dup.

ADMINISTRATION OF ISLAMIC LAW OF MARRIAGE AND DIVORCE IN SOUTH AFRICA

BY

ABDUL KARIEM TOFFAR

submitted in fulfilment of the requirements for the degree of

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SUPERVISOR:

PROFESSOR DR S S NADVI
HEAD: DEPT. OF ISLAMIC STUDIES
UNIVERSITY OF DURBAN-WESTVILLE

JOINT SUPERVISOR:

DR A F M EBRAHIM
DEPT. OF ISLAMIC STUDIES
UNIVERSITY OF DURBAN-WESTVILLE

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DEDICATION

I dedicate this thesis to memory of my late parents whose dedication and patience in my upbringing have served me well in life.

I would also like to dedicate it to my wife and children who bore much discomfort during my working on this thesis.

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INTRODUCTION

The present day South African Muslim community has been in South Africa since about 1654 when they first arrived from the Indonesian archipelago and India.[1] The Muslim community received a boost with the arrival of *Shaikh* Yūsuf, whose real name is `Abidīn Tādia Tsoessoep, from Java in 1694.[2] He was from Macassar, Bantam, in Java.

Having rebelled against the Dutch presence in his country, he was imprisoned in Ceylon (Sri Lanka) and was later transferred to the Cape of Good Hope as an exile.[3]

Shaikh Yūsuf died in 1699 at Zandvlei at the Cape and the entire party except a daughter and two of his companions was shipped back to Bantam, Java.[4] The remaining Muslim community was established and developed at the Bo-Kaap in Cape Town, where the first residential houses were constructed between 1750 and 1850 and where the first Muslim occupation took place from 1790 onwards.[5]

This Muslim community had the onerous task of not only keeping Islām alive and well but also to devise ways and means to maintain its Islamic identity. The community succeeded in achieving this object to an extent by establishing Mosques and

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1 Davids A: The Mosques of Bo-Kaap, Cape Town, Institute of Arabic and Islamic Research, 1980, foreword p. xv.

2 Mosques of Bo-Kaap op. cit. foreword, p. xv.

3 The Early Muslims at the Cape, Cape Town, Muslim Assembly, 1977, p. 5.

4 Ibid, op. cit. p. 6.

5 Mosques of Bo-Kaap op. cit. foreword p. xvi.

Madrasahs (Islamic religious schools) where basic instructions in Islam were given to children and adults. This was not sufficient. Furthermore, the paucity of Muslim scholars and *Imāms* (*Imām*: one who leads the prayers) with good knowledge of Islamic sciences created difficulties for the community to maintain Islamic identity in all aspects.

This situation was partially improved in the Cape when the Muslim Judicial Council was finally established in Cape Town in 1945.[1] This Council began to concern itself with affairs related to Mosques and later on marriage and divorce matters etc. This necessitated the community to send men to higher institutions of Islamic learning in primarily Egypt and present day Saudi Arabia etc. for gaining knowledge and qualifications in Islamic sciences.

A parallel development, similar to the Cape, took place in Natal and later in the Transvaal with the arrival of Indians in 1860 and 1870 respectively. The establishment of the *Jami`yāt al `Ulamā'* (society of theologians) of Transvaal in 1923[2] and the *Jami`yāt al `Ulamā'* of Natal in 1950[3] facilitated the efforts of the Muslims in Natal and Transvaal to look after the administration of Mosques, *Madrasahs*, marriage, divorce etc.

Muslims follow Islam as a way of life. Islam literally means "submission". In its technical sense Islam means "submission to *Allāh*. In other words, "open exhibition of

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[1] Mosques of Bo-Kaap, op. cit. p. 56.

[2] Mahida, E M: History of Muslims in South Africa - A Chronology, Durban, Arabic Study Circle, 1993, pp. 56 - 58.

[3] Ibid. op. cit. pp. 70 - 71.

submission to the *Sharī`ah* (Islamic law) and following that which the Prophet (S.A.W.S)[1] came with."[2]

Islam is a complete way of life which controls and regulates every aspect of a Muslim's life from birth to death. Thus, as far as Muslims are concerned, their legal system is based on revelation and is thus of divine origin.

Islam regulates all aspects of Muslim life such as mode of worship, human interaction, ethics, morality and laws for all spheres of life including marriage and divorce, amongst others.

In an Islamic State, thus, all laws, private and public, have to conform to the Islamic legal system. These issues are dealt with in detail in chapter 1 of this thesis. However, in a non-Muslim country like South Africa, Muslims can only follow their Islamic law as far as Personal Law is concerned in the field of marriage, divorce, inheritance and religious endowments (awqaf).

In this field Muslims usually experience conflicting situations and especially in personal law matters.

All Muslims in South Africa follow the Islamic dictates of law in marriage and divorce while some, at least, avail themselves to fulfil the legal South African requirements in the fields of marriage and divorce. This is where the conflict occurs as South African laws are, at times, in sharp conflict with the Islamic Personal Law. Local Muslim societies and organisations of theologians and others have attempted to devise a system of administration of marriage and divorce which is not entirely

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[1] S.A.W.S is the abbreviation for - "sal-lal-lahu`alaihi wa sallam", the Peace and Blessings of God upon him.

[2] Ibn Manẓūr: Lisān al `Arab, Cairo, Dar al Ma`aref undated, Vol 3 p. 2080.

satisfactory and not completely free from legal problems and difficulties due to the clashing of Islamic law with South African law.

After much delay and reluctance, the South African authorities have at last yielded on the question of non-recognition of Islamic Personal Law and at the moment there is a study being done by the South African Law Commission to rectify this problem.

South Africa lags far behind other countries in this field.

The Netherlands' courts apply the common national law to a divorce petition (of persons married in foreign countries) in accordance with Article 6 of The General Provisions Act of 1829.[1]

Australia recognises a Muslim marriage performed in a domicile where such a marriage is legal and also recognises a polygamous marriage contracted in such a domicile even if the parties are Australian residents. There is an anomaly in that the same procedure in not accepted in Australia itself but Australian law attributes some legal consequences to a de facto relationship of a man and a woman i.e unmarried partners living together as man and wife. The Australian Law Reform Commission had now recommended that religious and customary divorce be recognised as legal and called for criteria to be established to determine the circumstances under which it would be valid.[2]

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[1] Statement No: 152/189, Ministerie van Justitie, s'Gravenhage, dated 04/04/1989, p. 2.

[2] The Australian Law Reform Commission: Report 57, Multiculturalism And The Law, Sydney, Alken Press, 1992, pp. 93 - 94.

While Islamic Personal Law has no official recognition in the United Kingdom, the Lord Chancellor's Review of Family and Domestic Jurisdiction declared in London on 4th September 1986;

"Whatever the opinion chosen for the future family system in England and Wales, the concerns of Muslim families and individuals must be taken into account as part of the general accommodation of culture and religious minorities..."[1]

Other Muslim minorities enjoy recognition of their Islamic Personal Law such as the Philippines where the Code of Muslim Personal Law was enacted in 1977, in Thailand where special concessions are allowed for the application of Muslim laws in family relations and inheritance since 1944, Sri Lanka where Islamic Personal Law was recognised from 1770 already and now administered in the comprehensive Muslim Marriage and Divorce Act of 1951 and Singapore where the entire spectrum of Muslim life including the Islamic Personal Law are recognised legally and administered by Muslims according to The Administration of Muslim Law Act, Act 27 of 1966. Prior to this, the Muslim Ordinance of 1957 regulated Muslim Personal Law.[2] Muslim Personal Law is protected and recognised by the Act of India of 1935 and the Shariah Application Act of 1937.[3]

Thus, the object of this study is three-fold, namely;

a) to survey and analyse the present Islamic system of administration of marriage and divorce in order to identify the deficiencies,

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[1] The Islamic Academy: Muslim Education Quarterly, Cambridge, 1991, Vol 9, No. 1. p. 59.

[2] Nadvi S H H: Islamic Legal Philosophy And Origins Of The Islamic Law, Durban, Dept. of Arabic, Urdu & Persian, University Durban Westville, 1989, pp. 352, 354 - 355 & 356.

[3] Ibid, op. cit. p. 360.

b) to formulate basic Muslim laws of marriage and divorce on the basis of Islamic principles, and

c) to explore the best possible way to administer and implement the Islamic laws of marriage and divorce suitable for operation in South Africa.

Attention is drawn to the fact that most of the references used, are from the original Arabic sources in Islamic law, consequently Arabic terms had been used in the thesis and its meaning had been given in brackets when used for the first time.

Thereafter, the reader should refer to the glossary of Arabic terms at the back of the thesis.

Unfamiliar words have been translated at the top of each page to assist the reader.

Chapter 1

THE NATURE AND SOURCES OF ISLAMIC LAW

1. DEFINITION:

Islamic Law is termed as *sharī`ah* in Arabic. The word *sharī`ah,* in Arabic, literally means "the slopy leading to a drinking place or the drinking place itself where people drink and let their animals drink from."[1]

In its legal meaning, *sharī`ah* means "that which Allāh (Almighty God), legislated for His servants."

This law is called *sharī`ah* because it resembles the watering place, for as water refreshes the being and is necessary for life, so the *sharī`ah* refreshes and gives life to the soul and mind."[2]

Further, the *sharī`ah* is the embodiment of the cornmands - theological and practical (applied) laws which the *Shārī`* (The Supreme Legislator i.e Almighty God), had enacted and commanded to be followed for salvation in the Hereafter and for achieving the proper balance in human life on earth.

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1 Lisān al `Arab, op. cit. Vol 4 p. 2238.

2 Zaidān A K: Al Madkhal li Dirāsah al Sharī`ah al Islāmiyyah, Baghdād, Al Matba`ah al `Ānī, 1969, 4th ed., p. 38.

Islām has, thus, three main reformative aims for society, namely:

- freeing the human mind from the slavery of imitation and superstition which is achieved by way of belief in the One and only Almighty God through the *hidāyah* (guidance) of a thinking process of knowledge, proof and clear thinking.
- reform of the individual, spiritually and morally and directing him to virtue and good so that his passions and greed cannot overrule his mind nor interfere with his commanded duties.

  This Islām does by way of lawful worship which reminds the being of his Creator and instils in him the principle of reward and punishment in the Hereafter so that he can strive for attaining good and virtue and abstain from evil and vice.
- reformation of the society in such a manner that general peace and societal justice between all people and protection of acceptable freedoms and respect for human honour can be attained and maintained.[1]

In its general pattern, the *sharī`ah* operates in two main spheres, namely:

- the sphere of *al ḥuqūq al khāssah* (special rights), in both the civil and criminal spheres, and
- the *al ḥuqūq al `āmmah* (public rights) which encompass both the internal and external spheres i.e. constitutional, administrative and monetary/fiscal spheres in the internal sphere and international affairs in the external sphere.

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[1] Zarqā M: Al Madkhal al Fiqhī al `Āmm, Damascus, Matba`ah al Hayah, 1964, 8th ed., Vol 1: 30 - 31.

From all these instances, the *Shār`i* had given textual laws contained in the *Qur'ān*, which is the basic constitution of Islām, being the Book of Almighty God, and the *ḥadīth*, which is the Prophetic precepts. *Ḥadīth* is sometimes called *sunnah*, by some of the *`ulamā'* (scholars in Islām).

Augmentative details of these texts had been left to *ijtihād* (considered juristic law opinion extracted from existing law principles and precedents by those qualified to do so), which will be applicable and suitable to the time and place of Muslim society. This is the case in all matters save a few in which the *Shār`i* gave *tafṣīl* (details), like in *mīrāth* (inheritance) and some *`uqūbāt* (prescribed criminal punishments).[1]

Under the above first heading (i.e *al ḥuqūq al khāssah*) comes the laws of the Islamic Order - the family law in all its branches, laws of obligations, contracts, criminal laws and those laws relating to it.

Under the second heading (*al ḥuqūq al `āmmah*) comes, as regards the internal division of it, the constitutional matters namely:

- freedom for all people subject to public moral and ethical order, all subject to the non-curtailment of the freedom of others (in the understanding of the law).
- equality before the law.
- necessity of founding the State on the principle of *shūrā* (mutual consultation and agreement in those fields so allowed by the law, between government and governed).

In this constitutional issue, the *sharī`ah* did not prescribe any norm or pattern as that would change and be influenced by time and place.

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[1] Al MadKhal al Fiqhī al `Āmm op. cit. Vol 1 p. 32.

As for the administrative side, the *sharī`ah* granted the *imām* or *khalīfah* (Head of the Islamic State), unlimited executive and administrative powers. However, he is restricted to the sources of the *sharī`ah* and functioning of the *sharī`ah* to which all Muslims are bound in its execution.

Thus, improper executive imposition or authoritarianism does not enter this scene, thus.

Muslims are expected to obey the *imām*, while the *imām* is required to rule justly and properly. The *Qur'ān* thus commands:

"Obey *Allāh*, obey the Messenger[1] and obey the righteous (Muslims) rulers amongst you....."[2]

This obedience is not to be blind but, ought to be bound by the constitutional rule taken from the Prophet's (S.A.W.S) ruling:

"There is no obedience required to any person if such obedience necessitates the disobedience of the Creator's laws."[3]

There is thus a mutual responsibility between the governor and the governed in Islam.

In the sphere of monetary matters, the *sharī`ah* placed the *imām* as chief *mutawallī* (trustee) of the *bait al māl* (public treasury) and to use its revenue for the benefit of the public and its welfare.

In the international sphere, the *sharī`ah* enunciated the following principles:

- all nations are equal in human rights.

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[1] i.e. the Prophet Muḥammad (S.A.W.S). Only the term "Prophet (S.A.W.S)" will be used hereafter.

[2] Al Qur'ān, Sūrah al Nisā': 59.

[3] Ibn Kathīr I D: Tafsīr al Qur'ān al `Aẓīm, Beirūt, Dār al Andalus, 1966, 1st ed., Vol 2 p. 326. A Qurṭubī Abū `Abd Allāh: Al Jāmi` Li Aḥkām al Qur'ān, Cairo, Al Maktabah al `Arabīyyah, 1967, 3rd ed., Vol 5 p. 259.

- relations between the Islamic State and other States must be based on justice in both peace and wartime.
- the accepted honourable agreements and treaties between the Islamic State and other States are binding in the same manner as contractual obligations between individuals.
- no war is allowed without an announcement of it.
- retributive action of like nature as an offensive act committed is valid and possible, save if it contradicts *sharī`ah* principles.[1]

The classical example of the *khalīfah* Abū Bakr (R.A) on accepting the caliphate highlights the position between ruler and ruled.

"Behold me, behold me charged with the care of government. I am not the best among you: I need your advice and all your help. If I do well, support me, if I mistake, counsel me. To tell the truth to a person commissioned to rule is faithful allegiance: to conceal it is treason. In my sight the powerful and weak are alike: and to both I wish to render justice. As you obey God and His Prophet (S.A.W.S), obey me: if I neglect the laws of God and the Prophet (S.A.W.S), I have no more right to your obedience."[2]

We have come to know that the *sharī`ah* covers the entire spectrum of law in Islām.

The part of the *sharī`ah* that actually has to do with the practical or applied laws of human action and inter-action is called *fiqh*.

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[1] Al Madkhal al Fiqhī al `Āmm op. cit. Vol 1 pp. 33 - 51.

[2] Al Suyūṭī Jalāl al Dīn: Ta'rīkh al Khulafā', Cairo, Matba`ah al Madanī, 1964, 3rd ed., p. 69.
`Alī S A: A Short History of the Saracens, Delhi, 1981, p. 21 - 22.
Al Kandalāwī M Y: Ḥayāh al Ṣaḥābah, Damascus, Dār al Qalam, 1983, 2nd ed., Vol 2: 12.
`Azīz A: Abu Bakr The Caliph, Karachi, Ghanzafar Academy, 1978, 1st ed., p. 66.

Hereunder now follows the system of *fiqh* as for the *ahl al sunnah* or *ahl al sunnah wa al jamā`ah* commonly known as *sunnī fiqh* of *sunnī* Muslims who make up the vast overwhelming majority of Muslims in the world.

2. DEFINITION OF *FIQH:*

The word *fiqh* is derived from the Arabic verb *faqaha* which literally means "to have a deep understanding". The technical usage of the term *fiqh* restricted its meaning to "knowledge of the *sharī`ah* and specifically knowledge of its branches i.e. applied law".[1] Dr Zaidān defines *fiqh* in its literal sense as:

"knowledge of something and understanding it" or "understanding the implication of the speech of a speaker."[2]

As for the meaning of *fiqh* in the law, it is defined as:

"knowledge of the practical applied laws of the *sharī`ah*, with its proofs."[3]

This is the standard definition with most authorities, although there are variations. For instance, Abū Ḥanīfah[4] defined *fiqh* as "knowledge of what your rights are and what your obligations are."[5]

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1 Lisān al `Arab, op. cit Vol 5 p. 3450.

2 Zaidān A K: Madkhal Li Dirāsah al Sharī`ah op. cit. p. 62.

3 Al Madkhal al Fiqhī al `Āmm op. cit. Vol 1 p. 59.
Makhluf M H: Bulūgh al Sūl Fi Madkhal `Ilm al Usūl, Cairo, Matba`ah Muṣṭafā al Ḥalabī, 1966, 2nd ed., p. 189.

4 senior Legist in Sharī`ah and founder of the Ḥanafī School of Thought in Fiqh.

5 Al Madkhal li Dirasah al Sharī`ah op. cit. p. 62.

Fiqh is thus those laws of the *Sharī`*, promulgated through His Messenger Muḥammad (S.A.W.S) and all those laws derived from it and which has a practical or applied value i.e it is practised by Muslims in their daily lives or have need for it in their daily lives.

3. DIVISIONS OF THE LAWS OF *FIQH*:

There are seven divisions under this heading and they are:

- laws of *`ibādāt* (worship), namely *ṣalāh*, (prayers), *zakāh* (compulsory alms), *ṣiyām* (fasting and specifically fasting of *Ramaḍān*), *ḥajj* and *`umrah* (pilgrimage and lesser pilgrimage to Makkah).
- laws of the family and having bearing on the family, namely: *nikāḥ* (marriage), *ṭalāq* (divorce), *nasab* (lineage), *nafaqah* (maintenance) etc. These are called *al aḥwāl al shakhsīyyah.*
- laws pertaining to the acts and inter-reaction of people in the fields of money, rights and obligations, settling of disputes etc. This is called al *mu`āmalāt* (transactions with legal implications).
- laws pertaining to the *ḥakim* (ruler) in the Islamic State and those pertaining to the governed in matters of obligations and rights between the two parties. This is called *al aḥkām al sulṭānīyyah* or *al siyāsah al shar`īyyah.*
- laws pertaining to the criminals and control of internal security called al *`uqūbāt.*

- laws pertaining to the regulations between the Islamic State and other States during peace and times of war. This is called *al siyar.*
- laws pertaining to morals, good conduct virtue and fairness. This is called *al ādāb*.

It is clear from the above that the Islamic code is a spiritual as well as temporal order and that even its civil code is imbued with religious law requirements in addition to being a religious based law. In short, it is a morally imbued law of a religious nature which is linked with one's conscience. In this sphere, Islamic law differs cardinally and fundamentally from all secular systems of law as well as other religions.

This issue is clearly illustrated in another important and interesting *fiqh* issue regarding judgment by *qaḍā* (judicial process) and judgment by *iftā'* (legal dispensation), both of which are valid in the *sharī`ah.*

The *qāḍī* (judge) judges on facts and acts and applies the law to the manifest issues as the law prescribes. He does not venture into the issue of obscure or hidden intent or aim in a given act which is at variance with the specified act.

The *muftī* (law-giver), however, looks to both the *qaḍā* (judicial) and *diyānah* (religious) sides. Many a time, thus, one will read in *fiqh* works: "the judgment of this issue is such by *qaḍā* and such by *diyānah*."

This kind of judgment is derived from the Prophet's (S.A.W.S) ruling for honesty and truthfulness in giving evidence in a given matter.[1]

[1] Al Madkhal al Fiqhī al `Āmm op. cit Vol 1 pp. 59 - 64.

4. THE MAIN SOURCES OF *FIQH*

These sources are divided into primary sources and secondary sources. The primary sources are two in number, namely:

- The *Qur'ān*, which is the Book or Revelation of God, and,
- The *ḥadīth/sunnah* of the Prophet (S.A.W.S) which are his precepts.

The secondary sources are founded on the *ijtihād*[1] of the *mujtahid* (independent legist).

The sources of *ijtihād* are primarily *ijmā`* (juristic consensus of legists) in all its forms and *ra'ī ijtihādī* (considered derived juristic opinion) in its various forms, of which *qiyās* (analogical reasoning) is the primary one.[2]

This pattern of law is clear from the *ḥadīth* text of Mu`ādh bin Jabal when the Prophet (S.A.W.S) questioned him on his procedure of *qada* when he was sent to Yemen as *qadi*:

"How will you judge?" : the Prophet (S.A.W.S) asked Mu`ādh.

"By the Book of Allāh", replied Mu`ādh.

"And if you do not find it in the Book of *Allāh*?" : the Prophet (S.A.W.S) asked.

"Then in the *sunnah* of the Prophet (S.A.W.S)" , Mu`ādh replied.

"And if you do not find it there nor in the Book of *Allāh*?" : the Prophet asked.

"Then I will exercise *ijtihād*...."

The Prophet then struck his chest and said:

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[1] considered juristic derived opinion of a duly qualified Islamic Law legist.

[2] `Abd al `Azīz A R: Al Qaḍā Wa Niẓāmuhu Fī al Kitāb Wa al Sunnah, Makkah, Umm Qurā University, 1984, p. 321.

"Praise to be to *Allāh* who blessed the messenger of the Messenger of *Allāh* in that which pleases the Messenger of *Allāh*."[1]

Before we deal with the above, it is necessary to have a short summary of historical events in the Islamic calendar.

Muḥammad ibn `Abd Allāh, the Prophet of Islam (S.A.W.S), was born in 570 C.E. in Mecca, Arabia.

He received the first Revelation of Quranic *āyāt*[2] in 610 C.E. This continued in Mecca till 622 C.E. when he migrated to Madīnah. This was on 16/7/622 C.E. This time marks the end of the Makkī (Meccan) period of Revelation. This migration is called the ***Hijrah*** from where the Muslim calendar dates.

The Prophet (S.A.W.S) arrived in Madīnah on 22/9/622 C.E. and this is the starting period of the Madanī (Medinite) period of Revelation.

The Prophet (S.A.W.S) died in 632 C.E. in Madīnah and is buried there.[3]

4.1 THE PRIMARY SOURCES OF *FIQH*:

As stated previously, they are two in number.

We deal firstly with the *Qur'ān*.

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1 Al Sajastānī Abū Dāwūd: Sunan Abī Dāwūd, Cairo, Matba`ah Muṣṭafā al Ḥalabī, 1983, 2nd ed., Vol 2: 297.
Al Qaḍā Wa Niẓāmuhu op. cit. p. 88.

2 āyāt mean verses of the Qur'ān. The singular is āyah.

3 Raḥmān H: Chronology of Islamic History, London, 1989, Introduction p. 5.

4.1.1 Definition:

The word *Qur'ān* comes from the Arabic verb *qara'a* which means "to read" . It is so called due to it having been gathered in one book and joined one part to another.[1]

The *Qur'ān* is also called the *Kitāb Allāh* which means "the Book of Allāh" as it is the revelation from the Exalted Almighty *Allāh.*

It is sometimes called the *furqān* which means "that which distinguishes between right and wrong".[2]

The *Qur'ān* is defined as:

"The Divine Word, revealed to the Prophet Muḥammad (S.A.W.S) and recorded in the *muṣḥaf* (the Qur'ān) and transmitted to us by *tawātur*[3].

Dr S Ṣāliḥ asserts that this is the definition that the learned scholars of *fiqh*, jurisprudence principles and Arabic agree on.[4] The learned *uṣūlī* (Muslim authority in the principles of jurisprudence) Shaikh al Āmidī defines the *Qur'ān* as: "that Book which was revealed to us, through *Jibrīl* (the arch-angel Gabriel) from the Almighty and is between the covers of the *Qur'ān* and transmitted to us by *tawātur*."[5]

From these definitions the *Qur'ān* is thus:

"The Book of *Allāh* which was revealed to the Prophet Muḥammad (S.A.W.S), by *Allāh*, words and order, starting from *Sūrah al Fātiḥah* and ending with *Sūrah al Nās* and

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1 Al Munjid, Published by Dār al Mashriq, Beirūt, 1973, 23rd ed., p. 617.
Al Qaḍā Wa Niẓāmuhu op. cit. p. 322.

2 Al Munjid op. cit. p. 579.

3 continuous uninterrupted transmission.

4 Ṣāliḥ S: Al Mabāhith Fī `Ulūm al Qur'ān, Beirūt, Dār al `Ilm lil Malāyin, 1984, 3rd ed., p. 21.

5 Al Āmidī S D: Al Iḥkām Fī Uṣūl al Aḥkām, Cairo, Maṭba`ah Muṣṭafā al Ḥalabī, Vol 1 pp. 120 - 121.

which was transmitted to us by *tawātur*". The meaning of the Quranic exegesis is included herein, as S Ṣāliḥ says: "*Tafsīr* (Quranic exegesis) existed very early in Islām, in fact right from the era of the Prophet (S.A.W.S), who was the first exegetist of the *Qur'ān*."[1]

This is amplified by the *Qur'ān* itself:

"And thus have We inspired in you (Muḥammad) a spirit of our command. You did not know what the Scripture was nor the Faith...."[2]

4.2 A SHORT ANALYSIS OF THE *QUR'ĀN*:

The *Qur'ān* is the constitution of the Muslims and their first source of law. Herein there is consensus.

As a constitution, the *Qur'ān* gives law in generality and seldom resorts to detail. An example hereof is *ṣalāh* and *zakāh*, both of which are mentioned in and commanded with in the *Qur'ān* though details about their implementation are not given. That the Prophet (S.A.W.S) had to complete by instruction and practical example.

"We sent you down a Reminder[3] so that you may explain to mankind what was sent down to them, so that they may meditate."[4]

In this case, the *ḥadīth/sunnah* is the key to the *Qur'ān*.[5]

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[1] Al Mabāḥith Fī `Ulūm al Qur'ān, op. cit. p. 289.

[2] Al Qur'ān, Sūrah al Shūrā: 52.

[3] "Al Dhikr" here (Reminder) is another word for the Qur'ān.

[4] Al Qur'ān, Sūrah al Naḥl: 44.

[5] Al Madkhal al Fiqhī al `Āmm op. cit. Vol 1 pp. 60 - 68.

In format, the *Qur'ān* consists of 114 *suwar* (chapters - sing. *sūrah*), each having a name derived from somewhere in the text of the specific sūrah. These *suwar* are further divided into 30 *ajzā* (parts - sing. *juz*). The main division of the *Qur'ān* is the Revelations of Makkī (Meccan) and Madanī (Medinite) eras. Makkī *suwar* consist mainly of short *āyāt*, principles of Theology and beliefs, exhortation to truth and virtue, debates with the pagans and their wrong beliefs, narrations of previous Prophets and nations, speaks about Paradise and Hell and are usually not long. The Madanī *suwar* are long, deal with actual law issues of persons and the State, *jihād*, debates with the hypocrites and *Ahl al Kitāb* (Jews and Christians) etc.[1] The following few selected suwar deal with the law subject matter mentioned:

Sūrah al Baqarah:

This *sūrah* deals with *ḥajj* laws and Rites, dietary laws, *qiṣāṣ* (retributive punishment for murder and injuries), *ṣiyām* laws, *jihād*, oaths a wide spectrum of personal law and prohibition of *ribā* (usury) etc.

Sūrah al Nisā':

This *sūrah* deals with, amongst other things, polygamy and its laws, curatorship and succession, personal law matters, settling of disputes, murder and its laws of punishment , war and its procedure etc.

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[1] Al Mabāḥith Fī `Ulūm al Qur'ān op. cit. p. 183.

Sūrah al Mā'idah:

This *sūrah* deals with contractual obligations, pilgrimage restrictions, *ḥudūd* (prescribed punishments) punishments, final prohibition of liquor, gambling, *jihād* against the pagans etc.

Sūrah al Anfāl:

Deals with laws of booty and spoils of war, *jihād*, animal sacrifices etc.

Sūrah al Nūr:

Deals with sexual offences and its punishments, personal law, slander of chaste women, privacy of homes and persons, dress requirements for men and women, prohibition of sexual lewdness and practices etc.

Sūrah al Aḥzāb:

Deals with prohibition of certain associations of persons, laws of adoption, the Prophet's (S.A.W.S) standing amongst the Muslims, personal laws, procedure of addressing the Prophet's (S.A.W.S) wives, prohibition of remarriage of the Prophet's (S.A.W.S) wives after his death, dress laws of Muslim women etc.

Sūrah Muḥammad:

Deals with procedure of *jihād*, compulsion of obedience to *Allāh* and His Messenger (S.A.W.S) etc.

Surah al Hujurat:

This surah deals with the procedure of evidence evaluation, internecine strife and its solution etc.

Surah al Mujadalah:

Deals with *zihar* and its laws, procedure of entering into the presence of the Prophet (S.A.W.S) etc.

Surah al Mumtahanah:

Deals with laws for Muslim women migrating from Mecca to Madinah and disbelieving women coming to Madinah to profess the Faith, prohibition of associating with persons on whom is the anger of *Allah*.

Surah al Jumu`ah:

Deals with the Friday service and the Jews.

Surah al Talaq:

Deals with the laws of *talaq* (divorce) and procedure therein.

Basically, the *Qur'an* consists of three major kinds of *ayat*:

- those dealing with theological principles and beliefs.
- those dealing with the purification of the soul and conduct.
- those dealing with all other acts besides the above two.

The latter one in "c" above is again divided into two parts, namely:

- all forms of *`ibādāt* (worship), and
- *mu`āmalāt* (transactions with legal implications) which consist of all the required spheres of human activity and matters pertaining thereto.[1]

It appears that Dr Zaidān infers a loose usage of *mu`āmalāt* encompassing all acts under the *sharī`ah.*

5. THE *ḤADĪTH/SUNNAH:*

This is the second primary source by consensus of all the *`ulamā'* (sing. `ālim - the learned scholars of *sharī`ah*), *fuqahā'* (sing. *faqīh* - expert jurists of jurisprudence), *usuliyūn* (sing. *usūlī* - legists/authority in principles of jurisprudence) and other branch scholars of the *sharī`ah.*

The *ḥadīth* is sometimes taken to be synonymous to the *sunnah*. Many a time they are used loosely. It is necessary to understand the real meaning of each. As for this thesis, *ḥadīth* will mean the instruction text of the Prophet (S.A.W.S.), while *sunnah* will mean the actual practical application of his directives and instructions.

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[1] Al Madkhal li Dirāsah al Sharī`ah op. cit. p. 186.
Al Qaḍā Wa Niẓāmuhu op. cit. pp. 319 - 321.

5.1 Definition:

Literally *hadith* means "new" as opposed to "old" or a "report"[1]. In the *shari`ah*, *hadith* means specifically the sayings and the actions of the Prophet (S.A.W.S).[2] Dr S Salih's definition must include the *iqrarat* (approval) of the Prophet (S.A.W.S) of the actions of the *sahabah* (companions of the Prophet (S.A.W.S)), which, by consensus, is part of the *hadith*.

The word *sunnah* literally means *tariqah* meaning "a way or pattern of life".[3] In the *shari`ah*, *sunnah* specifically means "the actions and way of life of the Prophet Muhammad (S.A.W.S)." In this sense, *sunnah* is a specialised part of *hadith*.[4]

5.2 PECULIARITIES OF THE *HADITH*:

- *Hadith* is the key to the *Qur'an*, explaining the principles and generalities.[5] "He (S.A.W.S) explained to the people what was revealed to him.... He carried this responsibility alone, carrying out the obligations on him (herein).... until he died."[6]

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1 Al Abadi: Qamus al Muhit, Cairo, Matba`ah Mustafa al Halabi, 1952, 2nd ed., Vol 1 p. 170. Al Munjid op. cit. p. 121.

2 Salih S: `Ulum al Hadith, Beirut, Dar `Ilm Lil-Malayin,1969, 5th ed., p. 5.

3 Al Munjid op. cit. p. 353. `Ulum al Hadith op. cit. p. 6.

4 `Ulum al Hadith op. cit. p. 6.

5 Ba Billi M: Fi al Tashri` al Nabawi, Beirut, Dar al Irshad, 1969, 1st ed., p. 36.

6 Mabahith Fi `Ulum al Qur'an op. cit. p. 289.

In explaining the *ayah* referring to the birth of *Mariam* (Mary - later mother of `*Isa* (Jesus - A.S.), the Prophet (A.S) read:

"....and I seek refuge with You (*Allah*) for her and her offspring from the outcast Satan."[1]

Thereafter he said as narrated by Abu Hurairah (R.A)

"No one is born save that Satan touches him when he is born which causes the infant to cry out, save *Mariam* and her son."[2]

This explains the meaning of granting of "refuge" to *Mariam* and her son from Satan as asked for by her mother when she was born.

- it can be an independent source of law in itself and in this way is independent from the *Qur'an* in law enactment but subject to its principles.[3]

Ibn `Umar narrates "that the Prophet (S.A.W.S) obligated *zakah al fitr*.....on the Muslims."[4]

`Imran bin Husain narrates that a man asked the Prophet (S.A.W.S) if there was any *mirath*[5] due to him from his deceased grandson (son of his son), to which the Prophet (S.A.W.S) replied: "You get one sixth...."[6] The first ruling on *zakah al fitr* is based on the Quranic welfare principle to people

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[1] Al Qur'an, Surah al `Imran: 36.

[2] Al Bukhari M I: Sahih al Bukhari, Cairo, Matba`ah Mustafa al Halabi, undated, Vol 6: 42.

[3] Fi al Tashri` al Nabawi, op. cit. p. 36.

[4] Sahih al Bukhari op. cit. Vol 2: 153.
Al Mundhiri Z D: Mukhtasar Sahih Muslim, Damascus, al Maktab al Islami, 1393 A.H., 2nd ed., p. 142.

[5] inheritance.

[6] Sunan Abi Dawud op. cit. Vol 2 p. 121.

while the second one is based on the general Quranic concept of fatherhood and as understood in the line of *wilāyah*.

(The understanding here is that the grandfather's son had already deceased and thus the grandfather succeeds to the share of the *mīrāth* of his deceased son).

- it is a secondary source to the *Qur'ān* and as such does not depart from the texts of the *Qur'ān* nor the general principles of the *sharī`ah*.[1] In organising the civil code, the Prophet (S.A.W.S) ruled as narrated by Jābir (R.A) "that they are not to sell dates until the fruit is present and in good condition."[2] This is based on the Quranic principles of honesty and exchange of real goods.
- all matters of *sharī`ah*, which the *ḥadith* complement or explain, have to be obeyed compulsorily as it is a complement then of the *Qur'ān*, completing the law itself. No one is allowed to give another ruling in this case.[3] This refers to issues like *ḥajj* and contracts.

The *Qur'ān* commands:

"And perform (properly) the *ḥajj* and *`umrah*."[4] Sālim bin `Abd Allāh (R.A.) narrates from his father that (the latter) said: "The Prophet (S.A.W.S)

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1 Al Madkhal li Dirāsah al Sharī`ah, op. cit. p. 194.

2 Mukhtasar Ṣaḥīḥ Muslim, op. cit. p. 246.

3 Fī al Tashrī` al Nabawī, op. cit. p. 36.

4 Al Qur'ān, Sūrah al Baqarah: 196.

entered into the *iḥrām* (state of starting pilgrimage rites) at the mosque of Dhū al Hulaifah."[1]

This means the Prophet (S.A.W.S) made Dhū al Hulaifah the pilgrimage boundary of *iḥrām* for the people of Madinah.

- the superegatory part of *ḥadīth* is called the *af`āl jabalīyyah* and is exhorted to be followed, but no one can be compelled to follow it.

  However, some *ṣaḥābah*, strong in devotion to the Prophet (S.A.W.S), followed him even therein.

  Examples hereof are his (S.A.W.S) ways in eating, drinking, walking, sitting etc. These do not enter the *tashrī`* (legislative) sphere.[2]

The *ḥadīth* and *sunnah* are thus necessary parts of the *sharī`ah* to which the *Qur'ān* itself has commanded.

"Say (Oh Muhammad): if you (the Muslims) love *Allāh*, follow me, *Allāh* will love you and forgive you your sins..."[3]

"Your comrade does not err, nor is (he) deceived, it is but inspiration that is inspired (in him)."[4]

".....And whatever the Messenger gives you, take it and whatever he forbids you from, abstain (from it)...."[5]

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[1] Ṣaḥīḥ al Bukhārī, op. cit. Vol 2 p. 161.

[2] Zaidān A K: Wajīz Uṣūl al Fiqh, Baghdād, Matba`ah Salmān al `Azamī, 1967, 3rd ed., p. 137. Al Madkhal li Dirāsah al Sharī`ah al Islāmīyyah, op. cit. p. 194.

[3] Al Qur'ān, Sūrah al `Imrān: 31.

[4] Al Qur'ān, Sūrah al Najm: 2 - 5.

[5] Al Qur'ān, Sūrah al Ḥashr: 7.

The general sequence of the quoted ayat obligates following of both the *Qur'an* and *hadith/sunnah*.

6. THE SECONDARY SOURCES:

The secondary sources are derived from *ijtihad*, which in turn is based on the primary sources' texts or derived or extracted from it.

There is thus, in the *shari`ah*, no place for *hawa* (unqualified opinion based on other than a shari`ah proof).

The *`ulama'*, *fuqaha'*, *usuliyun* (Muslim legist/authority in the principles of jurisprudence) and all the other learned scholars of the branches of the *shari`ah* are universal in their condemnation, rejection and inadmissibility of such a practice[1].

The *Qur'an* itself ruled who is to work and pronounce in the *shari`ah*:

"If they would only refer it to the Messenger and those amongst them who hold command, those of them who investigate matters would know about it...[2]

Al Qurtubi in his exegesis states:

"matters which people do not know as to ruling therein, must refer such a matter to the Messenger (S.A.W.S) and (after him) to those Muslims who are *`ulama'* or *fuqaha'*.

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[1] Khallaf A W: Maṣadir al Tashri` al Islami Fi Ma La Naṣṣa Fiha, Kuwait, Dar al Qalam, 1970, 2nd ed., p. 8.
Ibn Qaiyyim Al Jawziyyah: `Alam al Muwaqqi`in `An Sayyid al `Alamin, Cairo, Maktabah al Kulliyat al Azhariyyah, 1968. p. 67.

[2] Al Qur'an, Surah al Nisa': 83.

The verb - *yastanbitunahu* - means "extracting" indicating that those who are empowered to deliver judgment are to be consulted."[1]

The most important of these is the *ijma`* (juristic consensus of opinion) in its various forms, with the *ijma`* of the *sahabah*, or *ijma`* al *ummah* (universal juristic consensus of opinion), the first and most important category.

Hereafter follows the other secondary sources, the most important and most used one being *qiyas* (analogical reasoning) in its various manifestations.

Some of these secondary sources are agreed upon and in others the *fuqaha'* differed, sometimes very markedly.

6.1 THE *IJMA`* (JURISTIC CONSENSUS OF OPINION):

The word *ijma`* literally means *`azm* and *tasmim* which mean "firm of intention." It also means *ittifaq* which means "agreement."[2]

In the *shari`ah*, *ijma`* means:

The full agreement of the *mujtahidun* (indepedent legists) of the Muslim *ummah* (entire Muslim nation) on a *shari`ah* ruling after the death of the Prophet (S.A.W.S).[3]

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1 Al Jami` li Ahkam al Qur'an, op. cit. Vol 5 p. 291.

2 Lisan al `Arab, op. cit. Vol 1 p. 681.
Qamus al Muhit, op. cit. Vol 3 p. 15.
Al Munjid, op. cit. p. 101.

3 Al Ihkam, op. cit. Vol 1 p. 148.
Wajiz Usul al Fiqh, op. cit. p. 150.
Al Madkhal al Fiqhi al `Amm, op. cit. Vol 1 p. 71.

6.1.1 Analysis of the Definition of *Ijmā`*:

From the definition it is noted that:

- there must be full agreement on the judgment reached, thus if any of the *mujtahidūn* (independent legists) differ or even one of them, then no *ijmā`* is founded, but a majority and a minority ruling will be founded.
- those deciding the issue must be *mujtahidūn*.

  Thus if the persons gathered are not *mujtahidūn* no *ijmā`* is founded.

  (It is important to know who a *mujtahid* is and such qualification they must have are listed hereunder.)
- the *mujtahidūn* must be Muslims, thus non-Muslim persons whether they are jurists of their systems or not, cannot found *ijmā`*.
- their ruling must be founded after the death of the Prophet (S.A.W.S) as during his lifetime, he was the law entity on earth and gave the laws as revealed to him or as he was empowered to do so by *Allāh*.
- they must decide on a *ḥukm sharʽī*, i.e. a *shari`ah* ruling on a matter which has no ruling yet and which is "new". Thus if there is already a ruling in the *Qur'an* or *ḥadīth/sunnah*, such a ruling is taken and no *ijmā`* (juristic consensus of opinion) can take place. The *ḥadīth* of Mu`ādh bin Jabl on this issue quoted before is clear therein as well as other *shari`ah* texts.
- *Ijmā`* must have a *mustanad shar*`ī (a supporting *shari`ah* proof). Thus *ijmā`* based on other than *mustanad shar`ī* is void.[1]

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[1] Wajīz Fi Usūl al Fiqh, op. cit. pp. 150 - 152.
Al Madhkhal al Fiqhī al `Āmm, op. cit. Vol 1 p.71.

6.2 SHURUT OF THE *MUJTAHID* (INDEPENDENT LEGIST):

In order to qualify as a *mujtahid*, the following *shurut* (conditions) must be fulfilled:

- knowledge of Arabic which enable the person to understand Arabic properly and correctly. This includes knowledge of *nahwu* (Arabic grammar), *sarf* (etymology) and *balaghah* (rhetoric with all its branches).
- knowledge of the *Qur'an* because it is the fundamental source of the *shari`ah*. He must know all the *ayat* of the *Qur'an* generally, but must know the *ayat* of *ahkam* (laws) in depth because from these the law is extracted. He must know the rulings of the *fuqaha'* in all these *ayat*, the *nasikh* (ayat still applicable as law) and *mansukh* (ayat cancelled and inapplicable) and *asbab al nuzul* (reasons for revelation).
- knowledge of the *sunnah* in *hadith sahih* (authentic *hadith*) and *hadith da`if* (weak *hadith*), the grades of it namely, *mutawatir* (numerously reported *hadith*), *mashhur* (famous *hadith* due to extensive usage) and *ahad* (singularly reported *hadith*).

  He must also know the causes for the *hadith* to be found as well as its meaning, strength of texts, selection process of texts, cancellations that occurred in application of these texts, knowledge of *hadith* dealing with law matters and the law extracted from it, to know the *`ulum* of *hadith* and the science of criticism of hadith.
- knowledge of *usul al fiqh* (principles of jurisprudence) because every *mujtahid* must be a *faqih*. Thus he must know all the proofs in *shari`ah* and

its order of standing as well as the approved ways of law extraction, proofs derived from word usage and its procedure and the laws of selection in proofs.

- knowledge of *ijma`* (juristic consensus of opinion). He must know all the issues in which there is *ijma`* so that he does not breach the *ijma`* of the *ummah*.
- knowledge of the *maqasid* (aims) of the *shari`ah*. He must thus know the reasons for the laws (*`ilal al ḥukm*) as well as the *maṣalih* (sanctioned benefits) of the Muslims within the ambit of the *shari`ah* so that he can extract laws for application to the people by way of *qiyas* (analogical reasoning) or by *maṣaliḥ* or by *`adat* (customs) of the people in their dealings with one another.
- to be naturally inclined to *ijtihad*. This means he must be in a position to exercise *ijtihad* for if he is not, the other *shurut* will be useless.[1]

6.3 PROOF OF THE VALIDITY OF *IJMA`* (JURISTIC CONSENSUS OF OPINION):

The validity of *ijma`* is confirmed by *Allah* Himself in the *Qur'an*. *Allah* says: "And whoso opposes the Messenger after the Guidance (of *Allah*) has been manifested unto him, and follow other than the believers' way, We appoint for him that unto which he himself has turned, and expose him unto Hell - a hapless journey's end -."[2] This Quranic law warns Muslims from following a way or ways other than the

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[1] Wajiz Usul al Fiqh, op. cit. pp. 315 - 318.

[2] Al Qur'an, Surah al Nisa': 115.

way of the Muslims. Thus, the way of the Muslims is the right and correct way and is incumbent to be followed and the ways or ways besides that specific way is forbidden to be followed.

Thus, what the *mujtahidun* agree upon as a *shari`ah* ruling by way of *ijma`* is the agreed way of dealing with a specific issue in terms of the *shari`ah* and that is the proper and correct way for the Muslims to follow and this is precisely what *ijma`* is.[1]

6.3.1 The Kinds of *Ijma`* (Juristic Consensus of Opinion):

Basically *ijma`* is either *sarih* (clear) or *sukuti* (silent).

By *ijma` sarih* is meant *ijma`* that is clear and known publicly, while *ijma` sukuti* (silent judicial consensus of opinion) is not so.

The following are the instances of *ijma` sarih* (clear juristic consensus of opinion).

The most important form of *ijma` sarih* and which is permanently binding on the ummah, is the *ijma` al ummah* (universal juristic consensus of opinion) or the *ijma`* of the *mujtahidun* (independent legists) among the *sahabah*. No other ruling is allowed to be founded.

This kind of *ijma`* was founded in the time of the *al khulafa' al rashidun* (i.e the four righteous caliphs Abu Bakr, `Umar, `Uthman and `Ali) righteous and specifically in the reign of Abu Bakr and `Umar due to both of them not allowing the *mujtahidun* of the *sahabah* to leave Madinah without their permission. In `Uthman and `Ali's time, this became difficult as the former allowed the *sahabah* to go to the *Amsar* (conquered cities of the Islamic State).

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[1] Al Ihkam, op. cit. Vol 1 p. 150.
Al Qada Wa Nizamuhu, op. cit. pp. 354 - 355.
Wajiz Fi Usul al Fiqh, op. cit. p. 152 - 153.

The other two forms of *ijma`* sarih are localised *ijma`* forms.

They are *ijma` al iqlimi* and *ijma` al mahalli*.

Ijma` al iqlimi* is the *ijma` of the *mujtahidun* of a region and as such is only binding on the Muslims of that region which the *mujtahidun* represent, like the *ijma`* of the *mujtahidun* of the Middle East or the *ijma`* of the *mujtahidun* of South East Asia, while *ijma` al mahalli* is the *ijma`* of the *mujtahidun* of a specific locality, usually a country or province or even a city and as such is only binding on the Muslims of that specific locality represented by those *mujtahidun* (independent legists).[1]

As for *ijma` al sukuti* (silent judicial consensus of opinion), there is a difference of opinion amongst the *fuqaha'* as to its binding force.

This form of *ijma`* (juristic consensus of opinion) is formed when some *mujtahidun* or even one *mujtahid* expresses a juristic opinion on a *mas'alah* (juristic problem) which has no *shari`ah* ruling yet and which needs a *shari`ah* ruling.

Theirs or his ruling reaches the other *mujtahidun* and the latter keep quiet thereon, not expressing reservations nor criticising it either.

The *usuliyun* (Muslim legists/authorities in the principles of jurisprudence) differ on the standing of *ijma` al sukuti* as follows:

- that it is binding like *ijma` al ummah* (universal juristic consensus of opinion). This is the view of most of the *Hanafis*[2] and the ruling of the *Hanbalis*.[3]

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[1] Wajiz Fi Usul al Fiqh, op. cit. p. 150.

[2] one of the senior Sunni Fiqh Schools of Thought, founded by Nu`man bin Thabit al Kufi, commonly known as Abu Hanifah in the Fiqh works. His followers are called Hanafis.

[3] another senior Sunni Fiqh School of Thought, the founder of whom was Abu `Abd Allah Ahmad bin Hanbal bin Hilal bin Asad al Shaibani, commonly known as Ahmad in the Fiqh works.

- that it is ordinary *ijtihād* (juristic opinion) and not even of the level of *ḥadīth* and is thus ordinary juristic opinion. This is the view of *Mālik*[1] and *al Shāfi`ī*.[2]
- that it is not compulsory to be followed, but fall in the category of *ḥadīth* strength. This is the view of some *Ḥanafis* and some *Shāfi`īs*.[3]

We will now deal with the other secondary sources based on *ijtihād*.

6.4 *AL QIYĀS* (ANALOGICAL REASONING):

The word *qiyās* is derived from the Arabic verb *qāsa*, which means *taqdīr* or *muqāranah*. Literally thus *qiyās* means "to compare or measure or estimate similar things."[4]

In the *sharī`ah, qiyās* is defined as:

"The application of a known *sharī`ah* ruling on another issue, similar to it, due to both issues having the same *`illah* i.e cause for a specific ruling given in law."[5]

An example is the *qiyās* specifically applied to intoxicants.

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1 another senior founder of a Sunnī Fiqh School of Thought. His real name is Mālik bin Anas al Asbahī. His followers are called Malikis. Mālik was the Imām of Fiqh in Madīnah during his time.

2 another senior founder of a Sunnī Fiqh School of Thought. His real name is Abū `Abd Allah Muḥammad Idris Al Shāfi'ī. His followers are called Shāfis.

3 Wajīz Fi Usūl al Fiqh, op. cit. pp. 154 - 155.

4 Qamūs al Muḥīṭ, op. cit. Vol 2 p. 252.
Al Munjid, op. cit. p. 662.
Al Rabī`ah `Abd al `Azīz: Adillah al Tashrī` al Mukhtalif Fī al Ihtijāj Bihā, Beirūt, Mu'assasah al Risālah, 1979, 1st ed., p. 9.

