



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

IJLRA

EDITORIAL TEAM

EDITORS



Megha Middha

Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



Dr. Namita Jain



Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

MARRIAGE UNDER PERSONAL LAWS; AS COMPARATIVE STUDY

AUTHORED BY - RUHBAN RAFIQUE & DR. MEENU SHARMA
AMITY LAW SCHOOL, NOIDA

3.1 HISTORY

The main stage in the advancement of Muslim Law starts with 622 A.D. (Hejrat) and finishes with 632 A.D. the demise of the Prophet. This period is known as the administrative period. As referenced before, the main message of God went to the Prophet in 609 A.D. at Mecca. From that point forward, the perfect messages were imparted to him now and again and he used to pass on them to the general population at Mecca. Yet, those individuals did not trust that Mohammad was giving them the message of God and furthermore doubted everything the thing he said about God (Allah). Along these lines, the Prophet's first undertaking at Mecca was to influence them to trust the presence of one God. The outcome was that a large portion of the disclosures at Mecca were religious or profound and did not contain positive law (Fiqh). In 622 A.D. Prophet Mohammad went to Medina where the messages of God, as of now uncovered at Mecca, were effectively accepted. In the disclosures at Medina, in this manner, the Prophet for the most part set out the standards to control the lead of the general population (for example positive law). There had been disclosures taking care of every single issue of the general public.

During this period, the accumulation and altering of the Quran likewise occurred. This approved content of the Quran which stays without change or debasement right up 'til the present time was first distributed amid the rule of Usman, the third Caliph. The third time frame is a long one, which ranges from 40 A.H., to the third century after Hejira. This period was likewise essential, since it was amid this period that crafted by gathering of the 'customs' of the Prophet occurred. Amid the prior piece of this period, there developed the four schools of Sunni law, which are named after their four originators. (The striking parts of these schools are viewed as later in this Chapter.) The fourth time frame in the improvement of Islamic law stretches out from the third century after Hejira to the present day. After the four perceived schools had been established, later researchers put forth a concentrated effort to the techniques set somewhere near the organizers, and built up every framework in a specific way. Nonetheless, no individual law specialist was ever a short time later perceived as having a similar position as the author himself. This proceeded till the passing of the Prophet. Along these lines, the greater part of the law-

production disclosures were made between 622 A.D. also, 632 A.D. Divine messages or the disclosures, in the case of clarifying the idea of God or setting down principles of positive law were gathered and contained in the blessed book Quran.

We have seen that the messages from God went to the Prophet just on those events when he used to be roused with awesome forces. Rest of the time Prophet carried on with the life of a typical individual. Maxims or the doings of the Prophet without awesome motivation were additionally trailed by the general population as his statutes or customs. Laws, which were not accessible in the immediate expressions of God {Quran) were defined through the customs of the Prophet. Hence we see that the most recent ten years before the demise of the Prophet, were critical from the perspective of the enactment of Muslim Law. The vast majority of the essential guidelines of law were set down amid this period either through the expressions of God or through Prophet's very own words. As indicated by Abdur Rahim, the main time frame has appropriately been known as the 'administrative period' of Islam when laws were established by the heavenly assembly and declared in the expressions of Quran or, by the statutes of Muhammad.

3.2 THE SECOND PERIOD (632-661 A.D.):

This is known as the time of initial four Caliphs of Islam. Amid his life, Prophet Mohammad had been a flat out specialist on law and religion. He was otherworldly just as the regulatory leader of the Muslim State. After his passing, the inquiry emerged with respect to who might be the successor of the Prophet. Larger part of the general population concurred that there ought to be a decision for his successor. In like manner, a race was held in which Abu Bakr was chosen. Hence, Abu Bakr turned into the primary Caliph and headed the network of the Muslims. He was father of Ayesha Begum, the most youthful spouse of the Prophet. Abu Bakr was prevalent among the Muslims of Arabia notwithstanding amid the life of the Prophet. He kicked the bucket in 634 A.D. what's more, after him Omar was chosen as the second Caliph. Omar was the Chief for a long time, and was killed in 644 A.D. After him, Osman turned into the third Caliph through race. He headed the network for a long time yet he was likewise killed by the rivals in 656 A.D. After him, Ali, who was the spouse of the Prophet's girl Fatima, was chosen and he turned into the fourth Caliph. Ali also was executed in 661 A.D. These initial four Caliphs are known as the 'appropriately guided Caliphs' (Khulfai-I-Rashidin) in light of the fact that they had the benefit of being extremely close associates of the Prophet. At the season of the Prophet's passing, the celestial interchanges were in the dissipated structure. Some of them were just in the recollections of the general population. One of the remarkable highlights of this period is that all the heavenly messages were gathered, orchestrated subject-wise and written to give a last shape. This

accumulation is known as the sacred book Quran. The principal gathering of Quran was by Zaid (a nearby buddy of the Prophet) amid the standard of Abu Bakr. Be that as it may, therefore this gathering was observed to be mistaken and opposing at numerous spots. Osman, the third Caliph asked Zaid indeed to overhaul the blessed book and right it. The prior form of Quran was, be that as it may, decimated by him. Along these lines, the main true form of Quran now accessible to us is the Osman's assemblage. Another imperative element of this period is that conventions of the Prophet were carefully pursued. In this manner, in the second phase of the improvement of Muslim Law the main wellsprings of law were the Quran and the customs. In so far as the organization of equity is concerned, it was amid this period that Omar the second Caliph, designated the first Quadi (or Qazi) to choose the question of common nature, he proclaimed that law is incomparable and is over the official specialist.

3.3 THE THIRD PERIOD (661-900 A.D.)

The fourth and the remainder of the "appropriately guided Caliphs" had two children, Hasan and Hussain. After the demise of Ali, Hasan was made the Caliph. Be that as it may, Hasan was a holy person and disliked to include himself in organization. He willfully surrendered for Muavia of the Umayyad family. Along these lines Muavia turned into the following Caliph of the Muslim world. From him began the Umayyad line. Two detectable occasions occurred amid his rule. Initially, the seat of Caliphate was moved from Medina to Damascus and also, the workplace of Caliph, which had been elective, was made innate. Following the rule of progression, Muavia's child Yezid turned into the following head of Muslim realm. In the mean time Hasan, despite the fact that not associated with the organization, was harmed to death by his very own better half at the impelling of Yezid. In any case, Hussain, the more youthful child of Ali, rebelled against Yezid. Be that as it may, he also was murdered savagely at Karbala. It is huge to take note of that amid Umayyad's standard, Caliphate wound up ordinary sovereignty. As was self-evident, those lords were keen on the extension of their realm instead of in the improvement of law. In 750 A.D. the Umayyad's line was caught by Abbasids who were the relatives of the Prophet's uncle Abbas. Abbasids made their capital at Baghdad and declared (not at all like Umayyads) additionally the religious or profound headship of the Muslim realm. The Umayyad rulers, as leaders of the Muslim State, did nothing shocking for the advancement of law. Essentially, as rulers the Abbasids also did not add to the advancement of law. Without consultations by the State expert, further composition of law was embraced secretly by the educated researchers at Mecca, Medina and Kufa. As is self-evident, investigation of law by individual researchers offered ascend to clashing assessments. Every researcher asserted his understanding of law to be the right one. The

scholastic contrasts among the researchers prompted the arrangement of various schools of the Sunni organization. The Sunnis were separated into four sub-organizations, Hanafi, Shafie, Maliki and Hanbali, each named after the researchers who elucidated the law as per their own understandings and thinking. Thus, the Shias were likewise separated into three sub-orders, Ithna Ashria, Ismailia and Zaidi.

