CHAPTER 1

INTRODUCTION

1.1 Pre-Islamic Arabian Society

For a proper study of Muslim law, it is necessary to have some knowledge of the background, origin and the historical development of Islam. Arabia, where Islam was born, was desert. The land was mostly barren and full of sanddunes. The climate was very hot with burning sun in the day and cold nights. Occasional sand storms raised clouds of dust. From one end to another, there used to be no trace of water or vegetation. Only palm and date trees or some herbs of the desert could be seen at distant places. The nature was not at all generous and the life of the people was very hard. Nowadays there is some improvement in the Arab countries, yet there is little change in the climate. In those days, when Islam was not promulgated, the Arabs lived in groups. They had to roam about from place to place in search of water and pasturage for their cattle. Wherever a stream of water or an asterian well was found they used to settle till the resources exhausted. Thus, the Arabs of those days (called Beduin\(^1\) or Baddoo) moved as nomads and except in few cities like Mecca or Madina, there was no settled form of society. Main occupations of the people of Arabia were trade and cattle-breeding. Their cattles were camels, sheep and horses. Arabs had no common religion. Majority of them worshipped Christians and Jews. But, it is interesting to note that a bulk of the population had forgotten the fundamentals of their specific religion and

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\(^1\) The Beduin of the desert has changed but little in the two or three thousand years within historic memory. (Asaf A. A. Fyzee; *Outlines of Muhammadan Law*, p. 2 (2008).)
generally believed in the principles of vengeance, courage, freedom and hospitality. This was obvious, because the life of desert was so hard that the first task before an Arab was to manage the means of his livelihood rather than to give time for any philosophical thinking about his God or religion. As the Arabs used to move from one place to another in groups, there was no permanent or static society. Therefore, there was no settled form of Government or administrative machinery to control the people. Arabs were divided into tribes and sub-tribes headed by the elected Chiefs. They were known as Caliph or Khalifa. Duty of the Chief was to represent his tribe and to control the tribesmen by enforcing customs and usages. Customs and usages were the only known laws to control the society. Broadly speaking, such customary laws were divided into two categories. First, there were intertribal customs to regulate the relations of one tribe with another. Secondly, there were customs which regulated the conduct of individuals within the tribe. 

Customary laws of Arabian society before the advent of Islam were very peculiar. Most of the customs were unreasonable and inhuman. Nobody can believe today that they were laws of society. For example, there was a custom to bury alive an unwanted female child. Usury i.e.charging a very high rate of interest on the debts was an usual practice, gambling was prevalent throughout the Arabian society. Slavery was very common and the slaves were treated as valuable properties of their masters. Customs, which regulated the relationship of a male with females, were all in favour of the males. The position of women was very bad. Women were not given human values; they were treated as properties. Their status in the society was so degraded that they lived like slaves. A girl could

be sold and married to anyone by her guardian without her consent. There was no restriction as to the number of wives and an Arab could marry with as many women at a time as he liked. Except a few close blood relations there was no restriction in marrying a girl. Arabs who followed the Magian religion could marry their own daughters and sister.\(^3\)

An Arab husband had unregistered rights to divorce his wife whenever he liked. Pre-Islamic customary law of Arabia recognized the practice of adopting a son. Such a child was treated as a natural born son of the adopter. Right to own property and transfer properties was recognized. Common mode of the transfer of properties was exchange. But, later on money was also in use. A woman could also own properties but it was under the sole supervision of her guardian or husband. Like a slave, a female too had no right of inheritance. After the death of an Arab his wife, mother, sister or daughter etc. had no share in his properties. Crimes were dealt with severely. The object of punishment in the cases of crimes was deterrent and retaliatory. Sometimes blood money i.e. compensation for injury was also realized from offenders. In thefts, the right hand of the thief was cut off. A person who committed adultery was stoned to death. But later on the punishment for an adulterer was that his face was painted black and there was public whipping. This, in brief, was the social structure of Arabia where Prophet Mohammad was born and preached the religion of Islam.\(^4\)

1.2 Muslim’s Prophet

Prophet Mohammad was born at Mecca on the 17th of Rabi al-awwal of the 53 years before the migration (Hijrat) 570 A. D. His father, Abdullah, was from the family of Hazrat (Prophet) Isma’il and had died before he could see his son. His mother (Ameneh) was one of the most pious women of that time.

In Islamic thought, it has always been emphasized that although Prophet Muhammad was an apostle of God, he was a human being and not an embodiment of God. However, the Prophet was the perfect human being and the best creature, since he was the closest person to God and was entrusted a heavy responsibility as God’s chosen person. He was a manifestation of all virtues and beauties, and an embodiment of the message he advocated. He was, as the Quran says, “the perfect man and an excellent exemplar for all mankind”. 7

The blessed Prophet was so kind, trustworthy and humble that all the people loved him; hence, his teachings, moral and otherwise, became widespread all over the Arabian Peninsula. To him, there was no worship better than helping people. Despite all his worship and good deeds, he did not consider himself superior to others. Though he was the closest person to God and a perfect exemplar of divine virtues and values, he was unassuming and eager to guide people to the right path. It was these moral characteristics that made

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6 There are, different views regarding the date of the Prophet’s birth. According to Ameer Ali, Prophet was born in 570 A. D. Another view is that this date corresponds to Nov. 569 A. D (Qurane Majeed of Maqtaba — i-Alhasanat 7th Ed. p.19) and according to R. K. Sinha, in 571 A. D, Muslim Law, p13.
7 Holy Quran, (33:21).
people love him and feel humble towards him because he was kind, lenient, truthful and highly motivated.

Love of Prophet Muhammad has played a central and focal role in the life of Muslims, affecting their deeds, behavior and speech. Due to this love, all the deeds and behavior of the Prophet were recorded, especially in the 23 years of his Prophethood. Since the early days of Islam, Muslim scholars have written biographies of the Prophet (known as sirah), just as they have collected sayings of the Prophet in authentic collections of Prophetic hadith (traditions).

Knowing the speech and activities of the Prophet is necessary on two grounds. In the first place, they are good samples for the speech and activities of Muslims. Moreover, they are needed for the analysis and interpretation of the holy Quran: since the Prophet was the receiver of the message, he could therefore explain it better than anyone else. Hence, the speech of the Prophet is considered the first source for the authentic interpretation of the Quran.

The Prophet Mohammad married with khadijah when he was 25 years old and khadijah was 40 years old. Khadijah was Muhammad’s only wife until she died at 65. She was faithful to the Prophet and always supported him spiritually as well as economically (i.e. with her wealth) throughout the 23 years of his Prophetic mission.

The Prophet was appointed to Prophethood at the age of 40 when he was contemplating and pondering in Hira cave, on Jabal al-Nur (literally meaning “Mount Light”) in Mecca. On Rajab\(^8\) 27 of

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that year, the archangel Jibra'il descended and read to him the first verses of the Quran: Read in the name of your Lord Who created. He created man from a clot. Read and your Lord is most honorable".  

From that time onwards, the Prophet entered a new phases of his life, the Prophethood. For 13 years in Mecca, the Prophet preached Oneness of God and rejected polytheism and idolatry using the arguments of the Quran. Moreover, he finally stood against unjust political and economic affairs as well as immoral dealings of the time. The 13 years in Mecca were the most difficult period of the Prophet's life, as he was tortured, insulted and treated with disrespect under worst circumstances and conditions. During the 13 years, the most difficult period for the Prophet and his followers was that of the siege in Shi'b Abu Talib (Abu Talib mountain-pass). Furthermore, during the 13 years in Mecca, the Prophet educated and trained the people he needed for establishing an Islamic government. Therefore, this period in Mecca was a formative period and can be considered of Islam and training the cadre needed.

When Muslims grew in number, they became a really powerful group. The nobles of Quraysh tried to bribe the Prophet when they realized that their political profits and class distinctions were at risk. In this connection, they suggested that he be the head of the Quraysh tribe, which the Prophet rejected. Disappointed, they then planned to assassinate his in bed. Informed of the treacherous plan through God, Muhammad was commanded to migrate to

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Yathrib, which he did. On that risky and dangerous night, ‘Ali slept in the Prophet’s bed’.  

Ali was always in the company of the Prophet until the Prophet migrated from Mecca to Medina (Yathrib). On the night of the migration to Medina (hijrah) when the infidels had surrounded the house of the Prophet and were determined to invade the house at the end of the night and cut him to pieces while he was in bed, Ali slept in place of the Prophet while the Prophet left the house and set out for Medina. After the departure of the Prophet, according to his wish Ali gave back to the people the trusts and charges that they had left with the Prophet. Then he went to Medina with his mother, the daughter of the Prophet, and two other women. In Medina also Ali was constantly in the company of the Prophet in private and in public. The Prophet gave Fatimah, his beloved daughter from Khadijah, to Ali as his wife and when the Prophet was creating bonds of brotherhood among his companions he selected Ali as his brother.  

At that night, The Prophet and Abu Bakr left Mecca for Yathrib (Medina). On their way to Yathrib, they spent three days in a cave. They were hidden there because the entrance to the cave was miraculously covered with a spider’s web and branches of an acacia tree on which a bird had nested. When they entered the city Yathrib, the Prophet decided to stay there; hence, the city was the called Madinat al-Nabi (the city of the Prophet). The first thing the Prophet did in Madinah was to build a mosque, which has since then been called the Prophet’s Mosque. He then established the first Islamic society in Madinah, based on the principles of Justice, 

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11 Allamah Syyid Muhammad Husayn Tabatabai; Shi’a, p. 78 (1963).
security and liberty. During the eleven years of his rule in madinah, the Prophet took part in numerous wars against the polytheists of the Quraysh, hypocrites, invaders, and the Jews who did not abide by their peace treaties. Many verses of the Quran were revealed to him during these years. Moreover, the Prophet was a judge, a commander of the army and a leader of the society, managing socio-political affairs of the Islamic society. He could spread Islam all over Arabia from his headquarter in Madinah. The Prophet returned to Mecca triumphantly the year before his death. Upon entering Mecca, the Prophet declared an amnesty even though he could well remember the sufferings, ordeals, torments, and wars that he and his followers had experienced at the hands of the Meccans. He showed that he was “The Prophet of Forgiveness” not only when he had very few followers but also at the peak of his strength. The Prophet’s forgiveness and leniency brought security and unity to the whole Arabia once again.  

The Prophet left Mecca and went to Medina in 622 A.D. This journey from Mecca to Medina is taken to be a ‘holy mission’ (Hijrat).  

The hijrat of the Prophet opening an entirely new chapter in the history of Islam from which a stimulating and surprising leap forward was made. For this very reason, the hijrah of Mohammad (peace be upon him) became the beginning of the dating system of the Muslims.

