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## THE ORIGIN AND DEVELOPMENT OF ISLAMIC LAWS

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### INTRODUCTION:

Islamic law, also known as the Sharia law or Muslim Law, is the Islamic legal system and is spread throughout the world. Sharia means “the clear, well-trodden path to water” and is seen as an expression and belief of god. It signifies the Divine nature of the Islamic Community and lays down laws and rules which are to be followed very carefully. The people who chose to follow these laws and rules laid down by the Islamic law are called as Muslims. There are two types of Muslims – a) Shias and b) Sunnis and a person can be a Muslim either by taking birth in a Muslim family or by converting from any other religion into Islam. Sharia law has its basis on the directions and directives given by God and constitutes the duties that all Muslims are bound to follow because of their religious beliefs. It also divides the laws into two categories - a) man made laws and b) divine laws. It not only regulates the individual’s relationships with the state and the neighbours but also with the divine source – GOD which makes it different from many other legal systems in the world. In Islam or the countries where the Muslims are in majority Islamic law is very straightforward in nature and specifies what all is expected from an individual and any breach of the duties often leads to extreme punishments. In countries where the National religion is Islam or the countries with majority population of Muslims, these countries punish the culprits based on the crimes committed by them. In the Islamic law Hadd is the punishment awarded for serious crimes which have fixed penalties (these crimes are said to be against god and anybody who commits them is punished severely). Another crime is known as Tazir and here the punishment awarded is decided by the courts (discretion of the courts).

Islamic law performs according to the propositions of the Holy Quran. Prophet Muhammad is known as the Founder and the supreme authority of the Muslim community. He was born in Mecca in 570 and died in 632 in Medina where he was forced to immigrate in 622. He was last of all the prophets and was believed to be a messenger and a prophet of Allah (God). It is believed that the first Wahi came to Prophet Mohammad in 600 A.D. And for the next 23 years it came to him in fragments until he expired. As Prophet Muhammad was chosen as the recipient of

the words of God Muslims followed his teachings and after the Quran the sayings of the Prophet hadith and Sunnah are the most important Muslim texts Which are followed. He was deeply religious and when he was meditating in the cave on Mount Jabal al-Nour when the angel Gabriel appeared in front of him and spoke to him.

## **ORIGIN/SOURCES OF ISLAMIC LAW**

The term source means where something has originated from. In the context of Muslim law, it means where the Muslim law which we see today is derived from. The original Islamic law dates to Arabia where Mohammad Prophet enunciated Islam.<sup>1</sup> The main objective behind Islam is the submission to Allah. Aamir Ali once said - 'a person who follows Islam accepts the character of Prophet Muhammad and the unity of God.' This law is purely based on the Muslim theology which states how a person should behave towards God and towards other men.

The sources of Muslim law have been categorised into two categories- a) Primary sources and b) secondary sources.

The primary sources - These are referred to as the basic sources on which the Islamic law of the present relies on, these include: - Quran, Sunnat, Ijma and Qiyas.

The Secondary sources - These are not the basic sources but are said to be the supplementary sources for Islamic law, these include: - Urf or custom, judicial decision, legislation, equity and the absolute good.

### **PRIMARY SOURCES: -**

- I. Quran** - The word Quran is derived from the Arabic word 'Qurra' meaning the reading or which ought to be read. This book is considered as the fundamental source of Islamic law. Since this book is of such a divine origin many Muslims believe that it cannot be modified or be changed by any ordinary human agency. It is because of this reason that Muslims in India believe that the Parliament or the state legislatures cannot reform their laws. This is however not true as many countries have changed this notion.<sup>2</sup> Quran is

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<sup>1</sup> <https://www.britannica.com/topic/Shariah> (was browsed on 1 August 2020 at 6:20 p.m.)

<sup>2</sup> <http://www.legalserviceindia.com/legal/article-1876-sources-of-muslim-law.html#:~:text=These%20four%20sources%20namely%20Quran,as%20source%20of%20Muslim%20law.> (was browsed on 1 August 2020 at 6:40 p.m.)

a book which contains instructions and commandments of Allah which were communicated to Prophet Muhammad through angel Gabriel. Overall, it took 22 years and some months for the Quran to be revealed. One important thing to note while interpreting the Quran is that some verses are Nasik and some Munsuk and the Munsuk verses are deemed to be repealed by Nasik verses. The Quran is divided into 114 chapters called 'Sura' and each one has a separate designation. It contains 6237 verses called 'Ayats'. It is of great legal importance as it contains 200 verses relating to the laws. 80 verses out of the 200 verses relate to family law including marriage, divorce, dowry, guardians, inheritance etc. and the rest relates to the state and polity.