3.4 THE FOURTH PERIOD (900-1924 A.D.)

This period in the Islamic lawful history starts with the foundation of the four Sunni schools and reaches out up to 1924 A.D. The Abbasids ruled for five centuries and were toppled by the Mongols in 1258 A.D. For quite a while, the Sunni people group stayed with no Caliph. In 1261 A.D. Abdul Kasim Ahmed was made the Caliph with his capital at Cairo. This administration has been in power for over two centuries. A prominent element of the Caliphate in this line was that Caliphs had no authoritative forces. In the start of the sixteenth century, in any case, the Ottoman ruler Selim I was welcome to head the network. The Caliphate was exchanged to Selim I by a deed of task in 1571 A.D. In this manner, the Caliphate go to the Ottomans and Constantinople turned into the "Dar-ul-Khilafat". Subsequently the Sultanate of Turkey was abrogated by Mustafa Kamal Ataturk in 1922 and the Caliphate was likewise canceled everlastingly in the year 1924 A.D. by the National Assembly of Ankara. From the perspective of the improvement of Muslim Law, this period isn't huge at all in light of the fact that at this stage further article of law had halted. The reason is that after the demise of the originators of the four Sunni schools, no researcher of their prominence and learning was accessible who could propound new speculations of law. As no legal scholar was esteemed skilled for individual elucidation, the law couldn't be defined through Ijtihad (sentiment of the legal advisers). The outcome was that what was at that point set down when in doubt of law by those four legal scholars was essentially trailed by the general public. As such, there built up the precept of Taqlid (following or impersonation). Under this convention the sentiments of those extraordinary legal advisers were trailed by the researchers (muftis) of this period without adding anything new to it. The researchers of this period have, be that as it may, composed comprehensive analyses on the law effectively set somewhere near the legal scholars of their separate schools.

3.5 THE FIFTH PERIOD (1924 A.D. TO PRESENT DAY)

With the annulment of Caliphate in 1924 A.D. started the modern time of Islamic law. This period still proceeds. After 1924 there is no Caliph as a religious head to manage and execute the conventional law of Islam. This circumstance has been handled by hypothetically isolating

Islamic law from the religion (Shariat). With no equipped expert to execute it, the Islamic religion turned into the ethical set of principles though the Muslim Law with the approval of the State was seen juridically. It is in any case, clear that juridical article of Muslim Law has to a great extent been impacted by the study of law in European nations. Along these lines, endeavors were made by modern Islamic nations like Turkey, Tunisia, Egypt and so on to classify their laws in such a way, that the intrinsic character of Shariat being protected, the law is figured as per the prerequisites of the present society. Another critical point to note is that once in the past all parts of human direct (considerate just as criminal) were managed by customary Islamic laws yet "subject after subject was bit by bit rejected from the domain of the conventional Islamic law in a few pieces of the Muslim world. In the end, the extent of Islamic law was significantly limited. Present day Codes of Civil and Criminal laws were established in numerous nations possessed or managed by Muslims". Prior to foundation of the British principle in India, the Moghul Emperors connected Muslim Law as tradition that must be adhered to and all issues, in the case of relating to family status or wrongdoing or income, were represented by Muslim Law. The British Government had changed this framework by ordering a few Acts which connected to Muslims and non-Muslims alike in the non-individual issues. It might be said in this way, that in India the modern time frame starts with the foundation of the British Courts. After autonomy, a similar set-up has been embraced and is being pursued. The Shariat Act of 1937 obviously settled this circumstance by setting out that aside from inquiries identifying with farming area, in all inquiries in regards to intestate or testamentary progression, or some other arrangement of individual law, (marriage, separate, dower, upkeep, guardianship and so forth.) the standard of choice, in situations where the gatherings are Muslims, will be the Muslim individual law. Be that as it may, only two years after the Shariat Act, the Dissolution of Muslim Marriages Act, 1939 was established by the Parliament which has rolled out progressive improvements in the law of separation. A few different authorizations have been passed by the governing body which set down standards of Muslim individual law. However, a large portion of them either restore or clear up the arrangements of customary Muslim Law. But the Dissolution of Muslim Marriages Act, 1939 and to some degree, the Muslim Women (Protection of Rights on Divorce) Act, 1986 there has been no administrative sanctioning for alteration of the standards of Muslim Law. Be that as it may, inside their own limits the courts have intensely endeavored on a few events to justify or generally clarify the tenets of Muslim individual law. These legal choices have changed the utilization of conventional Muslim Law as per the evolving financial conditions. The present Muslim Law of India, in this way, incorporates the customary law, the administrative institutions and, the legal points of reference.

3.6 SOURCES OF MUSLIM LAW

Muslim Law is a religious law, and it applies to an individual, who is Muslim either by birth or by conversion. In any case, Islamic law depends on a man's obligations or commitments as opposed to his rights. The word Islam signifies 'all out surrender of oneself to God' and its supporter for example Muslim signifies, 'who submitted himself to God.' The individual law of Muslims depends on Islam. Islam had its birthplace in Arabia and from whence it was transplanted into India. In Arabia, Prophet Hazrat Mohammed, himself an Arab, declared Islam and set out the establishment of Islamic law. The fundamental foundation of Islamic Legal System was supported and created by Arab-legal scholars, and the genuine wellspring of Islamic Jurisprudence is to be found in the pre-Islamic Arabian traditions and utilizations of the seventh century of the Christian time. Islamic law is a part of Muslim philosophy, giving useful articulation to the confidence, which sets down how a Muslim should act through his religion, both towards God and towards other men. As indicated by Prophet, Muslim Law is a charge of God and the sovereigns in the Muslim States, and it is his (Muslim's) obligation to tail it. Islam implies harmony by accommodation and dutifulness to the will and decrees of God and the individuals who have acknowledged the message of harmony by accommodation to God.

3.7 PRIMARY SOURCES OF MUSLIM LAW

- Sunna or Ahadis
- Quran
- Ijma
- Qiyas

3.8 SUNNA or AHADIS

The exacting importance of the term 'Sunna' is 'the trodden way.' It indicates some training and points of reference of the Prophet, whatever the Prophet said or managed without reference to God, and is treated as his conventions. It is the second wellspring of Muslim Law. Customs are orders of Allah in the expressions of the prophet. Where the expressions of Allah couldn't supply an expert for a given guideline of law, Prophet's words were treated as a specialist since it is trusted that even his truisms got motivation from Allah. As per Muslim Law, there are two sorts of disclosures for example show (Zahir) and inward (Batin). Show or express disclosures were the very expressions of Allah and went to the Prophet through the blessed messenger Gabriel. Such disclosures turned out to be a piece of the Quran. Then again, the inner disclosures were

those which were the 'Prophet's words' and did not come through Gabriel, yet Allah roused the thoughts in his platitudes. Such inside disclosures framed piece of Sunna. Conventions, in this way, vary from Quran as in Quran comprises of the very expressions of God while a Sunna is in the language of Prophet.