1.3 What is Islam?

The Arabic word ‘Islam’ stands for ‘Submission’ or ‘Peace’. In a religious context, it implies the peace that reaches out to one

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13 Muslim Calendar, Hijrat begins with 622 A.D. to commemorate this holy mission.
when one completely submits oneself to the will of Almighty God. This is achieved only when the individual acts in accordance with the direction of his Creator in all spheres of life. The word of Islam occurs eight times in the Holy Quran in such verses as:

“The (true) religion with God is Islam”.\(^\text{14}\)

“This day has I Perfected for you, your religion and completed. My favors on you, and chosen for you Islam as a religion”.\(^\text{15}\)

The word Islam is comprehensive one and does not express any association with any particular person, people or country. The object of this religion is to create a sense of obedience and submission to Allah, His ordinances and thereby to walk on right path (Siratal Mustaqeem). Those who follow this path are Muslims. It is given the verse, ‘who-so a Muslim, he seeketh after the right way’.\(^\text{16}\) The welfare of the humanity lies in following the right path and thus Islam has come for the welfare of humanity irrespective of race or region. Submission or obedience to Allah’s commands or ordinances covers every aspects of life, spiritual as well as temporal. However, in temporal matters certain amount of discretion is permitted to judge and choose a correct standing for the welfare of individual as well as people in general, keeping in view the prevailing circumstances, needs and requirements of time.\(^\text{17}\)

As mention above, the word Islam means “submission to God”, the Origin, the Target, the Creator, the Preserver, the Manager of the Universe. Professing Islam or confessing faith has

\(^{14}\) Holy Quran, 3:19.

\(^{15}\) Supra note, 5:3.

\(^{16}\) Supra note, 72:14.

three stages: it begins with attesting verbally to the Oneness of God and the Prophethood of Muhammad (i.e. attesting to the formulae \textit{la ilaha illa Allah, Muhammad rasul Allah}). There is no God but Allah; Muhammad is the messenger of Allah"); [According to Shia Islam, Mohammad declared \textit{Ali bin Abu Talib} as his successor and said that “for whoever I am a 'Moula' of them, Ali is his ‘Moula’”]. Hence, they say the \textit{Kalema} required further confession of the third phrase “\textit{Ali-un- wali-ul-lah}”, meaning “Ali is his (Mohammad’s successor) ‘Wali’, its caretaker, stressing the need that for continuation of faith there is a requirement of \textit{Wali}, the Imams which are the real caretakers of Islam] then comes appreciation with the heart; finally, it is realized in the individual and social activities and behavior of a Muslim to be in accordance with the Will and Providence of Allah. The latter indicates ultimate submission to be materialized as an everlasting reality in the life, thoughts, feelings and behavior of a Muslim. As such, Islam means unconditional submission to the Will and Providence of Allah. To embrace Islam, one has to just bear witness to the Oneness of God and Prophethood of Prophet Muhammad by attesting to the aforementioned formulae. The very truth and the core of the message of Islam lie in saying, “\textit{There is no god but Allah}”. This sentence has two entailments: one, negative; the other, affirmative. The negative entailment rejects any likeness between Allah and other being (uniqueness). The affirmative entailment, on the other hand, attests to the Oneness of the Exalted Being.

Technically speaking, the divine religion revealed to Prophet Muhammad is called Islam, with the holy Quran as the text of the revealed message. In the Quran, “Islam” and “religion” are synonymous, and all true prophets are referred to as Muslims
(Verily the religion with Allah is Islam). Put another way, religion (in the broad sense of the word) has been realized differently since it was first revealed. At each period, it was revealed according to the appreciation and understanding of the addresses, and in order to provide answers for their questions”. Islam as a particular religion was the last and perfect realization of the divine religion.

1.4 Who is Muslim?

A Muslim is a person whose religion is Islam. The Arabic word ‘Islam’ means submission to the will of God. Legally, Islam is a religion in which it is believed that (i) God (Allah) is one and only one, and (ii) Muhammad is His messenger (Rasool). The word ‘Muslim’ is derived from Islam and signifies and person who adopts the faith of Islam. From the point of view of the Court of law, the only requirement for being a Muslim is the belief in one God and the prophethood of Muhammad. This belief is the minimum requirement for recognizing a person as a Muslim. If a person does not believe in this in this fundamental principle of Islam, the courts cannot treat him as Muslim. On the other hand, if he has faith in the above mentioned principle but does not follow the culture or practices of Islam, he is legally a Muslim. But it is difficult to say whether a person is Muslim or not only on the basis of his faith in Islam because this is essentially a matter of feelings of heart. Therefore, the courts have laid down objective and ascertainable grounds for establishing whether a person is Muslim or not.

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18 Holy Quran, 3:19.
20 *Abdoor Razack v. Aga Mahomed*, (1894) 21 IA 56.
According to Court, a person may be Muslim either by birth or through conversion.

(i) Muslim by Birth

A person whose both the parents were Muslims at the time of his birth is regarded to be a Muslim by birth. According to Hedaya, even if one of the parents of a person was a Muslim. But in India, the courts have held that where only one of the parents of a child is Muslim the child is to be regarded as Muslim only when it is proved that he has been brought up as a Muslim. A child whose mother was a Muslim but father was a Hindu, was brought up as a Muslim. A child whose mother was a Muslim but father was a Hindu, was brought up as a Hindu. It was held by the Court that such a child is Hindu although his mother was a Muslim.

A person who is Muslim by birth continues to be a Muslim unless on attaining majority, he renounces Islam i.e.changes his religion of birth. Changing religion of birth and adopting another religion of one’s own choice is called conversion. But the Muslim by birth must renounce Islam himself by a public declaration. No one has right to condemn a person with Muslim name as non-Muslim until and unless he or she renounces Islam as religion by his or her own pronouncement publicly.

(ii) Muslim by Conversion

Any person of any religion, who is of sound mind and has attained the age of majority, can become the follower of Islam after renouncing his original religion. By adopting Islam a non-Muslim

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21 Hedaya (Hamilton’s Translation), 2nd Edition, p. 64.
becomes a Muslim and the rules of Muslim personal law begin to apply on him immediately. A non-Muslim who adopts Islam after giving up his original religion is generally known as ‘converted Muslim’ conversion to Islam may take place in two ways:

(i) A person may publicly declare that he has renounced his original religion and is now professing Islam and believe that there is one God (Allah) and that Muhammad is His messenger;

(ii) The second method of conversion is through ceremonies prescribed in the religion of Islam itself.

The ceremonies are, however, simple. The non-Muslim would go to a mosque where the Imam may ask him to read a Kaleema and give him a Muslim name, whereupon that person becomes a Muslim. In both the methods of conversion we find that the essential requirement is that the non-Muslim now profess or believes in the principles of Islam. But, as there is no objective test for one’s sincerity in a faith, it is difficult to ascertain the genuineness of one’s belief in Islam. It is just possible that a person converts to Islam not because he actually has faith in it but because of any other reason e.g. he wants certain benefits under Muslim law. For example, any non-Muslim may convert to Islam not because of his actual faith but only to get benefit of marrying with four wives which is not allowed under the personal law and is

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24 Generally the Kalema includes ‘La ilaha-ill Allah, Muhammad-ur-Rasool-ullah’ (There is one God Allah, Muhammad is the Messenger of Allah and according to Shia Islam, as mention above, Muhammad declared Ali bin Abu Talib as his successor. Hence, the Kalema in shi’a required further confession of the third phrase “Ali-un- wali-ul-lah”, meaning “Ali is his (Mohammad’s) “Wali”, its care taker, stressing the need that for continuation of faith there is a requirement of Wali, the Imams which are the real care-takers of Islam).
allowed under Muslim law. Therefore, in case where the conversion is only to legalise an act under Muslim law which is illegal under any other law, the converted person cannot be regarded as Muslim even if he says that he is professing Islam. In *Skinner v. Orde*, the facts were that a Christian widow used to live and cohabit with a Christian male who had already a wife living. Cohabitation of a person with any woman other than his wife is illegal. To legalise their cohabitation the converted to Islam and became Muslims because under Muslim law a person can have four wives at a time. It was held by the Privy Council that such a conversion was not bona fide because its purpose was to commit fraud upon Muslim law.26

A Muslim is one who believes to certain standards also, for example, he believes in the following fivefold classification of human actions, namely:

(a) *Farz* [or vajeb], acts the omission of which is punished and the doing of which is rewarded;

(b) *Mustahab*, acts the doing of which is rewarded but the omission of which is not punished;

(c) *Jaiz or Mubah*, acts the doing of which is simply permitted and which carry neither reward nor punishment;

(d) *Makruh*, acts which are disapproved but are largely valid; and

(e) *Haram*, acts which are strictly prohibited and punishable.

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1.5 Schools of Muslim Law

(i) The Sunni’s Schools
(ii) The Shia Schools
(iii) The Motazila school

1.6 Table Showing the Muslim Sects, Sub-Sects and Different Schools of Law

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1.7 The Shi’s and the Sunnis

The fundamental difference between the Shi‘et (Shi’a) and the Sunnite (Suni) is the doctrine of Imamat developed by the former. According to the Sunnite doctrine, the leader of the Muslims at any given moment is the khalifa or Caliph, literally, the ‘successor’ of the Prophet. He is more of a temporal ruler than a religious chief: for in religious matters he has simply to follow the path of shariat. He is a mere mortal; he must possess certain qualification for election to his office, and remains Caliph so long as he performs his
duties in accordance with the law; if he is found unfit, he may be deprived of the Caliphate.

The concept of Imam (lit, leader) among the Shi‘a, however, is totally different. Here temporal affairs take a secondary place; the Imam is the final interpreter of the law on earth. He is ‘leader’ not by the suffrage of the people, but by Divine Right, because he is a descendant of the prophet or rather of Ali. Originally the Imam, being descendant of Ali, was supposed to be the repository of the secret doctrines and teaching of Islam imparted by the Prophet to his favorite son-in-law.²⁷

The Shi‘a belief holds that the generous Grace and Love of God and His infinite wisdom demand that after the Prophet should not be without a leader. Such a leader must be sinless and wise, so that correctness of speech and action may be a guarantee and a true sign of a superior man, selected by God. He must take the reins of the Muslim community in his hands and lead and guide them with extensive wisdom and foresight, without error, and this he must take from the Prophet of Islam.

So, the issue separating the Shi‘is and the Sunnis dates back to the events that occurred after the death of the Prophet and pertained to the vicegerency of the Prophet. The Sunnis maintain that Abu Bakr is the first caliph based on the consensus of the Muslim community. The Shi‘is, however, hold that the issue of vicegerency of the Prophet is not simply political. This position, they maintain, requires not only political power, but also spiritual power and a specific kind of knowledge and Justice to enable the person to interpret the Quran and religion correctly. They conclude that Allah should choose such a person. The Shi‘is believe that ‘Ali,

son of Abutalib, possessed all these characteristics and was appointed Imam by God through the Prophet. This trend will continue till the coming of the twelfth Imam, the hidden Imam Mahdi or Imam-I Zaman (literally meaning “Imam of the age”).

The Shi’is meaning in that revelation and Prophethood came to an end with the death of Prophet Muhammad. People, however, were still considered in need of perfect sample and an exemplar of the teachings of Islam.

Moreover, they needed someone who could interpret the rationale behind Islamic teachings, analyze the Islamic texts and explain complexities of the religion. All this necessitates that there should be an Imam who possesses all these characteristics in the absence of the Prophet. The Imam is appointed by Allah and has a spiritual status much more exalted than the mere political position of the “caliph”.

As such the Shi’is have a specific view about the successor of the Prophet; the view is based on the theory of Imamate. According to this theory, an infallible Imam and those appointed by him enjoy a legitimate political power that no one else does.  