5 Bulūgh al Sul, op. cit. p. 88.
Maṣādir al Tashrī` al Islāmī, op. cit. p. 19.

Drinking of wine is forbidden according to the *Qur'an*[1] due to its intoxicating nature and in that state "Satan brings forth jealousy and enmity between people." This is the `*illah* of the ruling in the prohibition of wine. Wine is called *khamr* in Arabic and *khamr* is defined as "fermented grape juice".[2] The *fuqaha'* used *qiyas (analogical reasoning)* to arrive at prohibition of any intoxicant irrespective of what it is constituted of or prepared from for result of consumption leads to intoxication.[3]

Due to the difficulty of the enactment of *ijma`* from the time of `Uthman, the third of the *al khulafa' al rashidun*, *qiyas* became the most widely used source in *fiqh*. Examples of the *qiyas* rulings are the laws of *waqf* (endownment) taken from the law texts on *wasaya* (legacies) and applying the laws of the *wasi* (legal guardian) to the *waqif* (one who makes an Islamic endownment).
Also the application of the laws of *bai`* (sale) on *ijarah* (leasing) due to the similarity between the two as *bai`* is the transfer of ownership and *ijarah* the transfer of benefit without ownership.[4]

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[1] Al Qur'an, Surah al Ma'idah: 90.

[2] Al Munjid, op. cit. p. 195.

[3] Wajiz Usul al Fiqh, op. cit. p. 164.

[4] Al Madkhal al Fiqhi al `Amm, op. cit. pp. 73 - 77.

6.5 *AL ISTIḤSĀN*:

Istiḥsān literally means "to think something to be good."[1]

In the *sharī`ah*, *istiḥsān* means:

"the suspension of ruling by *qiyās* (analogical reasoning) for a ruling better than it or which necessitates it."[2] This is the general definition for there are variations amongst the *fuqahā'* herein due to their scope of usage of *istiḥsān*.

In this light, *al istiḥsān* is the opposite of *qiyās*.

There are two kinds of *istiḥsān*, namely:

- *istiḥsān qiyāsī*, and
- *istiḥsān ḍarūrah*.

Istiḥsān qiyāsī is that kind of *istiḥsān* in which manifest *qiyās* ruling is departed from and a "finer or refined" ruling is applied. An example hereof is that in the case of two persons being joint creditors and one of them receives his share of the profits in advance. His partner has the right to demand his share percentage-wise of that advance. So if that advance is lost or destroyed, by *qiyās* ruling, both creditors should share the loss of the percentage of the amount owing.

By ruling of *istiḥsān*, however, this is not so, in that the one who receives that advance, and it is lost or destroyed before he can share it with his other creditor partner, then the one who received the advance has to bear that loss and the other creditor partner has nothing to do with the issue.

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1 Qāmūs al Muḥīṭ, op. cit. Vol 4 p. 215.
Al Munjid, op. cit. p. 134.
Adillah al Tashrī`, op. cit. p. 155.

2 Maṣādir al Tashrī` al Islāmī, op. cit. p. 71.
Adillah al Tashrī`, op. cit. pp. 157 - 158.

This is based on the rule that the second partner is not under obligation to demand his share from the party that received the advance.

Istiḥsān ḍarūrah is more of a *maṣāliḥ* nature, than of a *qiyās* nature.

Briefly, *istiḥsān ḍarūrah* is "the leaving of manifest *qiyās* for another ruling to prevent harm, loss or hardship to him who does not merit it."

An example hereof is that if someone advances money to someone else either for maintenance or settling of a debt or settling of any monetary contractual obligation without instruction of the real debtor, then such an advance is taken as charity and cannot be demanded back whether charity was intended or not.

However, if someone asks somebody else to settle a debt for him or to supply maintenance for his family,and the *wakīl* (agent) so ordered by the *muwakkil* (principal) does so with his own money with the understanding that he will be reimbursed by the *muwakkil*, this is not taken as charity as in the first case, as it will cause undue harm and loss to an innocent party.[1]

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[1] Al Madkhal al Fiqhī al `Āmm, op. cit. Vol 1 pp. 84 - 89.

6.6 *AL ISTISLAH* OR *MASALIH AL MURSALAH*:

Al Istislah literally means "acquiring benefit".[1]

In the *shari`ah* it means: "building *shari`ah* laws on the principle of benefit (to the Muslims) where such an issue has no ruling by any *shari`ah* text nor *ijma`* and such a ruling being required."[2]

Al istislah is built on the principle of procuring benefit (*jalb al manfa'ah*) for the Muslims and (*sadd al mafsadah*) i.e. preventing harm from them. This application encompasses the spheres of *din* (religion), *nafs* (person), *`aql* (the mind), *nasl* (offspring) and *mal* (wealth). The *fuqaha'* applied this principle in its absolute sense in the mentioned spheres on condition that in the process, nothing unlawful in the *shari`ah* is made lawful and vice versa and on condition that there is no text or *ijma`* (juristic consensus of opinion) ruling on the issue.

The entire *shari`ah*, in actuality, is based on the principle of *jalb al manfa'ah* (procuring permissible benefit) and *sadd al mafsadah* (prevention of all harm). The *Shari`* Himself legislated as halal all things that is good, virtuous and beneficial to mankind in this world and forbade and discouraged those things which are harmful and detrimental to life in this world.[3]

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[1] Qamus al Muhit, op. cit. Vol 1 p. 243.
Al Munjid, op. cit. p. 432.

[2] Masadir al Tashri` al Islami, op. cit. p. 85.
Adillah al Tashri`, op. cit. p. 190.

[3] Al Qada Wa Nizamuhu, op. cit. pp. 374 - 375.
Al Madkhal al Fiqhi al `Amm, op. cit. Vol 1 pp. 98 - 100.
Adillah al Tashri`, op. cit. p. 190.

The principle of istislah is clearly reflected in the *Qur'an* itself:

"Say: My Lord has forbidden only those indecencies such of them that are apparent and such as are within (hidden): sin, wrongful oppression and that you should associate with *Allah* that which no warrant has been revealed, and that you say nothing concerning *Allah* of which you have no knowledge."[1]

6.7 *SADD AL-DHARAI'* (BLOCKING THE WAYS TO EVIL AND SIN):

Dhara'i is the plural of *dhari`ah*. *Dhari`ah* means literally "a way which is resorted to by a person in any matter."

In the *shari`ah* it is attributed to "ways and means of preventing any evil or sin or the blocking of ways and avenues which may lead to evil and sin."

As the definition indicates, it is a wide field of operation for the *fuqaha'* to operate in in safeguarding the Muslim *Ummah* and protecting its values in all spheres of human life.[2]

Some *fuqaha'* classify *dhara'i* under *al istislah* and not as a separate source in its own right.

Zaidan mentions some cases of the Prophet (S.A.W.S) and after him his sahabah (R.A.H) employing this principle of *sadd al dhara'i*

(blocking the ways that lead to evil and sin).

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1 Al Qur'an, Surah al-A`raf: 33.

2 Wajiz Fi Usul al Fiqh, op. cit. p. 209.

- the Prophet (S.A.W.S) prohibiting the loan debtor of giving his creditor a gift over and above the amount repaid to prevent *ribā* (usury) entering the contract in another way.
- the *ṣaḥābah* (R.A.H) in their ruling inheritance to the *mutallaqah bā'inah* (irrevocably divorced woman) when her husband divorces her irrevocably on his sickbed from which he eventually dies, thus preventing him from excluding her from his estate on his deathbed wilfully and unlawfully.[1]

6.8 *AL `URF*:

`Urf* literally means *ma`rifah which means "knowledge".[2]

In the *Qur'ān*, *Allāh* uses the word *`urf* to mean "good and virtuous".

"Practice forgiveness, command what is good (*`urf*)...."[3]

Al Qurtubī says in his exegesis that *`urf* in the above ayah means "abstention from sin, acknowledging your kin, and preparing for the Hereafter."[4]

In the *sharī`ah `urf* is defined as:

"that which the people accept and practice be it by word, practice or abstention."[5]

The *fuqaha*' make no distinction between *`urf* (custom) and *`ādah* (tradition).

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1 Al Madkhal li Dirāsah al Sharī`ah al Islāmiyyah, op. cit. p. 204.

2 Qāmūs al Muḥīṭ, op. cit. Vol 4 p. 178.
Al Munjid, op. cit. p. 500.

3 Al Qur'ān, Sūrah al `Ārāf: 199.

4 Al Jamī` li Aḥkām al Qur'ān, op. cit. Vol 7 p. 344.

5 Al Qaḍā Wa Niẓāmuhu, op. cit. p. 375.
Al Madkhal Li Dirāsah al Sharī`ah al Islāmiyyah op. cit. p. 205.

There are two kinds of `urf - `urf ṣaḥiḥ (proper and lawful `urf) and `urf fasid (invalid `urf).

`Urf ṣaḥiḥ is that `urf which the people practice and which does not clash with any of the shari`ah laws of ḥalal and ḥaram and neither opposes any of the compulsory orders of the shari`ah.

On the other hand `urf fasid is that `urf which people practice and which contradicts shari`ah law or legalises ḥaram or prohibits ḥalal.[1]

Thus before `urf can be incorporated into the shari`ah as law, it must conform to the following shurut:

- the `urf must be practised in the land or place.
- the `urf must not clash with any of the shari`ah laws already enacted in the shari`ah and must not undo any of the laws of ḥalal and ḥaram.

`Urf is subject to change due to the changing circumstances and one form of `urf may be present a country and not in another. `Urf thus has no uniformity on an international scale.

An example of `urf is the practice of certain Muslim countries that the bridegroom is allowed to pay a part of his ṣadaq (dowry) and the rest either by instalments throughout the nikaḥ's (marriage) subsistence or fully on divorce or at death of the wife (i.e into her estate). Recognition of `urf is maṣlaḥah for the people which in itself is a shari`ah principle. Not recognising `urf ṣaḥiḥ will bring undue hardship on people, something which is at variance with the maqasid (aims) of the shari`ah itself.

Most of the fuqaha' legalised `urf as a principle of law making in the shari`ah due to the ḥadith text of `Abd Allah ibn Mas`ud which reads:

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1 Al Qaḍa Wa Niẓamuhu, op. cit. p. 376.

" That which the Muslims see as good, is good for them."

Certain general *fiqh* principles have been enacted based on *`urf* and they are:

- Custom is law.
- Word usage is subject to customary meaning of such words.
- That which is accepted by custom is as that which had been legally set.
- specification by custom is as specification by *the sharī`ah* text.[1]

6.9 *QAWL* OR *MADHHAB (SCHOOL OF LAW) OF A ṢAḤĀBĪ*:

By this is meant the *fatwā' (legal dispensation)* of a *ṣaḥābī*.

After the death of the Prophet (S.A.W.S), the learned in *sharī`ah* and *fiqh* of the *ṣaḥābah* gave *fatāwā* and judgments in law to the people who needed them.

The issue now is whether that *fatwā'* of the *ṣaḥābī* is binding in law. Whatever a *ṣaḥābī* heard from the Prophet (S.A.W.S) and transits is termed *ḥadīth/sunnah* and thus not classifiable under *madhhab* (school of law) of a *ṣaḥābī*. A *ṣaḥābī* of equal standing in *sharī`ah* knowledge is not obliged to accept the ruling of his counterpart.

The issue is thus the individual *fatwā'* of a *ṣaḥābī*. Herein the *fuqahā'* differ.

Some maintain that the *mujtahid* (independent legist) must take the *ṣaḥābī*'s *fatwā* before he resorts to his own *ijtihād* initiative for a *ṣaḥābī* is one who was present during the period when the revelation was being revealed with the Prophet (S.A.W.S) at revelation and thus the margin of error in judgment on his part is much smaller than those who were not contemporaries of the Prophet.

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[1] Al Madkhal al Fiqhī al `Āmm, op. cit. Vol 1 pp. 143 - 148.
Al Madkhal li Dirāsah al Sharī`ah al Islāmiyyah op. cit. p. 205 - 207.
Maṣādir al Tashrī` al Islāmī, op. cit. pp. 146 - 147.

Those who subscribe to this view are, according to ibn Taimiyyah, Abu Hanifah, Malik, Ahmad bin Hanbal and al Shafi`i in one of the narrations from him.

In fact, *madhhab sahabi* (school of law of a *sahabi*) is one of the principles of the *Hanbali madhhab*.

The other group state that it is necessary to follow the *Qur'an* and the *sunnah*. *Ijtihad* is subject to error as the human factor enters and there is no difference herein between a *sahabi* and other *mujtahidun* (independent legists) of later eras.[1]

6.10 *AL ISTISHAB*:

Al istishab is the noun of *istashaba* which means "to have something or someone or ask someone to accompany you."[2]

In the *shari`ah* it means: "the acceptance of a situation which presently exists until there is proof to the contrary or it is the acceptance of the validity of an issue proven to be valid in the past until the contrary is proven."[3]

There are three main principles emanating from *al istishab* and they are:

- the rule in all issues is permissibility. This means that, for example, all foodstuffs are halal until proven haram by *shari`ah* proof. This ruling is taken from the *Qur'an*: "He it is who created for you all that is on the

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1 Al Qada Wa Nizamuhu, op. cit. pp. 370 - 382.
Al Madkhal li Dirasah al Shari`ah al Islamiyyah, op. cit. p. 208 - 209.

2 Qamus al Muhit, op. cit. Vol 1 p. 95.
Al Munjid, op. cit. p. 416.
Adillah al Tashri`, op. cit. p. 275.

3 Adillah al Tashri`, op. cit. pp. 275 - 276.

earth."[1] Also the *āyah*: "...and had made of service unto you whatsoever is in the heavens and whatsoever is on the earth."[2] Application of this rule is also found in the issue that all contracts are valid if no text or precedent of prohibition exists.

- that which is established is not cancelled by a doubt. Thus, someone whose marriage to someone else is certain is taken as married and doubt to the existence of the marriage does not interfere with the standing and thus consequences of that marriage.
- the original status of any person is innocence. This means that anyone accused of any misdemeanour is innocent until proven guilty by due process of the law as according to the *shari`ah*. Also, someone claiming a right from someone else is assumed not to have that right until it is proven as claimed.

Al istiṣḥāb is the weakest of all the *ijtihād* proofs because, it only confirms a previous state or condition.

It is not allowed to implement it save after having searched for a proof pertaining to the given situation using the other proofs of *sharī`ah* and only after finding none is resort made to *al istiṣḥāb*.

The *Mālikis*, *Ḥanbalis* and most *Shāfi`is* accept *al istishab* as a *sharī`ah* proof while most *Ḥanafis* reject it.[3]

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1 Al Qur'ān, Sūrah al Baqarah: 29.

2 Al Qur'ān, Sūrah al Jāthiyah: 13.

3 Maṣādir al Tashrī` al Islāmī, op. cit. pp. 151 - 153.
Al Qaḍā Wa Niẓāmuhu, op. cit. pp. 376 - 378.

7. THE INDISPENSABILITY OF *SHARI`AH* TO MUSLIMS:

From the previous pages of this chapter, it is clear that the *shari`ah* is fundamentally and cardinally different from secular laws in that it is religiously based and structured in all departments of law related to human activity.

As Houtsma and others say:

"Islam is a religion and a political phenomenon as its founder was a Prophet and a Statesman."[1]

The belief in *Allah* is central to a Muslim's existence and actions and obedience to Him and His laws is a requirement of Faith as well as an act of necessary required worship.

The *Qur'an* states:

"And I (*Allah*) created the *jinn* and *mankind* only to worship Me."[2]

"Worship" in the Islamic concept is obedience to all the commandments of the *shari`ah* and is not restricted, as with other religions, to ritual worship.[3] The opposite of this obedience is sin.

Thus, all laws of Islam come under the heading of worship and obedience and included herein, amongst others, is the Islamic Personal Law.

Allah warns in the *Qur'an* against disobeying the Law:

"....whoso do not judge by that which *Allah* has revealed, such are the disbelievers."[4]

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1 Houtsma et.al.: The Encyclopedia of Islam, Leyden, E J Brill, 1934, Vol 4 p. 350.

2 Al Qur'an, Surah al Dhariyat: 56.

3 Al Jami` li Ahkam al Qur'an, op. cit. Vol 17 p. 56.

4 Al Qur'an, Surah al Ma'idah: 44.

"....whoso does not judge by that which *Allāh* revealed, such are the wrong-doers."[1]

"....whoso does not judge by that which *Allāh* has revealed, such are the evil-doers."[2]

The command is much more direct in *Sūrah al `Imrān*:

"Obey *Allāh* and the Messenger."[3]

The mechanism of solving disputes is also clearly stated:

"Oh you who believe! Obey *Allāh* and obey the Messenger and those of you (Muslims) in authority: and if you have a dispute concerning any matter, refer it to *Allāh* and the Messenger if you are (in truth) believers in *Allāh* and the Last Day...."[4]

The compulsory reference to *Allāh* is the *Qur'ān* and the reference to the Messenger (S.A.W.S) is his person during his lifetime and his *ḥadīth/sunnah* which he left behind after he (S.A.W.S) died.

The command then goes further:

"But no! By your Lord! They can never have Faith until they make you (Muḥammad) judge in all disputes between them, and find in their souls no resistance against your decisions but accept (them) fully with submission."[5]

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1 Al Qur'ān, Sūrah al Mā'idah: 45.

2 Ibid, op. cit. 47

3 Al Qur'ān, Sūrah Al `Imrān: 32.

4 Al Qur'ān, Sūrah al Nisā': 59.

5 Ibid, op. cit. 65.

Finally, *Allah* says:

"No believing man nor any believing woman should exercise any choice in their affair once *Allah* and His Messenger have decided upon some matter. Anyone who disobeys *Allah* and His Messenger has wandered off into manifest error."[1]

There is thus clearly no choice for a Muslim but to follow his Faith's instructions.

The application and standing of Islam and its law are different in a Muslim and a non-Muslim environment. In the Muslim environment, the above laws must apply compulsorily. Whether the Muslim country's government applies that law or not does not alter the fact of the standing of those laws.

Nowadays, as is common knowledge, there is virtually an international desire and forward movement for the re-implementation of *shari`ah* in many Muslim countries. Although some Muslim countries tampered with the application of *the shari`ah* in their countries, the Islamic Personal Law had largely remained in force in the overwhelming majority of them which shows the strong commitment of Muslims to that part of the *shari`ah*.

It is not surprising at all for the family and its organisation is central to Muslim society.

In the non-Muslim countries where Muslims are minorities, Muslims experience difficulty to great difficulty in legally practising their Islam and its institutionalised practices, amongst them being the Islamic Personal Law.

These States are mostly secularist states and some of them have an anti-Islam history, like the European and European descendant or influenced governments worldwide.

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[1] Al Qur'an, Surah al Ahzab: 36.

Some these States have marginally accepted some minor aspects of the Islamic Personal Law, mostly of a nature that will save their States maintenance payments, or such acts which they can construe to mean a legal act in terms of their secularist laws. There is an emphatic and manifest negative response to the recognition of the Islamic Personal Law for Muslim minorities in such States, a stance which is against fairness and justice.

South Africa falls in this category, although, presently, there is a limited instruction to the South African Law Commission to look into the recognition of the Islamic person law.

The above matter of Muslims' plight with their Islamic Personal Law will be dealt with in detail in chapter six of this thesis to give clarity on this matter.

Chapter 2

MARRIAGE AND ITS LEGAL POSITION IN ISLĀM.

1. DEFINITION:

Marriage is called *zawāj* or *nikāḥ*. In this thesis the word *nikāḥ* will be used.

The word *nikāḥ* (marriage) comes from the Arabic verb *nakaḥa* which means *tazawwaja*. *Tazawwaja* means "to marry". This is also the opinion of al `Ashā.[1]

In the lingual origin, *nikāḥ* means *ḍam* and *jam`* , meaning "to bring together" and "to unite" respectively.[2]

In the *sharī`ah*, various definitions have been proffered.

The *Qur'ān* and *ḥadīth* use the term to mean *tazwīj* i.e "marriage". Most of the linguist accept this view. Al-Jawhari asserts that *nikāḥ* literally means the "marital act" and metaphorical, the *`aqd al nikāḥ* (marriage contract).[3]

Through the above variation the *fuqahā'* have given their definitions.

The *Ḥanafis* agree with al Jawhari's definition while the *Shāfi`is* assert that *nikāḥ* is *`aqd al nikāḥ* which includes the privilege of cohabitation. *Mālikis* state that it means "an *`aqd* (contract) which allows the intimate enjoyment of husband and wife relationship."

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[1] Lisān al `Arab, op. cit. Vol 6 p. 4537.

[2] Al Ḥuṣarī A: Al Nikāḥ, Wa al Qaḍāyā al Muta`allaqah Bihī, Cairo, Maktabah al Kulliyāt al Azhariyyah, 1967, p. 3.

[3] Lisān al `Arab, op. cit. Vol 6 p. 4537.

The *Hanbalis* have virtually the same definition as the *Hanafis*.[1]

Judging from the definitions given of *nikah* (marriage) and reading it in relation to the Qur'anic verses herein and its literal meaning given, Professor al Husari in his book, "*Al-Nikah*", states that *nikah* can be defined as "the union of a man and a woman by the *shari`ah* to live as man and wife according to the law of the *shari`ah*."[2]

The Encyclopedia Britannica defines "marriage" as:

"A legally and socially sanctioned union between one or more husbands and one or more wives....and is regulated by laws, rules, customs, beliefs and attitudes that prescribe the rights and duties of the partners."[3]

This definition is partly true for Muslim *ankihah* (marriages).

2. THE PRE-ISLAMIC ERA SYSTEM OF MARRIAGES:

Before dealing with marriage in Islam, it is necessary to understand the era before the advent of Islam in this field. Arabs used to marry in their own tribe and

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1 Al Juzairi A R: Kitab al Fiqh `ala al Madhahib al Arba`ah, Cairo, Matba`ah al Istiqamah, 3rd ed., Vol 4: 2.
Al Ramli S D: Nihayah al Muhtaj Ila Sharh al Minhaj, Cairo, Matba`ah Mustafa al Halabi, 1967, final ed., Vol 6: 176.
Al Dardir A: Aqrab al Masalik li Madhhab al Imam Malik, Cairo, Matba`ah Mustafa al Halabi, 1954, 2nd ed., p. 69.
Ibn Qudamah,Abu Muhammad: Al Mughni, Riyadh, Maktabah al Riyadh al Hadithah, undated, Vol 6: 445.

2 Al Nikah, op. cit. p. 10.
Sha`ban Z D: Al Zawaj Wa al Talaq Fi al Islam, Cairo, al Maktabah al `Arabiyyah, 1964, p. 9.

3 New Encyclopedia Britannica, Encyclopedia Britannica Inc., London, 15th ed., Vol 7: 871.

sometimes into other tribes, the latter form being usually for political purposes. This was usually done by the tribal chiefs. The pre-Islamic marriage pattern was as follows:

- the man would propose to a girl through her *walī* (guardian) and give the ṣadāq (dowry) or a *hadīyah* (gift).
- some married an unlimited number of wives and divorced freely as they chose. The eldest son even inherited his father's wives on the latter's death without any ceremony or *ṣadāq* (dowry).
- some kept slave girls or apparently hired them out for sexual purposes i.e trading in sex.
- a group of men, usually ten, would all marry one woman and all would cohabit with her. If she bore a child she pointed to any one as the father who then actually becomes the father of that child.
- temporary marriages were enacted for a time. A child born to such a union was attributed to the mother of the child.
- there were prostitutes operating business, but the extent is not actually known.
- marrying off minors when still very minor.[1]
- some would exchange wives or a man would order his wife to cohabit with another man until she became pregnant and would take the child as his when born.[2]

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[1] Al-`Alī S A: Muḥāḍarāt fī Ta'rikh al `Arab, Baghdad, Matba`ah al Irshād, 1967, 4th ed., Vol pp. 141 - 145, & 149.
Ṣaḥīḥ al Bukhārī op. cit. Vol 7 p. 30.

[2] Sābiq S: Fiqh al Sunnah, Beirūt, Dār al Kitāb al `Arabī, 1969, 1st ed., Vol 2 p. 8.

The pre-Islamic social scene was thus obscene. Islam came to destroy that part of the system which was against its value system and regulate what was permissible of it and agreed with the moral stand it took in this sphere of human existence.

3. THE PLACE OF *NIKĀḤ* (MARRIAGE) IN ISLĀM:

As pointed out in the previous chapter, worship is an all-encompassing act in Islam. *Nikāḥ* is one of these acts to which the *Qur'ān* alludes. Here are some:

- Marriage was the way of the Prophets.

  "And verily We have sent Messengers (to mankind) before you (Muḥammad) and We appointed for them wives and offspring...."[1]

- Marriage is exhorted to:

  "And *Allāh* has given you wives of your own kind and has given you, from your wives, children and grandchildren and has made provisions of good things for you...."[2]

- Marriage is of the Signs of *Allāh*:

  "And of His Signs is that He created mates from amongst yourselves that you might find repose in them, and He has put between you affection and mercy. Verily in that are Signs for men of knowledge."[3]

The Prophet (S.A W.S) himself encouraged the youth to marry.

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[1] Al Qur'ān, Sūrah al Ra`d: 38.

[2] Al Qur'ān, Sūrah al Naḥl: 72.

[3] Al Qur'ān, Sūrah Rūm: 21.

The following is a *hadith* usually read in the marriage sermon:

> *Alqamah* narrated that the Prophet (S.A.W.S,) said:
>
> "Oh Youth! Whoever of you is able to marry, let him marry, for it is better for his sight and modesty: and whoso cannot (afford marriage), let him fast for it (fasting) will control the (sexual) desire."[1]

He (S.A.W.S) also denied membership of the Islamic family to those who forsake *nikah* and take another illicit pattern of sexual relationship.

"*Nikah* is of my *sunnah* (way) and whoso deviates from it has departed from my lifestyle."[2]

The intimate life of a man and a woman can only be realised, in Islam, in a *nikah*, thus Islam prohibits strongly any illicit sex.

"Come not near adultery (and fornication), certainly
it is an abomination and an evil way."[3]

Islam, inter alia, encompasses a form of worship, an act of piety, an approach to inter-family alliance and group solidarity, social placement, a means of legitimate procreation, a mechanism of tension reduction and a means of emotional and sexual gratification.[4]

Nikah is the foundation of society in the Islamic concept and the family unit forms the unit with which Islamic society is built.

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[1] Sahih al Bukhari op. cit. Vol 4 p. 3.
Mukhtasar Sahih Muslim op. cit. p. 208.
Al Ghazali A H M: Ihya `Ulum al Din, Cairo, Dar al Hadith, 1992, 1st ed., Vol 2: 36.

[2] Ihya `Ulum al Din, op. cit. Vol 2 p. 35.

[3] Al Qur'an, Surah al Isra: 32.

[4] Doi A: Shari`ah - The Islamic Law, London, Ta Ha Publishers, 1984, p. 117.

Nikaḥ is thus cardinal to Islamic civilisation as such. Being such an important issue, it stands to reason that there has to be laws for its enactment, functioning, consequences and related issues and its dissolution.

Thus the Personal Law Code is extensively dealt with in the *sharī`ah* to care for this very important facet of Muslim existence.[1]

4. *NIKĀḤ* AND ITS LEGAL POSITION IN ISLĀM

The main issues concerning nikah in Islam are:

- *wilāyah* (guardianship).
- *khiṭbah* (betrothal).
- *ṣadāq* (dowry).
- *arkān* of *nikāḥ* (principal requirements of marriage).
- *aḥkām* of *nikāḥ* (laws of marriage).

4.1 *WILĀYAH*:

The word *wilāyah* is the gerund of the Arabic verb *waliya*, which means *nāṣir* i.e. a helper.[2]

1 Al Madkhal al Fiqhī al `Āmm, op. cit. Vol 1 pp. 33 - 41.

2 Lisān al `Arab, op. cit. Vol 6 p. 4920.
Qāmūs al Muḥīṭ, op. cit. Vol 4 p. 404.

Wilayah literally means *nusrah*, and its noun agent is *wali*.[1]

In the *shari`ah*, *wilayah* is "the right in *shari`ah* by which a person has the full authority over another person's affairs."

There are many forms of *wilayat* (pl of *wilayah*). *Wilayah* is divided into two main sections namely:

- *Al-wilayah al-`ammah* (general *wilayah*), and,
- *Al-wilayah al-khassah*. (special *wilayah*).

Al wilayah al `ammah is the *wilayah* of the *Sultan* (ruler of the Muslims and sometimes called the *Hakim*).

The last form of *wilayah* covers *wilayah* on persons and wealth. In *nikah* the *wilayah* of persons is dealt with.[2]

4.2 PURPOSE OF *WILAYAH* IN ISLAM:

The purpose of *wilayah* in *nikah* is due to the social set-up in Islam. Free social intermingling and mixing are prohibited. Thus, women usually do not have first hand practical experience of men and thus the assistance of an advisory opinion and guidance of her nearest *`asib* (agnate) guardian is required for a wrong choice in this matter can have serious consequences.

Since *nikah* should be of a permanent nature, care should be taken in the selection of a *zawj* (husband) and since men mix with their own kind, they should have a better

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[1] Lisan al `Arab, op. cit. Vol 6 p. 4920.

[2] Fiqh al Sunnah, op. cit. Vol 2 p. 125.
Al Husari A: Al Wilayah Wa al Wasaya Wa al Talaq Cairo, Maktabah al Kulliyat al Azhariyyah, undated, pp. 1 - 3.

knowledge of who is who, or can make enquiries without causing moral problems. They can thus then direct and guide their daughters or sisters or nieces better.

It is rather a cooperative partnership in real practical terms - the *wali* guides and advises and the woman makes up her mind herself. Islam being strongly against the incorporation of evil elements into good families, has given the *wali* the right to object if a choice, which is against the *shari`ah*, is made, and insisted upon.

Being such a serious position and one for which one will be answerable here and on the Last Day, the *shari`ah* imposed shurut (conditions) that the *awliya* (guardians - pl. of *wali*) must fulfil.

4.3 *AHKAM* FOR THE *WALI*:

The following *ahkam* is applicable to every *wali*:

- He must be a free Muslim, *`aqil* (sane) and *baligh* (mature). The vast majority of *fuqaha'* require *`adalah (righteousness)* as a necessary requirement, save the *Hanafis*. Ibn `Abidin says that this means that he is not allowed to marry off the woman to someone lower in rank and status than her nor for less than *sadaq mithl*[1], if he does it will not be enforceable. If he does marry her off within her rank and *sadaq mithl*, it will still be valid and binding with legal consequences.
- The nearest *`asib* (agnate) takes the *wilayah*. The taking over of the *wilayah* by the distant related *wali* when the near related *wali* is present is invalid by *Shafi`is* and *Hanbalis*, but valid by *Hanafis* and *Malikis*. However,

[1] this is a dowry equal to a dowry of woman of the same standing or of women of her family.

the *Shafi`is* and *Ḥanbalis* approve of the distant *wali* taking over the *wilayah* when the near *wali* does not comply with the requirements of *ahliyyah*[1] or has a physical prohibition to executing his *wilayah* like being far away or being imprisoned or being missing. (Being far-away nowadays is not an issue as the *qaḍi* (judge) can write to him to obtain instructions, if the *wali* has a domicile.)

- When the *wali* unlawfully obstructs the woman under his *wilayah* from *nikaḥ* (marriage), she has the option to petition the *qaḍi* herein. If she succeeds in her application, the *Sulṭan* or *qaḍi* takes over the *wilayah*. The *Ḥanafis* differ in that and rule that the next in line of *wilayah* of the *`asabat* (agnates) assumes the *wilayah* and not the *Sulṭan* or *qaḍi*. *Malikis* differ further on this issue by ruling that if the lawful *wali* of a woman has not got the *wilayah mujbirah* (*wilayah* of the legitimate father or paternal grandfather), then she can appoint any Muslim male with *ahliyyah* (having legal capability) to act as her *wali* as Malik considers in such cases, each and every Muslim male with *ahliyyah* as a *wali*. However, this is only for women who are not wealthy, beautiful or of high rank according to some *Malikis*.[2]

Most of the *fuqaha'* rule that no woman may contract her own *nikaḥ* nor should another woman act as her *waliyyah* (feminine for *wali*) or *wakilah* (feminine agent).

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[1] having legal capability.

[2] Fiqh Madhahib Arba`ah Vol op. cit. Vol 4 pp. 26 - 28
Ibn `Abidin: Radd Durr al Mukhtar `Ala al Durr al Mukhtar, (Ottoman era work), undated Vol 2: 484.
Al Ḥuṣari A: Al Wilayah Wa al Waṣaya Wa al Ṭalaq p. 13, 16, 20.
Al Qairawani A A: The Risalah, translated by Joseph Kenny, Minna, Nigeria, Islamic Education Trust, 1st ed., p. 116.

These *fuqaha'* took their ruling from their understanding of Qur'anic *ayat* (verses) on *nikah* in which the masculine form of the Arabic verb *nakaha* is used.

"And give not your daughters in marriage to idolaters until they (become) believers...."[1]

"And marry off such of you as are solitary..."[2]

In both cases the verb *ankihu* is used which is in the plural masculine form. An Arabic verb denotes the *fa`il* (noun agent) and thus the address is to the male *awliya*.

The above view on *wilayah* is that of the *Malikis*, *Shafi`is* and *Hanbalis* as well as that of the *Zahiriyyah*.

There are also a *hadith* texts on *wilayah* as set out above.

The sister of Ma`qil bin Yasar wanted to remarry her erstwhile *zawj* who divorced her (revocably, but had the *`iddah* lapsed). Ma`qil refused. Then the *ayah* was revealed:

"...and do not forbid them from marrying their (former) husbands."[3]

Ma`qil consented to the remarriage and asked the Prophet to perform it. This is narrated by al Hasan.[4]

The reasoning here is that if *wilayah* was not required, then there would be no sense or legality for Ma`qil's refusal.

`A'isha also narrates: "Any woman who married without the consent of her *wali*, her *nikah* is void, her *nikah* is void, her *nikah* is void, and if the marriage was

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1 Al Qur'an, Surah al Baqarah: 221.

2 Al Qur'an, Surah al Nur: 32.

3 Al Qur'an, Surah al Baqarah: 232.

4 Sahih al Bukhari, op. cit. Vol 7 p. 75.
Al Jami` li Ahkam al Qur'an, op. cit. Vol 3 p.158.
Tafsir al Qur'an al `Azim, op. cit. Vol 1 p. 500.

consummated, her *ṣadāq* (dowry) is due to her, and if her *walī* refuses consent, then the *Sulṭān* is the *walī* for the one who has no *walī*". Abū Dāwūd transmitted[1] as well as Aḥmad, al Tirmidhī and ibn Mājah. Al Tirmidhī further transmits that : "there is no valid *nikāḥ* without a *walī*."[2] He further contends that this is accepted by the *ṣaḥābah* and the *`ulamā'*.

Accepting this view of *wilāyah* in *nikāḥ* are, of the *ṣaḥābah*: `Umar and `Alī and of the *tābi`ūn* ibn Musaiyyib and al Hasan al Basrī and of the *fuqahā'* al Thawrī, Mālik, al Shāfi`ī, Aḥmad, ibn Hazm, al Tabarī et al.[3]

A minority of the *fuqahā'* took another view in this matter of *wilāyah* in *nikāḥ*. The main protagonists of this view are Abū Ḥanīfah and Abū Yūsuf of the *Ḥanafis*. They rule that a woman with complete *ahlīyyah* (having legal capability) can enact her own nikāḥ whether she is a *bikr* (a virgin) or a *thaiyyib* (a non virgin woman or a previously married woman). They further rule that it is only mustahab (preferred) for her *walī* to enact the *nikāḥ* on her behalf so that "she be not accused by society as being a woman of loose morals". *Ḥanafis* further rule that the walī has no right of *`itirāḍ* (objection) if she marries herself off on her own on condition that it is to a Muslim man of her equal in standing and status and she receives a *ṣadāq mithl* (*ṣadāq* of a woman of her standing or of women of her family).

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[1] Sunan Abī Dāwūd, op. cit. Vol 1 p. 566.

[2] Al Tirmidhī A I: Sunan al Tirmidhī, Al Madīnah, Al Maktabah al Salafīyyah, undated, Vol 2 p. 370.

[3] Fiqh al Sunnah, op. cit. Vol 2 pp. 125 -127.
Ibn Hazm A M: Al Muḥallā, Cairo, Dār Al Turāth, undated, Vol 9 pp. 451 - 455.
Al Qurṭubī M: Bidāyah al Mujtahid Wa Nihāyah Al Muqtaṣid, Cairo, Maktabah al Kullīyāt al Azharīyyah, 1966, Vol 2 pp. 5 - 8.
Nihāyah al Muḥtāj, op. cit. Vol 6 p. 224.
Al Mughnī, op. cit. Vol 6 p. 449.

If, however, the *wali* of the woman is the *Sultan* (Head of State) or the *qadi* or a *qarib* (relative) other than the legitimate father or legitimate paternal grandfather of the woman, they have none of the above powers of objection in *wilayah* according to the *Hanafi madhhab*. This is so as none of them can suffer from the `*ar* (disgrace) in this matter.

Hanafis advance the following proofs for their ruling:

- from the *Qur'an*: "And if he has divorced her (for a third time), then she is not lawful unto him thereafter, until she has wedded another husband."[1]

The proof lies in the verb *tankiha* meaning "she wedded" , and the actual doer in the verb is the third singular feminine.

- "And when you have divorced women and they reach their term (of `*iddah*), place not difficulties in the way of their marrying their husbands if it is agreed between them in kindness."[2]

Here again the verb is *yankihna*, which is the third person feminine plural form of the verb *nakaha*.

Hanafis thus assert that these two Quranic *ayat* have attributed the enacting of *nikah* at the hands of the women themselves as the language usage indicates. Thus, according to them, a Muslim woman can marry herself off and be *waliyyah* for another woman.

Hanafis also advance *ma`qul* (logic) proofs too in proving their argument:

- a woman with full *ahliyyah* (having legal capability) is free to enact any lawful contract in Islam unassisted and this must also apply to her *nikah*.

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1 Al Qur'an, Surah al Baqarah: 230.

2 Al Qur'an, Surah al Baqarah: 232.

- there can only be interference by the *wali* when she may have made a bad decision and "defiles" the honour of her *wali* and his family. This right of interference has nothing to do with the enactment of the `*aqd al nikah* (marriage contract) enacted by the woman herself. This is specifically so when her legitimate father is her *wali*.
- all *ahadith* referring to *wilayah* in *nikah* are thus construed to mean *wilayah* on women who do not have full required *ahliyyah*.[1]

Irrespective of the difference of opinion on *wilayah* in *nikah* by the *fuqaha'*, the Prophet's (S.A.W.S) instructions in this regard are clear and in both the cases of never married *abkar* (virgins), and previously married *ima'* (non virgins), have themselves to consent to the *nikah*. The following point to this:

- Al Bukhari and Muslim transmit that Hansa bint Juth`am, a *thaiyyib*, was married off to a man she detested. She came to the Prophet (S.A.W.S) to complain and he annulled the *nikah*.
- its established in the *Sunan* (Prophetic practice), by narration of ibn `Abbas that a maiden came to the Prophet (S.A.W.S) complaining that her father married her off to a man and she was not consulted therein. The Prophet (S.A.W.S) gave her the option of choice to either continue the *nikah* or to have it annulled.[2]

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[1] Fiqh al Sunnah, op[. cit. Vol 2 pp. 128 -129.
Al Kasani A D: Kitab Bada'i`u al Sana'i `i Fi Tartib al Shara'i`i, Beirut, Dar al Kutub al `Ilmiyyah, 1986, 2nd ed., Vol 2: 241 - 243.
Al Mughni op. cit. Vol 6 p. 449.

[2] Ibn Qaiyyim Al Jawziyyah: Zad al Ma`ad Fi Hadyi Khair al `Ibad, Makkah, al Matba`ah al Misriyyah, undated, Vol 4: 2
Ibn al Athir Maj al Din: Jami` al Usul Fi Ahadith al Rasul, edited by `Abd al Qadir al Arna`awt, Maktab Dar al Bayan, 1972, Vol 11: 464.

Hadith texts are quoted by some authorities pointing to the necessity of receiving the consent of women during the process of their *nikah* being enacted.

- ibn `Abbas narrates that the Prophet (S.A.W.S) said: "The *thaiyyib* is not married off without her explicit consent and the never married *bikr*'s permission is required and her consent is her silence. Text transmitted by the Jama`ah.
- ibn `Abbas also narrates: "the *thaiyyib* is not married off without her explicit consent and the never married *bikr* is consulted by her father." Text transmitted by Ahmad, Muslim, Abu Dawud and al Nasa'i.
- `Abd Allah bin Buraidah narrates from his father: "A maiden came to the Messenger of *Allah* (S.A.W.S) and said: "my father married me off to my paternal cousin to vent his meanness on me." The Messenger of *Allah* then placed the matter in her hand (i.e. to choose to remain married or to have it annulled). The woman replied: "I consent (now) to what my father did, but I wish to teach the women that their fathers cannot do this unto them."[1]

The above rules apply to the women with full *ahliyyah* (i. e. having legal capability).

4.4 THE *WILAYAH* OF THE *SAGHA'IR (MINORS)*:

A *saghir* (male minor who is under seven years of age) or *saghirah* (female minor who is under nine years of age) are those who are sane minors but have not yet

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[1] Fiqh al Sunnah, op. cit. Vol 2 p. 119 - 120.
Zad al Ma`ad op. cit. Vol 4 p. 2.
Sunan Abi Dawud op. cit. Vol 1:p. 524 - 526.
Mukhtasar Sahih Muslim op. cit. p. 208 - 209.

attained the age of *taklif* (pubescence). Also those who have reached puberty but are not sane (i.e mad, retarded, simple and the like).

The laws of *wilayah* in *nikah* for them are as follows:

- those who are insane (all categories of insanity), whether they reached puberty or not, are married off by their *wali* if it is in their interest.
- the sane *saghir* may be married off by the same wali as above and on becoming *mukallaf* may repudiate or accept the *nikah*. The sane *saghirah* does not have this right. The *saghirah* who is a *thayyib* takes the rules of the pubescent female. Al Shafi`i thus rule that the *saghirah* should preferably marry when pubescent when her consent will then be necessary then for her *nikah*.

It is conditional that the *saghirah* is only married off if it is in her interest and of someone of her rank and societal standing.

If these rules are not met, the *nikah* will be invalid.[1]

From the aforementioned, it is clear that the proper understanding of *wilayah* is that the Qur'anic *ayat* and *ahadith* pertaining to *wilayah* should be read together. The atmosphere that should exist in a Muslim *nikah* is mentioned in the *Qur'an*:

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[1] Al Juzairi A R: Kitab al Fiqh `Ala al Madhahib Al Arba`ah, Cairo, Al Maktabah al Tijariyyah al-Kubra, 1969, 3rd ed., Vol 4: 26 - 36.
Al Marghinani, Abu al Hasan: Al Hidayah - Sharh Bidayah Al Mubtadi', Cairo, Matba`ah Mustafa al Halabi, final ed., Vol 1: 198.
Al Maliki, Khalil bin Ishaq: Mukhtasar Khalil fi Fiqh al Imam Malik, Cairo, Matba`ah Mustafa al Halabi, 1922, p. 99 - 100.
Al Khatib, Shams al Din: Al Iqna` fi Hal Alfaz Abi Shuja`ah, Cairo, Matba`ah Mustafa al Halabi, 1940, final ed., Vol 2: 78.
Al Maqdisi, Muwaffaq al Din: Al Muqni`, Cairo, Al Matba`ah al Salafiyyah, undated, p. 208.

"And of His Signs is this: He created for you partners from amongst yourselves that you might find rest in them, and He ordained between you love and mercy..."[1]

This necessitates an affinity to one another and thus the marrying off of a sane mature woman without her consent would not be in order. In fact, the Prophet (S.A.W.S) is the interpreter of the *Qur'an* and the *aḥādith* quoted clearly state that both the *bikr* and *thaiyyib* have to consent to their *nikah*.

Nikaḥ is meant to be permanent in Islam in order to, amongst other things, create a stable atmosphere for the offspring. On this there is consensus.

It is thus impossible to achieve this if women have no say in the *nikaḥ* and its contractual terms.[2]

4.5 PERSONS MERITING *WILĀYAH* OF *NIKĀḤ*:

There is *ikhtilāf* (difference of opinion) amongst the *fuqahā'* herein. The *Ḥanafis* list them as the *`asabāt* (agnates) - (males directly linked to your legitimate father without the entering of a female in the lineage like you paternal grandfather, your brother etc.) followed by the *Dhawū al Arḥām* (non *`asabāt* male relatives), followed by the *Sulṭān* and finally the *qāḍī*. There is a difference of opinion amongst the *fuqahā'* on the categories of these persons as well as the order they follow.

The line of *wilāyah* is as follows:

- the woman's son, even if illegitimate. If not found then his son, how lowsoever. There is dispute herein by the *fuqahā'*.

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[1] Al Qur'ān, Sūrah al Rūm: 21.

[2] Zād al Ma`ād, op. cit. Vol 4 p. 2.

- then the woman's legitimate father. If not found, then his legitimate father, how highsoever.
- then her legitimate *shaqīq* (full) brother (i.e. from the same father and the same mother). If not found, then his son, how lowsoever.
- then her paternal *akh li abb* (half brother) i.e. consanguine brother. If not found, then his son, how lowsoever.
- then the legitimate `*amm shaqīq* (full paternal uncle). If not found, then his son how lowsoever.
- then the legitimate `*amm li abb* (consanguine paternal uncle). If not found, then his son how lowsoever.
- if none of the above are found, then the grand-uncle in the sequence of nearest of relation to the woman as for all the aforementioned categories. Thereafter the great-grand uncle, as for the grand-uncle.
- hereafter the distant paternal cousin who is the weakest of the `*aṣabāt* relatives. When there are no `*aṣabāt* to be found, then the *Dhawū al Arḥām* takes on the *wilāyah*, the strongest and nearest in *qarābah* (relation to the woman) takes on the *wilāyah*.

Some *fuqahā'*, like the *Mālikis* rule that the woman's brothers take preference over her paternal grandfathers.

Ḥanafis are distinct amongst all the *fuqahā'* in Islām in that they follow a part female pattern in the *arḥām* category who fall in the inheritance pattern according to them. They are (in relation to the woman): her mother, then her sister, then the latter's daughter, then her daughter, then the daughter of the grandson, then the daughter of the granddaughter, then the *shaqīqah* (full sister), then the *ukht li abb* (consanguine

sister), then the *ukt li umm* (uterine sister), thereafter the paternal aunts, then the maternal uncles followed by the maternal aunts, then the daughter of the legitimate paternal uncles, then the daughters of the paternal aunts.

However,the legitimate father of the mother takes precedence over the sisters of the woman.

Hereafter the *mawlā muwalā* (an adopted non related person under your protection) which is now in disuse, follows. Then follows the *Sulṭān* , then the *qāḍī* or the one who deputises for him.

The *Mālikis* and *Ḥanbalis* start with the legitimate father of the woman, followed by the *waṣī* (guardian) appointed by the father before his death. Al Maqdisī, the *Ḥanbali Faqīh,* states that the legitimate father comes first, then his legitimate father how highsoever, then the son and then his son how lowsoever in the usual pattern hereof. Hereafter the pattern is the same in the male line only as for the *`aṣabāt* category of the *Ḥanafis*.

When the *`aṣabāt* line has been exhausted, then the *Sulṭān* follows on condition that he is righteous and just, if not, then the *Mālikis* rule that the general Muslim male public get the *wilāyah* i.e. anyone of them, if the woman has no *walī.*

The *Ḥanbalis* rule that if *wilāyah* cedes to the *Sulṭān* and he does not qualify for it, then his deputy or representative assumes that position on condition that he is righteous and just. If none are found, then the woman may appoint any righteous and just Muslim male to be her *walī*.

The *Shāfi`is* start with the legitimate father of the woman, followed by his legitimate father, how highsoever. Thereafter the pattern is the pattern is the same as

for the *Hanafis* save that *Shafi`is* do not allow *wilayah* to sons of the woman to be married.[1]

5. *WIKALAH* IN *NIKAH*:

Al wikalah (agency i.e someone acting on your behalf per your instructions) is *mashru`* (lawful) in the *shari`ah* in any contractual matter. The general rule is that every person with full *ahliyyah* (having legal capability) can appoint a *wakil* to act for him in a given matter. The Prophet (S.A.W.S) himself acted as *wakil* in marrying off women under the *wilayah* of some of his *sahabah*. The requirements of *ahliyyah* also apply to the *wakil*.
The majority of the *fuqaha'* rule that only men can be appointed *wakil* while the *Hanafis* insist that both men and women may accede to the position of *wakil*.

6. *ARKAN* OF *NIKAH*:

The *fuqaha'* differ on what constitutes the *arkan* of *nikah*. However, all agree that the *ijab (offer to marry)* and *qabul (acceptance of it)* are part and parcel of the *arkan*

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[1] Fiqh Madhahib Arba`ah, op. cit. Vol 2 pp. 26 - 28.
Bidayah Al Mujtahid, op. cit. Vol 2 p. 13.
Kifayah Al Akhyar, op. cit. Vol 2 p. 51.
Bada'i, op. cit Vol 2 p. 250.
Al Maqdisi M D: Al Muqni` - Fi Fiqh Imam al Sunnah, Ahmad ibn Hanbal, Cairo, Maktabah al Salafiyyah, undated, p. 208.

