

HISTORICAL BACKGROUND OF ISLAM

Historical Background

The men of Semitic stock, who inhabited Arabia and who developed the ancient civilization of the Sumerians (on which the empires of Babylon and Assyria were based) reached a high level of culture in Phoenicia and South Arabia. Urged on by poverty and hunger, wave upon wave of Arabs came up from southern and central Arabia, and found their way into the settled lands of the fertile crescent. Only a limited number of people could be supported by the few oases and settlements. Therefore, the only alternative to starvation was annual raids and wars of conquests.

Commerce was an important link between the desert and the sown land. In southern Arabia, there were highly developed civilizations based on agriculture and the spice traffic; trade with the outside world brought wealth and prosperity to its people more than a thousand years before the Christian era.

It will thus be seen that *trading*, as much as *raiding*, formed the basis of the social and economic life of the ancient Arabs. Trading naturally was primarily the affair of the settled Arabs, though no settled form of government or administration of law existed. Besides the traders, there were also the desert nomads who led a more or less roving life, and were called *Bedoins*.

The tribe was the principal unit of Arab social life. The tribal chief exercised great powers and influence. Generally, he was elected because of his nobility of birth or wisdom or courage or character. There was no regular manner in which his behests were carried out; he relied mainly on the force of his character and on tribal opinion.

There was continuous *tribal warfare*, and the Arabs were not very effective in organising power and were incapable of combined action. *Idolatry* of a crude type generally prevailed all over Arabia, and all forms of religion and morality were almost forgotten. *Polygamy* was universal, *divorce* was easy, and female infanticide was common. *Women had no legal rights* and were not treated on a par with men.

Thus, the time was peculiarly ripe for the acceptance of a simple and rational faith like *Islam*, which among other things, gave women many important rights, and united the warring tribes, inspiring them with a common ideal.

Muhammad the Prophet and his Mission

Muhammad was born in Mecca about the year 570 or 571 A.D. The family of Prophet Muhammad has been traced back to Abraham. The Prophet was a posthumous child. He was brought up by his mother. On the death of his mother, the child was brought up by his grandfather, and later, by his uncle.

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From his childhood, the Prophet was serious-minded, and when he grew up, he would often retire to a cave for meditation. When he was 35 years old, the Prophet married a rich widow called Khadija.

In his fortieth year, the Prophet received a message or *wahi* from God. The message to the Prophet was that there was only one God, and Muhammad was his Prophet sent to propagate the message. The Prophet propagated this message, and soon gathered round him a faithful band of followers. But, the Pagans, who formed the ruling classes in Mecca, persecuted the Prophet and his followers, who ultimately fled to Medina in 622 A.D. This marks the beginning of a new era, which is known as *Hejira*.

At Medina, the Prophet's message was well received. The Prophet welded the people of Medina into a well-knit political organisation. In a number of battles, the Meccans were routed by the better-organised and devout followers of the Prophet. Within a few years, the Prophet consolidated his position, and in spite of heavy odds, the Meccans, Jews and Christians were repelled in their subsequent assaults. By the tenth year after *Hejira*, the Prophet had gathered round him several tribes, and the Prophet entered Mecca. In 632 A.D., the prophet passed away.

The Caliphate

Muhammad had established himself as the supreme overlord and preceptor of all Arabia. It is believed that he did not nominate a successor, and that Abu Bakr was elected as the successor to the Prophet. Abu Bakr was the *Caliph* or *Commander of the Faithful* for only two years. He was succeeded by Umar. Umar was a bold and courageous man. The boundaries of the Islamic State expanded far and wide during his tenure as *Caliph*. Umar was assassinated after ten years as *Caliph*, and Usman was elected as the third *Caliph*. When Usman was assassinated after twelve years, he was succeeded by Ali, the son-in-law of the Prophet. The election of the first four Caliphs, who are known as *Khulfa-i-Rashidain* (the rightly-guided *Caliphs*) was real and democratic. Ali was *Caliph* for five years, after which he expired. After Ali's death, his son, Hasan, resigned in favour of Muavia, the founder of the Umayyad dynasty. Hasan was, however, murdered. The followers of Ali, known as the *Shiat-i-Ali*, (the party of Ali) persuaded Husain, the second son of Ali, to revolt against the son of Muavia. Husain died fighting after great suffering in Kerbala. Thereafter, the rift between the *Sunni* and the *Shias* became very great. The *Shias* were the supporters of Ali and opposed the *Sunnis*.