3.8 QURAN

It is the first or essential wellspring of Muslim Law. It is the name of the heavenly book of the Muslims containing the immediate divine revelations through Prophet. The immediate express or show disclosures comprise of the interchanges which were made by the heavenly attendant, Gabriel, under bearings from God, to Mohammed, either in the very expressions of God or by insights and of such information which the Prophet has procured through the motivation (Ilham) of God. Every one of the standards, laws, lessons and the acts of Islam are drawn from Quran. The substance of Quran were not composed amid the lifetime of the Prophet, yet these were introduced amid the lifetime of Prophet, in the recollections of the mates. There is no systematic arrangement of the sections in the Quran however they are dissipated all through the content. It contains the crucial standards which control the human life. The real part of the Quran manages philosophical and moral reflections. The Quran comprises of correspondences of God; it is accepted to be of heavenly starting point having no natural source. It is the first and the first authoritative code of Islam. It is the last and supreme authority.

3.9 IJMA

With the passing of the prophet, the first law-production process finished, so the inquiries, which couldn't be illuminated either by the standards of the Quran or the Sunna, were chosen by the Jurists with the presentation of the foundation of Ijma. Ijma implies understanding of the Muslim Jurists of a specific age on a specific inquiry of law, at the end of the day, it is the accord of Jurist's conclusion. Those people who knew about law were called Mujtahids (Jurists). Whenever Quran and customs couldn't supply any standard of law for a new issue, the legal scholars collectively gave their regular supposition or a consistent choice and it was named as Ijma. Not every single Muslim was able to take an interest in the development of Ijma, yet no one but Mujtahids could participate in it.

There are three kinds of Ijma:

- **Ijma of Companions:** The concurrent opinion of the companions of Prophet was considered most authoritative and could not be overruled or modified.

- **Ijma of the Jurists:** This was the unanimous decision of the jurists (other than companion).
- **Ijma of the people or masses:** It is the opinion of the majority of the Muslims which was accepted as law. But this kind of Ijma has little value.¹

Once a valid Ijma is established, it is respected equivalent to Quranic stanza for example it is similarly official on individuals. Without Ijma, these guidelines of Islamic law would have been diffused and fragmented. Its standards spread the tremendous subject. Ijma confirmed the correct understanding of the Quran and the Sunna.

3.10 QIYAS (Analogical deductions)

The word Qiyas was gotten from term 'Hiaqish' which signifies 'beat together.' In Arabic Qiyas signifies 'estimation, accord, and balance.' as such, it implies estimating or contrasting a thing with a specific standard, or to 'set up a similarity.' If the issues which have not been secured by Quran, Sunna or Ijma, the law might be deducted from what has been now set somewhere near these three specialists by the procedure of relationship (Qiyas). The Qiyas is a procedure of derivation, which helps in finding law and not to build up another law. Its primary capacity is to broaden the law of the content, to cases which don't fall inside the domain of the content.

3.11 SECONDARY SOURCES OF MUSLIM LAW

These are those sources developments on the foundation laid down which are laid down by the primary sources.

- **Customs**
- **Judicial Decisions (Precedent)**
- **Legislaton**

3.12 CUSTOM (Urf)

A custom is tradition passing on from one generation to another, that originally governed human conduct and has obtained the force of law in a particular locality. It is a natural source of law. The muslim jurist do no expressly describe it as a source of law but those customs and usage which were not modified or abrogated by the prophet, remained good and valid. Those customs usage of the Arabs which were not abolished by the Prophet are held to have been sanctioned by the jurists by their silence. During the British regime, courts in India recognised the legal force

¹ <https://blog.ipleaders.in/preliminary-sources-muslim-law/>

of custom on some occasions in spite of the fact that they were opposed to clear texts of a primary source of Muslim Law. This caused great resentment among the orthodox Muslim and they demanded that there should not be any place for custom in the Muslim Personal law (Shariat) as it was un-islamic. According, the shariat Act 1937 was enacted. Now because of this act, custom is no more any independent source of Muslim law.

3.13 JUDICIAL DECISION (Precedent)

A precedent is not merely an evidence of law but a source of it and the courts of law are bound to follow the precedents. Strictly speaking, judicial decision only declare the law as it is and are not source of it but they undoubtedly supplement and modify the law. Muslim Law is no exception to this rule. In the absence of any clear text of Muslim Law. The court may interpret a rule of law according to their own concept of justice. Interpretation of Muslim law by the judges of the Indian High Courts and the supreme court continue in modern times to supplements and modify the Islamic law. As such they are continuing sources of Muslim law and are regarded as precedent for future cases. In **Katheessa Umma vs. Narayanath Kunhamu AIR 1964 SC 27**, the Supreme Court has held that a gift by a husband to his minor wife above the age of fifteen incompetent guardian under Muslim law. Although such a gift is invalid under pure Muslim law after this decision the law in India is that under the given circumstance as gift is valid².

3.14 LEGISLATION

It is generally believed in Islam that Allah alone is the Supreme Legislator and no other agency or body on earth has authority to make laws. This belief is so deep-rooted that even today any legislative modification may be treated as an encroachment upon the traditional Islamic law. The result is that as independent source of Muslim law, the legislative enactments are almost insignificant. However some important enactments on Muslim Personal law are given below.

- i. **The Mussalam Waqf Validating Act 1913:** It re-established validity of Waaf-al-aulad (family waqf). It has simply re-established the law relating to family-waqfs which was modified by the judicial decision.
- ii. **The Child Marriage Restrain Act, 1929:** To some extent this act modified the Muslim law regarding the age of marriage. The act, (as amended by the act of 1978) provides that

² <https://indiankanoon.org/doc/652066/>

the marriage of a boy under the age 21 and of a girl under 18 years is a child marriage and is punishable. Under muslim personal law the age for the marriage is fifteen years.

- iii. **The Muslim Personal Law (Shariat) Application Act, 1937:** This enactment confirms the general principle of Muslim of Jurisprudence customs have no place in Muslim Law. Thus enactment has simply established the rule of pure Muslim Law custom is not to be taken as an independent source of Muslim law.
- iv. **Dissolution of Muslim Act, 1939:** This is an enactment which may be said to have modified the pure Muslim Law. Under this act, a Muslim wife is given a right of judicial divorce on any of the grounds mentioned in it. Under pure Muslim law wife had no independent right to seek divorce.

3.15 JUSTICE, EQUITY AND GOOD CONSCIENCE

Under Muslim law principles of justice, equity and good conscience can also be regarded as one of the source. Sometimes analogical deduction failed to satisfy the jurists owing to narrowness and inadaptability of the habits or due to hardship to public. In such a case, according to the Hanafis, a jurist could use good conscience. The importance of justice, equity and good conscience as a source of Muslim law can be well assessed by the following by the following observation of Ameer Ali; he says that “When the great expounders of Muslaman law have enunciated divergent doctrines or expressed different opinions, the judge administering of the times.