**II. Sunna or Ahadis** - The term Sunna means precedents or practises. It was believed by the Muslims that the revelations that came were of two different kinds: -

- a) Manifest** - Quran is composed of the manifest revelations as these are the communications which were directly made by Angel Gabrielle on the directions of God.
- b) Internal** - these revelations are the opinions of Prophet Muhammad which was said by him on different occasions and based on different questions which were raised before him.

Sunna basically means the behaviour of the Prophet. Whatever the prophet said, did or allowed is called the tradition. Traditions as the basic source of Muslim law and are of three types: -

- a) Sunnat-ul-Qaul (words spoken)** – meaning the sayings of the utterances of Prophet Mohammad which made or said.
- b) Sunnat-ul-Fail (conduct)** – which means the behavior and the doings of the Prophet.
- c) Sunnat-ul-Taqrir (silence)** – this type was characterized by the silence of the Prophet as an answer to the questions raised for him. Here silence indicates consent.

Prophet Muhammad said that traditions were the injunctions of God. Sunna is classified according to its narration, its time of compilation and its authenticity. It deals with trade, ethics, government, etc. apart from the laws that it provides. Sunna is considered important in Muslim law because it is laid down in Quran by the Prophet himself and was recognised by his immediate successors. The purpose of Sunna is the supplementation of the Quran. It plays a

vital role in understanding the teachings of the Quran and helps in the implementation of the principles and the laws which are mentioned in the holy Quran.

**III. Ijma** - It means an agreement among the followers of Prophet Muhammad on the question of law. It is the consensus of the opinion among the learned class of the Muslim community.<sup>3</sup> It is used when the Quran and the traditions do not mention any rule of law for a new problem and when such a case happens the jurists (Mujtahids) used to agree unanimously and used to give their common opinion over that question. Ijma has been divided into three types: -

- a) Ijma of the companions of the Prophet - it is universally accepted and is incapable of being repealed.
- b) Ijma of the jurists - it is disputed.
- c) Ijma of the people - it is also disputed.

**IV. Qiyas (Analogy)** - Shia's said does not recognise Qiyas as a source of law. Qiyas means accord, measurement, equality etc. It is the reasoning (with the help of analogy) from the above three sources and may be defined as a deduction by which the law which is present in the text is applied to the various cases which are specifically not covered by the languages of the text. Qiyas does not aim to create a new law but helps to apply the old principles to the new circumstances. There are however a few conditions required to be met if Qiyas needs to be declared valid: -

- a) It should not be of any special nature and the original source from which it is deduced should be capable of being extended
- b) The original Source of the Quran or hadith to which the Qiyas applies should not have been repealed.
- c) It should be applied not to understand the meaning of the word but to understand the point of the law.
- d) It should not change the law which are mentioned in the text

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<sup>3</sup> <http://www.legalserviceindia.com/article/I302-Sources-of-Islamic-Law.html> (was browsed on 1 August 2020 at 8:10 p.m.)

- e) The result of Qiyas should not stand inconsistent with the Quran.

## SECONDARY SOURCES: -

- 1. Custom (Urf or Taamul)** - The customs prevailed even before the Islamic law was established. Customs played a major role when it comes to a few cases like dispute of agricultural land, case of succession, charitable and religious endowments. These customs, however, should be territorial, should have been existing for a long period (ancient), must be continuous in nature and invariable. It should not oppose the public policies and must not be in contravention to the Quran or Ijma. Prophet Muhammad said that the customs were evil and that they should be totally abolished and declared them to be un-Islamic. But there were many customs which were accepted by him like talaq (his silence on these cases amounted to acceptance). Customs also formed a part of Ijma and therefore we cannot say that customs are not on its own a source of law, but it is the supplement for the other main sources. In the Shariat Act 1937, section 2 Specifies matters which are mandatorily governed by the Shariat law and customs and usages cannot be applied to them (matters like Special property of females, waqf, trust, gift, maintenance, guardianship, divorce dower, marriage and inheritance).
- 2. Judicial decisions** - The judgement of the Supreme Court of India is binding on all the high courts and lower courts. Similarly, the decision of the High Court is binding on the lower courts. Any law which is decided by the Supreme Court or the High Court hence becomes the source of law for the courts which are lower to them and this also applies for the Muslim law. These judgements then become the Precedent for future. In the British period the common law doctrine of precedent formed the part of Muslim law. In the case of Begum Subanu v. Abdul Gafoor (1987), the supreme court said that if the first wife lives separately only because of her husband's second marriage then she would be entitled to get the maintenance from her husband (even though Islamic law permits a man to have more than one wife).
- 3. Legislation** - During the British period in India there had been many legislative changes made to the Muslim Law. Shariat Act of 1937 was passed to make the Muslim law applicable to all the Muslims on the matters which were previously governed by customs and usages. There are many Acts which now have changed or modified the original Islamic law, and these are: -