The scene of power now shifted from Mecca to Damascus, when Muavia made it his capital. When the Umayyads became rulers, the *Caliphate* became a regular kingship, and vices (like the tribal rivalry of earlier days) again crept in. The Umayyad dynasty was overthrown by the Abbasids, who donned the mantle of the Prophet by claiming descent from Abbas, the uncle of the Prophet. The Abbasid *Caliphate* lasted for five centuries and collapsed in 1258 A.D., when the Mongols sacked Baghdad.

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The *Caliphate* now shifted to Cairo, where Sultan Baibars invited Abul Kasim Ahmed, who had escaped death at the hands of Mongols, to hold spiritual power. This *Caliphate* lasted for two and a half centuries.

In the fifteenth century, the Ottomans of Turkey had become a force to contend with. They overthrew the Mameluke Sultans of Egypt and got the *Caliphate* transferred to themselves by a deed of assignment. Thus, the *Caliphate* shifted from Cairo to Constantinople. In 1922, Mustafa Kamal Pasha abolished the Sultanate of Turkey, when he established the Turkish Republic. Two years later, the *Caliphate* was formally abolished by the National Assembly of the Turkish Republic.

Islam - its basis

Islam is the last revealed religion '*Islam*' is an Arabic word meaning '*peace*' and '*submission*'. In its religious sense, it connotes submission to the will of God; in its secular sense, it signifies the establishment of peace. Muhammad identified himself as a simple human being sent by God as His Prophet to the people.

The *Quran* is the Divine Book, which is God's own word as revealed to Muhammad through the Angel of Revelation. It dictates the Law, initiates into the Unseen, purifies the soul and guides social progress. *It can be said to be a complete code of conduct for all times.*

The *Quran*, to-day, is a record of what the Prophet said while in a state of ecstatic seizure. The recording of the Prophet's words in the beginning was haphazard. Verses were written on palm leaves, stones, the shoulder-blades of animals-in short, any material which was readily available. There is no doubt that at the death of Muhammad, a good deal of the *Quran* was already written down, though not all of it, for while the Prophet was alive, new *Suras* or chapters, were constantly being added. There is also no doubt that a great deal of the *Quran* had been learnt by heart.

Tradition associates the collection of all this material to Abu Bakr, the first *Caliph*. The first authorised version was published in the times of *Caliph* Usman.

At the time of the Prophet, and just before he preached the new faith, there were several kinds of religious beliefs in Arabia. Paganism or heathenism of a crude and inartistic type without any ritual, pomp, mythology or philosophical speculation was rampant. Then, there were colonies of Christians in parts of Arabia. Jewish and Zoroastrian communities were also to be found. In most cases, the outward form of each faith was preserved, but people had forgoUen the true principles of their religion. People had lost contact with spirituality. It was at about this time that there arose a group of men called '*hanifs*' who devoted themselves to religious meditation. These *hanifs* were monotheistic in their attitude.

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It was at such a time that the Prophet preached his message. His faith had appeal because it was a socialistic and democratic creed. It divided the estate of a person after his death and compulsorily distributed it among his nearest relations, male and female. It enjoyed the giving of 'zakat'-almost two-and-a-half per cent of one's capital-as alms every year. It preached equality among human beings and the brotherhood of man. In Islam, laws are intermixed with religion. It would, therefore, be relevant first to understand and appreciate the true spirit of Islam.

First of all, the Prophet himself never claimed that Islam was a new religion. He asserted that it was as old as the hills. In *Quranic* theory, Islam is a religion which has existed since the beginning of the world, and will exist till the day of Resurrection. Muhammad claimed that he was merely a man, a human being, like the other prophets, and was liable to err in human affairs, but was divinely guided and inspired in matters of religion.

Secondly, there is the principle of *Tawhid* or the *unity of God*. Islam is essentially monotheistic, and was in direct contrast to the paganism of the times.

The *third principle* is that of brotherhood of man. Pride of colour or race was absolutely condemned by the Prophet. In his last sermon, the Prophet is reported to have said: "*The Arab is not superior to the non-Arab; the non-Arab is not superior to the Arab. You are all sons of Adam, and Adam was made of earth. Verily Muslims are brothers...*"

ORIGIN AND DEVELOPMENT OF MUHAMMADAN LAW

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The *first period* in the development of Islamic Law is the one between 1 A. Hejira and 10 A.H. This is the most important period so far as the first two sources of law, viz., the *Quran* and *Hadith* are concerned. The Prophet had conquered Mecca, and in the last few years of his life, he took upon himself the task of legislation. Most of the verses of the *Quran* revealed during this period deal with legal aspects. So also do some of the Prophet's most important judicial decisions and traditions. The precepts of the Prophet acquired a binding force, because Muslims believed that the actions and sayings of the Prophet were inspired or commanded by God.