So, Muslims are divided into two major groups: the Shi’is and the Sunnis. The sunnis are divided into four sub-sects:

(a) the Hanafis,
(b) the Malikis
(c) the Shafeis
(d) the Hanbalis,

and the Shi’is are divided into three main sub-sects:

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(a) the Imamis (the Twelver’s),
(b) the Zaydis (followers of Zayd, the great son of the fourth Imam), and
(c) the Isma’ilis (followers of Isma’il, one of Imam Sadiq’s sons).

The Imamis comprise about 130 million Muslims. Most of them live in Iran, Iraq, Lebanon, and Persian Gulf countries, Afghanistan, Azerbaijan, Pakistan and India.29

1.8 Differences between Shi’a and Sunni Schools

Both Sunni and Shi’a Muslims share the most fundamental Islamic beliefs and Articles of faith. All the Muslims agree that Allah is one; Muhammad, peace be upon him and his family (PBUH & HF) is His last Prophet, the Holy Quran is His last Holy Book for mankind, and that one day Allah will resurrect all human beings, and they will be questioned about their beliefs and actions.

In other word, there is no difference of opinion amongst Muslim schools that the religion of Allah is Islam; that the only way to know Islam is through the Book of Allah and the Sunnah of the Holy Prophet; and that the Book of Allah is what is known as the Quran, without any “addition” or “deletion”. The difference is in the interpretation of some of the verses of the Quran; and in believing or not believing some of the Sunnah as genuine; or in its interpretation. This difference of approach has led towards the difference in some basic principles and some laws of religion. As the basic principles of Islam are well known. It will be sufficient if some of the important differences are described here to give the

29 Supra note at 24.
readers a fairly comprehensive idea of the main characteristics which distinguish the Shiats from the Sunnis. As mention above, all the Muslims agree that Allah is one, Muhammad (PBUH & HF) is His last prophet, and that one day Allah will resurrect all the human beings and all will be questioned about their beliefs and actions. All of them agree that anyone who does not believe in any of the above three basic principles is not a Muslim. Also, they agree that anybody denying the famous tenets of Islam, like salat (prayers), sawm (fasting), hajj (pilgrimage to Mecca), zakat (religious tax), etc., or believing that the famous sins, like drinking wine, adultery, stealing, gambling, lie, murder, etc., are not sins, is not a Muslim, though he might have been believing in Allah and His Prophet Muhammad (PBUH & HF). That is because to deny such things is like to deny the prophet hood of Muhammad and his shariah (Divine Laws). When we go further, we come across those subjects which are not agreed amongst Muslims, and the differences between different schools of Islam begin there. Many people think that the difference between Shia and Sunni is the issue of leadership after the death of prophet. This is true, but as a matter of fact, different leaders instruct different ways of approach to each issue. This may result to more differences as the time goes.

1.9 Points of difference between the Sunni and Shi’a Schools

The following are briefly some of the important points of difference between the Sunni and the shia schools:

1. Law of Marriage.
2. Dower.
3. Divorce.
4. Maternity.
5. Guardianship.
7. Gift.
8. Waqf.
9. Pre-emption.
10. Wills.
11. Inheritance.

In this research, I will study a kind of family law called divorce laws among in Iranian Muslims (Shia Athna Asharia) and Indian Muslims (Sunni-majority are Hanafi).

1.10 The Sunni Schools and Sub-school

The suuni schools divided to four sects.

Personal study by the jurists gave rise to different opinions about any given rule of law because of the differences in their approach as to the source of that law. Each jurist having his own interpretation had followers and they constituted a distinct or separate school. In this manner, the Sunni sect was divided further into four important schools. But, the principles of these four schools are substantially the same and they differ from each other merely in matters of detail. 30 Besides these four schools, there had been certain other ‘personal schools’ of the Sunni Muslims. But, by 1300 A. D. only four schools, discussed below, were given recognition. 31

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30 Abdur Rahim, Mohammadan Jurisprudence, p. 23.
(i) The Hanifi School

This is the most important of the school of the Sunnis. Its founder was the Great Imam Abu Hanifa. The main features of this school are:\(^{32}\)

1. Less reliance on traditions unless their authority is beyond any doubt;

2. Greater reliance on Qiyas;

3. A little extension of the scope of Ijma; and

4. Evolving the doctrine of Istihsan, i.e., applying a rule of law as the special circumstances required.\(^{33}\)

The Hanafi School recognizes only those traditions which are not authentic, are not to be accepted as law. Abu Hanifa is said to have relied upon eighteen traditions only. On the other hand Qiyas and Ijma as sources of law, have been given prominence under this school. Several important principles of Hanafi law were obtained through Qiyas. As regards Ijma, this school does not confine to the Ijma of the companions. According to Hanafi School Ijma may be formed by the jurists of any age and may be used as source of a law. It was for the first time under this school that the doctrine of Istihsan (juristic equity) was used in interpreting the texts of Quran and traditions. Similarly, customs and usages, provided they were not against the text of Quran, were recognized as proof of the practices of society. The doctrine of this school being practical and most suitable to the changing conditions of the society have always been favoured by Caliphs and the emperors.\(^{34}\)

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(ii) The Maliki School

This school was established by Mmalik-ibn-Anas of Medina. The main distinctions of this school are as follows:

1. Acceptance of Tradition which were, in the opinion of Imam Malik, Authentic even if the Tradition carried the authority of only one narrator.
2. Acceptance of the practices of the people of Medina and of the sayings of the Companions of the prophet.
3. Recourse to analogy (Qiyas) only in the absence of an explicit text.
4. Making use of a source unique to this School, known as al-masalih-al-mursalah (public interest). 35

Malik has written an exhaustive book namely, Kitab-al-Muwatta which is an authority on the Maliki doctrines. His compilation of the traditions, ‘Muwatta’ is available even to-day, Khalil-ibn-Ishaq’s ‘al-Mukhtasar’ is another important work containing Maliki principles. The principles of this school spread over to the Central and West Africa, Spain, Kuwait, and Bahrain. There are also no Malikis in India. 36

(iii) The Shafei School

Founder of this School, Ash Shafei was an eminent scholar of Islamic jurisprudence. He was a pupil of Malik-ibn-Anas and was related to the Prophet. He developed his doctrines at Baghdad and

35 Syed Khalid Rashid, Muslim Law, revised by Prof. V.P. Bhartiya, Muslim Law, p. 18.
36 Supra note at 21.
This School was a compromise between the Hanafi and Maliki Schools. Mahmassani beautifully sums up the philosophy of this School in following words:

"He would accept the four sources of Law; the Koran [Quran], the Sunnah, consensus, and analogy. He would also accept Istidlal. However, he rejected what the Hanafi School called Istihsan (preference) and what the Maliki School called al-masalih-al-mursalah (public interest)".  

Iman-al-Shafii was the first to compile the sources of law. His most famous pupil was Ahmad-ibn-Hanbal.

This School is followed in many parts of Egypt, Syria, and Lebanon (particularly in the city of Beirut) and also in Iraq, Pakistan, India, Indo-China, Java and among the Sunni inhabitants of Iran and Yemen. It is predominant in Palestine and Jordan.

(iv) The Hanbali School

The fourth and the latest school of the Sunni sect was established by Ibn Hanbal. He studied under several scholars of eminence, including Ash Shafei. His peculiar feature was that he rigidly adhered to the traditions of the Prophet. It is therefore said that Hanbal was traditionist rather than a jurist. He relied so much upon the traditions that other sources of law namely Ijma and Qiyas were neglected by him. He recognized Ijma only of the Companions of the Prophet. Under this school, therefore, there is no scope for private judgments and human reasoning. The result is that the

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doctrines of this school are rigid and uncompromising. Because of this, Ibn Hanbal and his followers were always regarded as reactionaries and were harassed by the authorities from time to time.\textsuperscript{40} So, He was a more strict follower of the tradition than others and restricted \textit{Qiyas} and \textit{Ijma} within narrow limits. The foundation of this School rests on five main sources:\textsuperscript{41}

1. The \textit{Koran\[Quran\]}\textsuperscript{42};

2. The \textit{sunnah};

3. The \textit{Ijma} of the Companions of the Prophet, if there was nothing to contradict them, and the saying of certain of the Companions when these were consistent with the \textit{Koran\[Quran\]} and the \textit{sunnah};

4. \textit{Zaif} and \textit{Mursal} tradition i.e.tradition having a weak chain of transmission, and lacking in the names of some of the transmitters; and

5. \textit{Qiyas}, whenever it was necessary.

This school is the least widespread of all the \textit{suni} schools. Today, it is the official School of the Kingdom of Saudi Arabia, and has followers numbering about fifty \textit{lakhs} in the Arabian Peninsula, Palestine, Syria, Iraq, and other countries.\textsuperscript{43}

\textit{Musnad-ul-Iman Hanbal}, is an important book on \textit{Hanbali} law. It is a collection of about fifty thousand traditions by Ibn

\textsuperscript{40} R.K. Sinha, \textit{Muslim Law}, p. 22.
\textsuperscript{41} Mahmassani, p. 27.
\textsuperscript{42} Quran is a Arabic word. That correct pronunciation is ‘Quran’ not ‘Koran’, but some authors of Muslim book in India had written ‘Koran’
\textsuperscript{43} V.P. Bhartiya, \textit{Muslim Law}, p. 19.
Hanbal. Other books by him are Kitab-ul-Mashaekh and Kitab-ul-Alal.44

1.11 The Shia Schools and Sub-School

Shia Islam (Arabic: Shi’ah, sometimes spelled Shi’a), is the second largest denomination of Islam, after Sunni Islam”.Shia” is the short form of the historic phrase Shi’atu ‘Alī, meaning “the followers of Alī”45 or “the faction of Ali” or simply “The Party”.

Similar to other schools of thought in Islam, Shia Islam is based on the teachings of the Islamic Holy Book, the Qur’ān and the message of the final prophet of Islam, Muhammad. 46 In contrast to other schools of thought, Shia Islam holds that Muhammad’s family, the Ahl al-Bayt (“the People of the House”), and certain individuals among his descendants, who are known as Imams, have special spiritual and political authority over the community. Shia Muslims further believe that Ali, Muhammad’s cousin and son-in-law, was the first of these Imams and was the rightful successor to Muhammad and thus reject the legitimacy of the first three caliphs.

As discussed above, the Shi’a belief holds that the generous Grace and Love of God and His infinite wisdom demand that after the Prophet should not be without a leader. Such a leader must be sinless and wise, so that correctness of speech and action may be a guarantee and a true sign of a superior man, selected by God. He must take the reins of the Muslim community in his hands and lead and guide them with extensive wisdom and foresight, without error, and this he must take from the Prophet of Islam.

44 R.K. Sinha, Muslim Law, pp. 22-23.
Shi’as regard Ali as the second most important figure after Prophet Muhammad. According to them, Muhammad suggested on various occasions during his lifetime that Ali should be the leader of Muslims after his demise. According to this view, Ali as the successor of Muhammad not only ruled over the community in justice, but also interpreted the Sharia Law and its esoteric meaning. Hence he was regarded as being free from error and sin (infallible), and appointed by God by divine decree (Nass) to be the first Imam.\footnote{Sayyid Mohammad Hosayn Tabatabaei, Shī‘ite Islam, translated by Seyyed Hossein Nasr, (1979).} Ali is known as “perfect man” (al-insan al-kamil) similar to Muhammad according to Shia viewpoint.\footnote{Morteza Motahhari, Perfect man, Translated by Aladdin Pazargadi, Chapter 1.} As a result, Shias exclusively use sermons attributed to Ali, in contrast to the Sunni traditions where the sunnah is largely narrated by companions.\footnote{Moojan Momen, Introduction to Shi‘i Islam, p. 174 (1985).} Subsequently, the Shi‘a have their own form of hadith which leans towards narrations of the Ahl al-Bayt.

