

Primary what law he  
would apply in



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Primary sources are those which the Prophet himself directed to be the sources of Muslim law. There is an old tradition according to which once the Prophet asked Muadh, one of his companions, as to what law he would apply in deciding a case? The companion replied that first he would judge a case according to the words of God; failing that, according to the traditions (precepts) of the Prophet and failing that too he would interpret with his own reason.

The Prophet approved these sources in the same order. These sources are, therefore, of highest quality and importance in their respective order of merit. The whole of Muslim personal law is based on the primary sources. They are also called the formal sources of Muslim law. Secondary sources explain or modify the primary sources of Muslim Personal Law according to the changing needs of the Islamic society. To meet the requirements of the society, Muslim law has been developed or modified also.

By local customs, judicial decisions and the State. Therefore, the rules of Muslim law are found also in the customs, legislations and the judicial decisions. Local customs, legislation and judicial decisions are, therefore, the secondary sources of Muslim law. Secondary sources are also called as extraneous sources. The Primary Sources:

**(1) Quran:**

The word Quran is derived from the Arabic word “ Qurra” and properly signifies, “ the reading” or “ that which ought to be read”.

It is believed that Quran is of divine origin and was revealed to Prophet Mohammad for the benefit of mankind. Quran is the first source of Muslim

law in point of time as well as in importance. It is the first source in point of time because, before Quran there was no Islamic society as it exists today.

As pointed out earlier, the first revelation (Wahi) came to the Prophet in 609 A. D. Since then the revelations continued to come to the Prophet in fragments during a period of 23 years, till 632 A.

D. when the Prophet expired. The revelations were the communications of God and were made by angel Gabriel to the Prophet. These communications or messages from God were conveyed to the society by the Prophet through his preachings. The Prophet from time to time used to deliver preachings to his followers saying that these were the messages to them from God. The communications were in the form of verses and were remembered by the followers of the Prophet.

Some of them were also reduced to writing on palm-leaves, camel hide or even on mud so that they may not be forgotten. The communications were in scattered form and were not systematically revealed. After the Prophet's death, the revealed verses were collected, consolidated and systematically written under the authority of Osman who was the third Caliph. A peculiar feature of the verses of Quran is that they are believed to be the very words of God; Prophet Muhammad was simply the messenger of God to the society. Quran is of divine origin, therefore, in importance it is the first source of Muslim law. Salient Features of Quran as Source of Law: Salient features of Quran as a source of Muslim law, may be summarised as under (i) Divine Origin: Quran is of divine origin.

It is believed in Islam that the words and the verses of this holy book are made by Almighty God and not by any human being. The Prophet simply uttered these words on behalf of God. Since Quran is compilation of the very words of God, its words are unchangeable and its authority is unchallengeable. (ii) First Source: Quran is the first and fundamental source of Islam in point of time. The present Muslim religion was born with the words of Quran. Any study of Islamic principles or the Muslim law must therefore, begin with it. (iii) Structure: Quran is in the form of verses.

Each verse is called 'Ayat'. There are 6237 verses in Quran which are contained in 114 Chapters. Each Chapter of Quran is called 'Sura'. The various chapters are arranged subject-wise and have their specific titles. The first 'Sura' of Quran is Surat-ul-Fatiha which is an introduction to the holy book and consists of verses in the praise of Almighty God.

Similarly, other chapters contain generally the verses on the subject which justify their titles. Some of the important chapters of Quran are, Surat-un-Nisa (rules relating to women), Surat-ul-Talaq (rules relating to divorce), Surat-ul-Baqr (rules relating to religion and morality), Surat-ul-Ikhlās (principle of absolute surrender to God) and, Surat-ul-Noor (rules relating to home-life). (iv) Admixture of Religion, Law and Morality: Quran is mixture of religion, law and morality. Religion, law and morality are, at some places, mixed in such a manner that it is difficult to separate them. In holy books of other religions too, we find the same peculiarity. For example, in Vedas and Smritis (the fundamental sources of Hindu Law), the legal rules are mixed with the moral code of conduct. It is believed that the verses of Quran pertaining to religion and morality were revealed at Mecca and those

pertaining to 'law' were revealed at Medina. The whole of Quran, therefore, may not be treated as a source of law.

