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UTTARAKHAND

Judicial Services Exam

CIVIL JUDGE (Junior Division)

Uttrakhand Public Service Commission (UKPSC)

Law

Part - 2

SIERRA INNOVATIONS

UTTARAKHAND JUDICIAL SERVICES

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Muslim Law

MUSLIM LAW

Introduction

In religious sense Islam means 'Submission to the will of God and in secular sense Islam means the 'establishment of peace.

Muslim law in India means "that portion of Islamic civil law which is applied to Muslims as a personal law" (Fyzee). Muslim law is founded upon Al-Quran' which is believed by the Mussalmans to have existed from eternity, subsisting in the very essence of god.

There are mainly two different conceptions of Muslim Law, one of divine origin as in the case with the Hindu law and another man made. Muslim law is founded upon revelation is blend with religion. There is in Islam, a doctrine of 'certitude' (ilm-ul-yaqin) in the matter of Good and Evil. What is morally beautiful that must be done, and what is morally ugly must not be done. This is law of shariat which means the totality of Allah's commandment. It is a doctrine of duties.

The Muslim legal system differs from other modern systems, in the sense that it purports to have The Muslim its sole source of Divine will communicated, on its final form, through a single human channel. God alone is the legislator in Islam and has Supreme legislative power in the Islamic system. But as laws are needed for the benefit of the community the Divine Legislator has delegated to it power to lay down laws by the resolution of those men in the community who are competent in that behalf, i.e., the Mujtahids (or jurists). In this system the legal rules are so deeply connected with the moral and religious rules that it is difficult to separate them. In the words of Mr. Justice Mahmood "Hindu and Mohammedan law are so intimately connected with religion that they cannot readily be dissevered from it."

WHO IS A MUSLIM?

A good discussion of this question is to be found in Aghnides where it has been explained that are at least three divergent views on the subject:

(i) He who believes in Muhammad as a Prophet belongs to the Muslim community, or

(ii) Every person who says "there is no God but one and Mohammad is the Prophet of God" is a Muslim; or

(iii) Al-Baghdadi and other theologians hold that in addition to the belief in God and the Prophet, a number of other beliefs are also necessary.

According to Ameer Ali, "The Mohammedan law applies to all Mussalmans whether they are so by birth or by conversion. Any person who professes the religion of Islam, in other words, accepts the unity of God and the Prophetic character of Mohammed is a Moslem and is subject to Mussalman law. This view has now been accepted by the Indian Courts.

In Narantakath v. Parakkal, (1922) 45 Mad 986, it was laid down by the Madras High Court that the essential of doctrine of Islam is: -

(i) that there is one God; and

(ii) that Mohammed is His Prophet.

A person may be a Muslim either by birth or by conversion. The conversion should be bona fide.

Muslim by birth - If both the parents of a person were Muslims at the time of his birth, he would be a Muslim unless he renounces Islam. Where one of the parents of a child was Muslim at the time of his birth, but the other parent was a non-Muslim at that time the child would be a Muslim, provided he is brought up as a Muslim. In *Bhaiya Sher Bahadur V. Bhaiya Ganga Bakhsh Singh, (1914) 41 1A 1*, the child's mother was a Muslim but father was a Hindu. It was brought up as a Hindu, held that the child was a Hindu.

Muslim by conversion- By the very fact of professing the Muslim faith, a person embraces Islam matter whether before that period, he be a Christian, a Hindu or a Buddhist and no matter what customs and practices or manner of living he may have been following up to that moment, immediately he becomes subject to Muslim law.

But the conversion must be *bona fide* and not merely a colorable one with a view to elude the personal law to which he is subject. A Christian man married to a Christian woman, was cohabiting with another native Christian woman, and in order to escape the punishment for bigamy, both the man and the native Christian woman declared themselves Muslims and went through a form of marriage according to Muslim law. The marriage was held to be invalid; Skinner v. Orde, (1871)14 MIA 309.

