FAMILY LAW
of Muslims, Parsis and Christians of India

By
I.A. SAIYED
Advocate, Notary and Law Professor

Foreword by

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(Mumbai University Academic Council accepted ‘Administrative Law’ by Mr. I.A. Saiyed as Reference – Book for LL.B. Degree Course on recommendations of Board of Studies in Law – See Circular No. UG/214 of 2011 of University of Mumbai.)
FOREWORD TO THE THIRD EDITION

The Dictionary meaning of the word Family is “a brotherhood of Persons or Nations United by Political or Religious Ties.” If one looks at the word from this broad perspective, then the need for Laws, Rules, Regulations to preserve and foster the ties is better appreciated. For the survival of the family as an Institution, it is necessary to regulate the functioning of the same. It is incumbent, then, to define and set out the Mutual Rights and Obligations. Ultimately, the fraternity and brotherhood of those within the Institution helps them in interacting with others. The Constitution of India while recognising and guaranteeing freedom of religion envisages this spirit so that there is not only respect for each other, but there is “Unity in Diversity.” If the Constitutional Goal as set out in the Preamble to the same is to be achieved and fulfilled, then it is necessary that the basic Foundation of the Family as an Institution is strengthened and the Nation progresses as a whole. Ultimately, laws assist in removing disparities and inequalities and creating an equitable and just society. Laws relating to family aim at ending all discrimination and treating men, women and children alike. Therefore, it is imperative that such laws are known to all. They ought to be publicised widely so that the best of all religions comes to the fore. This also helps in removing deficiencies and shortfalls within them while fostering brotherhood and respect for all religions. Further, some myths, misconceptions and misunderstandings are also eliminated in such process.

This compilation assists in informing and educating on the aspects of marriage, divorce and succession in three prominent religions. That the compilation is comprehensive and complete is apparent from the fact that the Author had to reprint it in 2001 after its first publication in 1999. The second Revised Edition came in 2004. This is the third attempt and now the author has incorporated important developments including modifications and changes, if any. The Author needs to be commended for this effort. If a strong, independent, socialist, democratic and secular Republic is the need of the hour, then such publications create the right atmosphere. It is useful to all, including lawyers and students of law.

I wish the book all success and once again congratulate the Author.

(Justice S.C. Dharmadhikari)
FOREWORD TO THE SECOND EDITION

Mr. Saiyed has undertaken an enormous task of compiling the marriage and divorce laws applicable to Muslims, Parsis and Christians in India. The book also includes the Indian Succession Act. The author has, in his inimitable style, explained the provisions of the law. The latest case law has been discussed.

The book should prove to be a boon for all students of law.

21st April, 2003

(Nishita Mhatre)
Justice R.J. KOCHAR

FOREWORD TO THE FIRST EDITION

Mr. Imtiaz A. Saiyed, a friend for mine and a learned friend of others in the profession, doesn’t appear to believe in the planning of his family of books, though personally he has neatly planned his family. His creativity in the field of book-writing has continued incessantly. I had an opportunity to read his earlier three books on the law subjects. This is the fourth book which he is handed over to me and other class of readers, i.e., the law students and law practitioners, as also to those who have interest to know about the Personal laws. I have gone through this compendium of the eight enactments of personal laws governing the minorities in our country, i.e., the followers of Islam, Parsis and Christians. This compilation of the personal laws of the aforesaid three minority communities will instantaneously facilitate the students as well as lawyers while comparing the different topics or subjects under different enactments governing the minorities. The author who is also a practising lawyer and a law teacher, having found the practical difficulties of the students as well as the law practitioners in the court of law to get all the enactments at a time whenever needed and whenever issues are required to be compared with each other for final dissection and analysis of the law points, has rendered a yeomen service to all the concerned in this field. This is the advantage of an author who is also a law teacher as well as a law practitioner, as he knows where the shoe pinches at the time of teaching and practising. Many a times, some enactments are not readily available when required. This book will completely satisfy the momentary and important needs of the students, teachers and lawyers. Even the common man who has curiosity to know what are the provisions in the personal laws of the different communities can enrich himself by going through these pages.

In his commentary, the Author has tried to simplify the provisions of the Mohammedan Law by giving proper explanations and also the case law. The reading of his lucid commentary of the Mohammed in Law definitely gives an impression of his own objectivity. He has, in simple language, explained the various complicated topics of the personal law governing the Muslims of this country. He has also taken equal pains to deal with the other personal laws and their respective topics such as Marriage, Divorce, Succession, Guardianship, etc.

According to me, this book will be of immense help to the law students as well as the law practitioners. It would also be of tremendous use to the Judges and common people who will find all the personal laws of the minority communities, together at one united place which the Author has created. I hope, like in this book, all the communities in this country get together and be united and the least they can do is to co-exist peacefully and to prosper in their own interest which will also be in the national interest.

(R.J. KOCHAR)
Judge
Mumbai
25.12.1998
With immense pleasure, I put in the hands of my readers the Fourth Edition of my new Compendium of Family Law of Muslims, Parsis and Christians of India. I first thank my readers for they have well received my earlier edition of this Compendium.

The classic historic judgment of the Hon’ble Supreme Court of India on Triple Talaq has given immediate cause to me to revise this Compendium. The ruling has also unfolded the need of Uniform Civil Code and I have failed not in writing on it in this edition of my Compendium.

I know it is most difficult for anyone to spare time for writing a foreword. But the Hon’ble Mr. Justice M.S. Karnik of the Hon’ble High Court of Judicature at Bombay without any hesitation agreed to give foreword and that too in shortest period of time. I thank him for his gracious act of giving foreword to my Compendium of Family Law of Muslims, Parsis and Christians of India.

I thank Mr. N.M. Rajadhyksha, the Principal of New Law College, Mumbai for, without his inspiration, my Compendium would not have seen the light of the day. Professor Ajit J. Kenjale, Advocate practicing in Bombay High Court, childlike, was always with me to help me in my time of real difficulties. So also Learned Advocates practicing in the Bombay High Court, Mr. Satyajeet H. Joshi and Mr. Sandeep V. Mahadik were giving unstinted help to me unfailingly. I have no words to express my thanks, but I thank them all very much for their help and assistance to me. Ms. Ayesha Saiyed, a Law Student of Swami Vivekanand Law College, Mumbai ventured to take up the proof reading work and completed it in record time. I thank her for invaluable contribution in publication of this Compendium.

I cannot forget the entire team of Himalaya Publishing House Pvt. Ltd. because, without them, it would have been impossible to bring out this book and publish it so successfully. I thank the entire team.

I welcome the criticism from my readers because it guides me to raise the standard of this book.

Mumbai
25th December, 2018
I.A. Saiyed
The University of Mumbai has newly introduced the FAMILY LAW – I subject in the First Year LL.B. Course. It includes, the Mohammedan Law (other than Property Law), the Christian Marriages Act, The Indian Divorce Act, the Parsi Marriage and Divorce Act and the Indian Succession Act (up to Section 166 only).

This, FAMILY LAW, book is designed especially for the First Year LL.B. students of Mumbai University but, I am sure, it should also be quite useful to the students of other universities and the junior advocates. The busy senior advocates and the judges should also find it useful as this book gives exactly what they need, the Bare Act, a brief discussion and the Case Laws.

I am very much grateful to Mr. Justice R.J. KOCHAR of the Hon’ble High Court of Judicature at Mumbai for readily agreeing to write a FOREWORD to this book and for his having done so — before the period of limitation. Indeed, I am also thankful to my friend Prof. G.H. HAMLANI, Advocate, High Court, because without him, this book would not have seen the light of the day. I will be failing in my duty if I fail to thank my friend, H.M. SOLKAR, Advocate, High Court who has given his help in searching case laws. No doubt, the Himalaya Publishing House Pvt. Ltd. also deserve a basketful of thanks and I do offer them without any reservation. Last but not the least, I am also thankful to my readers.