The position of Ali is supported by numerous Hadith, including Hadith of the pond of Khumm [Ghadir khumm], Hadith of the two weighty things [thaqalain], Hadith of the pen and paper, Hadith of the invitation of the close families, and Hadith of the Twelve Successors. In particular, the Hadith of the Cloak is often quoted to illustrate Muhammad's feeling towards Ali and his family by both Sunni and Shia scholars. Therefore, the Shi‘a believe that the Family of the Prophet's hadiths are exclusively to be followed.

Although there were several Shia branches through history, nowadays Shi‘a Islam is divided into three main branches.\footnote{John Esposito, What Everyone Needs to Know about Islam, p. 40 (2002).} The largest Shia sect in the early 21\textsuperscript{st} century is the Ithnā ’Ashariyyah,
commonly referred to in English as the Twelvers, while smaller branches include the Ismaili and Zaidi. Twelvers constitute the majority of the population in Iran, Azerbaijan, Bahrain, and Iraq. Other countries with a significant proportion of Shia are Syria, Lebanon, Kuwait, Pakistan, India, Afghanistan, Saudi Arabia, south Turkey, and Yemen.

(i) The Ithna Asharia School

The Ithna Asharia school called as Imamia School. Majority of Shias are Ithna Asharia. The followers of this school believe that starting from Imam Ali (A. S) there had been twelve Imams who possessed spiritual powers. Twelve Imams are:

1. **Ali ibn Abu Talib** (600–661), also known as “Ali, Amir ul- Mu'mineen” (commander of the faithful), also known as “Shah-e Mar dan Ali” (King of men)
2. **Hasan ibn Ali** (625–669), also known as “Hasan al Mujtaba”
3. **Husayn ibn Ali** (626–680), also known as “Husayn al Shaheed”, also known as “Sah Hüseyin”
4. **Ali ibn Husayn** (658–713), also known as “Ali Zainul Abideen”
5. **Muhammad ibn Ali** (676–743), also known as “Muhammad al Baqir”

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54 [http://en.wikipedia.org/wiki/Shi%27a](http://en.wikipedia.org/wiki/Shi%27a)
6. **Jafar ibn Muhammad** (703–765), also known as “Ja’far as Sadiq”

7. **Musa ibn Jafar** (745–799), also known as “Musa al Kadhim”

8. **Ali ibn Musa** (765–818), also known as “Ali ar Ridha”

9. **Muhammad ibn Ali** (810–835), also known as “Muhammad al Jawad” (Muhammad at Taqi), also known as “Taqi”

10. **Ali ibn Muhammad** (827–868), also known as “Ali al-Hadi”, also known as “Naqi”

11. **Hasan ibn Ali** (846–874), also known as “Hasan al Askari”

12. **Muhammad ibn Hasan** (868–?), also known as “Hujjat ibn al Hasan”, also known as “Mahdi”

The *Athna Asharia* school is further divided into two subsects. (1) *Akhbari* and the (2) *Usuli*. The *Ithna Asharias* are found in Iran, Iraq, Lebanon, Pakistan and India.

(ii) **The Zyadis (Zaidis) School**

As pointed out earlier, the founder of this school was Zyad, one of the sons of the fourth Imam. The *Zyadis* were the first to defect from the general body of *Shia* Muslims, One of the peculiar features of this school is that its doctrine incorporate some of the *Sunni* principles as well. The followers of this school are not found in India; they are mostly in Yemen.  

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(iii) The Ismailia School

For some reasons Jafar Sadiq disinherited, his eldest son Ismail. The majority of Shias therefore did not accept him as their Imam. But there were some Shias, although in minority, who acknowledge Ismail as the seventh Imam. The followers of Imam are called Ismailias or the Seveners because according to them there had been only seven Imams the Seventh being Ismail. They believe that from him (Ismail) descended a series of concealed Imams whose secret emissaries were constantly on the watch for a chance of striking at some weak point in the large ill-cemented empire of orthodox Islam.\(^5\) The Ismailias therefore, hold that Imams subsequent to Ismail are still alive but they have concealed their existence.\(^5\) In India, they consist of two main groups (i) Khojas and Bohras.\(^8\) Khojas were originally Hindus. Bohras are also Ismailias and they separated from the other groups during the Fatimid regime.\(^9\) Both of them are commercial communities from the very beginning. Ismailias are found in the Central Asia, Syria, India and Pakistan etc. Ismailias of Bombay are either Khojas or Bohras. Daimul-Islam is an authoritative work on Ismailias doctrines.\(^6\)

1.12 The Motazila School

The Motazila emerged as a separate sect of Islam around 9th Century A.D. This school was established by Ata-al-Ghazzal during the reign of Mamun. Although they do not associate themselves from any of the two existing sects yet, it is said that they were defectors from the Shia community. Ameer Ali observes that, “a

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\(^9\) Supra note 16.
careful comparison of the Motazilite doctrines will show that they were either word for word the same as taught by the early Fatimides (Ismailia-Shias) or were modifications of those doctrines induced by the requirements of a progressive society and partly perhaps, by the study of Greek and Alexandrian philosophy.\(^{61}\) The followers of this school believe that Quran is the only basis for their doctrines. Most of the traditions have been rejected by the Motazilas. One of the characteristic features of the Motazilas is that this is the only school in Islam which practices strict monogamy. Marriage with more than one wife at a time is unlawful under the Motazila principles. Another peculiarity is that there cannot be any divorce without interference of a judge. Divorce by Talaq is not recognized under this school. At present the followers of Motazila sect are comparatively very less in number.\(^{62}\)

1.13 Muslim population in the world

The Muslim population in the world stands at 1.57 billion, and India has the third largest number of Muslims at over 160\(^{63}\) million after Indonesia and Pakistan. Muslims constitute 23 percent of the 6.8 billion global populations, according to a new study in 232 countries and territories. Indonesia and Pakistan are home to over 200 million and 174 million Muslims.\(^{64}\)

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\(^{63}\) According to this report, India is projected to have a Muslim population of 23,618,000 in 2030; which would be nearly 16 per cent of the then Indian population. And in 2010, India is estimated to have 177,286,000 Muslims, which is 14.6 per cent of the total Indian population. The report said, world's Muslim population is expected to increase by about 35 per cent in the next 20 years, rising from 1.6 billion in 2010 to 2.2 billion by 2030, [https://hinduexistence.wordpress.com/tag/increasing-muslim-population-in-india-will-create-severe-persecution/](https://hinduexistence.wordpress.com/tag/increasing-muslim-population-in-india-will-create-severe-persecution/).

\(^{64}\) [http://www.twocircles.net/2009oct08/india_third_global_muslim_population_1_57_bn.html](http://www.twocircles.net/2009oct08/india_third_global_muslim_population_1_57_bn.html).
More than 300 million Muslims or one-fifth of the world’s Muslim population, live in countries where Islam is not the majority religion. Theses minority Muslim populations are often quite large. India, for example, has third-largest population of Muslims worldwide. China has more Muslims than Syria, while Russia is home to more Muslims than Jordan and Libya combined. These are some of the key findings of Mapping the Global Muslim population: A report on the Size and Distribution of the World’s Muslim Population, a new study by the Pew research center’s Forum on Religion & Public Life. The report offers the most up-to-date and fully sourced estimates of the size and distribution of the worldwide Muslim population, including sectarian identity.65

Sunni and Shia Islam are the two major denominations of Islam. The demographic breakdown between the two groups is difficult to assess and varies by source, but a good approximation is that 80-90% of the world's Muslims are Sunni and 10-20% are Shia.66

Most Shias, between 68-80 percent, live in just four countries, namely Iran, Pakistan, India and Iraq.

65 Mapping the Global Muslim population, A report on the size and Distribution of the world’s Muslim population, October 2009. (The Pew Forum report is based on the best available data for 232 countries and territories. Pew Forum researchers, in consultation with nearly 50 demographers and social scientists at universities and research centers around the world, acquired and analyzed about 1,500 sources, including census reports, demographic studies and general population surveys, to arrive at these figures - the largest project of its kind to date.

66 http://en.wikipedia.org/wiki/Shi%27a%E2%80%93Sunni_relations

- 31 -
(i) **Countries with the Largest Muslim Populations (2009):**

<table>
<thead>
<tr>
<th>Country</th>
<th>Number of Muslims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indonesia</td>
<td>203 million</td>
</tr>
<tr>
<td>Pakistan</td>
<td>174 million</td>
</tr>
<tr>
<td>India</td>
<td>161 million</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>145 million</td>
</tr>
<tr>
<td>Egypt</td>
<td>79 million</td>
</tr>
<tr>
<td>Nigeria</td>
<td>78 million</td>
</tr>
<tr>
<td>Iran</td>
<td>74 million</td>
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<tr>
<td>Turkey</td>
<td>74 million</td>
</tr>
<tr>
<td>Algeria</td>
<td>34 million</td>
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<tr>
<td>Morocco</td>
<td>32 million</td>
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<tr>
<td>Iraq</td>
<td>30 million</td>
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<tr>
<td>Sudan</td>
<td>30 million</td>
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<tr>
<td>Afghanistan</td>
<td>28 million</td>
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<tr>
<td>Ethiopia</td>
<td>28 million</td>
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<tr>
<td>Uzbekistan</td>
<td>26 million</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>25 million</td>
</tr>
<tr>
<td>Yemen</td>
<td>23 million</td>
</tr>
<tr>
<td>China</td>
<td>22 million</td>
</tr>
<tr>
<td>Syria</td>
<td>20 million</td>
</tr>
<tr>
<td>Russia</td>
<td>16 million</td>
</tr>
</tbody>
</table>

(ii) **Population of Indian Muslim**

In Muslim population, India is second only to Indonesia. Both the Sunni and the Shia the major sects of Muslim or Islam are there in India, but Shiites are a minority. The majority of Indian Sunnis

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67 [http://islam.about.com/od/muslimcountries/a/population.htm](http://islam.about.com/od/muslimcountries/a/population.htm)
are followers of the Hanifi division. The moplahs of Kerala and Lakshadweep follow the Safi system. The Sunnis of Gujarat follow the Malki system. The Hanbali branch has no followers in India. 68

(iii) Population of Iranian Muslim

Nowadays Islam is the religion of 98% of Iranians, approximately 90% of Iranians are Shi'a and 8% are Sunni, 2% Non-Muslim minorities include Zoroastrians, Jews, Bahá'ís, Mandeans, Christians and Yarsan. Almost all of Iranian Shi'as are Twelvers. 69

In this research, I will study a kind of family law called divorce laws among in Iranian (Shia Athna Asharia=Twevers Imami) Muslims and Indian (Sunni-majority are Hanafi) Muslims.