SCHOOLS OF MUSLIM LAW

3.16 ORIGIN OF SUNNI AND SHIA SECTS

The division between the Sunnis and the Shias originated in the dispute concerning the question of Imamat the spiritual leadership of Islam which came up for decision and settlement immediately on the death of Prophet. On party advocated the principal of succession, while another pressed for the election of the successor. A great majority of Muslims, represented by Ayesha begum the youngest wife of the Prophet, pleaded that there should be an election for the successor of the prophet because of the prophet himself had suggested. The election was held in which Abu Bakr, who was father of Ayesha Begum, was elected and became the first caliph. This group of Muslims formed the Sunni sect of Islam. The Sunnis base their doctrine on the entirety of the traditions and regard the decisions of the caliph or khalif and of the general body of the jurist as supplementing the koranic ruled and as equal in authority to them.

There were minority section of Muslim who did not agree to the principle of election. This group

emphasised upon the spiritual headship of the prophet rather than his administrative control. This group was represented by Fatima, daughter of prophet. Their contention was that the prophet himself was. They argued that his quality comes through the blood or belongs to his family. They advocated that the office should go by right of appointment and succession and thus the Imam (headship) should be confined to the prophet own family as his nominees. Consequently Ali, who was son-in-law of Prophet and was also his cousin was nominated as the first imam by this group of Muslims. They dissociated themselves from the majority and constituted a separate sect called Shia. Thus the split which divides the Muslims as to how to find out the successor of Prophet. The Shia repudiated the authority of the Imam while Sunnis upheld the principle of election by Imam (or the Universality of the people) and ultimately chose out their khalifa by means of votes. Therefore, division of Islam originated with political question only but subsequently it resulted in the separation on legal principles as well. These two sects formed major schools of Muslim Law. The majority of Muslims are Sunnis and hence it is presumed that the parties to a suit are Sunni unless proved otherwise.

3.17 THE SUNNI SCHOOLS

The full name of the Sunni branch is Ahl al-Sunna wa al-Jama'ah. Abu Bakr, the Prophet's dear companion and father-in-law, was the principal Caliph. Sunnis at first trusted that the situation of Caliph ought to be equitably picked, yet after the initial four Rightly Guided Caliphs, the position transformed into an innate dynastic rule. After the fall of the Ottoman Empire in 1923, there has never been another Caliph. As indicated by sources, present assessments show that around 85% of the world's Muslims are Sunni and roughly 15% are Shia. There were different translations by the law specialists and along these lines numerous schools came up. Sunnis perceive four madhabs (lawful customs): Maliki, Shafei, Hanafi, and Hanbali starting at now. These schools are comparative and contrast for the most part on the subtleties. Despite the fact that various different legal advisers likewise ended up prominent amid their occasions, as it were the over four are currently perceived by far most of Sunni Muslims. These four incredible law specialists and scholars endeavored to systemise the Islamic law into an exhaustive sound framework which secured all conceivable legitimate circumstances. The four noticeable schools of Islamic law are named after their organizers and are called the Hanafiyya, the Malikiyya, the Shafiyya, and the Hanbaliyya schools of religious law. Most Muslims see these four schools as similarly legitimate elucidations of the religious law of Islam. These schools are in great concession to every single basic angle of the religion of Islam. They all recognize the expert of the Holy Qur'an what's more, the Traditions as a definitive wellspring of the Islamic law. Just in territories and circumstances

where these two sources are quiet, do the four schools utilize their autonomous thinking in which they may vary with each other.

3.18 THE HANAFI SCHOOL(Great Imam Abu Hanifa)

This is the most famous school of sunni law. This school of the sunni is named after its founder Abu Hanifa who was an eminent scholar of his time and was widely known for his outstanding logical reasoning and technical legal thought. His main contribution was that instead of accepting each and every tradition as law in the texts of Quran itself through analogical deduction. In this manner he preferred scientifically concluded private judgement based quran over a blind reliance on the tradition. According to him the law must be formulated in accordance with the changing needs of society. In the absence of law in Quran it may also be obtained by the unanimous decision of the jurists. He further suggested if justice could not be done under the law then the principal of justice equity(istihsan) may be applied in interpreting and the founder of Muslim jurisprudence. Hanafi School recognises only those tradition which have passed through the serve test regarding their originality. Those traditions which are not authentic, are not to be accepted as law. Abu Hanifa is said to have relied upon eighteen traditions only. On the other hand Qiyas and Ijma as sources of law, have been given prominence under this school. Several important principles of Hanafi law were obtained through Qiyas. As regard Ijma, this school does not confine to the ijma of the companions . According to Hanafi school Ijma may be formed by the jurists of any age and may be used as a source of a law. It was for the first time under this school that the doctrine of istihsan (juristic equity) was in interpreting the texts of quran and traditions. Similarly, customs usage, provided they were not against the texts of quran, were recognised as proof of the practices of society.

3.19 THE MALIKI SCHOOL (Jurist Imam Malik)

This school was established by Malik-ibn-anas of Medina. He was a great scholar and is regarded to be an authority on traditions. Unlike Hanafis this school emphasises the importance of traditions as a source of law. It recognises the traditions of the companions, and of successor of the companions. According to maliki school, as far as possible, the new rules should be obtained exclusively from the traditions. If it is not possible than only Qiyas and Ijma may be taken into consideration. But this school recognises Ijma of only such jurists who lived in Medina. The scope of Ijma as a source of law is therefore limited under this school malik and subsequent jurists of this school had the privilege of being judges and as such they had to solve problems of the public. This made their approach to law more practical than of hanafi. Because of this fact, in

interpreting a rule of law a new element called Istidial (inferring a thing from another thing for public welfare) was introduced by Maliki jurists. Another point which is peculiar to Maliki doctrine is that it recognises the importance of customs (of Medina) more than any other school. In addition to Quran traditions, Ijma and Qiyas. The Maliki school accepts also the customs and Istidial as additional sources of law. A noticeable feature of this school is that it is the only school in which a married woman and her properties are always supposed to be under the control of her husband. The powers of the head of the family over his wife's property and over his children are the main features of this school. A Maliki woman cannot deal with her own properties without the consent of her husband.

3.20 THE SHAFEI SCHOOL (Scholar Ash Shafei)

Shafei was established by Imam Muhammad ibn Idris 'Fiery remains Shafei', an understudy of Malik ibn-Anas and was identified with the Prophet. It is most pervasive in Egypt, Somalia and Singapore and is the school of thought authoritatively pursued by the legislature of Brunei Darussalam and Malaysia. It is trailed by around 15% of Muslims around the world. The Shafei School of thought stipulates expert to four wellsprings of statute: the Quran, the Sunna of the Prophet, Ijma and Qiyas just as the suppositions of the Prophet's partners. The school extended the extent of Qiyas. The school stresses on the best possible istinbaat (deduction of laws) through the thorough use of lawful standards instead of hypothesis or guess. Cinder Shafei contended that Sunna negating the Quran were unsatisfactory, asserting that Sunna should just be utilized to clarify the Quran. He asserted that if training is broadly acknowledged all through the Muslim people group, it can't be in the inconsistency of Sunna. In any case, a lady can't be a free specialist in her marriage regardless of whether she is a grown-up. Fiery remains Shafei consolidated the standards of law or Usul in his book Kitab-ul-umm. He is otherwise called the originator of 'usul'. His "Risala" contains standards of statute or lawful hypothesis.

