

4) Qiyas

- i) Meaning - Qiyas means reasoning by analogy from Quran, Sunnat and the Ijma.
- ii) Conditions for the validity of Qiyas :-
 - a) Original source from which Qiyas is deduced must be capable of being extended.
 - b) Original order of the Quran or Hadith to which the process of Qiyas is applied should not have been repealed.
 - c) Result of Qiyas should not be inconsistent with any verse of Quran or established Sunnah.
 - d) Qiyas should be applied to ascertain a point of law and not to determine the meaning of words used.
 - e) The deduction must not be such as to involve a change in the law embodied in the text.
- iii) Non-Acceptance - Qiyas is of no value to persons belonging to the school of Ahmad-Ibn-Hanbal. The Shias also do not accept Qiyas because they are of the opinion that if law need to be enlarged it must be by Imam and no one else. The Shafis also regard Ijtihad and Qiyas as contradictory of their own views.

ii) A Hindu cannot succeed to the estate of a Muslim.

Eg. Chandra Sekh Chedabaram v. Ma Nyier ILR (1928) 6 Ran. 243

Hindu man with wife & children embraced Islam & married a muslim wife, his property will pass to his muslim wife and children and not to his Hindu wife & children.

* Apostasy of guardian

i) Muslim law → an apostate has no right to contract a minor in marriage.

ii) FRA, 1850 (Act XXI of 1850) "no law or usage shall inflict on any person who renounces his religion any forfeiture of rights or property."

* Effect of renunciation of Islam on Marriage. - When a muslim married couple renounce Islam and embrace another religion their marriage remains intact and is not dissolved.

** Origin of Muslim Law **

The place of Muslim law's origin is Arabia where Mohammad promulgated Islam. Muslim law originates from divinity. It is that law which is established by a communication from God. with reference to man's act, expressive either of demand or indifference on his part or being merely declaratory. The entire system of Muslim law, as well as of theology, ritual and private ethics have been built upon two foundations -

- i) the Quran
- ii) the Traditions (Sunnah and ahadis)

1) The Quran

i) Divine Communication & revelation - The Quran is the divine communication and revelation to the Prophet of Islam. It is the first and great legislative code of Islam.

ii) It is declared to be revealed to Prophet at different times in various portions during the last twenty years of his life. The Quran is Al-Furqan i.e. the one showing truth from falsehood, right from wrong.

iii) Wilson : Anglo Mohammedan law - Wilson is of the opinion that Quran has the emanations of Mohammed's own brain, under conditions of abnormal strain and excitement, as he concentrated his attention on the problems that came one after the another to be solved by him.

iv) Criticism of Wilson's view - The view expressed by Wilson does not hold good because the distinction between Quran and Sunnah has been expressed beyond doubt. Moreover, the language of Quran is almost different from Hadith or as spoken in Arab.

read with Section 494. Change of religion does not dissolve the marriage performed v/HMA. Apostasy does not bring to an end the civil obligation or the matrimonial bond but it is a ground for divorce v/S 13 as well as a ground for judicial separation v/S 10 of HMA.

* Effect on Marriage on conversion by :-

i) Muslim husband :- his marriage with his wife is dissolved ipso facto (by that very fact/act). Apostasy

ii) Both (H & W) convert to other faith
- marriage remains intact

I renounce

Islam

Expressed Implying
using disrespectful words

ii) Muslim wife :- not dissolve ipso-facto. She is however entitled to a decree for the dissolution of her marriage. v/S 4 of Dissolution of Muslim Marriage Act 1939

iii) Woman previously from other faith embracing Islam and re-converting to the same faith - marriage dissolved ipso-facto. (Eg - muslim man - Jain woman - converts to Islam, woman ^{re-embraces} re-converts to Jain) (but converts to Christianity marriage not dissolved) (S-4-NA)

iv) Christian man marrying a muslim after conversion - J.J. Chandra v. Abinash (1939) 2 Cal. 12. Christian man converts to Islam, marries a muslim. His previous marriage is valid because v/ML marriage of a muslim with a christian woman (Kitabia) is permitted.

* Conversion to Islam and Rights of Inheritance

i) According to the strict Muhammadan Law, difference of religion is a bar to inheritance. But, by the application of the Freedom of Religion Act, 1850, a convert from Islam does not lose his right of inheritance.