The *second period* is the period of thirty years from 10 A.H. to 40 A.H., when "the rightly-guided *Caliphs*", viz., Abu Bakr, Umar, Usman and Ali were the *Caliphs*. During this period, there was a close adherence to ancient practice under the guise of adherence to the '*sunnah*' - the precept of the Prophet. During this period, the collection and editing of the *Quran* also took place. This authorised text of *Quran*-which remains without change or corruption to this day-was first published during the reign of Usman, the third Caliph.

The *third period* is a long one, which ranges from 40 A.H., to the third century after Hejira. This period was also important, because it was during this period that the work of collection of the '*traditions*' of the Prophet took place. During the earlier part of this period, there emerged the *four schools* of Sunni law, which are named after their four founders.

The *fourth period* in the development of Islamic law extends from the third century after Hejira to the present day. After the four recognised schools had been founded, later scholars applied themselves to the methods laid down by the founders and developed each system in a particular manner. However, no individual jurist was ever afterwards recognised as having the same rank as the founder himself.

After the abolition of the Caliphate, a new situation arose and there was no one to execute the behest of the *Shariat*.

During the last period, the doctrines of 'taqlid' - following by imitation- 'ijtihad' - the power of independent interpretation of law, developed and came into prominence.

The *Shia School of Thought* -The term '*Shia*' by itself means faction and is a contraction of the word '*Shia-t-i-Ali*' or the '*faction of Ali*'. The *Shias* deny and dispute the principle of election by the people in the matter of *Caliphate*, and hold that the Prophet had appointed Ali as his successor. The *Shias* are divided into a large number of schools, the two most important of which are the *Ismailis* and the *Ithna Ashari*. In India, the *Ismailis* consist of *two main groups*, viz., the Khojas and the Bohras. The Khojas are the followers

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of the Agha Khan, and the Bohras are mainly the followers of the Syedna or Dai. The majority of *Shias* belong to the *Ithna Ashari school*. The word *Shia* is, in India, applied in general to the *Ithna Ashari school of Shias*.

The Imam - According to the *Sunni* doctrine the leader of the Muslims, at any given moment, is the Caliph. He is more a temporal ruler than a religious chief; in religious matters, he has merely to follow the *shariat*. The concept of the *Imam*, according to the *Shias*, is totally different. It is here that the fundamental difference between the *Shias* and the *Sunni* theology comes in. According to the *Shias*, *Imam* is the final interpreter of the laws. He is the leader, not by election, but by divine right, as he is successor of the Prophet - a descendant of Ali. The *Shias* hold that no *hadith* is valid unless it is related by an *Imam* descended from the Prophet. They accept the authority of the *Quran*. but say that only the *Imam* can say what the correct interpretation of the law is.

According to the *Shias*, the Imam is the law-giver himself, but as he is hidden, the 'mujtahid' - corresponding to the *Sunni Kazis* - are his agents, the interpreters of the law. 'Ijtihad' the power of independent interpretation of the law, therefore, has an altogether different significance in *Shia* law. The *Shia Mujtahid* can give decisions on his own responsibility. The doctrine of *qiyas* (analogical deduction) and *ijma* (consensus of opinion) as understood by the *Sunnis* is not accepted by the *Shia* school of thought. Therefore, law, according to the *Shia* school, consists of rules of conduct based on authoritative interpretation of the *Quran* and the *Sunnah* and the decisions of the Imams through the *mujtahids*.

Development of Muhammadan Law in India

The Mughal emperors being Hanafis, the Hanafi law was administered in India till the establishment of the British Rule.

The British applied Muhammadan Law as a branch of personal law to those who belonged to the Muslim religion in accordance with the principle of their own school or sub-school. In all suits regarding inheritance, succession, marriage and caste and other usages or institutions, the laws of the *Quran*, in accordance with opinion of the Maulvis, were invariably adhered to in the case of Muslims. With the changing social conditions, the need for a change in some of these laws became apparent. On the one hand, certain portions of the law were abolished, such as the banning of slavery and forfeiture of rights on apostacy. Similarly, certain portions of the customary law were altered to make the original rules of Islamic law applicable. The *Wakf Act*, 1913 was enacted on these lines. Today, the law of Marriage, Divorce, Dower, Legitimacy, Guardianship, Wakfs, Wills and Gifts and Inheritance among Muslims is uniform all over India. The Shariat Act of 1937 abrogated custom and restored to Muslims their own personal law in almost all cases. Thus, Muhammadan Law, as applied in India, is the *shariat* modified by the principles of English common law and equity.

SCHOOLS OF MUHAMMADAN LAW

Sunni and Shia

There are two schools of Muhammadan law, viz., the Sunni and the Shia. This division did not spring originally out of the difference of legal or religious doctrine; rather, it was caused by a dispute which, in its origin, was wholly political.