- a) Child marriage Restraint Act, 1929
- b) Muslim Women (Protection of Rights on divorce) Act, 1986 (this act nullified the Supreme Court's judgement given in the case of Mohd. Ahmed Khan v. Shah Bano Begum)
- c) The Mussalman Wakf Validating Act, 1913, etc.

In the Muslim community even today, the legislative modifications are seen as an encroachment upon the Original Islamic law.

#### **4. Equity and the absolute good-**

- a) Istishasan (preference) - It was developed by Abu Hanifa and it means preferring something to be good. A jurist can get over a Qiyas because it opposes the text and it can be said that Istishasan is used to override the Qiyas.
- b) Istisalah or Al-masalih al-mursalah (public interest) - Imam Malik developed this source. Shariah has a transcriptional aspect and this aspect is based upon the benefits and the interests of the people of Islam. These entries have not been covered by any of the text and are considered to be set as loose from such main texts.<sup>4</sup>
- c) Istidlal (textual indication) - Istidlal means the inference of one thing from the other. Shafi's accepted the cases which were more flexible. It is the process of taking guidance to avoid any strict analogy.

### **SCHOOLS OF ISLAMIC LAW**

Prophet Muhammad had no successor and after this death there was this urgent need to find out who his successor could be. The majority of the Islamic community said that there should be an election to decide who the successor of the prophet would be and this vision was given by Ayesha Begum, the youngest wife of the Prophet (this concept of voting was also given by the Prophet himself). The people of this group said that since the Prophet was the controller of the community there should be a successor who should control the Muslims and that voting

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<sup>4</sup> <http://www.legalserviceindia.com/legal/article-1876-sources-of-muslim-law.html#:~:text=These%20four%20sources%20namely%20Quran,as%20source%20of%20Muslim%20law.>  
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was the only technique to choose the successor. Abu Bakr was elected and became the first Caliph. He was the father of Ayesha Begum and this group of Muslims formed the Sunni sect of Islam. They were universally known as Sunnis (Ahle-Sunnat-Wal-Jammat meaning the people of traditions and assembly).

There was another set of Muslims who did not support this form of voting as they give preference to the divine headship of the Prophet. This group was headed by the daughter of the Prophet – Fathima. They argued that the heir of Prophet should be the divine leader as this superiority comes from the blood of the Prophet Muhammad and therefore a person from the family of Prophet Muhammad should be able to succeed him (principle of Succession). Soon the son-in-law of the Prophet (Fatima's husband) Ali became the first Imam and this group of Muslims constituted the Shia community. This division of two different communities led to the two major schools of the Muslim law and both the schools have different ideologies on how to understand the message of God and they followed different ways of studying and practising Islam.

These two main schools were further subdivided into different schools.

### **The Sunni School**

The Sunnis were further divided as the Hanafis, the Malikis, the Shafi and the Hanbalis.

- I. Hanafis school or Kufah school** - It is the most popular school and has the largest following. It is the oldest surviving school of the Islamic law and the Indian and the Pakistani Muslims belong to this school. The founder of the school was Abu Hanafi and his ideologies were to find out the law in the text of the Quran by applying analogical thinking. Instead of Converting every tradition into law, he gave emphasis to the doctrine of ijma and developed Istehsan which had a resemblance to equality. He believed that the society undergoes a change and believed that the needs of the society changes and therefore these changing needs should be incorporated in the law.
- II. The Maliki School or Madina School** - The founder of the school was Imam Malik ibin Anas and was born in Medina where Prophet Muhammad spent part of his life. He is also the author of Al-Muwatta which contains 300 traditions. He also accepted the traditions which were authentic and accepted practice and usage of customs. He gave one more source of Muslim law that is the Istidial - the principle of logical deduction.

Another particularly important part of the school was that women could not deal with her own personal properties without the actual approval of her husband. It was said that a married woman and her property is always supposed to be under the control of her husband. This school is prevalent in Spain and Northern Africa and has no basis in India.