(Kitabia - one who believes in Christianity or Judaism)

3) Ijma

i) Defⁿ :- Sir Abdul Rahim - "agreement of the jurists among the followers of Prophet Mohammad in a particular age on a particular question of law".

ii) Essentials :-

a) The consensus - jurists are of the view that unanimity is a pre-requisite for Ijma. Any dissent - no Ijma, some jurists hold that Ijma could be constituted by majority.

* Stages - 1 people express views

2 discussions and debates

3 dropping differences & agreeing on one point.

b) The jurists - opinions of experts are admissible. Since jurists being the experts, therefore only their opinions are relevant for Ijma. Opinions could be required for matters such as the rites of marriage, rules of divorce, etc.

c) Jurists of a particular period - Ijma of one age may be reversed by subsequent Ijma of the same age. Similarly Ijma of one age may be superseded by Ijma of a subsequent age. But that of companions cannot be reversed.

d) Jurists to be Muslims -

e) Consensus on a religious matter - fact / law

Quran based on

Govt. of Muslim

Prophet's revelation

having represent capacity.

iii) Repeal - means abrogation of the legal effect of a text by another text. Ijma - not a text - cannot repeal Quran & Sunnah.

i) Kinds.

a) Ijma of the companions of the Prophet - unrepeatable accepted by all,

b) Ijma of Jurists - divergent opinions

no. of jurists procedure majority/unanimous

c) Ijma of People; regular dealings

where a passage of Quran has been interpreted in particular manner in the ^(guidance) Hedaya and ^(people lead prayer) Imania, it was not open to the courts to construe the same in different manner.

2. The Sunnat and Ahadis (Traditions)

i) Revelations (Wahi) - Zakir (manifested) Quran

Batin (internal) opinions of Prophet

Absence of Revelation - Prophet exercised his own judgment

- inspired by God.

- doing, allowed by Prophet - Sunnat

ii) Sunna - model behaviour of the Prophet.

Hadis - narrations of what Prophet did/allowed. It was not reduced to writing during the lifetime of Mohammed.

Hadis ← Khabar-al wahid - confirmed by one person (weak)

confirmed by several declarations (strong)

iii) Traditions ← Sunnat ← (a) fail (did) & (b) qaul (enjoined by words)

Ahadis (c) tuqrir (things done in presence w/o disapp.)

- i-mutwatis - public & universal

- i-mashhool - known to majority - not universal

- e-wahid - depends on isolated individuals

iv) Compilation of Hadis - The companions of the Prophet used to take Sunnah as binding authority and were very anxious to learn it by heart for themselves and for the purpose of further transmission.

Eg: Anas bin Malik - servant of Prophet at Madina - ^{noted} points of what Prophet said during his discourse & other occasions - read them to Prophet - corrected - fair note was made.

iv) Misconception - 1st - orally transmitted & not recorded during the period of Prophet & 2nd - The sense uttered by the Prophet could change during oral transmission. Misconception was due to misunderstanding of the term 'Haddithana (it was reported to us) → not oral but referring word of authors:

2. Traditions - Sunnah and Ahadis

- i) Acceptance of Book of God - After the death of Prophet, the Quran was accepted as a "Book of God" as an all-sufficient guide for this world. It was reverently remembered, recited, written down, studied and obeyed.
- ii) Traditions introduced by practice of Prophet - The conquest of the world outside Arabia brought Muslims to face with new problems. These problems were solved by a process of interpretation by the companions of the Prophet by means of life of Prophet and memories of the sayings of the Prophet.
- iii) Hadis - These are varying texts of the traditions (Hadis) recording the Prophet's saying and doing and when it comes to their application, different schools of law emerge with their own characteristics.

* **Shariat**: The word Shariat literally means "the road to the watering place or the path to be followed." Quran, Sunna, Hadis, Ijma and Qiyas form the body of Muslim common law known as Shariat. It is used to denote the whole of Muslim religious law. It includes all human acts and its regulation. It is not law in modern sense but contains an infallible guide to ethics.

