

## **B.A. LL.B. III SEMESTER**

### **Family Law-I (Paper II)**

#### **Unit-1**

### **Sources & Schools of Muslim Law**

#### **Schools of Muslim Law**

Islam is pre-eminently, democratic and republic one, and the peoples religion par excellence. Though great freedom of opinion is allowed, but it should be noted that in Islam all institutions like political, legal and social etc. are guided by divine law and their freedom is within the bounds of Allah's Commands.

The basis on which all Schools of Islamic jurisprudence developed their doctrines is the same and it only in matters of secondary nature, they differ each other. These differences are due to their various methods of interpretation of the Holy Quran and the Sunna, the fundamental sources of Islamic law. All Schools accepted the superiority of these fundamental sources and based their system on them and with their own way of understanding and interpreting them. Thus, they are the stream of one ocean that is Sharia and their aim is to guide the people towards understanding of Islam and in following the right path and thereby to obey Allah's Commands in which lies his, the welfare of individual, as well as the society in general.

#### **Hanafi School or Kufah School**

Imam Abu Hanifa was the founder of Hanafi School (80 A.H. to 150 A.H.). Abu Hanifa an-Numan-ibn-Thabit, commonly known as Imam Abu Hanifa, the founder of most important of the Sunni Sects was born in the year 80 A.H. at Kufa. He first studied scholaristic divinity, but soon abandoned it in favour of jurisprudence. He got an opportunity to meet Anas, a famous companion of Prophet Muhammed (PBUH), at the age of 12 or 13 years and attended the lectures of Imam Jaffar as Sadiq. He joined the institution of Imam Hammad, he heard Hadidths, it is an admitted fact that he learnt Hadith from as many Scholars as possible, as he considered that it is not possible to study fiqh without the study of Hadith.

He was an independent, well off man, who made his living as a merchant having a business of clothes. He performed Hajj several times.

After the death of his teacher, Hammad in 120 A.H., he succeeded him and started giving discourses in fiqh and other persons who were desirous to learn fiqh from him. His public lectures in Kufa soon gave him fame as a great jurist and his utterances gained great weight, people flocked daily to hear him and to question him on the rituals and law.

Abu-Hanifa was a pious and honest man, with independent character. He never accepted any post in the Government and became victim of Ummayyad rulers as well as Abbasid.

In the year 132 A.H. he constituted a committee of 40 members for the codification of Islamic law and this committee took 22 years to complete its work. He studied 5 lakh legal problems, thus, compiled is known as Kutub Abu Hanifa. After completion of codification he delivered a speech before his disciples and other eminent persons who were present at that time in the Jama Masjid of Kufa. He said, "I have completed the work of codification of Islamic legal principles and

now Islamic Jurisprudence (fiqh) has achieved such eminence that further generations will consult its principles to solve their legal issues”. “I am handing over the vehicle of fiqh well-adorned for its just and proper utilization”. He added, “ I feel pleasure to declare that my disciples are so well versed and expert in the field of Islamic Jurisprudence that among them 40 persons are fully qualified for the post of Qadi (Judge) and 10 among these 40 are able to train people for the post of Qadi (Judge). He further instructed, “if anybody among you will accept the post of Qadi, he must decide cases impartially and without bias”.

Towards the end of Ummayyad Caliphate, Ibn Hubaira, the governor of Iraq, offered Abu-Hanifa the post of Kazi, but he declined it and for his act of refusal was flogged by the Governor. During Abbaside dynasty, Al-Mansur put him behind the bars ostensibly for the same reason, and he died in the year 150 A.H. He was held in such high esteem that his funeral prayers were offered for ten days and on each occasion about 50,000 people attended the congregation.

Among all the Schools of Islamic Jurisprudence his school got so much popularity that majority of the population of the Muslim World at present is following the Hanafi School.

Main features of this School:

- (a) Less reliance on tradition unless their authority is beyond doubt. (Abu Hanifa was stricter than others in lifting the traditions.)
- (b) Greater reliance on Qiyas;
- (c) A little extension of the scope of Ijma. (Abu Hanifa advocated the validity of Ijma in every age, though in theory it was strictly confined to companions of prophet.