(principles) of *nikah*. For some the issue is a *rukn* (necessary law or principle) while for others the same issue would be a *shart* (condition). The following are the views of the *fuqaha'* herein:

The *Hanafis*:

They stipulate only one *rukn*, namely, the *ijab* and *qabul*.[1]

The *Malikis*:

The have five *arkan (pl or rukn)* as follows:

- The *wali*.
- The *sadaq* (dowry), which need not be mentioned at the time of contracting the `*aqd al nikah* (marriage contract), but which should be present then.
- The *zawj*.
- The *zawjah* who should be free from any *nikah* bond or restriction to *nikah*.
- The *sighah* (the *nikah* formula).[2]

The *Shafi`is*:

They lay down five *arkan*. The *zawj, zawjah, wali, shahidan* (two Muslim male witnesses) and the *sighah*.[3]

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[1] Al Marghinani A H: Al Hidayah - Sharh Bidayah al Mubtadi', Cairo, Matba`ah Mustafa al Halabi, Vol 1 p. 189.
Bada'i op. cit. Vol 2 p. 229.

[2] Fiqh Madhahib Arba`ah, op. cit. Vol 4 p. 12.
Aqrab al Masalik op. cit. p. 69.

[3] Fiqh Madhahib Arba`ah, op. cit. Vol 4 p. 12.
Al Iqna`, op. cit. Vol 2 p.71.

The *Hanbalis*:

Like the *Hanafis* they stipulate only one *rukn* and that is the *sighah* of *ijab* and *qabul*. Only the words of *tajwiz* (to marry off) and its derivatives are permissible for the *sighah*. The *sighah* must be said in Arabic for those who can manage it.[1]

Shurut (Conditions) of *Nikah*:

Most of the *shurut* (pl of *shart* - conditions)) are qualifying factors to the *arkan* mentioned above. The *fuqaha'* have differing views on the details of these *shurut* but are in agreement on the basic conditions which are using specific Arabic words like *tazwij* or *inkah* (marrying off). Some in the *sighah al nikah* (marriage formula), rules for the enactment of *nikah* with the *sighah*, *ahliyyah* (having legal capability) for the *wali* and the *shuhud*. Both the marrying partners must not be in any state of the states which could prohibit *nikah* between them, like the woman being a *mu`taddah* (in a state of waiting period due to divorce or death of her spouse) or anyone of them being of prohibited degrees in *nasab (lineage)*, *qarabah* or *rada`ah* (fostering through suckling).[2]

Imam ibn Taimiyyah (died 728) has a very novel ruling in the contracting and enacting of *nikah*. He says:

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1 Al Muqni`, op. cit. p. 207.

2 Bida`i op. cit. Vol 2: pp. 230 - 233, 241, 245, 252 - 254.
Fiqh Madhahib Arba`ah op. cit. pp. 13 - 18, 21 - 23.
Bidayah al Mujtahid op. cit. Vol 2 pp. 12 - 13, 17.
Al Ghazzi ibn Qasim: Hashiyah al Ghazzi `ala Matn Abi Shuja`ah, Cairo, Matba`ah al Sharikah, undated Vol 2 pp. 104 - 111.
Al Muqni` op. cit. pp. 207 - 210.

"*Nikaḥ* (in Islam) is contracted and enacted by what the people accept to be a *nikaḥ*: be it in what language, or with what expression or with what act and likewise it is with any contract or *shart* between people."[1]

By this definition Ibn Taimiyyah excised all the technicalities of the sectarian approach and technical restrictions imposed by other *fuqahā'*.

His *fatwā*, is, of course, interpreted subject to the requirements of the *sharī`ah* texts, but he nonetheless removed cumbersome and obstructive technicalities in the way of the enactment of *nikāḥ* and brought the issue of *`urf* in in a practical and logical manner.

There is also some difference of opinion amongst some of the *fuqahā'* on the legal requirement and standing of *shahādah* (witnessing) in *nikāḥ*.

Al Qurṭubī mentions that Abū Thawr and a group of the *fuqahā'* rule that *shahādah* is nor a *shart* (condition) of *nikāḥ* - not a *shart* of *ṣiḥah* (correctness), nor *shart* for completing the enactment of *nikāḥ*.

Their proof is the *nikāḥ* of Hasan bin `Alī, grandson of the Prophet (S.A.W.S), who married without *shuhūd* and then made the *nikāḥ* public. Al Qurtubī also quotes a *ḥadīth*, transmitted by Abū Dāwūd in which the Prophet gave a similar instruction (in announcing a *nikāḥ* already contracted).[2]

The second issue is in reference to the *ījāb* and *qabūl*. This is to be seen in the philosophy of the Arabic language and understanding that Arabic in the language of the *sharī`ah*.

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[1] Ibn Taimiyyah T D: Majmū`ah Fatāwā ibn Taimīyyah, Beirūt, Dār al Kutub al `Ilmīyyah, 1980, Vol 4, Section 2: 119.

[2] Bidāyah al Mujtahid op. cit. p. 18.

Many of the technicalities in this sphere can be obviated nowadays by administrative rules, without departing from the basic fundamentals of the *sharī`ah*.

The third issue is the issue of *shahādah* in Islām which is regulated by the *Qur'ān*, the constitution of Muslims.

That constitution had denied the non-Muslims authority over Muslims in their Law matters.

"... And Allāh never allowed the disbelievers a way over the (affairs of) the Muslims.."[1]

This is the nearest meaning to the *āyah* according to the classical and leading Muslim exegetists.[2]

In addition to this, all lawful acts in Islām are acts of worship as such and are restricted to those that the law applies to.

We have dealt with the *arkān* and the normal *shurūt* (conditions) of *nikāḥ*.

There are other forms of *shurūt* which are to be dealt with now. These *shurūt* are:

- *shurūt mashrū`ah* (lawful *shurūt*) and *shurūt ghair mashrū`ah* (unlawful *shurūt*).
- *shurūt nafādh al `aqd* (*shurūt* which cause the contract to be enacted).
- *shurūt luzūm al `aqd* (*shurūt* which makes the contract necessary to be executed).

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[1] Al Qur'ān, Sūrah al Nisā': 141.

[2] Al Jami` li Aḥkām al Qur'ān, op. cit. Vol 5 pp. 219 - 220.

7. *SHURUT MASHRU`AH* AND *SHURUT GHAIR MASHRU`AH*:

Shurut under this heading are of three kinds namely,

- *shurut al sahihah* (valid shurut).
- *shurut al fasidah* (improper shurut).
- *shurut al batilah* (void shurut).

The *fuqaha'* differ on the validity of certain *shurut*.

All agree that the *shurut al sahihah* (valid conditions) are the normal *shurut* of an *`aqd al nikah* (marriage contract) or endorsed by *`urf sahih* (valid custom) like living amicably together in fairness, justice and loyalty, adequate maintenance for the *zawjah* and the like.

All *shurut* not in conformity with these rules are *shurut batilah* (prohibited conditions) and make the *`aqd batil* (void) while some might be *fasid*, making the `aqd (contract) invalid.

Hanafis, Malikis, Shafi`is and *Zahiris* subscribe to this.[1]

Hanbalis allow *shurut* benefitting the *zawjah* as valid and binding like agreeing to a monogamous *nikah* with her or not removing her form her place of residence or necessitating her on travelling with him if his employment necessitates such or increasing her *sadaq* (dowry), stating that it is in the interest of *`aqd al nikah*. They do not differ much in the *shurut batilah* and *fasidah* from the others.[2]

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[1] Al Nikah op. cit. pp. 124 - 125.
Khatib S S: Mughni al Muhtaj ila Ma`rifah al Faz al Minhaj, Cairo, undated, Vol 2: pp. 226 - 227.
Al Muhalla op. cit. Vol 9: 491.

[2] Al Mughni, op. cit. Vol 6 pp. 549 - 552.

There is a difference of opinion as to whether a *zawjah* can prescribe in her *`aqd al nikāḥ* (marriage contract) that her husband divorce his other wife before he marries her.

Ibn Khaṭṭāb of the *Ḥanbalis* says it is valid as it is beneficial to the *zawjah* thus prescribing it prevents harm to her in her pending marriage and resembles the *shart* (condition) of not marrying another woman whilst married to her. This is the minority view in the *Ḥanbali madhhab*.

The majority of the *Ḥanbalī fuqaha*' rule that it is an invalid *shart* as it is against the Prophet's (S.A.W.S) ruling as stated by al Bukhārī as narrated by Abū Hurairah:

"A woman must not set the *shart* of the divorce of her sister -

(wife of her pending husband)."

It is also an abrogation of the rights of the husband and his other wife which are not tolerated in the *sharī`ah*.[1]

Those *fuqahā*' who oppose the validity of the *shurūt* (conditions) benefitting the *zawjah* of the *madhāhib* mentioned as well as other senior (*kibār*) *fuqahā*' like the *a'immah* (pl of *imām*) Qatādah, al Zuhrī, al Laith and others state:

- That Muslims are under obligation to fulfil *shurūt* they bind themselves to save such *shurūt* as are *ḥarām* or prohibit the *ḥalāl*. This group further states that the *shart* a man makes not to marry another woman whilst still married to her or not taking her out of her domicile clash with the lawful status of polygamy and the rule that a wife must live with her husband, which is the basic essence of married life.

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[1] Al Mughnī op. cit. Vol 6 pp. 549 - 550.

- They further assert that a *shart* not found in the "*Kitab* of *Allah*" is *batil* (void) even if it is a hundred *shurut*. This is according to the *hadith* of the Prophet (S.A.W.S). The abovementioned *shurut* (conditions) are not found in the *shari`ah* and are thus *batil* (void) according to them.
- They also assert that such *shurut* are not beneficial to the *nikah* nor the requirements of the *`aqd al nikah* (marriage contract) and thus *batil*.[1]

Those who sanction these *shurut* beneficial to the *zawjah* are, in addition to the *Hanbalis*: ibn `Umar, Ibn Abu Waqqas and `Amr ibn al `As of the sahabah, Umar ibn `Abd al `Aziz, Jabir bin Zaid, Tawus and of the *fuqaha'* of the *Amsar*, Imam al Awza`i and Ishaq.

They advance the following proofs:

- The *Qur'an* commands: "Oh you who believe! Carry out your undertakings."[2]

Imam Hasan al Basri states that this *ayah* specifically orders fulfilment of all obligations in Islam and this thus includes *`aqd al nikah*.[3]

They further quote the *ahadith* in support of their argument:

- "Muslims are to fulfil the *shurut* they set for themselves save such *shurut* that legalises *haram* or prohibits *halal*." They interpret this *hadith* to mean that all *shurut* set have to be fulfilled and that the *shurut* beneficial to the *zawjah* does not make *haram halal* or vice verse.

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1 Al Nikah op. cit. pp. 132 - 135.

2 Al Qur'an, Surah al Ma'idah: 1.

3 Al Jami` li Ahkam al Qur'an, op. cit. Vol 6 p. 32.
Tafsir al Qur'an al `Azim, op. cit. Vol 2 p. 471.

- They also quote the *hadith* narrated by `Uqbah bin `Amir as transmitted by al Bukhari and others that the Prophet (S.A.W.S) said: "the *shurut* which warrant the most to be fulfilled are those (*shurut*) set in *nikah*."[1] This *hadith* obligates a Muslim to specifically fulfil the *shurut* (conditions) set in the `*aqd al nikah* (marriage contract).
- They also quote the ruling of the Khalifah `Umar ibn al Khattab, as narrated by al Athram, that a man obligated himself in his `*aqd al nikah* not to remove his *zawjah* from her domicile. Later he wanted to do this and he brought the matter to `Umar who ruled that he is under obligation to fulfil that *shart* (condition).
- Finally they contend that the *shurut* are benefitting the *zawjah* and do not nullify the `*aqd al nikah* and as such are binding.[2]

From the arguments advanced, it appears that:

- The wording *Kitab Allah* could mean the "Book of *Allah*" which will be the *Qur'an* or it can mean the "Laws of *Allah*" (literally, "that which *Allah* wrote" i.e. commanded with, as *kataba* in its passive form *kutiba* means "obligated on you". *Kataba* `*ala* has the same meaning as *kutiba*).[3] Those who oppose the *shurut* beneficial to the *zawjah* accept the first meaning while the other group resort to the second meaning.

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[1] Sahih Al Bukhari op. cit. Vol 7 p. 26.
Sunan Abi Dawud Vol 1 p. 398.
Al Suyuti Jalal al Din: Sunan al Nasa'i, Beirut, Dar al Fikr, 1930, 1st ed., Vol 5 p. 93.

[2] Zad al Ma`ad, op. cit. Vol 4 pp. 4 - 5.
Fiqh al Sunnah, op. cit. Vol 2 pp. 51 - 53.
Al Mughni, op. cit. Vol 6 pp. 548 - 549.

[3] Al Munjid op. cit. p. 671.

- The *hadith* texts legalising all *shurut* save those which legalises *haram* and vice versa, are quoted by the opposers as nullifying the said *shurut*. Those who sanction those *shurut* (conditions) state that the *zawjah* will only have the right of *faskh* (annulment) of her `*aqd al nikah* (marriage contract) if the *zawj* defaults on them or any of them. There is thus no validity in the argument of the opposers of these *shurut*.
- The two other proofs quoted namely from *Surah al Ma'idah* and the *hadith* of the Prophet (S.A.W.S) obligating the *shurut* set in *nikah* and the ruling of `Umar herein as well as sanction of the most senior of the *fuqaha'* from the *sahabah* down to the *fuqaha'* of the *Amsar*, carry the argument for those sanctioning these *shurut*.

Many Muslim countries have taken the view of the *Hanbalis* in this matter in their Family and Personal Law Codes.

8. THE KINDS OF *ANKIHAH*:

There are three kinds of *ankihah* (pl of *nikah*) all linked to the time of enactment of `*aqd al nikah* (marriage contract). They are:

- `*aqd al munjiz* which is a contract enacted immediately in one session without any time restriction.
- `*aqd al mudaf* which is a contract linked to a futuristic act or time factor and is thus enacted only when that act occurs.
- `*aqd al mu`allaq* which is chained to a *shart* (condition) for its enactment.

The latter kind of `*aqd* (contract) is invalid by the majority of *fuqahā'* amongst them being the *Mālikis, Shāfi`īs* and *Ḥanbalis*.[1]

9. THE STATE OF THE `*AQD* AS TO ITS EXECUTION:

In this sense, an `*aqd al nikāḥ* is either:

- *nāfidh*, (executionable) or
- *lāzim*, (binding) or
- *ghair lāzim* (non-binding).

9.1 `*AQD AL NIKĀḤ AL NĀFIDH*:

An `*aqd* is *nāfidh* if *sharṭān* (two conditions) are met:

- That both parties contracting the *nikāḥ* have full *ahliyyah* (having legal capability). Thus if one of the contracting parties has not got full *ahlīyyah,* such as not being *mukallaf* yet, then the `*aqd* (contract) cannot be enacted save with the consent of the *walī*.
- That both parties enact the `*aqd* directly. Thus if a *wakīl* is involved, the `*aqd* is *mawqūf (dependent)* on the approval of the *muwakkil* (principal).

[1] Al Nikāḥ, op. cit. pp. 120 - 123.

9.2 AL-`AQD AL-LAZIM:

An `*aqd al nikah* is *lazim* (binding) when all the *arkan* (principles) and lawful *shurut* (conditions) and the *shurut nafadh* (conditions of execution) have been met. When this has been done, then none of the contracting parties can cancel the `*aqd* nor annul it and this `*aqd* only ends at death or *talaq* (divorce). The actual intention of *nikah* is *dawam* (permanency) due to the *shari`ah*'s aim with permanency being for the adaptation of *zawj* and *zawjah* relationship, procreation of children and their upbringing and related matters. This aim cannot be reached save by the binding nature of `*aqd al nikah* with all its obligations, rights and privileges.[1]

9.3 AL-`AQD GHAIR AL-LAZIM:

There are occasions when the `*aqd* is enacted but is *ghair lazim*. These occasions are related to `*uyub* (defects) of one of the marrying parties i.e *zawj* or *zawjah*. The ending of such a *nikah* is by *faskh* (annulment). This issue will be dealt with in the chapter on *faskh* later on.

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[1] Fiqh al Sunnah op. cit. Vol 2 p. 60.

10. THE *KHITBAH* (ENGAGEMENT):

Khitbah is derived from the Arabic verb *khataba*, and in the *shari`ah* means asking a woman's hand in *nikah*.[1]

Khitbah is thus a prelude to *nikah* and is *mashru`* in the *shari`ah* and is optional. *Khitbah* is a promise to marry and nothing else as far as the *shari`ah* is concerned.

10.1 *KHITBAH* OF THE SINGLE WOMAN:

There are *shartan* (two conditions) which must be complied with in making *khitbah* with her, and they are:

- That she be free from any prohibition by the *shari`ah* in enacting the *khitbah*. This means that she must be unmarried and must not fall within the *maharim* (women you cannot marry).
- She must not be already *makhtubah* (engaged) to another man.

10.2 PROHIBITIONS OF *KHITBAH*:

There is prohibition of *khitbah* for the *mu`taddah (woman in `iddah*), whether in *`iddah* of *wafat (death)* or *talaq*: whether *talaq ba'in* (irrevocable divorce) or *raj`i (revocable divorce)*.

This means you cannot enact a *khitbah* with these women.

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[1] Qamus al Muhit op. cit. Vol 1 p. 65.
Al Munjid, op. cit. p. 186.

The *fuqahā'* differ on whether it will be valid to send a proposal to these women.

The *mu`taddah* of *wafat* may receive an offer of *khiṭbah* due to her *zawj* being deceased and her nikāḥ having permanently and irrevocably ended.

But a *mu`taddah* of *`iddah* of *talāq rajʿī* may not receive such an offer as in this case the *nikāḥ* may resume if reconciliation is effected before the expiry of the *`iddah*. *Nikāḥ* did not end fully yet in this case.

It is also not allowed to make the proposal sent to a *mu`taddah* of *wafāt* public due to her mourning and bereavement and in respect to the feelings of the deceased's heirs and relatives.

The *Qur'ān* ruled herein:

"There is no sin for you if you make a hint of your betrothal or conceal it in your hearts. *Allāh* Knows that you will remember them. But plight not your troth with women except uttering a recognised form of words."[1]

There is consensus that if *`aqd al nikāḥ* (marriage contract) was enacted during the *`iddah* of a woman, then the two parties have to be separated.

Imām Mālik, al Laith and *al Awzāʿī* rule that they may not remarry one another, while the majority of the *fuqahā'* rule that they may remarry if the woman stays out her *`iddah*.

10.3 *KHIṬBAH* (ENGAGEMENT) OF A *MAKHTŪBAH* (FIANCEÉ):

A woman who is already betrothed (makhtubah) to a man may not receive or be proposed to.

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[1] Al Qur'ān, Sūrah al Baqarah: 235.

This is forbidden by the *ḥadīth* text. `Uqbah bin `Āmir narrates as transmitted by Muslim and Ahmad that the Prophet (S.A.W.S) said:

"The Muslim is the brother of the other Muslim: so it is prohibited for him to enter the completed sale contract of his brother or to make *khiṭbah* to his (brother's) *makhṭūbah* (fianceé)."

This prohibition applies to those whose *khiṭbah* is known.

10.4 LAWS OF *KHIṬBAH*:

- *khiṭbah* is not a *nikāḥ* nor a necessary *shart* (condition) for *nikāḥ*.
- Both the *khāṭib* (fiancé) and the *makhṭūbah* (fianceé) are strangers to one another and none of the marital privileges are allowed, including being alone in one another's company.
- It is permissible for the parties to see one another, preferably when the other one is not knowing and then only when both are properly attired as by *sharī`ah* requirement.
- The *khiṭbah* is not a permanently binding *`aqd* and both parties have the right to end it should they so wish before they enact an *`aqd al nikāḥ*. This is because *khiṭbah* is only a promise to marry. Breaking it off without valid reason is considered bad manners.
- If *ṣadāq* (dowry) had been paid or part of it at *khiṭbah* (engagement) and the *khiṭbah* is ended before enactment of the *`aqd al nikāḥ* (marriage contract), then it has to be returned in full to the *khāṭib* (fiancé).

- All gifts given or exchanged take the law of *hibat* (gifts). This means basically that you own a gift and it is not returnable nor should it be demanded back. Ibn `Abbas narrates as transmitted by Ashab al Sunan (Abu Dawud, al Tirmidhi, al Nasa'i and ibn Majah). "It is not permitted for a man who gave something to someone or gave him a gift to demand it back, save the father if he gives a gift to his son he may take it back."[1]

11. *AL NASAB* (LINEAGE) AND *AL MU`ASHARAH AL ZAWJIYYAH*

Since children are the natural consequence of a *nikah*, the *shari`ah* has enacted laws to protect them, their rights, privileges and obligations. Of these important rights of children is the right of *nasab* to their parents.

Nasab literally means "to be related to". It specifically means "to be related (lawfully) to your father."[2]

A child is never illegitimate in relation to his own natural mother as there is no doubt about her parentage to the child. She carries him and gives birth to him. This is the *Sunni* ruling. The *Shi`ah* rules that an illegitimate child has no right to paternity nor to maternity.[3]

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1 Al Mundhiri A M: Al Targhib Wa al Tarhib Fi al Hadith al Sharif, Cairo, Matba`ah al Sa`adah, 1962, 1st ed., Vol 5: 65.

2 Lisan al `Arab, op. cit. Vol 6 p. 4405.
Qamus al Muhit, op. cit. Vol 1 p. 136.

3 Ahmad A: Textbook of Mohammedan Law, Allahabad, Central Law Agency, 1977, 8th ed. p. 107.

He is legitimate or illegitimate pending his father's marital status vis-a-vis his mother at the time of his conception.[1]

Thus *nasab* (lineage), in the *shari`ah*, has to do with the relationship of a father to his children as far as legitimacy is concerned.[2]

It is an serious sin and crime in Islam to deny your child his *nasab* (lineage) when such a child is entitled to it.

The Prophet has seriously warned those who claim parentage wrongfully as well as accusing those who deny their parentage as *kufr* (disbelief). Abu Waqqas (R.A) narrates:

"I heard with my own ears that the Prophet (S.A.W.S) said:

Whosoever claims fatherhood from a man and he knows that that man is not his father, Paradise is forbidden for him."[3]

Al Bukhari and Muslim transmit the following in this regard:

"Whosoever claims fatherhood from other than his (own) father, on him is the curse of *Allah* and all the Angels and all the people. *Allah* does not accept from him any repentance nor any penitary compensation."[4] Another *hadith* is as follows:

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1 `Uthman A: Athar `Aqd al Zawaj Fi al Shari`ah al Islamiyyah, Riyad, Imam Muhammad bin Sa`ud Islamic University, 1981, p. 365.

2 Al Qardawi Y: Al Halal Wa al Haram Fi al Islam, Beirut, al Maktab al Islami, undated, 5th ed., pp. 219 - 220.

3 Mukhtasar Sahih Muslim op. cit. p. 19.
Adwa al Shari`ah, Riyad, Imam Muhammad bin Sa`ud Islamic University, 1400 AH, No 14, Article: " Al Tifl Fi Nazar al Shari`ah al Islamiyyah" by Dr M A Al Salih, p. 34.

4 Al Sabuni M A: Rawa'i`u al Bayan - Tafsir Ayat al Ahkam Min al Qur'an, Damascus & Makkah, Maktabah al Ghazali, 1980, 1st ed. Vol 2 p. 263.

"Do not deny your fathers, for whoso does that, it (would be) an act of *kufr* (disbelief) on his part."[1]

Legitimate parentage of a child to the father is confirmed under the following conditions:

- The father must be a person who can father a child.
- That the *zawj* and zawjah be of such a state that it is possible to have their *nikāḥ* consummated. A child is attributed to his parents by ruling of the Prophet: "*Al walad li al firāsh* - a child is attributed to the married partners." Most of the *fuqahā'* state that *firāsh* in the *ḥadīth* means "the mother" while Abū Ḥanīfah says it means "the father."[2]
- That no less than six months have passed since the *nikah* i.e consummation of it. This is deducted from the Quranic *āyah*: "...and his weaning is two years..."[3] and another *āyah*: "He was carried and weaned for thirty months."[4] This means that he is conceived and born after six months. Thus anyone conceived before a valid and correct *nikāḥ* and born within six months of the of the *nikāḥ* is illegitimate to the natural father.
- That the father does not negate the *nasab* (lineage) of the child. If he does, he must make *mula`ānah* (denial of parentage). In this case he is actually accusing his wife of adultery.

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1 Aḍwā al Sharī`ah op. cit. p. 34.

2 Al San`ānī M: Subul al Salām - Sharḥ Bulūgh al Marām Min Adillah al Aḥkām, Cairo, Matba`ah Muṣṭafā al Ḥalabī, 1960. 4th ed., Vol 3 p. 210.

3 Al Qur'ān, Sūrah Luqmān: 14.

4 Al Qur'ān, Sūrah al Qāf: 15.

- By proof of parentage which will not then depend on the other forms of proofs of *nasab*. This is usually by way of *shahādah* (evidence) of *shuhūd* which passes the test by *sharī`ah* standards.
- Parentage is also attributed when a birth had taken place in a time which is not above the maximum time allowed in the *sharī`ah* for a pregnancy.[1]

The *fuqahā'* have strong difference of opinion on the longest period of pregnancy ranging from six months to four years, all are based on evidence of women as there is no clear *sharī`ah* text on this issue.

The learned *Shaikh* Muṣṭafā al Marāghī states in his book *Buḥūth Fi al Tashrī` al Islāmī*: "that women were confused in their calculations of time of their pregnancies, hence the discrepancies in time in the examples quoted.

Sometimes they may miss their menstruation or it may be absent for a time, sometimes due to breastfeeding or something else and they believe that they are pregnant.

Thus they would not know accurately when they fell pregnant.

Nowadays medicine has so advanced that medical experts can tell the age of the foetus very accurately.... A woman claiming pregnancy of two years' duration will not likely be believed in this day and age and in the event that this claim is made, it can create serious moral problems for one who is an *armalah* (widow) or *mutalla*-qah (divorcee).[2]

Today, the above issue can readily be solved since pregnancy can medically be established during the early stages.

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[1] Aḍwā al Sharī`ah p. 35 - 37.
Āthār Aqd al Zawāj p. 365 - 367.
Aḥmad A: Mohammedan Law p. 113 - 114.

[2] Āthār `Aqd al Zawāj op. cit. pp. 370 - 371.

This can eliminate the issue of the time factor completely.

Due care should, however be taken not to rob a child of his *nasab* (lineage), but at the same time not to allow attributing of *nasab* to a father who is not the father of the child.

12. *AL MU`ĀSHARAH AL ZAWJĪYYAH*

By *al mu`āsharah al zawjīyyah* is meant "sound marriage coexistence." A man may have a *zawjah* or *zawjāt* (wives). In all cases the basic rules of *mu`āsharah* have to be upheld. Thus fairness, justice and noble conduct towards your *zawjah* or *zawjāt* is a compulsory duty. The *Qur'ān* states:

"...and live with them honourably...."[1] The Prophet (S.A.W.S) said, as narrated by Abū Hurairah, and transmitted by al Tirmidhī: "The most complete of you in Faith are those with the best conduct and the chosen amongst you are those best disposed towards their wives."[2]

This necessitates that the *zawj* must not harm his *zawjah* by word or act nor lower her standing or her honour.

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[1] Al Qur'ān, Sūrah al Nisa': 19.

[2] Al Mundhiri A M: Al Targhīb Wa al Tarhīb Min Ḥadith al Sharīf, Cairo, al Maktabah al Tijārīyyah, 1961, 1st ed., Vol 4 p. 117.

Should he continue to do so and refuse to mend his ways and he has no valid *shari`ah* sanctioned reason for his action, then his wife has the right to seek annulment of the *nikah* from the *qadi* who cannot refuse her request to end it.[1]

13. *TA`ADDUT AL ZAWAJ*

By *ta`addud al zawjat* is meant "polygamy", which is the act of having more than one *zawjah*. Polygamy is lawful in the Islamic order, under certain strict conditions. Polygamy is a social institution from times immemorial.

The Jewish and Christian Scriptures testify that polygamy was an acceptable practice. The Talmudic Prophets were polygamous with the exception of Jesus. Many of the Prophets mentioned in the Old Testament and the *Qur'an* were polygamous.

Abraham had Sarah and Hagar, the bondwoman.[2] Samuel's father Elka'nah has two wives,[3] David took Abigail and Ahin'o-am of Jezeel as wives,[4]and later took Bathsheba.[5]

Solomon had seven hundred wives and princesses and three hundred concubines.[6]

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[1] Athar `Aqd al Zawaj op. cit. pp. 262 - 263.
Fiqh al Sunnah op. cit. Vol 2 pp. 185 - 186.
Al Halal Wa al Haram op. cit. p. 196.

[2] The Bible Society of South Africa: The Holy Bible - Revised Standard Edition, Great Britain, W M Collins & Co. Ltd., 1984, Genesis 16: 1 - 3.

[3] Ibid, op. cit. 1 Samuel: 1

[4] Ibid, op. cit. 1 Samuel 25: 42 - 43.

[5] Ibid, op. cit. 2 Samuel 11: 26.

[6] Ibid, op. cit. 1 Kings 11: 3.

There is no restriction on the number of women a Jewish male can marry according to the Bible and the Talmud. The *Takanah* (decree) against polygamy was taken by the Jewish Synod of Worms by Rabbi Gershom Ben Juda in the 11th century C.E. That ruling is in conflict with both the Bible and Talmud. Initially only German Jews were affected by the decree, but later all of Europe. However the Sephardim refused to accept or adhere to that decree.[1]

The legal status of polygamy was recognised by the ancient nations like the Medas, Babylonians, Abyssinians and Persians. The Greeks also practised polygamy and their wives were not only transferable but also marketable.
Tribes in Africa and Australia also practised it and Hindu law allows it. It is still in vogue in many African countries and societies. Polygamy was practised with the Church's blessing as recently as the 17th century.
Islam is thus not the inventor of polygamy as is commonly proclaimed so often. It inherited the problem from pre-Islamic days and the ancient world.[2]
Polygamy and concubinage were also practised by the German tribes in the Early Germanic Period.[3]

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1 South African Law Commission: Jewish Divorces, Working Paper 45, Project 76, Pretoria, November, 1992, pp. 13 & 14.

2 Islamic Legal Philosophy, op. cit. pp. 193 - 194.
Sharī`ah - The Islamic Law, op. cit. p. 144.
Siddiqi M I: The Family Laws of Islam, New Delhi, 1986, p. 181 - 182.

3 Hahlo & Kahn: The South African Legal System and its Background, 1973, Juta & Co. Ltd., Cape Town, 2nd Impression, p. 346.

Polygamy was promulgated by the Mormon Church (The Church of Jesus Christ of Latter Day Saints), in the United States of America in 1852. Joseph Smith, founder of the Mormons adopted it in 1844. Requirements for consent to polygamy were: good moral character and economic support for a plural family. The Anti-Polygamy Act of 1862 made polygamy a crime in the USA punishable with five years imprisonment.[1]

Polygamy was found in the pre-Islamic Arabian era where a man could marry any number of *zawjāt* and divorce at will or keep *zawjāt* on a "stay - not divorced nor married state".

Ghailān had ten *zawjāt* when he accepted Islam.[2] He had to divorce six and have only a maximum of four.

Islam severely limited the unbridled polygamy and the iniquity of treatment of *zawjāt* within a polygamous union.

It limited the *zawjāt* to four as an exception and ruled one *zawjah* as the general rule. The *Qur'ān* states:

"....marry women of your choice, two or three or four, but if you fear that you shall not be able to deal justly (with them), then only one...."[3] This is further amplified by the *āyah*:

"You will not be able to do perfect justice between wives even if it is your ardent desire..."[4]

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[1] New Catholic Encyclopedia, McGraw-Hill Book Co., New York, 1966, Vol 11 pp. 536 - 537.

[2] Rawā'i al Bayān op. cit. Vol 1 p. 428.
Ta'rīkh al `Arab op. cit. p. 144.

[3] Al Qur'ān, Sūrah al Nisā': 3.

[4] Al Qur'ān, Sūrah al Nisā': 129.

Thus, if justice cannot be done to more than one *zawjah* in the way of *nafaqah* (maintenance), *suknā* (lodging), *kiswah* (clothing) and other requirements of *nafaqah* (maintenance), then only one *zawjah* is allowed. Polygamy is allowed when there is a scarcity of men due to wars, specifically. This is in preference to brothels, mistresses and other immoral social evils.

It is also permitted in such cases when ones *zawjah* is barren and the *zawj* desires heirs or she is so ill that his physical needs cannot be accommodated, or the like. Instead of divorcing her, he may keep her and marry another woman.

It is a necessary requirement that there has to be total equality between all the *zawjat* under ones hand in all matters of required *nafaqah* (maintenance). No discrimination or preferential treatment of some is permissible. The only exception is love, for it is humanly impossible to love all the *zawjāt* equally.[1]

14. *AL KAFĀ'AH*

Al kafā'ah literally means "equality".

In *nikāḥ* it means "equality of standing" of the marrying partners.[2] It is a fact that people of the same standing have a better chance of making a success of their union

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[1] Al Shawqānī M: Nail al Awṭār - Sharḥ Muntaqā al Akhbār Min Aḥādīth Sayyid al Akhyār, Cairo, Matba`ah Muṣṭafā al Halabī, undated, final ed., Vol 6 p. 244.
Rawā'i Al Bayān op. cit. Vol 1 p. 428.
Āthār `Aqd al Zawāj, op. cit. p. 264.

[2] Lisān al `Arab, op. cit. Vol 5 p.3892.
Qāmūs al Muḥīt, op. cit. Vol 1 p. 27.

due to less divergent qualities being present. This is the primary reason for *kafa'ah* by the *fuqaha'*, although some went too far in its necessity for *nikah*.

The *fuqaha'* have wide divergent rulings on the issue of *al kafa'ah*, which are as follows:

- Ibn Hazm rules that k*afa'ah* is not recognised in *nikah*. This is what the brotherhood of Islam means. The *Qur'an* specifically points this out: "The believers are nothing else but brothers."[1] It further states: "....marry of the women of your choice..."[2] Further the Prophet (S.A.W.S) married al Miqdad to the daughter of Zubair ibn `Abd al Muttalib and they were not of equal standing. Had this been forbidden, he would not have done so.[3]
- Some *fuqaha'* rule *kafa'ah* as valid in *nikah*, but restrict it to good and sound conduct and soundness from `*uyub* (defects). Thus, a pious Muslim man without any known *nasab* (lineage) may marry a woman of standing and rank. The *Qur'an* points to this:

  "Oh Mankind! We have created you from a singular (pair) of a male and a female and made you into nations and tribes that you may know one another. Verily, the most honourable of you in the Sight of *Allah* is that (believer) who is best in (his) religion."[4] This is the ruling of Malik.

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[1] Al Qur'an, Surah al Hujurat: 10.

[2] Al Qur'an, Surah al Nisa': 3.

[3] Al Muhalla op. cit. Vol 10 p. 24.

[4] Al Qur'an, Surah al Hujurat: 13.

Shawqani states that `Umar ibn Khattab, ibn Mas`ud, ibn Sirin, and `Umar ibn `Abd al `Aziz all conform to this view also.[1]

- Most of the other *fuqaha'* rule *kafa'ah* as a necessary requirement. *Hanafis* require equality in Islam, descent, profession, wealth and religious practice. The *Malikis* require wealth, descent and profession in addition to Islam. Some of the *fuqaha'* rule that if a *mawla* (freed slave) marries an Arab woman, such a *nikah* is annulled. They are, Sufyan al Thawri, ibn Juraij, and others.

There are long discussions on the descent of persons which clash with the basic Qur'anic Laws and mentioned practice of the Prophet (S.A.W.S) in at least some cases. Texts quoted in substantiation of these requirements are weak and faulty and thus not admissible as proof.

Diyanah (religious practice) is a requirement laid down by all the *fuqaha'* while wealth is a requirement for any *nikah*.

Some of these *fuqaha'* maintain that a poorer man is a disgrace to the *zawjah's* family while some mention difficulty in keeping up the *zawjah's* accustomed lifestyle which will strain the married life, something the *shari`ah* does not encourage i.e strained married life.

It appears that these rules were enacted due to customary practice of certain communities. There is no sanction for it in the *Qur'an* or the *sunnah* practice of the Prophet (S.A.W.S).

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[1] Fiqh al Sunnah, op. cit. Vol 2 pp. 143 - 146.
Zad al Ma`ad, op. cit Vol 4 p. 22.

The Prophet's rulings in *kafa'ah* is in agreement with this:

"If someone comes to you requesting *nikah* and you are satisfied with their Islam and conduct, then marry them off, for if you do not, evil and sin will triumph in the land." This is transmitted by al Tirmidhi.[1] This text is also narrated by Abu Hatim al Muzani. Al Bukhari transmits as narrated by Abu Hurairah that the Prophet (S.A.W.S) said: "A woman is married for four reasons: her wealth, her rank, her beauty and her *Din*. Choose the quality of *Din* and you will be successful."[2]

15. CONSEQUENCES OF THE *`AQD AL NIKAH* (MARRIAGE CONTRACT)

We will deal hereunder with the immediate consequences of *`aqd al nikah*, followed by the laws of *sadaq* (dowry) and finally the *nafaqah* (maintenance).

15.1 IMMEDIATE CONSEQUENCES OF AN *`AQD AL NIKAH*:

As soon as *`aqd al nikah* becomes *lazim*, the following consequences immediately come into operation:

- The *tahrim* (prohibition) principle comes into operation for relatives of both sides of the married parties.

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[1] Jami` al Usul op. cit. Vol 11 pp. 465 - 466.

[2] Sahih al Bukhari, op. cit. Vol 7 p. 9.

15.1 IMMEDIATE CONSEQUENCES OF AN `*AQD AL NIKAH*:

As soon as `*aqd al nikah* becomes *lazim*, the following consequences immediately come into operation:

- The *tahrim* (prohibition) principle comes into operation for relatives of both sides of the married parties.
- It becomes *halal* for the *zawj* and *zawjah* to enjoy one another's intimate company including sexual relations.
- The *mirath* (inheritance laws) come into operation at death of each (the *zawj* and *zawjah*.
- *sadaq* (dowry) becomes necessary subject to the terms agreed upon.
- *nafaqah* (maintenance) becomes compulsory for the *zawjah* and all offspring born from the *nikah*.
- *nasab* (lineage) is effected in respect of all the offspring conceived in the *nikah* as well as their right to *mirath* from both their parents.
- The right of *hadanah* (custody of rearing) for rearing minor children is conferred on the *zawjah* in the case of her being divorced by her *zawj* or as a result of his *wafat (death)*.
- `*iddah* will become compulsory on the *zawjah* whether `*iddah* of *talaq* or *wafat*.
- general rights of the spouses become operational - joint rights and special rights.[1]

[1] Athar `Aqd al Zawaj, op. cit. p. 75 - 76.
Fiqh al Sunnah, op. cit. Vol 2 pp. 153 - 154.

These rights are referred to in general in the *Qur'an*:

"And they (women) have rights (over their husbands) similar (to those of their husbands) over them to what is reasonable, but men have a degree (of responsibility) over them."[1]

16. THE *SADAQ (MAHR)*.

16.1 DEFINITION:

The *mahr* or *sadaq* is the dowry the *zawj* must give to the *zawjah* at marriage. The word *sadaq* (dowry) will be used in this thesis.

The *sadaq* or *sadqah* or *sidaq* (pl *asdiqah*) or *saduqah* (pl. *saduqat*), which is sometimes called the *mahr*, means *hibah* or *`atiyyah* which in turn means "a gift" and is the dowry a man gives to his bride on marrying her.[2] It is a free gift which becomes her property.

This is the opposite to other systems of other religions and social customs where the bride has to give her *zawj* a dowry or where the *zawj* has to pay an amount to the *zawjah's* father. *Sadaq* must not be confused with the African custom of bride-price since a woman is not sold to a man in *nikah* in Islam nor with the old European

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1 Al Qur'an, Surah al Baqarah: 228.

2 Lisan al `Arab, op. cit. Vol 4 p. 2420.
Qamus al Muhit, op. cit. Vol 3 p. 261.
Al `Aini B D: `Umdah al Qari - Sharh Sahih al Bukhari, Cairo, Matba`ah Mustafa al Halabi, 1972, 1st ed., Vol 16 p. 330.

custom of dowry where the latter, given to a daughter upon marriage, became the property of her *zawj* as if it was an inducement for him to marry her. Likewise within the Islamic system, the *sadaq* is not the same as the dowry of some Christian and Hindu practice in Kerala and elsewhere in India, where fathers have to pay heavy dowries to get suitable *azwaj* (husbands) for their daughters.[1]

16.2 *MASHRU`IYYAH* (LEGALITY) OF *SADAQ* (DOWRY):

The *mashru`iyyah* (legality) of *sadaq* is from the *Qur'an*:

"And give unto the women (whom you marry), their free gift of their marriage portions..."[2]

This *ayah* shows that *sadaq* is compulsory and upon this there is consensus of all *fuqaha'*. There is also consensus that there is no limit to the highest *sadaq*, but they differ as to what is the lowest value of *sadaq*.[3]

Some define *sadaq* in the *shari`ah* as "that which a man gives from his wealth or giving of *manfa`ah* (a form of benefit, like fruit from fruit trees for a period of time or the like) as a free gift to his bride when he contracts a *nikah* with her." Likewise it is payable when there had been consummation of a *fasid nikah* as well as

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[1] Shari`ah - The Islamic Law, op. cit. p. 158.
Family Laws of Islam, op. cit. p. 81.

[2] Al Qur'an, Surah al Nisa': 4.

[3] Jami` li Ahkam al Qur'an, op. cit. Vol 5 p. 23 - 24.

consummation of *nikah shubhah* (*nikah* in error). These situations will not cause waiving of the *sadaq*.[1]

16.3 PURPOSE OF *SADAQ*:

Sadaq is primarily a social security for the *zawjah* which the *Qur'an* obligates.[2] The *sadaq*, which must be of value, is given to the wife for forgoing her opportunity of financial enrichment of herself and she retains it most of the time at *talaq* (divorce) and definitely at *wafat* (death) of her spouse. There is thus security for her in *sadaq* if such *sadaq* (dowry) is proper and fitting.

The *Qur'an* refers to sadaq as being a *qintar*, which is a great amount[3], while the *sunnah* states that the *sadaq* of the Prophet's wives was *nisf `uqiyah*, which is five hundred silver *dirhams*.[4]

The *Khalifah `Umar* detested expensive *asdaq* citing possible animosity of the *zawj* to it and throwing it back at her, possibly in their arguments.[5]

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1 Athar `Aqd al Zawaj op. cit. p. 122.
Bosworth & Others: The New Encyclopedia of Islam, Leyden, E J Brill, 1986, Vol 6: 79.

2 Islamic Legal Philosophy, op. cit. p. 55.
Shari`ah - The Islamic Law op. cit. p. 158.
Family Laws op. cit. p. 79.

3 Al Qur'an, Surah al Nisa': 20.

4 Mukhtasar Sahih Muslim. op. cit. p. 212.
Nail al Awtar, op. cit. Vol 6 p. 189
Sunan Abi Dawud, op. cit. Vol 1 p. 527.

5 Hayah al Sahabah, op. cit. Vol 3 p. 438.

16.4 *SHURUT* (CONDITIONS) OF *SADAQ*:

- That the *sadaq* be of value, thus something normally of no value is not acceptable, like a grain of barley. Ibn Hazm differs herein from the other *fuqaha'*.
- That the wealth be pure and *halal* as by the definition of the *shari`ah.*
- That the *sadaq* is not *mal maghsub* (stolen wealth).
- That the *sadaq* be known and is to be found.

16.5 APPLICATION OF THE *SHURUT* OF *SADAQ*:

16.5.1 Wealth of Value:

The *fuqaha'* differ as to what is the minimum value of *sadaq*. The *Hanafis* rule at least 10 silver *dirhams*. Each *dirham* being equal to 14 *qirat* (carats). *Malikis* state that at least 3 *dirhams* of pure silver or merchandise equal to that value of pure silver. They state that each *dirham* must equal 55 grains of barley in weight. Ibn Hazm of the *Zahiriyyah* states that there is no minimum, thus a grain of barley will suffice if both parties agree thereto.[1] *Malikis* derived their ruling from the word *tawl* from the *Qur'an*.[2] It is argued that *tawl* does always mean sufficient wealth but can imply "means - both physical and figurative". Malik also quote *hadith* text that `Abd al Rahman bin Awf married with the weight of a date pit in pure gold being the *sadaq*.

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[1] Al Muhalla, op. cit. Vol 9 p. 494.

[2] Al Qur'an, Surah al Nisa': 25.

The Prophet (S.A.W.S.) blessed them in their *nikah*.[1] That was equal to 3 *dirhams*. These parties also quote: "....and lawful unto you are all beyond those mentioned that you seek them with your wealth in honest wedlock and not in debauchery."[2] They state that the text only says that wealth should be given for *sadaq* (dowry) and there is no limits set. Thus, wealth can be two *dirhams* and much more than that.[3]

However, authentic *ahadith* from the Prophet (S.A.W.S.) are reported by Abu Hurairah as transmitted by Ahmad and al Nasa'i that the *sadaq* in the time of the Prophet (S.A.W.S.) was ten *awaqi* which was equivalent to 400 *dirhams*. `Urwah and Abu al `Ajfa report that the *sadaq* of the wives of the Prophet (S.A.W.S.) was 400 dirhams. Ibn Ishaq narrates that *sadaq* was 400 *dinars* which was not much more than 400 *dirhams*. However this was for most of his (S.A.W.S) wives as this rule was not always followed.

Safiyyah, a slave whom the Prophet (S.A.W.S.) married, was set free and her freedom was her *sadaq* (dowry) while this was not the case with another wife of his, Jawahiriyyah whom the Prophet (S.A.W.S.) also married.[4]

It is thus obvious that *sadaq* must be of value and that such wealth has to be agreed on by the marrying parties. The *zawjah*, of course, sets the amount and the terms of delivery of it.

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1 Sahih al Bukhari, op. cit. Vol 7 p. 25.
Athar `Aqd al Zawaj op. cit. p. 129.
Mukhtasar Sahih Muslim. op. cit. p. 212.

2 Al Qur'an, Surah al Nisa': 24.

3 Athar `Aqd al Zawaj op. cit. pp. 126 - 132.
Nail al Awtar, op. cit. Vol 6 pp. 187 - 188.
Bidayah al Mujtahid, op. cit. Vol 2 p. 18 - 21.

4 Nail al Awtar, op. cit. Vol 6 pp. 188 - 191.
Subul al Salam, op. cit. Vol 4 p. 147.

There is a difference on the interpretation of the Prophet (S.A.W.S) marrying off a woman to a *sahabi* "with what he had memorised of the *Qur'an*." Some, notably the *Hanafis*, rule that this is not a *sadaq* and if a *nikah* is so enacted it is proper but *sadaq mithl* will be necessary. Abu `Umar states that there is consensus amongst the *fuqaha*' that there can be no *nikah* without *sadaq*. *Nikah* performed by the Prophet with "what was memorised of the *Qur'an*" , is for according great stature to the *Qur'an* and those who uphold its standing in Islam and not that it was in itself *sadaq*.[1]

With regards to *manfa`ah* (benefit/usufruct) of a physical asset, *Hanafis* allow any form of *manfa`ah* such as that of "usage of a house or vehicle" or "produce from land for a fixed period". However, labour of the *zawj* for the *zawjah* as *sadaq* is not allowed in this category as it is against the requirements of *`aqd al nikah* (marriage contract) because the *manfa`ah* produced by a free man is not wealth.

The other three senior *fuqaha*', *Malik, al Shafi`i* and *Ahmad*, in one ruling attributed to him, rule permissibility of this kind of *sadaq* i.e. labour of a husband to his *zawjah* being her *sadaq*. Malik's permissibility is chained down to *karahah* (detestability). These *fuqaha*' quote as proof the Prophet Shu`aib's (A.S.) agreement with Musa (Moses) for *sadaq*:

"Lo! I would marry you to one of these two daughters of mine on condition that you hire yourself to me for a term of eight pilgrimages."[2]

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1 `Umdah al-Qari, op. cit. Vol 16 pp. 333 - 334.
Subul al Salam, op. cit. Vol 4 p. 115.

2 Al Qur'an, Surah al Qasas: 27.

It would thus appear that a *manfa`ah* can be a *sadaq* (dowry).[1]

16.6 GENERAL LAWS OF *SADAQ*:

- When a *nikah* is properly and correctly enacted, the mentioned and agreed upon *sadaq* is due on terms so set out by the *zawjah* and accepted by the *zawj*. Hereon there is consensus by all the *fuqaha'*.
- It is *makruh* (detestable) to set an expensive *sadaq*.
- It is possible for the *sadaq* to be *mu`ajjal* (payable immediately on contract) or *mu'ajjal* (deferred), which will then, usually, be paid in instalments. This applies if it is the custom of a specific place. Ibn `Abbas reports that the Prophet (S.A.W.S) ordered `Ali to give Fatimah, the Prophet's daughter, something of the *sadaq* before he set up house with her.
- *sadaq* is compulsory when a *nikah* had been consummated. This is due to the *Qur'an* ruling: "...and how can you take it back (*sadaq*) after you have given in unto the other and they have taken a strong pledge from you."[2] *Sadaq* is still compulsory when the *zawj* dies before paying the full *sadaq*. His estate must pay it for it is then a debt.

He took his ruling from what ibn `Awfa narrates: "The *khulafa' rashidun* ruled that "if the door is locked and the curtains drawn, then *sadaq* is due to the *zawjah*." Waqi`

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[1] Athar `Aqd al Zawaj, op. cit. pp. 133 - 136.
Al Muqni` op. cit. p. 218.
Bada'i, op. cit. Vol 2 p. 278.
Bidayah al Mujtahid, op. cit. Vol 2 p. 21.