1. A non-Muslim, who has attained majority and is of sound mind may embrace Islam in any of two modes: -

   (a) He may simply declare that he believes in the oneness of God and the Prophetic character of Mohammad, or

   (b) He may go to a mosque, to a person who is well versed in Islamic theology (Alim), where he utters Kalma (Lailaha-ill-Allah Muham-mad-ur-Rasoolullah) before Imam, whereupon he is given a Muslim name by the Imam. A convert must formally profess to be a Mohammedan. It is however, necessary that the conversion must be bona fide, the court will not permit any one to commit a fraud upon the law by pretending to be a convert to Islam in order to elude the personal law by which he is bound.

In Skinner v. Orde, (1871) 14 MIA 309, Helen Skinner was married according to Christian rites with George Skinner who died in the lifetime of Helen. Thereafter, Helen cohabited with John Thomas who was married to a Christian wife, who was alive at that time. In order to legalize their union, Helen and John both got themselves converted into Islam. However, their conversion was not held to be bona fide. Their Lordships of the Privy Council held that this conversion was a pretended conversion for the purposes of bigamy which was not permissible under law.

In Rakeya Bibi v. Anil Kumar, a Hindu woman accepted Islam in order to get rid of her Hindu husband, who was impotent. It was held that her conversion to Islam was colorable and was effected with intent to commit a fraud upon the law, and was therefore invalid and ineffective.

2. **Conversion to Islam and marital rights** -According to Muslim Law, a distinction, is made between conversion to Islam of one of the spouses when such conversion takes place
   (i) In a country subject to Muslim Law, and
   (ii) In a country where the law of Islam is not the law of the land.

In the first case, when one of the parties embraces Islam, he should offer Islam to the other spouse, and if the latter refuses, the marriage can be dissolved. In the second case the marriage is automatically dissolved after the lapse of a period of three months after the adoption of Islam by one of the spouses. The courts in India

do not administer the laws of any particular community but they administer such laws as are valid in India. Muslim Law is administered only in those cases where it happens to be the law of India and where the parties are Muslims. In India, the spouse who has become a convert to Islam can sue for divorce or a declaration of dissolution of marriage on the ground that the other spouse has refused to adopt the Muslim religion (*Robaba Khanum v. Khodadad Bomanji Irani, (1946) 48 BLR 864).* It has been held in Pakistan that a marriage of a Hindu married woman on her conversion in British India to Islam should be regarded as dissolved on the completion of three of her monthly courses, without any decree or order of the court (*Faiz Ali Shah v. Ghulam Abbas Shah, (1952) P. Azad J&K 32).*

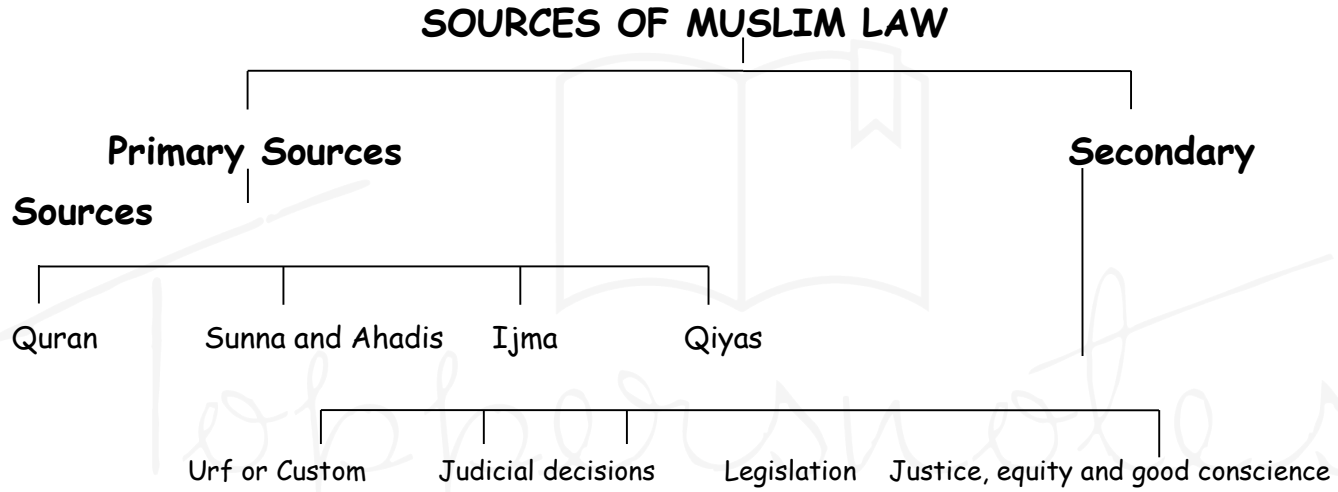
In *Sarla Mudgal v. Union of India, 1995 3 SCC 635*, the Supreme Court has held that the second marriage of a Hindu husband after conversion to Islam without having his first marriage dissolved under law would be invalid. The second marriage would be void in terms of the provision of Section 494, IPC and the apostate husband would be guilty of the offence under Section 494 of IPC.