68 http://www.indiavideo.org/text/muslims-341.php
1.14  Table Showing the Prophet Muhammad (PBUH & HF)

The prophet Muhammad (d. A. H. 11)

(1) 'Ali (d. 41) = Fatima

(2) Hasan (d. 50)  (3) Husayn (d. 61)

(Sharifs of Morocco, Idrisids of N. Africa)

(4) 'Ali Zayn al-Abidin (d. 94)

Zayd (d. 122)  (5) Muhammad al-Baqir (d. 113)

(Imams of the Zaydis of Yemen and N. Persia)

(6) Ja'far al-Sadiq (d. 148)

* (7) Isma'il

(Fatimid Caliphs of Egypt)

al-Mustansir (8th Fatimid Caliph) (d. 487)

(7) Musa al-Kazim (d. 183)

(8) 'Ali al-Rida (d. 202)

(9) 'Muhammad al-Jawad Rida (d. 220)

Nizar

al-Musta'Il

(9th Fatimid Caliph) (d. 487)

(10) 'Ali al-Hadi (d. 254)

Imams of the Musta'lians or Western Isma'ili's (Isma'ili's of Yemen, Syria, and Bohoras of India)

(11) 'al-Hasan al-'Askari (d. 260)

Imams of the Nizarites or Eastern Isma'ili's (Isma'ili's of Khojas, etc.)

(12) 'Muhammad al-Muntazar ('disappeared' in A. H. 260)

- 34 -
1.15 Table showing of the Source of the Sunni Muslim law

Sources of Sunni Law

(A). Primary Sources
- The Quran
- The Sunna (The traditions of Ahadis)
- The Ijma (Consensus of Opinion)
- The Qiyas (Analagical deductions)

(B). Secondary Sources
- Istihsan (Juristic Preference)
- Istitlah (Public good or public advantage)
- Istidal (Juristic deductions)

(C). Custom (Urf)
- Fatawas (Precedent)

1.16 Sources of Sunni Muslim Law

The sacred law (Shariat) of the Muslims has been derived from various primary as well as secondary sources. The primary sources are four – The Koran [Quran], the Sunna, the Ijma and the Qiyas (Qiyas). The Sunni School regards all the four as the primary sources of Islamic law. But the Shi'a School redard only the first two- the Koran [Quran] and the Sunna as the only primary source of Islamic law. The Koran [Quran] and the Sunna contain the direct (express or manifest or zahir) and indirect (implied or internal or Batin) revelation from God received by the Prophet.
The Secondary sources are five- *Istihson, Istislah, Istidlal, Fatawas* and legislation, Custom (*Urf*) makes a midway between the primary and the secondary sources.

There are three categories of the sources of Islamic (Sunni Muslim) Laws.

(i) **Primary Sources**
   
   (a) The *Quran*.
   
   (b) The *Sunna* (Tradition of *Ahadis*).
   
   (c) The *Ijma* (consensus of opinion)
   
   (d) The *Kiyas (Qiyas)* (Analogical deductions)

(ii) **Secondary Sources**

   (a) *Istihsan* (Juristic equity or Juristic preference).
   
   (b) *Istislah* (Public good or public advantage or public interest).
   
   (c) *Istidla* (Juristic deductions).
   
   (d) *Fatawas* (Precedent).
   
   (e) Legislation.

(iii) **Custom as a source of law (*urf*)**

1.17 **Primary Source of Sunni**

   Primary sources are those sources which formed the foundation of Islamic Law. These are:
The Quran. - It is original or primary source of Islamic Law. It is the name of the Holy Book of Muslims containing the direct revelations from God through the Prophet.  

The direct or express or manifest revelations consisted of the Communication, which were made by the angel, Jibriel, under the direction of God, to Mohammed either (1) in the very words of God or (2) by hints and (3) of such Knowledge as secured in the mind of the Prophet through the inspiration (ilham) of God. All the principles, ordinances, teaching and the practices of Islam are drawn from the Koran [Quran]. The contents of the Koran [Quran] consist of about 6000 verses, out of about 200 verses, 80 verses deal with the family law, especially with marriage, dower, divorce, guardianship and inheritance.

The Koran [Quran] occupies a prominent place among the other sources of Muslim Law. It is the primary and the original sources of law. The Islamic law differs from the other system of the world, in the sense that its original sources which contain the divine will, was communication through a single human channel. The Koran [Quran] consist of communication of God, it is of divine origin having no earthly source. It is immutable and is not liable to change. It is the foundation head of Islamic law. In the words of Abdur Rahim.

(i) The Quran

The Quran, which is the divine communication and revelation to the Prophet of Islam, may aptly be said to be the first and the

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great legislative Code of Islam. To the writers on Muslim law, Quran is the first source of law in point of time, no less than in point of importance. If the Holy Book is silent, it is supplemented by or interpreted in the light of the precepts of the Prophet, but the Muslim jurist would hardly refer to the pre-Islamic customs for the purpose of elucidating the law.\(^\text{74}\)

(ii) **The Sunna (Tradition or Ahadis)**

The traditions, i.e., the actions, sayings or doing of the Prophet, termed *Sunna* or *Hadis*, take the second place as the source of law. The *Sunna* comprises (i) all words, counsels or precepts of the Prophet (*sunnat-ul-qual*), (ii) his actions, words and daily practices (*sunnat-ul-fail*) and (iii) his silence implying a tacit approbation on his part of any individual act committed by his disciples (*sunnat-ul-taqrir*). The rules derived from these subsidiary sources very considerably in respect of the degree of authority which is attached to them. Traditions handed down by the contemporaries and companions of the Prophet are generally considered to be genuine, provided they satisfy other tests. \(^\text{75}\)

(iii) **Ijma**

The first resource, which the jurists availed themselves of after exhausting the *Sunna*, consists of the opinions of the Companions of the Prophet. So failing both the Quran and the *Hadis*, the consensus of opinion amongst the Companions who were imbued with his spirit, was generally deemed by the jurists as the best guide to law. It formed the third source of law and is called *Ijmaa*. Sir Abdur Rahim defines it as, “the agreement of the jurists

\(^{74}\) Kashi Prasad Saksena, *Muslim Law As Administered in India and Pakistan*, p. 2 (1956).

\(^{75}\) *Supra* note at 2.
among the followers of Mohammad in a particular age on a particular question". The *Ijma-i-limet* means general concordance, and under this collective name are included all the apostolic laws, the explanations, glosses and decisions of the leading disciples of the Prophet, specially the first four *Khalifas*. The jurists, who evolved this doctrine, compiled a set of rules as to classes of person whose opinions are considered, to be authentic, and laid down the course to be followed in case of conflict, an thus gave a good impetus to the foundation of this law. So *Ijmaa* is of various kinds:

1. *Ijmaa* of the Companions of the Prophet which is universally accepted throughout the Muslim world and is unrepeatable;

2. *Ijmaa* of the jurists; and

3. *Ijmaa* of the people, the general body of the Muslims.

*Ijmaa* cannot be confined or limited to any particular age or country. It is completed when the jurists, after due deliberation come to a finding. It cannot then be questioned or challenged by any individual jurist. *Ijmaa* of one age may be reversed or modified by the *Ijmaa* of the same or subsequent age.⁷⁶

**(iv) Qiyas**

All these sources could not furnish full material for the construction of a code theoretically complete, nor could they keep pace with the speculative power of keen, jurists, who had their ideas expanded by the great territorial strides that Islam had made in the course of a century. To cope with all the cases, no less powerful an agency was required than the right of the jurists to apply their own unfettered discretion and reasoning to the problems before them.

⁷⁶ Supra note at 2.
This step gave rise to a great controversy and some of the jurists totally refused to accept any other source excepting the Quran, Hadis or Ijmaa. It gave rise also to the rigid school of law which is represented by Az-Zahir, who undertook the scientific study of the Quran and its interpretation. But the majority of the doctors agreed to have resource to pure reasoning as a supplement to the three sources of law in case of necessity, but they had great difficulty in fixing the exact form in which the limitations under which reason could safely be employed in questions of law and religion. Even the first step forward of the leaders of the four great Sunni schools caused serious controversy, three opposed Abu Hanifa in his wide use of Qiyas and in his restriction of Hadis and Ijmaa within the most narrow limits.

Qiyas is thus defined as “an extension of law from the original text by means of common cause, ‘illat’”. It is a process of deduction which is not to change the law of the text. It is applicable in cases not covered by the language of the text but may fall under the reason of the text. Therefore, in importance, Qiyas occupies a place next to Quran, Hadis or Ijmaa. 77

1.18 The Secondary Source of Sunni Muslim

Secondary sources are those sources which are development on the foundations laid down by the primary sources. These are:

(i) Istihasan (Juristic equity or Juristic preference)

(ii) Istislah (public good or public advantage or public interest)

(iii) Istidlal (Juristic deductions) is of three types:

77 Supra note at 3.
1. The first kind “istidlal” is the expression of the connection existing between one proposition and another without any specific effective, causes.

2. The second kind of “istidlal” is “Istishab-ul-hal” which denotes a presumption of a state of things which is not proved to have ceased but still continues.

3. The third type of “istidlal” is the authority of revealed laws previous to Islam.

Hence, “istidlal” is a method of Juristic deductions but it is distinct from the Qiyas (analogical deductions).

Lastly, it may be concluded that the Hanafi doctrine of Istihsan, or Juristic equity, as well as the Maliki doctrine of public good are covered within the scope of Istidlal.

(iv) Fatawas (precedent)

(v) Legislation

Qiyas and Istihsan

Istihsan means juristic equity. It is a principle of interpretation recognized only under Hanafi School. Istishan is a conclusion of law based upon the jurist’s own sense of justice without reference to any text. Qiyas on the other hand, is a conclusion of law based on a definite text of Quran, tradition or Ijma.  

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Qiyas and Istidlal

*Istidlal* means inferring a ‘thing’ from another ‘thing’. For example, if the statement is that a particular thing is permitted then, the inference will be that the thing cannot forbidden. The basis of such reference is generally the welfare of the public. This too is a rule of interpretation and, is recognized by *Maliki* and *Shafei* Schools only. Thus, under the principle of *Istidlal* only an inference is drawn and analogy is not established whereas, in *Qiyas* the rule of law is deduced by establishing analogy. 80

Istislah

This doctrine was introduced by *Malik* and is based on the conception of common welfare. Public advantage (*muslaha*) was considered to be a basis for preference. If a rule caused general injury it was to be discarded even though valid on the basis of analogy. A rule of preference based on the ground that it was considered to be “better” would be *istehsan* while a preference based on “the general good of the community” would be *istislah* although the two are closely similar. 81

1.19 Custom as a source of law

Custom (*adat*) is an important source of law and existed as law in every country, although with the growth of time customary law, continues to lose its important relatively to other kinds of law, such as legislation. It has already been pointed out that the pre-Islamic custom still from the groundwork of the Mohammedan law.

Custom dose not command any spiritual authority like *Ijma* of the learned but a transaction sanctioned is legally operative even if

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80 Supra note at 33.
it is in violation of rule of law derived from analogy, it must not however be opposed to a clear text of the Quran or authentic tradition. There is agreement of opinion among the Sunnis that custom overrides analogical law and a student of Mohammedan law cannot help noticing that custom played no small part in its growth, especially during the time of the companions and their successors. The Hanafi writers on jurisprudence include custom as a source of law under the principle of istehsan, juristic preference.  