I have taken utmost care to see that no mistakes and discrepancies are left out. But still if there be any, I offer my regrets. I will be grateful if the mistakes, discrepancies and/or any suggestions are sent to me for it will help me in improving the next Edition, undoubtedly, if there be any. I know that only criticism helps in improving and I am eagerly awaiting the criticism of this book.

Mumbai
25-12-1998

I.A. Saiyed
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Case Laws

1. MOHAMMEDIAN OR MOHAMMEDAN – MISNOMER

The term ‘Mohammedian’ or ‘Mohammedan’ is understood to have been put to use by Christians on analogy that followers of Christ are Christians and, therefore, followers of Mohammed are Mohammedian or Mohammedan. Reality is that Christians follow Christ because Christ is the God or Son of God. Therefore, no fault can be found in calling the followers of Christ as Christians. But Mohammed is neither God nor the Son of God because it is clearly said in Quran.1

1. Huwa Allah-u-Ahad = He is the God, the One (only) and;

2. Lam-u-Lid, Wa Lam-you-Lad = He begets not and not was He begotten.

In view of this Quranic Injunction, it cannot be said that Mohammed is God or Son of God. Then who Mohammed is the only question to be answered. Answer is that God (Allah) chose Mohammed as His Rasool or Messenger or Postman to deliver His messages to People. Therefore, followers of Message of God are not the followers of Messanger2 (Mohammed). As such, by no analogical deduction, it can be said that the followers of Messages are the followers of Messenger3 (Mohammed) to term them as Mohammedian or Mohammedan. So, the use of the terms Mohammedian or Mohammedan is incorrect and misnomer. The term used for the followers of Messages (of Allah) is Muslim. The word ‘Muslim’ is derived from the word ‘Islam’, which in its turn, is derived from the word ‘Salam’ (Safety). In its technical application, the term Islam means submission to the WILL of God. The term Muslim is a noun of the term Islam and means the one who adopts the faith of Islam. Thus, the Prophet Muhammad having not propounded any law of his own creation, it would be very erroneous to say that there is any law laid down by Muhammad to be called as Mohammedan Law. Hence, the use of the terminology ‘Mohammedan Law’ is a misnomer. The terminology 'Mohammedan Law', however, is a useful expression so far as India is concerned because, in India, not the whole of the Islamic law, but only a certain part of it, is applied to

1. Part 30, Verse 112
2. Rasool in Arabic.
3. Rasool in Arabic.
Muslims, Mohammedan Law, in India, can be said to mean: that portion of Islamic Civil Law which relates to (i) Inheritance/succession, (ii) Wills, (iii) Gifts, (iv) Wakfs (v) Marriage, (vi) Dower, (vii) Divorce, (viii) Paternity, Guardianship and (ix) Maintenance which is applicable to Muslims in India. From amongst these, only the Personal Law of Muslims, namely: (a) Marriage, (b) Dower, (c) Divorce, (d) Paternity, Guardianship and (e) Maintenance is discussed in this Book.

2. APPLICATION OF MUSLIM LAW

Muslim Law was applied to Muslims in British India as a matter of policy, which was the result of the adoption of a tradition inherited from the Mughal rulers. The earliest trace of acceptance of this policy is to be found in the Charter of George II, granted in 1753. In Warren Hastings’s plan for the administration of justice (proposed and adopted in 1772), when the East India Company took over the management of their territories in India it was provided in that Plan that Maulvis and Pundits should attend the Courts to expound the law and to assist the Courts in administration of justice. Later on, by Section 27 of the Regulation of 1780, it was laid down that in all suits of inheritance, marriage and caste and other religious usages, the laws of the Quran with respect to Mohammedans and those of the Shastras with respect to Hindus shall be invariably adhered to. By that provision Maulvis gave out conflicting traditions of Prophet Mohammad. There also came to be enacted various enactments having limited applications to the respective princely States to avoid conflicting opinions of Maulvis. These, enactments then came to be made applicable to Muslims in India. It may expressly be noted here that in India Muslim Law is partly codified and partly un-codified. To be exact and precise, it may be noted that in India, codified Muslim Law includes The Kazi/Quazis Act, 1880, The Muslim Personal Law (Shariat) Act, 1937, The Dissolution of Muslim Marriages Act, 1939, The Muslim Women (Protection of Rights on Divorce) Act, 1986 and The Wakf Act, 1995. The rest is un-codified Muslim Law although there is no reason or justification for the same.

3. PRINCIPLES OF INTERPRETATIONS

It was observed⁴ that in India there is presumption that parties are Sunnis to which the great majority of Muslims belong.

The general position, however, can be summarized as follows:

1. Where both the parties to a suit are Muslims and belong to the same school, the Muslim Law of that school will apply.

2. Where the parties to a suit differ in religion or do not belong to the same school of Muslim Law, the Law of the Defendant will apply.

3. Where a person, in good faith, changes his religion, or his school, ordinarily, the personal law changes with immediate effect from the time of such conversion.

4. Where a person who is convert to a new faith or has changed his school, the law of succession applicable to the estate will be the law of the region or the school which he professed at the time of his death.

It must be borne in mind that in India, a Judge cannot decide a case contrary to the law laid down by the Honorable Supreme Court of India or the Honorable High Court to which he is subordinate. It should also be borne in mind that Muslim Law is applicable only when a person is a Muslim. As such, it is imperative to know as to who is Muslim.

4. WHO IS MUSLIM?

The question is: Who is a Muslim? The answer is: Any person who professes the religion of Islam is a Muslim. The requirements to profess Islam are: (1) Belief in unity of God (Allah) and (2) the acceptance of prophetic character of Muhammad. To say it in Arabic:

\[
\text{LA}^5\text{-ILAHA}^6 \text{ ILLA}^7\text{-ALLAH}^8, \text{ MUHAMMAD UR RASOOL ALLAH}
\]

(There is) no any God except The God and Muhammad is His (God’s) messenger.

This is an indispensable minimum belief. A belief in excess of this is redundancy for the purposes of law. Although, strictly according to Islam, there may be many other requirements for calling one to be a true Muslim but the Courts have not accepted them as the requirements of Muslim. Because, the courts are not concerned with the peculiarities in beliefs like offering of number of prayers, manner and method of offering prayers, believing or not believing the first three Caliphs etc. Therefore, so long as the minimum belief exists, it must be held that person is a Muslim. Testing on this measure rod, we find that despite peculiarities in beliefs, certain communities like Bohras, Khojas, Shiites (Shias) are treated as Muslims. In one landmark case\(^9\) it was contended that Shias (Shia) who use abusive language against the first three Caliphs, are not true Muslims and should not be allowed to pray in a Sunni Mosque. It was held: first of all, a mosque belongs neither to Sunnis nor to Shias. Secondly, as Shias accept the belief in one God and prophetic character of Muhammad, they come within the pale of Islam and hence they are very much Muslims. In another landmark case\(^10\) a Moplah husband became an Ahmedia. Moplahs are strict Muslims whereas Ahmedia are not. Hence, when the husband became Ahmedia, it was taken as if he had renounced Islam. According to Islam, change in religion would sever marital tie. The woman, under these circumstances, married another man. Thereupon, it became a matter of public importance to the Muslim community; some holding that there was no bigamy whereas the Ahmedia always claiming to be Muslims, asserted that this was a clear case of bigamy. On prosecuting wife for bigamy, the lower court held that conversion (to the Ahmedia faith being considered by generality of Muslims as an act of Apotasy) has the effect of severing the marital tie and hence the second marriage by the woman was not bigamy. The High Court then held that conversion to Ahmedism is not an act of apostasy on the part of a Muslim and therefore the second marriage by the woman was a bigamy on her part. For our purposes, the paramount question is: Would peculiarities in belief in any sect, take away that sect from the fold of Islam? The answer provided by the High Court is that it does not. The ruling of the Court in that case shows that in order to find out whether one is a Muslim or not, the only test that is to be applied is: Belief in Unity of God and Acceptance of the Prophetic Character of Muhammad.