Similarly, in *Lily Thomas v. Union of India, AIR 2000 SC 1651*, the Supreme Court has observed that if a Hindu wife files a complaint for the offence of bigamy under Section 494, IPC on the ground that during the subsistence of the marriage her husband had married a second wife under some other religion after converting to that religion, the offence of bigamy pleaded by her would have to be investigated and tried in accordance with the provisions of the Hindu Marriage Act. Since under Hindu Marriage Act, a bigamous marriage is prohibited and has been constituted as an offence under Section 17 of the Act, any marriage solemnized by the husband during the subsistence of that marriage in spite of his conversion to another religion, would be an offence under Section 17 of the Hindu Marriage Act read with Section 494, IPC. A change of religion does not dissolve the marriage performed under the Hindu Marriage Act between two Hindus. Apostasy does not bring to an end the civil obligation or the matrimonial bond but it is a ground for divorce under Section 13 as well as a ground for judicial separation under Section 10 of the Hindu Marriage Act.

3. Conversion to Islam and rights of inheritance-

In the absence of a custom to the contrary, in case if a Hindu converts to Islam, succession and inheritance are governed by Mohammedan Law and not by Hindu Law (Vohra Bai Khatija Isabhai v. Vohra Karimbhai, AIR 1974 Guj 4).

Where a Hindu, who had a Hindu wife and children, embraced Islam, and married a Muslim woman and had children by her, his property would pass on his death to his Muslim wife and children and not to his Hindu wife or children because under Muslim Law, a Hindu cannot succeed to the estate of a Muslim (Chandra Sekharappa v. Govt. of Mysore, AIR 1953 Mys 621).



Primary Sources

1. **The Quran** - Quran is the primary source of Muslim law, in point of time as well as in importance, Quran is the first source of Muslim Law. It contains the very words of God and it is the foundation upon which the very structure of Islam rests. Quran regulates individual, social, secular and spiritual life of the Muslims.
   The contents of Quran may be classified under the four heads:

   (a) Metaphysical and abstract
   (b) Theological
   (c) Ethical and mystical
   (d) Rituals and legal

   We are here concerned with the legal aspect only. The Quran has influenced the creation of Islamic legal system in following ways:

(1) The prophet faced legal problems and so did his companions and the Quran provided guidance. It gave such texts which possesses definite legal element.

(2) Non-legal texts in the Quran moral exhortations and Divine promises have been construed by reasoning to afford legal rules. The texts proclaiming that God will not punish anyone save for one's own sins have been applied to debts which a person leaves unpaid at his death with for reaching results in the law of administration of assests.

(3) By pointing out that the previous revelations have been corrupted, the Quran declared the legal material with the people of the book unreliable and called people to abandon the customs of their ancestors which are outside the sphere of the Book and Sunnah.

2. Ahadis and Sunnat

Just as Quran is the express revelation through Mohammed, the Ahadis and Sunnat are implied revelations in the precepts and sayings and actions of the Prophet, not written down in his lifetime, but preserved by traditions and handed down by authorized agents. Sunnat means that 'what the Prophet did', while Ahadis means 'what he said'.

Classification of Sunnat

(1) Sunnat-ul-qual- All words, counsel and precepts of the prophet.
(2) Sunnat-ul-fail- His actions, words and daily practice.
(3) Sunna-ul-Taqrir- His silence implying a tacit approval of what was done in his presence.