3.21 THE HANABLI SCHOOL (Traditionalist Imam Hanbal)

The fourth and the latest school of the Sunni sect was established by Imam ibn Hanbal. His peculiar feature was that he rigidly adhered to the tradition of the Prophet. His teaching was characterised by blind reliance on Tradition. He laid much stress on traditions and allowed a very narrow margin to the doctrine of analogy. It is therefore said that Hanbal was traditionalist rather than a jurist. He relied so much upon the traditions that other sources of law namely Ijma and Qiyas were neglected by him. He recognised Ijma only of the companions of the Prophet. Under the school therefore, there is no scope for private judgement and human reasoning. The result is

that the doctrines of this school are rigid and uncompromising. Because of this, ibn Hanbal and his followers were always regarded as reactionaries and were harassed by authorities from time to time.

3.22 THE SHIA SCHOOLS

Ali was acknowledged to be first Imam by the Shia community. He was accepted as temporal as well as the spiritual head of community. After the death of Ali, his two sons Hasan and Hussain became the second and the third Imam respectively. After Hussain's death, his son Zain-ul-abdeen succeeded as the fourth Imam. Up to this stage the Shia community remained united but afterwards there were divisions and sub divisions of the sect. Zain-ul-abdeen had two sons, Ziyad and Muhammad Baqir. First Split took place after death of Zain-ul-abdeen when some of the Shias acknowledged Ziyad as their Imam but the majority followed Muhammad Baqir. The followers of Ziyad formed a separate sect called Ziyadis whereas Muhammad Baqir was accepted as the fifth Imam by the majority. This was the first division of the Shia sect. After Muhammad Baqir's death his son Jafar Sadiq was accepted as the fifth Imam by the majority. This was the first division of the Shia sect. After Muhammad Baqir's death his son Jafar Sadiq became sixth Imam of this majority group. Upon the death of Sadiq there took place the second split in the Shia community. He had two sons Ismail and Musa Kazim. Here again, one group recognised Ismail (the elder son) as the seventh Imam but to the majority of them the younger son Musa Kazim was the seventh. Followers of Ismail were called Ismailis and constituted the second school of Shia sect. In the other section of Shia community headed by Musa Kazim there had been other Imams through secession. The twelfth Imam in this line of succession was Askari's son who is said to have disappeared from the world and is awaited in the near future. The twelfth Imam called Muhammad Ash'ari. In this manner we see that mainly it was the dispute over leadership of the Shia community in various stages of its development which caused the formation of the three schools.

3.23 ITHANA ASHARIA SCHOOL

This school is also called as Imamia School. Majority of Shias are Ithna Asharia. The followers of this school believed that starting from Ali there had been twelve Imams who possessed spiritual powers. Everything that comes from an Imam is taken to be law. It is believed that the twelfth Imam who disappeared when he was still a child, would reappear in the future. A characteristic feature of the Ithna Asharia school is that *this is the only school in the Muslim world which recognises Muta or temporary marriage*. This school is further divided into sub-sects 1) Akhbari and 2) Usuli. Akhbari

are very orthodox because they follow rigidly the traditions of Imam. Usuli on the other hand interpret the texts of Quran with reference to the practical problems of day to day life. The Ithna Ashirias are found in Iran, Iraq, Lebanon, Pakistan, India. Shari-ul-Islam is an authoritative book of this school.

3.24 ISMAILIA SCHOOL

For some reasons Jafar Sadiq disinherited, his eldest Ismail. The majority of Shias, therefore did not accept him as their Imam. But there were some Shias, although in majority, who acknowledged Ismail as the seventh Imam. The followers of Ismail called Ismailias or the Seveners because according to them there had been only seven Imams the Seventh being Ismail. They believe that from him (Ismail) descended a series of concealed Imams whose secret emissaries constantly on the watch for a chance of striking at some weak point in the large ill-cemented empire of orthodox Islam. The Ismailias therefore, hold that imams subsequent to Ismail are still alive but they have concealed their existence. In India, they consist of two main groups Khojas and Bohras. Khojas were originally Hindus, Bohras are also Ismailias and they separated from the other groups during the Fatimid regime.

3.25 ZYADIS SCHOOL

The founder of this school was Zyad, one of the sons of the fourth Imam. The Zyadis were first to defect from the general body Shia Muslims. One of the peculiar features of this school is that its doctrines incorporate some of the Sunni principle as well.

3.26 SHIA VS SUNNI

A notable segment of the non-Muslim world may see Shias and Sunnis as pretty much the equivalent. In any case, these are two unmistakable organizations of Muslims and ought not be mistaken for one another. Every has a one of a kind arrangement of traditions, conventions and even functions. The manner in which that a Shia and Sunni marriage is solemnized contrasts incredibly. There are not many between group relational unions because of the clear contrasts. Shia and Sunni relational unions comprise of altogether different wedding capacities. In a Sunni wedding capacity, it is imperative to have two grown-up consenting guys present for the whole length of the function as observers. Such observers are not required according to the tenets of Sunni separate. It tends to be done within the sight of just the spouse and the wife. The instance of a Shia wedding is totally unique as for this situation where the observers are commanded to be available on account of a separation and not when the wedding happens. Another prominent

distinction between a Shia and Sunni wedding is that in a Shia nikah function, a sum of six sections must be conveyed openly. This factor is absent in a Sunni wedding service. A Sunni nikah function in this way has a shorter period of time. On account of a Shia wedding, there is a one of a kind shower related function that the lady of the hour and man of the hour partake in. There is no such impulse in a Sunni wedding. This service generally happens before the real wedding. A noteworthy purpose of distinction between these two groups is that Shias have faith in a transitory course of action of marriage. As indicated by such a game plan, it is legitimate for the lady of the hour and lucky man to go into a marriage for a pre-concurred time span. After this time has passed, the marriage consequently reaches an end except if the lady and man of the hour need to in any case stay in the marriage. This arrangement is absent in a Sunni marriage. Sunnis have faith in going into a lasting type of marriage as it were. A separation isn't required when Shias go into a momentary marriage understanding. The date when the settlement will arrive at an end is obviously referenced on the papers relating to the marriage that is occurring³.

3.27 THE MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT, 1937

It has been the cherished desire of the Muslim of British India that customary Law should in no case take the place of Muslim Personal Law. The matter was agitated in the press as well as on the platform. The status of Muslim women under the so called Customary Law as it disgraceful. All the Muslim women Organisation condemned the customary law as it adversely affected their rights. They demanded that the Muslim Personal law (shariat) Bill no.39 of 1935 was introduced in the legislative assembly on 26th September, 1935. The bill was referred to select committee. Incorporating the recommendation of the select committee the bill was re-introduced in the legislative assembly. For several years past It has been cherished desire of the Muslim of British India that customary law should in no case take the place of Muslim Personal law. The matter has been repeatedly agitated in the press in the press as well as on the platform. The jamiat-ul-Ulema-i-Hind, the greatest Moslem religious body has supported the demand and invited the attention of all concerned too the urgent necessity of introducing a measure to this effect. Customary Law is a misnomer in as much as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in the future that certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under so-called Customary law is simple disgraceful. The Muslim Personal law automatically raise them to the position to which they are naturally entitled. In addition to present