It is not necessary that a person should be born Muslim, it is sufficient if he is a Muslim by profession. Thus we have

\[
\begin{align*}
\text{Muslims} & \\
\text{By birth} & \Downarrow & \text{By conversion}
\end{align*}
\]

5. La = No.
6. Ela-ha = a God/any God.
7. Illa = Except.
8. Allah = Al (the) + Ilaha = God = the God.
INTRODUCTION

If a person is born Muslim, presumption is that he is a Muslim until he renounces Islam. Indeed, mere adoption of some Hindu forms of worship would not tantamount to renunciation of Islam. Therefore, if a person is Muslim by birth, what is most important is unequivocal renunciation of Islam. According to strict Islamic law, if one of the parents (either mother (female) or father (male) is Muslim, the child is treated as Muslim. However, in India, child is presumed to belong to the religion of his father. Therefore, in India, even if mother is Muslim child is not treated as Muslim. When a person is not Muslim, he can still be a Muslim by embracing the religion of Islam. He will be a convert Muslim in contradistinction to Muslim by birth.

When a person accepts a Religion in which he is not born, the process of accepting the Religion (in which he is not born) is termed as “Conversion” whereas, the process of a person going out of his own religion is termed as “Apotasy”. As is shown in the Table above, one can be Muslim by conversion. But surely and certainly, ‘Conversion’ must be bonafide and must not be malafide or colourable. In other words, change in religion must not be for some other purpose or for ulterior motive. If change in religion is not for change in “heart” or “belief” but it is pretended one, such a change in religion is not legal, valid but “fraud in Law”. One Helan, Christian woman, had married, according to Christian rites, to George who was married to a Christian woman. In order to legalize their union, John and Helan went through the ceremony of conversion to Islam. The Privy Council held11 that such a marriage was of doubtful validity and fraud on law. In another case, it was held12 that a formal profession of Islam is sufficient unless conversion is pretended. In other words, conversion must not be colourable and not a fraud in law. The formal conversion must be known to public at large. Therefore, conversion is always a Question-of-Fact and will have to be decided on the facts of that particular case.

5. VARIOUS SECTS OF MUSLIMS

A. Origin of Islam
B. Divide of Islamic World — Shia-Sunni
C. Shia-Sunni — Generally

A. Origin of Islam

According to Quran, Islam is a religion, which has existed since the beginning of mankind. It is, however, corrupted from time to time, as people forget the true faith. God, in His infinite mercy, sends to people Rasul (lit. messenger) so that he points out the way and warn people. Such Rasuls (messengers), earlier to Mohammed, were many including Abraham, Ismail, Moses and Jesus, the son of Mother Mary. So also was Mohammed, the son of Abdullah, the messenger of God, came to revive the true faith — submission to the Will of God.

B. Divide of Islamic World Shia-Sunni

The question of leadership came up immediately on demise of the Prophet of Islam, as it was necessary to have a leader (Iman-Caliph) or successor of the Prophet to assume leadership (Imamat-Caliphate) of Muslim Common Wealth. Hashamis, kinsmen of the Prophet always maintained that the Prophet had indicated Ali (son-in-law and also his kinsman) as his successor and by right also he could be the spiritual head. Thus, according to them, Ali was the only rightful and legitimate Iman (leader) of Muslim Common Wealth. Whereas, Koreshies say that the Prophet had not nominated any one as his successor and hence the leader (Caliph) will have to be appointed by

proceeding to election for the leader of Muslim Common Wealth. The faction, which adhered to Ali, is known as Shia, a term derived from the phrase, Shi‘at-E-Ali (faction or adherent to Ali). Whereas the faction, which believed in appointing the leader of Muslim Common Wealth, by election is called as Sunni, a term derived from the phrases, Ahlus Sunn-at-Wal Jamat (people of tradition and assembly). The unhappy events then divided the Islamic world into two, Shia and Sunni. Abu Bakar was elected to the office of Caliph by votes of Koreshies to become the first Caliph of Muslim Common World. Abu Bakar after two years nominated Omar as his successor and thus Omar became the Second Caliph. Omar reigned successfully for more than 10 years and died of a wound he received from a Persian slave. After Omar, Usman became the third Caliph and finally, after about 24 years, Ali became the Fourth Caliph. However, Shias do not give recognition to first three caliphs and always maintain that Ali is the only legitimate leader after the demise of the Prophet of Islam. In any case, it is worth noting that Sunnis too accept Ali as their Caliph and it is not that they do not pay reverence to Ali. Be it as it is, the fact remains that today the Islamic world is divided into two, Shia and Sunni.

C. Shia and Sunni Generally

Before entering into the thicket of Shia-Sunni, it may clearly be noted that Shia use the term ‘Iman’ whereas Sunni use the term Kalipha (Caliph) for the English Word Leader – Khilaf = Imam = Leadership. What is necessary for the present is to notice that the term “Iman” has to be understood in broader percept to denote the phenomenon when it had become necessary to have a successor or the leader, a ‘Temporal Ruler’ or a ‘Religious Chief or a Leader by Divine Right.’ The divergence in constructing the term “Iman” has divided Muslims into two, Shia and Sunni. Shia (Adherents of Ali) take the meaning of the term “Iman” as ‘leader by divine right’ and take Imamat (leadership) as hereditary. Therefore, according to Shias, since Ali is from the ‘House of Mohammed’, he alone has the divine right to be their “Imam” and so his successors too are the “Imams.” Shia are thus the adherents of Ali and, therefore, they are identified as “Shiat-e Ali” — Turning to Sunni, it may be stated that Sunnis (Ahuls Sunnat wal Jamat — People of Assembly) take the meaning of the term “Imam” as ‘the temporal leader’ and hence they believe that whenever it is so necessary, they can elect or select, their “Imam” from amongst them. Shias and Sunnis, as such, are so sharply divided that it is essential that we notice the differences in them.

- The followers of Ali or the Shi‘at-e-Ali (Faction of Ali) then came to be called as Shias. Shias accept only those traditions which come through Ali, Sunni accept in entirety, the traditions and perceptions of Prophet, which supplement the Quranic injunctions and treat them almost equal in authority in them.

- Imam is the leader by divine right because he is the successor of the Prophet or rather the descendant of Ali. Therefore, he is the final interpreter of Law on the earth. In appropriate cases, Imam can even legislate, Imam is more of a temporal ruler than a religious chief is. As such, in religious matters, he has to simply follow the path of Shariat.

- Shias repudiate entirely the authority of “Jamat” or the universality of people. As such, the Jamat cannot elect the spiritual Chief. If he is found unfit, he may be deprived of his Imamat.

- According to Shias, the oral precepts of the Prophet are supplementary to the Quranic injunctions and their binding effect depends upon the degree of harmony between the Quranic ordinances and oral precepts of the Prophet. After Turkish Revolution in 1924, the system of Caliphate is abolished.