Only the law-making Ayats, which are about 200 scattered in different chapters, may be regarded as the fundamental source of Muslim law. (v)

Different Forms of Legal Rules: The verses of Quran deal with law in different forms. Some of the verses have removed objectionable and evil customs like child infanticide, unlimited polygamy, gambling, usuary (charging very high interest in loans) etc. Some of them have laid down specific law-making 'rules' to settle the question that actually arose in day-to-day life. Quran contains also the general injunctions which have formed the basis of important juristic inferences. (vi) Unchangeable: The words of Quran are the words of God; therefore, it is the most authoritative source of Muslim law. If any specific meaning has been attributed to a particular verse of Quran, either by Shia or by Sunni authorities then, the courts have no power to give any other meaning to that verse. (vii) Incompleteness: Quran is not a complete code of Muslim personal law.

It generally contains verses relating to the philosophy of life and religion.

Only about 200 verses deal with legal matters. Out of these, only about 80 verses deal with personal law.

Thus, only basic principles of Muslim personal law are given in Quran. (viii)

Silence of Quran: On many legal issues the Quran is found to be silent. For new problems of the society no legal solutions were available in the apparent words of Quran. We have seen that Quran is such a source of Muslim law which has come directly from God. It was revealed to the Prophet for the

socio-religious reform of the Arabian society of that time and therefore we may find solutions to almost all the problems of that society. But the religion of Islam spread so rapidly that within a short period the Islamic society became a big Islamic Commonwealth. It was obvious that in such a progressive society new problems arose day by day.

It was, therefore, necessary to explain and supplement the verses of Quran so that solution to new problems could be found. Accordingly, as a source of law, Quran was supplemented by another source called Sunna. (2) Sunna or Ahadis (Traditions of the Prophet): Sunna or Ahadis means the traditions of the Prophet. Whatever the Prophet said or did without reference to God, is treated as his traditions and is the second source of Muslim law. Traditions are the injunctions of God in the words of the Prophet.

Where the words of God could not supply an authority for a given rule of law, 'Prophet's own words' were treated as an authority because it is believed that even his own sayings derived inspiration from God. In Islam it is believed that the revelations were of two kinds, manifest (Zahir) and internal (Batin). Manifest or express revelations were the very words of God and came to the Prophet through angel Gabriel; such revelations, as pointed out earlier, formed part of Quran. Internal or implied revelations on the other hand, were those which had been 'Prophet's own words' but the ideas contained in the sayings were inspired by God. Such internal revelations formed part of Sunna. Tradition therefore differs from Quran in the sense that Quran contains the very words of God whereas a Tradition is in the language of the Prophet. What Constituted Sunna? All the preachings and

the practices of the Prophet (except when direct revelations from God used to come) formed part of Sunna.

What the Prophet said what he did and also his silence in a question put before him, was all taken to be authoritative and become a precedent.

Traditions as a source of Muslim law consist of: (i) Sunnat-ul-Qaul (words spoken) which means the utterances or the sayings of Prophet Mohammad; (ii) Sunnat-ul-Fail (conduct) which includes the doings of the Prophet i. e. his behaviour; and (iii) Sunnat-ul-Taqrir (silence) which is the 'silence of the Prophet' in answer to a question which was put before him for his decision. Silence amounted implied consent or approval of a rule of law. Sunnat-ul-Taqrir also includes such pre-Islamic customs which were not disapproved by the Prophet. He allowed the continuance of some customs in the society by his silent approval. Narrators of the Traditions: The preachings and precepts could become an authoritative source of law when some competent and qualified person called Narrator, had narrated it.

In other words, the Narrator used to testify that he heard the Prophet Saying it, or seen him doing it or has seen his silence over that matter. If this narration was found to be reliable, it became Sunna. As the narration of a tradition amounted to the creation of a new rule of law, the Narrator was required to be a qualified person. According to Abdur Rahim a person must possess following qualifications for being a competent Narrator: (i) he must have understanding (sane and adult), (ii) he must possess the power of retention, (iii) he must be a Muslim, and (iv) he must be of righteous conduct. Having these qualifications, following class of persons was recognised as Narrators: (a) Companions of the Prophet: They were such

Muslims who lived during the life-time of the Prophet and had the privilege of being in his close contact. This narration was treated as most reliable.