³ Family law-1 Singhal Publication

measure, if enacted would have very salutary effect on society because it would ensure certainty and definiteness in the mutual rights and obligation of the public. Muslim Personal laws (Shariat) exists in the form of a veritable code and is to well known to admit of any doubt or to entail any great labour in the shape of research, which is the chief feature of Customary law. ⁴

3.28 CONCEPT OF MARRIAGE UNDER MUSLIM LAW

Marriage, that is, Nikah in pre-Islamic Arabia, implied diverse types of sex connection between a man and a lady set up on specific terms, In pre-Islamic days, ladies were treated as belongings, and were not given any privilege of legacy and were totally needy. It was Prophet Mohammad who realized a total change in the situation of ladies. The improvement was immense and striking and their position is presently special as respects their lawful status. Prophet Mohammad set ladies on a balance of practically ideal balance of men in the activity of every lawful power and capacities, which remain in hold help when contrasted and the condition of law among the old Arabs of the pre-Islamic days. Under the Muslim Law marriage is considered as common contract. After marriage, a lady does not lose her singularity. She remains a particular individual from the network; her reality of identity isn't converged into that of her significant other. The agreement of marriage gives no capacity to anybody over her individual or property in any capacity she satisfies with no unessential control of her better half. She can go into restricting contracts with her better half and continue against him in law courts, if essential. The lady appreciates this situation through the directive of the Quran.

According to Ronal Wilson, "Muslim marriage is an agreement to legalize sexual; intercourse and the reproduction of kids. As indicated by fyzee the primary point of the Muslim marriage is to shield the general public from indecency and un-modesty⁵.

In the words of M.A. Quareshi the primary object of marriage is the advancement of everyday family life and the authorization of youngsters" Thus fulfilment of sex want, shared love, multiplication and legitimization of kids are the principle points of the Muslim marriage. Since Muslim marriage is a common contract, it must satisfy certain basic conditions so as to be legitimate.⁶

Justice Sulaiman has said " n Islam, marriage isn't just a common contract yet in addition a ceremony " Abdul Rahim's definition is the most adjusted one. By utilizing two keen words "Ibadat" and "Muamlat" he has outlined the entire the idea of Muslim marriage in one sentence.⁷

⁴ MUSLIM MARRIAGE ACT 1939

⁵ <http://www.yourarticlelibrary.com/essay/essay-on-muslim-marriage/47622>

⁶ <http://www.yourarticlelibrary.com/essay/essay-on-muslim-marriage/47622>

⁷ <http://www.yourarticlelibrary.com/essay/essay-on-muslim-marriage/47622>

At the end of 6th Century the Arabian society was full of vices like ignorance, superstitions and barbarism. The ancient paganism or heathenism was not a fixed system. *At that time the "Prophet Mohammed was born on 29th August, 570 A.D at Mecca*⁸. He received his first revelation from God at the age of forty and he had laid down the foundation of a new faith and the messages delivered by the Prophet have been contained in the Holy Book of Allah, called "the Koran". *The religion propounded by the Prophet "Islam" and the persons who follow Islam are "Muslims"*⁹. Pre-Islamic Arabia, customs regulated the sexual- relations and there flourished four types of sexual connexions, out of which one was prevailing in the regular form known as Marriage. At that time, the position of women was weak, which was later on improved by the Prophet Mohammad. Group Marriage, Marriages by barter, flag marriages or prostitution and the sending of a wife to a famous man for intercourse, all these types of loose sexual unions were forbidden by the Prophet. He also forbade the temporary or Muta Marriages. In Paganism, the idea of sale of the woman was connected with the marriage and Islam also adopted this concept and reformed it by making the woman the principal contracting party as well as the object of the contract, hence the present form of Mohammedan Marriage came into force. Nika is an Arabic term used for marriage. It means "contract". The Quran specifically refers to marriage as "Mithaqun Ghalithun", which means a strong agreement. The original means of the word Nikah is the physical relationship between man and woman. It is also used secondarily to refer to the contract of marriage which makes that relationship lawful. "A contract that result in the man and woman living with each other and supporting each other within the limits of what has been laid down for them in terms of rights and obligations". It is a mutual contract between a man and a woman whose goal is for each to enjoy the other, become a pious family and a sound society.

*"Nikah" amongst Muslims has been considered for the most part pious act. In „Radd-ul-Mukhtar" it has been mentioned as "there is no act of devotion that has remained prescribed for us, since the time of Adam, upon him be peace, up to his moment, and which is to be continued in paradise except Nikah (marriage) and Imaan (faith)"*¹⁰.

The meaning of marriage is wedlock or the mutual relation of husband and wife or the institution whereby a man and a woman are joined in a special kind of social and legal relationship for the purpose of making a family. In Muslim Law, Nikah is a contract for the legalization of intercourse and the procreation of children. Hence Nikah means union of sexes. There is also some object behind this union, which confers the status of husband and wife on a man and woman to marriage

⁸ The principles of Mohammedan Law by Dr Nishipurohit

⁹ The principles of Mohammedan Law by Dr Nishipurohit

¹⁰ Radd-ul-Mukhtar, Vol.2 at page 280 (Hizri); cited in Dr Mohammad Nazmi –Mohammadan Law, 2nd edn. 2008, p.32, Central Law Publications, Allahabad.

and the status of legitimacy on the children born out of such union. Marriage is recognized as the basis of society. Marriage as an institution leads to the uplift of man and is a means for the continuance of the human race. Spouses are strictly enjoined to honour and love each other. The Prophet was determined to raise the status of woman. He asked the people to see their brides before marrying them; and thought that nobility of character is the best reason for marrying a woman. It is a contract for the legalization of intercourse and procreation of children.

3.29 THE OBJECTIVES OF MARRIAGE ARE:

- i). to provide legal validity to the sexual relationship of husband and wife.
- ii). to legalize the children. There is no valid contract of marriage, the intercourse between a man and woman is unlawful. Marriage legalizes the children born out of that marriage. Children born out of any union other than a valid marriage are illegitimate.

Legally speaking, Muslim marriage is a civil contract. Therefore, its legal nature is contractual. Besides being a civil contract, Muslim marriage is also a social and religious institution.

3.30 LEGAL ASPECT

Legally, a Muslim marriage is considered as a contract; because the elements which constitute a marriage and the manner in which it is completed, is almost similar to that of a civil contract. The contractual nature of a Muslim marriage is explained on the basis of the following elements.

- i). The parties to the marriage also must be competent.
- ii) The marriage is not complete without offer, acceptance and free consent of the parties or guardians.
- iii) The terms of marriage contract within legal limits may be settled by the parties themselves.
- iv) Just as there are rules for regulating the rights and duties of the parties upon the breach of a contract, there are also provisions for respective rights and duties of husband and wife on divorce or dissolution of marriage. The nature of Muslim marriage is similar to that of a civil contract but it is not so in its essence. It is evident from the following arguments, its social aspect is also very important.

Abdul Kadir vs. Salima *In this case, Justice Mahmood held that marriage among Muhammedans is not a sacrament, but purely a civil contract; and though it is solemnized generally with a recitation of certain verses from the Quran, yet the Muhammedan law does not positively prescribe any service particular to the occasion. That it is a civil contract is manifest from the various ways and circumstances in and under which marriages are contracted or presumed to have been contracted. And though a civil contract, it is not positively prescribed to be reduced to writing, but the validity and operation of the whole are made to depend upon the*

declaration or proposal of the one, and the acceptance of consent of the other contracting parties, or of their natural and legal guardian before competent and sufficient witnesses; as also upon the restrictions imposed, and certain of the conditions to the peculiarity of the case¹¹.