- **Religious Injunctions under Shariat** :-

1. **Farz** i.e. duties which are strictly enjoined on Muslim.
(prayers five times a day)
2. **Haram** i.e. acts which are strictly forbidden to Muslims.
(wine)
3. **Mundub** i.e. things which are advised to Muslims to do.
(additional prayers or id)
4. **Makruh** i.e. things which are advised to Muslims not to do.
(certain kinds of fish)

** Development of Muslim Law **

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

The period of Quranic Percepts (622-623 A.D)	The period of Orthodox Khilafat (632-661 A.D)	The period of theoretical study & collection	The period of evolution of Ijtihad and Taqlid	5th Period (1924A present)
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First Period: The Period of Quranic percepts (rule about behavior / think)

- i) The flight of Prophet i.e. Hijra marks the beginning of Muslim era. The Prophet took the complete responsibility as a sovereign, first over the city of Madina and ultimately over Arabia. Prophet ruled Mecca after defeating it with his followers.
- ii) Madinah Surahs & Meccan Surahs - Madinah Surahs give guidance to a growing social and political community and Prophet as an example as law-giver and reformer - Meccan Surahs give guidance to the individual soul and Prophet as an example of warner.
- iii) Judicial Decisions and Traditions of Prophet came into existence during this period. to show something

- ii) Wahi (Inspiration) : a) Zahir (manifest) Quran (words of God)
- b) Batin (implied) Hadis (actions, sayings, teachings, judicial decisions of the Prophet)

Second Period: The period of Orthodox Khilafat (following old traditions)

- i) death of Prophet & division of Muslim community - The Prophet died without any son and without appointing any successor. The Muslim community was divided into two groups to decide regarding the successor. One group

married woman who renounces Islam and converts to any other religion ceases to be a muslim. But under section 4 of Dissolution of Muslim Marriage Act 1939, such a woman who renounces Islam may obtain a decree for the dissolution of her marriage on any grounds mentioned in 3-2 of this Act.

** Interpretation of Muslim Law **

1. Interpretation of Quran - It is the duty of the court to see how the text under consideration has been interpreted by the Muslim Jurists of recognised merit and authority and the exposition of the jurists who are regarded as authoritative should be followed.

Aga Mohammad Jaffer Khan v. Koolom Beebee 10CWN41

The PC held that where a passage of Quran has been interpreted in a particular manner both in Hedaya (work on Sunni Law) and in Imamia (work on Shia Law), it is not open to the court to construe the same in a different manner.

2. Interpretation of Hadis - When there is difference of opinion among the Muslim jurists, the point in dispute cannot be decided by the court itself but reliance should be placed on the opinion of recognised jurists and in case of divergence - on their comparative seniority.
3. Interpretation of Hanafi Law - Abu Hanifa and his two disciples Abu Yusuf and Imam Mohammad. All agree - no difficulty, in case of difference of opinion - the general rule
 - i) Difference b/t AH and AY+IM - AY+IM prevails
 - ii) ———— AH and IM ———— - AY prevail (opinion coincides)
 - iii) All three different - AY prevail
 - iv) Conflict + no rule to guide court - opinion based on Justice, Equity & G

of law was stopped

Fifth Period: 1924 AD to the present day

i) Abolition of Caliphate - This was the modern period wherein Caliphate was abolished. There was no Caliph to execute and enforce Shariat.

ii) Shariat as a moral and religious code of conduct - Shariat lost its juristic sanction and was codified in modern Islamic countries like Tunisia, Turkey, Egypt, etc.

was headed by Prophet's daughter Fatema and other group was headed by Ayesha (widow of Prophet and daughter of Abu Bakar.)

ii) Contentions of groups: Prophet's daughter Fatema's ^{group} contended that Ali (cousin and son-in-law of Prophet) was the rightful successor of Prophet whereas the other group demanded election.

iii) Election and Caliph: The successor of Prophet was elected by way of election and Abu Bakar became the first Khalifa or Caliph followed by Umar and Umar and Ali.

Shias hold that Ali was the first Caliph and others were not rightful successors.

iv) Period of Sunnah: This period ended with the assassination of Ali followed by accession of Muavia and the beginning of Umayyad Dynasty. This period is also known as period of sunnah as close adherence was kept to the conduct and sayings of the Prophet.

v) A collection of whole Quran was made and put in writing under the third Caliph Umar.