[2] Al Qur'an, Surah al Nisa': 21.

narrates a similar text from Nafi` ibn Jubair. `Umar ruled likewise as well as ibn Musaiyyib.[1]

16.7 *SADAQ MUFAWWAD* (UNSPECIFIED DOWRY):

This is a *sadaq* which has not been mentioned or specified. There is consensus by the *fuqaha'* that a man marrying a woman without mentioning her *sadaq* is entitled to *sadaq mithl*. She receives no *sadaq* when no *sadaq* had been agreed upon or specified and the *nikah* is annulled or she is divorced before the *nikah* is consummated. However, she has to receive *mut`ah* (a gift) from the *zawj* if she is not the cause of the separation. This is from the *Qur'an*: "It is not a sin for you to divorce wives while you have not touched them nor appointed unto them a portion (*sadaq*). Provide for them, the rich according to his means and the poor according to his means - a fair provision. (This is) a bounden duty for those who do good."[2]

16.8 *SADAQ MITHL*:

The majority of the *fuqaha'* rule that it is necessary to calculate the *sadaq* according to the women of the paternal side of the bride. If the mother or maternal aunts are from the father's family, then their *sadaq* may be taken into consideration

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1 Al Suyuti J D: Muwatta' Malik, Cairo, Matba`ah Mashhad al Husaini, 1353 AH., Vol 2 p. 65.

2 Al Qur'an, Surah al Baqarah: 236.

herein. Factors to be taken into consideration for *ṣadāq mithl* calculation are: sanity, intelligence, fertility, virginity at *nikāḥ* time, wealth, beauty, age and country.[1]

16.9 FORFEITURE OF THE *ṢADĀQ* (DOWRY):

The entire *ṣadāq* is forfeited if:

a) The *nikāḥ* is annulled before consummation or *khulwah ṣaḥīḥah* (being alone with one another and enjoying private company of, one another) if the woman is responsible for it like her *riddah* (apostacy) from Islam, or she annuls it due to an `*aib* (defect) in the *zawj* or when the *zawj* annuls it due to an `*aib* in the *zawjah*.

b) The *zawj* divorces his *zawjah* before consummating the *nikah* or before *khulwah ṣaḥīḥah* in a *nikāḥ* where no mention had been made of the *ṣadāq*. Likewise the *ṣadāq* is forfeited if the *zawjah* absolves the *zawj* from it by her own free choice and will before the consummation of the *nikāḥ*. Or if she grants it to him as a gift freely and without any coercion.[2]

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[1] Āthār `Aqd al Zawāj op. cit. p. 152.
Fiqh al Sunnah, op. cit. Vol 2 p. 162.
Al Mughnī, op. cit. Vol 6 p. 723.
Al Huṣainī T D: Kifāyah al Akhyār Fi Ḥill Ghāyah al Ikhtiṣār, Cairo, Dar Iḥyā al Kutub al `Arabīyyah, undated, Vol 2 p. 63.

[2] Āthār `Aqd al Zawāj, op. cit. p. 153.
Fiqh al Sunnah, op. cit. Vol 2 p. 165.
Bidāyah al Mujtahid, op. cit. Vol 2 pp. 25 - 26.

16.10 *SADAQ* CONTRACTED IN PRIVATE:

The *fuqaha'* differ on the two parties contracting a *nikah* and agreeing to a *sadaq* secretly and thereafter publicly announcing a *sadaq* higher than the secretly agreed *sadaq* (dowry). Abu Yusuf opines that the secretly agreed upon *sadaq* is the valid *sadaq* as it is the actual agreed upon *sadaq* and the intended one. Abu Hanifah, Muhammad al Shaibani, Ahmad (in one of his rulings), al Sha`bi, ibn Abu Laila and Abu `Ubaid all rule that the publicly announced *sadaq* is taken as the real *sadaq*. Their reasoning is that the publicly announced *sadaq* is to be written in *`aqd al nikah* (marriage contract) and the *hukm* (ruling) is given on what is visible as only *Allah* knows the unseen.[1]

16.11 ACCEPTANCE OF THE *SADAQ*:

Sadaq is accepted on behalf of the *saghirah* by her *wali*. If the *wali* is other than the legitimate father or paternal legitimate grandfather, then they are not allowed to use any of it. The *sadaq* of the *bikr* and *thaiyyib* is given to them and is their property although customarily the *wali* accepts it on their behalf.[2]

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1 Fiqh Madhahib Arba`ah, op. cit. Vol 4 pp. 146 - 152.

2 Fiqh al Sunnah, op. cit. Vol 2 pp. 164 - 166.
Fiqh Madhahib Arba`ah, op. cit. Vol 4 pp. 167 - 174.

17. *AL NAFAQAH* (MAINTENANCE):

The word *nafaqah* is derived from *anfaqa* which literally means "losing of your possessions or spending of your wealth."[1]

In the *sharī`ah* it means "adequate provision in food (and drink), residence, clothing and medical care for your *zawjah* even if she is rich."[2]

Nafaqah is compulsory by rulings from the *Qur'ān, sunnah* and the *ijmā`*.

As for the *Qur'ān*:

- "...and the father is responsible for the maintenance and clothing of his wives in fair measure. No one is taxed beyond his means."[3]
- "Lodge them where you dwell, according to your wealth, and do not harass them so as to make their lives difficult. And if they are pregnant, then spend for them till they bring forth their burden...."[4]
- "Let him who has abundance spend of his abundance, and he whose provision is measured, let him spend that which *Allāh* has given him."[5]

As for the *sunnah*, the following *ḥadīth* texts show the necessity of *nafaqah* (maintenance): `Ā'isha narrates that the Prophet (S.A.W.S) allowed Hind bint `Utbah

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[1] Lisan al `Arab, op. cit. Vol 6 p. 4508.
Al Munjid. op. cit. p. 828.

[2] Āthār `Aqd al Zawāj, op. cit. p. 169.

[3] Al Qur'ān, Sūrah al Baqarah: 233.

[4] Al Qur'ān, Sūrah al Ṭalāq: 6.

[5] Al Qur'ān, Sūrah al Ṭalāq: 7.

to take for her and her child's provisions from her husband's wealth (when the latter was miserly in *nafaqah* for them) without his permission.[1]

17.1 *SHURŪT* (CONDITIONS) OF *NAFAQAH*:

A *zawjah* receives *nafaqah* from her *zawj* if the following shurūt are met:

- If the `*aqd al nikāḥ* (marriage contract)had been properly and correctly enacted.
- That she agrees to live with her *zawj* as required.
- That she permits him to consummate the *nikāḥ* and thereafter in a voluntary manner.
- That she does not refuse to transfer or travel with him wherever he goes save if he intends therewith to harm her or if she fears for her person or her wealth or if he agreed not to take her with him on his journeys or remove her from her domicile.
- That both the *zawjān* (married partners) be of such position as to be possible for them to consummate the *nikāḥ*.[2]

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1 Ṣaḥīḥ al Bukhārī, op. cit. Vol 7 p. 85.
Mukhtaṣar Ṣaḥīḥ Muslim, op. cit. p. 234.

2 Fiqh al Sunnah, op. cit. Vol 2 pp. 169 - 171.
Āthār `Aqd al Zawāj, op. cit. pp. 154 - 156.

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17.2 THE AMOUNT OF *NAFAQAH* (MAINTENANCE):

N*afaqah* is compulsory by *tamkin* which means the ability to provide it. There is a difference of opinion amongst *fuqaha'* on its measure. Al Shafi`i, in his new ruling, and ibn Hazm of the *Zahiriyyah* rule a prescribed form of *nafaqah*. They rule so according to the *Qur'an*: "...of the average you feed your own family...."[1] This is the rule in *kaffarah* (a form of penalty). The Hanafis, Malik, the Hanbalis and al Shafi`i in his old ruling, rule *kifayah* i.e. sufficiency. They took their ruling from the *Qur'an*: "...but the father shall bear the cost of the mothers's food and clothing on a reasonable basis..."[2] They also quote the Prophet's (S.A.W.S) instruction "...and you are responsible for their (*zawjat's*) *nafaqah* and clothing in sufficient measure (*bi al ma`ruf*)," as well as his instruction to Hind bint `Utbah in the hadith quoted afore.[3]

17.3 DEGREE OF COMPULSION OF PROVIDING SERVANTS:

There are three views of the *fuqaha'* herein:

- Both Dawud al Zahiri and ibn Hazm rule that she is not entitled to servants as there is no text hereon.[4]

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[1] Al Qur'an, Surah al Ma'idah: 89.

[2] Al Qur'an, Surah al Baqarah: 233.

[3] Athar `Aqd al Zawaj, op. cit. pp. 162 - 165.
`Umdah al Qari, op. cit. Vol 17 p. 125.

[4] Al Muhalla, op. cit. Vol 10 p. 90.

- Some *fuqaha'* like al Shafi`i and Muhammad al Shaibani of the *Hanafis* rule that if she is someone who is served by servants, she must be given a servant as this is then a part of the *nafaqah* (maintenance).[1]
- Others like Abu Hanifah, Malik and Ahmad rule that if the *zawjah* comes from a family where she was waited upon and her *zawj* is rich or of means, he must give her a servant to wait on her. They say this is due to the *ayah*: "....and live with them harmoniously..."[2] Abu Yusuf of the Hanafis, Abu Thawr and a view of Malik say two servants. If the *zawj* is poor, then he is not under obligation to supply a servant as he will only be able to manage the ordinary *nafaqah* and a servant will be an increase over that. This, they say, agrees with the *ayah*: "*Allah* burdens not a soul beyond its scope (means)."[3]

17.4 *SUKNA* (LODGINGS) FOR THE *ZAWJAH*:

Sukna means "lodgings". There is consensus by all the *fuqaha'* that the *zawjah* must compulsorily be housed. This is based on the *ayah*: "Lodge them where you dwell..."[4] This *ayah* is for the *mutallaqat* (pl of *mutallaqah*) in *`iddah*. The argument is that if *sukna* is required during *`iddah* of *talaq*, then it is more so during the

[1] Al Khatib S D: Al Iqna` Fi Hal Alfaz Abi Shuja`ah, Cairo, Matba`ah Mustafa al Halabi, 1940, final ed. Vol 2 p. 146.
Al Nawawi A Z: Minhaj al Talibin Wa `Umdah al Muftin, Cairo, Matba`ah Mustafa al Halabi, undated, Vol 2 p. 119.
Al Hidayah, op. cit. Vol 2 p. 41.

[2] Al Qur'an, Surah al Nisa': 19.

[3] Al Qur'an, Surah al Baqarah: 286.

[4] Al Qur'an, Surah al Talaq: 6

subsistence of the *nikah*. The *sukna* is to be such as to be affordable for the *zawj* and sufficient for privacy.

17.5 REFUSAL OF THE *ZAWJ* OF *NAFAQAH* (MAINTENANCE) FOR THE *ZAWJAH*:

If the *zawj* refuses to give due *nafaqah* to his *zawjah*, she may take from his wealth which suffices for her, if she can do so. This is taken from the Prophet's (S.A.W.S) ruling to Hind bint 'Utbah as mentioned previously. If she cannot, then she should refer her case to the *qadi* who, on investigating the matter, will order the *zawj* to give the required *nafaqah*. If he disobeys him, the *qadi* should send him to prison.[1]

17.6 *NAFAQAH* (MAINTENANCE) OF THE *MUTAWAFFA `ANHA*:

The *mutawaffa `anha* is the *armalah* (widow) of a man. The basic rule in *nafaqah* is that *nikah* obligates *nafaqah* while *wafat* (death) ends it. The *fuqaha'* differ herein some ruling no *nafaqah* for her at like the *Hanafis* while some obligate *nafaqah* only when she is pregnant like *Hanbalis* due to *ayah* 6 of *Surah al Talaq*.[2]

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[1] Athar `Aqd al Zawaj, op. cit. pp. 174 - 176.
Al Muhalla, op. cit. Vol 10 pp. 90 - 91.
Al Khassaf A B A: Kitab al Nafaqat, Bombay, Dar Al Salafiyyah, undated, p. 42.
Al Mughni, op. cit. Vol 7 pp. 570 - 571.
Nihayah al Muhtaj, op. cit. Vol 7 pp. 212 - 213.

[2] Athar `Aqd al Zawaj, op. cit. p. 205.

17.7 *SUKNĀ* (LODGINGS) OF THE *MUTAWAFFĀ `ANHĀ*:

The *fuqahā'* have the following rulings in this case:

- The *Ḥanafis*, al Shāfi`i, in one of his rulings and ibn Ḥazm rule that she has no *suknā* during the `*iddah* of *wafāt* whether she is *ḥamil* (pregnant) or not. These *fuqahā'* thus see that at death of the *zawj*, according to the *sharī`ah*, the *warathah* (heirs) become the owners of his possessions in such measure as the *sharī`ah* prescribes. The *armalah* must take her *nafaqah* (maintenance) from her share of the *mīrāth*.
- Aḥmad rules that if the *armalah* is not pregnant, she has no *suknā*. If she is *ḥāmil*, then Aḥmad has two rulings: one ruling is on the necessity of *suknā* and the other is an opposite ruling. This is based on *āyah* 6 of *Sūrah al Talaq*.
- Mālik and al Shāfi`i, in his other more accepted ruling, ruled that the *armalah* receives *suknā* from the *mīrāth* of her deceased *zawj*, whether she is *ḥāmil* or not. They assert that the ruling on the *nafaqah* and *kiswah* had been cancelled in the *Qur'ān*[1] but that *suknā* remained for the entire period of the `*iddah* after *wafāt*.

The *Mālikī* ruling is closer to the spirit of the *sharī`ah* texts.[2]

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[1] Al Qur'ān, Sūrah al Baqarah: 240.

[2] Āthār `Aqd al Zawāj, op. cit. pp. 208 - 212.

17.8 *NAFAQAH* OF THE *ḤAMIL* (PREGNANT WOMAN):

The *ḥamil* woman and still married to her *zawj*, receives all the required *nafaqah*, *kiswah*, *sukna* and the required medical attention and matters related to it. If she is divorced from her *zawj* and is *ḥamil*, then her former *zawj* is to provide for her all *nafaqah* (maintenance) in its full meaning until she delivers the baby. Thereafter, if she breastfeeds, she can levy a fee for the service and for looking after the baby.She is still to receive *nafaqah* of food and drink and medication, if so required, to enable her to provide a nourishing and beneficial breastfeeding service. The majority of the *fuqaha'* ruled *nafaqah* necessary for the *ḥamil mutallaqah* due to the *ayah*: "Lodge them (divorced women) where you dwell according to your wealth, and treat them not in a bad manner so as to force them to leave: and if they are pregnant. then spend for them till they deliver. Then if they suckle your children, give them their due payment...."[1]

The ruling of the vast majority of the *fuqaha'* is nearer to the *shari`ah* text in this issue.[2]

17.9 CONTRIBUTIONS OF THE *ZAWJAH* TO THE HOUSEHOLD:

The payments the *zawjah* makes to the household when the income of the *zawj* is insufficient, is taken as a debt on the *zawj* owing to the *zawjah* and is due when he has the means to settle the debt or when he divorces her or at his *wafat*. In the latter

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1 Al Qur'an, Surah al Ṭalaq: 6.

2 Athar `Aqd al Zawaj, op. cit. pp. 193 - 204.

two cases, it is due in full immediately. If she explicitly gives it as a gift, then the *zawj* has no liability. If she agrees to go into a partnership with him in the purchase of fixed assets, she is a partner on such terms as they agree upon provided that it is a *ḥalāl* and valid undertaking as per the *sharī`ah*. At *ṭalāq* or at *wafāt* of the *zawjah*, her share is due to her in full - to her directly in the case of *talaq* and to her *tarikah* (estate) on her *wafāt*. This ruling is based on the ruling of the Prophet as transmitted by Dār al Quṭnī: "The wealth of a Muslim is forbidden for another Muslim save if it is given as a gift."[1] The *Qur'ān* amplifies this fact: " Oh you who believe! Devour not your wealth among yourselves unjustly, except it be a trade amongst you by mutual consent."[2]

17.10 *NAFAQAH* (MAINTENANCE) OF THE CHILDREN:

The basic rule is that the legitimate father is responsible for the *nafaqah* of all his legitimate children born from his Muslim *nikāḥ*. A father is legitimate to his children when such children are conceived after he married their mother in *ṣaḥīḥ* (valid) or *fāsid (invalid) nikāḥ*, but not a *bāṭil nikāḥ* (void marriage).[3] There is thus no legitimisation of illegitimate offspring in Islām.

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1 `Alī Jād Al Haqq: Shaikh Al Azhar: Fatwā S/551
Cairo, Al Azhar University,dated 8/1/1413 AH corresponding to 9/7/1992, page 30.

2 Al Qur'ān, Sūrah al Nisā': 29.

3 Mohammedan Law, op. cit. p. 108.

Chapter 3

MARRIAGE WITH NON-MUSLIMS.

In this chapter, marriages contracted with the *Ahl al Kitab* (People of the Book, i.e. the Jews and Christians) as well as non-*Ahl al Kitab* like the *mushrikun* (polythiests) and the prohibited forms of *ankihah* (marriages) will be discussed.

1. PROHIBITED *ANKIHAH* (MARRIAGES):

These are the forbidden marriages in the *shari`ah.*

They are basically the following:

- *Nikah* to *Ahl al Kitab* (in which there is dispute).
- *Nikah al Mut`ah* (forbidden by *Sunni* schools of law).
- *al Nikah al Mu`aqqatah* (temporary marriage).
- *Nikah al Tahlil* (illegally validating a forbidden form of marriage).
- *Nikah al Shighar* (a pre-Islamic form of marriage).
- *Nikah* to a *Mushrik* (polytheist - m -) or *Mushrikah (polytheist - f -).*
- *Nikah* to the *Zunat* (adulterers an fornicators).
- *Nikah Batil* and *Nikah Fasid* (void and invalid marriages).

1.1 *NIKAH* TO THE *AHL AL KITAB*:

The *Ahl al Kitab* are those people who received a heavenly Scripture before the advent of Islam and they are thus the Jews and the Christians. The *Qur'an* says: "....lest you say: `The Book was sent down to only two factions before us'....."[1]
The "two factions" mentioned in the above ayah are the *Yahud* (Jews) and *Nasara (Christians)*[2]. The *Qur'an* and the Prophet (S.A.W.S) called the followers of Jesus *Nasara* (lit. helpers) while the present day term for them is *Masihiyun* (followers of the Messiah) possibly due to the Trinity doctrine of most Christians and divinity attributed to Jesus by them.
Islam views both the Jewish and Christian Scriptures as incomplete and Islam came to fulfil and complete the entire process of Revelation in which both the spiritual and worldly matters were dealt with by the Creator in finality.
The *Qur'an* says:
"This day I (*Allah*) have perfected your religion for you, completed My favour upon you and have chosen Islam as your religion."[3] This is emphasised by:
"Truly, the religion (accepted) in the Sight of *Allah* is Islam."[4]

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[1] Al Qur'an, Surah al An`am: 156.

[2] Al Jami` li Ahkam al Qur'an, op. cit. Vol 7 p. 144.
Tafsir al Qur'an al `Azim, op. cit. Vol 3 p. 129.

[3] Al Qur'an, Surah al Ma'idah: 3.

[4] Al Qur'an, Surah al `Imran: 19.

The status of the Jews and Christians are confirmed by the *Qur'an* as people who received a message before.[1]

These have been tampered with and changed over the years.

"But those among them who did wrong, changed the Word that had been told (to) them."[2] The higher criticism of the Jewish and Christians Scriptures as well as history bear testimony to that.

The Bible itself speaks of its limitations as to the scope of its application.

"Come, I will send you to Pharaoh that you may bring forth my people, the sons of Israel, out of Egypt."[3]

"Go and gather the elders of Israel together and say unto them - ` the Lord, the God of your fathers...' "[4]

Jesus according to the Gospels instructed: "Go nowhere among the Gentiles, and enter no town of the Samaritans, but go rather to the lost sheep of the house of Israel."[5] Jesus stated that he was sent to the "lost sheep of Israel."[6] Similar expressions are found elsewhere in the New Testament.[7]

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[1] Al Qur'an, Surah al Baqarah: 53.
Al Qur'an, Surah al-Saff: 6.

[2] Al Qur'an, Surah al-A`raf: 162.

[3] The Holy Bible, op. cit. Exodus 3: 10.

[4] Ibid, op. cit. Exodus 3: 16.

[5] Ibid, op. cit. Matthew 10: 5 - 6.

[6] Ibid, op. cit. Matthew 15: 24.

[7] Ibid, op. cit. Luke 24: 21., and John 1: 31.

Differences of opinion exist amongst the fuqaha' on the question of whom are to be categorised as *Ahl al Kitab* and whether *nikah* contracted with them is proper or legal within the *shari`ah*.

It is common knowledge that the very first principle of Islam, is the absolute and uncompromising Oneness of the Almighty with no likeness to any created being. This is seriously compromised by the Trinity dogma of the vast majority of Christians, where Jesus is part of the Godhead or God Himself in human form. The *Qur'an* strongly condemns this as disbelief.[1]

From this angle some of the *sahabah* and *fuqaha'* ruled that these people are not *Ahl al Kitab* but *mushrikun* and thus rule that they cannot be married to Muslims in or outside of *Dar al Islam* (Islamic State).

To this view went ibn `Umar of the *sahabah* who said:

"*Allah* forbade marriage between the *mushrikun* and the Muslims and I do not know of anything worse in *shirk* (polytheism) than a woman saying that her God is `*Isa* (Jesus)."[2]

Ibn `Abbas, in a ruling from him, ruled the *ayah* of the prohibition of *nikah* to the *mushrikun* as generally applicable to all persons other than Muslims while al Harbi narrates that a group of the *fuqaha'* rule the *ayah (Quranic verse)* of *nikah* (marriage) to the *kitabiyat* (women of the People of the Book) as cancelled by the *ayah* of prohibition of *nikah* to all the *mushrikun* (polytheists).[3]

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[1] Al Qur'an, Surah al Ma'idah: 17 & 73.
Al Qur'an, Surah al Tawbah: 30.

[2] Tafsir al Qur'an al `Azim, op. cit. Vol 1 p.457.
Al Jami` li Ahkam al Qur'an, op. cit. Vol 3 p. 68.
Al Muhalla, op. cit. Vol 9 p. 445.

[3] Al Jami li Ahkam al Qur'an, op. cit. Vol 3 pp. 65 - 66.

Ibn `Umar's father the *khalifah* `Umar, ordered one of his governors, Hudhaifah, who married a woman from *Ahl al Kitab*, to divorce her, claiming "concern that the Muslims will leave their Muslim women and marry *kitabiyat* (women of *Ahl al Kitab* - the People of the Book)".[1]

This ruling of `Umar is taken as *karahah* (detestableness) of such a *nikah*.

Those who take *Ahl al Kitab* (People of the Book) as they are, quote:

".....(Lawful to you in marriage) are chaste women from the believers and chaste women from those who were given Scripture before you..."[2]

They further claim that the *mushrikun* (polytheists') rule is not applicable to them. Amongst these are `Uthman and ibn Jubair. It is conditional that these *Ahl al Kitab* women must be believing *Ahl al Kitab* women. Thus disbelieving or immoral *kitabiyat* are forbidden in *nikah* by these *`ulama'*.

Those who allow it restrict its practice by rule that it is detestable (*makruh*) to marry women of *Ahl al Kitab*, due to the danger of diluting your Islam or losing it. There is thus not a clear unfettered permissibility by those who allow such a *nikah*. The actual purpose of this kind of nikah is to bring the women of *Ahl al Kitab* into the fold of Islam.

This concession is only applicable to Muslim men and those living in the *Dar al Islam* (Islamic State) where the *shari`ah* operates and where, thus, the affairs of *nikah* and related matters are enforced in the Islamic system.

This is particularly the ruling of ibn `Abbas.

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[1] Tafsir al Qur'an al `Azim, op. cit. Vol 1 p. 456.
Al Jami` li Ahkam al Qur'an, op. cit. Vol 3 p. 68.

[2] Al Qur'an, Surah al Ma'idah: 5.

There is consensus that a Muslim woman may not marry a *kitābī* (a man of the *Ahl al Kitāb* category), due to the authority a zawj has in family life.

Some *fuqahā'*, like some *Shāfi`īs*, rule that only the *Ahl al Kitāb* whose ancestors entered the religion of Prophet *Mūsā* (Moses) or Prophet *`Īsā* (Jesus) before their respective cancellations i.e Jews before the advent of *`Īsā* and Christians before the advent of Islam and before their Scriptures were corrupted by deletions or additions, are *Ahl al Kitāb.*[1]

The *Ḥanbalis* share this view.

According to this interpretation, there is virtually no *Ahl al Kitāb (People of the Book)* to be found nowadays.

Ḥanafis do not allow marriage to Jewesses and Christian women in *Dār al Ḥarb* (non Muslim country) due to the absence of the application of *sharī`ah. Shāfi`īs* and *Ḥanbalis* require both parents to be *Ahl al Kitāb* before the rule of *kitābīyyah* marriages (marriages to a Jewess or Christian woman) can apply.[2]

The *Shī`ah Imāmiyyah* and some of the *Zaidiyyah* prohibit marriage to *Ahl al Kitāb* claiming that the permissibility of nikah to *Ahl al Kitāb* women was cancelled by the revelation prohibiting marriage to the *mushrikūn* and *mushrikāt.*[3]

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1 Nihāyah Al Muḥtāj, op. cit. Vol 6 p. 291.
Minhaj al Ṭālibīn, op. cit. pp. 98 - 99.
Al Nikāḥ, op. cit. pp. 440 - 441.
Iḥyā `Ulūm al Dīn, op. cit. Vol 2 p. 59.

2 Sharī`ah - The Islamic Law, op. cit. p. 136.

3 Sāyis A and Shaltūt M: Āyāt al Aḥkām, Cairo, Maṭba`ah Muḥammad `Ali Subḥi, 1953, Vol 2: 178.
Rawāfi' al Bayān, op. cit. Vol 2 pp. 287 - 290.
Fiqh al Sunnah Vol 2 pp. 101 - 102.

This issue has to be further clarified. Trinity is a very clear breach of the *Tawhid* law (law of Oneness of *Allah*) as it is clearly that of joining partners to the Almighty. The quoted *Shafi`i* rule in definition, is thus logical and clear while the ruling of the *Shi`ah* is more logical and in conformity to history and content of the Scriptures of most of the *Ahl al Kitab*.

All forms of atheists are excluded by all *fuqaha'* from the *Ahl al Kitab* category due to their *ilhad* (atheism).

There is a further problem in the *Ahl al Kitab ankihah* (marriages to the People of the Book) in that there is a concept, amongst certain persons, that the *Ahl al Kitab* issue could be extended to non-Muslim lands.

This is a serious mistake. Ibn `Abbas, one of the senior *sahabah* has already precluded that, as well as some of the senior *fuqaha'*.

Some *fatawa* (legal opinions) issued herein clearly do not reflect understanding of the functioning and application of Family laws in non-Muslims countries where Muslims live as minorities.

Firstly, the Islamic Personal Law is not recognised in the overwhelming majority of these countries and where it is recognised, with few exceptions, it is usually such a recognition where the non-Muslim authority makes the laws and takes what it feels it wishes to enact, save in Singapore perhaps.

If there is a fear that the children might lose their Islam in such a setup, then such *ankihah* are not allowed. There is no way that the *shari`ah* will sanction any order which will destroy its own system.

"Those who fulfil the covenant of *Allah* and break not the covenant."[1]

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[1] Al Qur'an, Surah al Ra`d: 20

"And fulfil (every) covenant...."[1]

Common logic also supports this point.

A *kitābiyah* married to a Muslim must take the required baths after menstruation, lochia (after birth) and after sexual relations. She is also to refrain from eating and drinking all such substances as are forbidden in Islam.

None of the secularist countries would condone the above stipulations since that would be considered to be in violation of personal rights.

Further, a Muslim *zawj* and father is obligated by the *sharī`ah* to see to the Islamic upbringing of the family at all times, even after divorce.

In the secularist non-Muslim countries, mothers invariably are given the custody of their minors. Thus, it would be impossible to implement the *sharī'ah* stipulation to the contrary.

It is thus clear that the aims of *nikāḥ*, as set out in the *sharī`ah*, cannot be met under such circumstances and as such the prohibition in Non-Muslim countries should be applied. The *Qur'ān* does also proclaim all those who do not "follow the Religion of Truth (i.e. Islam)"[2] as enemies of the Muslims who must be subdued so that they do not obstruct or hinder the Faith or its spreading. There is thus no *nuṣrah* (spirit of mutual help) between obstructionist Non-Muslims and practising Muslims.

The position of Muslims in the world and especially most of the Muslim minorities, testifies in practical terms to this position. Besides, the real *Ahl al Kitāb* who follow the true, correct and unadulterated *Tawrah* (Old Testament) and the true, correct and unadulterated *Injīl* (Gospel) are not to be found nowadays.

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[1] Al Qur'ān, Sūrah al Isrā: 34

[2] Al Qur'ān, Sūrah al Tawbah: 29.

1.2 NIKAḤ AL *MUT`AH*:

The Arabians were, prior to the advent of Islam, sunk in iniquity of which sexual iniquity was prominent. When Islam came, there was a genuine need for a practical approach to solve this unsavoury position.

Nikaḥ was thus made the cornerstone institution of society's social fabric. However, problems occurred on expeditions and especially during warfare, when the men would be far away from the their wives for long periods and some of them were new in the Faith.

Thus we read in some *ḥadith* texts of the issue of *mut`ah* unions being allowed for a fixed period in a certain place and finally prohibited permanently by the Prophet (S.A.W.S).

Mut`ah is a system whereby a man marries a woman, gives her a *ṣadaq* and live with her as her *zawj* for a period of time[1], usually for the period of encampment in a place in the war zone.

When the agreed time expired, the *mut`ah* marriage is automatically dissolved.

It is conditional that no inheritance takes place between the parties of a *mut`ah* marriage, nor for the offspring coming from that union nor is paternity established.

The initial *mashru`iyyah* (legality) of this kind of union was established by *ḥadith* texts.[2]

- Ibn Mas`ud narrates that "we used to be in the war party with the Prophet (S.A.W.S) and we did not have our wives with ourselves and we asked

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[1] Lisan al `Arab, op. cit. Vol 6 p. 4127.

[2] Ta'rikh al `Arab, op. cit. pp. 146 - 147.
Shari`ah - The Islamic Law, op. cit. pp. 155 - 156.
The Family Laws of Islam, op. cit.p. 193.

permission from the Prophet (S.A.W.S) to castrate ourselves, which he refused, but he allowed us to marry a woman for a certain period."[1]

- Muḥammad bin Ka`b narrates from ibn `Abbās that he said: "*mut`ah* was valid in early Islam. A man would come to a place where he knew no one and he would marry a woman for the length of that period as he would remain there and she would look after him and his belongings as a *zawjah*. Thereafter the *Qur'ān āyah* was revealed: "Successful indeed will be the believers who are humble in their prayers and who shun vain conversation and who pay the poor-due and who guard their sexual purity save from their wives...."[2] Ibn `Abbās then said: "besides this all forms of sexual behaviour is forbidden."[3]
- Imām al Zuhrī narrates prohibition of *mut`ah* during the farewell pilgrimage. He also narrates it from ibn `Abbās as from the time of Khaibar.[4]
- Imām `Alī , the fourth *khalifah*, narrates that the Prophet (S.A.W.S) prohibited *mut`ah* in the time of Khaybar (i.e. expedition of Khaybar).[5]

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[1] Zād al Ma`ād, op. cit. Vol 4 p. 6.
Jāmi` al Usūl, op. cit. Vol 11 p. 444.
Mukhtasar Ṣaḥīḥ Muslim, op. cit. pp. 210 - 211.

[2] Al Qur'ān, Sūrah al Mu'minūn: 1 - 6.

[3] Sunan al Tirmidhī, op. cit. Vol 2 p. 395.
Jāmi` al Usūl, op. cit. Vol 11 p. 446.

[4] Sunan Abī Dāwūd, op. cit. Vol 1 p. 520.
Ṣaḥīḥ al Bukhārī, op. cit. Vol 7 p. 16.
Jāmi` al Usūl, op. cit. Vol 11 p. 449.

[5] Ṣaḥīḥ al Bukhārī, op. cit. Vol 8 p. 16.
Jāmi` al Usūl, op. cit. Vol 11 p. 451.
Muwatta' Mālik, op. cit. Vol 2 p. 74.

The vast overwhelming majority of the *fuqahā'* of the *ṣaḥābah* (companions of the Prophet), *tābi`ūn* (students of the Prophet's companions) and the *Amṣār* (cities) all agree that *mut`ah* was permitted in the initial period of Islam, mostly to the troops fighting a long way from home and not having their wives with them. Later the Prophet (S.A.W.S) himself permanently prohibited this.

The *`ulamā'* (learned scholars) and *fuqahā'* who rule that *mut`ah* is forbidden rule that, irrespective of the duration of this artificial *nikāḥ*, the parties are living in sin and all the sexual activity thereby is tantamount to *zina* (adultery).[1]

This is the view of *Ahl al Sunnah* who forms the overwhelming majority of Muslims in the world.

The *Shī`ah* grouping, notably the *Imāmiyyah*, the largest of the *Shī`ah* groupings, still rule it as valid and they do not accept the *aḥādīth* (prophetic precepts) indicating prohibition. They assert that ibn Mas`ūd and ibn `Abbās specifically ruled it as valid. Ibn `Abbās later retracted in the lattter part of his life while `Alī the actual first Imam (leader) of the *Shī`ah* grouping, himself narrates the prohibition as indicated above. *Mut`ah* was thus banned by the Prophet (S.A.W.S.) during his lifetime.[2]

Ṣiddīqī quotes Ja`far bin Muḥammad, also called Ja`far al Ṣādiq, the sixth *Shī`ah Imāmiyyah Imām*, equated *mut`ah* to *zina* (adultery) and fornication.[3]

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[1] Ibn Taimiyyah: Fatāwā ibn Taimiyyah, Vol 4: 69.
Al Jāmi` li Aḥkām al Qur'ān, Vol 3: 147 - 148.
Ibn Ḥazm: Al Muḥallā Vol 9: 520.

[2] Nail al Awṭār, op. cit. Vol 6 p. 154.
Sunan al Nasā'i, op. cit. Vol 6 pp. 165 - 167.
Sunan Abī Dāwūd, op. cit. Vol 1 p. 520.
The Family Laws of Islam, op. cit. pp. 199, 201 & 202.

[3] The Family Laws of Islam, op. cit. p. 203.

1.4 NIKAḤ AL TAḤLIL:

Taḥlil means "making lawful" and is derived from the Arabic verb *ḥallala* which means "to make lawful" In the *shari`ah* it is the "unlawful legalising process of a woman who had been divorced irrevocably by her *zawj*".[1]

When a Muslim man marries a woman for the first time he possesses three *talaqat* (divorces) over her. After executing the third *talqah* (divorce), he cannot remarry her save if she naturally and by normal events married another man, was by natural and normal events divorced or widowed by him and stays out her required *`iddah*.[2]

Should anyone make an arrangement herein for another man to marry his irrevocably divorced *zawjah* in order to circumvent the requirements, then that is called *taḥlil*.

The second party who undertakes the *nikaḥ* is the *muḥallil* and the one for whom it is done is called the *muḥallal lahu*.

Both of these persons were cursed by the Prophet (S.A.W.S) himself.

Imam `Ali narrates that the Prophet (S.A.W.S) said:

"Cursed is the *muḥallil* and the *muḥallal lahu*."[3]

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1 Lisan al `Arab, op. cit. Vol 2 p. 975.
Qamus al Muḥit, op. cit. Vol 3 p. 371.

2 Saḥiḥ al Bukhari, op. cit. Vol 7 p. 15.
Sunan Abi Dawud, op. cit. Vol 1 p. 520.

3 Sunan Abi Dawud, op. cit. Vol 1 p. 520.
Sunan al Tirmidhi, op. cit. Vol 2 p. 394.

1.4 *NIKAH AL SHIGHAR*:

This is the *nikah* in which there is agreement that no *sadaq* be paid to the woman.

This was a pre-Islamic form of pagan marriage and was explicitly forbidden by the Prophet (S.A.W.S.) in *the ahadith.*

Ibn `Umar narrates that the Prophet (S.A.W.S) said:

"There is no *shighar* in Islam." Ibn Sa`id and ibn Husain also narrate it.[1]

Abu Hurairah narrates that the Prophet prohibited *shighar*. Jabir bin `Abd Allah also narrate it.[2]

There are two cases of *shighar*: one mentioned in the *hadith* texts above and the second one is where *waliyan* (two Walis i.e guardians)) of two women agree to marry a woman under each one's *wilayah* and no sadaq is payable to the women they marry.

In the first case, where no *sadaq* is paid to the woman, there is consensus that that is *batil* (invalid).

In the second case of the two *walis* marrying without *sadaq*, the *fuqaha'* differ on the validity of the *nikah*.

1 Sahih Al Bukhari, op. cit. Vol 7 p. 15.
Sunan Abi Dawud, op. cit. Vol 1 p. 520.
Sunan al Nasa'i, op. cit. Vol 6 pp. 110 - 111.
Al Zabidi Z D: Al Tajrid al Sarih li Ahadith al Jami`al Sahih, Cairo, Matba`ah Mustafa al Halabi, undated, Vol 2 p. 120.

2 Mukhtasar Sahih Muslim, op. cit. p. 210.
Jami` al Usul, op. cit. Vol 11 p. 453.

1.5 *NIKAH* TO THE *MUSHRIKUN* (POLYTHEISTS):

The *mushrikun* (sing. *mushrik*) are the idolaters and polytheists. *Tawhid* (absolute unitarianism) is the first and most cardinal principle of belief in Islam. No compromise in that is permissible under any circumstances. The *Qur'an* is very strong on this point:

" Worship *Allah* alone and join none with Him."[1]

" Verily whosoever sets up rivals in worship with *Allah* then *Allah* has forbidden Paradise for him..."[2]

Prohibition of *nikah* to these people is by clear text of the *Qur'an*:

" Wed not the idolatresses till they believe (in *Allah*): for a slave woman who believes is better that an idolatress though she allures you. And give not your daughters in marriage to idolaters till they believe (in *Allah*) for a believing slave is better than an idolater though he allures you. Those (idolaters) invite to the Hell and *Allah* Calls to Paradise and unto forgiveness by His Grace...."[3]

This *ayah* was revealed prohibiting Marthad al Ghanawi from marrying an idolatrous prostitute resident in Mecca still after the *Hijrah*.[4]

There is consensus by all the *`ulama'* and *fuqaha'* in Islam that this kind of *nikah*, i.e *nikah* to the *mushrikun* (idolaters), is *batil*[5].

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[1] Al Qur'an, Surah al Nisa': 36.

[2] Al Qur'an, Surah al Ma'idah: 72.

[3] Al Qur'an, Surah al Baqarah: 221.

[4] Al Jami` li Ahkam al Qur'an, op. cit. Vol 3 p. 67.
Sunan al Nasa'i, op. cit. Vol 6 p. 66.

[5] Al Muhalla, op. cit. Vol 9 p. 445.

1.6 *NIKAH* TO THE *ZUNAT* (ADULTERERS):

The *zunat* are the adulterers and fornicators, males and females. *Nikah* to them by righteous Muslims, while they are still *zunat*, is forbidden. *Allah* states in the *Qur'an*: "The man who agrees to marry a prostitute, then surely he is either an adulterer or a pagan. And the woman who agrees to marry an adulterer, then she is either a prostitute or a pagan. Such a thing is forbidden for the believers."[1]

This is general for all categories of people. It is even the rule when you married a slave girl.

"....and give them (slave girls you marry) their dower (and they) should be chaste, not adulterous nor taking lovers."[2]

The Prophet said, as narrated by `Amr bin Shu`aib:

"the fornicator marries none save one like him (or her)."[3] *Imam* Ahmad also transmitted it.

Al Shawqani says that this is applicable to one who's *zina* (adultery or illicit sex activities) are known. There is also agreement amongst the *fuqaha'* that someone who fornicates with a woman may marry her as they are of the same category.[4]

The *zunat* (adulterers) become acceptable Muslims again when they repent with *tawbah nasuhah* (full proper repentance in which one admits the wrongdoing, regrets it sincerely, and repents never to return to it). The *Qur'an* alludes hereto.

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[1] Al Qur'an, Surah al Nur: 3.

[2] Al Qur'an, Surah al Nisa': 25.

[3] Sunan Abi Dawud, op. cit. Vol 1 p. 514.

[4] Nail al Awtar, op. cit. Vol 6 p. 164.

"....nor commit illegal sexual intercourse: and whoever does this shall receive punishment. Their torment will be doubled on the Day of Resurrection and he will abide in there in disgrace. Except those who repent, believe and do good deeds, for those, *Allāh* will change their sins into good deeds..."[1]

2. *NIKĀḤ BĀṬIL* (VOID MARRIAGE) AND *NIKĀḤ FĀSID* (INVALID MARRIAGE):

Nikāḥ bāṭil is a void nikah while *nikāḥ fāsid* is an imperfect or invalid *nikāḥ*.

2.1 *NIKĀḤ BĀṬIL:*

This is a *nikāḥ* in which there is non-compliance with the *arkān* (principles) and *shurūt al in`iqād* (conditions of enactment) of the *`aqd al nikāḥ*. An example being that a *nikāḥ* is contracted directly with a *ṣaghīr* (male minor) or *ṣaghīrah* (female minor) who is not *mukallaf* (mature) nor even of the *mumayyiz* (discerning) category or marrying one who is of those who are permanently prohibited to you, like your uncle, brother or foster brother or their corresponding female categories.

If this kind of *nikāḥ* is enacted and that marriage is consummated, then no *nasab* is effected nor familial consequences of a normal correct *nikāḥ*. If consummation had taken place, then no *taḥrīm* (prohibition of marriage) is effected between the relatives

[1] Al Qur'ān, Sūrah al Furqān: 68 - 70.

of both the parties and there is no `iddah on the woman either as *nasab* is not an issue here.

2.2 *NIKAH FASID* (INVALID MARRIAGE):

This is an imperfect *nikah* in which the *arkan (principles)* and *shurut in`iqad* (conditions of enactment) of the `*aqd al nikah* have been met, but not the *shurut al sihhah* (conditions of correctness) of *nikah* like the *nikah* without the *shuhud* (witnesses), according to the majority of *the fuqaha'*.

If this kind of *nikah* was not consummated and separation of the parties took place, then nothing is done to the parties including the non-application of the provisions of the Islamic criminal law.

If separation took place after consummation, then still criminal punishment is not effected (of the *hadd* category - i.e. the prescribed punishment). This is due to the *shubhah* (doubtful form) of this kind of `*aqd al nikah*. This is due to the Prophet's (S.A.W.S) ruling:

"Do not execute the *hadd* if there is reason of doubt."[1]

However, the *Hakim* (Muslim ruler) is obligated to mete out some form of deterrent punishment for such sinful behaviour.

If there had been consummation of a *nikah fasid*, then:

- payment of the full *sadaq (dowry)* agreed on, or if there had not been an agreement of *sadaq*, then *sadaq mithl* is necessary.

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[1] Nail al Awtar, op. cit. Vol 7 p. 117.

- *nasab* (lineage) is attributed to the man if the woman became pregnant from him.
- `*iddah* of *ṭalāq* (period of waiting of divorce) is compulsory on the woman.
- The *ḥurmah* (prohibition) of the categories of persons on both side comes into operation.

Ḥanafis have the above divisions for the`*aqd al nikāḥ*, (marriage contract) including also the `*uqud saḥiḥah* (valid contracts).

Mālik, and Aḥmad speak of the `*uqūd saḥiḥah* (valid contracts), *mawqūfah* (on which no ruling of validity or otherwise exists) and *batilah* (void) contracts while al Shāfi`ī speaks of only `*uqūd ṣaḥiḥah* (valid contracts) and *bāṭilah*.

Thus the consequences for each will be what kind of definition is given to what kind of `*aqd* (contract) contracted.[1]

3. THE *MUḤARRAMĀT* (PROHIBITED PERSONS FOR MARRIAGE).

These are persons Muslims are not allowed to marry. These are corresponding categories of Muslim men and Muslim women. Some *muḥarramāt* are permanently prohibited and some are temporarily forbidden.

These *muḥarramāt* of the women are of categories, namely:

- The *muḥarramāt mu'abbadah (permanently prohibited).*
- The *muḥarramāt mu`aqqatah* (temporarily prohibited).

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[1] Al Zawāj Wa al Ṭalāq, op. cit. pp. 28 - 29.
Athār `Aqd al Zawāj, op. cit. pp. 75 - 77.

3.1 THE *MUḤARRAMĀT MU'ABBADAH*:

These are the women you are permanently not allowed to marry ever. They are of three main categories:

- *Muḥarramāt* by *nasab*. (lineage).
- *Muḥarramāt* by *muṣaharah*. (affinity).
- *Muharramāt* by *radaʽah*.[1] (fosterage).

The *Qur'ān* refers to all the prohibited persons:

"Forbidden unto you are your mothers, and your daughters, and your sisters, and your father's sisters, and your mother's sisters, and your brother's daughters, and your sister's daughters, and your foster mothers and your foster sisters, and your mothers-in-law, and your step-daughters who are under your protection (born) from your women whose marriage you consummated, but if you did not consummate their marriage, then it is no sin for you (to marry their daughters), and (forbidden) are the wives of your sons who (are born) from you. And it is forbidden (unto you) that you shall have two sisters together (in marriage) except what has already happened (of that nature) in the past.
Lo! Allah is Ever Forgiving, Merciful. And all (still) married women (are forbidden unto you)....."[2]

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1 Al Nikāḥ, op. cit. p. 206.
Al Zawāj Wa al Ṭalāq, op. cit. p. 30.
Iḥyā ʽUlūm al Dīn, op. cit. Vol 2 p. 59.

2 Al Qur'ān, Sūrah al Nisā': 23 - 24.

3.2 THE *MUḤARRAMĀT* OF *NASAB*:

These are those women who are permanently forbidden due to lineage how highsoever or how lowsoever i.e you are directly descendant from them and those directly descendant from you.

They are:

3.2.1 The Mothers:

These include your own mother as well as her mothers how highsoever and includes your father's mothers how highsoever and all the women he married. The latter is confirmed in another *āyah*: "And marry not those women your fathers married, except that which had already happened in the past. Lo! it was ever lewdness and abomination and an evil way."[1]

3.2.2 The Daughters:

This denotes every female person born from you be it of what grade or level. Thus your own daughter and all your granddaughters how lowsoever are all your daughters by *sharī`ah* definition and understanding.

3.2.3 Sisters, Aunts And Nieces:

- Your sister is a female who shares both parents as you or one of your parents, either a father or a mother.

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[1] Al Qur'ān, Sūrah al Nisā': 22.

- Your paternal aunt is a woman with the same parents as your father or who shares one of the parents of your father or grandmothers how highsoever.
- Your maternal aunts are the sisters of your mother who share the same parents as her or one of her parents or the same grandmothers how highsoever.
- your niece is the daughter of your brother or your sister, a brother and a sister who shares the same parents as you or one of your parents.

All the above are permanently forbidden unto you.[1]

The Prophet (S.A.W.S) prohibited the *nikāḥ* of a woman along with the *nikāḥ* of her aunt, maternal or paternal. Abū Hurairah narrates that the Prophet (S.A.W.S) said: "It is not lawful for a man to be joined in *nikāḥ* to a woman and her `*ammah* (paternal aunt) or her *khālah* (maternal aunt)." Only a group of the *Khawārij* and *Shī`ah* oppose this ruling.[2]

3.3 THE *MUḤARRAMĀT* DUE TO *MUṢĀHARAH* (AFFINITY):

Under this heading comes your mother-in-law and her mothers how highsoever. They are permanently forbidden unto you. All the *fuqahā'* rule that the mothers of your

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[1] `Umdah al Qārī, op. cit. Vol 16 p. 290.
Al Nikāḥ, op. cit. pp. 207 - 210.
The Family Laws of Islam, op. cit. pp. 60 - 61.
Al Ḥalāl Wa al Ḥarām, op. cit. p. 173.

[2] Al Nawawi A Z: Sharḥ Ṣaḥīḥ Muslim, Beirūt, Dār Iḥyā al Turāth al `Arabī, undated, Vol 9: 190 - 191.
Jāmi` al Uṣūl, op. cit. Vol 11 p. 494.
Sunan al Tirmidhī, op. cit. Vol 6 p. 96.

mother-in-law, both from her father and mother's side how highsoever are all permanently forbidden unto you.

This prohibition comes into operation after you married the woman and consummation is not a requirement.

Your daughters-in-law are also permanently prohibited to you.

The daughters of your mother-in-law fall in another category.

The following cases have some kind of relation to this category or persons. They are:

- The *rabībah* (step-daughter, i.e. daughter of your wife from a previous marriage) and
- The *walad* (child) of *zinā* (adultery or fornication).

3.3.1 The *Rabībah*:

She is the daughter of a woman you married from her previous marriage, which means she has a father other than you. The law is that if you consummate the *nikāḥ* of her mother, she will be prohibited to you permanently.

There is a difference of opinion whether it is a *shart* that this *rabībah* has to be resident with her mother and you in the same house.

3.3.2 The *Bint* (daughter) of *Zinā*:

This is a female born from fornication or *zinā*: i.e you are the biological father. The juristic question revolves around whether she is your daughter by *sharī`ah*. The majority of the *fuqahā'* rule that she falls in the permanently prohibited category because she is physically from your seed and you are her biological father. The

shari`ah has only denied her legitimacy of the male parentage due to the rules of legitimacy having been breached by an illicit sexual relationship.

This is the view of the Hanafis, one view of Malik and some Malikis, the Hanbalis, al Thawri and al Awza`i. The *Shafi`is* dissent with this stating that the *bint zina* (illegitimate daughter) is not his daughter as the *shari`ah* had denied such an illegitimate issue such rights and privileges as a legitimate daughter. This is also one of the views of Malik.

