

(i) **Ithna Asharia:** *Ithna Asharia* are those who believe in the twelve Imams. Their last Imam was Al-Mehedi Muhammad Al-Muntazir who disappeared between 873-477 A.D. That is why he is called *Imam Gaib* and they believe that he will re-appear and reform the world. *Ithna Asharia* is divided into two schools, namely –(a) *Akhbari* (b) *Asuli*. The *Akhbarias* are traditionalists and follow rigidly the principles of the *Mujtahids*. They believe in *taqlid*. The *asulis* depend on reasoning and they interpret the Quran in the light of everyday knowledge. They reject those Hadith which, according to them, are not in conformity with the spirit of the Quran.

(ii) **Ismailia:** *Ismailia* are the followers of seventh Imam Ismail, Imam Ismail died during the lifetime of his father, Imam Jafor. Those who refused to accept Imam Musa al Kazim and brought allegiance to Imam Ismail are Ismailia. The Ismailias are divided into two groups – (a) *Nisari* and (b) *Mustali*

(iii) **Zaidiyya:** They were the followers of Imam Zaid, Son of Imam Ali Asgar. He was the fifth Imam. Zaidijyas are very few in numbers scattered in different parts.

Chapter Five

Evolution of Islamic Law

Islamic law has been developed through evolution under different stages. Justice Abdur Rahim divides the stages into four but Asaf Fyzee divides it into five adding one more.¹ We discuss the five periods of development of Islamic law.

First period

The first period extends from 1 A.H. (622 A.D) to 10 A.H. (632 A.D.) i.e. the last ten years of the prophet's life. This is the most important period so far Quran and Hadith are concerned. At this period most of the legal verses of the Quran were revealed and this period is also related to most important judicial decisions and traditions of the prophet. The prophet used to receive revelation for the guidance of human beings. As a matter of fact, many rules and regulations of law were revealed in answer to the questions made by people. The following verses of the Quran are cited in support of this view.

- (a) "They ask thee about the new moons."-(2:189).
- (b) "They ask thee what they should spend."- (2: 215).
- (c) "They ask thee regarding the sacred month."-(2:17).
- (d) "They ask about intoxicants and games of chance."- (2: 219).
- (e) "They ask thee what is made lawful for them"-(5:4).
- (f) "They ask thee of the spoils of war"-(8:1).
- (g) "They ask thee concerning the orphans"-. (2:220).

The answers in reply to these questions have become part of legislation. The number of legislative verses concerning law is about five hundred. Besides, the practice and precepts of the prophet are also part of legislation. Thus all the problems are solved by the Quran and the Sunnah of the prophet, which arose during this period. The first period of evolution of Islamic law came to an end with the demise of the prophet in the eleventh year of the Hijri era.

¹ Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, P. 32.

Second period

The second period extends from the date of the demise of the prophet (632 A.D.) and lasted for about a century. It approximately covers the time of the companions (*Shahabas*) of the prophet and their successors (*Tabiun*). In fact, it starts from 11 A.H. and continued upto Umayyad period. Two significant works were performed during the second period –(a) collection of Quran and Hadith and (b) study of law as a science.

At the beginning of this period, selection of Hazrat Abu Bakar (R) as head of the state took place. During this period, collection and editing of the text of the Quran were performed. Hazrat Usman (R), the third Caliph, collected and edited the text of the Quran with the help of Zaid, a companion and personal secretary of the prophet. The present Quran, which exists all over the world absolutely pure and without perversion, was edited by Hazrat Usman (R). During this period Hadith, the second source of Islamic law, was compiled in book form by private enterprise of Muslims and not by state management.

Discussion on Hadith was made at Medina, but consequently it spread outside of Medina with the shifting of Capital to Damascus. Abu Masud used to deliver lectures on Hadith and law at kufa in Bagdad. So Medina, Kufa and Damascus became the seat of learning of Hadith.

Four Caliphs administered the country from ten A.H. to forty A.H. During this period, the first Caliph, Abu Bakar(R). Constructed jails for the custody of criminals, the second Caliph, Umar Faruq, for the first time, appointed Qadi (Judge) for deciding the cases.² This was the first attempt for methodical administration of justice which later on developed into a regular system in this century. With the fall of Umayyad dynasty in 132 A.H., the second period came to an end.

² Mir Waliullah, Muslim Jurisprudence, P. 106.

Third Period

This period extends from 132 A.H. to the third century of the Hijri. After coming into power, the Abbasids shifted the capital from Damascus to Bagdad. This period is noteworthy for three events:-³

- (a) Collection of Hadith;
- (b) Development of four Sunni Schools; and
- (c) a systematic and scientific study of law.

In this period four Sunni schools of Islamic jurisprudence appeared. They differed from each other merely in matters of detail and not on fundamental matters. The contributions of these schools are already discussed under chapter four.

The jurists of this period, specially Abu Hanifa, Shafei and Malik formulated the Principle of the Science of *usul* or Islamic jurisprudence. The main aim of the science of *usul* is to interpret the texts of the Quran, Hadith and *Ijma* and also to deduce *Qiyas* or analogy in the light of the three sources. *Usul* leads to the expansion of Islamic law, which is essential to meet the demand of ever changing society.