- (d) Recognizing the authority of Local custom and usages as guiding the application of law.
- (e) Evolving the doctrine of Istihsan. (It means the modification of theory of law in its application to actual fact)

### **The Maliki School (Madina School)**

Imam Malik ibn Anas (93 A.H.–179 A.H.). Imam Malik ibn Anas was born at Madina in the year 93 A.H. His full name was Abu Abd Allah Malik ibn Anas. Madina is the sacred city of Islam, where Prophet Muhammad (PBUH) spent later part of his life and established Islamic State. From this holy city the teaching of Islam spread through out the world. Maliki School of Islamic Jurisprudence, which is also known as Madani School, commenced its life from the city of learning. Imam Malik was not only a great traditionalist but also a jurist who founded a school of jurisprudence. He is fortunate enough to have been born in the city of prophet (PBUH), got education there, gave discourses in law and religion in the Mosque of prophet (PBUH) (Masjid-e-Nabavi), people from nooks and corners of this world used to come to learn from him and he never left Madina and spent his whole life for the cause of Islamic learning there.

Imam Malik started giving discourses in fiqh and Hadith when he got permission from his Shuyukh of Haidth and Jurisprudence. He himself said “I did not start give discourses in law and religion unless and until I was declared eligible for that by 70 teachers of Hadith and jurisprudence.”

He devoted his whole life for the study of Jurisprudence and Hadith. He used to give his discourses in the mosque of Prophet (PBUH). (Masjid-e-Nabavi). Scholars and people gathered around him to learn fiqh and Hadith and to get solutions to

legal problems. He was scrupulously careful in giving Judgement, and whenever he had least doubt as to the correctness of his decision, he would say “I do not know”. His book, the Muwatta, though a comparatively small collection of Hadith, and limited only to Hadith and practices of people of Madina, is a great work of its kind, and one of the most authoritative.

He was also a pious man with an independent character and never bowed before political authorities and gave decisions before bias. He spent 50 years of his life in the study of Jurisprudence and Hadith and died at the age of 85 in the year 179 Islamic era and was buried in al-Baki. After his death his disciples continued to work on the same line and spread the doctrine of the school in many countries of the world.

Imam Maliki’s greatest contribution is his book Muwatta. Regarding the importance of this book, Imam Shafi remarked, “Beneath the sky, on the earth, no book after Holy Quran is most authentic than Muwatta-e-Imam Malik”. Such is the importance and eminence of the contribution of Imam Malik.

He is regarded as the greatest exponent of the traditions and one of the greatest authority on the Hadith. He was a born jurist and a traditionalist of a very high order.

Imam Malik is the author of Al-Muwatta, containing about 300 traditions. This book is connecting line between fiqh literature of earlier days and collection of Hadith in later times.

Main features:

1. Acceptance of traditions, which in the opinion of Imam Malik, were authentic, even if tradition carried authority of only one narrator.

2. Acceptance of practices, usages customs of the people of Madina and of the saying of companions of prophet (PBUH).
3. Resource to Qiyas (Analogy), only in the absence of explicit of test.
4. Recognition of Principle of public welfare (Al-masalih al- mursalah) as basis of deduction.
5. Adding to the four main sources of Muslim Law, one more source viz., Istidial i.e., principle of logical deduction.

## **Shafi's School**

Imam Muhammad ibn Idris Ash-Shafi (150 A.H. – 204 A.H.)

Imam Abu Abd Allah Muhammad ibn Idris Ash Shafi, the founder of Shafi School of Islamic Jurisprudence was born in 150 A.H. in Ghazza (Palestine). He belonged to the tribe of Quraish, he was a Hashmi and thus, remotely connected with the Prophet (PBUH). His mother was Ummal Hassan Binte-Hamza ibn al Qasim ibn Yazid ibn Imam Hussain. Thus, he related to Prophet from both paternal as well as Maternal side. His father died when he was only two years old and was brought up in very humble circumstances in the sacred city of Mecca. In Mecca he studied Hadith and fiqh with Muslim ibn Khalid Zindji (died 180 A.H.) and sufyan ibn aina(died 198 A.H.). He memorized Holy Quran and Muwatta at the age of ten years and when he was about 20 years he went to Madina to Malik Ibn Anas, studied fiqh under him and remained there till his master's death in 179 A.H. He developed a school of Jurisprudence influenced by both Hanafi and Maliki fiqh and wrote many books, it was called Madhab-e-Qadeem of Imam Shafi's (old School of Jurisprudence). In this way he got mastery in Hanafi Jurisprudence as well as Maliki. He went to Egypt. There he attached himself to Abd Allah, son of