Muhammad, the Prophet, died in 632 A.D., without leaving any male issue, and on his death, a quarrel arose as to the succession to the Imamate, i.e., the title of the spiritual and temporal headship of Islam, after him. One group, the Sunnis, advocated the principle of election in choosing the Imam. Thus, the divergence between the two groups of sects was chiefly political and dynastic. Doctrinal and legal differences began to grow only in course of time.

The Sunnis base their doctrine on the entirety of the traditions and regard the concordant decisions of the successive Imams and of the general body of jurists as supplementing the Koranic rules and as equal in authority to them. The Shias on the other hand, reject not only the decisions of the jurists, but also all traditions not handed down by Ali or his immediate descendants-those who had seen the Prophet and held familiar intercourse with him.

Sunni Sub-schools

There are four sub-schools in Sunni Law, as follows:

- (1) *The Hanafi School*, named after its founder, Imam Abu Hanifa (A.H. 80-150). - The majority of Sunnis in India are followers of the school. This school placed great reliance on the principles of "qiyas" (or analogical deductions). Imam Abu Hanifa leaned heavily on qiyas because the doctrine of Hadith had not fully developed in his time. Nor were there any recognised collections of the hadith. The two celebrated authoritative texts. of this school are the *Fatava Alamgiri* and the *Hidaya*.
- (2) *The Maliki School*, whose founder was Imam Malik Ibn Anas (A.H.95-175).-This school does not differ materially from the Hanafi school. Imam Malik, however, placed greater reliance on systematic reasoning.
- (3) *The Shaafi School*, founded by Imam Shaafi (A.H. 150-204), who perfected the doctrine of 'ijma' (or consensus of the learned).
- (4) *The Hanbali School*, whose founder was Imam Hanbal (A.H. 164-241), who advocated the principle of adhering to the hadith literally. (It is believed that the followers of Imam Hanbal are almost extinct today).

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Though these schools differ in detail, their doctrines are essentially the same as regards the fundamentals.

Presumption

Unless the contrary is shown, it is to be presumed that parties to a suit or proceeding are Sunnis of the Hanafi School.

The Calcutta High Court has observed that, in India, "there is a presumption that the parties are Sunnis, to which a great majority of the (Mahommedans of this country belong". (*Bafatun v. Bilaiti Khanun*, (1903) 30 Cal. 683)

Istihsan or juristic equity

It may happen that the law which is analogically deduced (*qiyas*), might fail to recommend itself to the jurists owing to its inadaptability to meet the new habits and the usages of the people, or on account of its being likely to cause hardship and inconvenience. Abu Hanifa, a great jurist, therefore, adopted as a corrective "*istihsan*" which literally means "approbation" and has been translated as "liberal construction" or "juristic preference". This term was used by Tyabjee, the great jurist, to express the liberty which he assumed of laying down such a rule of law as would meet with the exigencies of a particular case, rather than the rule that an analogy might indicate.

Shia Sub-schools

Among the Shias, different schools arose as the result of dynastic troubles, and of disputes as to the rightful Imam.

The Shias are divided into the following three sub-schools:

- (1) *The Ithna-Asharis*: They follow the "Ithna-Ashari" law. The great majority of the Shias in India follow this system of law. Their important text is 'Shara'ya-ul-Islam.'
- (2) *The Ismaili*: The Khojas and Bohras of Bombay belong to this school.
- (3) *Zaidys*: (They do not exist in India, and are to be found mostly in South Arabia.)

The difference between Shia sub-schools is not so much in the interpretation of law as in doctrinal points.

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Presumption

As most Shias are Ithna-Asharis, the presumption is that a Shia is governed by the Ithna-Ashari exposition of the law. [Akbarally v. Mahomedally (1932) 34 Born L. R. 655]

Choice of Schools

Every adult Muhammadan may choose any school he or she likes, and may renounce one school in favour of another. (Hayat-un-Nissa v. Muhammad, 17 I.A. 73.) Moreover, a Sunni woman contracting a marriage with a Shia does not thereby become subject to the Shia law. (Nasrat v. Hamidan, I.L.R (1882) 4 All. 20)

Applicability of law of different schools

The position regarding applicability of the law of the different schools of Muhammadan law may be summed up as follows:

- (a) When the parties to suit are Muslims of the same school, the law of that school will apply.
- (b) If they do not belong to the same school, the law of the defendant will apply.
- (c) If a Muslim, in good faith, changes his school of law in Islam, his personal law ordinarily changes with immediate effect.
- (d) When a person who has changed his school of law in Islam dies, the law of succession applicable to his estate will be the law of the school, which he professed at the time of his death.