From the point of view of their importance and authority, Ahadis may be classified as under-

(i) ***Ahadis-i-mutwatra*** are those traditions which are of public and universal notoriety and are held absolutely authentic. These traditions are accepted as genuine and authentic by all the sects of Muslims. Abdur Rahim aptly remarks that traditions of this class, like verse of the *Quran*, ensure absolute authenticity and demand implicit belief.

(ii) ***Ahadis-i-mushhura*** are those traditions which though known to the majority, do not possess the character of universal notoriety.

(iii) ***Ahadis-i-Wahid*** are those traditions which depend on isolated individuals. Most of the Muslim jurists do not accept these traditions as a source of law.

Ijmaa

It means the consensus of the companions and followers of the Prophet. Abdur Rahim defines it as "the agreement of the jurists among the followers of Mohammed in a particular age on a particular question." After the death of the Prophet, as the expansion of the Islamic influence took place, a large number of new situations and new problems cropped up this would not be decided by reference only to Quran and Ahadis.

The jurists then took the recourse to the principle of *Ijmaa*, that is, the consensus of opinion of jurists on any question. The authority of Ijmaa, as a source of law based upon tradition, "My followers can never agree upon what is wrong".

Classification:

(i) **Ijmaa of the companions of the Prophet** – It is that which is universally accepted throughout the Muslim world and is unrepealable. Though there is great difference of opinion among the important Muslim jurists with regard to the requirement of a valid Ijmaa, there is general agreement that Ijmaa of the companions of Prophet should invariably be accepted. The reason behind it was that those associated with the Prophet as his companions must have known, as by instinct, the policy of the Islamic law and whether a particular rule or decision was in harmony with its principles.

(ii) **Ijmaa of the Jurists** - It is the opinion of majority of the jurists that, *Mujtahids*, the learned in the traditions of the Prophet and well acquainted with the meaning of the Arabic words and the passages in the Koran alone are competent to participate in Ijmaa.

(iii) **Ijmaa of the people** – As a source of law, this kind of *Ijmaa* has not much importance.

Its place- Ijmaa is the third source. It owes its authority to the tradition, "My people can never agree upon what is s wrong". The Ijmaa of the companions of the Prophet Mohammed is deemed to be the best guide and is universally accepted as an authority next to the Quran and Ahadis. Ijmaa, as a matter of fact, was intended to be a source of law, for all times to come, but the extreme uncertainty of the procedure to regulate it made it a thing of doubtful utility.

"Ijmaa cannot be confined or limited to a particular age or country. It is completed when the jurists after the deliberation came to a finding. It cannot then be questioned or challenged by any individual jurist. Ijmaa of any age may be reserved or modified by the Ijmaa of same or the subsequent age."

Note- The Shia jurists do not recognize Ijmaa as a source of law. They accept only those traditions which had come from the members of the Prophet's family.

4. Qiyas (Analogical Deductions)

Meaning- Etymologically, *Qiyas* means "measuring", "accord" of "equality". In Muslim jurisprudence, it means an extension of law from the original text, by means of common sense. According to Jung, "it is a process of deduction applying the law of the text to the cases which, though not covered by the language of the text, are nevertheless covered by the reason of text."

Its place - Qiyas is analogical deduction derived from a comparison with law in one of the first three sources when they do not apply directly to a particular case and occupies a place next to *Quran, Ahadis* and *Ijmaa*. There are some jurists who do recognize Qiyas. This gave rise to a rigid school of law represented by Az-Zahir, who undertook the scientific study of the Quran and its interpretation. But the majority of the jurists agree to take recourse to the pure reasoning as a supplement to the three sources of law in of necessity.

Correctives to Qiyas

(1) Istehsan - If the Qiyas was opposed to the habits of the people and was therefore inapplicable or otherwise likely to cause hardship. Abu Hanifa gave to the judges the option to override Qiyas and apply that law which suited the circumstances of a case in question. The use of option was known as Istehsan.

(2) Istidlal- It is a doctrine of public good which enables a jurist to override Qiyas which is positively harmful to general public. Istidlal means inferring a thing from another thing (Abdur Rahim Mohammadan Jurisprudence, p. 166).

Note. Under Shia Law, the primary sources of law are:

(1) Quran,

(2) Traditions - Only such traditions which are handed down from the Prophet's household; and

(3) Reason.