**III. The Shafi school** - The founder of the school was Imam Muhammad ibn Idris Ash-Shafi. He is regarded as one of the great jurists of Islamic jurisprudence and has been credited for compiling the sources of law for the first time. He was influenced by both the Hanafi and the Maliki and his school of thought reflects a hint of both these schools. One major finding of the school is that women are not at all regarded as a free instrument in her marriage and the permission of her legal guardian is always to be taken before a marriage even if she is an adult. The school accepted the four major sources of law: the Quran, the Sunnah, the Ijma and Qiyas and he believed that Qiyas is to be considered only after the Quran and Ijma.

**IV. The Hanbali School** - The founder of the school was Imam Abu Abdullah Ahmed ibn Muhammad Hanbal Ibn Hilal Commonly known as ibn Hanbali. He studied under different masters and travelled to learn hadith and Fiqh. He was more traditionalist and strictly followed the customs of the prophet and ignored the other sources of law namely Ijma and Qiyas. This school has very few followers and they are mostly concentrated in the United Arab Emirates and Saudi Arabia.

### **The Shia School**

This school is further subdivided as the Imamiyah school or the Ithna Asharia school, the Zaidiyah school and the Ismailiya school.

I. **The Imamiyah school or the Ithna Ashriyah school**- Ithna Asharis is an Arabic term and means twelvevers. They are found in Lebanon, Pakistan and Syria. In India they are next to Hanafis and are mostly found in Lucknow. In the Kashmir region Ithna Asharis are in majority amongst the Shias. This is the only school that recognises the “muta” which is a temporary marriage. The school is further divided into two sub- sects: -

a) **Akhbaris** - they followed the tradition of Imams strictly.



b) **Usuli** - they understand the Quran with reference to the struggles of everyday life.

II. **The Ismailiya School** - The minority group of Shias after the death of Imam Jafar did not follow Musa-al-Kazim but followed his elder brother Ismail. They are also known as 'seveners' for accepting only seven Imams. In India they had two groups: -

a) **Khojas or eastern Ismail's**- They were originally Hindus and were the followers of the present Aga Khan who is the 49th Imam in line of the Prophet.

b) **Bohras or the western Ismail's**- Bohra simply means merchant and does not really signify any school of Muslim Law.

Ismail's are present in Syria, Pakistan and Central Asia. In India they are either Khojas or Bohras.

III. **The Zaidiyah School** - Zayd was one of the sons of the fourth imam and he was the founder of this school. He is the author of Majmu-ul-Fiahmuch and they are represented in South Arabia, mostly in Yemen and are not found in India. They recognise the principle of succession and believe that Imam is a right guide and nothing more than that. This school had some of the doctrines of Sunni schools also.

Apart from these two major schools -Sunni and Shia, the Mutazila sect also emerged and was founded by Ata-al-Ghazzal and they believe that there is no correlation between them and the two other active sects. They are very few and believe that the Quran is the only basis for their principles.

## **DEVELOPMENT OF THE ISLAMIC LAW**

The Muslim personal laws are governed by the Shariat law and the development of the Islamic law started with the Muslim rule in India.

I. **Slave Dynasty**: Tughlaq and Khalji played a major role in development of this dynasty. The Courts in this period were of two types: - a) Shariat – dealt with the traditions, rituals, and other customs of the Muslims. b) common law court- these courts were not limited to only Muslims but other persons from other religions could also go into these courts.

- II. **Mughal Dynasty:** this era paved the path for secularism in the country as Aurangzeb was the first ruler who banned the taxes over Hindus. In this era Sunni Schools came into effect with Akbar as their ruler.

The Britishers entered India and quickly saw that there were disputes among the people with the Mohammedan practises.<sup>5</sup> Issues such as those of marriage were present in the holy Quran however the other aspects like trade, commerce, etc. were not mentioned and hence gave rise to disputes. As it is already known that Muslims are divided as Shias and Sunnis and during 1822 there emerged a distinction between them as the privy council of the East India company said that the Shia sect had a right to be governed by their own laws and were not bound to follow the Muslim law which was uniformly applied at that time. The Muslim community as such does not recognise adoption and this was proved in the case of Mohammed Allahabad Khan Vs Mohammad Ismail, the privy council said that adoption under Mohammedan law is the same under the Hindu laws but the Muslim law only acknowledges the concept of paternity.