newly appointed governor of Egypt. As a result of disturbances there, he left Egypt and went to Mecca from where he returned in 200 A.H. to Egypt and remained there till his death in 204 A. H. His legal thinking got slight modification in Egyptian environment and there he wrote many books. This was called his new School for Islamic Jurisprudence or 'Madhab Jadeed' of Imam Shafi's and he died on the last day of Rajab 204 A.H.

Imam Shafi is regarded as one of the greatest Jurist in the history of Islamic Jurisprudence. Modern Critics place Imam Shafi very high as a Jurist. He is the creator of classical theory of Islamic Jurisprudence and is regarded as founder of the Science of Unusual. He examined traditions critically and more use of Qiyas than Imam Malik and he perfected doctrine of Ijma.

Shafi was also a pupil of Imam Mohammad who was one of the disciples of Abu Hanifa. He inherited the knowledge of traditions from his master Imam Malik. He also got the legacy of talents and discretion from his other master Imam Mohammad, with the result that his School had the tint and influence of Hanafi School as well as Maliki School. Not only did he work through the legal material available but in his Risala he also investigated the principles and methods of Jurisprudence.

He was first to compile sources of law. He writes in a systematic way on the origins of Jurisprudence in his famous treatise al-Risala. Al-umm is another work of Shafi, containing seven volumes and was compiled by his pupil al-Rabi ibn Sulayman. Iktilaf-al-Hadith and Musanad-al-Imam Shafi are other works of Imam Shafi. His most famous pupil was Imam Ahmad ibn Hanbal.

Main features:

- (a) Acceptance of four sources of law; the Quran, the Sunnah; the Ijma and the Qiyas.
- (b) Acceptance of Istidial as fifth source of law;
- (c) Non-Acceptance of Ishithsan of Hanafi School and al-Malih al-mursalalah of Maliki School.

### **The Hanbali School**

Imam Abu Abdullah Ahmed ibn Muhammad Hanbal ibn Hilal (164 A.H.–241 A.H.):

Imam Abu Abdullah Ahmed ibn Muhamad Hanbal, commonly known as ibn Hanbali was the founder of the Hanbali School of Islamic Jurisprudence. Ibn Hanbal was born at Bagdad on Rabi 1-164 A.H. He Studied under different masters and made extensive travels to learn Hadith and Fiqh. In his early age he studied Fiqh under Imam Abu Yousuf and heard Hadith from Hisham and Sufyam ibn Aina and other traditionalists. His inclination of mind was towards the study of Hadith, therefore he made a very extensive study of Hadith and went to Mecca and Yemen etc. to hear Hadith from the traditionalists of those centers. After he had returned home, he took lessons from Imam Shafi in fiqh. The frame of his learning, piety and Justice gathered a host of disciples and admires around him. In fact he was more a traditionalist than a jurist. He died at Baghdad on the 12th of Rabi 241 A.H.

It is true that Imam Ahmed Hanbal was undoubtedly more traditionalists than a jurist. But it is wrong to say that he had not contributed towards the development of Islamic Jurisprudence. Imam ibn Hanabal's method of formulating legal



principles was simple. He sought his answers of legal questions from Holy Quran and next source was Hadith. But he learned more towards the Hadiths.