Shias do not recognize Ijmaa and Qiyas as sources of law.

Secondary Sources

1. Custom (Urf)

Meaning - A custom is a tradition passing on from one generation to another, which originally governed human conduct and has obtained the force of law in a particular locality. It is a natural source of law. The Muslim Jurists do not expressly describe it as a source of law but those customs and usages which were not modified or abrogated by the Prophet, remained good and valid. The primeval customs were regulated by Mohammed.

The customs are not independent sources of Muslim law. During the British regime, courts in India recognized the legal force of customs on some occasions in spite of the fact that they were opposed to the clear texts of a primary text of Muslim law. This caused great dissatisfaction among the orthodox Muslims and led to the passage of Shariat Act, 1937 which abolishes most of the customs from the Muslims Personal Law.

Section 2 of this Act lays down that if the parties are Muslims, only Muslim Personal Law will be applied to them in the following matters: -

(i) inheritance,	(ii) special property of females,
(iii) marriage,	(iv) dower,
(v) divorce,	(vi) maintenance,
(vii) guardianship,	(viii) gift,
(ix) wakf, and	(x) trust.

In respect of these matters, customs or usages have no place. But customs are still applicable in matters of agricultural lands, charities and religious and charitable endowments.

2. Judicial Precedents

The interpretation of Mohammedan law by the judges of the Indian High Courts and Supreme Court continue in modern times to supplement and modify the Islamic law. As such they are continuing sources of Mohammedan law. These include the decision of the Privy Council, the Supreme Court, as well as of the High Courts of India. These decisions are regarded as precedents for future cases.

3. Legislation

There have been many legislative enactments which have considerably amplified, altered or modified the original Muslim law.

Examples:

(i) The Guardians and Wards Act, 1890.

(ii) The Mussalman Waqf Validating Act, 1913.

(iii) The Mussalman Waqf Act, 1923.

(iv) Child Marriage Restraint Act, 1939.

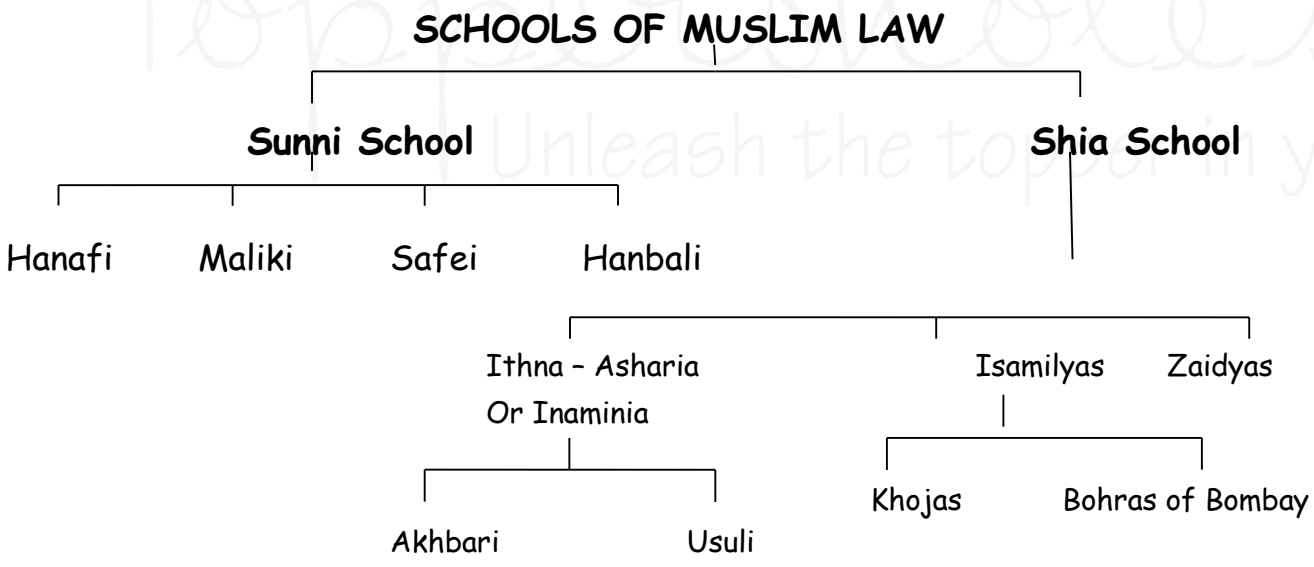
(v) Shariat Act, 1937.