The importance of Ijma as a source of Muslim law is undoubtedly great. It has made possible changes to suit the needs of changing times and usages and it has been influenced by the opinion of jurists in all cases not provided in the Quran or the traditions, or where such provisions were not explicit. Ijma was regarded as authoritative not only for deciding the right at present and in the future, but also for establishing the past. It was because of Ijma, that it could be determined as to what the Sunna of the Prophet had been and indeed what was the right interpretation of the Quran.

A major milestone for the development of Islamic law was on 7 October 1937 when the Britishers gave the Shariat act of 1937 which was the only statute to regulate the personal laws of the Indian Muslims. Then came the dissolution of Muslim marriage act 1939 the original Islamic laws never recognise the right of the Muslim woman to dissolve her marriage under any situation and this right was only given to the men which resulted in miss use the british is believed that the women also had the right to seek divorce and therefore this act was made. This act allowed women to obtain divorce and go to the courts for the Desi illusion of a marriage. The act recognises the grounds which are as follows one if the husband runs away from the matrimonial home and does not give any maintenance to the wife to if the husband

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<sup>5</sup> <https://www.legalbites.in/historical-development-of-muslim-law/#:~:text=The%20historical%20development%20of%20Muslim%20law%20did%20not%20end%20in,it%20and%20uphold%20the%20Muslims.> (was browsed on 3 August 2020 at 7:20 p.m.)

does not maintain the wife and her emotional and financial needs see if the husband leaves his wife or ill-treats her causing your life to be miserable.

The major development in the Islamic law can be seen if we investigate the status of the women in Islamic religion. The rights of women were originally not considered but now as the time passed and people slowly started recognising the rights of a Muslim woman. These can be seen under the ambit of personal status and child marriage. The personal status laws determine the right of a woman in matters like divorce, child custody and marriage. The provisions under the Shariat law are discriminatory against the women. Before the minimum age for girls was 9 and that of boys were 12 to get married and now it has been increased to 21 for boys and 18 for girls. Domestic violence to some extent was allowed against women only when the husband thinks that the wife is being disobedient, rebellious, or showing an ill conduct. However, now the Muslim women are also under the ambit of the Protection of women from Domestic Violence Act, 2005. These developments have significantly helped the woman to remain worry free.

A landmark case which can show the developments made in the Islamic law is the case of *Shayara Bano vs Union of India*. In this case Shayara Bano was divorced by her Muslim husband after he pronounced talaq three times (talaq-e-biddat). Surprisingly Sharaya Bano was not the only woman who challenged the constitutionality of triple talaq, but there were many others with her. All the petitions on triple talaq were clubbed together and this challenged the constitutional validity of polygamy, triple talaq and Nikaah- halal (When the husband and wife divorce each other but after a time decide to get back together than the woman has to get married and get divorced and then get married to the original husband again). Supreme Court gave the landmark judgement and said that they would consider only the case of triple talaq and mentioned that the theocratic Muslim countries were not following triple talaq and even the Middle East countries had banned this practice. Triple Talaq gives power only to the man and not to the woman (there was no chance of reconciliation) and hence it was discriminatory based on gender. The Supreme Court said that triple talaq violates article 14 and 15 and does not form the essential religious practises mentioned under article 25 and hence the practice of triple talaq was banned in India.

## **CONCLUSION**

We have seen some drastic changes made in the Islamic law. Earlier the laws were evil and inhuman (not all but a few) and they were mandatory to be followed by every person who called themselves as Muslims. It was so mandated by the Prophets that people succumbed to it and did not say a word against it. Later with the developments in the world and with the changing times, people started to realize that their Fundamental Rights and Human Rights were being violated which lead to many cases being filled in the courts. Earlier the courts were reluctant to get into the matters of personal laws as they thought that their interference would create havoc in the society, but with the progression the courts realized that there is nothing above an individual's Fundamental Rights (as seen in the case of Sharaya Bano). This was the time when the laws started to change and became more tolerable.

The disputes which happened earlier are resolved because of the Shariat Act coming into force. Islamic religion believes that there original laws cannot be changed as they come from a divine source, however, it is seen that as the time has passed there have been modifications made to the law which were against basic human rights of the people. The status of women has drastically changed now and a huge credit for this should be given to the Indian Judiciary. The Muslim women are now more secure, and they need not worry about problems relating to maintenance, dowry, etc. this being said, there are still some issues which needs to be addressed as regards to the Muslim women. Muslims were very reluctant to accept these laws however with the passage of time we see more and more people are now accepting these laws. Instead of believing in everything blindly they now have become more aware of what is right and what is not.