1.20 The Sources of Shia Law

1.21 The Primary Sources of Shia Law

The primary Source under Shi’a Muslim law are:

(i) The Quran;

(ii) Sunnat/Tradition; (only those which have come from the Prophet and Prophet’s family (Imams).

(iii) Ijma; (only those which were confirmed by Imams).

(iv) Reason; (Aql)

As regards the Quran, the Shias hold it as the first and the foremost source of the Muslim law like the Sunnis; and the difference between them is due to the fact that they differ in its interpretations. The Shias hold only those Ahadis [tradition] as authentic which come down from the Prophet or his family members and are very strict in this respect; and so they have got very few Ahadis. In the absence of the first two sources of law the Shias take recourse to the Reason.  

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82 Supra note.
83 Kashi Prasad Saksena, Muslim Law as Administered In India and Pakistan, pp. 1-3 (1956).
Various sources of Islamic law are used by Islamic jurisprudence to elucidate the Sharia, the body of Islamic law.\footnote{Morteza Motahhari, *Jurisprudence and Its Principles*, (1983), Translator: Salman Tawhidi, Moslem Student Association (Persian Speaking Group), http://www.al-islam.org/jurisprudence/.
\footnote{Ibid.}} The primary sources, accepted universally by all Muslims, are the Qur'an and Sunnah. The Qur'an is the holy scripture of Islam, believed by Muslims to be the direct and unaltered word of Allah. The Sunnah consists of the religious actions and quotations of the Islamic Prophet Muhammad and narrated through his Companions and Imams- (as per the beliefs of the school of Ahle-Sunnah and Ahle-Shia).\footnote{Ibid.} However, some schools of jurisprudence use different methods to judge the source's level of authenticity.

As Islamic regulations stated in the primary sources do not explicitly deal with every conceivable eventuality, jurisprudence must refer to resources and authentic documents to find the correct course of action.\footnote{Ibid.} According to Sunni schools of law, secondary sources of Islamic law are consensus among Muslims jurists, analogical deduction, al-Ra'y; independent reasoning, benefit for the Community and Custom. Hanafi School frequently relies on analogical deduction and independent reasoning, and Maliki and Hanbali generally use the Hadith instead. Shafi'i school uses Sunnah more than Hanafi and analogy more than two others. Among Shia, Usuli school of Ja'fari jurisprudence uses four sources, which are Qur'an, Sunnah, consensus and 'aql. They use ijma under special conditions and rely on 'aql (intellect) to find general principles based on the Qur'an and Sunnah, and use usul al-fiqh as methodology to interpret the Qur'an and Sunnah in different

\footnote{Ibid.}
circumstances, and Akhbari Jafaris rely more on Hadith and reject ijtihad. According to Momen, despite considerable differences in the principles of jurisprudence between Shia and the four Sunni schools of law, there are fewer differences in the practical application of jurisprudence to ritual observances and social transactions.

(i) Qur'an

As above mentioned, the Qur'an is the first and most important source of Islamic law. Believed to be the direct word of God as revealed to Muhammad through angel Gabriel in Mecca and Medina, the scripture specifies the moral, philosophical, social, political and economic basis on which a society should be constructed. The verses revealed in Mecca deal with philosophical and theological issues, whereas those revealed in Medina are concerned with socio-economic laws. The Qur'an was written and preserved during the life of Muhammad, and compiled soon after his death.

Muslim jurists agree that the Qur'an in its entirety is not a legal code (used in the modern sense); rather its purpose is to lay down a way of life which regulates man's relationship with others and God. The verses of the Qur'an are categorized into three fields: “science of speculative theology”, “ethical principles” and “rules of human conduct”. The third category is directly concerned with Islamic legal matters which contains about five hundred verses or one thirteenth of it. The task of interpreting the Qur'an has led to

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88 Supra note at 188.
various opinions and judgments. The interpretations of the verses by Muhammad's companions for Sunnis and Imams for Shias are considered the most authentic, since they knew why, where and on what occasion each verse was revealed.  

(ii) The Sunna/ Tradition

The Tradition - only those which have come from the Prophet and Imams. The Sunnah is the next important source, and is commonly defined as “the traditions and customs of Muhammad” or “the words, actions and silent assertions of him”. It includes the everyday sayings and utterances of Muhammad, his acts, his tacit consent, and acknowledgments of statements and activities. According to Shi’ite jurists, the sunnah also includes the words, deeds and acknowledgments of the twelve Imams and Fatimah, Muhammad's daughter, who are believed to be infallible.  

Justification for using the Sunnah as a source of law can be found in the Qur'an. The Qur'an commands Muslims to follow Muhammad. During his lifetime, Muhammad made it clear that his traditions (along with the Qur'an) should be followed after his death.  

The overwhelming majority of Muslims consider the sunnah to be essential supplements to and clarifications of the Qur'an. In Islamic jurisprudence, the Qur'an contains many rules for the behavior expected of Muslims but there are no specific Qur'anic rules on many religious and practical matters. Muslims believe that

they can look at the way of life, or *sunnah*, of Muhammad and his companions to discover what to imitate and what to avoid.

(iii) **Ijma**

The *ijma*, or consensus amongst Muslim jurists on a particular legal issue, constitutes the third source of Islamic law. Muslim jurists provide many verses of the Qur'an that legitimize *ijma* as a source of legislation.94

In history, it has been the most important factor in defining the meaning of the other sources and thus in formulating the doctrine and practice of the Muslim community.95 This is so because *ijma* represents the unanimous agreement of Muslims on a regulation or law at any given time.96

There are various views on *ijma* among Muslims. Sunni jurists consider *ijma* as a source, in matters of legislation, as important as the Qur'an and *Sunnah*. Shiite jurists, however, consider *ijma* as source of secondary importance, and a source that is, unlike the Qur'an and *Sunnah*, not free from error.97

(iv) **Reason (Aql)**

*Qiyas* or analogical deduction is the fourth source of *Sharia* for the Sunni jurisprudence. Shiites do not accept *qiyas*, but replace it with reason (*aql*). *Qiyas* is the process of legal deduction according to which the jurist, confronted with an unprecedented case, bases his or her argument on the logic used in the Qur'an and

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95 Encyclopedia Britannica, *Ijma*.
96 "Iǰmā‘", Encyclopaedia of Islam.
Sunnah. Qiyas must not be based on arbitrary judgment, but rather be firmly rooted in the primary sources.\

Shi'ite jurists maintain that if a solution to a problem cannot be found from the primary sources, then aql or reason should be given free rein to deduce a proper response from the primary sources. The process, whereby rational efforts are made by the jurist to arrive at an appropriate ruling, when applied is called *ijtihad* (literally meaning “exerting oneself”). Shi'ite jurists maintain that qiyas is a specific type of *ijtihad*. The Sunni Shafi’i school of thought, however, holds that both qiyas and *ijtihad* are the same.99

Sunni jurists accepted *ijtihad* as a mechanism for deducing rulings. They, however, announced an end to its practice during the thirteenth century. The reason for this was that centers of Islamic learning (such as Baghdad, Nishapur, and Bukhara) had fallen into the hands of the Mongols. Thus, the “doors to *ijtihad*”, were closed.100 In Sunni Islam, thus, *ijtihad* was replaced by taqlid or the acceptance of doctrines developed previously.101 Later in Sunni history, however, there were notable instances of jurists using reason to re-derive law from the first principles. One was *Ibn Taymiyya* (d. 728/1328); another was *Ibn Rushd* (d. 595/1198).102

1.22 The Secondary source of Shi’a in Iranian laws

Secondary source in Iranian (Shi’a) laws are commentary and *fatwas* (legal opinions) based on these:

and to some extent established customs and the rulings of superior courts.

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99 Nomani and Rahnema, pp. 15–16 (1994).
100 Supra note at 16.
101 *Ijtihad, Encyclopaedia of Islam.*
102 Supra note.
According to Article 167 of Iranian constitution [Rule of Law for Judiciary]

"The judge is bound to endeavour to judge each case on the basis of the codified law. In case of the absence of any such law, he has to deliver his judgement on the basis of authoritative Islamic sources and authentic fatawa. He, on the pretext of the silence of or deficiency of law in the matter, or its brevity or contradictory nature, cannot refrain from admitting and examining cases and delivering his judgement".

1.23 Islamic Jurisprudence

Definition of Islamic Jurisprudence

"Islamic law is divine law as it is based on the totality of Allah’s commands revealed on Prophet Muhammad (PBUH) and embodied in Holy Quran. The discipline which studies the principles of Islamic law is denominated as Usulu’l Fiqh also called ‘ilmu’l Usul’ (Islamic Jurisprudence). Illumu’l Faru, is the material science of Islamic law.

Fiqh literally means ‘intelligence’ and faqih is a jurist, a person expert in legal science. There is a different between ‘Ilm, knowledge and fiqh, which requires both intelligence and independent judgement.

The author of the Taudih gives the definition of fiqh as the knowledge of laws (ahkam) of the Shariat which are intended to be acted upon, and have been divulged to us by revelation or determined by concurrent decision of the learned, such knowledge being derived from the sources of the laws with the power of making correct deductions there from.
In fact, *Fiqh* is the name given to the jurisprudence in Islam. In its widest sense, it covers all aspects of religious, political and civil life. In addition to the laws regulating ritual and religious observances (*Ibadaat*), as far as concerns performance and abstinence, it includes the whole field of a family law, the law of inheritance, of property and of contract, in other words, provisions for all the legal questions that arise in social life (*Muamalat*), it also includes criminal law and procedure and finally constitutional law and laws regulating the administration of the State and the conduct of war. All aspects of public and private life and business should be regulated by laws recognized by religion; the science of these laws is *Fiqh*. In other words, *Fiqh* or the science of Islamic law is the study of one’s rights and obligations derived from the Quran, and the *Sunna* of the Prophet (PBUH) (tradition), the consensus of opinion among the learned (*Ijma*), analogical deduction (*qiyas*). Here it is necessary to understand the distinction between *Shariat* and *Fiqh*.

1.24 Muslim Shari’ah/Shariyat Law (The Canon Law)

Islam includes different kinds of teachings: canonical, philosophical, moral, historical, etc. The set of canonical laws of Islam is called *shari’ah*. Technologically speaking, by *shari’ah* is meant the totality of Allah’s commandments (does and don’ts) relating to vocational actions of man. The commandments represent Allah’s Will for people’s way of life in this world. To Muslims, following these dos and don’ts secures happiness and success for mankind in this life and in the hereafter.

Muslims maintain that *shari’ah* principles and regulations are fixed and permanent (according to a tradition, what the Prophet

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declared as *halal* (lawful, permitted) or *haram* (unlawful, prohibited) will remain so till Resurrection. The general principles and regulations have been stated in the Quran in a very general way. When new issues and situations arise, knowledge and time-conscious scholars form an opinion by taking into account the major principles in the light of the *sunnah* [i.e., practice (speeches and actions)] of the Prophet (and according to the *shi'is*, the practice of the Imam too). This kind of inference is called *Ijtihad* (which literally means “exerting one’s self to the utmost degree to attain an object”). In doing so, Muslims scholars are “wisdom” to look at the situations and circumstances on the one hand, and the “*sunnah*” on the other. Hence, the Prophet’s (and Imams’) practice is considered the second important source of canon laws in Islam.