Imam ibn Hanabal was more traditionalists than a jurist and made use of this source (traditions) extensively. His interpretation of Hadith was literal and unbending. He leaned so much on Hadith that it is said that he accepted weak Hadith and did not adhere to the strict principle of scrutinizing the transmission of Hadith. Imam Hanabal's collection of traditions known as Musnad Ahmed, which contains nearly thirty thousand Hadiths, does not apply strict rules of criticism. From the very nature of exertion of Hadith it is evident that he made very little reasoning, as he was dependent almost entirely on Hadith, the result was that he admitted even the weakest Hadith.

Imam Hanbal was the author of several treatises, among these the important ones are: Musnad al-Iman Hanbal (It contains a collection of 5000 traditions); Taat-ur-Rusul and Kitab-ul-Alal.

His pupils included Ismail al-Bukhari and Muslim ibn Daub.

Main Features:

The adherents of Hanabali School recognize five main sources:

- (a) The Quran;
- (b) The Sunnah;
- (c) The Ijma of the companions of Prophet, if there is nothing to contradict them, and sayings of some of the companions when these are consistent with the Quran and the Sunnah;

- (d) 'Zaief' and 'Mursal' traditions (traditions having a weak chain of transmission and lacking in the name of some of the transmitters); and
- (e) Qiyas whenever it is necessary.

### **Zaidiyah School**

After the death of fourth Imam, Zayn ul Abidin, one faction of the Shias accepted Zaydi, one of his sons, as Imam. Thus Zaidiyah school or sect was founded. Zayd is the author of *Majmu-ul-Fiah*, but the work is available in spurious form. The Zaidis are represented in South Arabia, mostly in Yemen.

Main fetures

1. Recognition of principle of election as the basis of succesion.
2. Considering the Imam is nothing more than a 'right guide'.

### **Ashriyah school**

After the death of Imam Zayn ul Abidin, the majority, however, followed Imam Muhammad al-Baqir and after him Imam Jafar-as- Sadiq aFter the death of Imam Jafar the Sixth Imam a difference arose; the majority folowing Imam Musa al-Kazim and though him six other Imams, thus making twelve imams in all. Thus making twelve Imams in all. Thus ithna Asharis school of Shias was founded . Ithna Asharis, an Arabic term, means Twelvers.

It is the religion of ruling house of Persia. Almost half of the Muslim population of Iraq belongs to this sect. They are also found in Syria, Lebanon and Pakistan. The majority of Shias belong to this school. In India, they are next to Hanafis and mostly found in Lucknow, Murshidabad and Deccan. In Kashmir Itnna Asharis are in majority among Shias.

Main feature:

Believing that last of these Imams has disappeared and to be returning as Mehdi (Messiah).

### **Ismailiyah School**

The minority of the Shias, after the death of Imam Jafar did not acknowledge Musa-al-Kazim, but followed his elder brother, Ismail and are known as Ismailies. They are also called “Sabiyya” or “Seveners” for accepting only seven Imams.

In India, they consist of two groups, viz, (1) the Kohojas or Eastern Ismailis, representing the followers of the present Aga Khan, who is believed to be 49th Imam in line of the prophet, and (2) the western Ismailis, who are popularly called Bohoras and may be divided into Daudis and Sulaymanis and various other small groups. It must be pointed out that the word “bohora” merely means merchant and does not signify any particular school of Muslim law.

Originally this school prevailed in Egypt where it found favour with the fatimid Kings. It is for this reason, Sometimes called “Fatimid School”, it has small number of followers in several countries, such as central Asia, East Africa South Arabia, Iran Syria and Pakistan.

## **B.A. LL.B. III SEMESTER**

### **Family Law-I (Paper II)**

#### **Unit-1**

#### **Sources of Muslim Law**

#### **Sources of Muslim Law**

The word “source” means origin or originating cause. Here, it implies those sources from which Muslim Law has derived its authority. The following are the recognised sources of Muslim Law:

##### **A. Primary Sources**

- i. Koran;
- ii. Sunna (Tradition);
- iii. Ijmaz;
- iv. Qiyas;
- v. Equity and absolute good;
  - a) Istehsan
  - b) Al-masalih-al-mursalah
  - c) Istedlal
  - d) Istishab

vi. Ijtihab; and

vii. Taqlid

**B. Other Sources,**

i) Legal fiction

ii) Precedent

iii) Positive legislation

iv) Custom

**A. Primary Sources**

**1. Quran**

It is a book containing word-by-word instructions and commandments of Allah communicated to prophet Muhammad through angel Gabriel. It is the fundamental source of law.