- Shias reject not only the decisions but also the traditions, which do not come through Ali or the immediate successors of Ali who had seen the Prophet. Accept the authority of the Quran.
Imam is the descendant of Ali. According to Zaydis, a human being. According to Khojas, he is Hazir Imam. After 4th century of Hijara, there is no Mujtahid and hence the doctrine of Ijtehad is strictly constrained. Taqlid has come to be accepted by not the Qiyas and Ijmas, Taqlid (Law of Precedent), Qiyas (Law of Analogical deductions) and Ijma (agreement of juris-consults) are widely accepted.

Accept the authority of the Quran.

6. MUSLIMS — HOW DIVIDED?

![Diagram of Muslim Groups]

7. SCHOOLS OF THOUGHTS (SCHOOLS OF LAW)

A. Shia Schools of Thought
   (a) Zayadi Sects
   (b) Ishna Asharis
   (c) Ismailis – Seveners
      (i) Khojas
      (ii) Bohris

B. Sunni Schools of Thoughts
   (a) Hanafi School
   (b) Memons
   (c) Malaki School
   (d) Shafee School
   (e) Hambali School

A. Shia Schools of Thoughts
   (a) Zayad Sect: After Ali also, amongst, Shia, there arose the difference of opinion in respect of Imam. One of the sects that emerged out powerful was the follower of Zayd, called as Zaydis. According to Zaydis, Imam is a mere human being. Zaydis are found mostly in Yemen and North Persia.
(b) Ishna Ashari Sect: Strangely in India, the term Shia is applied to Ishna (also spelt as Ithna) Ashari School of Shia and hardly to any other Ishna Asharis are the followers of the 12th Imam. Their Imam partakes the Divine Essence. He is Ghayab (vanished) and Muntazar (awaited). He is deathless and will appear at the pre-ordained time. Most of the Shias belong to Ishna Ashari School and generally they are in Persia and princely states of India like Lucknow, Murshidabad, Deccan etc.

(c) Ismailis-Seveners: Imam Ismail was the Seventh and hence his followers, in India, are also called as the Seveners. Ismailis consist of two main groups, Eastern Ismailis, Khojas and Western Ismailis, Bohras who are further sub-divided as Dawoodi and Sulemani.

(i) Khojas: The word Khoja (Khuwaja) means the honourable person. The Khojas were originally Hindus of the trading class from Sind and Kutch-Sindh. The Sindh and Kutch was conquered early by the Muslims and the trading communities were converted to Islam. The conversion on large scale was mainly due to the efforts and personality of Pir Sadruddin who lived in Kutch, Kathiawar. According to majority belief, Pir Sadruddin was a missionary sent by Shah Islam, one of the ancestors of His Highness, the Aga Khan who is the head of the community in all religious matters and is called the Hazar Imam. Hazar (present-living) Imam is the descendant of the Prophet and is therefore entitled to absolute reverence; he is the final interpreter of the religion.

The original faith of Khojas was a hybrid between Hinduism and Islam. Gradually, the community has come more and more under the influence of Islam; even the original Ismailis have been attracted by the simpler form of the faith and some of them have formed themselves into two groups. The larger of these professes the Shiite Ishna Ashari faith, the smaller has adopted the Hanafi school. Therefore, the Khojas now consist of three groups: (i) followers of Aga Khan (ii) Shiite Ishna Ashari faith and (iii) the Hanafi School of Sunni law.

The legal position of Khojas may be summed up as follows:

Prior to 1937: They were governed by the Hindu Law of inheritance and succession which they had retained by custom. They were, however, not governed by the Hindu Law of joint family or partition and in all other respects governed by Muslim Law.

After the Shariat Act, 1937: As to the intestate succession, they are governed by Muslim law but as to testamentary succession, they retained their customary law and hence they can will away the whole of their property. However, making or revocation of Khoja WILL be on the principles of Muslim Law because even though they can WILL away the whole property, as per the customary law, they are governed by Muslim Law. As such, Khoja will be construed in accordance with the principles of Muslim Law.

(ii) Bohris: The word Bohra means a ‘merchant’. They are trading community doing business in all parts of the world but they are mostly established in Western India. They are divided into Daudis, Sulaimanis and in some other smaller branches. But as a group, they are called Western Ismailis to distinguish them from the Eastern Ismailis, the Khojas. They got separated from the other groups during the Fatimid regime.

The present religious head Mullaji Saheb of the Daudi Bohras is called as Dai-E-Mutalaq. The Dai is an assistant of Imam, the final religious head; but as the Imam is Mastur (hidden from sight) the Dai has large powers of interpreting religion. A peculiar belief of the community is that the Imam must always exist and he must be assisted by the assistant. As the Imam is in seclusion, the Dai is entitled to the equal reverence or oath of allegiance. The Sulaimanis have their own religious heads but, in essentials, their beliefs are almost identical. However, they are Sunni by persuasion whereas, the Daudi Bohars are more skin to Malik rather than Shiite Ithan Ashari School.
B. Sunni Schools of Thoughts

(a) Hanafi School: The Hanafi School is named after its founder Imam (Caliph) Abu Hanifa (699-767 A.D. = 80-150 A.H.) It is oldest and supposedly the most liberal of the four schools. The special characteristic of this school is reliance on the principles of Qiyas - Analogical deductions. Abu Hanifa employed Qiyas more because the science of Hadis had not developed fully by that time and no recognized collections were available. In essence, his system does not differ from the others. It would be interesting to know that Imam Abu Hanifa had a pupil, a founder of Shia School Imam Jafar-as-Sadiq but as he was also a pupil of Abu Abdulla and Hamid bin Suleman. Abu Hanifa left very few written books but he was fortunate to have his two celebrated pupils. Abu Yusuf, Chief Kazi/Quazi of Baghdad under Khalifa Haroon-al-Rasheed and Mohammed Shybani who left written work dealing with Abu Hanifa’s unwritten work. Two very authoritative texts of this school, are the Fatwa-E-Alamgiri (because Emperor Aurangzeb was an orthodox Hanafi Sunni Muslim) and the Hidaya originally written by Burhanuddin of Marghinani, a small town place in Russian Turkistan to the east of Bukhara. It was translated by Hamilton. These two books were translated early in the last century and were well known in the British Courts. The Hanafi School is also known as Kufa School. In fact, the vast majority of Muslims of the world taken in aggregate belong to Hanafi School. It is the dominant school in India, Pakistan, Asia Minor, Palestine and Cyprus. In Egypt, while the majority are Shafis, the State Code is Hanafi. In India, the Hanafi school was introduced by the Mughal Emperors who were Central Asian Turks who are mostly Hanafis. The Court observed that in India presumption is that the parties are Sunni Hanafi. A Hanafi may freely become Shafi and vice versa. So also Hanafi Kazi/Quazi may adopt, under certain circumstances, a rule of Shafi. It was laid down that a Hanafi woman on attaining majority can select a husband without reference to her father. But a Shafi woman cannot. But she can convert herself to Hanafi and can do so.

(b) Memons: The Memon is perhaps a corruption of a term Maumin means a believer. The Memons are divided into two groups — Kutchhi Memons and Halai Memons. The Memons like the Khojas are coverts from Hindu trading community, the Lohanas from Kathiawar Kutch. The Kutchhi Memons had until 1938 retained their own customary law which was identical with Hindu Law. After the Kutchhi Memons Act, 1938, they are governed entirely by the Hanafi Law. The Kutchhi Memons Act, 1938 was replaced by the Kutchhi Memons Act, 1942 however, legal position remains that they are governed entirely by Hanafi Law in all matters. Similarly, Halai Memons too are governed by the Hanafi Law. It was held that Kutchi Memons are governed by Muslim Law in all matters of succession.