(vi) The Dissolution of Muslim Marriage Act, 1931.

(vii) The Muslim Women (Protection of Rights on Divorce) Act, 1986.

8. Good Conscience and Equity

Sometimes, analogical deductions fail, to satisfy the jurists owing to the narrowness and inadaptability of the habits or due to hardship to the public. In such case, according to the Hanafi, a jurist could use good conscience.



There are two main schools of Muslim law - the Sunni and the Shia. The majority of the Muslims are Sunnis and hence it is presumed that the parties to a suit are Sunnis unless proved otherwise. The various sub-schools of the Sunni and Shia schools can easily be appreciated by the following chart:

Sunni Sub-Schools

1. **Hanafi** -It is the most important school; this school was founded by Abu Hanafi. He laid stress on Ijmaa and Istehsan and recognized the authority of the custom (Urf).
2. **Maliki-** It was founded by *Maliki*. The main features of this school are the powers of the head of the "family over his wife's property and over his children.
3. **Safei**- Imam Shafei was the founder of this school. He was the founder of doctrine of *Qiyas.*
4. **Hanbali**- It was founded by Ibn Hanbal. He laid much stress on traditions and allowed very narrow margin to the doctrine of analogy.

Shia Sub-Schools

The principal Shia sub-schools are:

1. The Ithna Asharia.
2. The Ismailiya (among who are the Khojas and Bohras of India whose Imam is H.H. the Aga Khan)
3. The Zaidiya.

Diff on the point	Sunni School	Shia School
Basic Difference	1. Sunni school recognised the seat of Khallifa or the successor of Prophet.	1. Shiaites recognised the seat of Imam', i.e., leader.
	2. Caliph is a temporal ruler rather than religious chief.	2. "Imam' is known as the descendant of Prophet or father of Ali.
	3. Khalifa or Caliph is known as the successor of prophet.	3. Imam is the final interpreter of law on the earth, his temporal affairs are secondary.
	4. Sunni's believe in the election of 'Caliph' from the Jamat (Society).	4. Shias do not believe in the election of Imam.

II. Marriage	1. Muta-marriage is not legally recognised as valid.	1. Muta-marriage is held legal.
	2. In addition to father or grandfather, the brother of a girl or the relations from her maternal side can give the consent for marriage on her behalf.	2. Only the father or grand-father can give consent for marriage of a girl.
	3. Witnesses are essentially required at the time of nikah (marriage).	3. Witnesses are not essentially required.
	4. The marriage relations are deemed either valid, irregular or void.	4. The marriage relations are either valid or void.
	5. The relation made by minors for their marriage is recognised as irregular.	5. All relations entered into before attaining puberty are void.
	6. The marriage of woman with her husband is not treated invalid if she observed the period of iddat.	6. The intercourse with any person during the course of iddat makes marriage invalid.
	7. Marriage can be cancelled on the basis of inequalities.	7. A marriage cannot be declared cancelled due to inequalities between the marriage parties.
	8. Witnesses are not required at the time of Talak.	8. Two witnesses are required for Talak.
	9. Valid retirement is recognised	9. Not recognised.
	10. The re-marriage after the third divorce is recognised	10. Recognised legally as valid.
III. Mahr (Dower)	1. There is prescribed minimum limit of dower, i.e., ten dirham (The coins of Arabian period).	1. No minimum limit.
	2. No maximum limit.	2. The maximum limit of dower is 500 Dirham.
	3. Some parts of dower is to be paid promptly and some part afterwards.	3. The payment of dower is to be made immediately and without any condition.