(b) Successors of the Companions: Those Muslims who did not live during the life of the Prophet but had the occasion of being in contact with the Companions of the Prophet were called the Successors. Authority of the narrations of the successors was second in priority. (c) Successors of the

Successors: Such Muslims who neither lived during the life of the Prophet nor during the life of any of the Prophet's Companions, but were in contact with the Successors, were called the Successor of the Successor of a Companion.

Their narration was last to be relied upon. Thus we see that the nearer was a Narrator to the Prophet, greater was the force of his narration. Kinds of

Traditions: Recognition and acceptance of a tradition as a source of law depends upon its authority and, its authority depends upon its proof given by the Narrators. From the point of view of their authority and acceptance in the society, traditions may be classified as under: (i) Ahadis-i-Mutwatir

(Universally Accepted Traditions): They are the traditions which have continuously been narrated by indefinite number of persons. They are most authoritative because there is no doubt in their genuineness and certainty.

These traditions have universal acceptance and are followed by all the sects of Islam. Abdur Rahim rightly observes that traditions of this class, like verse of the Quran, ensure absolute certainty as to their authenticity and demand implicit belief. (ii) Ahadis-i-Mashhoor (Popular Traditions): Traditions, which have been narrated by some Companion of the Prophet but subsequently accepted by majority of the people, are called Ahadis-i-Mashhoor or the well known traditions. These traditions are not accepted unanimously by all



Muslims but a great majority has always recognised them as a source of law.

(iii) Ahadis-i-Ahad (Isolated Traditions): Isolated traditions have neither been continuously followed nor followed by majority of the people. Only a certain section of the society has accepted them as source of law. Where the authenticity of any narration was doubtful, it was followed for some time only by few persons. Such traditions are called isolated traditions because their acceptance and recognition is localised one.

Majority of the jurists do not recognise these traditions as a source of Muslim law. Traditions are narrations of law and religion which were communicated from one generation to another and thus became the practices in the society. They were for a long time neither written nor systematically arranged. For the first time, Abu-Ibn-Zuhri attempted to collect and write down the scattered traditions. But Muvatta of Malik Ibn- Anas is regarded to be the first systematic collection of traditions, arranged and classified according to subjects. Traditions are in a very large number. Ibn Hanbal has collected about 80, 000 traditions in his book Masnad.

Drawbacks of Traditions: The importance of traditions as a source of Muslim law is unquestionable. But as source of law it suffers from following drawbacks: (1) There are many traditions of doubtful origin. On several occasions, the prevalent customs were treated as a rule of law in the name of the practices of the Prophet.

Narrators of such traditions are unknown persons. (2) There are several traditions which are contradictory to each other. There is, therefore, no

uniform and certain law on many issues. (3) Traditions have laid down religious, moral and also the legal codes of conduct for the society.

Sometimes it is difficult to separate a religious or moral principle from a legal rule. (4) Traditions got their authority from the narrators. After sometimes when successor of the successor also died, the formation of this source of law was stopped. For any new situation, therefore, traditions, as a source of law were not available. Because of the above-mentioned reasons, some other source of law was necessitated for the rapidly increasing Islamic society.

The next source of Muslim law is Ijma, which is discussed below.

### **(3) Ijma (Unanimous Decisions of Jurists):**

When Quran and traditions could not supply any rule of law for a new problem, the 'law-knowing persons' (jurists) used to agree unanimously and gave their common opinion over that point. Persons having knowledge of law were called Mujtahids (Jurists).

Such consensus opinion or unanimous decision of the jurists was termed Ijma, and is the third primary source of Muslim law. According to Abdur Rahim, Ijma may be defined as the agreement of the jurists among the followers of the Prophet Mohammad in a particular age on a particular question. This source of Muslim law has played a very important role in the subsequent development of Muslim law because; through Ijma it was possible to lay down new principles in accordance with the changing needs of the Islamic society. Validity of Ijma as a source of Muslim law is based on a tradition of the Prophet. In this 'tradition' he has said that, 'God will not

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allow His people to agree on an error. Formation of Ijma: When a new principle of law was required, the jurists (Mujtahids) used to give their concurrent opinion and a new law was laid down. Every Muslim was not competent to participate in the formation of Ijma.