(c) Malaki School: The Malaki School is named after is founder Malik Ibne Anas [713-795 A.D.-90-179 A.H.] Malik Ibne Anas was inhabitant of Madina and so the school founded by him is known as Madina School (whereas Hanafi School is known as Kufa School). Malik gave a ruling that an oath of allegiance given under duress (to the Abbasids of Madina) has no binding force. Therefore, Abbasids of Madina looked upon him with wrath. But later on, he was forgiven. Although he was taught by a teacher who emphasised independent exercise of reason in interpretation, Malik leaned towards jurisprudence based on Koran and Hadis. He followed the Hadis of Prophet and when traditions conflicted, Malik depended on Ijma of Medinese Mujtehids (Muslim scholars from Madina) for the solution Therefore, the learned modern critic Schachit has observed that Malik’s tendency to consistent systematic reasoning is secondary to his dependence of prevalent usage by tradition. His reasoning is inspired by practical expediency and the tendency to Islamize. The teaching of Malik spread from Madina to Morocco, Upper Egypt, Central and Western Africa, Algeria and Spain. We, in India, have no Malikis.

15. Abdul vs. Provider V, AIR 1954 Mad 96.
(d) Shafee School: The Shafee School is named after its founder Mohammad Ibne Idris As-Shafi (760-820 A.D. — 150-204 A.H.). He lived, a part of his life, at Baghdad and the rest in Cairo. He was a pupil of Imam Malik and also of Abu Hanifa. Modern critics place Imam Shafi very high above Malik and also Abu Hanifa. Modern critics place Imam Shafi very high as a Jurist. He is one of the greatest jurists of Islam and the creator of Classical Theory of Islamic Jurisprudence. He was foremost in methodology of law and jurisprudence. He was foremost in methodology of law and jurisprudence. He was responsible for the doctrine of Qiyas. He established Ijma as a source of law. The doctrine of Shafi schools spread to Egypt, hejas, South Arabia, East Africa and India. Konkanis of Mumbai/Maharashtra and Moplahs of Malbar are Shafis.

(e) Hambali School: The Hambali school is named after its founder Ahmed Ibne-e-Hambal (780-855 A.D. = 164-241 A.H.) from Baghdad. He was a pupil of Imam Shafi but was an orthodox traditionalist. He was such a puritan that he rejected everything which was opposed to Traditions (Sunnas of Prophet Muhammad). Imam Ibne-e-Hambal, one day, wanted to eat watermelon. But before eating, he reverted to Quran and Hadis and he found no guidelines for eating watermelon and therefore, he did not eat it. Hambal being the traditionalist did not accept doctrine of Ijtihad. He perfected the doctrine of Usool and collected 80,000 of Ahadis (plural of Hadis). The Wahabis are Humbalis localised mostly in the centre of Arabia and are nowhere else to be found. In India, there is a sect known as Ghaair Muqqallad who do not follow any school and who are akin to Wahabis; compelling the Muslim communities to give up their customary rights which are contrary to Islamic Law, to merge into the general Islamic community and to be governed exclusively by the laws of Shariat.

8. WHAT IS LAW?

A. Generally
   (a) Shariat
   (b) Shariat-Fiqh Distinction
   (c) Fiqh
      (i) Generally
      (ii) The Classical Theory of Fiqh
      (iii) The Modern Theory of Fiqh

B. Source of Law
   (i) First Source of Law — Quran
   (ii) Second Source of Law — Sunna
   (iii) Third Source of Law
   (iv) Fourth Source of Law
   (v) Other Sources of Law
      (a) Isti-Hasan
      (b) Isti-Salah
      (c) Ijtihad
      (d) Taqlid
      (e) Fatwa
A. Generally

Before we proceed to learn the Islamic notion of law let us first understand, in general, the meaning of the term “Law”. We may be compelled to act in accordance with certain principles because (i) God or (ii) the king or (iii) the Assembly (of wise men) or (iv) the Leaders of the Community or (v) Social Customs desire us to do so, for the good of the people in general. Dharma, as defined by Hindu Lawyers, implies a course of conduct which is approved by God. Then, what is the Islamic notion of Law?

(a) Shariat: There is a doctrine or theory in Islam known as ‘Ilmul Yaqin’ (certitude). According to this theory, what is good (Husna-beautiful) must be done and what is evil (Qubh-Ugly) must not be done; and that is law. What is good (Husna) and what is bad (Qubh) has to be answered with reference to Quran and Sunna. Thus, Quran and Sunna are the principle roots of Islamic Law. If there is nothing either in Quran or in Sunna to answer a particular question which is to be answered, we have to follow the dictates of our reasoning in accordance with certain definite principles. These principles constitute the basis of Canon Law or Shariat as Muslim Doctors understand it.

It must always be borne in mind that the ‘Islamic Law’ is not the result of legislative activity but a science developed by juristic thought. Further while Shariat means the Islamic Law, the Shariat Act means the enactment passed in 1937 whereby the Law of Islam (i.e., Shariat) is restored to Muslim residing in India.

The word Shariat literally means the road to watering place, the path to be followed. As technical term it means the Canon Law of Islam or the Doctrine of Duties or the Totality of Allah’s Commandments. Each one of such commandment is called ‘Hukm’ (Pl, Ahkam). Shariat, the totality of Allah’s commandments and it embraces all human actions and for this reason Shariat is not the Law in the modern sense. The Law, in the modern sense of the term, under the Islamic Law is known as Fiqh.

(b) Shariat — Fiqh Distinction: The distinction between Shariat and Fiqh is undoubtedly narrow and very often Muslim Doctors themselves have used the terms synonymously. However, it can be safely said that the Shariat is a wider circle and embraces in its compass all human actions. Fiqh is the narrower one and deals with legal acts. Shariaiat reminds us of ‘ilm’ (i.e., one may be ‘alim’) but unless he possesses independent judgement, i.e., capacity to decide correct and binding rule of law, one cannot be a Fakih (jurist or a person skilled in law). Therefore, Fiqh means knowledge (ilm) plus independent judgement. Fiqh is the term used for the Law as a Science. Whereas term Shariat is used for the Law as divinely ordained path. The path of Shariat is laid down by God and his Prophet, the edifice of Fiqh is erected by human endeavour. In the Fiqh, an action is either, legal or illegal – permissible or impermissible. In the Shariat, there are various grades of approval or disapproval. According to Shariat religious injunctions are of five kinds.

1. Farz — Strictly enjoined like 5 times prayers.
2. Haram — Strictly prohibited like taking wine.
3. Mandub/Wajib — Advised to do prayer on Ed.
4. Makruh — Advised not to do, not eating certain type of fish.
5. Jayaz — Law is indifferent, like traveling by Air.

From the above, it is now easier to comprehend the distinction between the Shariat and Fiqh. It is as under:
1. Wider circle covering all human actions legal, moral etc.
2. Reminds us of revelations through Quran and Hadis.
3. It is of divinely origin.
4. Totality of Allah’s Commandments
5. Law as divinely ordained path

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<tr>
<th>Shariat</th>
<th>Fiqh</th>
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<td>1. Wider circle covering all human actions legal, moral etc.</td>
<td>1. Narrower circle and deals with legal acts.</td>
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<tr>
<td>2. Reminds us of revelations through Quran and Hadis.</td>
<td>2. The ilm is the basis of approval of any legal act</td>
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<td>3. It is of divinely origin.</td>
<td>3. It is manmade.</td>
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<td>4. Totality of Allah’s Commandments</td>
<td>4. Deals with only those Commandments which deal with legality of the human acts</td>
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<td>5. Law as divinely ordained path</td>
<td>5. Law as a science,</td>
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(c) Fiqh

(i) Generally: Literally it means ‘intelligence’. It is a name given to the whole Science of Jurisprudence or it is the science of Islamic Law of one’s rights and obligations derived from the Quran, Sunna, Ijma, Qiyas. It must also be pointed out that the Fiqh has been divided into two viz. Usul and Furu. The Usul literally means roots of law and the Furu means branches of law. The Usul deal with principles of law and may be linked to our modern Jurisprudence. While the Furu deals with the law as it is actually applicable in the Courts of Law.