The Koran was revealed in 22 years and some months. Out of this, revelation in Mecca was for 12 years, 5 months and 13 days. And remaining in Medina. It is divided into 114 chapters, called 'suras, each having a separate designation. The Koran contains about 6000 verses called 'Ayats'. The verses dealing with law does not exceed 200 and were revealed at Madina. The revelations made at Mecca pertain to theology, Islam and philosophy of life.

In interpreting Koran, one principle has to be observed. Some verses are abrogating (Nasik) and some abrogated (Munsuk). The latter verses are deemed to be repealed by earlier ones.

Since the Koran is of divine origin, it is postulated that Muslim law cannot be changed or modified by any human agency. Thus, in India, the Muslims proclaim that the union parliament or the State Legislatures cannot reform their law. However, such a contention of Muslims has been disregarded in many of the Muslim countries.

The importance of the Koran is religious, spiritual, legal, political, moral and social etc, its legal importance lies in the fact that it contains 200 verses relating to law, out of which 80 verses relate to family law and the rest deal with state and polity. The basis of Muslim Law relating to marriage, dower, divorce, guardians, inheritance, etc is provided in the Koran.

## **2.Sunna**

The term “Sunna” literally means a path, a procedure and a way of action. In pre-Islamic times the word “Sunna” stood for ancient and continuous usage of the community. In Muslim law, the term has come to mean the practice of the Prophet, which comprises of his sayings, deeds and tacit approvals.

The word “Sunna” is often confused with “Hadith” However Hadith is a story of a particular occurrence or instance, while Sunna is the rule deduced from the instance or occurrence.

Sunna is classified accordingly to its time of compilation, narration and authenticity, Like the Koran, Sunna is also not confined to legal norms. Sunna also deals with theology, trade, ethics, government, etc.

The importance of Sunna as a source of Muslim Law has been laid down in the Koran emphasized by the Prophet, recognized by his immediate successors and other companions, and accepted by all the important Muslim jurists.

A verse in the Koran runs as, whatever the Prophet gives, accept it and whatever he forbids you, abstain from it (49.7). It also says "he does not speak out of his desire. It is ought, but the revelation revealed (to him).

The Prophet once said to his followers: so long as you hold fast to two things, which I have left among you, you will not go astray; viz; God's Book and His messenger's sunna.

The successors of the Prophet followed the practice of the Prophet. If they did not know of any decision of the Prophet on a subject, they made enquiries from His companions about it, and if any of them informed them of any Hadith on the subject, they decided the case accordingly.

They however, always tested the reliability of the traditions

All the important orthodox Muslim jurists are unanimous in upholding the validity of Hadith as a source of Islamic Law.

The purpose of Sunna is exposition, explanation, and supplementation of the Koran. In other words, it is a key to the understanding of the teachings of Holy Koran and a guide to the implementation of the principles and laws enunciated in Holy Koran. Muslim law relating to gifts, wakfs and pre-emptions was introduced in Islam through the agency of sunna laws relating to marriage, dower, divorce, wills etc. though enshrined in koran, were developed to a great extent by traditions of Prophet.

### **3.Ijma**

The "Ijma" means an agreement, among followers of Muhammad (PBUH) in particular age on a question of law. Fayzee, a contemporary authority on Muslim

Law, defines 'Ijma' as a consensus of opinion among learned of defines 'Ijma' as a consensus of opinion among learned of the community.

The majority of jurists regard it as third source of Shariah, but modern jurists consider it to be the most important element in Islamic law. The authority of Ijma as a source of law is based on the Koran and the Sunnah as well as upon reason.

“O ye who believe; obey God and obey the Prophet, and those of you who are in authority, and if ye have a dispute concerning any matter, refer it to God and the prophet” (Koran 4:5a)

“There can be no consensus on error, or misguided behavior amongst my people”. [Hadith]

Ijma may be constituted by decisions expressed in words or by practice of jurists. Both are equally authoritative.