Only Mujtahids could take part in it. Qualification for being a Mujtahid was that he must be a Muslim having adequate knowledge of law and was also competent to give independent judgments. This process of formulating a law through the consensus of the jurists was termed as Ijtihad which technically means exercise of one's own reasoning to deduce a new rule of law. But, the jurists were not free to give the decisions without any basis.

They had to justify their opinions in the light of some well settled principles already given in Quran or the traditions. Public policy, 'interest of the community' and equity were also taken into account as the basis for a new explanation of law. Kinds of Ijma: Authority of Ijma depended upon the merit of the participator in its formation. There were different categories of the jurists. Better was the category of jurists, greater is the value of their opinions. From the point of view of authority and importance, there are three kinds of Ijma: (1) Ijma of the Companions: The concurrent opinions of the Companions of the Prophet were taken to be most valuable and reliable. It was presumed that the Companions were the best persons to act as jurists. Such Ijma, being most authoritative, could not be overruled or modified by any subsequent Ijma.

Hanbalis recognise only this kind of Ijma. (2) Ijma of the Jurists: This was the unanimous decision of the jurists (other than Companions) over a point of

law in a particular age. In the absence of the opinions of the Companions of the Prophet, it was natural that the opinion of other learned scholars of any age was taken to be the law.

A great mass of Hanafi rules of law have been formulated through this kind of Ijma. (3) Ijma of the People: The third category of Ijma is the opinions of the majority of the Muslims. Sometimes the general agreement of the great majority of Muslims was also accepted as law. As a source of law, this kind of Ijma has little value because of two reasons. Firstly, it was not possible to have the concurrent opinion or even the absolute majority of the community at large.

Secondly, every Muslim cannot be supposed to be a learned scholar. Ijma of this kind generally relates to religious practices such as the observance of fasts, Zakat, prayers, etc. Importance of Ijma: New facts and new situations required new laws. Quran and traditions were adequate only for the past and not for the future society.

Fyzee rightly observes that, “ Quran and Sunna look to the past; consensus and qias deal with the future of Islamic jurisprudence”. In fact a major portion of the positive Muslim law (fiqh) came through Ijma. As a source of law importance of Ijma is twofold: First, further explanation and clarification of Quran and traditions was possible through consensus opinions of the jurists. Secondly, new principles of law, not found in the words of Quran or the traditions were also formulated according to the changing needs of the society. Quran and Traditions being rigid, no change was possible in their

words. But Ijma had opened the doors for new interpretations of Islamic legal rules. Ijma has rightly been termed as a 'movable element in law'.

It is movable element in law because it is flexible and not rigid like Quran or Traditions. According to J. Schacht, it is 'living tradition'. Through Ijtihad (process of Ijma) rule of law may be obtained for any society in any age. In this manner, it is a living source of legislation. Reform in Muslim personal law is possible even to-day in the same manner as Ijma was being formed in the past.

Defects of Ijma: As a source of Muslim law, Ijma had following defects: (i) The consensus of opinion of the jurists was based on several grounds, such as Quran, traditions, custom, public policy, equity etc. This led to differences in the approach of scholars in arriving at a decision. The result was that different schools and sub-schools were formed and law became complicated. (ii) After sometime, it was doubted whether the consensus or unanimity in the opinions, was at all necessary. Different views were expressed regarding the nature of consensus. According to some, a unanimous decision was necessary but according to others, opinions of the majority were sufficient to constitute the Ijma. (iii) Except the Ijma of the Companions, other two kinds of Ijma could be modified or overruled by a subsequent Ijma. There was, therefore, no certainty in law.

(iv) In a very short period, Islam spread to distant places. It became practically difficult to consult all the jurists and obtain their opinions. (v) Only learned scholars could take part in the formation of Ijma. By and by these

scholars died and it was felt that no jurists are available for its formation. The result was that about the 10th century, Ijma had to be abandoned.