Imam *Ja'far Sadiq*, who belongs to the household of the blessed Prophet and lived in the second century A.H., is the founder of the school of *Fiqh-I Ja'fari* (Imamite juridical school) and in fact the first great teacher of *Shari'ah*. The *Shi'is* living in Iran, Iraq, Lebanon follow this school of jurisprudence.

As mentioned before, canon laws of Islam are classified into *ibadat* (duties) and *mo'amilat* (transactions). *Ibadat* regulate man-God relationship, dealing with the obligations, duties, conditions, etc. that should be observed while performing the rituals. *Moamilat*, on the other hand, concern social and individual relationships among people, regulations governing the society, and conditions for the felicity of a transaction in terms of Islamic canon laws.

In Islam, the major *ibadat* are *salat* (ritual prayer), *sawm* (fasting during the month of *Ramadhan-Ramazan*), *Hajj* (pilgrimage to Mecca), *Zakat* (paying alms), and *Jihad* (holy war). Juridical
books (now in the form of *Risalah-yi amaliyya* "a book of Islamic laws") contain Sections on the ritual prayer as the major pillar of Islam. In Islamic tradition and customs, the ritual prayer and its conditions have been dealt with so much that it is said “All other acts of worship will be accepted only if the ritual prayer is accepted”; by the same token, “all other acts of worship will be rejected if the ritual prayer is rejected”.

There are very minor differences among the juridical schools as regards conditions of performing the ritual prayer. Typically, Muslims perform the ritual prayer five times a day (consisting of 17 rak’a’s “Sections, parts”) in the morning, at noon and in the evening. There are also some specific prayers such as Friday prayer, F (when fasting finishes at the end of *Ramadhan*), and *Ayat* prayer (performed when some natural phenomena happen, such as eclipse of the sun/moon, earthquake, flooding, etc.).

1.25 Division of *Fiqh*

*Fiqh* literally means ‘intelligence’. It is the name given to the whole science of jurisprudence, because it implies the independent exercise of intelligence in deciding a point of law.

Muslim jurists define *Fiqh* as “the knowledge of one’s right and obligation derived from the *Koran* [Quran] or *Hadith*, or deduced therefrom, or about which the learned have agreed”.

From the above definition it is clear that the science of Muslim law or *Fiqh* is based on *Koran* [Quran] and *Hadith* and analogical deduction [*Qiyas* in Sunni opinion and *Aql*reason in *Shia* opinion]. The last line of the definition, about which the learned

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have agreed, shows that *Ijma* or consensus of opinion among the learned, is also a source of *Fiqh*.105

(i) **Distinction between Shariat and Fiqh**

*Shariat* is a wider circle; it embraces in its orbit all human actions. Whether legal or otherwise, whereas *Fiqh* is the narrower circle, and deals with legal acts. *Shariat* owes its existence to the *Koran* [*Quran*] and *Hadith*, while *Fiqh* is mainly erected by human try. In other words, the path of *Shariat* is laid down by God and his Prophet: The edifice of *Fiqh* is erected by human try. In the *Fiqh*, an action is either legal or illegal. In the *Shariat* there are various grades of approval or disapproval.

Apart from the above narrow distinctions, there is not much to separate *Shariat* from *Fiqh*. It is because “*Hindu* and *Muhammadan* Laws are so intimately connected with religion that they cannot readily be disserved from it”.106

1.26 **The position of women in pre-Islamic Arabia**

In trying to study the social condition of the ancient Arabs it is necessary to realize the position of women in pre-Islamic Arabia. Muslim authors as a rule maintain that the position of women at the time of the Prophet was no better than that of animals: they had no legal rights; in youth they were the goods and chattels of the father; after marriage the husband became their lord and master.107 Polygamy was universal, divorce was easy and female infanticide was common.

To understand the nature and concept of divorce law in Isla a brief account of his historical background of divorce is necessary.

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106 Supra note at 22-25.
Among all the nations of antiquity, the power of divorce was regarded as a natural corollary to the marital right. Originally, this power was exclusively vested in the husband, and the wife was under no circumstance entitled to claim a divorce.\footnote{Furqan Ahmad, “Understanding the Islamic Law of Divorce”, \textit{Journal of the Indian Law Institute}, Vol. 45, p. 483 (Jul-Dec 2003).} The progress of civilization and the advancement of idea have let to a partial amelioration in the condition of women. They too, acquired a qualified right of divorce, when they where never backward in exercising freely, until the facility with which marriages were contracted and dissolved under the roman emperors passed into a by-word.\footnote{Ameer Ali, \textit{Mohammedan Law}, Vol. II, p. 471 (1985).}

1.27 \textbf{Lexical Meaning of Talaq (Divorce)}

\textit{Talaqa, yatluqu, talaqan (chapter nasara, yansuru)} lexically mean ‘to release, to free, to separate’. \textit{Talaqatin naqatu} means ‘untying of the she-camel’s foot from the rope’.\footnote{Misbahul Lughat, p. 515} It says in the margin of \textit{Hidayah}:

\begin{quote}
\end{quote}

1.28 \textbf{Pre-Islamic background of divorce (Talaq)}

Among the pre-Islamic Arab, the power of divorce possessed by the husband was unlimited. They could divorce their wives at any time, for any reason or without any reason. They could also revoke their divorce, and divorce again as many times as they

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{110} Misbahul Lughat, p. 515
\item \textsuperscript{112} Mufti Fuzail-ur-Rahman, The Islamic Law, Marriage, Divorce, Inheritance, p. 223 (2000).
\end{enumerate}
\end{footnotesize}
preferred. They could, moreover, if they were so inclined, swear that they would have no intercourse with their wives, though still living with them. They could arbitrarily accuse their wives of adultery, dismiss them, and leave them with such notoriety as would deter other suitors; while they themselves would go exempt from any formal responsibility of maintenance or legal punishment.¹¹³

Woman was never a free agent in marriage. It was the father or other male guardian who gave her in marriage, and her consent was of no moment. There were no limits to the number of wives a man could have. Divorce was a matter of a few words, and there were many forms dissolution of marriage some of which have been adopted by Islam.¹¹⁴ And they could marry two sisters at the same time, and was like-wise absolutely free to release himself from the marital tie. His power in this connection was absolute and he was neither required to assign any reason for the exercise nor was he under the necessity of observing any particular procedure. The word *talaq* was commonly used for this purpose. It depended upon this discretion whether he would dissolve the marriage absolutely and thus set the woman free to marry again or not. He might if he so chose revoke the divorce and resume marital connection. Sometimes an Arab would pronounced *talaq* ten times and take back his wife and again divorce her and then take her back and so on. The wife in such a predicament was entirely at the mercy of the husband and would not know when she was free. Sometimes the husband would renounce his wife by means of what was called a suspensory divorce.¹¹⁵

The wife among the Arab had no corresponding right to release herself from the bond of marriage. But her parents, by a friendly arrangement with the husband, could obtain a separation by returning the dower if had been paid or by agreed to forego it if not paid. Such an arrangement was called *khula* and by it the marriage tie would be absolutely dissolved.\(^{116}\)

According to *Abdur Rahim*, at least four various types of dissolution of marriage were known in pre-Islamic Arabia. These were *Talak (Tlaq)*, *Ila*, *Zihar* and *Khula*. A woman if absolutely separated through any of these four modes was probably free to remarry, but she could not do so until sometime, called the period of *iddat*, had passed. It was to ascertain the legitimacy of the child. But it was not a strict rule. Sometimes, pregnant wife was divorced and was married to another person under an agreement. It is interesting to note that the period of *iddat* in case of death husband then was one year.\(^{117}\)

1.29 Divorce after the advent of Islam

Prophet of Islam looked on these customs of divorce with extreme disapproval and regarded their practice as calculated to undermine the foundation of society. It was impossible, however, under the existing conditions of society to abolish the custom entirely. The Prophet had to mould the mind of an uncultured and semi-barbarous community to a higher development. Accordingly, he allowed the exercise of the power of divorce to husbands under certain conditions. He permitted to divorce parties three distinct and separate periods within which they might try to reconcile their differences; but should all attempts at reconciliation prove

\(^{116}\) *Supra* note at 6.

unsuccessful, then in the third period the final separation became effective.\footnote{118}

The reforms of Prophet Muhammad marked a new departure in the history of Eastern legislation. He restrained the unlimited power of divorce by the husband and gave to the woman the right of obtaining the separation on reasonable grounds. He pronounced “talak (Talaq) to be the most detestable before God of all permitted things” for it prevented conjugal happiness and interfered with the proper bringing up of children.\footnote{119} Ameer Ali assert:

“The permission (of divorce), therefore, in the Koran[Quran] though it gave a certain countenance to the old customs, has to be read in the light of the lawgiver’s own enunciations. When it is borne in mind how intimately law and religion are connected in the Islamic system, it will be easy to understand the bearing of his words on the institution of divorce.\footnote{120}

An effective check placed by Islam on frequent divorce and remarriage was that in case of irrevocable separation, it is essential for remarriage that the wife should marry another man, and this marriage should be consummated before divorce, and the wife should observe iddat. This was a measure which rendered separation rare. Certain critics accuse this procedure as “a disgusting ordeal” and “revolting”, but they ignore that among a proud, jealous, and sensitive race like the Arab, such a condition was one of the strongest antidotes for the evil. It intended to control one of the most sensitive nations of the earth, by acting on the strongest feeling of their nature, the sense of honour.\footnote{121}
Fyzee says that it is sometimes suggested that the greatest defect of the Islamic system is the absolute power given to the husband to divorce his wife without cause. Dower to some extent restricts the use of this power. But experience shows that greater suffering is engendered by the husband's withholding divorce than by his irresponsible exercise of the right.122

1.30 Why Divorce . . .?

When all the utmost efforts have come to blank wall, no way of love and harmony has remained, the real purposes of the relation of marriage are being defeated, the limits of Allah are being broken, it is better to break the relation of marriage rather than the limits of Allah. There should be no insistence on remaining tied to each other in spite of hatred, aversion and lack of congeniality, and the way of their separation should be opened. Divorce is an emergency exit for such circumstances only and, conceding to human nature, has been provided for the protection of the expediencies of civilization.

“When it is not possible to bring a story to (a proper) end, it is good to give it a good turn and leave it”.

Neither should the religion of marriage be as weak as a spider’s web that for insignificant things, as in Europe, women may obtain divorce from the Court and the whole system of family life may be shattered; nor should it be so unbreakable that though the spouses’ life may become a misery and yet the yoke of even may not separate.123

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1.31 **What does Islam say about divorce (Talaq)?**

Islam gives necessary instructions for the preservation of family relationship. Conformation to these instructions paves the way for a strong family bond and trouble free matrimonial life. However, Islam is not blind to the discords that may occur in family life. Islam recommends three practical and scientific methods to prevent the severing of family relations due to discord caused by lack of discipline. The first procedure recommends good advice, failing which one boycotts the bed. If this also fails, mild physical punishment can be given, without bruising her body or mind. When all the three methods fail, the relatives of the couple can arbitrate and try for a compromise. If this attempt also fails to reunite the couple, Islam permits a divorce in a decent manner. Islam is very stern on the issue of divorce and it is allowed only in absolutely unavoidable situations. *Prophet Mohammed (PBUH):*

> “Know that all of you are rulers and that you will be questioned about all that you rule over. A leader is a ruler. Every man is the ruler of his household. The woman is in charge of her house and children. Hence every one of you is a ruler and you are responsible for those whom you rule”.