(ii) The Classical Theory of Fiqh: Abu Hanifi’s definition of Fiqh stresses the moral aspect while most of Islamic authorities define in terms of its basic constituents. According to classical theory, Fiqh is the knowledge of one’s Rights and Obligations derived from (1) Quran, (2) Sunna of the Prophet or (3) the consensus of opinion among the learned (i.e., Ijma) or (4) analogical deductions (i.e., Qiyas). The classical view is founded on the oft-quoted tradition of Muaz (Muadth). The Prophet sent Muaz, one of his companions, as Governor of a Province — Yemen and also appointed him as the Chief Justice, the distributor of Justice in Yemen.

Prophet is reported to have asked him:
He is reported to have replied:
And if thou findest nought therein?
According to the Traditions of the Messenger of God.
And if thou fondest naught therein?
Then I shall interpret with my reason.
And thereupon the Prophet is reported to have said: Praise be to God who has favoured the Messenger. His Messenger is willing to approve the appointment. This is an important tradition (Hadith) which emphasizes the principle that the exercise of independent judgement, within certain limits, is not only permissible but praiseworthy. A noteworthy feature of this Hadis is that the Quran is given pre-eminence and next come the practice of the Prophet. Although consensus is not mentioned specifically, it prepares the way for it. And if all these sources (Quran, Sunna and Consensus) fail then the opinion of distinguished persons (Qiyas) may also have the force of Law.

(iii) The Modern Theory of Fiqh: In the last century, Ignaz Goldzihar began the scientific criticism of the Hadis Literature and he may be said to be the originator of the Modern Theory of Fiqh.

According to him, the Prophet of Islam did not create a new system of law; he took the existing Sunna (prevailing usages) and modified it in two ways. First by direct revelations, that is the ordinances of the Quran and second by his own teachings and traditions (Hadith/Hadis). Modern research tends to show that a major portion of the traditions (Hadis) attributed to Prophet is apocryphal. Goldzihar has shown that the great majority of traditions even in the classical collections do not belong to time to which they claim to belong. Therefore, according to Goldzihar, Hadis may thus be one of the two things (1) a form advocated by the Prophet in opposition to the prevalent usages or (2) practice put forward by certain jurists to support their own theoretical views. Thus, it can be said that the spirit to law, in Islam, is religious and ethical but the contents are based upon pre-Islamic customs and usages. The matter is non-Islamic but the spirit is Islamic.

<table>
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<tr>
<th>Classical Theory of Fiqh</th>
<th>Modern Theory of Fiqh</th>
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<tr>
<td>1. Classical theory is founded on tradition of Muaz.</td>
<td>1. Modern theory was propounded by Ignaz Goldzihar</td>
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<td>2. Gives more competence to Quran, Hadis and moral aspects.</td>
<td>2. Pays little regard to ethical and Spiritual norms.</td>
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<td>3. Knowledge of one’s right and obligation derived from Quran and Sunna</td>
<td>3. Has the scientific value and contents is of Law are based on pre-Islamic customs and usages.</td>
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Having thus considered the Modern theory and the Classical theory of Fiqh, we now turn to the different sources of law, viz. Quran, Sunna, Ijma, Qiyas, etc.

B. Sources of Law

(i) First Source of Law: Quran

According to classical theory, the Quran is the first source of law. Its importance is religious an spiritual, no less than the law, A verse (Ayat) of the Quran is always held of paramount authority. The Quran although resembles a code, in that it derives all its authority from itself, yet it does not in any portion of it, profess to be a code complete in itself. The Quran was revealed to Prophet through Gabriel in fragments, during the period of 22 years (609 A.D. to 632 A.D. after Christ). Either God would send message or Prophet would put his queries and would in turn get a reply in the form of message. All these messages (Verses — Ayats) were memorised by the Prophet (he was illiterate and did not know reading and writing) and then by his followers. His followers also had put down the memorised verses (messages) on Date-tree or palm tree leaves, white stones and even on their breasts. Abu Baker who succeeded Prophet sought for the Quran and collected it for the first time. The compilation work was finally completed by Usman, the Third Caliph and he put them in book form, the Quran. All the transcripts now existing are from Usman’s edition and
since then there has been no alteration. Probably no other work in the world has remained for centuries so pure a text. There are 6000 verses (Ayats) set out in the Quran in order of revelations. 200 of them deal with law and only 80 of them deal with personal law. It is alleged by Shias that Usman has suppressed the revelations about Ali.

(ii) Second source of Law: Sunna (Traditions of Prophet)

According to classical theory of Fiqh, the second source of law is sunna or the traditions of practice of the Prophet. The principles laid down in Quran found their way in the hands of the Prophet. The Prophet lived strictly in accordance with the injunctions of the Quran and his was the Model Behaviour. Practices, precedents and traditions of Prophet Muhammad are known as Sunna. The terms Sunna and Hadis must be distinguished and understood. Hadis is the narration of a particular occurrence in the life of the Prophet of Islam whose was Model Behaviour. The rule of law deduced from the Hadis is called as Sunna. the word Sunna in Pre-Islamic time, was used for an ancient and continuous usage, well established in the community. Later, after the advent of Islam, the term was, however, used to mean the practice, precedents and traditions of Prophet Muhammad. Sunnas are classified in three groups (1) Sunnatul-nil, what the Prophet did (2) Sunnatul-taqrif - the Action - conduct done in presence of Prophet with his approval or rather without his disapproval and (3) Sunnatul-qual — the Prophet enjoined expressly by words. Ahdis (plural of Hadis) are not written down or noted anywhere. There are many collections of Hadis. The authoritative collections are those of Tirmidhi, Bukhari, Muslim, Samin and Sasai. Although modern research tend to show that a large number of traditions (Hadis) ascribed to the prophet are of late origin and therefore not free from doubt, nevertheless, their importance, in law, is never minimized. It may also be well remembered that Shias give no credence to a Hadis which does not come from the House of Ali.

(iii) Third Source of Law: Ijma (Agreement and Juris-Consults)

According to the classical theory of Fiqh, the third source of law is ijma. Failing the Quran and direct precedents or practice of the Prophet himself, the best guide to the law was the consensus of his companions. Muslim Doctors (Faqihs) define ijma as agreement of jurists amongst the followers of Muhammad in a particular age on a question of law. In ijma, opinions of Juris-consult coincide. Although the Muslim legists (Doctors) give it the third place, the modern critics consider it to be the most important. A tradition summarises the principle: ‘My community will never agree upon error.’ Rules deduced on the basis of ijma have varying degree of sanctity in different schools. But all schools agree that where there is a valid agreement amongst juris-consults (Fakih), no divergence can be allowed. In other words, once ijma (Agreement of Juris-consults) is established it cannot be repealed. The ijma of companions of prophet rank first. The next in order are the ijma wherein jurists agreed and others did not dissent. The agreement of Juris-Consults on a new point come third in order and last ill them come the ijma on which earlier there was disagreement amongst juris-consults. Hanafis regard as a fundamental source whereas Shafis give second place. Malakis place ijma of scholars of Madina above others.

