitted from the Prophet Muhammad called *Hadiths/Hadis*
- ▣ The *Sunna* of Muhammad therefore is preserved and communicated to the succeeding generations through the means of *Hadiths*

- ▣ Prophet made some implied revelations, which contained some holy and pious ideas.
- ▣ Such implied or internal revelations are believed to be made on the inspiration of God.
- ▣ These revelations formed part of the Sunna.
- ▣ In other words, Sunna means traditions of the Prophet, whatever Prophet said or did, are treated as his traditions.

It is divided as:

1. *Qawol* , which means all the **sayings and the utterances of the Prophet Muhammad**
2. *F'al* , which denotes the **actions and daily practices of the Prophet Muhammad**
3. *Iqrar* , which denotes the tacit approval on the part of the Prophet of **acts done and practices carried on by his followers**

### 3. Ijma:

- ▣ This principle was likely to have developed in Medina and Iraq.
- ▣ When 'Quran' and 'Sunna' could not supply any rule of law for a new problem then the persons having knowledge of Muslim Law used to agree unanimously and gave their common opinion over that point.
- ▣ Therefore consensus of the founders of law or of the community as expressed by the most learned members is another important source of Islamic law

## SCHOOL OF JURISPRUDENCE

- ▣ Hanafi
- ▣ Shafi'i

## FORMATION OF IJMA

- ▣ Through public agreement of Islamic Jurists
- ▣ Through agreement of the entire community and public at large

- ▣ Maliki

- ▣ Through agreement amongst the residents of Medina, the first Islamic capital

- ▣ Hanbali

- ▣ Through agreement and practice of Muhammad's Companions

## 4. Qiyas:

- ▣ Qiyas or analogical deduction is the fourth source of Sharia for the Sunni jurisprudence.
- ▣ Qiyas is the process of legal deduction according to which the jurist, confronted with an unprecedented case, bases his or her argument on the logic used in the Qur'an and Sunnah.
- ▣ Qiyas must not be based on arbitrary judgment, but rather be firmly rooted in the primary sources.

- ▣ In the absence of concrete answers from the *Qur'an* and *Hadith*, Muslim jurists would look for an analogous situation in which a decision had been made
- ▣ It can also be defined as “an extension of law from original text to which the process is applied to a particular case by means of effective cause, which cannot be ascertained by interpretation of the language of text”.

- ▣ *Qiyas* should be used only when the solution to a specific issue can not be found in either the *Qur'an* or *Hadiths*
- ▣ *Qiyas* should not contradict the principles of Islam
- ▣ *Qiyas* should not contradict either the contents of the *Qur'an* or the traditions of Prophet
- ▣ *Qiyas* should be strict and based on the *Qur'an* , *Hadiths* , or *ijma*

# Modern Sources

1. **Custom and Usages:**
  - ▣ Custom is never recognized as a source of Muslim law although it given importance some time as a supplementary source. The important thing of Custom is that it should be territorial. In India Muslim Personal Law (shariyat) Application Act 1937 section 2 has reject that custom which displaced the rule of Muslim law.

- ▣ The custom which is recognized as law should be enforce in the country although it is not necessary that its origin come at the time of Prophet Mohammad.

## 2. Legislations:

- ▣ Legislations mean statutes enacted by the Parliament or the State legislature for the regulation of human actions in a particular aspect.
- ▣ The first law that was passed was the Shariat Act, 1937. In Islam, the entire body of law that governs their day to day personal laws, marriage, divorce, etc. is collectively called the Sharia.

- ▣ Law relating to the succession of a Muslim person dying intestate. i.e. without a will or a testament.
- ▣ Law relating to vesting of properties and gifts on females of the Sect.
- ▣ Law relating to marriage, divorce, grounds of divorce, Mehar, guardianship and maintenance.
- ▣ Law relating to wakfs i.e. any trust created for the Muslim religion.

- ▣ In 1939, an attempt was made to allow the woman to divorce their husbands through the Dissolution of Muslim Marriage Act, 1939.
- ▣ The woman could divorce their husband on three main grounds, viz.
  - a. refusal from maintaining the wife, financially and emotionally,
  - b. ill-treatment in the matrimonial house and
  - c. desertion by the husband.

- ▣ Muslim Women (Protection of Rights on Divorce) Act, 1986 was enacted that gave them the right to maintenance from their husband.

### 3. Precedents: Judicial Decisions

- ▣ The first landmark judgment that deals with Muslim personal law was the 1986 judgment in **Shah Bano Begum v. Md. Ahmed**. In this case, the apex court held that Muslim women have a right to maintenance under Section 125 of the Cr.P.C even if the Quran or their personal laws have provided for an alternate remedy. The same ratio was upheld by the apex court in **Daniel Latifi v. Union of India**

- ▣ Recently, in the leading case of **Shayara Bano v. Union of India**, the apex court held the system of instantaneous divorce by the utterance of the word 'talaq' thrice orally unconstitutional because the right to instantaneous divorce is only with the men and not women. Further, the system is arbitrary and hence, violative of Article 14. Therefore, the judiciary has assisted in the development of Muslim personal law.

#### **4. Justice, Equity and Good conscience:**

- ▣ The doctrine of equity, justice and good conscience is essentially a product of the British administration of justice in India
- ▣ For instance, the Muslim law of pardanashin lady, of guardianship, of divorce, of wakf, etc. has undergone considerable modifications. The interference in the law has been made avowedly in those cases where the rules of Muslim law have been found wanting, or to be too rigorous, or to be not in consonance with the notions of English justice and equity.

- ▣ Istihsan of the Hanafi School, and the doctrine of maselihul mursala of Malik, are near to the English doctrine of equity, justice and good conscience.