Third Period: The period of theoretical study and collection

i) Importance of Traditions: During the reign of Umayyads traditions as source of law was realized. The Commandments and Prohibitions of God that were borne in the hearts of men drew their origin from Book of God and from the doing and sayings of the Prophet. With the increase in traditions, it became necessary to make collections and to separate those which were authentic from those which were of doubtful authority.

ii) Collections of Traditions: The first collection of traditions was made by Abu-Ibn-Shurab-az-zuhri. The collections made by Abdul Malik Ibn Juraiji was arranged not

5. Taiz i.e. things about which Islam is indifferent / legal / valid (travelling on sea/air)

Fiqh: Fiqh literally means "intelligence". It implies the exercise of intelligence in deciding a point of law in the absence of a binding command from the Quran.

Fyzee defines it as "knowledge of one's rights and obligations derived from the Quran or the Sunna of the Prophet or the consensus of opinion among the learned (Ijma) or analogical deductions (Qiyas).

The classical theory of Fiqh was formulated as a system first by Imam Shafi which is universally accepted by Islamic scholars. Schacht in his book "Origin and Development of Islamic Jurisprudence" states that the spirit of law in Islam is religious and ethical. It draws its inspiration from the Quran and the teaching of Prophet Mohammad but the content of law is based upon pre-Islamic customs and usage.

Difference between Shariat and Fiqh

Shariat

Fiqh

i) Shariat embraces all human actions within its ambit

i) Fiqh deals with legal acts alone

ii) Shariat reminds about revelation and that knowledge which no one could have possessed except for Quran/Hadis

ii) The power of reasoning is the chief factor

iii) God and Prophet laid down the path of Shariat

iii) The whole structure is created by human agency

iv) The grades of approval or disapproval are various.

iv) The action is legal or illegal, permissible or not permissible.

according to subjects but according to the name of the companions and were thus called *Masnads*.

Malik Ibn Abbas was the one who arranged and classified traditions according to subjects which was called *Musannaf*.

iii) Defeat of Umayyads and Emergence of Schools:
Umayyads were defeated and was taken by Abbasides of Baghdad. Here learned men of Islam studied Islamic Jurisprudence. The four schools of Sunni law emerged :-

a) Hanafi School - named after Imam Abu Hanifa (669-767 A.D.). was the most liberal school as it relied on the principles of *Qiyas*.

b) Maliki School - named after Malik Ibn Anas (713-795). It gives importance to the traditions of the Prophet & *Tijma*.

c) Shafi School - founded by Mohammad-ash-Shafi (767-820). It gives importance to the doctrine of *Tijma*.

d) Hanbali School - founded by Imam Ahmad Ibn Hanbal (780-855). He adhered to principles of *Hadis*.

Fourth Period: Period of evolution of *Ijtihad* and *Taglid* (upto 1924 AD)

i) Jurists interpretation and Emergence of Doctrines - The interpretation by jurists continued and led to the emergence of two parallel doctrines i.e. *Ijtihad* and *Taglid*.

a) *Ijtihad* - studying intensely to arrive at a sound opinion or judgment (forming one's own opinion) - person following it were known as *Mujtahids*.

b) *Taglid* - following the opinion of another person without knowledge of the authority for such opinion (man in street being ignorant follow the opinions of those who knew it).

During this period, the growth and development

** Application of Muslim Law

MUSLIM LAW

Muslims by birth

Muslims by conversion

1) Muslim by birth -

- a) Person born in Muslim faith and has never been proved to have adopted any other religion - is a Muslim
- b) Presumption of Sunnis - where it is not shown nor alleged that parties are Shias, there is a presumption that they are Sunnis, to which sects the great majority of the Muslims of this country belong. - is/are Muslim
- c) Renounce sect / sub-sect - Every adult Muslim, whether male or female may renounce the doctrine of the sect or sub-sect to which he or she belongs and adopt the tenets of the other sect or sub-sect and he or she shall thenceforth be governed by the law of the new sect or sub-sect.

2) Muslims by conversion - The converts to Islamic faith must be considered to have substituted the religion of Islam from the previous religion.