They state that the Prophet (S.A.W.S) said:

"*Al Walad li al Firash...*"[1] - children are legitimate from a lawful marriage. The *bint zina* (illegitimate daughter) is thus not of this category.

They thus rule that the biological father may marry his *bint* of *zina* but they rule it as *makruh (detestable).*[2]

3.4 THE *MUHARRAMAT* OF *RADA`AH* (FOSTERAGE):

These are the persons who become prohibited permanently due to fostering i.e suckling. *Rada`ah* prohibits in the same way and in the same pattern as *nasab*. The *ayah* on the prohibitive categories, quoted earlier, is clear in this regard. Thus the foster mother who suckled you becomes like your mother with all the prohibitions of

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[1] Mukhtaṣar Ṣaḥiḥ Muslim, op. cit. p. 229.
Sunan al Nasā'i, op. cit. Vol 6 p. 181.
Āthar `Aqd al Zawāj, op. cit. p. 365.
Al Qaḍā Wa Niẓāmuhu, op. cit. p. 705.

[2] Al Nikaḥ, op. cit. p. 210 - 212.
Bidāyah al Mujtahid, op. cit. Vol 2 p. 34 - 35.
Al Iqnā`, op. cit. Vol 2 p. 79.
Badā'i, op. cit. Vol 2 p. 257.

nikah applying as well as all females of her side of the same category of the *nasab* line like her daughter, sister etc.

The above is confirmed by *hadith* text also.

`Amratah bint `Abd al Rahman and `A'isha narrate that the Prophet (S.A.W.S) said:

"*Rada`ah* prohibits what birth prohibits."[1]

`Ali narrates that the Prophet (S.A.W.S) said:

"*Allah* forbade by fostering that which is forbidden by *nasab*."[2]

4. PROCEDURE IN DETERMINING *TAHRIM* (PROHIBITION) BY *RADA`AH*:

There is a difference of opinion amongst the *fuqaha'* as to how much milk of the foster mother brings forth this *tahrim*. The differences are due to the interpretations of different texts in this matter.

- Some *fuqaha'* rule that irrespective of amount of milk consumed, tahrim (prohibition)is effected due to the Prophet (S.A.W.S) not asking the slave woman who suckled `Uqbah and Umm Yahya as to amount of milk consumed when he separated the two permanently.[3]

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1 `Umdah al Qari, op. cit. Vol 16 p. 282
Mukhtasar Sahih Muslim, op. cit. p. 230.
Sunan al Nasa'i, op. cit. Vol 6 p. 98.

2 Jami` al Usul, op. cit. Vol 11 p. 472.

3 Sahih al Bukhari, op. cit. Vol 7 p. 13.
Jami` al Usul, op. cit. Vol 11 pp. 491 - 492.

Subscribing to this view are: `Ali, ibn `Abbas, ibn Musaiyyib, al Hasan al Basri, Abu Hanifah, Malik and it is one of the views of Ahmad.[1]

- Some rule that five *rada`at mutafarriqah* (five separate feeding sessions) necessitate tahrim. This is according to the text of `A'isha transmitted by Muslim[2] and others. Subscribing to this view are: ibn Mas`ud, ibn Hazm, al Shafi`i and its the more famous view of Ahmad and of most of the Ahl al Hadith.[3]
- Some again rule that three sucking movements with three swallowings give rise to *tahrim*, due to the *hadith* text: "a single suck or two sucks do not give rise to *tahrim*."[4] This *hadith* is narrated by `A'isha and others. Those subscribing to this view are: Abu `Ubaid, Abu Thawr, Dawud al Zahiri, ibn Mundhir and is a view of Ahmad.[5]
- The *fuqaha'* also differ as to the *shahadah* accepted for tahrim by *rada`ah*. Some take one *shahidah* (female witness) as sufficient due to the *hadith* of `Uqbah bin al Harithah mentioned afore. This is the view of Tawus, al Zuhri,

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1 Fiqh al Sunnah, op. cit. Vol 2 p. 76
Bidayah al Mujtahid, op. cit. Vol 2 p. 35.

2 Mukhtasar Sahih Muslim, op. cit. p. 231.
Sunan al Nasa'i, op. cit. Vol 6 p. 100.
Sunan Abi Dawud, op. cit. Vol 1 p. 517

3 Bidayah al Mujtahid, op. cit. Vol 2 p. 35.
Al Muhalla, op. cit. Vol 10 p. 9.
Fiqh al Sunnah, op. cit. Vol 2 p. 76.

4 Sunan Abi Dawud, op. cit. Vol 1 p. 517.
Sunan al Nasa'i, op. cit. Vol 6 p. 101.
Mukhtasar Sahih Muslim, op. cit. p. 231.

5 Nail al Awtar, op. cit. Vol 6 p. 348.
Fiqh al Sunnah, op. cit. Vol 2 p. 76.
Al Muhalla, op. cit. Vol 10 p. 13.
Al Halal Wa al Haram, op. cit. p. 175.

Awza`i, Ahmad and others. The majority of *fuqaha'* do not accept this as it is the evidence of one person on his own action. Ibn `Abbas, `Ali and others take this view. The *Hanafis* rule two Muslim males or one Muslim male and two Muslim women are required as *shuhud*. Al Shafi`i has the same requirement as the Hanafis, but also allow the *shahadah* (evidence) of four Muslim women herein. His reason for this ruling is "that women usually witness this kind of act."[1]

4.1 THE *MUHARRAMAT MU'AQQATAH*:

These are women who are prohibited to a man to marry due to prevailing circumstances. If the prohibitive circumstances are relieved, then *nikah* will be lawful to such a woman.

These women are:

- A woman still married to another man. She is still *haram* unto you if she is in *`iddah* of *talaq raj`i* (revocable divorce) due to the fact that the *zawj* may retract the *talqah* (divorce pronouncement) and resume the marriage. This prohibition is expressed in the *ayah* of the *muharramat* quoted before (*Surah al Nisa'*: 23 - 24).
- A woman in *`iddah* of *talaq ba'in* (period of waiting of irrevocable divorce) or in *`iddah* of *wafat* (period of waiting of a widow) is *haram* (forbidden) to a man until her *`iddah* is completed. If a *nikah* (marriage) is contracted

[1] Fiqh al Sunnah, op. cit. Vol 2 pp. 80 - 81.
Nail al Awtar, op. cit. Vol 6 p. 358.

during this period, it will be invalid and if consummated and a child is born, no *nasab* is attributed to the biological father.

- The *mutallaqah thalathan* (a woman who was given three *talaqat* - three divorce pronouncements) is *haram* for her *zawj* who gave her the *talaqat*. Her remarriage to him has been explained under *nikah al tahlil*.
- Any woman who has no Divinely Revealed religion and there is consensus on this.
- Your sisters-in-law are *haram* (forbidden unto you) as long as you are married to their sister. Even when you divorce her, you cannot marry any of her sisters until the *`iddah* of your *zawjah* had been completed in full. "Sister-in-law" here means all sisters-in-law whether *shaqiqat, ukht li abb* or *ukht li umm* (full sister, consanguine sister and uterine sister respectively).[1]
- It is *haram* (forbidden) to be married to a woman and her aunt at the same time. Abu Hurairah, Jabir and others narrate that the Prophet (S.A.W.S) said: "Do not marry a woman and her *`ammah* (paternal aunt) nor a woman and her *khalah* (maternal aunt)."[2]

This means that you are not to be married to them both at the same time.[3]

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[1] Al Zawaj Wa al Talaq, op. cit. pp. 37 - 38.

[2] Sahih al Bukhari, op. cit. Vol 7 p. 15.
Sunan Abi Dawud, op. cit. Vol 1 pp. 517 - 518.

[3] Nail al Awtar, op. cit. Vol 5 pp. 166 - 167.
Bidayah al Mujtahid, op. cit. Vol 2 p. 47.
Fiqh al Sunnah, op. cit. Vol 2 pp. 88 - 91.

Chapter 4

DIVORCE (*TALAQ*) IN ISLAM.

1. DEFINITION:

The word *talaq* is derived from the Arabic word *itlaq* which literally means "leaving off" or "releasing". *Talaq* of a woman means "termination of marriage to her husband."[1] In the *shari`ah, talaq* means "the breaking of the *nikah* bond and ending of the *nikah* relationship."[2]

Nikah is meant to be a permanent bond, but Islam, unlike certain other religions or religious systems, accepts that, due to factors beyond human control, that bond may have to be severed for the sake of justice, at times.

Although *talaq* is lawful, it is not encouraged and is detested. It is thus a lawful act which is detested by the *Shari`* Himself. It is sinful if it is misused and thus punishable in the Hereafter.[3]

Ibn `Umar and Muharib narrate that the Prophet (S.A.W.S) said:

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[1] Lisan al `Arab, op. cit, Vol 4 p. 2238.
Qamus al Muhit, op. cit. Vol 3 p. 267.

[2] Fiqh al Sunnah, op. cit. Vol 2 p. 241.
Fiqh Madhahib Arba`ah, op. cit. Vol 4 p. 278.
Mohammedan Law, op. cit. p. 89.

[3] Family Laws in Islam, op. cit. p. 213.
Shari`ah - The Islamic Law - , op. cit. pp. 168 - 169.

"The most detestable of the lawful acts, in the Sight of *Allah*, is *talaq*."[1] This is construed to mean the unlawful form of *talaq*.

2. *ARKAN* OF *TALAQ* (PRINCIPLES OF DIVORCE):

According to some of the *fuqaha'*, they are four in number.

- The *zawj* (husband): thus the *talaq* of a man other than the actual *zawj* cannot divorce a zawjah.
- The *zawjah* (wife): with the same rule as for the *zawj* as indicated above.
- The *sighah* (divorce formula) which must end the *nikah* relationship. This may either be in *sarih* (clear) terms or *kinayah* (indirect intent) terms.
- The *niyyah* (intention).

Some *fuqaha'*, like those of the *Hanafis* and *Hanbali* schools of Islamic Jurisprudence, rule that the *sighah* (divorce formula) is the only *rukn* (principle) of *talaq* as it is the only means of knowing the *zawj's* intention herein.

Some others like `Ali, the *Hanafis* and *Malikis* again rule that if a man states "that if I marry so and so, she will be *taliq* (divorced), then when he does so, she is immediately divorced.

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[1] Sunan Abi Dawud, op. cit. Vol 1 p. 546.
Nail al Awtar, op. cit. Vol 6 p. 247.
Subul al Salam, op. cit. Vol 3 p. 168.

This is in conflict with the *hadith* text: ".... there is no *talaq* for one not possessing the right of *talaq*."[1]

This latter ruling is also that of `Ali, ibn`Abbas, ibn Zaid, al Shafi`i and others.[2]

3. *SHURUT* (CONDITIONS) OF *TALAQ*:

There are specific *shurut* for the *mutalliq* (divorce) and the *talaq sighah* (divorce formula) which are:

- that the *mutalliq* (divorcé) must have *ahliyyah* (legal ability) and as such sanity is a requirement. There is vast difference of opinion on inebriation whether done voluntarily or not.

Some *fuqaha'* ruling validity of *talaq* like al Shafi`i and not, like ibn Hazm. Some even differentiate between *khamr* (wine from grapes) and other wines, like *Hanafis* .

From some of the *fuqaha'*, like the *Hanbalis, we* have three different rulings in this matter, namely, some ruling validity, others non-validity and *tawqif* (non ruling).[3]

There is consensus that unknowingly consuming anything which causes inebriation, does not validate *talaq* issued, be it food or drink or medication.

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[1] Sahih al Bukhari, op. cit. Vol 7: p. 57.
Sunan Abi Dawud, op. cit. Vol 1: p. 550.
Subul al Salam, op. cit. Vol 3 p. 179.

[2] Fiqh Madhahib Arba`ah, op. cit. Vol 4 pp. 280 - 281.
Fiqh al Sunnah, op. cit. Vol 2 pp. 253.

[3] Fiqh Madhahib Arba`ah, op. cit. Vol 4 pp. 281 - 183.
Al Wilayah Wa al Wasaya Wa al Talaq, op. cit. pp. 318 - 321.
Kifayah al Akhyar, op. cit. Vol 2 pp. 104 - 105.
Al Mughni, op. cit. Vol 7 pp. 114 - 115.
Al Muhalla, op. cit. Vol 10 p. 208.

Their proof is the *hadith* text of the Prophet (S.A.W.S): "No act is recorded against three (persons): the one who sleeps till he awakes, the immature child till he matures and the mad person until he regains his senses."[1]

It should be noted that voluntary intoxication is a sin in Islam and is a punishable offence.

Bulugh (maturity) and freedom of choice are requirements. Ahmad is the only one validating *talaq* of a *saghir* (minor) if he knows what he is saying. The vast majority of *fuqaha'* rule free choice of *talaq* by the *mutalliq* as necessary. Thus a coerced act will be invalid. *Hanafis* differ in ruling *talaq* of the coerced as valid if spoken but not if written.[2]

3.1 *SHURUT* OF THE *SIGHAH* OF *TALAQ*:

These are that the *sighah* must point clearly to the act of *talaq* by speech or writing or sign for the *akhras* (dumb person). There are varying rulings for each of these kinds like some of the *fuqaha'* permitting equal usage of speech or writing but limiting the sign to an *akhras* only like al Shafi`i and Ahmad, while Malik allows both sign and writing to an *akhras*, while *Hanafis* rule an *akhras's* sign invalid if he can write. The issue here is what is clearer in the issue of *talaq* for a specific kind of person. It is

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1 Al Suyuti: Sunan al Nasa'i Vol 6: 156.
Subul al Salam Vol 3: 180.

2 Al Zawaj Wa al Talaq, op. cit. pp. 98 - 100.
Al Hidayah, op. cit. Vol 1 pp. 229 - 230.
Al Wilayah Wa al Wasaya Wa al Talaq, op. cit. pp. 302 -308.

conditional that the *zawjah* understands the sign of the *akhras zawj* (dumb husband).[1]

3.2 THE GRADES OF *ṬALĀQ*:

The *ṭalāq* of the *hāzil* (one who fools), *mukht'i* (one whose tongue slipped), *madhūsh* (one suddenly surprised) and *ghaḍbān* (one in extreme anger), has not been covered fully in the above rules. These are dealt in short as follows:

- The majority of the *fuqahā'* rule that the *ṭalāq* of the *hāzil* i.e one who jokes with the pronouncement of *ṭalāq*, is regarded to be enacted. They quote *ḥadīth* text by Abū Hurairah who said: "Three acts' consequences are the same, whether you are serious with it or not - *nikāḥ, ṭalāq* and *raj`ah* (retraction of revocable *ṭalāq*)". Al Tirmidhī says this is an exceptional *ḥadīth*, although *ṣaḥīḥ*[2]. Mālik, in one of his rulings and Aḥmad rule that this *ṭalāq* is invalid as no intention is present and the *Qur'ān* states: "And if they decide on *ṭalāq*, then *Allāh* is all-hearing and all-knowing."[3] The Prophet (S.A.W.S) also said: "All actions will be judged according to intentions."[4]
- *ṭalāq* of the *mukht'i* is the *ṭalāq* of one who alleges his tongue slipped and pronounced the word *ṭalāq* in error, like wanting to call someone called

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[1] Fiqh Madhāhib Arba`ah, op. cit. Vol 4 pp. 281 - 294.

[2] Sunan Abi Dāwūd, op. cit. Vol 1 p. 550.
Sunan Tirmidhī, op. cit. Vol 2 p. 428.

[3] Al Qur'ān, Sūrah al Baqarah: 227.

[4] Ṣaḥīḥ al Bukhārī, op. cit. Vol 1 p. 4.

"Ṭāriq" and he says instead, in the presence of his *zawjah*, "*ṭāliq*" (which means "you are divorced"). *Ḥanafis* rule validity of his *ṭalāq* by *qaḍā'* (judicial process) and not by *diyānah* (dispensationary process) after swearing an oath to the effect of a slip of the tongue. The same applies to the *ghāfil* (ignorant person). The *ṭalāq* of the *hāzil*, however is valid both by *qaḍā'* and *diyanah*.

- *ṭalāq* of the *madhūsh* is the *ṭalāq* of the one who is surprised by someone or something and in that state pronounce the word *talaq*. His *ṭalāq* is invalid as it is of the category of *ṭalāq* of the unconscious person.
- talaq of the *ghaḍbān* is *talaq* of he who is so enraged that he does not know he said the word *ṭalāq*. His *ṭalāq* is assessed by the following rules:
    - complete blanking of the mind due to the extreme anger which makes his *ṭalāq* invalid.
    - anger but knows what one said makes his *ṭalāq* valid.
    - in the case between the above two cases it would be better to rule *ṭalāq* as valid.[1]

3.3 *TAQSĪM* OF *ṬALĀQ*

"*Taqsīm* of *ṭalāq*" means the divisions into which *ṭalāq* is divided. This *taqsīm* (division), basically, is according to time and *ṣīghah* (formula).

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[1] Fiqh al Sunnah, op. cit. Vol 2: pp. 249 - 251.
Zād al Ma`ād, op. cit. Vol 4 pp. 40 - 42.

3.3.1 *Ṭalāq* Related to Time:

Ṭalāq is either *ṭalāq sunnī* or *ṭalāq bid`ī*.

- ***Ṭalāq Sunnī***: *Ṭalāq sunnī* is *ṭalāq* executed in accordance with the requirements of the *sharī`ah*. *Ṭalāq sunnī* is divided into two sections, namely:
  - *ṭalāq sunnī aḥsan* (the best *sunni talaq*), and
  - *ṭalāq sunnī ḥasan* (good *sunnī ṭalāq*).
- ***Ṭalāq Sunnī Aḥsan***: This is the giving of one *ṭalqah* (divorce pronouncement) to the *zawjah* by the *zawj* when she is in *tuhr* (non menstrual period) and he had no sexual relations of any kind with her in that *tuhr* state since the immediate previous *haid*. After the issue of this one *ṭalqah*, he lets her complete her *`iddah*. This is the *Ḥanafi* view and Mālik, al Shafi`i and Aḥmad concur.

  Al Shāfi`i further contends that no ruling exists for the *ḥāmil* (pregnant), *ṣaghīrah* (minor) or menopausal *zawjāt* i.e their *ṭalāq* in neither *sunnī* or *bid`ī*. Aḥmad generally agrees with al Shāfi`i.
- *Ṭalāq sunnī ḥasan* by *Hanafis* is the giving of three *separate talaqat* (divorces) in three consecutive pure states of the *zawjah*.

  Their differences of rulings are due to their understanding of the *sharī`ah* texts herein.

  The *Qur'ān* states:

  "Oh Prophet! When you (menfolk) divorce women, divorce them at their prescribed periods."[1]

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[1] Al Qur'ān, Sūrah al Ṭalāq: 1.

This is explained further in *hadith* by ibn `Abbas:

"*talaq* are of two kinds: two lawful ones and two unlawful ones. The lawful ones are the *talaq* of a *zawjah* in her *tuhr* in which no sexual relations took place and the *talaq* of the visibly *hamil zawjah*.

The unlawful ones are the *talaq* of a *zawjah* in a state of *haid* and in a state of *tuhr* in which he had sexual relations with her and thus does not know if she is pregnant or not."[1]

Hanafis further interpret "divorce them at their prescribed periods" as meaning one *talqah* after every *haidah* and this for them is *talaq sunni hasan* as indicated above.

Another *hadith* narration herein is that of ibn `Umar who divorced his *zawjah* in *haid* and the Prophet (S.A.W.S) ordering him to make *muraja`ah* (retraction) with his *zawjah*.[2]

- ***Talaq Bid`i***: This is *talaq* contrary to the procedure of the *talaq sunni*. The *fuqaha'* differ in its status.

  Generally speaking, *talaq bid`i* is defined as a *talaq* in which the *zawj* give three *talaqat* to his *zawjah* in one expression or three *talaqat* separately, but in one session or *talqatan* (two divorce pronouncements) in one session or one *talqah* in the *haid* of the *zawjah* or in her *tuhr* in which he had sexual relations with her or during her *haid* following her *tuhr* in which he had no sexual relations with her.

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1 Nail al Awtar, op. cit. Vol 6 pp. 250.

2 Ibid. op. cit. Vol 6 pp. 249.

The *fuqahā'* have detailed differences on the rulings of *ṭalāq bid`ī*, some pertaining to numbers which cause the enactment of divorce like the view of the *Ḥanafis* while others order retraction by order of the *Ḥākim* if the *nikāḥ* was consummated and even ordering imprisonment to force retraction like the view of Mālik. This applies to *ṭalāq* in menstruation or *tuhr* in which consummation took place.

Generally *Shāfi`is* and *Ḥanbalis* agree with Mālik save that they do not allow imprisonment to force retraction.

Ibn Ḥazm rule *ṭalāq bid`ī* as invalid save if three *talaqāt* is given in one session or the *zawj* gives the third *talqah* after having given two previously.[1]

3.4 THE NUMBER OF *ṬALĀQAT* AND RULINGS THEREON:

There is substantial differences between the *fuqahā'* on the effect of three *talaqāt* given, either in one expression or in three separate expressions, but in one session.

It is agreed that when a man married a woman for the first time, he possesses three *talaqāt* over her. There is also agreement that he may give three *talaqāt* in one session in the manner explained above, but that would be sinful.

They explain that the *zawj* has this right by the *`aqd al nikāḥ* and if he used it, he has closed the door of retraction or reconciliation and continuation of the *nikāḥ* and he acted contrary to the *sharī`ah* which has given instruction of separate *ṭalāqāt* on separate occasions as a safety measure against over-hastiness and miscalculation by

[1] Nail al Awṭār, op. cit. Vol 6 pp. 247 - 250.
Fiqh Madhāhib Arba`ah, op. cit. Vol 4 pp. 296 - 309.
Al Wilāyah Wa al Waṣāyā Wa al Ṭalāq, op. cit. pp. 229 - 247.

the *zawj* in this matter. This issue already happened in the Prophet's (S.A.W.S) time as al Nasā'ī records that Maḥmūd bin Labīb said:

"The Prophet (S.A.W.S) was informed of a man who gave three *ṭalaqāt* together. The Prophet (S.A.W.S) got up in anger and said: "Do they play with the Book of *Allāh* and I am still present amongst you!?"[1]

The *fuqahā'* differ on how many *ṭalaqāt* take effect when three *ṭalaqāt* are given as indicated above. The vast majority of the *fuqahā'* rule validity of the three *ṭalaqāt*, others rule only one *ṭalqah* takes effect, while a small minority rule that it has no effect at all.

The *fuqahā'* substantiate their view points as follows:

- The vast majority of the *fuqahā'* quote a number of *āyāt* in support of their ruling e.g.: "Then if he divorces her (for a third time) then she is not lawful to him thereafter until she has married another husband."[2] "There is no blame on you if you divorce women while you have not touched them..."[3] "And if you divorce them before you touched them and you have not appointed them a dowry (*ṣadāq*)..."[4] There is no difference here in the *ayat* on the *ṭalaqāt* whether one, two or three. "Divorce is only permissible twice, after that the parties should either hold together on reasonable terms or separate in kindness."[5] This *āyah* is clear in the permissibility of *ṭalqatān* or

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[1] Sunan al Nasā'ī, op. cit. Vol 6 p. 147.

[2] Al Qur'ān, Sūrah al Baqarah: 230.

[3] Ibid, op. cit. 236.

[4] Ibid, op. cit. 237.

[5] Ibid, op. cit. 229.

three *talaqat*, at once or separately. In the *sunnah* practice, the *hadith* of Sahl ibn Sa`d who reported the *mula`anah* of `Uwaimir of his *zawjah* and divorced her with three *talaqat* in the presence of the Prophet (S.A.W.S) and he did not say anything.[1] This is the ruling of most of the *sahabah*, the *tabi`un* as well as Abu Hanifah, Malik, al Shafi`i and Ahmad.

- The group of *fuqaha'* who rule only one *talqah* is effected by the giving of three *talaqat* in one session, quote the following proof: `Ikramah narrates from ibn `Abbas in the divorce of the wife of Rakanah, the latter who divorced her with three *talaqat*. After querying it with the Prophet (S.A.W.S) the latter asked: "In one session?" to which Rakanah replied in the affirmative. The Prophet then said: " That will be only one."[2] The latter text is questioned as to authenticity according to al Shawqani. This ruling (of one *talqah* taking effect when three are pronounced in one session) is the view of `Ali, ibn `Abbas, Jabir, Zaid bin `Ali, ibn Taimiyyah and ibn Qaiyyim as well as that of the *Shaikhs* of Qurtubah (Cordova in Andalusia of Muslim Spain).
- Those who rule this *talqah* as *bid`i* rule it has no effect. This is the view of some of the *tabi`un*, ibn `Aliyyah, Abu `Ubaidah, some of the Zahiriyyah and some others.
- There is a further view that if three *talaqat* is given to a *zawjah* whose *nikah* had been consummated, then three will take effect while only one will take

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[1] Sahih al Bukhari. op. cit. Vol 7 p. 69
Sunan Abi Dawud, op. cit. Vol 1 p. 565.

[2] Sunan Abi Dawud, op. cit. Vol 1 pp. 551 - 552.

effect if the *nikah* had not been consummated. This is the view of some of the companions of ibn `Abbas and of Ishaq al Rahawai.

3.4.1 *Talaq al Battah*:

Talaq al battah is a final *ba'in* (irrevocable) form of *talaq* like a *zawj* saying to his *zawjah*: "*anti taliq al battah* - you are divorced in finality." The *sahabah* of the Prophet (S.A.W.S) differed on its ruling. Some like `Umar ruled it as one *talqah* (one divorce) while `Ali ruled it as three *talaqat* (three divorces) and some *fuqaha'* ruled that the intention to is to be taken into consideration as that was intended as does al Thawri and the *fuqaha'* of Kufah, while Malik rule three *talaqat* if the *nikah* was consummated.[1]

3.4.2 *Talaq Sarih* and *Talaq Kinayah*:

Talaq sarih (clear divorce) is a clearly indicated *talaq* in which there is no ambiguity as to intention of the *mutalliq* (divorce) while *talaq kinayah* (indirect intent divorce) is an unclear form of *talaq* which needs clarity from the *mutalliq* as to what he meant by his expression.

- ***Talaq Sarih***: *Hanafis, Malikis, Shafi`is* and *Hanbalis* all agree that the word *talaq* and its derivatives in Arabic have to be used to enact *talaq sarih*. If the *mutalliq* does so, his intention is not asked for. Thus, according to these *fuqaha'*, if a *zawj* says to his *zawjah*: "*anti taliq*" (you are divorced), or "*talaqtuki*" (I have divorced you), he cannot claim fooling with it. Their proof is from the *Qur'an's* usage of the term *talaq* for this matter and

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[1] Fiqh al Sunnah, op. cit. Vol 2 pp. 268 - 272.
Nail al Awtar, op. cit. Vol 6 pp. 255 - 261.

nothing else. *Allah* says: "..*fa taliquhunna li`iddati-hinna* - "...divorce them at their prescribed times...."[1] There is a lot of discussions amongst the *fuqaha'* as to the usage of a foreign language in issuing *talaq*. Most of it are irrelevant to non-arabic speaking Muslims.

- ***Talaq Kinayah* (Indirect Intent Divorce)**: The *fuqaha'* divide the *kinayat* (pl of *kinayah*) into categories. The basic division is between *kinayah zahirah* (indirect but clearly expressed intent) and *kinayah khafiyyah* (indirect declaration of intent not clearly expressed). These are the main divisions of the majority of the *fuqaha'* amongst of them the *Maliki, Shafi* and *Hanbali schools*.

The *Hanafis* have three categories, namely:

A *zawj's* reply to a request from his *zawjah* for *talaq*, or that which can be a reply to a request for *talaq*, or that which may be a reply to a request for *talaq* by the *zawjah*. These *fuqaha'* further go into and give many kinds of examples and usage of Arabic terms which are not relevant in Non-Arabic speaking societies and they will not be dealt with here.

Fundamental to the *kinayah* being taken for *talaq* is the intention of the *zawj* herein so much so that even if he utters *kinayah talaq* like saying: "*anti wahidah*" (literally "you are alone") and he intended a number of *talaqat*, then that number of *talaqat* is effected.

He must swear an oath if he did not intend *talaq* and his word will be taken.

The *Zahiriyyah* rule that no *talaq* takes effect with a *kinayah* utterance whether intended for *talaq* or not. This is the rule for both *diyanah* (dispensationary cases) and

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[1] Al Qur'an, Surah al Talaq: 1.

qada' (judicial cases) due to such form of *talaq* not being mentioned in the *Qur'an* nor the *sunnah*, according to them.

The *Shi`ah Imamiyyah* has the same view as the *Zahiriyyah* herein .[1]

3.4.3 Talaq Munjiz, Talaq Mu`allaq and Talaq Mudaf:

Talaq munjiz is a *talaq* that comes into operation immediately due to clarity of intent by the *mutalliq*.

Talaq mu`allaq is *talaq* chained down to a certain happening while *talaq mudaf* is chained down to a time factor or place.

All the *fuqaha'* agree that *talaq mu`allaq* made on your *zawjah* is immediately enacted when the condition set is met but differ when it is made to a woman with whom one is not married yet. Discussions on these issues by the *fuqaha'* exist but are not relevant to the South African Muslim scene and practice and are thus omitted here.

Those of the *fuqaha'* who rule validity of *talaq mu`allaq*, assert that it actually happened in the days of the *sahabah* who gave *fatwa* on its enactment. The same applies to the *tabi`un* of *Ahl al Ijtihad* (legists).

Nafi` narrates that a man divorced his *zawjah* by saying:
"you will be *taliq al batt* if you leave." Ibn `Umar said: "If she leaves, *talaq ba'in* will take effect immediately and if not, nothing will happen."[2]

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[1] Al Wilayah Wa al Wasaya Wa al Talaq, op. cit. pp. 347 - 397.
Fiqh Madhahib Arba`ah, op. cit. Vol 4 pp. 316 - 332.

[2] Sahih al Bukhari, op. cit. Vol 7 p. 58.

A similar ruling is reported from ibn Mas`ūd while ibn Abū al Zunād transmits it from the *fuqahā'* of al Madinah.[1]

3.4.4 *Ṭalāq Muḍāf*:

This is *ṭalāq* chained down to a time factor or a place.

As soon as the time factor prescribed in the *talāq* is found, *ṭalāq* is enacted. Some *fuqahā'* rule that this form of *ṭalāq* may be chained down to a time factor, past, present or future like the view of the *Ḥanafis*.

Others like Mālik, the *Shāfi`īs* and Aḥmad rule that any impossible or far fetched time factor like "you are divorced when you touch the sky" enacts *ṭalāq munjiz* (divorce with immediate effect). The same occurs when this kind of *ṭalāq* is chained down to the "Will of *Allāh*".

Ibn Ḥazm rules this kind of *talaq* i.e *ṭalāq muḍāf*, as invalid as the *Qur'ān* and *sunnah* did not entertain it.[2]

3.4.5 *Tafwīḍ* (Ceding) and *Tawkīl* (Agency) of *Ṭalāq*:

Since *ṭalāq* is a *ḥaqq* (right) of the *zawj*, normally, due to his obligations in the *nikāḥ*, he has the right to appoint a representative in the process of *ṭalāq* who will act on his behalf.

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1 Al Zawāj Wa al Ṭalāq, op. cit. pp. 109 -110.
Al Wilāyah Wa al Waṣāyā Wa al Ṭalāq, op. cit. pp. 458 - 462.
Fatāwā ibn Taimiyyah, op. cit. Vol 4 p. 156.
Bidāyah al Mujtahid, op. cit. Vol 2 pp. 78 - 79.

2 Fiqh Madhāhib Arba`ah, op. cit. Vol 4 pp. 356 - 357 & 362 - 363.
Al Mughni, op. cit. Vol 7 pp. 199 - 204.
Al Zawāj Wa al Ṭalāq, op. cit. p. 108.
Fiqh al Sunnah, op. cit. Vol 2 p. 263.

The *fuqaha*' differ in that:

Ibn Hazm rules that it is not valid to cede such a *haqq* (right) to one's *zawjah*, while the majority of the *fuqaha*' rule validity of ceding it to both the *zawjah* and the *wakil*.

Tafwid is specifically the ceding of *talaq* to the *zawjah* and the result will depend on her reaction to it.

Tawkil is the appointing of a *wakil* to carry out the *talaq* process of the *mutalliq*, either verbally or in writing.

All the *fuqaha*' agree that the *mutalliq* can relieve the *wakil* of the instructions.

There is a difference amongst the *fuqaha*' whether the *mufawwid* (one making *tafwid*) can retract his *tafwid* or whether the *zawjah* possesses that *tafwid* of *talaq* until she responds to it.

The *fuqaha*' also differ as to whether the matter has to be settled in one session or not.

Some, like the *Hanbalis,* rule that the offer is still the *zawjah's*, even after the session in which the offer was made to her. This is reported from `Ali, Abu Thawr and others. While others like Malik and al Shafi`i and the *Hanafis* restrict it to one session. Thus if she does not respond in the session in which the offer is made, and her *zawj* leaves her presence, the offer lapses. She has thus to respond immediately to the offer, according to the above *fuqaha*'.

A claim is made of consensus herein by some *Hanbalis* as no difference was found amongst the *sahabah* herein.

The *fuqaha*' also differ whether the *zawj* may retract this offer of *talaq tafwid*, after having made it.

`Ata'a, Mujahid, al Awza`i and others rule that he can as he is the possessor of that *haqq* (right) while al Zuhri, al Thawri, Malik and the *Hanafis* rule that he cannot as he ceded a *haqq* and cannot retract it.[1]

3.4.6 *Talaq Marid Marad al Mawt* Or *Talaq al Far*:

This is *talaq* of a *zawj* who is on his sickbed from which he does not recover and finally dies from.

There is no clear and unambiguous text on this in the *shari`ah*. There is only the practice of the *sahabah* herein as in the case of `Abd al Rahman ibn `Awf who gave *talaq* to his *zawjah* while ill and from which illness he eventually died.

The khalifah `Uthman ruled her right to her share of his estate. Some of the *fuqaha'* claim *Ijma`* of the *sahabah* herein, but this is incorrect as ibn Zubair differs herein. The *fuqaha'* differ on this form of *talaq*.

Some *fuqaha'* like the *Hanafis* rule that if a *zawj* gives *talaq* to his *zawjah* while in *marad al mawt* (illness from which he dies), she inherits from him as long as he dies during her *`iddah* of *talaq* (period of waiting in divorce). This is to refuse the *zawj* the luxury of disinheriting his *zawjah* at *wafat* (death) to deny her her rightful share of his estate.

Malik rules that she receives inheritance from his estate, whether the *zawj* dies during or after the completion of her *`iddah* of *talaq*, whether she marries another man after it or not. This is a clear ruling so as to prevent the *zawj from* getting away with his improper action.

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[1] Fiqh al Sunnah, op. cit. Vol 2 pp. 281 - 285.
Al Wilayah Wa al Wasaya Wa al Talaq, op. cit. pp. 604, 608, 610 & 619 - 648.
Al Zawaj Wa al Talaq, op. cit. pp. 111 - 112.

Ahmad and ibn Abu Laila rule that the *zawjah* in the *talaq* of *marad al mawt* (illness from which he dies) receives her inheritance from the estate of her former *zawj* on condition that she does not remarry before she receives her allotted share. This period is unspecified.

Al Shafi`i and ibn Hazm rule no inheritance due to her as the *nikah* bond was severed and thus no consequences of *nikah*, like inheritance, is applicable.

It should be noted that the *zawj* must have full *ahliyyah* (legal capacity) in his *marad al mawt* (illness from which he dies) before his *talaq* can be valid and correct. Sanity is especially required.

Those of the *fuqaha'* who rule inheritance for the *mutallaqah* of *marad al mawt*, based it on *qiyas* with the *mutallaqah* (divorceé) of *talaq raj`i* where consequences of the *nikah* is still to be found. Those who rule that she inherits subject to her not remarrying, do so to avoid breaking the *Ijma`* that a woman does not inherit from two husbands simultaneously. This is based on the supposition that her second *zawj* dies before she receives her inheritance from her first former *zawj's* estate.[1]

3.4.7 *Ishhad* (Witnessing) of *Talaq*:

The *fuqaha'* differ on the necessity of *ishhad* (witnessing) of *talaq*.

The *Zahiriyyah* rule *ishhad* of *talaq* as a *shart* (condition) for the validity of *talaq* while the *Shi`ah Imamiyyah* rule it a necessary *rukn* (principle) of *talaq*.

They quote as proof for their argument the *ayah*:

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[1] Al Wilayah Wa al Wasaya Wa al Talaq, op. cit. pp. 276 - 282.
Fiqh al Sunnah, op. cit. pp. 278 - 281.

"And when they are about to fulfil their `*iddah*, either take them back in a good manner or part with them in a good manner and take for witnesses, two just persons from amongst you (i.e Muslims)."[1]

They state that *Allah* here joins between *muraja`ah* (reconciliation) and *talaq* and witnessing and thus separation of the two issues are not permissible.

Thus *talaq* without *ishhad* is invalid by them and has thus no consequences.

The majority of the *fuqaha'*, amongst them, the *Hanafis, Malikis, Shafi`is* and *Hanbalis*, rule that *ishhad* is not a requirement for the correctness of *talaq* as there is no contract in Islam which requires *ishhad* for its correctness save `*aqd al nikah* due to its serious consequences.

The Prophet (S.A.W.S) has stated that "the most detestable *halal* act in the sight of *Allah* is *talaq*".

Thus this act does not have the serious moral and social consequences which *nikah* has and thus *ishhad* is not necessary for it.

The relevant *ayah* quoted on *ishhad* of *talaq* is for *istihbab* (preference) but not for *wujub* (necessity).[2]

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1 Al Qur'an, Surah al Talaq: 2.

2 Ayat al Ahkam, op. cit. Vol 4 p. 162.
Al Wilayah Wa al Wasaya Wa al Talaq, op. cit. pp. 732 - 734.

4. *TALAQ RAJ`I* (REVOCABLE DIVORCE) AND *TALAQ BA'IN* (IRREVOCABLE DIVORCE).

4.1 DEFINITIONS:

Talaq raj`i* is the *talaq* after which the *zawj* may make *muraja`ah (reconciliation) with his *zawjah* and continue the *nikah* without remarriage and a new *`aqd al nikah*, provided such *muraja`ah* takes place before the *`iddah* of her *talaq* had been completed.

Talaq ba'in is a *talaq* in which the *zawj* may only live again with his *mutallaqah* after he had contracted a new *`aqd al nikah* and *nikah* with her subject to such conditions as the *shari`ah* prescribe.

Talaq ba'in are of two kinds: *talaq ba'in sughra* (irrevocable divorce - minor degree) and *talaq ba'in kubra (irrevocable divorce - major degree).*

As for *talaq ba'in sughra*, it is the *talaq* in which the *mutalliq* (divorcé) and the *mutallaqah* (divorceé) may resume married life only after they have contracted an entirely new *nikah* and *`aqd al nikah*.

Talaq ba'in kubra is the *talaq* where the *nikah* is fully and completely ended and the *mutalliq* and the *mutallaqah* may not remarry save if the *mutallaqah* has, by free choice and natural events, married another man, lived with him naturally and normally as his *zawjah* and by normal and natural events be divorced by him or widowed by him and stays out her required *`iddah* fully and completely.

4.2 CASES OF THE STATUS OF *TALAQ*:

Some of the *fuqaha'* like the *Hanafis* rule the following cases as *talaq raj`i* (revocable divorce):

Talaq raj`i* is a *talaq* of a *zawjah*, whose *nikah* was consummated, by usage of the *talaq* wording and which is not conditioned by *`iwad (compensation), nor number (of *talaqat*) nor qualified by a strong adjective of separation nor chained down to any form of monetary compensation nor compelling three *talaqat*. All forms of *kinayah talaq* will also be *talaq raj`i* on condition that it is not qualified by a strong adjective indicating *bainunah* (irrevocability).

For others it is the issue of less than three *talaqat* or divorce chained own to *`iwad* as for the *Hanbalis*. *Malikis* and *Shafi`is* have more or less the same rulings as *Hanafis* herein.

Talaq ba'in for the *fuqaha'* are as follows:

- *Talaq* after *nikah* and before consummation of it as that *nikah* does not accept *raj`ah* (retraction or reconciliation). These *zawjat* do not observe an *`iddah* of *talaq*.
- *Talaq* with a strong qualifying adjective indicating *bainunah* (irrevocable) status.
- *Talaq* where the *zawjah* offers *`iwad* (compensation) for ridding herself of her *zawj*.
- A *talaq* which completes three *talaqat* or three *talaqat* given separately in one session or in one sentence indicating three *talaqat*, whether by words or sign.

- *Kināyah ṭalāq* which points to *bainūnah* status like saying: *anti bā'in* - "you are separated from me" save for *Mālikis* who rule it *raj`ī*. (revocable). *Khul`* save for *Shāfi`is* who rule it *raj`ī* always. The *Ẓāhiriyyah* rule that *ṭalāq* is only effected by the three words of *ṭalāq* and its derivatives as mentioned before. *Kināyah* has no consequence for them. Thus *ṭalāq bā'in* for them is three *ṭalaqāt* or completing three *ṭalaqāt* to a *zawjah* whose *nikāḥ* had been consummated or one *talqah* to the *zawjah* whose *nikāḥ* had not been consummated. Besides this, all other forms of *ṭalāq* permissible in their view, are enacted as *ṭalāq raj`ī* (revocable divorce). They further opine that there is no other kind of *talaq* mentioned in the *Qur'ān* and *sunnah*, save these categories.
- *Ṭalāq* given by the *qadi* (judge) is *bā'in* even if it is the first *talqah* given to the *zawjah*. This is the ruling of most of the *fuqahā'*. It is especially so when there is a reason necessitating such action.[1]

  This latter issue, called *taṭlīq* (judicial divorce), or *ṭalāq* by *qaḍā'* and sanctioned by some of the *fuqahā'*, will be dealt with fully later on.

4.3 POSITION OF *ṬALĀQ RAJ`Ī* (REVOCABLE DIVORCE):

Raj`ah (retraction in revocable divorces) is lawful by rule of the *Qur'ān* and the *sunnah* Prophet (S.A.W.S). As for the *Qur'ān*:

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[1] Al Wilāyah Wa al Waṣāyā Wa al Ṭalāq, op. cit. pp. 396 - 406.
Al Hidāyah, op. cit. Vol 2 p. 6.
Al Zawāj Wa al Ṭalāq, op. cit. pp. 102 - 104.

"And divorced women should wait for three menstrual periods and it is not allowed for them to hide what *Allah* had created in their wombs, if they believe in *Allah* and the Last Day. And their husbands have more right (than others) to take them back in that period should they feel they can effect reconciliation."[1]

The Prophet (S.A.W.S) divorced Hafsah and then reconciled with her. He also ordered ibn `Umar to make *muraja`ah* (reconciliation) with his *zawjah* whom he divorced while she was in *haid* (menstruation).[2]

There is consensus by the *fuqaha'* that during the *`iddah* of *talaq raj`i*, the *zawj* has the right of *muraja`ah* with the *zawjah* with or without her agreement. This is specifically so if the *zawj* had been overhasty with *talaq* and erred in the process. However, the *Qur'an* makes it clear that the intention of the *muraja`ah* must be reconciliation and not for causing any harm to the *zawjah* in any way. If he intends that, then he is not entitled to *muraja`ah* (reconciliation).

4.4 CONSEQUENCES OF *TALAQ RAJ`I*:

Some *fuqaha'* like the *Hanafis* rule that the only difference occurring in the the *nikah* relationship in this form of *talaq* is the diminishing of the number of *talaqat* the *zawj* still possesses over his *zawjah*. Thus she is his *zawjah* in all respects during the *`iddah*. They rule that he has the following *huquq* (rights) during he *`iddah* of this form of *talaq*:

- The full right of *muraja`ah* during the *`iddah*.

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1 Al Qur'an, Surah al Baqarah: 228.

2 Athar `Aqd al Zawaj, op. cit. p. 343.
Subul al Salam, op. cit. Vol 3 p. 183.

- The remaining balance of the *sadaq* (dowry) is not due during the *`iddah.*
- The *zawjah* inherits from the *zawj* and vice verse during the *`iddah* irrespective what the circumstances of *talaq* were on condition that it is *talaq raj`i*, with or without her consent.
- The *zawj* has the right to add to the number of *talaqat* during the *`iddah.*
- Conjugal rights are valid.
- The *zawjah* is entitled to all forms of *nafaqah* (maintenance) during the *`iddah* of this form of *talaq*.

All these above rules are basic to all the major *madhahib* (schools of Islamic Jurisprudence).

Hanbalis share the *Hanafis'* view that sexual relations during the *`iddah* of *talaq raj`i* is valid.

Malik prohibits this before *raj`ah* (reconciliation) had been made.

His ruling is due to the *ayah* speaking of *bu`ul* (former spouses) and as such, they have to make *raj`ah* so that the former marriage status is restored.

Al Shafi`i rules that *raj`ah* has to be expressed by words as in the case of the enactment of *nikah* or that which is in its meaning for categories of persons who cannot speak.

This is because he sees this form of *talaq* as a break in the *nikah*.

The other *fuqaha'* rule that any act which can be construed to be indicative of *raj`ah*, is taken as such.

If the *`iddah* lapses and no valid *muraja`ah* had been made, the *nikah* ends, even if only one and the first *talqah* has been given. If they wish to resume their

married life, they will have to enact a new *nikah* with a new `*aqd al nikah* and a new *sadaq*.[1]

Hereafter the *fuqaha'* differ when a *mutallaqah raj`iyyah* (revocably divorced woman) was not informed by her *zawj* of her *talaq* from him.

Some of the *fuqaha'*, like Malik and ibn Hazm, validate the second *nikah* and base their ruling on *fatwa* of `Umar while some rule the right of the first *zawj* over the woman on condition that the *nikah* was not consummated as does `Ata'a in his ruling as well as being one of the rulings of Ahmad while al Shafi`i and others rule the right of the first *zawj* over her whether the *nikah* was consummated or not. This is the *fatwa* of `Ali.[2]

4.5 *TALAQ BA'IN* AND ITS CONSEQUENCES:

Talaq ba'in (irrevocable divorce) is either *sughra* (minor degree) or *kubra* (major degree).

Talaq ba'in sughra is a *talaq* which is not enacted with more than *talqatan* (two divorce pronouncements) nor a *talqah* (divorce pronouncent) completing three *talaqat* (divorce pronouncements).

The following are of the *talaq ba'in sughra* category:

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1 Ayat Ahkam, op. cit. Vol 4 p. 139.
Fiqh al Sunnah, op. cit. Vol 2 p. 274.
Al Wilayah Wa al Wasaya Wa al Talaq, op. cit. p. 409.
Al Mughni, op. cit. Vol 7 p. 273.

2 Athar `Aqd al Zawaj, op. cit. pp. 248 - 250.

- a *talqah* after *nikah*, but before consummation of it. Also included herein is a *talqah* after *nikah* and *khulwah sahihah* (being alone with one another), but before consummation of the *nikah*.
- *talaq `ala al mal* (divorce by compensation) which is *talaq* against *`iwad*, (compensation) usually the *sadaq* or part of it. This is the *talaq* a *zawjah* requests to rid herself of her *zawj* when there is no reason warranting her to be granted a *talaq*.
- *talaq* issued by the *qadi* (Muslim judge) on request of the *zawjah* due to the *zawj's* default in *nikah* obligation in *nafaqah*, *`uyub* (defects) of the *zawj*, *darar* (harm) from him and the like.

In these cases *muraja`ah* (reconciliation) is not allowed to the *zawj* as the *nikah* broke down and one of the parties have clear intent of getting rid of the marriage bond.[1]

Talaq ba'in sughra (irrevocable divorce - minor degree) has the following consequences:

- the *nikah* is immediately ended and the parties are total strangers to one another.
- the parties do not inherit from one another when one of them dies, during or after the *`iddah* (period of waiting) of the *zawjah*.
- the outstanding *sadaq* (dowry) becomes due immediately and in full to the *zawjah*.

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[1] Bidayah al Mujtahid, op. cit. Vol 2 p. 60.
Al Wilayah Wa al Wasaya Wa al Talaq pp. 103 - 104.

- the parties may remarry during or after the *`iddah* if they so agree. This means an entirely new *`aqd al nikah, sadaq* and *nikah*. The *wali* enters the the scene again by such *madhahib* (schools of Islamic Jurisprudence) requiring it for validity of *nikah*.
- the *mutallaqah* (divorceé) must receive *sukna* (lodgings) during her *`iddah* of this kind of *talaq*. No *nafaqah* (maintenance) and *kiswah* (clothing) are required as there is no *muraja`ah* (reconciliation) to the *zawj*. This is based on the *ayah* (Quranic verse): "Lodge them (the *mutallaqat*) where you dwell and obliged them not to leave, and if they are pregnant, then spend on them until they deliver (their child)."[1]
- *nasab* of the child or children are attributed to the *zawj* if attributable to him or proven to be his.

4.6 *TALAQ BA'IN KUBRA* (IRREVOCABLE DIVORCE - MAJOR DEGREE) AND ITS CONSEQUENCES:

There is consensus that a third *talqah* breaks the *nikah* irrevocably and both the partners immediately become strangers to one another.

However, they may not remarry directly again during or after the *`iddah* but only after the woman, by natural and normal events married another man, lived with him and had her *nikah* consummated and then, by natural and normal events, either be divorced by him or widowed by him and stays out her required *`iddah*.

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[1] Al Qur'an, Surah al Talaq: 6.

Only then may she remarry her former spouse, if they so both agree, with a new *nikah*, `*aqd al nikah* (marriage contract) and *sadaq* (dowry).