The important requirements for the validity of Ijma are (a) Once a question is concurrently decided, it cannot be re-opened by individual jurists, (b) one Ijma may be re-opened by a subsequent Ijma; (c) when the jurists of an age have expressed only two views on a particular question, the third view is precluded.

Ijma has been classified into three types:-

- a) Ijma of the companions of the Prophet;
- b) Ijma of the jurists; and
- c) ijma of the people while the first type is universally accepted and is incapable of being repealed, the other two types are somewhat disputed.

Participants in Ijma:



The majority of sunni jurists hold that Muslim Majtahids alone are competent to participate in Ijma. However, in certain fundamental matters, such as duties of saying 5 times prayers, fasting during month of Ramadhan, etc. the law has been established by Ijma of people.

Further, the Hanafis accept the opinions of the jurists of any age; while the Hanbalis abide by the Ijma of the companions of Prophet alone. The Malikis repose their faith on the consensus of the scholars of Medina.

Imam Shafi, who was an intermediary between the independent legal investigation and a tradition and a traditionalist, perfected the doctrine of Ijma.

On the other hand, the Shias, accept the Ijma emanating from the household of the prophet or unless the jurist consults endorsed in their consensus by the infallible Shia Imam.

Origin:

The koran and the sunna did not contain all the rules of law. With the expanding territories of Islam, situations arose, for which no direct authority could be found either in the Koran or the sunna. In such case, recourse had to be taken to the opinions “or joint deliberations of ‘Ahsab’ (companions of prophet) and ‘tabians’ (successors of Ahsab’ ) in this way, doctrine of Ijam got developed. The Hanafi jurists unequivocally assert that the law must change with the changing times, or, as Malik puts it, new facts require new decision.

Defect & importance:

The main defect in the doctrine of Ijma is the omission to provide a definite and workable machinery for the selection of jurists, who are qualified to take part in

Ijma, and for ascertaining, collecting and preserving the results of their deliberations in an authoritative form.

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 for in the Koran or the traditions, or where such provisions were not explicit, Ijma was regarded as authoritative not only for discerning 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 Koran. In the final analysis, both the Koran and the sunna were authenticated by Ijma.

#### **4.Qiyas (Analogy)**

The word “Qiyas” has come from a root which means measurement, accord, equality, etc. Qiyas or analogy is defined as the process of deduction from first three sources of law, the koran, the sunna and the Ijma by which the law of a text is applied to cases which, though not covered by the language, are governed by the reason of the text Qiyas should be distinguished from Rai (opinion). ‘Ria’ signifies individual opinion or reasoning i.e. sound and considered opinion. “When it is directed to ward achieving systematic consistency and guided by the parallel of an existing institution or decision, it is called Qiyas.

All the four schools of Sunni accept the authority of Qiyas as source of law. However, it was one of the causes of conflict among the Sunni schools, as all the schools do not agree as to the precise scope and importance of Qiyas for example, the Malikis interpret it as “the accord of a known things with a known thing by

reason of the equality of a one with the other, in respect of effective cause of its law. “According to the Haanafis, the Qiyas is an extension of law.

With the conquest and the expansion of the Islamic state, and with the advent of time, new cases came up which were not provided for in the koran, Sunna or Ijma. The jurists found themselves compelled in seeking solutions, and to have recourse to reason, logic and opinion. Analogy, thus became the fourth source of Islamic law.

A section of the Muslim jurists were opposed the use of Qiyas, quoted following koranic texts in support of their assertion:

“And we revealed the Book unto thee, as an exposition of all things” Koran 16.89)

“We have neglected nothing in the Book”. (Koran 6:38).

The jurists who advocate the exercise of Qiyas contend that the two texts cited above are valid and it is accepted every Muslim should seek guidance in all matters from the Koran, but they argue that the law relating to few questions alone are expressly laid down in Koran, and as regards the rest, it merely affords indications from which inferences has to be drawn. In their support, they cite many Koranic texts and traditions, a few of which are as follow:

“As for similitude we cite them for mankind but none will grasp their meaning save the wise”. (Koran 29:43) “Learn a lesson, O ye who have vision to See” (Koran 29 43).