(iv) Fourth Source of Law: Qiyas (Analogical Deductions)

The Fourth Source of law, according to the classical theory of Fiqh, is Qiyas. Qiyas means analogical deductions. Qiyas does not lay down a new principle but it is a kind of permissible exigency. Qiyas is a weak kind of Ijtehad. The term ‘rai’ and ‘qiyas’ are often misconstrued, individual reasoning ill general is called ‘rai’ opinion. Y\textquotesingle\textquotesingle en rai (opinion) is directed towards achieving systematic consistency or decision it is called Qiyas. Hambalis oppose the Quiyas so also Shias (because, according to them, only Imams can change he law). Shafis also regard Ijtehad and Quiyas as contradictory of their views.
(e) Other Sources of Law

In addition to the above main Sources of Law, we find that the law is occasionally supplemented by other principles also. The following can be summarized.

(a) Isti Hasan — Jurisic preference — Equity

Imam Abu Hanifa adopted the principle of Isti Hasan for the relief from absolute dependence on analogical reasoning. Isti Hasan literally means liberal construction or juristic preference or what we call today as law of equity. This term was used to express liberty of laying down such rule as may be necessary and the special circumstances may require. The objection taken against it is that it left an almost uncontrolled discretion in the exposition of the law.

(b) Isti Salah— Public interest

Imam Malik who will be presently mentioned as the founder of a school of Sunni law, also felt the necessity of surer test for the development of law on right lines than the use of analogy. He approved the introduction of Isti Salah (public interest) in preference to Isti Hasan. He laid down that ordinarily, analogy was used to expand law but if it appears that a rule indicated by analogy is opposed to general utility then Isti Salah (principles of public interest) should be resorted to. Under this system, rule of law pointed out by analogy could not be set aside either: (i) on the opinion of the individual expert of the law or (ii) with reference merely to the circumstances of particular case: it could be disregarded only if it would be harmful to the public in general.

(c) Ijtehad — Exercising one’s own reasoning to deduce rule of law (Shariat)

When Quran and Hadis did not disclose the precise line to follow, Ijtehad came to be born. Ijtehad means independent judgement or considered opinions of individuals or exercising one’s own reasoning to deduce a rule of Shariat. As a method of reasoning in law, Ijtehad of prophet tersely has gained almost equal footing with the first four founders of the law. In deducing Ijtehad, Quran and Hadis cannot be over looked but exigency of time and public interest were also to be borne in mind. Where a legal principle is silent, Ijtehad can be used with advantage. But Ijtehad was the privilege of great scholars or Mujtahids. The authority of the Mujtahids (great scholars) based not on his holding any office in the State but is derived purely from the learning and reputation of the individuals. The qualifications of the Mujtahids consists of a complete knowledge of Quran i.e., he should know the sacred text by heart and should be able to say when and where each verse was revealed and he should also have a perfect knowledge of all the traditions (Sunna-Hadis) and all the branches of the science of law. He should, besides, be a man of austere piety. In short, the qualifications required are such that so far as the Sunni Law is concerned, after the death of Ibne Hanbal (856 after Christ) there have been no recognised Mujtahids. With the end of Mujtahids, the doors of Ijtehad no longer remained open. This is known as the closure of the golden gate of Ijtehad — Bad Al Ijtehad.

(d) Taqlid — Law of Precedents

After Ijtehad or rather on the closure of the Gates of Ijtehad, a parallel doctrine of Taqlid (Law of precedents) came to be in existence. Under Taqlid (literally, imitation) means following opinions of another person without knowledge o the Authority or the authority for such opinion. a Muslim had to follow the Law; every Muslim in the street could not be learned in the rules of Shariat, being
ignorant, he was asked to follow the opinions of those who knew better. Those who knew better (Ulemas) were denied independence of judgement in any vital matter. Hence, the vicious circle of Taqlid (imitation - Law of Precedents).

(e) Fatwas — Decisions of Muslim Judges

As already aforesaid, the Law sent down by Allah by direct revelations is recorded in Quran and what is sent down by him is recorded in Sunna/Sunnat of Prophet of Islam. Even the King has no authority to make law and therefore, the Muslim Kings called upon the Muslim scholars to guide them in the matter of Law. The opinions tendered by Muslim Jurists to King were accepted by King of enforce the Law in the territory of his kingdom. Therefore, the opinions of Muslim Jurists were always held in high regard. With the advent of time, even the ordinary Muslims would turn to such jurist and ask for his opinion. Such opinion of Muslim Jurist is referred to as Fatwas. In India, during the Seventeenth Century A.D. when Mughal Emperor Aurangazeb came in power, he appointed Shaykh Nizam Burhanpuri and four others to prepare a compilations of Fatwas. Accordingly, they sent questionnaire various juris-consults and Muftis. Their Replies are the collection of Fatwas, popularly known as Fatwa-e-Alamigir. However, Fatwas are not source of law.

9. UNIFORM CIVIL CODE

1. Introduction

At the outset, the two terms, “Civil” and “Code” appearing in “Uniform Civil Code” need to be comprehended. The term “Civil” relates to “Civil Law” in contradistinction to Criminal Law — because Criminal Law, all over India, is same, similar and uniform for all Citizens of all religions. The ‘Civil Law’ expression is of wider import and includes all Civil Laws of all specialization, like Labour Laws, Taxation Laws, Land Laws, Criminal Laws, Family Laws, etc. Therefore, for narrowing down the wider import of ‘Civil Law, the word “Law” is replaced by word ‘Code’ – to say – ‘Civil Code’ instead of ‘Civil Law’. But use of ‘Code’ gives wrong impression that it is the ‘Procedure’ of Civil Law because, generally, ‘Code’ is used for ‘procedure’. The statement (that ‘Code’ is used for ‘procedure) is fortified from the fact that procedural law is referred to as: (1) the ‘Code of Civil Procedure’ and (2) the ‘Code of Criminal Procedure’ for the procedure to be followed in Civil Courts and Criminal Courts respectively. Before going further, it is necessary to clarify that there is Substantive Law as well as Procedural Law. The “Substantive Law” is the Law from which all ‘legal rights’ flow to claim remedy under the Law. The Law relating to “Procedure to be followed” for enforcing Substantive Law is called as the ‘Procedural Law’. The Substantive Law is always very strictly adhered to or followed, the ‘Procedural Law’ is not; unless it is in the nature of “Substantive Law”. Coming back to expression Civil Code, it can be said that expression ‘Civil Code’ is not the Procedural Law but the ‘Substantive Law’ of Marriage, Divorce, Custody of Children and so on. In other words, ‘Uniform Civil Code’ means the same or similar or uniform Law of Marriage, Divorce, Custody of Children or Family Law or Personal Law for all Citizens of India whether they are Hindus, Muslims, Christians or Parsis.

2. Constitutional Duty

Having comprehended the expression ‘Uniform Civil Code’, it can now be said that, after independence, on 26th November, 1949, India gave to itself the “Constitution”. The Written Constitution of India invests ‘Powers’ in Parliament to make-and-unmake any law for the country. The Constitution, under Article 44, has laid down the Directive Principles of the State Policy to endeavor to frame Uniform Civil Code – for all Citizens and throughout the territory of India. But the Parliament failed to perform its constitutional duty by not framing the Uniform Civil Code. Therefore, the Hon’ble Shri K.M. Munshi, in the Constituent Assembly, in Parliamentary Proceedings, said: “if Uniform Civil
Code is not framed now then it will never be framed”. The prophesy of Hon’ble Shri K.M. Munshi has come true and till date, India has not framed the Uniform Civil Code. The reason for not framing Uniform Civil Code, in short, can be that the phrase (Uniform Civil Code) has in it the three confrontations; (1) Political, (2) Social and (3) Religious.