3.31 SOCIAL ASPECT

The social aspect of Nikah should also be studied to understand its real nature. Nikah is a social institution by which, a definite and dignified status has been conferred upon the women. The Prophet brought about a reform in the society. No social reform was possible without giving equal status to the women. Therefore, a definite institution or an established law was required to give equality and freedom to the women. In that object in mind, the Prophet introduced Nikah through which, the women could be placed on equal footing with men. It is therefore, submitted that Nikah is a well-established social institution which gives to the women, a separate and dignified status in the society. The social institution may be explained on the basis of the following arguments.

1) There is limited polygamy under Muslim Law and a person is not allowed to marry more than four wives at a time. In civil contracts, one may enter into many contracts at a time as he likes.

2) In every Muslim marriage, dower must be given or promised to be given by the husband to the wife as a mark of respect towards her.

In civil contracts, the general rule is that, there is no liability to pay consideration if it has not been specified or referred in the contract. But in a Muslim marriage, even if the amount of dower has not been specified, the husband should pay proper dower to his wife as mark of respect towards her.

3) There is prohibition in the marriage between certain close relatives. A brother cannot marry his sister. But he can legally enter into a valid contract with his sister.

4) There are certain circumstances in which the Muslim disapproves the contract of marriage. For example, a Shia Muslim is not allowed to marry during a religious journey (Haj). Similarly there are other circumstances which are called the relative prohibitions in marriage. There are no such prohibitions in the civil contracts. But a marriage during Haj is void under Shia law. Therefore, it is clear that marriage among Muslims is not an ordinary contract. It is a powerful social institution for the uplift of women and promotes the development of a healthy society free from evils.

¹¹ International Journal Of Socio-Legal Analysis And Rural Development
Volume 2 Issue Ii(madhumita acharjee & fakhru Islam choudury
department of law assam university silchar) **Abdul Kadir vs. Salima**

3.32 RELIGIOUS ASPECT

Apart from the Legal and Social aspects, Quran, which is a collection of the words of God, directs every Muslims to marry a suitable woman of his choice. It is therefore, a religious duty of every Muslim to contract a marriage according to the rules of Islam. A person who remains bachelor without any reasonable excuse disobeys the words of God. Moreover, marriage is also the tradition (Sunnat) of the Prophet. It is believed that marriage is a Sunnat Muwakkidah. This means that it is an act of such a nature that, if a person does it, he gets religious benefits. If he abstains from doing it, then he commits sin. Abdul Rahim observes that “the Mohammedan jurists therefore, regard the institution of marriage as partaking both of the nature of Ibadat” or devotional act and Muammalat or dealings among men”.

In Islam, marriage is recognized as the basis of society. It is a contract but it is also a sacred covenant. Marriage as an institution leads to the uplift of man and is a means for the continuance of the human race. The main aim of the institution of marriage is to protect the society from filth and un-chastity. It has also been said that marriage is so holy a sacrament that in this world, it is an act of Ibadat or worship, for it preserves mankind free from contamination.

According to Tyabji “marriage brings about a relation based on and arising from a permanent contract for intercourse and procreation of children between a man and a woman, who are referred to as „parties to one marriage” and who after being married, become husband and wife”. Therefore, according to Muslim Law, marriage is a contract for the purpose of legalizing sexual intercourse and the procreation and legitimating children and the regulation of social life in the interest of society by creating the rights and duties between the parties themselves and children born from the union.

3.33 FORMS OF MARRIAGE UNDER MUSLIM LAW

As we have seen in earlier chapter of Hindu Personal Law, that as per the Hindu personal Law the Muslim personal law also have some approved form of marriages as well as unapproved marriages. As we known that the Muslim law have the Shia and Sunni Sect under which the Marriages have been divided between them. A Muslim Marriage according to muslim law may be ‘VALID (Sahih), VOID (Batil), IRREGULAR (Fasid). But under the shia law, Marriage may be either Valid or Void.

3.33.1 VALID (Sahih)Marriage

A marriage which is neither void nor irregular is valid. A marriage which conforms in all respects with the legal requirements is a valid marriage. A marriage to be valid must satisfy the following

requirements.

- There must be a proposal by any of the party and its acceptance by the other party.
- The parties must have capacity to contract marriage i.e they should be
 - a. Of sound mind.
 - b. Major
 - c. Capable to give consent
- The consent of parties is free.
- Proposal and acceptance must have taken place at one meeting and before two witness.
But under Shia law witness is not a necessary requirement.

3.33.2 VOID (Batil)Marriage

A void marriage is an unlawful connection which creates no mutual rights and obligation between the parties. It is semblance of marriage without the reality of no legal results. A marriage contracted by parties suffering from absolute incapacity, i.e prohibition on the grounds of of consanguinity, affinity or fosterage, is void. Similarly marriage with a woman who is wife of another, or remarriage with divorced wife, without observing the strict rules set for this occasion is void.

But under **Shia law** marriages which violates absolute incapacity are void, marriage with the wife of another person, whose marriage is still subsisting, remarriage with one's own wife, when there is legal bar, marriage with fifth wife, Marriage with a woman undergoing **iddat**.

3.33.3 IDDAT

Iddat is an Arabic word and its literal meaning is "counting". Counting here means of counting the days of possible conception to ascertain whether a woman is pregnant or not. Under muslim law, it is period during which a woman is prohibited form remarrying after her dissolution of her marriage. During this period the widow or a divorced wife is required to live a pure and simple life. The object of iddat period is to ascertain the paternity of a possible conception by her former husband. After divorced or death of the husband, if the woman re-marries immediately and child is born within normal course, then there is every likelihood that he conception 'could be by the former husband and not by the present. It would be difficult, therefore, the establish as to who may be regarded as father of such child. To overcome this difficulty, Muslim law provides that where a marriage is dissolved (by divorce or death of the husband)the woman cannot re-marry before the expiry of a specified period called Iddat. After this period the possible conception by the former husband would naturally

become apparent and visible. Under both the sect marriage will be said as void and irregular.

3.33.4 IRREGULAR or INVALID(Fasid) Marriage

Irregular marriages are recognised only under Sunni Law. The irregular marriage is an incomplete marriage. If there is any illegality in a marriage which may be removed, the marriage is irregular. As soon as that illegality or irregularity is removed, such marriage becomes perfectly valid. A marriage contracted in violation of any of the relative prohibition are merely temporary which may be removed afterwards. Following marriages as regarded as irregular marriages.

- Marriage against rule of unlawful conjunction.
- Marriage with fifth wife.
- Marriage without incompetent witness.
- Marriage with two sister with the same time.