Qiyas as a source of law:

The Qiyas as a source of law has been given the last position. It is considered to be subsidiary and subordinate to the Koran, the Sunna and the Ijma. The reason is that with respect to analogical deduction, one cannot be certain that they are what the lawgiver (Allah) intended, as human reason is liable to err.

## **5. Equity and the absolute good**

In most systems of law, something akin to the English doctrine of Equity, has existed. The concepts are present in Islamic law also. Sobhi Rajib Mahamassani in his *fiqh al-Tashrih al-Islam* (The philosophy of jurisprudence in Islam) groups under this head “those sources which have their origin in equity and absolute good.”

According to him, “Real justice and equity are the basis of the Shariat because it is divine in origin and comprises in its rules the fundamental principles of religion, morality and economic transaction. It was natural. Therefore, that these rules should overlap and be influenced by one another. It was natural also that the sources, bases, sciences and studies of these rules should be integrated in one whole.

### **a) Isthsan:**

Literally it means preferring or considering a thing to be good, it is also called, by some authors a juristic preference or equity. Istehsan is a doctrine by which a jurist is enabled to get over a deduction of analogy (Qiyas) either because it is opposed to text or consensus of opinion or is such that his better Judgement does not approve of it. Thus, Istishan is used to over-ride the qiyas.

In presence of a basis stronger than qiyas, such as a text of the Koran, the Sunna or the Ijma. The following example shall make the principle clear:

“The sale of a non-existent thing namely, a thing which is not in existence at the time of the signing of the contract, is void analogically as the benefits and services are not considered in existence at the time of contract. However, contract of hire was sanctioned by the Koran, the sunna and the Ijma.

All these are the bases which are more substantial than analogy. Thus analogy was set aside and transactions of hire were considered permissible through “preference” this sort of deduction, namely the setting aside of analogy in the presence of stronger source is called “Istehsan” or “preference”

Thus, Istehsan came to signify a breach of strict analogy for reason of public interest, convenience or similar consideration. This is essentially a doctrine of Hanafis, and other schools of the Sunnis did not look at it kindly.

**b) Al-masalih-Al mursalah (public interest)**

Shariah has religious and transactional aspect. The transactional aspect is based upon the interests of, and the benefit of people. So Imam Malik approved “public interest” as one of the sources of the Sharia. He named this new source al masalih-al mursalah. These interests have not been covered by any text of the Shariah and are therefore considered as mursal i.e. set loose from such texts.

The following examples illustrate this rule:

I. The imposition of taxes on the rich in order to meet the costs of the army and to protect the realm.

II. If the infidels in war shield themselves in their advance by Muslim prisoners of war, public interest permits the killing of the Muslim prisoners of war in the course of fighting the infidels, if such action be found essential to

contain and ward off the foe and to protect the interests of the Muslim people as a whole.

However, the followers of the Maliki school could not make much use of it to be too vague to permit any deduction of rule of law.

c) **Istidlal:**

Literally, the word “istidlal” means the inferring from one thing to another thing, in other words, Istidlal is an effort to reach at same rule acting on certain basis. It connotes a special source of law derived from reason and logic. An example of Istidlal, is as follows:-

Sale is a contract; the basis of every contract is consent; it is necessary therefore that consent be the basis of sale, this source of law is mainly recognised by the Malikis and the Shafis, while Hanafis regard it as only a special mode of interpretation.

(d) **Istishab:**

Literally, it means permanency. Technically, it is used to denote the things whose existence or non-existence had been proved in the past be presumed to have remained as such for lack of establishing any change. This principle was particularly emphasised by most followers of the Shafi, Ahmed ibn-Hanbal and adherents of the Imamiyyah Shias.

For instance; A man who has disappeared and whose whereabouts are not known, the Shafis would treat such a man as living for all purposes of law until his death is proved, so that his estate will not be distributed among his heirs and he will be allotted his share in the estate of a person, from whom he is entitled to inherit and who happen to die during his disappearance.