1.32 **The Islamic Shari‘ah does not Approve of Divorce**

Wedding is a sacred relation, a chaste connection, a strong knot; Allah Most High has called it ‘a strong pledge’.

> “and they have taken a strong pledge from you”.

The Islamic *Shari‘ah* does not like the breaking of this strong relation.

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124 [http://www.nicheoftruth.org/pages/what_is_islam.htm](http://www.nicheoftruth.org/pages/what_is_islam.htm)

125 [Holy Quran, (Nisa, 4:21).](http://www.nicheoftruth.org/pages/what_is_islam.htm)
1.33 Indian Muslim Personal (Family) law /Shariat Law

An Act to make provision for the application of the Muslim personal law to Muslims is called Shariat law.

Marriage, divorce, guardianship, inheritance etc. are called 'personal matters' of individuals because they relate to those affairs which normally affect only their own personality. Personality of an individual develops and is affected by the family which such individual is born and is brought up. The personal matters may, therefore, be called also as “family-matters”. Accordingly, personal laws are known also as family laws. The family-matters such as family status and the family property etc. are generally based on religion. The practice is, therefore, to call the personal laws of individual by the name of their respective religion e.g: the Hindu law or the Muslim law. In respect of the family-matters, the courts are required to apply the rules of Hindu law where the parties are Hindu and Muslim law where the parties are Muslims. 126

The main provisions of The Muslim personal law (shariat) application Act, 1937 (in Indian Muslim law) are as follows:

Intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

The Shariat Act 1937 is a small law with only three Sections. First Section says: the name of this Act is Shariat Act, second Section says: notwithstanding any contrary custom, in the matters of marriage, divorce, inheritance, succession etc. Muslim law will be applied to Muslims, the third Section says: in respect of three particular matters – will, legacy and adoption – Muslim law will be applied only if a person desires that Muslim law should be applied and for that he has to file a declaration with the government. Otherwise he will be governed by customs.

1.34 The Shariat Act, 1937

There were certain doubts in the minds of Indian Muslim regarding the application of Muslim personal law to Muslims. To confirm the policy of the British Government and to remove their doubts, the Shariat Act had to be enacted by the Central Legislature in 1937. Act present the application of Muslim Personal Law is generally regulated by this enactment. Provisions of this Act regarding the application of Muslim Personal Law are summarized as under:

(a) Section 2 of the Shariat Act provides that in a case where both the parties are Muslim the rule for decision shall be Muslim Law, if the case involves any of the following matters:

1. Intestate succession (i.e.inheritance),
2. Special property of the females,
3. Marriage (including all incidents of marriage),
4. Dissolution of marriage (including all kinds of divorce),
5. Maintenance,
6. Dower,

7. Guardianship,

8. Gift,

9. Trust and trust properties,

10. Wakf.

It is, therefore, clear that respect of the above-mentioned matters, if both the parties to a case are Muslims, the courts shall apply only the Muslim personal law and nothing else. A custom or usage contrary to Muslim law cannot be applied now. It is significant to note that the words, “rule for decision shall be Muslim law” in Section 2 of the Act, are mandatory, meaning thereby that the courts are not only empowered but also bound to administer only Muslim personal law in the situations mentioned therein.  

1.35 The Dissolution of Muslim Marriages Act, VIII of 1939

The Dissolution of Muslim Marriage Act was passed in order to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie. The Act came into force on the 17th March, 1939, and lays down the following grounds of divorce:

1. The whereabouts of the husband are unknown for a period of four years (Section 324);

2. Failure of the husband to provide for the maintenance of the wife for a period of two years (Section 325);

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3. Sentence of imprisonment on husband for a period of seven years (Section 326);

4. Failure without reasonable cause to perform marital obligations (Section 327);

5. Impotence of husband (Section 328);

6. Insanity of husband (Section 329);

7. Repudiation of marriage by wife (Section 330);

8. Cruelty of husband (Section 331);

9. Any other grounds recognized by Muslim law (Section 332);

Section 4 of the Act deals with the effect of the apostasy from Islam of a married Muslim woman (Section 321). It is submitted that the grounds are independent of each other, and on proof of any one of them, a decree for dissolution of marriage can be made.

According to the preambles of the Act, it is a consolidating Act. In one case, it has been assumed that the Act is a declaratory one, but this almost would apply to Section 2 of the Act. But even as to Section 2, it is submitted that the Act is not wholly declaratory. The statement of objects and reasons for the Bill shows that there is no provision in the Hanafi Law enabling a married Muslim woman to obtain a decree dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and “under other circumstances”. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India”. It is further stated that the Courts

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hesitate to apply the Maliki Law (which provides for dissolution in such circumstances), although the Hanafi jurists have clearly laid down that in cases of hardship under the Hanafi law the principle of the Maliki law may be applied.

Whatever the position may be in cases dealt with in Section 2, there can be no doubt that the principle of a marriage being dissolved on account of the apostasy of a married woman has not been unknown to the Muslim jurists and this principle has been recognized and given effect to by the decisions of the Courts for more than 70 years. Although, therefore, the preamble states that Section 4 was enacted “to remove doubts as to the effect of renunciation of Islam by a married Muslim woman on her marriage tie”, the Section effects a material alteration in the law on the proof and can hardly be described as declaratory in its nature.

The question then is whether the Act can be said to be retrospective in its operation. This question arose in three cases decided by the Lahore High Court since the Act came into force and were, curiously enough, cased decided by single judges of the same Court under Section 4 of the Act. In the first of these cases a wife sued for a declaration that her marriage with the defendant had come to an end on account of her conversion to Christianity. The suit was instituted on the 31st August, 1938, and decreed by the trial Court on the 28th November, 1938. The first appellate Court reversed the decision on the 28th June, 1939, and dismissed the suit. In the meantime Act VIII of 1939 came into force on the 17th March, 1939. The High Court in second appeal confirmed the decision but on the ground that the case was governed by the Act

which operated retrospectively. In the later two cases, it was held that the Act could be applied retrospectively. In Mt. Rashi Bibi v. Tufail Muhammad, the Court seems to have held that the statute, as regards Section 4 at least was not declaratory and that the law on the point was before the Act different. In both the later decisions it was pointed out that the language used by the Legislature, namely, “the renunciation of Islam . . . shall not by itself operate to dissolve her marriage” would appear to apply only to renunciations or conversions which might take place after the Act came into force.

It is a general principle that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require that construction. Except in special cases, a new Act ought to be construed so as to interfere as little as possible with vested rights, and where the words admit of another construction, they should not be so construed as to impose, disabilities not existing at the passing of the Act. What the consequences of giving a retrospective effect to Section 4 would be it is easy to imagine and is pointed out in the cases noted below. It is submitted that the language used in Section 4 is clear and suggests that it was not intended to interfere with rights acquired under the existing law. It is therefore submitted that the decision in Fazal Begum v. Hakim Ali, is wrong and the view taken in the two later cases is correct.

The learned judge who decided Rabian Bibi v. Gulam Ali, has held that the provisions of Section 2 (ii) may be given retrospective effect.130

In a suit by a Mahomedan girl claiming to exercise her option for a declaration that her marriage with the defendant stood repudiated and dissolved, it was held that although the suit was not

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filed under Act III of 1939, “the Act must be taken to indicate the
general principles of justice, equity and good conscience
applicable” and as Mahommedan Law is administered in Sind as a
matter of justice, equity and good conscience, there was no reason
why the plaintiff should be required to file a fresh suit and therefore
the declaration sought was granted.

1.36 Grounds of Dissolution recognised by Mohammedan Law

The wife is entitled to a decree for the dissolution of her
marriage on any other ground which is recognised as valid for the
dissolution of marriages under Muslim law (c). Incompatibility of
temperaments and hatred of the wife for her husband are not
recognised by Muslim law as grounds of divorce.

Section 2 of the Shariat Act expressly refers to ila (see
Section 317), zihar (see Section 318), Khulaa and mubara’at (see
Section 319). Sub-clause (ix) of Section 2 is sufficiently wide to
cover all grounds recognised by the Muslim law entitling a wife to
divorce including the contractual right of divorce known as
talak(Talaq) by tafweez (see Section 314). Courts are entitled to
grant divorce on grounds recognised by the Shariat, regardless of
the fact that those grounds were not recognised by courts previous
to the passing of the Act.

1.37 Objective of study

Islam is divided into two main schools which are Shia and
Sunny; despite all of the differences in opinion and practice, Shia
and Sunny Muslims share the same believes in most fundamental
Islamic and Articles of faith. In fact, most Muslims do not
distinguish themselves by claiming membership in any particular
group, but prefer to call themselves simply”, Muslims.
The differences between these two main sub-groups within Islam initially stemmed not from spiritual differences, but political ones. Over the centuries, however, these political differences have spawned a number of varying practices and positions which will be studied in this research.

In addition to that the strong and weak points of two sect’s laws of Divorce will be studied. It is useful for a country to use the strong points in order to improve its laws. (Providing that the points aren’t against national and religious beliefs of the countries). They can mark the weakness points to legislative members to remove or correct them.

1.38 Research Hypotheses

There is no difference of opinion amongst Muslim schools that the religion of Allah is Islam; that the only way to know Islam is through the Book of Allah and the Sunnah of the Holy Prophet; and that the Book of Allah is what is known as the Quran, without any “addition” or “deletion”. All the Muslims agree that Allah is one, Muhammad (PBUH & HF) is His last prophet, and that one day Allah will resurrect all the human beings and all will be questioned about their beliefs and actions. All of them agree that anyone who does not believe in any of the above three basic principles is not a Muslim. As a matter of fact, different leaders instruct different ways of approach to each issue. This may result to more differences as the time goes.

Then, the split which divides the Muslim into two sects Shia and Sunni was due to the difference of opinions among the Muslims to find out the successor of the Prophet. Therefore different successor resulted in different interpretations regarding some versus of Holy Quran and accepting or not accepting some Sunnats. The
different interpretations and disagreement on some Sunnat caused disputes on some Laws.

Islamic law concerning family laws and divorce has got different interpretation. In this study both Sect’s interpretations about one part of Family Law which is Divorce will be described thoroughly in addition to their differences and consequently their strong points will be mentioned and accordingly some recommendations will be given to preserve the family; and as a result this will create the equality of status of husband and wife in Divorce Law.

As these laws are practiced differently in different Muslim countries; in this study two different Muslim Sects in two different countries of Iran and India, in India the majority of Muslims are Hanafi and in Iran the majority of Muslims are Shia Athna Ashari, will be scrutinized.

1.39 Methodology of Research

The design of this study is an analytic historical research in which the researcher will collect the data from secondary sources, i.e., different books for Civil Laws, Family Laws.

The analysis of data will be done based on the comparative analysis of the differences and similarities of two sects of Islam regarding Divorce Law.

The conclusion of the study will recommend the strong points of two sects in divorce Law.

1.40 Scope of the study

Since there are many old cultural and religious similarities between Iran and India; the researcher has selected the divorce laws of these two similar countries to study.
In this research, the researcher will study a kind of family law called divorce laws among Iranian Muslims (majority are 'Shia Athna Asharia') and Indian Muslims (Sunni-majority are Hanafi).