This procedure is prescribed in the *Qur'an*:

"And if he divorced her for a third time (by a third *talqah*), then she is not lawful for him thereafter until she married another husband."[1]

It is thus obvious that an "organised" marriage to legalise the situation for the first *zawj* to remarry his former *zawjah* is not permissible.[2]

This matter had been dealt with in marriages to Non-Muslims.

4.7 THE ISSUE OF *HADM* (DESTRUCTION) OF *TALAQAT*:

Hadm literally means "to destroy, pull down or demolish"[3]. In the *Fiqh* of *talaq* it means the "destroying of previously issued *talaqat*."

These *talaqat* are those issued to her by her former *zawj*.

There is consensus by all the *fuqaha'* that if a woman is divorced *talaq ba'in kubra* by her *zawj* and goes through the process of marriage to another man, not by *tahlil* (unlawful legalisation) method, by the more correct ruling, and remarries thereafter her former *zawj*, she returns to him with him possessing three *talaqat* over her.

Hereafter the *fuqaha'* differ on *talaqat* (divorce pronouncements) issued which are less than three and the *zawjah* marries someone else after her `*iddah* of *talaq* of

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[1] Al Qur'an, Surah al Baqarah: 230.

[2] Bidayah al Mujtahid, op. cit. Vol 2: 86.
Al Wilayah Wa al Wasaya Wa al Talaq, op. cit. pp. 409 - 416.

[3] Al Munjid, op. cit. p. 859.
Lisan al `Arab, op. cit. Vol 6: 4636.

the first *zawj* had been completed. Are those *talaqat* destroyed by the second marriage or not.

Abu Hanifah and Abu Yusuf rule that in the case of *talaq bainunah sughra* (irrevocable divorce - minor degree)), if the woman marries another man after completion of her *`iddah* of *talaq* of her former *zawj*, and later, when permitted in *shari`ah*, she remarries her first *zawj*, then the latter will possess three *talaqat* over her as the second *zawj* "destroyed" the *talqah* or *talqatan* of the first one.

Muhammad al Shaibani and Zufar of the *Hanafis* oppose this ruling, saying, as the rest of the *fuqaha'*, that on remarriage to her first *zawj*, she returns to him with only the remaining *talaqat* on her.

Thus if the first *zawj* gave only one *talqah* or *talqatan* and did not make *muraja`ah* during the *`iddah* of her *talaq* and she remarries him (the first *zawj*), when so permissible in *shari`ah*, he will only possess *talqatan* or one *talqah* over her respectively.[1]

4.8 OTHER FORMS OF *TALAQ* AND *TALAQ* BY *QADA'*

There are other forms of *talaq* like *talaq zihar*, *talaq li`an* (mutual imprecation) and *talaq qada'* (judicial divorce). Some *fuqaha'* classify *talaq qada'* or (*tatliq*) as *faskh*.

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[1] Fiqh al Sunnah, op. cit. Vol 2 p. 278.
Fiqh Madhahib Arba`ah, op. cit. Vol 4 p. 461.

4.8.1 *Talaq Zihar*:

Zihar comes from the word *zahr*, meaning a person's back. In the Jahiliyyah (pre-Islamic) era, saying to your *zawjah*: "*anti alaiya kazahri ummi* - you are to me like the back of my mother" meant *talaq*.[1]

The implication is that a child is carried on the back of his mother and a mother is of the *muharramat mu'abbadah* (permanently prohibited persons for marriage).

Islam forbade this practice and instituted laws to deal with it. Thus the *Qur'an* states: "Those amongst you who make their wives unlawful to them by saying: `you are like my mother': they cannot be their mothers. None can be their mothers except those who gave birth to them. And verily they utter an ill word and a lie...."[2]

This *ayah* was revealed due to Khawlah bint Tha`labah complaining to the Prophet (S.A.W.S) about this act from her husband, Aws bin al Samit. The Prophet (S.A.W.S) sent her away as there was then no Revelation on it yet. Later the above *ayah* was revealed.[3]

4.8.2 Rules of *Zihar*:

The utterer must have *ahliyyah* and use only the word "mother".

When *zihar* is enacted, cohabitation is forbidden as well as any sexual or other intimate act like kissing. *Kaffarah* (penalty) becomes compulsory when the *zawj* retracts. There is difference of opinion amongst the *fuqaha'* as to what constitutes retraction. Some rule any act indicating that as is the view of Qatadah and Abu

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[1] Qamus al Muhit, op. cit. Vol 2 p. 85.
Lisan al `Arab, op. cit. Vol 4 p. 2880.

[2] Al Qur'an, Surah al Mujadalah: 2.

[3] Tafsir al Qur'an al `Azim, Vol 6 p. 573 - 574.

Hanifah while actual verbal retraction is required by Dawud al Zahiri. Al Shafi`i rules if he keeps her with him that is taken as retraction. Malik and Ahmad require actual intention of retraction.

The *Qur'an* has specified the *kaffarah* of *zihar* as being freeing a slave or if incapable, then fasting two months consecutively and if unable, feeding sixty poor people for a full day.[1]

All the *fuqaha'* rule that the above are the only penalties for *zihar* and that the order must be kept. If he cannot do any of these, then he is exempted according most of the *fuqaha'* save al Shafi`i.

There is a difference of view when a *zawj* is busy paying the penalty and he "touches" his *zawjah* in the forbidden manner. Some *fuqaha'*, amongst them Abu Hanifah, al Shafi`i, rule that only one *kaffarah* is necessary. While ibn Shihab and others rule *kaffaratan* (two penalties) become due.[2]

4.9 *AL LI`AN* (DIVORCE BY MUTUAL IMPRECATION):

The word *li`an* comes from the Arabic word *l`an* which literally means "curse".[3] *Li`an* is so called due to the cursing process the parties have to complete when *mula`anah* (process of *li`an*) is made. This is explained further on.

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1 Al Qur'an, Surah al Mujadalah: 3 - 4.

2 Bidayah al Mujtahid, op. cit. Vol 2 pp. 106, 107, 109 - 113.
Al Hidyah, op. cit. Vol 2 pp. 18 - 21.
Al Muqni`, op. cit. pp. 250 - 253.
Fiqh al Sunnah, op. cit. Vol 2 pp. 309 - 313.
Nail al Awtar, op. cit. Vol 6 pp. 290 - 295.

3 Qamus al Muhit, op. cit. Vol 4 p. 269.
Lisan al `Arab, op. cit. Vol 5 p. 4044.

Li`an is actually the accusation of a *zawj* to his *zawjah* that he saw her committing adultery with another man or he denies the *haml* (pregnancy) of her as being his i.e his child.[1]

The process of *li`an* consists of four consecutive statements by the *zawj* that his *zawjah* committed *zina* (adultery) and the fifth statement he invokes the curse of *Allah* on him if he is lying.

The *zawjah* is then required to respond by admitting to the act, in which case the punishment of *zina* will be obligatory.

If not, she is to make four statements consecutively denying her *zawj's* accusation and the fifth statement she invokes the anger of *Allah* on her if she is lying.

They are then permanently separated and may never ever marry one another again.

The *ayah* of *mula`anah* came for Hilal bin Umaiyyah who found his wife committing *zina* with another man and he being the only witness.[2]

Hereafter the *ayah* of the law of *li`an* or *mula`nah* as it is also called, was revealed: "As for those who accuse their wives (of adultery) but have no witnesses except themselves, let the testimony of one of them be four testimonies (i.e. testify four times) by *Allah* that he is of those who speak the truth. And the fifth testimony is the invoking of the curse of *Allah* on him if he is of the liars.

And she shall avert the punishment if she bears witness four times by *Allah* that he is telling a lie. And the fifth one is that she invokes the anger of *Allah* upon her if her husband is speaking the truth."[3]

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[1] Al Jaza'iri A B: Minhaj al Muslim, Al Madinah al Munawwarah, 1969, 2nd ed. p. 456.

[2] Sahih al Bukhari, op. cit. Vol 8 p. 67.

[3] Al Qur'an, Surah al Nur: 6 - 9.

The *sunnah* practice of the Prophet (S.A.W.S) doing so is clear herein as the above texts indicate and also to the separating by *mulā`anah* between certain parties as reported by *ḥadīth* texts by ibn `Umar, Sa`d ibn Jubair and Sahl bin Sa`d.[1]

4.9.1 General Laws of *Li`ān*:

Both parties must have *ahliyyah* and the *zawj* is under obligation to make *mulā`anah* when accusing her of *zinā*. Abū Ḥanīfah even rule denial of the unborn child as *li`ān*.

The case must be brought to the *qāḍī* (judge) and if the *zawj* refuses to make *mulā`anah*, he receives *ḥadd* of *qadhf* (slander) and if the *zawjah* refuses to do the *mulā`anah*, the charge of *zinā* is confirmed and *hadd* carried out on her save by Abū Ḥanīfah who rule imprisonment for her until she makes *mulā`anah* or confesses to *zinā*.

When both make *mulā`anah* they are permanently separated due to the Prophet (S.A.W.S) as narrated by `Umar:

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1 Nail al Awṭār, op. cit. Vol 6 p. 299.
Zād al Ma`ād, op. cit. Vol 4 p. 92.

"When two parties make *mula`anah*, they are separated."[1] Similar texts are narrated by Sahl.[2] If *mula`anah* is complete and the *zawjah* is *hamil*, no *nasab* of that child is attributed to the *zawj* of the *zawjah*.[3]

4.10 *AL ILA'*:

Ila' literally means *half* which is swearing an oath.

In the *shari`ah* it specifically means the swearing of a *zawj* by oath that he will not cohabit with his *zawjah* for a period longer than four months.

Ila' in the pre-Islamic era was indefinite and could thus go on for years on end according to ibn `Abbas.

Islam changed the pattern and ruled stringent and restrictive rules for this.[4]

The issue of Ila' is dealt with in the *Qur'an*:

"Those of you who take an oath not to cohabit with their wives, must wait four months: then if they retract, verily *Allah* is oft forgiving, most merciful. And if they decide on divorce, *Allah* is all-hearing and all-knowing."[5]

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[1] Sahih al Bukhari op. cit. Vol 7 p. 71
Mukhtasar Sahih Muslim op. cit. p. 228.

[2] Sunan Abi Dawud op. cit. Vol 1 p. 565.
Subul al Salam op. cit. Vol 3 p. 192.

[3] Kifayat al Akhyar, op. cit. Vol 2 pp. 120 - 124.
Al Hidayah, op. cit. Vol 2 pp. 23 - 24.
Bidayah al Mujtahid, op. cit. Vol 2 pp. 113 - 114, 117 - 120.
Al Muqni`, op. cit. pp. 254 - 255.
`Alam al Muwhaqqi`in, op. cit. Vol 4 p. 353.

[4] Rawa'i al Bayan, op. cit. Vol 1 p. 312.

[5] Al Qur'an, Surah al Baqarah: 226 - 227.

4.10.1 General Laws of *Ila'*:

There is consensus that shunning the *zawjah* is not *ila'* and that swearing by oath with abstention from cohabitation is required. Some *fuqaha'* like ibn `Abbas and Abu Hanifah rule that if the four months of *ila'* passed, one *talqah* takes effect while others like Malik, al Shafi`i and Ahmad obligate retraction or *talaq* failing which the *Hakim* intervenes and issues *talaq*.

There is a difference as to what constitutes retraction of *ila`*. Some *fuqaha'* rule that it constitutes the actual cohabitation while others qualify it stating that it takes place while there is no prohibition to cohabitation by *shari`ah* like her fasting while others rule retraction by mouth as sufficient.[1]

5. *AL KHUL`* (DIVORCE BY COMPENSATION METHOD)

5.1 DEFINITION:

The word *khul`* is taken from the expression *khala`a al thawb* which means "removing the garment". This is the literal meaning.

In the *shari`ah* it is "the release from the *nikah* bond of the *zawjah* by the *zawjah* by `*iwad* (compensation)."[2]

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[1] Rawa'i al Bayan, Vol 1 pp. 312 - 314.
Al Jami` li Ahkam al Qur'an, Vol 3 p. 103.
Tafsir Ayat al Ahkam, op. cit. Vol 1 p. 136.

[2] Lisan al `Arab, op. cit. Vol 2 p. 1232.
al-Qamus al Muhit, op. cit. Vol 3 p. 19.

In *nikah*, a *zawj* is like a garment to a *zawjah* and she to him in that both protect the chastity of one another. This intimate relationship is based on love, mutual respect, fairness and a just co-existence.

When these requirements can no longer be upheld, and the *zawj* dislikes his *zawjah*, he can divorce her and she keeps the *ṣadāq* in this case.

If she dislikes him or no longer loves him and wishes to have her freedom, she is to return his *ṣadāq*, generally, and is set free.

The process whereby a *zawjah* gets her freedom by her own request is called *khul`*. The validity of *khul`* is confirmed in both the *Qur'ān* and the *sunnah* practice of the Prophet (S.A.W.S).

"And it is not lawful for you (men) to take back any of your gifts (*ṣadāq*) (from your wives) which you have given them, except when both parties fear that they would be unable to keep the limits ordained by *Allāh*. Then if you know that they would not be able to keep the limits ordained by *Allāh*, then there is no blame on either of them if she gives back (the *ṣadāq*) for her freedom."[1]

In the *sunnah* practice the Prophet (S.A.W.S) gave judgment in the case of Thābit bin Qais and his *zawjah*, as narrated by ibn `Abbās. She complained to the Prophet (S.A.W.S) that she could not stand Thābit any more, but had no complaint about his conduct or religious practice. The Prophet (S.A.W.S) ordered her to return the plantation he gave her as *ṣadāq* and ordered Thābit to "let her go", which is construed to mean, "divorce her."[2]

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1 Al Qur'ān, Sūrah al Baqarah: 229.

2 Ṣaḥīḥ al Bukhārī, op. cit. Vol 7 p. 60.
Sunan Abī Dāwūd, op. cit. Vol 1 pp. 559 - 560.
`Alām al Muwaqqi`in, op. cit. Vol 4 p. 351.

The majority of the *fuqaha'* rule validity of *khul`* and the *zawj* taking back the *sadaq* (dowry) in exchange for the *zawjah's* freedom from the *nikah* bond. They take their proof from the *ayah*:

"And give to the women (whom you marry) their dower (*sadaq*) as a gift, but if they, of their own good pleasure remit any part of it to you, take it and enjoy it without any fear of any harm (as *Allah* has made it lawful)."[1]

Abu Bakr ibn `Abd *Allah* al Muzani opposes the taking back of the *sadaq* stating that the above *ayah* was cancelled by:

"But if you want to take a wife in place of another wife, even if you gave the latter a *qintar*[2] for dower (*sadaq*), take not the least bit of it back..."[3]

The majority of the *fuqaha'* rule the latter applies when it is done against her will and it is not so in *khul`* and as per the procedure in the *ayah* 4 of *Surah al Nisa'*.[4]

5.2 THE *AHKAM* (LAWS) OF KHUL`:

The *fuqaha'* have the following general laws of *khul`*:

- The *fuqaha'* rule that the word *khul`* or its derivatives must be used or words with that meaning. If not, *khul`* is not enacted, but *talaq* by *`iwad mali* (*talaq* by monetary compensation) comes into force. Ibn Taimiyyah and ibn Qaiyyim al Jawziyyah rule that even if the word *talaq* is used and

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1 Al Qur'an, Surah al Nisa': 4.

2 A Qintar is a great amount of gold.

3 Al Qur'an, Surah al Nisa': 20.

4 Bidayah al Mujtahid, op. cit. Vol 2 p. 66.

khul`* was intended, *khul` will be enacted as, according to them, the principles of the *sharī`ah* accept facts as well as intentions in *`uqūd* (contracts). The Prophet (S.A.W.S) even used the word *fāriq hā* - "separate from her" - in his instruction to Thābit bin Qais in *khul`* of his *zawjah* and this kind of expression is explicitly used for *ṭalāq ṣarīḥ*.

- The *āyah* (Quranic verse) permitting *khul`* specifically restricts the *`iwaḍ* to the *ṣadāq* and nothing more. This is the ruling of al Sha`bī, al Zuhrī and al Hasan al Baṣri. Most of the *fuqahā'* rule that it is permissible to take more than the *ṣadāq* because, according to them, *khul`* is an *`aqd* of *`iwaḍ* and thus its scope is not limited. The difference of ruling of the *fuqahā'* is based on the difference of view on whether a Quranic *āyah* is restricted by certain *ḥadīth* texts as to its application or not.
- A group of the *fuqahā'* rule and classify *khul`* as being *faskh*, for if it is *ṭalāq*, then it would mean that a *zawj* has four *ṭalāqāt* over his *zawjah* which is repugnant in the *sharī`ah*. Those who claim it is to be *faskh* state that the *zawjah* of Thābit bin Qais had to observe *`iddah* of one *ḥaiḍah* (menstruation) only. This shows that it was not *ṭalāq* for in the latter case three *ḥiyaḍ* (menstruations) are required. The majority of the *fuqahā'* rule *khul`* as being *ṭalāq* and not *faskh*, for in the latter case, nothing other than the *ṣadāq* can be taken. Their ruling is based on the wording used by the Prophet (S.A.W.S) in the case of *khul`* of Thābit bin Qais and his *zawjah*.
- Most *fuqahā'* rule that the *zawj* is not under obligation to accept the *khul`*. Ibn Rushd opines that he has to as the *khul`* has been instituted to give relief to a *zawjah* due to valid *sharī`ah* approved reason. Since the *zawj*

has the right of *ṭalāq* in his hand and thus the *zawjah* must equally have the right of *khul`*. Some *fuqahā'* rule that the *qāḍi* (judge) obligates the *zawj* to accept *khul`* as the Prophet (S.A.W.S) obligated Thābit bin Qais herein.

- The *`iwaḍ* (compensation) can be anything according to al Shafi`ī as long as it is lawful and need even not be the actual *ṣadāq*. Mālik even allows a foetus in the womb of a pregnant animal as *`iwaḍ* in *khul`*. If the *`iwaḍ* is of a forbidden nature, then *ṭalāq* and not *khul`* takes effect.
- It is *ḥarām* for a *zawj* to harm his *zawjah* in any way so as to force her into *khul`* and then resort to taking back his *ṣadāq*. If he does that, *khul`* will be invalid even if it is already executed by the order of the *qāḍī*. This is clear from the *āyah*: "....and you should not treat them (wives) with harshness, that you may take away part of the dower (*ṣadāq*) you gave them..."[1] Mālik rules the return of the *ṣadāq* to the *zawjah* and enactment of *ṭalāq*, in this case.
- *Khul`* is valid in both the states of *tuhr* (non menstrual period) and *ḥaiḍ* (menstrual period) of the *zawjah* as neither the *Qur'ān* nor the *ḥadīth* restricted the period of its validity.
- The majority of the *fuqahā'* rule that retraction of *khul`* state after the *zawj* accepted it, is invalid and there is no *raj`ah* for it either. This is so even if he returns the *`iwaḍ* given by the *zawjah* and even if he does so during her *`iddah* of *khul`*. However, if the two parties agree voluntarily, they may remarry with a new *nikah*, a new *`aqd al nikāḥ*, a new *ṣadāq* and fulfil all such requirements as may be so required in *sharī`ah*.

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[1] Al Qur'ān, Sūrah al Nisā': 19.

- The *khul`* of a *zawjah maridah* (sick wife) who dies from her *marad* (sickness) is valid. The *fuqaha'*, however, differ on the *`iwad's* value in this case. Some, like Malik and Ahmad rule it equal to his share of her estate, while al Shafi`i insists it may be equal to *sadaq mithl* and the *Hanafis* insist that it may not be more than one third of the estate.
- In the ruling of the Prophet (S.A.W.S) of *khul`* between Thabit bin Qais and his *zawjah*, the Prophet (S.A.W.S) ordered her to keep *`iddah* of one *haidah*. This is also the ruling of all the senior *sahabah* such as `Uthman and ibn `Abbas and it is one of the rulings of Ahmad as well as the ruling of ibn Taimiyyah. Their explanation hereof is that in *talaq*, three *hiyad* is required as there is *raj`ah* in *talaq*. In *khul`* there is no *raj`ah* and one *haidah* is required to ascertain *haml* (pregnancy) or not and nothing else. The majority of the *fuqaha'* rule three *hiyad* for the *mukhtala`ah* (*zawjah* in *khul`*) as is the case with the *mutallaqah*.
- The *fuqaha'* allow the *khul`* between a *zawj* and an *ajnabi* (outsider). This is when an *ajnabi* agrees to pay the *`iwad* on condition that the *zawj* lets her free. Malik makes this conditional that there should be *maslahah* (benefit) therein or prevention of *mafsadah* (harm). Thus, if this is resorted to as a trick to allow the *zawj* to escape his responsibility of *nafaqah* (maintenance) of the *zawjah*, it should be forbidden. Abu Thawr rule this kind of *khul`* as invalid.[1]

[1] Ayat al Ahkam, op. cit. Vol 1 pp. 145 - 146.
Nail al Awtar, op. cit. Vol 6 pp. 276 - 282.
Fiqh al Sunnah, op. cit. Vol 2 pp. 294 - 306.
Zad al Ma`ad, op. cit. Vol 4 pp. 34 - 37.

6. *AL TATLIQ* (JUDICIAL DIVORCE)

By *tatliq* here is meant "*talaq* by *qada*'". This means judicial *talaq* or *talaq* issued by the *qadi*.

The word *tatliq* is from the word *tallaqa* which means "to relieve somebody from the bond of *nikah*."[1]

There are several kinds of separations of *nikah* which has to be done by the *qada'* on application by the *zawjah*. Some *fuqaha*' call this *tatliq* i.e *talaq* given by the *qadi* while others rule that the *qadi* can only grant *faskh* and not *talaq*.

Since *nikah* is based on continued sound, fair, just, honourable, friendly and loving foundation, the *shari`ah* has ruled that it should continue as long as the law of the *shari`ah* is upheld in that relationship.

Thus, if a *zawjah* breaks that covenant, the *zawj* has, after trying reconciliation, if such is possible and, under the circumstances prevailing, permissible, recourse to *talaq*. Likewise when the zawj is unjust, unfair, harsh, cruel, bad mannered, miserly or the like the *zawjah* has recourse to a process of relief. Such a *zawj* misuses his position of trustee in *nikah* in seeing that justice is done in the *nikah* and observing *mu`asharah zawjiyyah* (just married life).

In this case, the *shari`ah* intervenes through the *qada'* (judicial) system and gives the *zawjah* the right to ask the *qadi* for relief, including an end to such a *nikah* which the *shari`ah* never intended to bring forth nor legislated for.

The cases in which the *qadi* has the right of *tatliq* are:

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[1] Lisan al `Arab, op. cit Vol 4 p. 2693.
Al Munjid, op. cit p. 470.

- *tatliq* due to non-*nafaqah* or insufficient *nafaqah* by the *zawj*.
- *tatliq* due to *darar* of the *zawjah* by the *zawj*.
- *tatliq* due to the *ghiyab* (absence) of the *zawj* without an acceptable reason.
- *tatliq* due to the imprisonment of the *zawj*.

6.1 *TATLIQ* DUE TO NON-*NAFAQAH*:

Some *fuqaha'* like the *Hanafis* rule that the *qadi* cannot grant *tatliq* to the *zawjah* in this case for he can order him to give it and imprison him till he gives it if he has the means but refuse *nafaqah*.

They base their ruling on the *ayah*:

"Let the rich spend according to his means and the man whose resources are restricted, let him spend according to what *Allah* had given him."[1]

The Malikis, al Shafi`i and Ahmad grant her that right.

Al Shafi`i cites the *nikah* rule of "retaining the bond with justice or setting free with kindness" if the marriage bond cannot be held,[2] as well as claiming that non-*nafaqah* is harmful to the *zawjah* and retaining *nikah* to harm a *zawjah* is explicitly forbidden in the *Qur'an*.[3] There are other details pertaining like no *tatliq* granted if the *zawjah* knew of the *zawj's* position before the *nikah* and accepted it and the *qadi* selling of

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1 Al Qur'an, Surah al Talaq: 7.

2 Al Qur'an, Surah al Baqarah: 229.

3 Ibid, op. cit. 231.

the assets of the *zawj* to pay for the *zawjah's nafaqah*. There is difference of views amongst *fuqaha'* herein.[1]

6.2 *TATLIQ* DUE TO *DARAR*:

This is *tatliq* due to *darar* (harm) caused to the *zawjah* by her *zawj* or by his conduct or that he is such a person that she fears for her life living with him.

The basis of *tatliq* due to *darar* is from the *Qur'an*:

"If you fear a breech between the two (husband and wife) appoint *hakaman* (two arbitrators): one from his family and one from her family. If they both wish for peace, *Allah* will cause their reconciliation."[2]

The *ayah* speaks of *hakam* from both sides. Some *fuqaha'* rule that if there are no persons from one or either sides of the disputing parties, other righteous and just *hakaman* (two arbitrators) may be selected.[3]

The Malikis allow *tatliq* by the *qadi* on application of the *zawjah* and such is granted for a condition that she cannot tolerate or withstand like him physically assaulting her or insulting her or force her to do detestable acts or swearing at her. Some even rule his turning his back on her in bed as *darar*. When *darar* (harm) is proven the *qadi*

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[1] Al Wilayah Wa al Wasaya Wa al Talaq, op. cit. pp. 670 - 678.
Fiqh al Sunnah, op. cit. Vol 2 p. 288.

[2] Al Qur'an, Surah al Nisa' p. 35.

[3] Al Wilayah Wa al Wasaya Wa al Talaq. op. cit. pp. 726 -727.
Al Jami` li Ahkam al Qur'an, op. cit. Vol 5 p. 177.

gives one *talqah ba'inah* (irrevocable divorce). If she cannot prove her case and the *zawj* does not confess, the application is dismissed.[1]

The other *fuqaha'* like the *Hanafis, Shafi`is* and *Zahiris* rule that the *zawjah* does not have the right to petition the *qadi* (judge) for *tatliq*. They say the *qadi* can order the *zawj* to desist from the meting out the *darar* (harm) or he can punish him if he refuses. If all this fails, he is to send *hakaman* (two arbitrators) to try and effect reconciliation between the two. According to al Shafi`i, if this procedure fails, the *hakaman*, as *wakilan* (two agents) for the two, effect *talaq* from the *zawj* or *khul`*.[2]

Ahmad has the same above view as al Shafi`i, but in another ruling he empowers the *hakaman* to effect reconciliation or separation with or without *`iwad* (compensation). This is also the ruling of `Ali, Awza`i and others.[3]

6.3 *TATLIQ* DUE TO *GHAIBAH* (ABSENCE) OF THE *ZAWJ*:

Malik allows *tatliq* by the *qadi* due to the physical absence of the *zawj* and the *zawjah* suffering *darar* (harm) from it. This applies even though he left her *nafaqah* or not or whether the absence is valid by *shari`ah* or not.

If he is abroad and he can be contacted, the *qadi* is to write to him and give him three options: either to return to live with her or fetch her and live with her abroad or grant *talaq* to her. If he refuses, the *qadi* resorts to *tatliq*.[4]

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[1] Fiqh al Sunnah, op. cit. Vol 2 pp. 289 - 290.

[2] Al Iqna` op. cit. Vol 2 p. 92.

[3] Al Mughni, op. cit. Vol 7 pp. 48 - 49.

[4] Al Wilayah Wa al Wasaya Wa al Talaq, op. cit. pp. 729 - 730.

Hanbalis share Malik's view but rule separation by *faskh* and that the *zawjah* can complain only after six month's absence of the *zawj* and if she fears committing a sin of a sexual nature.[1]

Other *fuqaha'* like the *Shafi`is* refuse permission for the *qadi* to resort to *tatliq* herein insisting that the *zawjah* can effect *faskh* if he did not leave her *nafaqah*.[2]

If the *zawj* is imprisoned, Malik and Ahmad allow the *zawjah* to petition the *qadi* for *tatliq* if she is harmed by his physical absence. They make it conditional that absence must be three years or more and that one year had elapsed before she petitions the *qadi*. The separation by Malik will be *tatliq* by *talaq ba'in* (irrevocable divorce) and by Ahmad, *faskh*.[3]

6.4 *TALAQ* OF THE *MAFQUD* (MISSING PERSON):

The *mafqud* is derived from the Arabic verb *faqada* which means "to be absent from or to be non-existent."[4]

In the *shari`ah*, the *mafqud* is the one who goes absent and from whom no news is received and thus his whereabouts are not known nor whether he is dead or alive. There are two cases pertaining to the *mafqud*.

Either he is assumed alive, in which case his *zawjah* is his *zawjah* and all the consequences of the *nikah* remain and it is forbidden to distribute his estate, or he is

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[1] Fiqh al Sunnah, op. cit. Vol 2 pp. 291 - 192.

[2] Athar `Aqd al Zawaj, op. cit. p. 189.

[3] Fiqh al Sunnah, op. cit. Vol 2 p. 292.

[4] Qamus al Muhit, op. cit. Vol 1 p. 335.

assumed dead, in which case his *zawjah* becomes an *armalah* (a widow) and his estate is distributed as per the requirement of the *shari`ah*.

The *fuqaha'* have the following rulings in these cases:

The *Hanafis* and *Shafi`is* rule that irrespective of how the *mafqud* is lost, he is assumed alive until proven to be deceased. Thus his *zawjah* remains his *zawjah* and his wealth remains his property.

If his death is not proven, his death is assumed when persons of his age group in his place of residence usually die.

Various age limits had been set by these *fuqaha'*: some ruling seventy years, others eighty years and some even one hundred and twenty years.

One of the *Hanafis'* views is that the matter is left to the *ijtihad* (juristic decision) of the *qadi* and this is claimed to be the accepted view of the *Shafi`i madhhab* (school of law).

The ruling of these *fuqaha'* is based on the fact that a *nikah* can only be ended by *talaq* or *wafat* (death): the former is usually known factually, while the latter, if not factually known, has to be made definite, hence the age group death application.

The *Hanbalis* see the *ghaibah* (absence) of the *mafqud* (missing) in two perspectives, namely:

- A *zawj* who travels away from his domicile for trade or studies or tourism and does not return. The ruling herein is the same as for the *Hanafis*. Some *Hanbali fuqaha'* set the age limit for assumption of death as ninety years since birth while others rule it is to be left to the *ijtihad* (juristic opinion) of the *qadi* to decide on the period.

- The second case is where a *zawj* "disappears within reach of his family". This means near his place of residence like going to the mosque for prayer or to the shop and does not return.

A period of four years waiting is required with resultant ruling of assumption of *wafāt*, after which his *armalah* (widow) is to observe her *`iddah* of *wafāt* (period of waiting of death) and his estate distributed to his *warathah* (heirs) as per the requirements of the *sharī`ah*.

Some *Ḥanbalis* rule that only after the completion of both the four year waiting period and the *`iddah* of *wafāt* can his estate be distributed.

The *Mālikis* have the same division as the *Ḥanbalis* in regard to categories of the *mafqūd* (missing person). The first is like the *Ḥanbali* ruling for the *mafqūd* who disappears from his domicile. The second category of the one who is lost "in the presence of his family", is like the *Ḥanbali* ruling for this case but they have a different ruling when the *zawj* disappears in the *Dār al Islām* (Muslim ruled territory). They rule that if he does not return after the war she observes *`iddah* of *wafāt*. If he does not return during that period, *wafāt* (death) is confirmed and his estate is distributed to the *warathah* (heirs). This is also the ruling of ibn Zubair, `Ali, `Uthmān and others.

The *Shaikhs* Shaltūt and al Sāyis state that with today's greatly improved communications systems, it will be much easier to find a *mafqūd*. Thus it will be better to leave the matter to the *ijtihād* of the *qāḍī* for the rulings and views of the earlier *fuqahā'* were pertinent expressions of their times and the communications limitations of that era.[1]

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[1] Shaltūt & Al Sāyis: Muqāran al Madhāhib Fī al Fiqh, Cairo, 1953, Matba`ah `Alī Subaih & Sons pp. 117 - 123.

7. *AL MUT`AH* OF *TAFRĪQ* (GIFTS ON SEPARATION):

7.1 DEFINITION:

The word *mut`ah* literally means *tamattu`* which means "enjoyment". In the *sharī`ah* it means:

"that which is given by the *zawj* to the *zawjah* at *ṭalāq* or *firāq* (separation) on condition that she is not responsible for the *ṭalāq* or *firāq* (separation) like her *riddah* (apostasy) nor that it be given at the death of the *zawj*."[1]

Mut`ah of *ṭalāq* is derived from the *āyah* (Quranic verse):

"There is no blame on you if you divorce women before you touched them, nor appointed for them their dower (*ṣadāq*). But bestow on them a suitable gift: the rich according to his means and the poor according to his means, a gift of a reasonable amount is a duty on the doers of good."[2]

The *āyah* has the word *matti`u* (bestow!), which compels the act of giving a gift.

This *mut`ah* is thus a gift and is not to be confused with a *mut`ah nikāḥ* which is one of the forbidden forms of *ankiḥah* (marriages).

The *mut`ah* (gift) is given to the *zawjah* when they separate and end their *nikāḥ* before or after consummation according to the various rulings of the *fuqahā'*. There are three cases where *mut`ah* is received and they are as set out hereunder:

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[1] Lisān al `Arab Vol, op. cit. 6 p. 4128.
Āthār `Aqd al Zawāj, op. cit. p. 213.

[2] Al Qur'ān, Sūrah al Baqarah: 236.

- A *zawjah* that is divorced before consummation and allocation of her *ṣadāq* (dowry).
- A *zawjah* divorced after consummation of her *nikāḥ* and she received her *ṣadāq*.
- A *zawjah* divorced before consummation of her *nikāḥ* but after the allocation of her *ṣadāq*.

7.2 *MUT`AH* OF A WOMAN WHOSE *NIKĀḤ* IS ANNULLED:

In the case of a *zawjah* who cancels her *nikāḥ* to a man (i.e *faskh*), the *fuqahā'* differ on her *mut`ah* (gift):

Some of the *fuqahā'*, like ibn Ḥazm, rule no *mut`ah* whatever to her while others like the *Ḥanafis*, *Shāfi`is* and *Ḥanbalis* rule *mut`ah* due to her if her *nikāḥ* was ended by *faskh* (annulment) due an *`aib* (defect) in the *zawj* but no *mut`ah* if she is the cause of the *faskh* like her apostasy from Islām.[1]

The latter ruling is best as it is just and in agreement with the *sharī`ah* principles as when *faskh* is due to the *zawj's* fault or shortcoming, the rules of *ṭalāq* are applicable.

It is unfair to rule against the *zawjah* when her *zawj* has a shortcoming.

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[1] Āthār `Aqd al Zawāj op. cit. pp. 220 - 221.

7.3 THE VALUE OF THE *MUT`AH*:

The majority of the *fuqaha'* rule that *mut`ah* should comprise a fixed amount of clothing and money, basing their ruling on the practice of the *sahabah* (companions of the Prophet) and *tabi`un* (students of the Prophet's companions).

The minority ruling of the *fuqaha'*, namely, that of Malik, Ahmad and one of the rulings of al Shafi`i, rule that the allocation is left to the *qadi* as the allocation of former times is not the same as the allocation of later times.[1]

8. *AL `IDDAH* (PERIOD OF WAITING)

8.1 DEFINITION:

Literally the word *`iddah* comes from the Arabic word *`add* which means *ihsa'* which means "counting something". It also means "what a woman counts of the days in her *haid* (menstruation) and pure cycles.[2]

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[1] Athar `Aqd al Zawaj, op. cit. p. 222.

[2] Lisan al `Arab op. cit. Vol 4 p. 2832.
Qamus al Muhit op. cit. Vol 1 p. 324.

In the *shari`ah* it means "the necessary waiting of a woman whose *nikah* had been consummated for a fixed number of days when the *nikah* ends whether by *talaq* or *wafat* (death i.e of her spouse)."[1]

The senior *fuqaha'* more or less agree with this definition.[2]

`Iddah* is required by all major sources of the *shari`ah.

The *Qur'an* states:

"Divorced women shall wait (as regards their remarriage) for three menstrual cycles.."[3]

"And for those of your women as has passed the age of monthly courses, for them the prescribed period, if you have doubt (about their courses), is three months and for those who have no courses, is three months likewise, except in the case of the death of the husband.[4]

"And those of you who die and leave wives behind, they (the wives) shall wait (as regards their remarriage) for four months and ten days...."[5]

In the *sunnah*, the Prophet (S.A.W.S) ordered Fatimah bint Qais: "keep *`iddah* in the house of ibn Umm Maktum."[6] As for Ijma`, the Muslim nation, through their

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1 Athar `Aqd al Zawaj, op. cit. p. 268.
Al `Anqari A A: Al Rawd al Murbi` - Sharh Zad al Mustaqni`, Riyad, Maktabah al Riyad al Hadithah, undated, pp. 205 - 206.
Nail al Awtar, op. cit. Vol 6: 323.

2 Al Wilayah Wa al Wasaya Wa al Talaq, op. cit. pp. 206, 223, 231, 233 & 238.

3 Al Qur'an, Surah al Baqarah: 228.

4 Al Qur'an, Surah al Talaq: 4.

5 Al Qur'an, Surah al Baqarah: 234.

6 Mukhtasar Sahih Muslim, op. cit. p. 225.
Sunan al Nasa'i, op. cit Vol 6 p. 207.
Sunan al Tirmidhi, op. cit. Vol 2 p. 425.

mujtahidun (legists), have consensus, since the death of the Prophet (S.A.W.S), on the necessity of *`iddah* for the *mutallaqat* (divorceés) and *armalat* (widows).[1]

8.2 REASON FOR *`IDDAH*:

- to ensure that the *mutallaqah* or *armalah* is not pregnant so as not to disadvantage the unborn child or children and prejudice their rights.
- to give a period of grace for the parties to reconcile during the *`iddah* of *talaq raj`i* (revocable divorce) and thus save undesirable consequences and also to render *nikah* its place of honour in the social sphere of the Islamic order.
- to give the *armalah* (widow) time to mourn her loss and overcome her trauma before a remarriage.[2]

8.3 CASES OF *`IDDAH*:

There are five cases of *`iddah*, four of which are agreed upon by all the *fuqaha'* and one they dissent in.

Those agreed upon are the *`iddah* of *wafat* whether the *nikah* was consummated or not but provided that it was properly enacted. The *`iddah* of *talaq* due to *faskh* (annulment) or *talaq* after a *nikah* which had been consummated on condition that it

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[1] Athar `Aqd al Zawaj, op. cit. p. 270.
Fiqh al Sunnah, op. cit. Vol 2 p. 325.

[2] Shari`ah - The Islamic Law op. cit. p. 198.
Family Law in Islam, op. cit. p. 215.
Fiqh al Sunnah, op. cit. Vol 2: 325.

was properly enacted, `*iddah* of a woman who contracted a *fasid nikah* (invalid marriage) on condition that it was consummated and the `*iddah* of a woman of *nikah shubhah* - a doubtful marriage - (like a *nikah* in which a *shart* (condition) of the *shurut sihhah* (conditions of correctness) is not met, like *nikah* without witnesses.[1]

They differ on the `*iddah* of *talaq* or *faskh* of a *nikah sahih* (valid marriage) ended before consummation but after *khulwah sahihah*, some like al Shafi`i, Ahmad and ibn Hazm ruling no `*iddah* on her due to the *ayah* "....when you marry believing women and then divorce them before you touched them, no `*iddah* have you to count in respect of them."[2] Ibn `Abbas' *fatwa* rules likewise.[3]

Other *fuqaha'* like the Hanafis and the Malikis obligate an `*iddah* as there could have occurred consummation when they were alone. The *khulafa' rashidun* ruled, as narrated by Zararah bin Abi `Awfa, that "when the curtains are drawn and the door locked, *sadaq* (dowry) and `*iddah* become necessary."[4]

As for the starting time of the `*iddah,* most *fuqaha'* rule that the `*iddah* starts when either *wafat* or *talaq* occurs. If not known or if she was not informed of it and the

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1 Athar `Aqd al Zawaj, op. cit. p. 271.

2 Al Qur'an, Surah al Ahzab: 49.

3 Kifayah al Akhyar, op. cit. Vol 2 p. 127.
Minhaj al Talibin, op. cit. p. 115.
Al Muhalla, op. cit Vol 10 p. 256.
Al Rawd al Murbi`, op. cit. Vol 3 p. 296.

4 Al Hidayah, op. cit. Vol 2 pp. 26 - 27.
Bada'i, op. cit. Vol 3 p. 192.
Al Mughni, op. cit. Vol 7 pp. 451 - 452.

`*iddah* time expired, no `*iddah* is required.[1] Ibn Ḥazm differs, obligating `*iddah* when she hears about his *wafāt* or her *ṭalāq* from him irrespective of time lapse.[2]

Their differences are due to interpretation of Quranic verses and *fatāwā* (legal dispensations) of the *ṣaḥābah*.

8.4 KINDS OF *MU`TADDĀT* (WOMEN IN *`IDDAH)*:

They are the *mu`taddāt* of *ṭalāq, faskh* and *wafāt* (divorce, annulment and death, respectively).

The *mu`taddāt* of *ṭalāq* or *faskh* may be either women who still menstruate, the *mustaḥāḍah* (a woman with irregular menstruations), the menopausal women, non-menopausal women whose menstrual cycle stopped and the *mukhtala`ah* (woman divorced by *khul`* - annulment - procedure).

The basic rule is that they have three *aqrā'* (cycles) to observe. The *fuqahā'* differ what this *qur'* (sing. of *aqrā'*) is. Some like Ḥanafis and a ruling of Aḥmad rule it to be the actual *ḥaiḍ* (menstruation) while others like Mālik al Shāfi`i and others rule it to be the *tuhr* (non-menstrual) state. Their differences are due to interpretation of *Qur'ān* text[3], *ḥadīth* and *fatāwā*.[4]

There is further difference on the `*iddah* of the *mukhtala`ah*.

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1 Āthār `Aqd al Zawāj, op. cit. pp. 276 - 277.

2 Al Muḥallā, op.cit. Vol 10 p. 310.

3 Al Qur'ān, Sūrah al Ṭalāq: 1.

4 Fiqh al Sunnah, op. cit. Vol 2 p. 328.
Al Mughnī, op. cit. Vol 7 p. 453.
Al Iqna`, op. cit. Vol 2 p. 128.
Bidāyah al Mujtahid, op. cit. Vol 2 p. 88.

Some *fuqahā'* like ibn `Abbās, Abu Thawr, ibn Taimīyyah and others rule one *ḥaiḍah* (menstrual cycle) due to the Prophet (S.A.W.S) ruling so for the wife of Thābit bin Qais[1] while the others like Abū Ḥanīfah, Mālik, the Ẓāhirīyyah and others rule three *ḥiyaḍ* (menstrual cycles) as for the ordinary *mutallaqah* (divorcee), quoting rulings of ibn `Umar.[2]

Since these text mention no number, the ordinary ruling is applicable.[3]

There are wide divergent views of the *fuqahā'* on the remaining kinds of *mutallaqāt* mentioned which are very complicated and involved but all are agreed that the menopausal women have an *`iddah* of three months.[4]

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[1] Sunan Abī Dāwūd, op. cit. Vol 1 p. 74.

[2] Muwatta' Mālik, op. cit. Vol 2 p. 88.
Jāmi` al Usūl, op. cit. Vol 8 p. 104.
Subul al Salām, op. cit. Vol 3 p. 166.

[3] Āthār `Aqd al Zawāj, op. cit. pp. 293 - 294.
Al Muḥalla, op. cit. Vol 10 pp. 238 - 239.
Nail al Awtār, op. cit. Vol 6 p. 280.

[4] Āthār `Aqd al Zawāj, op. cit. p. 297.

8.4 `*IDDAH* OF THE *HAMIL* (PREGNANT WOMAN):

The *hamil* is the pregnant woman. There is consensus that she ends her `*iddah* at birth due to the *ayah*:

"...and those who are pregnant, their `*iddah* is until they deliver."[1] This is for the woman who is visibly pregnant.[2]

There are divergent views on aborting of an embryo or a foetus, some obligating `*iddah* while others do not and some go according to what is a discernible human form.[3] There is also a difference when the child carried by the *mutallaqah* (divorceé) is illegitimate. Some *fuqaha'* like Abu Hanifah and ibn Hazm consider her liable for the ordinary `*iddah* of the *hamil*[4] while al Shafi`i and the Hanbalis rule no `*iddah* for her due to the illegitimacy and thus no *nasab* (lineage) issue arises and a view of Malik rule `*iddah* of one *haidah* (one menstrual cycle).[5]

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1 Al Qur'an, Surah al Talaq: 4.

2 Nihayah al Muhtaj, op. cit Vol 7 p.134.
Al Muqni`, op. cit. p. 258.
Risalah al Qairawani, op. cit. p. 72.
Al Hidayah, op. cit. Vol 2 p. 28.
Al Muhalla, op. cit. Vol 10 p. 163.

3 Al Mughni, op. cit Vol 7 p. 476.
Kifayah al Akhbar, op. cit. Vol 2 p. 126.
Athar `Aqd al Zawaj, op. cit p. 304.

4 Fiqh Madhahib Arba`ah, op. cit. Vol 4 p. 519.
Athar `Aqd al Zawaj, op. cit. p. 305.

5 Fiqh Madhahib Arba`ah, op. cit. Vol 4 p. 523.
Al Muhalla, op. cit. Vol 10 p. 263.
Al Mughni, op. cit. Vol 7 p. 450.

8.5 THE *MU`TADDAH* OF *WAFAT*:

This is the woman in the period of waiting due to the death of her spouse. Such women might either be *ha'il* (non-pregnant) or *hamil* (pregnant).

There is consensus that the *ha'il* category observes an *`iddah* of four months and ten days[1] according to the *ayah* of *Qur'an*[2] and *hadith* text.[3] There is further consensus that if a *zawj* divorces his *zawjah talaq raj`i* and dies in that *`iddah,* she must stay out the *`iddah* of *wafat* of four and ten days, but only *`iddah* of *talaq* if it was *talaq ba'in* (irrevocable divorce).[4]

As for the *hamil* (pregnant woman) of this category, the *fuqaha'* differ as to what time span her *`iddah* is to take - *`iddah* of the *mutallaqat* (divorceé) or the *armalah* (widow).

One group of the *fuqaha'* like `Ali, ibn `Abbas and Sahnun of the Malikis rule she takes the one that is longest[5] of the two basing their ruling on joining the *ayatan* (two verses) on *`iddah* of *talaq* and *wafat*.[6]

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1 Al Hidayah, op. cit. Vol 2 p. 30.
Aqrab al Masalik, op. cit. p. 97.
Al Rawd al Murbi`, op. cit. Vol 3 p. 208.
Al Iqna`, op. cit Vol 2 p. 126.
Fiqh Madhahib Arba`ah, op. cit. Vol 4 p. 532.

2 Al Qur'an, Surah al Baqarah: 234.

3 Sahih al Bukhari, op. cit. Vol 7 p. 94.
Mukhtasar Sahih Muslim, op. cit. p. 225.

4 Fiqh al Sunan, op. cit. Vol 2 p. 331.
Athar `Aqd al Zawaj, op. cit. p. 307.

5 Rawa'i al Bayan, op. cit. Vol 2 p. 615.
Al Jami` li Ahkam al Qur'an op. cit. Vol 3 pp. 174 - 175.
Al Mughni, op. cit. Vol 7 p. 473.

6 Al Qur'an, Surah al Talaq: 4.
Al Qur'an, Surah al Baqarah: 234.

The second group of the *fuqahā',* amongst them Abū Ḥanīfah, Mālik, al Shāfi`ī and Aḥmad rule ending of the *`iddah* at birth of the child irrespective of duration after the *zawj's* death.

They take the *āyah* of *`iddah* of the *ḥāmil* (pregnant woman) as general to all women who are *ḥāmil* and in *`iddah.*

They also take the *ḥadīth* of Umm Salamah who informed that Subai`ah al Aslamiyyah was delivered half a month after the death of her *zawj* and the Prophet (S.A.W.S) consented that she marry again then.[1] Ibn `Umar gave a similar ruling in a similar case.

Al Bukhārī, Muslim and al Nasā'ī all transmit *ḥadīth* texts with a similar meaning.[2]

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[1] Muwaṭṭa' Mālik op. cit. Vol 2: 105.
Jāmi` al Uṣūl op. cit Vol 8: 117.

[2] Āthār `Aqd al Zawāj op. cit. pp. 310 - 311.
Al Jāmi` Li Aḥkām al Qur'ān op. cit. Vol 3: 175 - 167.
Rawā'i al Bayān op. cit. Vol 2: 615 - 616.
Nihāyah al Muḥtāj op. cit. Vol 7: 146.
Al Muḥallā op. cit. Vol 10: 263 - 264.

Chapter 5

THE LAWS OF *AL FASKH* (ANNULMENT) OF MARRIAGE IN ISLĀM.

1. DEFINITION:

Faskh literally means "cancellation".[1]

Faskh al `aqd* means " abrogation or cancellation or annulment of an *`aqd al nikāḥ (marriage contract)". This *faskh* (annulment), in *nikāḥ*, is due to a defect or defects in the *`aqd al nikāḥ* (marriage contract) or an emergency which occurred in the *nikāḥ* situation which renders the continuity of *nikāḥ* impossible. Thus *faskh* ends the bond of *nikāḥ* between parties.[2]

Faskh has basically the same final result as *ṭalāq* (divorce) in that the marriage bond is ended by it.

It is different from *ṭalāq* in that it is invariably done judicially through the *qāḍī* (judge) and the applicant is usually the *zawjah* while *ṭalāq* is instituted by the *zawj* only.

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[1] Qāmūs al Muḥīṭ, op. cit. Vol 1 p. 276.

[2] Fiqh al Sunnah, op. cit. Vol 2 p. 314.