#### **(4) Qiyas (Analogical Deduction):**

In the Arabic language Qiyas means 'measurement'. In other words, it means measuring or comparing a thing in relation to a standard, or 'to establish an analogy'. If there was any problem before the society on which the texts (Quran, Sunna and Ijma) were silent then Qiyas was applied to get the law.

It was a method of comparing the problem of society with a similar problem for which solution was given in the texts. Wilson defines Qiyas as an analogical deduction from the reason of a text to a case not actually covered by its language. In obtaining a law through Qiyas, following method was applied by the jurists (Mujtahids): (a) A similarity was established between the new problem (for which the law was required) and an identical problem given in the text. For establishing similarity, 'reason' or the sense behind a text was taken into account rather than the meaning of its apparent words. In this manner, the 'common cause' (Illat) of the two problems was found and analogy was established between the given problem and a similar problem available in the text.

(b) After establishing the analogy, the solution of the problem given in the text was applied to the new problem. Thus, the required law was directly deduced from the texts of Quran or Sunna or the Ijma. It is significant to note that in this method new principles were not formulated. The law was simply discovered from the spirit or the implied meaning of the text. In drawing

conclusion through Qiyas, unanimity among the jurists who used to establish the analogy, was not necessary.

Only following conditions were required: (1) The person who established analogy was a Mujtahid (jurist) and that, (2) He deduced the law from a definite text of Quran or Sunna or the Ijma. Qiyas may be distinguished from other similar concepts namely, Istihsan and Istidlal. Qiyas and Istihsan: Istihsan means juristic equity.

It is a principle of interpretation recognised only under Hanafi School.

Istihsan 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. 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 be forbidden. The basis of such reference is generally the welfare of the public. This too is a rule of interpretation and, is recognised 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.

Primary Sources under Shia Law: The primary sources under Shia law may be summarised as under: (1) Quran. (2) Traditions (only those which have come from the Prophet's family). (3) Ijma (only those which were confirmed by Imams). (4) Reason (Aql). It may be noted that Shia sect does not recognise Qiyas as a source of law. Traditions too are recognised as source of law only if they have come from the Prophet's family. But, besides such Traditions of

the Prophet, Shia law recognises also the ' sayings and doings' (conduct) of Imams as source of law. It is significant to note that in addition to Quran, other sources are recognised under Shia law only where such sources have come through Imams.

Generally, it is believed that whatever has been laid down by Imams shall be accepted as law. Fyzee observes thus: " The Imam is the law-giver himself, the speaking Quran; he may in a proper case even legislate, make new laws and abrogate old ones; but as he is hidden..., the Mujtahids who are present at all times are his agents, the recognised interpreters of the law."

Secondary Sources:

**(1) Custom (Urf or Taamul):**

Before Islam, the Arabs were governed by customary laws. When Islam came into existence, most of the customs were found by the Prophet to be evil and bad. Such bad customs were totally abolished by him and he declared them to be un-Islamic. But there were certain pre-Islamic customs (e.

g. dower, talaq etc.) which were good and tolerable. The Prophet did not abolish them, and they continued in the society because the Prophet sanctioned them by his silent approval. In this manner some of the good customs became a part of the traditions of the Prophet i. e. Sunnat-ul-taqrir. Moreover, there were customs on the basis of which the jurists gave their unanimous decisions on a given point of law and they formed part of Ijma.

Thus, we see that custom is not any independent source of Muslim law. A customary law exists in Islam either because it has got the approval of the Prophet or, has been incorporated in Ijma. Importance of Customs: Although <https://assignbuster.com/primary-what-law-he-would-apply-in/>



custom is not any formal source yet, its importance in Muslim law cannot be under-estimated. In the absence of a rule of law in the texts of any of the four primary sources, the customary practices have been regarded as law. The four formal sources namely, Quran, Sunna, Ijma and Qiyas being fundamental sources, could not include minute details in respect of certain matters. In such specific cases the customs and usages became a rule in order to complete the law. Therefore, the customary law has been used to supplement the four primary sources of Muslim law.