3.33.5 MUTA MARRIAGES

The word “Muta” literally ‘enjoyment’ and in its legal context it may be rendered, according to Heffening as Marriage for pleasure. Muta may be defined as a temporary union of male and female for specified duration, on payment of some consideration. It is temporary marriage for a fixed period for a certain reward paid to the woman. The specified period may be a day, a month, a year, or a year or a term of years. Muta marriage also known as Nikah al-Mutah.¹² The act of Muta marriage is just perceived by the Ithna School of Shia Law while Zaidi Shia, Ismaeli Shia and Sunni Muslims don't allow Nikah Mutah. Such Marriage are void according to Sunni law. It is an private contract which might be oral, verbal or written declaration. And it is intent to marry to the woman as the requirement followed in Nikah Muslim marriage. In the earlier days of islam, when the arabs has to live away from their homes for a considerably long period either on account of wars or on trade- journeys thye used to satisfy their sex desires through prostitutes . In order to avoid the development of prostitution in the society and to confer legitimacy upon children of such unions, temporary marriages was recognised and permitted by the prophet for sometimes. The institution of Muta was fairly common in Arabia both before or at the time of prophet. But later on, when he felt that this concession was being exploited, he prohibited it absolutely.

Shoharat Singh vs Musammat Jafri (1915) 17 BOMLR 13

¹² <http://ijlljs.in/wp-content/uploads/2016/02/18.pdf>

Bibi the issue under the steady gaze of the court was whether Muhammad Kazim ever married to Achchhi Bibi, and assuming this is the case, when, and were there any offspring of the marriage.¹³ *In the case of Mahomed Abid Ali Kumar Kadar vs Ludden (1887) ILR 14 Cal 276* Sahiba, Minor, the court held that in spite of the fact that at the season of contracting muta marriage, a dower is fixed; the spouse may deduct a bit of the lady's dower if the marriage isn't fulfilled. She is qualified for full dower just if the marriage is culminated, regardless of whether they keep on co-habiting or not. In the event that the dwelling together stops through any issue of the lady, at that point she is qualified for just 50% of the dower yet the spouse, having paid the dower will undoubtedly live together with the lady. The lady has no privilege to support after the disintegration of a muta marriage. The court mentioned this objective fact in the wake of thinking about over the announcement made by Sharaya-ul-Islam, "if the spouse were to make the lady an endowment of the term before coition, he would be obligated for a large portion of the dower, and if coition ought to have occurred, she is entitled entire dower on state of her keeping the term, and in the event that she has avoided him, he is qualified for deduct a proportionate piece of the dower."¹⁴

3.34 NATURE OF MUSLIM MARRIAGE:

Some jurists are opined that Muslim marriage is purely a civil contract while others say that, it is a religious sacrament in nature. According to some text writers and jurists opined that the Muslim marriage is treated as a mere civil contract and not a sacrament. For instance:

- i) As marriage requires proposal (ijab) from one party and acceptance (qubul) from the other, so is the contract. Moreover, there can be no marriage without free consent and consent should not be obtained by means of fraud, coercion or undue influence.
- ii) Just as in case of contract entered into by a guardian, on attaining majority be set aside by a minor, so a marriage contract in Muslim Law, be set aside by a minor on attaining the age of puberty.
- iii) The parties to a Muslim marriage may enter into any ante-nuptial or post-nuptial agreements which are enforceable by law provided it is reasonable and not opposed to the policy of Islam.
- iv) Like any other contract, there is also provision for the breach of marriage contract.

Justice Mahmood in a observed that "Marriage among Mohammedans is not a sacrament, but purely a civil contract and though it is solemnized generally with recitation of certain verses from

¹³ <http://ijlljs.in/wp-content/uploads/2016/02/18.pdf> *Shoharat Singh vs Musammat Jafri (1915) 17 BOMLR 13*

¹⁴ <http://ijlljs.in/wp-content/uploads/2016/02/18.pdf> *Mahomed Abid Ali Kumar Kadar vs Ludden (1887) ILR 14 Cal 276*

the Quran, yet the Mohammedan law does not possibly prescribe any service peculiar to the occasion". Nikah is considered obligatory to every Muslim, because of its being continued to be performed by the Prophet Mohammad, and on account of his rejecting from his followers, one who has no liking for it amongst Muslims, there is a tradition "Nikah is my Sunnat and one who dislikes my Sunnat is not mine". According to the approved opinions, one commits sin by not marrying, and does a meritorious act for which, he will be rewarded in after life, because by marriage, he protects himself and the bride from committing adultery, and procreation of children in modern condition.

According to Hedaya: "Marriage (Nikah) implies a particular contract used for the purpose of legalizing children (generations)"¹⁵.

In Muslims Nikah is a ceremony through which, a man is united with a woman with the idea of enjoying life together and to produce children. Though a Muslim marriage is performed through a ceremony in which Qazi reads the fatiha and other Quranic verses, yet non-performance of the ceremony is no fatal to the validity of the marriage.

According to Dr Jang "marriage though essentially a contract, is also a devotional act; its objects are rights of enjoyment and procreation of children and regulation of social life in the interest of society"¹⁶.

There is a consensus of Muslim jurists that marriage under Muslim Law is Sunnat Muwakkida i.e., "the person, who complies with it is rewarded in the next world, and he who does not commits a sin". Fitzgerald observes, "Although a religious duty, marriage is emphatically not a sacrament, there are no sacraments in Islam, nor it is covertures". The social conditions of the ancient Arab women in Pre-Islamic Arabia were no better than that of animals. They had no legal rights. In youth, they were the goods and chattels of the father. After marriage, the husband became their lord and master. Polygamy was universal. Female slavery and concubine were common. The prohibited degrees of relationship were very narrow and were confined only to close degrees existing at the time when the Islamic laws came into vogue. Abdur Rahim citing the "Kashfu-i-Ghumm", tells us of four types of Arabian marriages.

i) Regular form of marriage:

A Form of marriage is similar to that sanctioned by Islam. A man would be as the father or guardian of the girl to give the hand of his daughter or ward and then would marry her by giving

¹⁵ Dr R.K. Sinha Muslim Law, 5th edn. 2003, P.40; Central Law Agency, Allahabad.

¹⁶ Dr M.U.S. Jang -,Dissertation on the Development of Muslim Law in British India, PP.1,2; cited in Aquil Ahmad – Mohammedan Law, 21st edn. 2004, P.108 Central Law Agency, Allahabad.

her, dower.

ii) Sexual intercourse for procuring noble child:

There was a custom that when a man was willing to have a noble child, he would ask his wife to send for a noble and famous man and have intercourse with him. The husband would stay away from his wife until the conception by that noble man and been taken place. He would only return to her when the pregnancy had been confirmed.

iii) Invitation by a woman to have sexual intercourse:

Less than ten men would be called by a woman to have sexual relations with her. If conception had taken place and a child was delivered, she had the right to summon all the men and they were bound to come. She would then say, "O so and so this is your son". This established paternity conclusively and the man had no right to disclaim it.

iv) Prostitution:

Prostitutes were also common. They used to fix at the doors of their tents, a flag as a sign of their calling. A huge number of men used to visit those prostitutes. If a woman of this class conceived, those men who frequently used to visit her would be assembled and the physiognomists would decide to whom the child belonged. Hence promiscuity was the rule and the sexual unions were loose which resulted into frequent divorces. Some of the conjugal relations described above can be called marriages in the modern acceptance of the term. It is more appropriate today to consider them as forms of legalized prostitution or of tribal sexual behaviour recognized by custom.

IJLRA