In this period the work of collection of Hadith was started and its compilation was also completed. Six authentic books on Hadith including Bukhari and Muslim were compiled. The compilers of the six books on Hadith made hard and exhaustive labour for collection and their compilation. These books have permanent influence on Islamic jurisprudence.

The introduction of *Istihsan*, *Istidlal*, *Istislah*, which look place in this period, enriched the scope of application of Islamic law.

Fourth period

This period extends from the third century of Hijri to 1922 A. D., the year of abolition of the sultanate or 1924 A.D., the year of abolition of the caliphate by Turkish Republic⁴. This period is treated as the period of *Ijtihad* and *Taqlid*. After the foundation of four schools, the jurists of later ages applied for themselves the methods laid down by the founders and developed each system in a definite way. *Taqlid*, on the one hand,

³ Syed Khalid Rashid, Muslim Law, P.26.

⁴ Asaf A.A Fyzee, Outlines of Muhammadan Law, P. 36

was followed prominently but on the other, the limits of Ijtihad were chiefly restricted. Though the earlier Mujtahids would exercise the power of interpretation of the texts, but the latter jurists could not cross the barrier of the formers. The jurists were classified according to their power of interpretation. The classification of the jurists or lawyers in this period was graded into seven different categories starting from Imams of four schools down to the ordinary Mufti. (juriconsult). The later jurists hold the lower rank and as such incompetent to exercise independent judgment. It impliedly means that the door of Ijtihad is closed. But the closure of Ijtihad creates deadlock and stands as barrier to the way of development. It is to be noted that in this period a large number of eminent commentators and annotators like Tabari, Jamaksari, Baidabi, Bhajjali, Ialalain, Fikhrudin, Rajcte were born, Besides, Ibn Hammam, Ibn Nazim and Ibn Abedin made a lot of contributions to the development of Hanafi law. Further more, Hedaya, Inaya, Nihaya, Durul Mukhtar, Raddul Muhtar, all are commentaries, are the important contributions of fourth period.

Fifth period

The fifth period of the evolution of Islamic law began with the fifth century of the Hijri, i.e. with the abolition of caliphate or Sultanate and it has not come to an end. Actually, this is the period of taqlid. A large number of books were written and are being written in this period, but these are mere compilations. Some writings are the commentaries of commentaries. The most standard work on Islamic law is the *Fatwa-i-Alamgiri* written and published under the orders and supervision of Emperor Aurangzeb.⁵ *Muhammadan law* in two vol. by Syed Ameer Ali, *Reconstruction of Religions Thoughts in Islam* by Dr. Muhammad Iqbal are the products of this period. These books are mostly the analysis of opinions of earlier writers. There is nothing new in them. In this long period, there has not been evolution of Islamic law, but new problem may arise which needs to be solved in the light of the Quran, Hadith and Ijma. Since Islam is a dynamic and complete code of life, it can suggest timely solution of any problem up to the day of resurrection.

⁵ Mir Waliullah, Muslim Jurisprudence, P.113.

Chapter Six Muslim Marriage

1. General Observations

Marriage is one of the oldest institutions in the history of human civilization. It is the foundation of all civilized communities. Considerable attention has been paid by all systems of law to the principles, rules and regulations to the contract of marriage. Thus marriage is a legally and socially sanctioned union between two persons of the opposite sex.¹ In Islamic jurisprudence, it means (*aqd*) or union.² The Arabic word for marriage is *Nikah*. In Bengal, a first marriage is commonly called *Shadi* which properly means joy or festivity. A second marriage is usually called *Nikah*. The word *nikah* thus used is supposed to imply an inferior kind of marriage which is altogether a misnomer.³ Marriage is regarded as the union of two souls for love and two bodies for procreation and legalising of children.⁴ Again, it has been defined as a social, noble and sacred contract, that has been referred to in the Holy Quran as *Mishaqan ghaliza*, solemn covenant.⁵ "A mere casual commerce, without the intention of cohabitation and bringing up of children, would not constitute marriage under any supposition. But when two persons of the opposite sex agree to have that commerce for the procreation and bringing up of children and such lasting cohabitation in a state of nature would be marriage."⁶ The intention of both the parties, husband and wife, therefore, plays a vital role in the mode of sexual gratification.

Syed Ameer Ali points out that marriage is an institution ordained for the protection of society and in order that human beings may guard themselves from foulness and unchastity.⁷ In Islam, marriage is a contract which has for its object the right of enjoyment and

¹ Encyclopaedia Britanica, Vol. XIV, P. 926.

² Muhammad Ali, The Religion of Islam, P. 602

³ S. Ameer Ali, Mahommedan Law, Vol. II, P. 257(1979).

⁴ Fazlul karim, al-Hadis, Vol. II, P. 629.

⁵ Al-Quran 4 : 21

⁶ Encyclopaedia Britannica, Vol. XIV. P. 931.

⁷ Ameer Ali, Muhammedan Law, Vol. II, P. 241(1979).