2. THE LAWS OF *FASKH*

- The *fuqahā'* have the differing rulings as to what constitutes the right of *faskh* of the `*aqd al nikāḥ* if an `*aib* (defect) or `*uyūb (defects)* are found in the *zawj* or *zawjah* after the contracting of the said `*aqd*.
- All the *fuqahā'* agree that insanity, leprosy, mutilations, absence of genitalia or part of it, notably testicles or vaginal passage, malformed or fused excretory and genitalia passages warrants *faskh*.
- *Mālikis* rule bad body odours and secretions as an `*uyūb* while some *fuqahā'* rule impotency but not sterility, bad breadth or lesions from pustules as an `*aib* as does the *Shāfi`is*.
- The *Ḥanbalis* differ amongst themselves in `*uyūb*, but agree that changing of skin pigmentation is reason for *faskh*, while Abū Bakr and Abū Ḥafs rule that even haemorrhoids, fistulas, tumours, pus ulcers and secretions from the genitalia warrant *faskh* as these repel people ordinarily.
- Sterility is reason for *faskh* by them due to `Umar's ruling to a sterile man, ibn Sandar, who married a woman without informing her that he inform her of his condition and to give her a choice of *faskh*.
- The *Ḥākim* (Muslim ruler) is the one who will give ruling in a matter of *faskh* by reason of `*aib*.[1]

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[1] Fiqh Madhāhib Arba`ah, op. cit. Vol 4 pp. 180 - 186.
Al Hidāyah, op. cit. Vol 2 pp. 26 - 27.
Kifāyah al Akhbār, op. cit. Vol 2 pp. 59 - 60
Nihāyah al Muḥtāj, op. cit. Vol 6 pp. 314 - 315
Al Mughni, op. cit. Vol 6 pp. 651 - 654.
Fatawā ibn Taimīyyah, op. cit. Vol 4 pp. 128 - 131.

- The *Zahiriyyah* is singularly distinguished in that they do not allow an *`aib* found after *nikah* as reason for *faskh* stating that the parties had to make sure of that before the *nikah*.[1]

It appears that for the sake of justice and fairness, *`uyub* has to be a cause for right of *faskh*.

How far one is to go is to be measured by what is just, fair and correct. Thus the ruling of some of the *fuqaha'* refusing the right to *faskh* for *`uyub*, by varying degrees, is not in line with the spirit of the *shari`ah*.

There are other *fuqaha'*, sometimes of their own *madhhab*, who hold views opposite than their fellow colleagues which shows the difference in application.

There are other cases wherein the *fuqaha'* allow *faskh*.

The *Hanafis* and *Malikis* allow *faskh* of *nikah* for the following cases:

- *Fasad* (invalidity) of the *`aqd al nikah* (i.e the marriage contract lacks a condition or correctness) like enacting *nikah* without *shuhud* (witnesses) or *nikah* for a fixed period or *nikah* with a *mu`taddah* (a woman in a period of waiting either of divorce or death of her husband).
- When the *zawj* or *zawjah* brings forth an act which brings forth *hurmah* of *musaharah* (prohibition by affinity), like kissing the daughter of his *zawjah* (a daughter from another man), with sexual desire or the *zawjah* doing the same to the same grade of a son of his *zawjah*. This act creates the state of *musaharah* (affinity) between such *zawj* and *zawjah* and thus *faskh* (annulment) of the *nikah* is necessary. The *Shafi`is* differ and rule no *faskh* necessary as no *hurmah* of *musaharah* had occurred according to them.

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[1] Bidayah al Mujtahid, op. cit. Vol 2 pp. 50.

- When one of the married disbelievers convert to Islām and the other one not. If it is the *zawjah* who converts, she will be completely divorced from him after three *ḥiyaḍ*, if she menstruates, or three months if she does not menstruate.
- If a man marries any of his foster family of the *muḥarramāt mu'abbadah* (permanently prohibited) category, like his foster mother, foster sister etc. the *nikāḥ* is immediately ended due to the *taḥrīm* (prohibited) degree created by fostering. The same applies to a woman in the male line of the foster relationship as that for a man.
- *Riddah* (apostasy) of one of the spouses necessitates *faskh* (annulment) of the *nikāḥ*.
- *The Shāfi`īs* also allow *faskh* for inability of the *zawj* to provide *nafaqah* (maintenance) or sufficient *nafaqah* and rule the separation by *li`ān* (separation by mutual imprecation) as *faskh* also. Besides this, they share all the other views of the *Ḥanafis* and *Mālikis*. *Ḥanbalis* rule *faskh* or *taṭlīq* (judicial divorce) necessary when four months had passed of *Īlā'* and no retraction was made by the *zawj*. The *Ḥākim* (Muslim ruler) then enact either *faskh* (annulment) or *taṭlīq* (judicial divorce).

They have, otherwise, the same views as the *Ḥanafis* and *Mālikis*.[1]

1 Fiqh Madhāhib Arba`ah op. cit. Vol 4 pp. 424 - 427.

Chapter 6

ADMINISTRATION AND IMPLEMENTATION OF THE ISLAMIC LAW OF MARRIAGE AND DIVORCE.

In this chapter we will deal with:

- A short history of the position of Muslim marriages and divorces in South Africa, and,
- An analysis of the present position of these issues in South Africa.
- Recommendations for the implementation and administration of Muslim marriages and divorces.

The basic difference between the *sharī`ah* and South African law is that the former is a divine law, both religious and temporal. Violating divine law is tantamount to committing both crime and sin, while in the case of the latter, only a crime or an offence, in a worldly sense, is committed.

Thus in the *sharī`ah* the consequences of a wrong act are both sinful and criminal - sinful in that the Supreme Sovereign, *Allāh*, had been disobeyed and criminal in that the society's code had been broken.

In this light thus, the *sharī`ah* is eternal in its value system and law content and does not accept change while secularists systems have varying degrees of separation between State and Church, due to historical happenings. No such separation ever occurred in Islām and thus there is to be no separation between State and Religion. The lack of understanding and appreciation of this salient fact is the major cause why Muslims all over the world and their Islamic system are not properly understood.

To understand the position of Muslims and their law in South Africa, it is necessary that we understand, very briefly, the background of law here.

6.1 BRIEF HISTORY OF ROMAN DUTCH LAW:

South Africa is one of the few countries in the world that has the Roman Dutch system of law. Roman Dutch law came to South Africa via the Cape and through Van Riebeeck.[1] From the Cape, Roman Dutch law found its way to the Transvaal, Orange Free State and Natal. When the British took over there were some changes as the British changed the government, administration and judicial machinery to conform to British practice.

The English law of Evidence was adopted in its entirety.[2]

The Charters of Justice replaced the old *Raad van Justitie* with the Supreme Court. A Master of the Supreme Court was enacted to replace the *Weeskamer* and the *Desolate Boedelkamer*. Important changes were made to Private law like reducing the age of majority from 25 years to 21 years.[3]

[1] The South African Legal System And Its Background op. cit. p. 571.

[2] Ibid op. cit. pp. 575 - 576.

[3] Ibid op. cit p. 577.

6.2 ROMAN DUTCH LAW APPLICATION IN SOUTH AFRICA TODAY:

South African courts rely mostly on institutional writers in elucidating Roman Dutch law while little use is made of the collection of law opinions that came down.[1] Views of the writers of Holland are preferred.[2]

Prevailing opinion holds that the courts must apply Justinian's law as understood and interpreted by Roman Dutch lawyers of the 18th century.[3]

The Supreme Courts appear to be less inclined than the Appeal Division to alter the ambit of an established rule.[4]

Hahlo and Kahn give this view of the situation:

"...it still remains true that effectively a reasonable adaptation to the ever-changing needs of a society in constant movement is a task the courts cannot shirk.... With the greatest humility, one cannot help feeling that in their endeavour to avoid pitfalls of policy-making, our courts have occasionally erred on the other side by dealing with cases that came before them as if they were abstract exercises in history, logic or semantics."[5]

Although the two authors possibly quoted the above for the Roman Dutch law as such, it should ring true for the Muslim community whose personal law cases were, at times, decided by the Court in South Africa.

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[1] The South African Legal System And Its Background op. cit. p. 579.

[2] Ibid op. cit p. 580.

[3] Ibid op. cit. p. 581.

[4] Ibid op. cit. p. 584.

[5] Ibid op. cit. pp. 595 - 596.

The courts feared becoming a "law-making body", leaving that to the legislature. The latter had been less than understanding and generous in this regard either as far as the Muslims' personal law is concerned as will be shown later on.

One may wonder whether the legal training and perhaps the religious inclinations of the officers of the courts did not compound their fear for becoming "lawmakers" and hence their abstract and academic approach to especially Muslim personal law matters and its validity, showing no due regard for any form of adaptation nor even, it would appear, mercy.

In short, the courts found it to be part of its duty to enforce the laws. It was not innovative herein by its own choice.

This will become clear when some cases dealing with and having relevance to Islamic Personal Law is dealt with later.

6.3 SOUTH AFRICAN LAW RELATING TO CUSTOMARY UNIONS:

The basic rule is that a marriage, not conforming to the requirements of the South Africa law, is void and has no legal standing nor consequences. This has been shown by both legislative as well as judiciary instances and decisions.

These two issues will now be dealt with to see how they affected Muslims in their personal law matters.

6.3.1 THE LEGISLATIVE POSITION:

A classical case of the standing of a Muslim marriage, contracted according to *sharī`ah*, is set out in the case Seedat vs The Master (Natal): In this case[1] the presiding judge said:

"... and even if such a union was entered into abroad and is recognised as a valid marriage in terms of the *lex loci celebrationis* or the *lex domicilii*, it will not be recognised as valid in South Africa."

This means that the children born from such a union are illegitimate, the laws of intestate succession would not apply and the mutual duty of support flowing from a marriage and other consequences would not apply. A marriage thus solemnised only in terms of the *sharī`ah* is void in terms of South African law.

This is not applicable *in toto* for there are certain statutory exceptions, namely:

- a part of the Insolvency Act of 1936 reads:[2]

  "in this section the word "spouse" means not only a wife or husband in a legal sense, but also a wife or husband by virtue of a marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another." This clause even recognises an immoral union, which is against strict Christian principles, for purposes of the mentioned Act.

- a part of the Income Tax Act of 1962 reads:[3]

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1 Seedat's Executors vs The Master (Natal) 1917 AD.

2 Section 21 (13) of the Insolvency Act (Act 24) of 1936.

3 Section 1 of Act 58 (The Income Tax Act) of 1962.

"..."married" includes joined together in union recognised as a marriage in accordance with any law or custom and "husband" and "wife" shall be construed accordingly."

This Act, of course, deals with monetary matters.

- One should also note that the South African law has equated a black customary union with a legal marriage for certain specific purposes in a number of general statutes. This was not the case with other customary unions or "potential polygamous" customary unions of other ethnic or religious groups.

Perhaps herein is the adamant refusal to accord any proper and meaningful recognition to marriages contracted according to the *sharī`ah*.

- Act 76 of 1963:[1] gives the right of a partner to a customary union to claim damages from a person unlawfully causing death of the other partner.

  This is recognition of consequences of a customary union in claiming compensation.

- Part of Act 45 of 1988 reads:[2]

  "...Provided further that it shall not be lawful for any court to declare that the custom of *lobola* or *bogadi* or other similar custom is repugnant to such principles."

  This clause gives the court the right to take judicial notice of customary law, provided that the particular rule of customary law is not to be applied where it is opposed to the principles of public policy or natural justice.

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1 Section 31 of Act 76 (The Black laws Amendment Act) of 1973.

2 Clause 1 of Act 45 (Evidence Amendment Act) of 1988.

Nevertheless, the custom of *lobola* or *bogadi* or other similar customs are not to be regarded as repugnant to these principles.

- The Child Care Act of 1983, at clause 27 reads:

  "In the application of the provision of this Chapter in respect of a person who is Black, any "customary union", as defined in section 35 of the Black Administration Act, 1927, (Act 38 of 1927), shall be deemed to be a marriage between the persons concerned, and any reference to a husband, wife, widower, widow, divorced person, married person or spouse shall be construed accordingly."[1]

  This clause recognises the customary union of black persons for purposes of adoption.

- Further, recognition is granted for the widow of a customary black union in The Workmen's Compensation Act where clause 4 (f)(3) reads:

  "For purposes of this Act "widow" includes a woman who was a participant in a customary union according to the indigenous law and custom, where neither the man nor the woman was a party to a subsisting marriage."[2]

  Here a widow of a customary black union is considered a dependant in terms of Act 30 of 1941.

  There is thus comprehensive recognition, in certain instances, of customary black unions and it is obvious that the South African Legislature did not apply this principle ethically, morally and uniformly to its subjects.

  It chose to be discriminatory herein.

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[1] Clause 27 of Chapter 4 of the Child Care Act (Act 74) of 1983.

[2] Clause 4 (f)(3) of The Workmen's Compensation Act (Act 30) of 1941.

6.3.2 THE POSITION OF A MUSLIM MARRIAGE PRESENTLY:

As pointed out in earlier in this thesis, Islām had a difficult beginning in South Africa. It was prohibited by law (*Placaat* 1642) to practice Islām publicly, like having a mosque as well its missionary activities being prohibited.[1]
The strong Christian leanings of the rulers and successive Colonial Powers ensured a difficult position for Islām and its adherents.
Amongst these was the non-recognition of the Islamic Personal Law, which is still the case to this day. Muslim marriages were thus only solemnised in terms of the *sharī`ah* and was, thus, and is still invalid at common law.
It is also invalid due to the fact that even if it is a monogamous Muslim marriage, monogamy being one of the tenets of the South African law of marriage, such a Muslim marriage has "the potential of becoming polygamous" according to the interpreters of the law here.
This very unfair and unjust principle has been upheld in numerous court cases in South Africa, due to the explicit absence of South African statutory law in that sphere even till today.
Statutorily, a Muslim marriage, solemnised as per the *sharī`ah* requirements, is void in terms of the South African Marriage Act.[2]
One may thus deduce that both the Legislature as well as the Judiciary are partners in this field and none has to this day shown any worthwhile practical innovative action herein.

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[1] Mosques of Bo-Kaap op. cit. Foreword p. xv.

[2] Marriage Act (Act 25) of 1961.

6.3.3 THE CASE LAW POSITION OF MUSLIM MARRIAGES:

The celebrated Seedat case, mentioned earlier, was decided in the Appeal Division of the South African Supreme Court and was the proverbial landmark decision in Muslim marriages in that it set down the basic fundamental principle that due to the "potential polygamy" of a Muslim marriage, all unions entered into in terms of the *shari`ah* were to be regarded as invalid even if they were *de facto* monogamous. One may even regard the court's decision as an entrenched principle as later cases proved.

6.3.3.1 Case 1:

In the case Ismail vs Ismail[1] in the Appeal Division of the Supreme Court, the issues of a Muslim marriage had been dealt with extensively.

The question the Court had to answer in the above mentioned case was whether the customary proprietary consequences of a Muslim marriage and its termination were enforceable by law.

The decision reached by the Court was that the solemnisation, payment of dowry (*ṣadāq*), the giving of engagement and wedding gifts, the duty to pay maintenance, the manner of termination and annulment of a Muslim marriage, the proprietary consequences of the marriage and the adjudication by the Muslim religious leader of proprietary disputes, were all governed by custom.

The *Imām* or person marrying the couple need not be a marriage officer as per terms of the Marriage Act (Act 25) of 1961.

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[1] Ismail vs Ismail 1983 (1) SA 1006 (AD).

There is also no participation of the State in this kind of marriage.

The case, broadly speaking, was as follows:

A man and a woman were married as per the Islamic law (*sharī`ah*) only by a *Mawlānā* (title of a Muslim who studied Islām in India or Pakistan).

The wife gave the gift of jewellery her husband gave her on marriage, to the latter for safekeeping.

Dowry (*ṣadāq*) was deferred until death of the husband or at the termination or annulment of the marriage.

About 4 years after the marriage, the husband divorced his wife irrevocably. The husband failed to maintain his wife during the days of the *`iddah* of *ṭalāq* (period of waiting of divorce).

The *Mawlānā* then ruled for the payment of maintenance, the return of the gold jewellery and payment of the deferred *ṣadāq* (dowry).

The divorced wife, not receiving satisfactory treatment from her erstwhile spouse, took the matter to the Supreme Court and asked the Court to find that the proprietary consequences of her marriage to the defendant, her erstwhile spouse, ought to be recognised by South African law.

The basic finding of the Appeal Court was that "to entertain the plaintiff's claim would tantamount to recognising the illegal union entered into by the parties and that would be to fly in the face of all the authority in this country..."

In its (the Appeal Court's) assessment of the South African law herein, the said Court found:

- Potential polygamy is tantamount to polygamy. Any agreement (tacit or otherwise) between the parties cannot alter this.

- The said marriage was not solemnised as per the requirements of Section 2, 3 and 11 of the Marriage Act, Act 25 of 1961, nor was there compliance with Section 29 (2) of the said Act requiring the presence of both parties.
- The customs and contracts between the parties are closely and intimately connected with the conjugal union entered into in terms of the Islamic law (the *sharī`ah*).
- Polygamous unions have never been recognised in South African courts.

It is interesting to note the arguments that the Counsel for the plaintiff advanced in favour of recognising the proprietary consequences of a Muslim union.

These were as follows:

- Counsel argued that it is possible in law for an *Imām* to be a marriage officer in terms of the Marriage Act (Act 25) of 1961. This section reads:

  "The Minister and any officer in the public service authorised thereto by him may designate any minister of religion...... as a marriage officer for the purpose of solemnising a marriage according to the Christian, Jewish and Mohammedan rites..."[1]

  However, the Court ruled that in this case the marriage must be monogamous and shall have to comply with all the formalities as in Act 25 of 1961.

  In other words, the consequences of such a marriage is South African law and not Islamic law.
- Plaintiff's Counsel then also relied on another section of the Marriage Act of 1961 which states:

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[1] Section 3 (1) of the Marriage Act, Act 25 of 1961.

"Nothing in sub-section (2) contained shall apply to any marriage ceremony solemnised in accordance with the rites or formalities of any religion, if such ceremony does not purport to effect a valid marriage."[1]

The said Counsel claimed that this section recognises polygamous unions and the proprietary consequences thereof.

The Court rejected this argument and interpretation of the said clause by stating that just because such a marriage (not purporting to be a valid marriage) can be solemnised by a marriage officer and then such solemnisation would not be an offence in terms of Section 11 (2) of the Marriage Act of 1961, does not mean that polygamous unions will be recognised in South African law.

- Counsel then argued that English law recognises polygamous unions solemnised abroad and that this is a relevant factor in this case.

  The Court again rejected this line of argument on the grounds that the case under discussion deals with a polygamous marriage solemnised in South Africa.

- Counsel referred to Rhodesian cases namely:

  Mehta vs Acting Master, High Court[2] and Kader vs Kader[3].

  In both these cases, the Court was asked whether a foreign polygamous marriage should be recognised as valid for a particular purpose. The Court, in Mehta's case found that the principle laid down in the Seedat case,

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1 Section 11 (3) of the Marriage Act (Act 25) of 1961.

2 Mehta vs Acting Master, High Court, 1958 (4) SA 252 FC.

3 Kader vs Kader, 1972 (3) SA 203 (RA).

namely, that the Court will under no circumstances recognise a polygamous marriage, should no longer be followed.

Justice C J Tredgold at 253 D-G said:

"There are good and sufficient reasons for not recognising such marriages when the consequences of recognition would be to disturb the incidents of our own monogamous system.

But where it is merely a question of recognising the marriage for the purpose of succession to property, no such complication arises."

This decision was also applied in the case Kader vs Kader.

The Court side-stepped this whole issue by claiming that it is not necessary to decide this point as the case of Ismail vs Ismail was of a marriage solemnised in South Africa and not abroad which distinguishes it from the mentioned Rhodesian cases.

Counsel for the plaintiff now moved to the extension of the recognition of polygamous unions by the Legislature of South Africa.

In the said case (i.e Ismail vs Ismail), the Court found that save for "Black" customary unions, there is no indication in any statutory provisions where the Legislature either expressedly or by implication approves of polygamous unions.

It further stated that the existence of statutes in which polygamous unions are recognised is no indication of the tolerance of polygamy as part of the general South African legal system.

The Court, in the end, gave its landmark judgment:

- Muslim marriages solemnised only in terms of Islamic law (*sharī`ah*) are void on grounds of public policy.
- The Court would refuse to give effect to the consequences of polygamous unions contracted in South Africa, statutory exceptions part.
- The Court also viewed that due to the trend in favour of the recognition of complete equality between marriage partners, the recognition of polygamous unions solemnised under the tenets of the Muslims Faith may be regarded as a retrogressive step particularly in respect of customs relating to the termination of such unions.
- The Court also found that such polygamous unions are not contrary to public policy in the sense that they are "immoral", but rather that they are contrary to "expected customs and usages" which are regarded as morally binding upon all members of our society.
- The Court thus rejected the claims of the plaintiff for dowry (*sadaq*) and maintenance, but ruled that contract of deposit was enacted when the plaintiff gave the jewellery to the defendant for safekeeping.

The Court thus refused to accept that it will rule in the jewellery matter from an Islamic law point of view.

Besides this case, other cases with certain aspects of Islamic Personal Law were pronounced upon.

These are:

- Bam vs Bhabha:[1]

  This case decided in the Appeal Court, concerned the custody of minor children and the decision reached was based on the principle that a Muslim marriage is invalid in law.

  The Court, thus, basically, ruled that there is no legally binding consequences to a Muslim marriage.

  It should be noted that the majority of the Court found it unnecessary to decide whether there had been a putative marriage between the parties, for, had there been such a putative marriage, the children born from that union would have been legitimate.

- Davids vs The Master & Others:[2]

  In this case the Court was asked whether the word "spouse" in Section 49 (1) of Act 66 of 1965[3], includes a woman married in terms of the Islamic law. The Court followed the decision of Seedat's case.[4]

- The State vs Johardien:[5]

  In this case in the Cape Supreme Court had to pronounce whether a woman married by Muslim rites could enforce privilege as in section 198 of

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[1] Bam vs Bhabha 1947 (4) 798 (AD).

[2] Davids vs The Master & Others 1983 (1) 458 (C).

[3] Administration of Estates Act, Act 66 of 1965.

[4] Seedat's Executors vs The Master (Natal) 1917 AD 302.

[5] The State vs Johardien 1990 (1) SA 1026 (C).

the Act 51 of 1977[1]. This section deals with the privilege of spouses in respect of marital communications in criminal proceedings.

The wife of the accused, so married to him only as per Muslim rites, wished to avail herself to the privilege as in the mentioned Act.

The Court found that although a *de facto* monogamous marriage was found, the priest who married them was not a marriage officer in terms of the Marriage Act.[2]

Presiding judge AJ Farlam in the Cape Provincial Division of the Supreme Court ruled:

"that if a wife is not *de jure*, the wife or husband of the accused cannot claim privilege under section 198 (1) of the mentioned Act."

From the two main legislative institutions in South Africa which had their hands in and on Muslim marriages and its consequences, it is clear that their attitude is, at the least, an unpalatable indifference, with the case of the Judiciary, a marked opposition to anything that the Roman Dutch law could not tolerate nor accept.

The legacy of this country's legal system and its origin, philosophy and civilizational milieu, at most times, clash head-on with the Islamic system.

There is also an apparent discrimination in the law in that it recognised "Black" customary unions, at certain times, as valid marriages, but refused this privilege to others, like Muslims, whose marriages are monogamous, in most cases.

The Judiciary exhibited, at times, a marked ignorance of the real *sharī`ah*.

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[1] The Criminal Procedure Act, Act 51 of 1977.

[2] The Marriage Act, Act 25, of 1961.

The rule that, even if a Muslim marriage is monogamous, it is "potentially polygamous" and as such is equated to a "polygamous union" is not only an absurd kind of reasoning, but also unjust and unfair.

The Courts also stated that recognising "polygamous" unions would be retrogressive. It made this statement as to its view on the ending of Muslim marriages by divorce. This statement of the Court is breathtaking for it obviously did not make the effort to ascertain factually from duly and properly qualified Muslim jurists and other sources as to what the real position in this matter was.

It would appear that the Court did not know that wives can initiate the end of the marriage with procedures of various forms and for reasons which the most advanced Western countries to this day do not accept.

Furthermore, for the Court to assert that "polygamous" unions are against public policy is ludicrous.

The level of immorality in society, the infidelity of persons in marriage, which are commonly reported in the media from time to time, are known facts.

Public policy might be rather "what is expected" and not "what it really is" at a given time.

One can nearly read some of the Frankish era's philosophy of marriage in some reasoning of the Courts.

The Courts here have failed to understand its function in a plural multi-cultural and multi-religious society and in the end have ended up ruling uncompromisingly and semantically in its judgments.

It had, by its own choice, failed to be innovative and above all, it failed to be the protector of a minority and its human rights.

That is a serious judicial failure.

This matter was so necessary in an era when the Legislature was not in the mood to do anything in this regard.

The Courts failed to hear the voice of the despairing and the only message it could give was a strict judicial palliative that the law cannot condone Islamic Personal Law consequences.

That is a very sad indictment indeed.

To further rule that even any agreement, tacit or otherwise, cannot alter the position of the standing of a Muslim marriage, is calculatedly improper.

If the vast majority of Muslim marriages are polygamous, that label might have stuck. But that is not the case and this is common knowledge.

6.3.4 REPRESENTATIONS FOR RECOGNITION OF ISLAMIC PERSONAL LAW IN SOUTH AFRICA:

Efforts had been made to have the Legislature recognise Islamic Personal Law, as the Courts were persistent in refusing any form of recognition.

Law in South Africa is either by statute through the Legislature or by case law through Court precedent. Besides these two instances, no avenue of legal enforcement can be effected no matter how it is done or executed.

This was and still is the reality of the situation, which some Muslims do not seem to understand.

There had been several petitions to the South African Government on the recognition of Islamic Personal Law applicable to all Muslims in South Africa, amongst these were the attempts of The Institute of Islamic Shariah Studies in Cape Town whose stand is

that it is a human right and Mr P. Poovalingham, Member of Parliament. Likewise several religious organisations as well as individual Muslims approached the South African Law Commission (SALC) in this regard like The Institute of Islamic Shariah Studies, Waterval Islamic Institute, Sayed & Lockhat (attorneys) and Professors S S Nadvi, S H Haq Nadvi the *Jamiʿyāt al ʿUlamā'* of both Natal and Transvaal and others.[1]

6.3.5 THE PRESENT SYSTEM OF ISLAMIC PERSONAL LAW OPERATION IN SOUTH AFRICA:

Muslim women experience a serious difficulty when they marry according to the *sharīʿah* (Islamic law) as well as entering into a civil marriage.

As soon as a civil marriage is entered into, the consequences of that marriage is automatically South African law as has been clearly set out by the Appeal Court in South Africa in the case Ismail vs Ismail. Many Muslims do not know this.

She cannot avail herself to Islamic law privileges and rights in this case.

A serious conflict occurs when the husband institutes a *ṭalāq* (Muslim divorce), which the courts will not accept. Should he enter into a subsequent Muslim marriage, he can be accused of sexual misconduct in marriage as his first marriage is still valid in law. On the other hand, if the wife institutes and obtains a civil divorce, such a divorce may not be recognised in the *sharīʿah* as valid and should such a woman remarry, serious moral problems arise from a *sharīʿah* point of view.

[1] South African Law Commission: Note and Appendages Pretoria, Ref: 7/2/1/59 dated 07/07/1993.

The issue is further compounded when a court grants a civil divorce and the spouse refuse to give the required *ṭalāq* (divorce).

In an Islamic State, the State administers the Islamic Personal Law, but in Non-Muslim States like South Africa, the Islamic Personal Law should be recognised legally and apparatus created for its functioning which is not repugnant to the *sharī`ah*.

In the *sharī`ah* there is no restriction as to who may engage in matters of *sharī`ah*, whether *fatwā* (giving legal opinion) or application of the *sharī`ah* save that they should be Muslims persons who are duly qualified in it. This applies also to Islamic Personal Law matters.

Universal registration of Muslim marriages, divorces and related matters are unheard of. There is, presently, no record book either of a provincial or national scale.

It was in the mid 1940's when some form of mosque *Imāms* in the Western Cape, or rather the Cape Peninsula, grouped themselves together into some form of a body.

Thus the Muslim Judicial Council was formed in Cape Town, primarily to solve doctrinal disputes between *Ḥanafī* and *Shāfi`ī* viewpoints.[1]

The other provinces established their *`Ulamā'* Councils namely the *Jami`yāt al `Ulamā'* of Transvaal and of Natal in 1923 and 1950 respectively.[2]

All three mentioned Councils deal with Islamic Personal Law matters.

Organisations which are also dealing with Islamic Personal Law matters are, amongst others, The Institute of Islamic Shariah Studies, The Majlis al Ashūra al Islāmī and the Islamic Council of South Africa (ICSA).

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[1] Mosques of Bo-Kaap, op. cit. p. 56.

[2] History of Muslims in South Africa, op. cit. pp. 56 & 70.

Some private individuals, who are not mosque *a'immah* (pl. of *Imām)*, or who were mosque *a'immah* before, also deal with Islamic Personal Law matters, but they are in a small minority. There are also *`ulamā'* who do not belong to any organisation or are not *a'immah* of mosques who also marry off Muslims and see to Islamic Personal Law consequences.

None of all the bodies mentioned has any formal recognition or is considered to represent lawfully any section of the Muslim community by law.

Certain Muslim social organisations also deal with Islamic Personal Law consequences, like the social consequences of divorce etc. Amongst them being The Muslim Assembly and The Islamic Social and Welfare Association (ISWA), both in Cape Town.

The issuing of Muslim marriage certificates were unknown in South Africa till the 1950's. Prior to this the presentees at the marriage ceremony were the witnesses. Divorce certificates were also unknown until recently.

From the above system of administration, theoretically speaking, a man may marry an unspecified number of wives at any time and no one will know. This shows the most untenable present position of this matter.

Further, marriage and related matters are dealt with by most of those working with it, in most cases, on a sectarian basis and rarely is departure made from this practice. This is in stark and glaring contradiction to the practice in most Muslim majority countries and sanctioned by their senior *`ulamā'* nowadays and the practice of the *fuqahā'* of the *salaf* (early Muslim jurists) in former days, when rigidly and sectarianism were unknown.

6.3.6 PROBLEMS EXPERIENCED BY MUSLIMS AS A RESULT OF NON RECOGNITION OF ISLAMIC PERSONAL LAW:

The basic problem of Muslim marriages and resultant consequences is that it is not legal in the eyes of South African law and thus have no lawful consequences. The married Muslim man and woman, so married only according to the *sharī`ah*, are just "living together" and thus all their children from that marriage are illegitimate in the eyes of South African law. Their legitimate father, by the *sharī`ah,* is not their lawful father either in terms of South African law.

This is utterly repugnant to Muslims.

There are further problems, which may be summarised as follows:

- Muslim religious experts, in general, are not marriage officers in terms of the Marriage Act of 1961 and thus, in terms of current South African law, cannot enact a lawful marriage. Those who can do so, conduct a Muslim marriage ceremony only as the consequences of such a marriage is South African law.

  Some Muslim marriage officers might not even be aware of this. They cannot thus effect a polygamous union.

- The issue of *wilāyah* (guardianship) of Muslim fathers, married only in terms of *sharī`ah*, over their minor children, generally, is denied by South African law and enforced by the *sharī`ah* thus causing a serious conflict of conscience.

  The issue of *wilāyah* in *nikāḥ* (marriage) is also radically affected by South African law.

This is anathema to a Muslim destroying fatherly rights and privilege in the Islamic setup.

In the *sharī`ah*, the *zawj* (husband) is head of the family and must take ultimate responsibility for all its members and their maintenance.

All those under his care are to obey him in matters which are right and in accordance with the *sharī`ah*.[1] He is answerable for it on the Last Day.

- Muslim women married only according to *sharī`ah* cannot resort to claim maintenance and support from their husbands by such *sharī`ah ankiḥah* (marriages) as lawfully wedded wives. This is a denial of their rights and privileges.
- Divorced *zawjāt* (wives) have to stay out an *`iddah* and some of them receive *nafaqah* (maintenance) of various forms according to the kind of *ṭalāq* (divorce) executed.

They may also not marry during their *`iddah*, while a man who divorced his wife and wants to marry her sister cannot do so until his first wife's *`iddah* is complete. The duration of this for of *`iddah* had been dealt with in detail in chapter 4.

`Iddah of *wafāt* (death) is necessary for all *armalāt* (widows), during which a different pattern of *nafaqah* is applied and during which they may also not contract a *nikāḥ* with another man.

There is no way this can be administered properly in the light of non-recognition of the Islamic Personal Law.

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[1] Sharī`ah - The Islamic Law, op. cit. p. 129.

- At death, if the parties are still married, they inherit from one another in fixed proportions, along with their other *warathah* (heirs). If no Will is found, then the spouses cannot inherit from one another in terms of current South African law, nor can the children inherit from their Muslim father.

  This is denying the right of inheritance. It further complicates the issue in that, in terms of South African law, persons who are not to inherit in terms of *sharī`ah* are made heirs and if such heirs do not wish to make a voluntary redistribution to comply with the *sharī`ah's* requirements, innocent persons suffer, quite possibly become destitute, which is the antithesis of the *sharī`ah's* aims in this matter.
- There is no administrative authority and power to effect consequences of *nikāḥ* (marriage), like forcing an unwilling *zawj* whose *nikāḥ* had been annulled, to leave the common home. There are endless problems in that field.
- The *nasab* (lineage) of children and thus the sphere of *nikāḥ* is seriously compromised by the non-recognition of their legitimate Muslim fathers according to the *sharī`ah*.
- There is no way of enforcing who may and who may not work or partake in application and functioning of the Islamic Personal Law.

  This allows for unscrupulous and unqualified persons to carry out unscrupulous and perhaps even unlawful acts forbidden according to the regulations of the *sharī`ah*.

- Uniformity of any kind in the application of the Islamic Personal Law is impossible due to the present position of Islamic Personal Law in South Africa.
- There is no uniform and reliable registration of all the aspects of the Islamic Personal Law. Thus no one in the other provinces will know who is married and who is not.

  There are no known births registers of any kind for Muslims anywhere in South Africa.

  This is highly improper as the rights of children are not properly looked after as required in the *sharī`ah*.
- The pattern of *nafaqah* (maintenance) is fundamentally different from the South African concept of it. These concepts cannot be enforced causing great harm to *zawjāt* (wives), dependant children and other dependants.
- Divorce granted by the South African courts are not recognised by the other spouse and or the *`ulamā'*.

All these constitute the major problems confronting Muslims in their private lives.

6.3.7 INTERNATIONAL OBLIGATIONS IN THE PROTECTION OF MINORITIES:

The United Nations (UN) enacted various Resolutions on various aspects of human life.

Of these, pertinent to this thesis are:

- The Universal Declaration of Human Rights[1] states:

  "Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief, and freedom either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[2]

  This obviously allows for, amongst others, the necessity of the recognition of the Islamic Personal Law.

- The above is amplified by another UN Resolution, The International Covenant on Economic, Social and Cultural Rights which states in one of its Articles:

  "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society...."[3]

  This ruling must include the families of all cultural, social and religious groupings which must include the Islamic Personal Law, which is, in essence, a family law.

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[1] Enacted by the General Assembly of the UN, New York, on 10/12/1948, per Resolution 217 (A)(III).

[2] The United Nations: Universal Declaration of Human Rights, New York, Article 18.

[3] The United Nations: The International Covenant on Economic, Social and Cultural Rights, enacted by General Assembly, New York, Resolution 2200 A (XXI) of 16/12/1966, Part III, Article 10.

- The Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief,[1] also pronounces on this subject:

  "No one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or belief."[2]

  This Article prohibits discrimination of non-recognition, amongst other issues, of Islamic Personal Law, which is an expression of the religious beliefs and subsequent practice of such beliefs.

  It further states:

  "Discrimination between human beings on grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations..."[3]

  The non-recognition of Islamic Personal Law is in conflict with the above Article.

- Another Article gives the right to parents or legal guardians for the organisation of family life, stating:

  "The parents...or the legal guardians of the child have the right to organise the life within the family in accordance with their respective religion or belief, bearing

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[1] The United Nations: The Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, New York, General Assembly Resolution 36/55 of 25/11/1981.

[2] Ibid, op. cit. Article 2 (1).

[3] Ibid, op. cit. Article 3.

in mind the moral education in which they believe the child should be brought up."[1]

The non-recognition of the Islamic Personal Law is against this Article also, as no proper legal consequences is given to such rights, as mentioned in the above Article, in South Africa.

It is thus clear that the non-recognition of the Islamic Personal Law code in South Africa, and elsewhere, is contrary to International Covenants and Resolutions. The dichotomy and double standards approach by some members of the UN, including the superpowers, in these matters, is a sad indictment on their moral commitment to justice and fairness, so often aired in public.

6.4 RECOMMENDATIONS FOR THE IMPLEMENTATION OF ISLAMIC PERSONAL LAW

The basic recommendation is that Islamic Personal Law must be legally recognised and administered officially in such a way that the *sharī`ah* is not compromised in such a system of administration and by those Muslims who are so qualified to do so in terms of the *sharī`ah.*

We have seen how the Legislature of this country and the Courts have dealt with Muslim matters in an unfair and rather, at times, an undignified and improper way. There had never been a willingness by either, since Muslims arrived here in the late

[1] The Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, New York, General Assembly Resolution 36/55 of 25/11/1981. op. cit. Article 5.

17th century till nearly the end of the 20th century, to do something about it, even in a limited way. There is thus no way that a system as different in philosophy, content, approach, aims and objectives, procedure and application can ever be assimilated into the Roman Dutch law and current South African law patterns. It is not a maverick attitude to be "different" that an entire separate system is called for, but rather the experience of history in the position of Islamic Personal Law here and elsewhere and to prevent any occurrence of the same issue painted in different colours against a different background in the new South Africa.

If ever this assimilation is to be resorted to, only those aspects which can be assimilated or which are not "repugnant" to the system of law will be acceptable to the authorities.

In short, a partial or a watered down version of the Islamic Personal Law of marriage and divorce and consequences can possibly be acceded to as well as other aspects of the Islamic Personal Law by the secularist new South African government.

This approach appears to be clear from the SALC's (South African Law Commission) statement and method of approach in this subject, namely : "Project 59: Islamic marriages and related matters." In the summary of the said project, the SALC states: "The object of this investigation is to determine the extent to which provision can be made in South African law for recognition of rules of Islamic law relating to marriage, matrimonial property, succession, guardianship and related aspects of family law."[1]

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[1] The South African Law Commission: Nineteenth Annual Report - 1991, Pretoria, Government Printer: 31.

This indicates a tampering with the law in accommodating and assimilating what the Legislature feels or thinks may or can be accommodated in law, whether that is in accordance with or repugnant to the *sharī`ah*.

It can be reasonably accepted that the entire Islamic Personal Law, in the context of the SALC's statement of approach, will not be accommodated.

This must be and is unacceptable to the vast majority of Muslims in South Africa, especially with the notion of a "new South Africa" floating all over and all around us.

6.4.1 CURRENT ATTITUDES OF POLITICAL PARTIES AND ORGANISATIONS TO RECOGNITION OF THE ISLAMIC PERSONAL LAW:

The policy of some of these are dealt with hereunder in alphabetical order.

6.4.1.1 The African National Congress:

Its stance is, at this stage is not clear. An enquiry sent to the Head of its constitutional committee was forwarded to the Department of Applied law at Wits University, from where a Mr Cachalia sent a booklet on Islamic Personal Law stating in a covering letter that "the ANC....has not yet formulated a policy on this matter (i.e. recognition of Islamic Personal Law).[1]

However, Dr Mandela, President of the ANC, as reported in the "Muslim Views", has made a clear statement in this matter. He is reported to have said at a meeting in the Bo-Kaap, Cape Town, on Thursday 19th March 1991:

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[1] Letter of F Cachalia, Department of Applied Law, Wits University, Johannesburg, dated 21/09/ 1992.

"We (ANC) regard it highly insensitive and arrogant that the culture of other groups can be disregarded."

"The ANC", he said, "had pledged itself to recognising Muslim personal law."[1]

He did not mention the procedure nor mechanics of this recognition, according to the said report. Dr Mandela's first sentiment on culture is echoed by the Attorney General of South Australia who said (in Australia):

"...at last Parliament and law makers must acknowledge the needs of a multicultural community, that is the needs of a culturally diverse population must be taken into consideration as a natural part of the process of government."[2]

That is sound advice to the present and future law makers of South Africa also.

6.4.1.2 The Democratic Party of South Africa:

The said party does not have "a separate and official policy on this matter (Islamic Personal Law)." It does, however, subscribe to a "justiciable Bill of Rights for the protection of all individual rights which, quite naturally, would include the right to freedom of religion, speech and movement."

The said party further believes that "when one protects the rights of individuals, one as a consequence, protects the rights of groups, howsoever defined."[3]

It should be noted that the party speaks of "freedom of religion" which is different from the "freedom of the practice of religion."

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1 Muslim Views, Cape Town, Ramadan 1412 corresponding to March 1991, Vol 5, No. 2, page 3.

2 Jupp J: The Challenge of Diversity - Policy Options for a Multicultural Australia, Canberra, Australian Government Publishing Service, 1989, p. 255.

3 Statement of Mr M Rajab M.P. (Democratic Party), Durban, dated 24/8/1992.

6.4.1.3 The Inkatha Freedom Party:

No response received.

6.4.1.4 The National Party:

This Party's view is that "every person shall have the right to profess and practise his own faith freely and without hindrance or interference by any state institution." It further states:"....the National Party is aware of differences that exist between Islamic Personal Law and South African law, especially in the field of family law, the law of persons and the law of succession." In practice hereof the Party states:"...that rules of Islamic law ought to be recognised as valid and enforceable amongst Muslims in so far as this can be achieved without disruption of the general principles of South African law and the South African legal system."

The Party is non-committal to the form of administration for Islamic Personal Law but speaks of the "determination of rules of Islamic law being vested in recognised Islamic religious authorities", the latter of which it does not explain.[1]

The Party distinctly does not state that the rules of the *sharī`ah* itself will have to be followed herein.

6.4.2 RECOMMENDATION FOR PROBLEMS IN MUSLIM MARRIAGES AND DIVORCE AND RELATED ISSUES:

The most basic problem pertaining to Muslim marriages and divorces is that they have no legal consequences which creates legal problems.

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[1] Statement: National Party of South Africa, Federal Council, Pretoria, July, 1993.

Consequently, all Muslim marriages must have full *sharī`ah* consequences in all spheres of the Islamic Personal Law which are legally recognised by the State.

The basic problems in Muslim marriages and divorces revolve around the following issues:

- *wilāyah* (guardianship) of women in *nikāḥ* (marriage).
- The *ṣadāq* (dowry).
- The *`aqd al nikāḥ* (marriage contract) itself and the special *shurūt* (conditions) the *`aqd al nikāḥ* may set.
- The power of the *zawjah* (wife) in the dissolution of the *nikāḥ* and effecting it as well as consequences arising from it.
- The issue of polygamy.
- The contribution of the *zawjah* (wife) to the marriage estate in movable and immovable assets.
- The *nafaqah* (maintenance) of the *muṭallaqāt* (divorceés) and *armalat* (widows).
- appointment of and legal recognition of Muslim marriage officers and rules they have to comply with in their duties herein.
- legalising the lawful operation of qualified Muslim jurists to practice in the field of Islamic Personal Law as does any other law jurist and to assist Muslims appearing before the Muslim Family Court.

There are other problems also, but those can be dealt with, in most cases, administratively with orders or the like.

6.4.2.1 *Wilāyah* (Guardianship):

The *fiqh madhāhib* (schools of law) followed in South Africa are *Ḥanafī* and *Shāfi`ī*, but this should not preclude the resorting to other *madhāhib* also especially when the *Ḥanafī and Shāfi`ī madhāhib* (schools of law) are difficult to apply as, for example, in the waiting period before a *mafqūd* (missing) person is pronounced dead. Most of the Indian community Muslims are *Ḥanafis* while most of the non-Indian Muslim community are *Shāfi`īs* and they are in the majority according to official census. This means that *wilāyah* as in the *Ḥanafi madhhab* (school of law), should be applicable to the Indian Muslim community which is a very liberal law in *wilāyah* i.e a Muslim women with *ahlīyyah* (contractual ability) can marry themselves off without the interference of their *walī* (guardian).

This does not happen like that here in South Africa.

The *Ḥanafi* ruling herein is the minority view in the *sharī`ah*. The other *madhāhib* (schools of law) have varying degrees of and levels of applying *wilāyah* to the *bikr* (never married virgin) and *thaiyyib* (previously married woman)

These have been dealt with under *wilāyah*.

6.4.2.2 Recommendation:

It is proposed that the *wilāyah* over never married Muslim ladies of repute be as is practised presently at the Cape.

This is an advisory *wilāyah* in practice where the *walī* advises on the issue of *zawj*, but having the right, if there is such a right accorded him in *sharī`ah*, to object and refuse consent.

He can do so if the prospective *zawj* has a quality or qualities or does anything which the *sharī`ah* refuse to endorse or accept and which is a cause for refusal of consent of *nikāḥ* (marriage).

In this case, the woman may petition the *qāḍī* (judge) and if he sees benefit in her marrying, like her marrying honourably i.e her standing as an honourable woman in Islam had not been compromised, he should allow such a *nikāḥ* to take place. This should be on condition that the woman may not claim and will not be granted the right of *faskh* (annulment) of her *nikāḥ* later on grounds of the defective nature of the man, the nature of which her *walī* (guardian) objected to and refused consent of the *nikāḥ*.

The *qāḍī* (judge)[1] should first impress upon her that it would be better to acquiesce to the fact that she is not marrying a good Muslim husband which will not be good for her or her *nikāḥ*.

The *qāḍī* must stress this fact to her clearly.

If the *qāḍī* fears *fasād* (sinful conduct), within reasonable grounds of assumption, he shall ask the *walī* to consent and if he refuses, the *qāḍī* shall marry them off without his (the *walī's*) consent.

In any case, the woman must consent to her *nikāḥ* to any Muslim man she is to be married to.

A never married woman of repute whose *walī* (guardian) uses his *wilāyah* (guardianship) unjustly or unfairly in order to restrain her from marrying the man of her choice, shall petition the *qāḍī* and if the *qāḍī* finds, after investigation, that the *walī* acts

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[1] A *qāḍī* is a Muslim person who is qualified in Islamic law to such an extent that he can apply the said law to solve problems of the Muslims. He must know Arabic so that he can resort to the original sources of the law, apart from his being qualified in Islamic law. A four year degree in the *Sharī`ah* faculty of a Muslim *Sharī`ah* college of post matriculation level should be the minimum requirement.

unjustly and unfairly herein, he shall order him to let the *nikah* be enacted and consent thereto. If the *wali* refuses, the *qadi* will marry her off to her suitor.

The immediate abovementioned kind of *wali* and the *wali* who force any never married woman of repute under his *wilayah* to marry a man against her will, will commit a punishable offence, the latter the more severe of the two offences.

A *thaiyyib* should be allowed to marry on her own accord on condition that the basic requirements of choice is made as prescribed in the *shari`ah*.

The Jordanian Family Law rules compulsion on the *qadi* (judge) to marry off a woman whose *wali (guardian)* refuses consent.[1]

In principle the same procedure is followed by the Singapore Muslim Act, save that the Appeal Board for Muslim marriages intervenes and instructs the *qadi* to marry off the parties.[2]

The Malaysian Family law code, however, insists on the consent of both the marrying parties (the man and the woman intending to marry) and that of the *wali* of the woman.

The *Syari'ah (shari`ah)* judge (*qadi*) consents if a woman has no *wali*.[3]

The latter appears to be strict *Shafi`i* doctrine.

6.4.2.3 The *Sadaq* (Dowry):

There is *Ijma`* (consensus) by all the *fuqaha'* of the necessity of *sadaq* for a woman marrying a man.

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1 Jordanian Family Law, Act 61 of 1976, clause 6 (b).

2 Muslim Marriage and Divorce Rules, Singapore, 1968, Clause 9.

3 Islamic Family Law, Act 303, Kuala Lumpur, 1984, Part II, Section 13(a)(b).

This is not a "purchase price of the bride" as was the custom in old Europe.

As pointed out earlier in this thesis, there is no prescribed minimum nor maximum for *ṣadāq* set by a *sharī`ah* text.

However, there is majority agreement that the *ṣadāq* must have value. The practice in most Muslim countries is a *ṣadāq* of substantial value. Some Muslim countries have prescribed a minimum *ṣadāq* due to some *madhāhib* (schools of law) prescribing a minimum, but not a maximum.

Nikāḥ (marriage) is an important institution in Islām and the most important social fabric of Muslim society.

Consequently, it should not be made difficult for people to marry, barring *sharī`ah* prohibitions and restrictions, but it should not be made that easy either so as to defeat the aims of *nikāḥ* itself.

There is currently, in South Africa, two kinds of *ṣadāq* procedures.

- the predominant and majority Muslim group in South Africa in the Cape and elsewhere have a meagre *ṣadāq* (dowry) ranging from a few rand to a few hundred rand.

  This is utter little security for the *zawjah*.

- the Indian Muslim community have a two tier *ṣadāq* system - the actual *ṣadāq* and a "gift" , which, on analysis, should actually to be taken as part of the *ṣadāq*. *Mutallaqāt* (divorceés) and *armalāt* (widows) of this community have a serious problem in the settlement at divorce or death with these items at times.

6.4.2.4 Recommendation:

- That the *ṣadāq* should preferably be calculated as being at least 10% of two years' gross wages/earnings of all employees i.e those who work for someone and who are not self-employed or is more of an employee than self-employed if he has both occupations.

  Acceptable proof must be produced herein.