British courts in India had on several occasions recognised the legal force of customs and usages. Those courts have made the maximum use of customary practices in respect of Muslim law and recognised a custom even if it was opposed to a clear text of a primary source. For example, in *Abdul Hussein v. Sona Dero*, the Privy Council observed that if proved, a custom would prevail over a written text of law provided the custom was ancient and invariable. The orthodox Muslims felt that by giving general application to this rule, the courts have attempted to violate the original Muslim law (Shariat). They demanded that there should not be any place for customs in the Muslim personal law as it was un-Islamic. Accordingly, the Muslim Personal Law (Shariat) Application Act, 1937 was enacted and is still in force.

Now, under this Act, custom is not any independent source of Muslim personal law. Present Position of Custom under Muslim Law: The Shariat Act, 1937, which applies to Muslims all over India (except Jammu and Kashmir) abolishes most of the customs from Muslim law. Section 2 of this Act provides that if the parties are Muslim, only Muslim personal law (Shariat) will be applied to them in matters of inheritance, special property of females,

marriage, dower, divorce, maintenance, guardianship, gift, waqf and trust. In respect of these ten matters, therefore, customs or usages cannot be applied now. But customs are still applicable to Muslims in the matters, relating to their (a) agricultural lands, (b) charities, and (c) religious and charitable endowments, because these matters have not been included in Section 2 of this Act. Moreover, Section 3 of the Shariat Act provides that adoption, wills and legacies would be regulated by customary law unless a Muslim had expressly declared that in these three additional matters too his rule of law should be Muslim personal law (Shariat).

The result is that at present Muslims in India may still be governed by the customary law except in the ten matters enumerated in Section 2 of the Shariat Act. In Jammu and Kashmir, where the Shariat Act, 1937 is not applicable, the rules of Muslim law have always been subjected to custom and usage. The custom of adoption by Muslims of this State is valid although under Muslim personal law adoption is not possible.

## **(2) Judicial Decisions:**

Judgment of a superior court becomes an authority for the courts subordinate to it. The subordinate courts are bound to follow the law laid down in that decision. This is called the principle of precedents and is followed in India on the pattern of the British courts. Thus, a judicial decision of the Supreme Court of India is binding on all the High Courts in so far as the law decided in that case is concerned.

Similarly decision of a High Court is binding on the subordinate courts.

Muslim law is no exception to this judicial practice and therefore, a point of

law decided by the Supreme Court or a High Court of India becomes a 'source of law' for the courts subordinate to them. There is not much scope for the judicial decisions as source of Muslim law. But, in the absence of any clear text of Muslim law, the courts may interpret a rule of law according to their own concepts of justice. In such cases, the Muslim law becomes what the courts say. For example, generally the taking of interest in a loan is prohibited in Islam, but the Privy Council allowed simple interest on the amount of unpaid dower. Accordingly, the realisation of interest on unpaid dower has now become a rule of Muslim law through precedent.

Similarly, in *Katheessa Umma v. Narayanath Kunhamu* the Supreme Court has held that a gift by a husband to his minor wife above the age of fifteen years but under eighteen years is valid even if the gift was accepted by any incompetent guardian under Muslim law. Although such a gift is invalid under pure Muslim law but after this decision the law in India is that under the given circumstances a gift is valid. Judicial decisions have played an important role in laying down rules of Muslim law in accordance with the socio-economic conditions of the Indian Muslims. The courts have given some very important judicial decisions. In *Begum Subanu v. Abdul Gafoor* the Supreme Court has held that despite the fact that a Muslim husband has legal right to contract second marriage, if the first wife lives separately only on the ground of husband's second marriage, she would be entitled to get maintenance from husband.

Section 2 of the Dissolution of Muslim Marriages Act, 1939 provides eight grounds on the basis of any one of which a wife may seek dissolution of her marriage. Clause (ix) of this Act provides 'any other ground recognised

under Muslim law'. Under this clause the Indian courts used to pass decree of dissolution on ground of 'false charge of adultery by husband against wife' (Lian) because this ground is not included specifically.