**Political:** The Nation is divided into two parties; one in favour of and one against the framing of Uniform Civil Code. Both have to play with the ‘Doll’ of Divide-and-Rule Policy to win the next Election. The ‘Doll’ to play with, in India, is the ‘Dividing of Hindus and Muslims’. Both Political Parties (one in Power and one in Opposition) play with this Doll to win the next election. Resultant is that India fails to perform its Mandatory Constitutional Duty.

**Social:** No doubt, there is unity of God inasmuch as, according to Hindus, God is One and also, according to Muslims, God is One. Yet, socially, it is most difficult, if not impossible, to bring them on one common platform.

**Religious:** The Constitution of India gives all powers to Parliament to make-unmake any and every Law. But any Law made by Parliament has to keep religious activities intact/unbroken so that all Religions are treated equally.

The aforesaid three confrontations (Politically, Socially and Religiously) are the hurdles in framing the Uniform Civil Code and the **bitter truths.** But the sweet truth is that there is **‘Uniformity in Diversity’** in Religions and Personal Laws. The same can be noticed from the following:

**A. The Uniformity in ‘Diversity of Religions’:**

**Religion of Hindus:** Generally, the scholars appear to have accepted that the word “Hindu” is derived from the river Sindhu otherwise known as Indus which flows from Punjab. The Persians pronounced this word as Hindu and named their Aryan brethren as Hindus. Those who are in India are Indians, the same way, those who lived on bank of Sindhu are Hindu but not those who follow any particular religion. Then what is Hindu religion? Indeed, it is difficult to define or even adequately describe the Hindu religion. Whatever it may be, but, surely and certainly, it is an admitted fact that it is the oldest religion which started to develop from 500 BCE. Further, it is admitted that Hindu Texts, “Shrutis” (Heard) and “Smritis” (Remembered) discuss: (a) theology, (b) philosophy, (c) mythology, and so on, and the Hindu “Trimurti” (त्रिमूर्ति) is the Only One God. Thus, Hindus believe in devotion to a Single God. But, then, in Vedic times, Indra, Varuna, Vayu and Agni came to be worshipped as God. Later on, Brahma, Vishnu and Mahesh came to be added. In the course of time, Rama and Krishna came to be added. Gradually, different philosophic concepts held sway in different sects and in different sections of the Hindu community and, as such, a large number of Gods came to be added. As a result, today, the Hindus present the spectacle of a very large number of Gods. But, truly, it is rather overgeneralization to say that Hindu Religion is Polytheism. The Hon’ble Supreme Court of India also declined to accept that Hindu religion is Polytheism – in other words, Hindu religion is Monotheism.

Though the term ‘Hindu’ is not defined anywhere but, surely and certainly, Jains, Buddhists and Sikhs are included in the term ‘Hindu’; may be – perhaps and in all probability – because these religions are offshoots of Hinduism as they all are idolaters and, in some respect, they flow from orthodox Hinduism. Therefore, they are governed by Codifying Statutes of 1956, namely, (1) Hindu Marriage Act, (2) The Hindu Succession Act, (3) Hindu Minority and Guardianship Act and (4) Hindu Adoption and Maintenance Act. Whatever, it may be but, even according to Buddhists, Jains and Sikhs, **God is One** as can be seen from the following.

16. Hindu-Trinity consists of: (i) Brahma, the Creator, (ii) Vishnu, the Preserver and (iii) Shiva, the Destroyer, who has “Trimurti” (त्रिमूर्ति – three forms).
Religion of Jains: The word “Jain” is derived from Sanskrit word Jina – Conqueror. One who conquers all inner passions like attachment, desire, anger, pride greed, etc. is called as Jaina. The three main principles of Jainism are ‘Ahimsa’ (non-violence), ‘Anekantavada’ (non-absolutism or dictatorship) and ‘Aparigraha’ (non-possessiveness). Jains trace their history through a succession of 24 teachers starting from Rishabhdeva and concluding with Mahavir. Therefore, it is more necessary to take notice of the fact that even according to Jains, Bhagwan Mahavir is the only God.

Religion of Buddhists: Buddhism originated from India in 4th and 6th Centuries BCE. It is believed that Siddharth (Buddha) was born to King Suddhodana and Queen Maya. Siddhartha (Buddha) grew up in Kapila-Vastu, a place in the plains of modern Nepal-India border. Buddha spent his life in today’s Bihar-UP. He reached enlightenment and gave his first sermon (in India) at Dhamek Stupa. Buddhism is a religion that encompasses a variety of traditions, beliefs and spiritual practices, based on teachings of the Buddha. Therefore, if one independently checks the ideology, philosophy and teaching of Buddhism, one will quickly reach to the conclusion that Bhagwan Buddha is the only God.

Religion of Sikhs: The word “Seekh” means Learner. Sikhism originates from Punjab region of Indian Subcontinent during 15th Century. The fundamental beliefs are enshrined in the “Guru-Granth-Sahib”. The religion is based on the teachings of Guru Nanak, the 1st Guru. Sikhs believe that: (1) for feeling presence of God, meditation (Simran) on the words of Guru-Ganth-Sahib through Kirtann and Jam Japo is essential and necessary, and (2) to have control on Five Thieves, namely, Lust, Rage, Greed, Attachment and Conceit/Pride. Sikhism is monotheistic religion and believes that God is omnipresent and that he is Va hi gu r u [means – God is Nirakar (shapeless), Akal (timeless) and Alakh (invisible to physical eyes)]. All it means is that Sikhs believe in faith and meditation in the name of One Creator – One God.

Religion of Muslims: Muslims believe that, with the first human being (Adam and Eve who came from heaven to earth) came the religion of Islam. The term Islam is derived from the word “Salam” (Safety) and word “Muslim” is a noun of the term Islam and means one who is on the ‘road of safety leading to God’. It is believed (by Muslims) that, with the advent of time, people lost their ways and were not on the ‘road of safety leading to God’. Therefore, God sent many Rasools = Messengers (including Noah, Abraham, Moses, Jesus and lastly, Mohammed) to bring people to ‘road of safety leading to God’. The God sent messages (verbally) to Muhammad through angel Gabriel (Jibril) to bring people to ‘road of safety leading to God’. Those messages (sent by God to bring people to road of safety) are recorded in the Quran. All it means that Muslims believe: “(there is) No God except the – God and Mohammed is Messenger of the – God” – in Arabic – “La18 ila19 ha20 Al21 + ila20 ha16, Mohammed ur Rasool Allah.”

Long and short of it, Muslims believe in Unity of God.

Religion of Christians: Christianity is an Abrahamic Religion that began in the mid-first century. The Modern-world Scholars virtually agree that Jesus was a Galilean Jew. He was conceived by Holy Spirit and born of a virgin, named as Mary. Jesus is the person of the Trinity = Threesome: (a) Father, (b) Holy Spirit and (c) Son. First and third person of the Trinity is the Jesus. Jesus began his own ministry, preaching his message orally. But then Jewish Authorities arrested Jesus, tried him and, at the end, Pontius Pilate ordered him to be crucified only to rise thereafter. His followers have become the Christians. Recapping it, Christians believe in unity of God.

18. La=No, 19. Ilaha=(any) God. 20. Illa=Except. 21. Al=the