IV. Talak (Divorce)	1. Talak (divorce) can be given orally or in writing.	1. Talak must be pronounced orally and in the words of Arabic language to be used.
	2. Witnesses are not required at the time of pronouncing Talak.	2. Witnesses are required while doing so.
	3. 'Talak-i-biddat' and 'Talak-ul-sunnat' both are recognised.	3. 'Talak-ul-sunnat' is recognised as the best form of Talak.
	4. The Talak given in the condition of intoxication or under pressure is not held void.	4. Talak done in the condition of intoxication or under any other kind of intoxication or by force is legally void.
	5. The language in which a talak is pronounced has no adverse effect if the intention of giving Talak is clear.	5. Talak should be in the clear and express words.
V. Guardianship	1. The mother of a daughter, upto the age of 7 years and of a son upto the age of attaining puberty, is entitled to remain as guardian.	1. The mother of a daughter, upto the of 7 age years and of a son upto 2 years, is legally entitled to remain as guardian.
VI. Maternity	1. Fixed with woman who gave birth to the child whether from adulterous act or valid marriage.	1. Fixed with woman who gave birth to the child only from valid marriage.
	2. Child has got the right of inheritance from the mother	2. Does not permit mutual rights of inheritance between the mother and her illegitimate child.
VII. Maintenance	1. The son is responsible for the maintenance of his father, even if the father has an independent source of income.	1. If father has his other source of income, the son is not liable to afford his maintenance.
	2. The liability of maintenance for all is equal.	2. In case the persons for maintenance are more then one, the proposition of the maintenance is determined accordingly to their age and relation.

VIII. Wakf	1. Declaration is deemed sufficient for creating a wakf.	1. Mere declaration is not sufficient to create wakf. The possession over the property is also necessary.
IX. Gift	1. The gift of an individual share is not valid.	1. The gift of an individual share is valid provided it is possible to divide it into shares.
X. Pre-emption	1. All persons other than coparceners are entitled to pre-emption.	1. Pre-emption is valid only for the coparceners and they should not be more than two.
XI. Will	1. The consent of successor is necessary for a will.	1. The owner of an estate can make a 'will' even without the consent of successors.
	2. If a legatee dies before testator such a 'will' is returned to testator.	2. If the legatee dies before testator and it is not cancelled by testator, such property devolves to the successor of legatee.
	3. 'Life-Estate' is not recognised as valid.	3. 'Life-Estate' is recognised as valid.
XII. Inheritance	1. Distant kindred and residuary both get their shares together.	1. The shareholders and residuaries get their shares together.
	2. The eldest issue is entitled to get the whole property of father.	2. The eldest issue (son or daughter) is entitled to get the sword, clothes and Quran etc., of the deceased father. It means primogeniture succession is permissible only upto a limited extent.
	3. An issueless widow can become the owner of immovable property.	3. An issueless widow has no right over the immovable property.
	4. Wife and husband both have a right to return.	4. The right of return is only to the husband and not to the wife.
	5. A person, who intentionally or un-intentionally commits murder is debarred from succession.	5. A person who intentionally commits murder of the real successor of a property is debarred from succession.

MUSLIM MARRIAGE

Marriage according to the Mohammedan law is not a sacrament but purely a civil contract. The object marriage (nikah) is procreation and the legalizing of children.

The term Marriage' in Muslim law has been defined by the various scholars and jurists in their own ways. Some of the definitions are given below:

(a) Hedaya- Marriage is a contract for the purpose of legalising sexual intercourse and for the procreation and legitimation of children and social life in the interest of society by creating the rights and duties between the parties themselves, between each of them and children born from the union.

(b) Mahmood. J.-Marriage among Mohammedans is not a sacrament but purely a civil contract for the completion of which due offer and acceptance is essential; Abdul Kadir Salima, (1886) 8 All 149.

(c) Bailee-Marriage is a contract for its design or object, the right of enjoyment and procreation of children.

(d) Ameer Ali-Marriage is an institution ordained for the protection of society and in order that the human beings may guard themselves from foulness and unchastity.

(e) Sir Ronald Wilson. -Marriage is a contract for the purpose of legalising sexual intercourse, and for procreation of children.

(f) Sir Fitzgerald. -Although a religious duty, marriage is emphatically not a sacrament. There is no sacrament in Islam nor is it a coverture.

Object of Marriage- The object of marriage in Muslim law is covered under three headings, i.e.,

(a) Religious;

(b) Social; and

(c) Legal.