But, in Muhammad Usman v. Sainba Umma the Kerala High Court has held that Section 2(ix) is a 'residuary clause' under which the court at its discretion may dissolve the marriage on any ground if it is satisfied that the dissolution is necessary in the case. It may be noted that in this case the ground on which wife wanted dissolution of marriage was her 'hate towards her husband'. This was found a reasonable ground and the court dissolved the marriage under clause (ix) of the Act.

Law of pre-emption is a glaring example where judicial decisions have modified the rules of pure Muslim law according to the changing needs of the Indian Muslims. It may be concluded therefore, that to some extent, the courts in India have attempted to modify the rules of Muslim personal law as applied in India. Unless overruled or negative by some legislative enactment, these rules through the decisions, continue to be a source of Muslim law.

### **(3) Legislation:**

In Islam it is generally believed that God alone is the Supreme Legislator and no other agency or body on earth has authority to make laws. This belief is so deep-rooted that even today; any legislative modification may be treated as an encroachment upon the traditional Islamic law. The result is that as independent source of Muslim law, the legislative enactments are almost insignificant. However, there are certain Acts which modify or otherwise lay

down principles of Muslim law, and for the modern courts in India these enactments are the only source of law on the points covered by them.

Some important enactments on Muslim personal law are given below: (i) The Mussalman Waqf Validating Act, 1913: This Act re-establishes the validity of Waqf-al-al-aulad (family waqf). This enactment has not changed the rule of pure Muslim law. It has simply re-established the law relating to family-waqfs which was modified by the judicial decision. (ii) The Child Marriage Restraint Act, 1929: To some extent this Act modifies the Muslim law regarding the age of marriage. The Act, (as amended by the Act of 1978) provides that the marriage of a boy under the age of 21 years and of a girl less than 18 years is a 'child marriage' and is punishable. Under Muslim personal law the age for the marriage is fifteen years.

However a marriage against the provisions of this Act is perfectly valid. (iii) The Muslim Personal Law (Shariat) Application Act, 1937: We have already seen that this enactment confirms the general principle of Muslim jurisprudence that customs have no place in Muslim law. Thus, this enactment too has not made any significant change in the pure Muslim law. It has simply established the rule of pure Muslim law that custom is not to be taken as an independent source of Muslim personal law. (iv) Dissolution of Muslim Marriages Act, 1939: This is an enactment which may be said to have modified the pure Muslim law. Under this Act, a Muslim wife is given a right of judicial divorce on any of the grounds mentioned in it.

Under pure Muslim law a wife had no independent right to seek divorce. (v) Muslim Women (Protection of Rights on Divorce) Act, 1986: Besides other

provisions, this Act gives statutory recognition to the established rule of pure Muslim law that a former husband is liable to pay maintenance to his divorced woman only up to her period of Iddat. In the controversial Shah Bano's case the Supreme Court held that under Section 125 Cr. P. C., 1973 a divorced Muslim woman is entitled to get maintenance from her former husband even beyond the period of Iddat. Under pure Muslim law, a divorced Muslim woman is entitled to get maintenance only upto the period of her Iddat which is normally three months.

It was argued that Section 125 of the Cr. P. C. was un-Islamic and was inapplicable to Muslim women. But the Supreme Court held that Section 125 is not un-Islamic and is equally applicable to Muslims as well. However, on demand of a section of the Muslim community, the Parliament negated the effect of Shah Bano's case and passed this enactment. Besides other things, The Muslim Women Act, 1986 now enacts the rule of pure Muslim law in respect of maintenance of a divorced Muslim woman. Besides these Acts, there are also enactments which regulate the law of pre-emption and the law of waqfs.

For example, the Punjab Pre-emption Act, 1913, the Rewa State Pre-emption Act, 1946 etc. and the Mussalman Waqf Act, 1923 or the Waqfs Act of 1954. The Pre-emption Acts do not lay down any new provision regarding the well-known right of pre-emption under Muslim personal law; they simply provide that the right is available to all persons within the jurisdiction of respective Act. Similarly, the various Waqfs Acts provide generally the rules for the supervision and administrative control of a waqf and waqf-properties. The Family Court Act, 1984 is applicable also to Muslims.

This Act too does not modify the substantive rules of Muslim personal law. It generally deals with the procedure.