- i) Person subject to Muslim Law - When the question is what a person is a Muslim/not, it will be decided in accordance with the tenets of the particular sect which he professes. If his conduct / belief does not conform - the court will apply law in accordance to justice, equity and good conscience.
- ii) Choice of Law when parties are not to the same sect - same sect - same law, different sect - law of defendant apply.
- iii) Muslim Law applies to Non-Muslims - For instance, a

4. Interpretation of old Arabic words and terms - Many of the old Arabic words have now acquired new significance in India and so in interpreting the old text they should be taken in the old sense and meaning. If it is not possible to follow the letter of the original Islamic law, the spirit of law should be kept in view, and the principle underlying it should be adhered to as far as possible.
5. Duty of Court in interpreting Muslim Law - When a great Muslim jurist has construed a particular precept of Muslim law in a particular way, the interpretation should be followed without referring back to original authorities. This makes Muslim law certain.
6. Doctrine of 'stare decisis' - It would be dangerous for a Court to go back upon a course of decisions and not to adhere to well recognised principles. Precedents should be followed.

* Conversion to Islam **

* Who may convert?

A non-Muslim who has attained majority and is of sound mind may embrace Islam in any of two modes:

- he may simply declare that he believes in the oneness of God and the Prophetic character of Mohammad; or
- he may go to a mosque, to a person who is well-versed in Islamic theology (Alim) where he utters Kalma (Lailaha-ill-Allah Muhammad-ur-Rasoolullah) before Imam, whereupon he is given a Muslim name by the Imam.

The conversion should be a bonafide one. *Rikhya Bibi v. Anil Kumar*, a Hindu woman accepted Islam in order to get rid of her Hindu husband (impotent).

It was held that her conversion to Islam was colourable and was effected with intent to commit a fraud upon the law and was therefore invalid and ineffective.

* Conversion to Islam and marital rights.

Conversion may take place :-

- a) In a country subject to Muslim law
- b) In a country where the Law of Islam is not the law of the land.

✓ In the first case, when one of the parties embraces Islam, he should offer Islam to the other spouse, and if the latter refuses, the marriage can be dissolved.

✓ In the second case, the marriage is automatically dissolved after the lapse of a period of three months after the adoption of Islam by one of the spouses.

In India, the spouse who has become a convert to Islam can sue for divorce or a declaration of dissolution of marriage on the ground that the other spouse has refused to adopt the Muslim religion.

Cases: Sarla Mudgal v. Union of India (1955) 3 SCC 635

The Supreme Court held that the second marriage of a Hindu husband after conversion to Islam without having his first marriage dissolved under law would be invalid. The second marriage would be void v/s. 494 of IPC and the apostate husband would be guilty of bigamy.

Lily Thomas v. Union of India AIR 2000 SC 1651

Facts: Hindu wife files a complaint v/s. 494 on the ground that during the subsistence of the marriage, her husband had married a second wife under some religion after converting to that religion.

Held: - A bigamous marriage is an offence v/s. 17 of HM

* * Sources of Muslim Law * *

SOURCES

PRIMARY

1. Quran
2. Sunnat
3. Ijmas
4. Qiyas

SECONDARY

1. Urf / Custom
2. Judicial Decisions
3. Legislation
4. Justice, Equity and good conscience.

* Primary Sources

1. Quran -

i) The word Quran is derived from the Arabic word Quana which means to read.

ii) Divine communication and revelation to Prophet - 1st source

iii) Structure - 114 Chapters ^(Suras), 6666 verses (Ayat), 200 verses are concerned with legal principles, 80 verses are concerned with marriage, dowry, divorce and inheritance.

iv) Portion of Quran - Madina - legal principles

(revealed to Prophet) Mecca - philosophy of life & Islamic religion

v) Collection of portions - Abu Bakar first time collected and arranged the various passages of Quran. It was ordered and revised by Usman, the third Caliph.

vi) Arrangement of Book - Zaid, Abdullah, Said, Abdur Rahman
The work was collected and presented to Khalifa who caused a number of copies to be made and sent them to different centres of Islam.

vii) Doctrine of Repeal - Naskh means 'to delete'. It means repeal of a legal provision by another legal provision.
(the application is repealed but text remains)

viii) Aga Mohammad Jaffer v. Kulkarn Beebee - PC held that