The Hanafis take the view that the presumption is that a particular state of things continue until the contrary is proved. Is valid only to the extent it serves to protect existing rights, and not for establishing or creating a new rights. Therefore, in the above case they would agree with the shafis, so far that they would not allow the property of the man who has disappeared, to be distributed among the heirs, but they would not recognise his right to inherit from the person who has died since the man's disappearance.

## **6.Ijtihad (Interpretation)**

Laterally means the extending of effort and the exhaustion of all powers but technically, it means the expending of effort in seeking, and arriving at rules from various sources of law.

Since Islamic law has been derived from the Koran, the Sunna, the Ijma, the Qiyas, Istehsan, etc. Ijtihad serves as a medium in deducing rules from these sources.

After Prophet's death the companions of prophet took recourse to the right of Ijtihad when need arose, under the shield of legislation approved and sanctioned by the prophet and the Koran.

However, towards the end of the abbasidi period. Suuni jurists declared that the Ijihad was closed. The reasons were:

- 1) a belief that the exposition of principles by four Sunni schols was sufficient to meet future requirements;
- 2) evolution of sectarian groups gave rise to prejudices and unwarranted hatred among the Muslims belonging to different schools;

- 3) moral degradation of Muslims. Many intelligent people became concerned with rulers of time and began to give futwas and practice Ijtihad for their pleasure;
- 4) Absence of qualified persons competent to make Ijtihad.

With the dawn of 19th century, Imams like Shyakh Muhammad abud advocated the unification of all schools, and return to source and true spirit of sharia.

The purpose of Ijtihad is not to replace divine law by secular law, but to understand supreme law. It aims to make Islamic law dynamic, in conformity with fundamental guidance of Sharia.

Ijtihad has been applied more extensively by the Imamiyah shais, than by the followers of the Sunni schools. To shias, the door of interpretation has always been open, and continues to be so.

## **7. Taqlid (Imitation)**

“Taqlid” means to follow the opinions of others without scrutinizing of understanding them. You know it fully that the Ijtihad was closed towards the end of Abbasid regime with closing of the gate of Ijtihad, the right of Ijtihad was replaced by duty of ‘Taqlid’ and since the every jurist was “Muqallid”(Imitator) bound to follow and accept the doctrine already established by his predecessor. In most cases the doctrine of Taqlid continues to rule the hearts of the Muslims of the world.

## **B. OTHER SOURCES**

### **1. Legal Fiction**



You should keep in mind that it is based upon the convention that “old law remains ostensibly unaltered, while in reality it has undergone changes and modifications.”

It can be illustrated as follows:

The inhabitants of Bukhara had been accustomed to long term leases of land. But, as the Hanafi school did not approve long lease contracts whereby the orchard was sold and the venter retained the right to redeem it. This form of sale was obviously a legal fiction to defeat the prohibition of long lease contracts.

This source is approved only by Hanafis and a Section of Shafis and no others.

## **2. Precedent**

Precedent means a previous instance or case which is, or may be taken as an example or rule or subsequent cases, or by which some similar act or circumstances may be supported or justified. The doctrine has never been a part of Muslim Law. The opinions of the jurists called Futawa, have great persuasive force, yet the Kazi was not bound to follow the Futawa, or if he thought it fit in his judgment, he could ignore it and render an independent judgment. But the common law doctrine of precedent became a part of Muslim Law during British period. Under this modern theory of judicial decisions of the High Courts attain a position of authority in respect of all branches of law and Muslim Law is no exception. The civil courts at various levels rely upon the decisions of the Higher Courts for the ascertainment of the provisions of Muslim Law judicial precedent is thus an important source of Muslim Law in India.

## **3. Legislation**

In India, during British period there have been many legislative modifications of Muslim Law. Shariat Act, 1937 was passed with a view to make Muslim Law

applicable to all Muslims, in those matters where they governed by some other law or usage. Similarly, Wakf Validating Act of 1913 was passed to validate wakf-alaL-awlad. However, the caste Disabilities Removal Act 1856 recognized the right of inheritance of a Muslim who has become apostate.