- In the case of self-employment of any kind, the *ṣadāq* is to be calculated, at date of the *`aqd al nikāḥ* (marriage contract) or date of *nikāḥ*, whichever the woman chooses voluntarily, and is to be 10% of turnover of business for a single year, on condition a profit was made by it, and provided it is not less than the *ṣadāq* of a woman of her standing which is calculated on the wage/salary scale.

  If the *qāḍī* (judge) suspects foul play in the Financial Statements produced, he may order an auditor to verify and check the Statements to the account of proprietor concerned.

  Foul play herein must be made on offence.

  If the concern runs at a loss, the *qāḍī* must fix the minimum *ṣadāq* for a woman of her standing.

  Ṣadāq (dowry) is a security for the spouse and as such should be of value. The amount of it is the *zawjah`s* (wife's) right and prerogative only.

- All gifts handed to the bride by the bridegroom or any of his family members at the time of the *`aqd al nikāḥ* or actual *nikāḥ* shall not be returnable on *ṭalāq* (divorce) or *wafāt* save if she voluntarily and explicitly forgoes that right.

All gifts given with the *ṣadāq* at the above occasions to the bride by the immediate abovementioned persons, shall be taken as being part of the *ṣadāq* (dowry).

- It is further recommended that the bedroom suite shall preferably be for the bride over and above the *ṣadāq* and is not returnable at *ṭalāq* (divorce) or *wafāt* save in the case of *ṭalāq* due to the proven *zinā* (adultery) of the *zawjah*. This should specifically be so when she has minor children in her care of her erstwhile spouse.
- a woman may set her *ṣadāq* as being half of that of the possessions of her *zawj* as from date of their marriage and such will be valid if the *zawj* so voluntarily consents. This is according to *fatwā* (legal dispensation) issued by the present Grand *Shaikh* of the al Azhar University of Cairo and quoted in this thesis.
- The *ṣadāq* (monetary part of it) is to be paid in accordance with anyone of the following methods:
    - either payable in full at once, by the latest on the day of the *nikāḥ* (marriage).
    - or a deposit and later instalments over a period which the woman specifies in her *`aqd al nikāḥ* (marriage contract).
    - or a deposit set by the woman in her *`aqd al nikāḥ* and the full balance payable immediately on the woman's *ṭalāq* or *wafāt* (death).

In the payment systems of the latter two patterns of payment, the woman may request security against the future payments.

The above three methods are enshrined in the Jordanian and Iraqi Family laws.[1] The Malaysian Family law, prescribes rules for *ṣadāq's* registration and security lodged against payment of *ṣadāq*.[2]

6.4.2.5 Motivation and Purpose of the Recommendation on *Sadaq*:

Ṣadāq is a "gift" to the *zawjah* on *nikāḥ*, but has to form part of the security of a *zawjah* in that relationship. By her agreeing to become the man's *zawjah*, she has to forego any opportunity she could have availed herself to earn what she wanted or could have earned through a lawful profession. It is in this understanding, and since she will be occupied with being a *zawjah* and, in most cases, a mother, that she is to receive, as long as the *nikāḥ* (marriage) subsists, full *nafaqah* (maintenance) in the spheres of nourishment, clothing, residence and all other related forms of *nafaqah*. As pointed out under *ṣadāq* (dowry), by the majority ruling of the *fuqahā'*, she does not spend on herself anything for the above from her own money.

The *ṣadāq* may be deposited by the *zawjah* in one of the Islamic financial institutions in her own name and be allowed to grow lawfully in value over the years irrespective of what system is used in paying the *ṣadāq*.

Further, the *ṣadāq* value and pattern, will restrain *azwaj* in the process of *ṭalāq* (divorce) which some seem to take so lightly due to, amongst other things, the very easy *ṣadāq* pattern, as in the Cape areas.

In the case of *ṭalāq*, the *ṣadāq* will be a form of security for her as well as in *wafāt* (death) of her spouse where she has the added advantage of a compulsory

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[1] Jordanian Family Law, 1976, Chapter 8, clause 45.
Iraqi Personal Law, 1959, Chapter 3, Part I, clause 3 (1) & (2).

[2] Malaysian Family Law, 1984, Part II Section 21.

share of the *tarikah* (inheritance) of her late *zawj* (husband) if the *nikah* subsisted till the latter's death.

6.4.2.6 The `*Aqd al Nikah* and its Contents:

There is what is generally called the *muqtadayat al `aqd* (normal requirements of a contract).

The `*aqd al nikah* (marriage contract) has its own normal *muqtadayat* (requirements). These *muqtadayat* are generally known, but should nevertheless be written in a standard form in each `*aqd* to avoid claim of ignorance at the time of disputes.

There are special *shurut* (conditions) pertaining to the `*aqd* (contract i.e. of marriage) and beneficial to the `*aqd*, in which the *fuqaha'* differ on.

These *shurut* should be made permissible due to the proofs advanced by those *fuqaha'* who allow such *shurut* and rule it as valid and enforceable.

6.4.2.7 Recommendation:

It is recommended that each and every Muslim couple wishing to contract *nikah* must compulsorily enter into an `*aqd al nikah* (marriage contract).

Such `*uqud* (contracts) must be scrutinised and approved by the Muslim Family Court's *qadi* (judge) as complying to the *shari`ah* before a licence of permission to *nikah* is issued. Such contracts must then be binding and enforceable.

It is further recommended that the basic *muqtadayat* (requirements) of the `*aqd al nikah* (marriage contract) be part of all *nikah* `*uqud* (marriage contracts), such as:

- that *mu`asharah zawjiyyah hasanah* (sound marriage relations), as in the understanding of the *shari`ah*, is compulsory on both of the parties.

- that the *zawj* provide adequate and becoming *nafaqah* (maintenance) to his *zawjah* according to his means and this will include *suknā* (lodgings) and *kiswah* (clothing) as well as medical care and such normal forms of *nafaqah* as the *sharī`ah* requires.
- that the *zawjah* goes to live with her *zawj* after the actual enactment of the *nikāḥ* and she received her prescribed *ṣadāq* or the deposit as she stipulated in their *`aqd al nikāḥ*.
- that the *nikāḥ* is based on the principle of continuity with *ma`rūf* or separation with *iḥsān* (i.e. that the laws of marriage of the *sharī`ah* will be upheld always, and if not, then the marriage should end with becoming grace and dignity).
- that only the *sharī`ah* will be applied to the *nikāḥ* and all its resultant consequences.
- that all valid *shurūt* (conditions) by *sharī`ah* set by any of the parties be executed as agreed upon.
- that the *nikāḥ* is not contracted verbally or by intent for a fixed duration of time.
- that both parties marrying are willingly contracting the *nikāḥ* and that the *walī* (guardian) consents within boundaries of the *sharī`ah*.
- that each of the contracting parties have full *ahlīyyah* (legal contracting ability).
- that the contracting parties express a willingness to carry out the obligations of a Muslim *nikāḥ* (marriage).

- that a woman marrying shall be proven not to be in any form of *`iddah* (period of waiting due to divorce or death of her spouse) nor that she be pregnant from someone other than the man she is marrying.
- that a woman who is proven to be pregnant when applying to marry, shall not be given permission to do so by the *qāḍī* (judge), until she can declare and prove the *nasab* (lineage) of the child she is carrying in which case the *qāḍī* will rule on the application in terms of the *sharī`ah.*

An unmarried woman who is pregnant from a known man and the latter admit to having fathered that child, such a woman may be granted a licence to marry the said man, with illegitimacy of the child recorded.

6.4.2.8 Special *Shurūt* (Conditions) Benefitting the *Zawjah*:

It must be permissible for a woman to specify in the *`aqd al nikāḥ* that:

- she wish to have a monogamous *nikāḥ* with the man she will marry.
- that she do not wish to accompany her *zawj* on his journeys if his work is such that he has to go on journeys often. "Journeys" being journeys in their domicile or outside it.
- that if she marries someone from another country or region in South Africa, that she will not be removed from her place of residence and domicile.

Any breaking of any of these *shurūt* will automatically give the *zawjah* the right of *faskh* (annulment) of the *nikāḥ* or she may condone her *zawj's* action, preferably in writing and such be duly signed by her in the presence of and signed by the *qāḍī* of the Muslim Family Court.

It is further recommended that:

- the age of *nikah* be set for both males and females.

  The *shari`ah* rules permissibility for both at puberty while the Family laws of most Muslim countries have set age limits, quite possibly due to custom and practice as well as, at least, in some cases, to ensure that the *zawj* (husband) would be able to maintain a spouse and home. The latter is a requirement of marriage.

  Any lower age group persons than the one set shall have to petition the *qadi* (judge) for permission to marry, the latter who must see if *nikah* (marriage) will be beneficial to the parties and that they can shoulder the obligations of *nikah* including *nafaqah* (maintenance).

- that people who are not sane and who will never ever recover, may not be married off. If sexual abuse from them is feared or occurs, the *qadi* may on or without the request of the *wali* (guardian) of such persons, consent or order the sterilisation of such persons.

6.4.2.9 Motivation of Recommendations:

There is gross ignorance, overall, amongst Muslims, as to what is the *muqtadayat* (requirements) of an *`aqd al nikah* (marriage contract). Thus the reason for its entry in the *`aqd al nikah*.

The special *shurut* (conditions) benefitting the *zawjah* is required to act as a deterrent to *azwaj* who are quick in contracting polygamous *ankihah* (marriages) and cannot do justice to more than one *zawjah* as well as enacting a situation which might

develop into an unacceptable state, which the *zawjah* refuse to acquiesce to and which will have to be ended before a sinful situation occurs.

As for the age restriction, the *nikaḥ* of a minor should, generally, be prohibited. This process, in earlier times, had been instituted by righteous and pious persons for the benefit of the minors involved. One cannot expect, generally, this attitude to exists, amongst the Muslim public, nowadays, hence the protection of persons by the age restriction.

Consent of *mukallaf* parties (persons who reached puberty) will enact a situation of mutual acceptance and application in the *nikaḥ* situation and thus aid success of the *nikaḥ*.

It should, however, be an age where one expect both males and females to have average knowledge of human situations.

Applicants younger than the agreed age, should, generally, not be allowed to marry, as they might not be able to shoulder the responsibilities of *nikaḥ*. There might be rare exceptions and hence the *qāḍī's* (judge) involvement therein.

The Iraqi law rules 18 years a minimum age for *nikaḥ* for both males and females and the minimum age of application to the *qadi* is 15 years.[1]

The Jordanian law rules 16 years for males and 15 year for females.[2]

The Malaysian law rules 18 years for males and 16 year for females[3]and younger persons must petition the *Syari'ah (sharī`ah)* Court for permission.

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[1] The Iraqi Personal Law, Baghdad, Act 188 of 1959 as amended, Chapter 3, clause 7 (1) & (8).

[2] Jordanian Family, 1976, clause 5.

[3] Malaysian Family Law, 1984, Part II clause 8.

The Singaporean Marriage law rule 16 years for both males and females. Younger females who have reached puberty should petition the *Syari'ah* Court for permission to marry. The law makes no mention of younger males.[1]

This must also be the rule if the woman is pregnant already and under age at application to marry. There is no system of legitimising illegitimate children in the *sharī`ah* thus that will not be a factor in this matter.

As for the rules with regards to pregnancy before *nikāḥ* (marriage), such are required as *nasab* (lineage) of persons are cardinal to *nafaqah* (maintenance) and other rights and privileges.

There is an erroneous belief amongst some Muslims that a child conceived before a *nikāḥ* becomes legitimate on *nikāḥ*. Some even marry for a short time "to give the child a name" and then divorce to go their own ways. This is utterly repugnant and there is no such rule anywhere in the *sharī`ah*.

The provisions mention previously will end such improper acts.

As for the insane persons, the ruling is for protection of such persons from being exploited by others as well as preventing the birth of children, possibly permanently defective mentally, from being born to persons who cannot possibly care for them, the burden of which will then cede to the Muslim community and the State.

Various Muslim Family laws of various Muslim countries and Muslim minorities have some of the above rules in their codes.

The Jordanian law states:

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[1] Singaporean Administration of Muslim Law Act, 1985, Chapter 3, clause 96 (4).

"If one of the parties of the (marriage) contract prescribe a *shart* (condition) which is beneficial, it will be necessary to execute it..."[1]

The same in meaning is prescribed in the Iraqi law.[2] While the same section of that law gives right of *faskh* (annulment) to the *zawjah* if the *shurūt* are not executed.[3]

There is no direct mention of these special *shurūt* in the Singaporean and Malaysian Family laws, but there is a clause that states that *faskh* is allowed to the *zawjah* "on any other grounds which is recognised as valid for the dissolution of marriage by *faskh* under the Muslim law."[4] This allows for *faskh* for non-compliance to special *shurūt* of the *`aqd al nikāḥ* (marriage) by implication.

Malaysia and Singapore are overwhelmingly *Shāfi`ī* and that *madhhab* is restrictive in the issue of special *shurut* benefitting the *zawjah*.

6.4.2.10 The Issue Of *Ṭalāq* And Related Issues:

There is generally a litany of complaints on the "unfair status" of Muslim *zawjāt* (wives) in a Muslim divorce.

This is either based on an abject misunderstanding of Islām and the Islamic Personal Law, or is based on disinformation or the actions of Muslims who act against the laws of the *sharī`ah*.

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[1] Jordanian Family Law, 1976, clause 19.

[2] The Islamic Personal Law, Baghdād 1959, as amended, Chapter 1, Section 2, clause 3.

[3] Ibid, chapter 1, section 2, clause 4.

[4] Administration of Muslim Law Act, Act 27 of 1966, Singapore, chapter 3, part III, clause 49 (g). Malaysian Family Law, 1984, part V, section 52 (l).

From previous chapters of this thesis, it is clear that the *zawjāt* (wives) can institute *ṭalāq* (divorce), when the *zawj* (husband) ceded that right to her or *faskh* (annulment) proceedings or request *taṭlīq* (judicial divorce) from the *qāḍī* (judge). The latter process is valid by ruling of Mālik of the *Mālikī madhhab* (school of law) as set out in chapter 4 under *Taṭlīq*. There is only the administrative difference in that the *qāḍī* intervenes in her application for relief as he can enforce the decision administratively, seeing that some men might intimidate and obstruct their *zawjāt* in this matter. The *zawj* has the right of *ṭalāq* which he has to use justly and fairly.

There is thus a faulty understanding amongst certain people that only *azwāj* (husbands) can institute *ṭalāq* an end to marriage and no one else.

Her application has to be made to the *qāḍī* and is not automatic. If she feels that she wishes to continue the awkward situation of an upset *nikāḥ* (marriage) with an unjust partner, she is free to do so and if she petitions the *qāḍī*, she will obtain relief if her application is proper in terms of the *sharī`ah*.

6.4.2.11 Recommendations For Relief Applications to the *Qāḍī*:

The *zawjah* must have the right for application of relief from her *nikāḥ* in the following cases:

- any physical defect in the man hidden from her before the *nikāḥ*.
- any physical defect afflicting the *zawj* after the *nikāḥ* and which is such that the husband/wife relationship is so impaired as to render the marriage covenant impossible to execute.
- when the *zawj* becomes mentally incapacitated or defective in such a manner that the *zawjah* no longer feels she can live with him as his *zawjah*.

Faskh (annulment) of *nikah* is allowed when there had been deception by one of the marrying parties in hiding a defect from the other. That had been dealt with in chapter 5. The other two conditions mentioned above are comparable in consequences to sterility and/or impotence and that is a reason for *faskh* (annulment) by ruling of `Umar. This had also been mentioned in chapter 5.

- when she ceases to love him as a husband. She has to resort to *khul`* herein. This had been dealt with under *khul`* in chapter 4 also.

  The law herein should be that the maximum to be returned is the *sadaq* given at *nikah* (marriage) which is the ruling of the senior *fuqaha`* al Sha`bi, al Zuhri and al Hasan al Basri. This is reflected in the Laws of *Khul`* in chapter 4. The profit accrued from the *sadaq* (dowry), if it was money and invested by the *zawjah*, should be excluded from this.

- when her *zawj* neglects in providing her with the basic *nafaqah* (maintenance) for a period of three continuous months or interruptedly as to be construed to be intended neglect of providing *nafaqah*. This had been done referred to under *Tatliq* (judicial divorce) in chapter 4.

- when the *zawj* fails to cohabit with her and perform his marital obligations to her. The *Qur'an* obligates this as a part of *nikah*.[1] Al Shafi`i speaks of once every four days while Ahmad rule once every four or six months as minimum.[2]

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[1] Al Qur'an, Surah al Baqarah: 222.

[2] Fiqh al Sunnah, op. cit. Vol 2 pp. 188 - 189.

- when the *zawj* was impotent before the *nikah* and this was hidden from her and he continued to be impotent after the *nikah*. The same applies if he was and is sterile in the mentioned cases. `Umar's ruling on *faskh* applies here.
- when the *zawj* is sentenced to imprisonment for two or more years and sentence is finally confirmed.
- when he habitually assaults her or makes her life unbearable and or miserable with his cruelty to her be such cruelty physical or mental cruelty.
- when the *zawj* associates with women of ill-repute or womanises even if he is not actually sexually involved with them.
- when the *zawj* lives with and or cohabits sexually with another woman or other women to whom he is not married as per the *shari`ah* definition of *nikah* (marriage).
- when he attempts to force her to live an immoral life for or without gain.
- when he obstructs her in the performance of her Islamic obligations.
- when his conduct is contrary to the *shari`ah* requirements herein.

  This includes slandering her, insulting her, injuring her honour and or her name in such a way as not ordained in the *shari`ah*.

  Grounds for *tatliq* by Malikis and others for reason of *darar* (harm to her) and breaking of the laws of *nikah* are found in the above.
- any other grounds which is recognised as valid for ending the *nikah* as in the *shari`ah*.
- any *zawj* ceding and possessing his *zawjah* of *talaq* by *tafwid* (ceding of divorce to her) should not be allowed to retract such *tafwid*. This *tafwid*

should be valid even after the session in which it was made, as some Ḥanbalis rule.

6.4.2.12 Motivation for the above:

There is a general understanding, even amongst some Muslims, that once a Muslim *nikāḥ* is enacted, only the *zawj* has the right to end it.

The laws mentioned on *ṭalāq* (divorce) and *faskh* (annulment) clearly negate that.

A *zawj* is the head of the family in the *sharī`ah*, but that does not mean that he can do what he wants to do and be his own judge thereof also. He is the head and is to be obeyed by the family as long as he follows the *sharī`ah* and instructs in it.

6.4.2.13 Recommendations on Use of Power of *Ṭalāq* by the *Nikāḥ*:

As pointed out earlier in this thesis, the *zawj* has the direct power of *ṭalāq*, but this is subject to the exhortation to be just and fair therein. It is sinful to use it when it should not be used.

It is further the duty of the Authority in Islām to see that sinful acts are not committed and that an adequate penalty is available to the offender. Thus we see a situation where a *zawj* issues *ṭalāq* (divorce) in a wrong way, the act of *ṭalāq* is legally executed but by doing so he commits a sin.

This situation should be rectified under the general Quranic rule of "ordering with the good (virtue) and restraining and abstaining from vice and sin."[1] It is this principle,

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[1] Al Qur'ān, Sūrah al `Imrān: 110.

amongst others, which makes the Muslims, according to the Qur'ān, "the best of people ever to tread the surface of the earth".[1]

The following is recommended in the issue of *ṭalāq* by the *azwāj*:

- All procedures of *ṭalāq* issued by *azwāj* (husbands) must be done through the Muslim Family Court in order to regulate the system and avoid misuse and abuse by *azwāj*.
- The said Court will not permit two or three *ṭalāqāt* (divorce pronouncements) in one session to avoid the sinful situation of closing the door of reconciliation and resorting to unlawful means to nullify the effect of such divorce pronouncements, like *taḥlīl*.
- *ṭalāq* procedures outside the Court, in the presence of two Muslim male witnesses, will be valid when so registered in the Family Court.

  This procedure will be an offence warranting a reasonable deterrent in the form of a fine, like 5% of gross annual income from each party involved. *Azwāj* (husbands) must learn to follow the required procedures in *ṭalāq* matters. The fine should be imposed on the witnesses also.
- *ṭalāq* issued by the *zawj* without a *sharī`ah* sanctioned reason, will be executed with a very heavy fine levied. It is recommended that a minimum of 25% of annual gross earnings, or profit, if self employed, be levied and such be given to the disadvantaged *zawjah* in this unfair a form of *ṭalāq*.
- That every *muṭallaqah* (divorceé) be given *mut`ah* (a gift) on her *ṭalāq* (divorce). Such a gift is to be determined by the *qāḍī* (judge). *Ṭalāq* due to the proven *zinā* of the *zawjah* will be excluded from this.

[1] Al Qur'ān, Sūrah al `Imrān:110.

There is no *mut`ah* (gift) in *khul`* for the *zawjah*.

- Every *zawj* who intends divorce must petition the Muslim Family Court for arbitration. This must specifically be so for all first time applications and such shall compulsorily be referred to the *ḥakamān* procedure (arbitration procedure). The *ḥakamān* (two arbitrators) must apparently be Muslim males (as the grammatical usage of the verb and the word *ḥakamān* being in the masculine form)[1] of righteous and pious conduct and demeanour and have knowledge of basic Islamic knowledge in *nikāḥ* (marriage) and related matters and preferably have knowledge of people and their ways. They must preferably be one from his side and one from her side which means that they must be related to them.

  The Court must execute the joint decision reached by the *ḥakamān* if it is in conformity with *sharī`ah* and the welfare of the spouses. If the *ḥakamān* cannot agree, the *qāḍī* dismisses them and appoints new *ḥakamān*. If they again fail to resolve the case and effect a reconciliation, the *qāḍī* must hear the case and act in the best interest of the parties and in conformity with the *sharī`ah*.

- All *ṭalāq* procedures must be done verbally in front of the *qāḍī* as well as in writing and certification issued thereof as well as entry made in the Court's register.

- *Ṭalāq* in *ḥaid* or in *tuhr* in which there was actual sexual cohabitation, will be invalid and *istirjā`* (retraction) will be necessary by order of the *qāḍī*.

1 Al Qur'ān, Sūrah al Nisā': 35.

This is the Mālikī ruling in this form of *ṭalāq* as well as of al Shāfi`ī and Aḥmad. Ibn Ḥazm rule this talaq as of no consequence whatsoever.

The word of the *zawjah* with her *yamīn* will be accepted in this case.

6.4.2.14 Motivation for the above:

Firstly, it is found necessary to restrict procedures of *ṭalāq* by *azwāj* to the Court for proper control.

This is the procedure in all Muslim countries in one way or another. There is no other way for effective control.

Secondly, the *fuqahā*' differ on the issue of issuing more than one *talqah* in one session as to its consequences.

The Prophet (S.A.W.S) himself strongly disapproved of three *ṭalāqat* (divorce pronouncements) issued in one session during his lifetime. There is consensus by the *fuqahā*' that giving three *ṭalāqāt* in one session is sinful. Sinful acts are not condoned nor should they be allowed to happen, most certainly not with impunity. Sinful situations are prevented from coming into being, not encouraged to come into being. Thus, by ruling that all matters of *ṭalāq* be brought to the Court, and restricting the Court not to issue *ṭalqatān* (two divorce pronouncements) or three *ṭalāqat* in one session, will effectively avoid the juristic problems involved in the differences of the *fuqahā*' herein as well as restraining the *azwāj* from resorting to that sinful act in matters of *ṭalāq* (divorce).

Thirdly, the issue of *ṭalāq* without a valid reason in the *sharī`ah* is a sin by consensus. It unnecessarily destroys families and family relationships. However, one cannot refuse acceptance of the *ṭalāq* as such as the *zawj* might, if he is refused execution of his

talaq, resort to issues most unwholesome, unbecoming and sinful to force the issue. This is not a preferable situation. On the other hand, it is an unacceptable act and hence the penalty.

It is proposed that the entire penalty levied be given to the *mutallaqah* (divorceé) as damages for the unacceptable act of her *mutalliq* (divorcé).

This is, of course, over and above what is due to her in such a case as a *mutallaqah* (divorceé).

The issue here is deterrent.

Fourthly, the issue of *mut`ah* (gift) to the *mutallaqah* had been dealt with before and is based on the views of those *fuqaha'* sanctioning it.

Fifthly, the issue of *hakaman* (two arbitrator) is for solving problems in a *nikah* (marriage) situation which the parties cannot solve and which may cause the *nikah* to end.

Talaq is the last resort, hence the *hakaman* (two arbitrators) procedure to effect saving the relationship.

If no reconciliation is effected, or can be effected, the *qadi* (judge) will have to intervene and act as the *shari`ah* commands in a situation like that. Muslims are married on the principle of "staying together with *ma`ruf* (with fairness) or separating with *ihsan* (grace)". There is no humanly possible third way out in this matter, according to the *shari`ah*.

The ruling by other secular systems that differing married partners must stay apart before a divorce is granted is self defeating - they will do, during that period, what their marriage bond has denied them.

As for the verbal *ṭalāq* (divorce) in the Court and the recording of it, it is to be clear of all *sharī`ah* rulings herein and effect modern administrative procedures in *ṭalāq* matters without compromising the *sharī`ah*.

6.4.3 THE ISSUE OF POLYGAMY

As shown previously, polygamy was not the invention of Islām nor is it the original law of *nikāḥ* (marriage) in Islām either. It is an exception. The general rule is monogamy.

However, Islām being a realistic system of life, recognises that certain situations may arise which will warrant the institution of polygamy to prevent social and sexual evils.

Sound morality is the norm in Islamic societal existence and this is the basic principle in the permissibility of polygamy under certain circumstances.

When an imbalance in the normal sex ratio occurs, the *sharī`ah* does not allow the institution of call-girls or "sophisticated escort girls", brothels and the like kind of evils to be created to solve the problem.

6.4.3.1 Situations Permissible for Practice of Polygamy:

- An over population of females.

  When such a situation definitely arises, instead of a woman engaging in prostitution or setting up institutions for extra-marital activities, with its resultant evils and dangers in social and health spheres, amongst others, Islam opts for *nikāḥ* in a polygamous union where the natural inclinations and urges can be lawfully satisfied and where obligations of the

requirements of *nafaqah* (maintenance) are discharged as well as avoiding the bringing forth of illegitimate children. This kind of union will also prevent the destruction of the institution of *nikāḥ* (marriage) by the organised institution of mistresses and prostitutes, something which, at least, believing people abhor and their religions prohibit in clear terms.

It is clear that, generally, Non-Muslim society is highly critical of the Muslim practice of polygamy, yet they allow prostitution, some officially under the control of the Health Ministries of their countries and or *de facto* situations where a man, while even still married, can lawfully engage in other sexual situations and persons of such situations being, at least partially, protected by law, especially children. Some joint property issues are also protected of such *de facto* situations. Australia is a classical case in the latter situation as indicated in the Introduction of this thesis.

This is not only an anomaly, but gross hypocrisy.

- When a man has a genuine sexual appetite which cannot be satisfied with being married to one woman only.

  In this situation, which admittedly will be quite rare, if polygamy is not allowed for such persons, the only other alternative will be for them to satisfy it elsewhere. This is against the Islamic, and indeed most other religions' moral laws.

  Those who genuinely and provenly have this unfortunate problem should be permitted to engage in a polygamous union.

- After, usually, major wars when many men may be killed leaving defenceless widows and orphans behind. Rather than leaving such women

to fall prey to the lustful desires of men, with its resultant socio-moral problems, and neglect of the orphans in such a situation, the Islamic system allows the polygamous union in such cases, where obligations can be enforced and the moral code upheld.

- Sometimes one's *zawjah* may contract a disease or a defect or a permanent illness which makes husband-wife relationships impossible. Rather than divorce such an unfortunate woman, the *sharī`ah* allows the husband to keep her and marry another woman, so that his natural urges can be lawfully satisfied.

  This is more merciful than dumping the sick zawjah.

  This will also alleviate the social security system, at least to some extent.[1]

These are the basic reasons for the exception of the practice of polygamy in Islam and is nowhere near the prevailing concept amongst many, even professional people, of what they perceive to be the Islamic concept and practice of polygamy. Thus the practice of polygamy is subject to two main requirements:

- there must be a need for having more than one *zawjah* and this must be factually ascertained by such professional people the Court may feel should give an opinion herein.
- that there be justice and fairness between all the *zawjāt* in all the forms of *nafaqah* (maintenance) required, including his physical presence and his cohabitation with them on an equitable revolving basis.

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[1] The Islamic Academy: Muslim Education Quarterly, Summer issue, Vol 8 No. 4, London, 1991, p. 48,
Article: The Question of Polygamy in Islām by H A Jawād.

- proof of financial means must be produced to the Court by the *zawj* that more than one spouse can be properly maintained as required in *shari`ah*.

There is only one exception and that is love - it is impossible to love them all equally and on the same level. This exemption falls under the general law of the Quranic *ayah*: "*Allah* burdens not a soul beyond its scope..."[1]

It had been previously stated that a woman may prescribe in the *`aqd al nikah* (marriage contract) the *shart* (condition) of a monogamous *nikah* with the man.
In a situation where the issue of polygamy is necessary to be applied, like when there are provenly more women than men, the *Hakim* of the Muslims will probably issue a temporary order for the prohibition of that right until the situation normalises again. Herein he is faced with two options: to allow the legitimate right of a woman to require a monogamous *nikah* and allow the evil of women without men. Both are situations with rights attributed to parties. The latter case is more in need to be solved than the former and has more right to be addressed.

6.4.3.2 Recommendation:

It is recommended that polygamy be allowed as an exception and in controlled conditions and that all requirements of the *shari`ah* be fully and provenly met herein.

Further, application must be made to the *qadi* (judge) for permission to contract such a *nikah* (marriage), the latter who will have to satisfy himself that all the issues, as per *shari`ah*, have been satisfied before granting permission.
In this way polygamy will not be the free domain for all nor will any unnecessary suffering be brought on any party involved.

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[1] Al Qur'an, Surah al Baqarah: 286.

6.4.3.3 Polygamy Laws in Islamic Personal Law Codes of Some Muslim Communities:

- The Jordanian law states:

  "He who has more than one wife shall deal justly and equally between all of them..."[1]

- The Singaporean law rules that no marriage shall be solemnised under the Marriage Act "unless all conditions necessary for the validity thereof in accordance with the Muslim law and the provisions of this Act, are satisfied."

  The said law further restricts already and still married men from contracting a subsequent marriage, save with the consent of the *Kadi (qāḍī)* or by the *walī* (guardian) of the woman to be married and the written consent of the *Kadi*."

  The law further states that the *qāḍī* (judge) gives consent for the subsequent marriage when he satisfied himself that "there is no lawful obstacle according to the Muslim law (*sharī`ah*), or this Act (i.e the Muslim Law Act) to such a marriage."[2]

- The Malaysian law is more explicit in this matter.

  The law rules for permission to be obtained from the *Syari'ah (sharī`ah)* Judge for a subsequent marriage. It requires, further, a special written application where the grounds for the proposed subsequent *nikāḥ* (marriage) is spelled out. The income, liabilities and financial obligations

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[1] Jordanian Family Law, 1976, chapter 7, clause 40.

[2] Muslim Law Act (Singapore), 1985, chapter 3, part IV, section 96 (1)(2)(3).

must be declared by the *zawj*. He must also declare all his dependants, including prospective dependants.

The law goes much further in that it requires the existing *zawjah* or *zawjāt* to consent to the proposed new *nikāḥ*.

(There is, incidentally, no such ruling in the *sharī`ah*, save, of course, if such a stipulation was made in the *`aqd al nikāḥ* of the *zawjah* or *zawjāt*. Perhaps the lawmakers tried to prevent a situation where a *zawjah* will not consent and thus start a process of feuding ending that specific *nikāḥ*.)

The law further specifies when the Court can consent to such a subsequent marriage and gives as examples: the sterility of the *zawjah*, her physical infirmity, physical unfitness for conjugal relations, wilful avoidance by her of an order to restore conjugal relations or her insanity.

The applicant must further satisfy the Court that he has the means to support all the *zawjāt* as required in the *sharī`ah*, including all the dependants.

He must also prove that he can accord equal treatment to all the *zawjāt* and that the new marriage would not cause *ḍarar syarie* i.e harm to the *zawjāt* in *sharī`ah* terms.

The Court must be satisfied that the new marriage will not lower the standard of living of the existing *zawjah* or *zawjāt* and all the dependants. The Court is required to hear the application *in camera*.[1]

- The Iraqi law also rule necessity for the *qāḍī's* (judge's) permission for marrying another woman and that the man must prove that he has enough

[1] Islamic Family Law, Act 303, 1984, Malaysia, part II section 23 (1)(2)(3)(4)(a)(b)(c)(d)(e).

means to support more than one *zawjah* and that there is a reason by the *shari`ah* for such a subsequent *nikah* (marriage).

The law prescribes a penalty of one year's imprisonment or one hundred dinars fine for anyone marrying outside the Court in contracting a subsequent *nikah* in addition to the already existing *nikah*.

No additional *zawjah* or *zawjat* will be allowed if it is feared that justice will not be done to the *zawjat* in a polygamous union.[1]

- The Egyptian law was amended in matters of polygamy in 1985.

  An amendment as introduced which rules that:

  The Court requires the *zawj* to mention his *zawjah* or *zawjat* and their places of residence in his marriage document when he wishes to remarry. The Court is to inform by registered mail the *zawjah* or *zawjat* of the new *nikah*.

  The *zawjah* is permitted to request *talaq* (divorce) from him if he enters into another *nikah* while still married to her if she is harmed physically or otherwise by this new *nikah* which makes her continued married life with him impossible. This is so irrespective whether she prescribed that special *shart* of a monogamous *nikah* with him or not.

  If the *zawj* refuses and the *qadi* cannot reconcile them, the *qadi* resorts to *tatliq* with one *talqah ba'inah* (one irrevocable judicial divorce).

  A *zawjah* whose *zawj* enters into a polygamous union with another woman while still married to her has this right, for one year from the date of her knowledge of the new *nikah*, to request *talaq* from him. She forfeits this

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[1] Islamic Personal Law, Iraq, Act 188, 1959, as amended, chapter 1, part I, section 6.

right if she accepted the new *nikah*, openly or by implication. Her right of *talaq* or *tatliq* applies each time her *zawj* marries another woman while still married to her. The new *zawjah* who did not know that her proposed *zawj* was already married, may likewise request *tatliq* from the *qadi* (judge).[1] *Tatliq* is *Maliki* law. However, the Egyptian law had gone further than most Muslim Family laws. Some of the above rulings have no *shari`ah* standing.

From the above laws, it is clear that polygamy is not an easy licence for Muslim men.

Admittedly, some regulations have gone too far and have no *shari`ah* sanction, but overall there is agreement with some other view within the *shari`ah* of the stand that had been taken.

Most of the above mentioned laws are derived from two Quranic laws, namely:

"...then marry (other) women of your choice, two or three or four, but if you fear that you shall not be able to deal justly (with them), then only one...."[2]

"You will never be able to do perfect justice between wives even if it is your ardent desire, so do not incline too much to one of them (by giving her more of your time and provisions), so as to leave the other hanging (in the air - i.e. neither married nor divorced)."[3]

The last *ayah* specifically state that absolute and complete equality and justice in every aspect of a polygamous married life is impossible.

This is due to the natural human inclination, affections and the like.

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[1] Islamic Personal Laws, Egypt, Act 100, 1985, article 11.

[2] Al Qur'an, Surah al Nisa': 3.

[3] Ibid, op. cit. 129.

A mufassir of the *Tabi`ūn*, al Mujāhid says:

"This *āyah* is taken to mean: do not calculatedly do injustice in the treatment and affections to your wives, but be calculatedly just and fair in your attention and provision to each of them, for this is humanly possible to achieve."[1]

The interpretation given by a small minority of the modern scholars to *ayah* 129 of Surah al Nisa' that it is prohibition of polygamy is weak. The assertion by some that the aforementioned *āyah* abrogated the *āyah* consenting to polygamy is far fetched and has no proven record of cancellation.

Furthermore, the vast overwhelming majority of *fuqahā'*, past and present have the opposite view and the Personal Law legislation of Muslim countries and communities add weight to it.

6.4.4 MARITAL PROPERTY:

The basic rule is that what the *zawjah* brings to the marriage is her own and remains as such. This includes her *ṣadāq* (dowry), her gifts and her own possessions as well as what she procures during the *nikāḥ* (marriage) for herself. Whatever she inherits from anyone is hers also, before and after her *nikāḥ*.

She is at liberty to make a voluntary gift thereof to her *zawj*, of course. The same is not true for the *zawj* as he is under compulsory obligation to provide for her.

The issue now arises of the contribution of the *zawjah* to the married estate (there is incidentally no such thing as a joint married estate as in the general sense in secular systems).

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[1] Al Jāmi` li Aḥkām al Qur'ān, op. cit. Vol 5 p. 407.

The *sharī`ah* prohibits the taking and using of the wealth of others, save if it is business by agreement of partners (in business).

The *Qur'ān* states:

"And eat up not one another's property unjustly..."[1]

Nikāḥ in Islām is not an automatic financial partnership.

If, due to some inability of the *zawj*, the *zawjah* provides *nafaqah* (maintenance) for herself and or the children born from the *nikāḥ*, such is a debt owing to her by the *zawj*, save if she voluntarily gives it as a gift. The loan that the *qāḍī* (judge) makes in the *zawj's* name for *nafaqah* (maintenance) for the *zawjah* when he is unable to provide, is a liability solely of the *zawj*.

In the matter of the *zawjah* acquiring assets for the household, such is hers. In the acquiring of fixed assets in which she contributed, like paying off the price of a dwelling or land or the like or contribute to her *zawj's* business, she becomes a partner in that venture with a percentage equal to her input of the concern being hers.

If she assists him in his concern without remuneration, such is due to her from him at market price.

The *zawj* has no marital control whatever over the assets of his *zawjah*. He can only interfere when she engages in business or trade or practices which are against the *sharī`ah*.

In this regard he is to admonish and order her to desist from such acts and she is under obligation to respond positively therein.

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[1] Al Qur'ān, Sūrah al Baqarah: 188.

The *zawjah* has the same right with regard to the *zawj* if he does wrong in his business in that she can seek relief from the *qāḍī* if he refuses to change his ways of operation.

Community of Property as is known in South Africa, is thus unknown to the Islamic Order. The A.N.C. (Ante Nuptial Contract) will not suffice nor is it proper in all respects either.

The only issue which may be possible, in some respects, is the A.N.C. - Accrual System, on condition that the contract rules only *sharī`ah* as consequence and is in full conformity with the *sharī`ah* as required in its laws.

Thus the agreement by the man and the woman, before their *nikāḥ* (marriage), in their *`aqd al nikāḥ*, that the woman will have half of everything he has as from the date of the *nikāḥ*, on her *ṭalāq* (divorce) or his *wafāt*, is valid as a *ṣadāq* (dowry) agreement, provided the assets are lawful and have been lawfully procured in terms of the *sharī`ah*. This is in accordance with the agreement principle of the *ṣadāq* (dowry).

The Grand *Shaikh* of the al Azhar University, Shaikh Jād al Ḥaqq, in his *fatwā* (legal dispensation), pronounced validity hereof.[1]

6.4.4.1 Recommendation:

It is recommended that all the above rules be enacted in marital property.

In addition, in the case of a *zawjah* opting for half of the zawj's possessions as at *nikāḥ*, (marriage) this should be subject to such *ṣadāq* (dowry) in this case, on *ṭalāq* (divorce), being equal to the *ṣadāq* of a *zawjah* of her standing in the case of a *zawjah* whose *ṣadāq* is from the remuneration of her employee *zawj*.

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[1] Shaikh Al Azhar: Fatwā S/551 dated 8/1/1413 corresponding to 9/7/1992, p. 26.

This would prevent disadvantage to the *zawjah* when she is divorced soon after the *nikāḥ* and the *zawj* has little to his name at that time.

The sharing system should not be allowed when the *zawj* carries on business with any form of a loan and his liabilities are more than his assets.

6.5 *NAFAQAH* (MAINTENANCE) OF THE *MUTALLAQĀT* (DIVORCEÉS) AND *ARMALĀT* (WIDOWS)

The *nafaqah* of the varying degrees of *muṭallaqāt*, on the ending of their *`iddah* revert to their *walī* (guardian), which will usually be their legitimate father. If he is not found, the next in line of *wilāyah* as per the scale of the `*aṣabāt* (agnates) in the *wilāyah* (guardianship) scale as mentioned in previous chapters.

If one person of the `*aṣabāt* (agnates) cannot supply the *nafaqah*, then they should jointly be held responsible for it. This is also the case when the *muṭallaqah* (divorceé) has no money and or assets of herself and she avails herself to her `*aṣabāt* for *nafaqah*. If she has insufficient means, the *walī* (guardian) or the `*aṣabāt* will have to augment it.

If these persons, due to circumstances, cannot produce the required *nafaqah*, the broad Muslim Community is to bear that responsibility.

This will necessitate the establishing of a special fund, by law, for this purpose.

The latter rule is from the Quranic *āyah* (verse):

"The believers, men and women, are the protectors of one another..."[1]

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[1] Al Qur'ān, Sūrah al Tawbah: 71.

The *nafaqah* (maintenance) of the *mutallaqāt* (divorceés) and *armalāt* (widows) during their respective *`iddad* (pl of *`iddah*), have been dealt with previously in chapter 4.

6.5.1 RECOMMENDATION:

It is recommended that:

- all *muṭallaqāt* (divorceés) be given full *nafaqah* during their *`iddad*, save those who committed proven adultery.

  There is no *nafaqah* for *`iddah* of *khul`* (period of waiting in divorce by compensation).
- There is no *nafaqah* for *`iddah* of *faskh* (period of waiting in divorce by annulment).
- There is to be full *nafaqah* for the *armalah* (widow) for the duration of her *`iddah* of *wafāt*.
- That a Special Fund be created, under the control of an officer of the Muslim Family Court, to administer the Fund to which all employed Muslims must contribute compulsorily on a monthly basis, preferably deducted together with the monthly taxes paid by employees generally.

  There will be a quarterly payment from self-employed Muslims.

  This Fund's income may be invested in lawful *sharī`ah* sanctioned investment portfolios to generate continuous income for the Fund.

  All fines levied for offences in the Muslim Family Court will likewise be for the said Fund.

This Fund will aid the *muṭallaqāt* (divorceés) and *armalāt* (widows) who do not have *nafaqah* (maintenance) and have no *walī (guardian)* nor any *`aṣabāt* (agnate) relatives or whose *awliyā* (guardians) or *`aṣabāt* cannot afford their *nafaqah* or can only afford a part of their required *nafaqah* (maintenance), until such time as *muṭallaqāt* (divorceés) and *armalāt* (widows) become self sufficient again or their *walī* or their *`asabat* (agnates) can afford their *nafaqah* or until they remarry.

The Fund may also be augmented from the State Treasury annually.

The Auditor General of the State will issue the Audited Statement of the said Fund to the authorities annually and such must be made public.

The said Fund may have other usages related to Islamic Personal Law situations, but such is beyond the scope of this thesis.

6.5.2 APPOINTMENT OF MUSLIM MARRIAGE OFFICERS AND RELATED MATTERS

It is recommended that the Muslim Board of Islamic Personal Law appoint Muslim marriage officers who will conduct a Muslim marriage ceremony for Muslims who enter upon marriage.

It is recommended that such marriage officers be Muslims of repute who have not committed any such wrongdoing as may preclude them, by *sharī`ah*, from being a Muslim marriage officer. The proposed appointment of such officers shall be made public calling for any objections from the Muslim public before as final decision is made by the abovementioned Board.

Such marriage officers as are appointed, are to be instructed in all the administrative procedures required from them by the Board and their duty, in the law, to report and register all marriages they conducted, together with all documentation, preferably not more than fourteen days after contracting such marriages, to the Registrar of the Muslim Family Court.

6.5.3 LEGAL PRACTICE OF MUSLIM JURISTS

In terms of current South African legislation, a Muslim jurist cannot practice. It is recommended that this discriminatory issue be rectified.
All those Muslims who have obtained a suitable Islamic law qualification from an Islamic institution of Higher learning and qualified in Islamic Personal Law, should be allowed to practice in that field and to assist Muslim litigants and persons appearing in the Muslim Family Court with their cases. Licence for practice should be issued by the Muslim Family Court and registration to be effected by the Permanent Board of Islamic Personal Law.

6.5.4 APPARATUS FOR THE IMPLEMENTATION AND ADMINISTRATION OF MUSLIM MARRIAGES AND DIVORCES:

From all the previously mentioned information of Islamic Personal Law, it will be clear that the *sharī`ah* is a very different code from the current South African one in origin, philosophy, fundamentals, aims and practice.

It is thus impossible to assimilate such a law into the current South African legal system. Those who propose assimilation do not know the *sharī`ah* properly nor understand the divine nature of it.

The issue that now arises is, is it permissible for Non-Muslim persons to be engaged in the *sharī`ah's* application to Muslims.

Some countries have this system, but the Muslims are minorities there and thus cannot make the law themselves. This is typical of India, apart from it being a secularist country. This issue is explained in Appendix 2.

Both famous *fuqahā'* and expert authors on al Aḥkām al Sulṭāniyyah,[1] al Māwardī and al Farrā', have expressed juristic opinion on this matter.

Al Māwardī states that there are necessary qualifications for *quḍāh* (Muslim judges) and they are, briefly, to be a Muslim and to have full *ahlīyyah* including being a male person, thorough and sound knowledge of the *sharī`ah* and noble and exemplary conduct.

Expounding on the requirement of Islām, he quotes the *āyah*:

"And *Allāh* did not grant to the unbelievers any way over the Muslims."[2]

Abū Ḥanīfah, however, allows the appointment of a Non-Muslim *wālī* (governor) and a Non-Muslim *qāḍī* (judge) over the non-Muslims to rule according to their Faith, customs and traditions.

Abū Ḥanīfah has some form of exception to the qualification of *dhukūrah* (masculinity) in that he rules the right to *qaḍā* (to be a judge) of women in matters in which the *shahādah* (evidence) of women are acceptable.

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1 Islamic Constitutional law.

2 Al Qur'ān, Sūrah al Nisā': 141.

Ibn Jarir al Tabari goes against the *Ijma`* when he rules it fit for all cases i.e. a woman being a *qadi* (judge).[1]

Al Farra' mentions more or less the same qualifications under the *shurut* for the *Imamah* (caliphate). One of the *shurut* (conditions) for the *Imam* (caliph) being to be fit for the *qada* (to be a judge).[2]

The present Grand *Shaikh* of the al Azhar University, Shaikh Jad al Haqq `Ali Jad al Haqq, has also pronounced hereon in *fatwa* (legal dispensation).

"...Thus, it is forbidden for Muslims to submit to the judicial authority of a Non-Muslim *qadi* (judge) save under absolute necessity (*darurah*)[3]. It is necessary on a Muslim minority in this case to rid themselves of such a situation, either by independence (from such judicial power) or migration (to another country) or to have the qualified *`ulama'* of the Muslims in which the disputing Muslim parties have trust, judge Muslim matters, especially in *halal* (the permissible) and *haram* (the forbidden) of which the Islamic Personal Law of *nikah, talaq, nasab* (marriage, divorce and lineage respectively) and *mirath* (inheritance) form a part.

This will be best for the Muslims in (their affairs) of a worldly or religious nature than submitting to the judicial authority of a Non-Muslim *qadi* (in matters pertaining to the *shari`ah*)."[4]

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1 Al Mawardi A H: Al Ahkam al Sultaniyyah, Cairo, Matba`ah Mustafa al Halabi, 1973, 3rd ed., p. 65.

2 Al Farra' A Y: Al Ahkam al Sultaniyyah, Cairo, Matba`ah Mustafa al Halabi, 1982, 3rd ed., p. 22.

3 "Darurah" is , in the Jurisprudence, really absolute necessity, where the Non-Muslim authority imposes its will by force, physically or administratively, usually with the penalty of death or torture or punishment as penalty for opposition.

4 Shaikh al Azhar: Fatwa No: 611, Cairo, al Azhar University, dated 26th November 1990.

In matters of a purely administrative nature pertaining to the above matters and in which no issue of *qaḍā* (judicial matter) or *iftā'* (dispensationary matter) applies, a Non-Muslim may be appointed to administer such.[1]

It is in the light of these rules that the apparatus for the implementation and application of the Islamic Personal Law has to be seen and planned.

Prior to actually offering recommendations, it is felt that the following points have to be made:

- there is virtual unanimity that the apartheid system is an unacceptable system for conducting human relations. This system, as was practised in South Africa, was the entrenchment of white minority privilege at the expense of the suppression and or oppression of the vast overwhelming majority of South Africans and denial of their most basic human rights. It is thus understandable that specific political extra-parliamentary organisations would strongly oppose such a system or something which resembles it.

  However, one must also be wary that political parties and political organisations do not use the sins of the National Party to impose a view they consider to be akin to the apartheid system which, in practice, will amount to the same form of denial, in principle, the apartheid system meted out.

  Thus to assert that "no group should receive special treatment in the new South Africa", can, if irreconcilable genuine differing human systems cannot be accommodated justly and fairly, perpetuate a system of apartheid in another name and with another form of "new" apparatus.

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1 Shaikh al Azhar: Fatwā No: S/926, Cairo, Al Azhar University, dated 7/11/1992, p. 4.

- the second serious misdemeanour of the apartheid system was the way of application of the law. In most instances it amounted to nothing less than administrative violence in enforcing the doctrine of apartheid.
  At times, the State was accused of "State terror" by its opponents. The end result was the imposition of the will of a minority on the majority, be the application moral or immoral.

This brings us to the application and accommodation of the communities in the new South Africa, and the accommodation of the Islamic Personal Law, amongst other things.

The new system should not resort to the same administrative force on grounds of the majority of the country not wishing to accord special recognition to defenceless minorities in matter of their religion and freedom in the practice of their religion.

If this form of the democracy of numbers is going to be used to ensure such an improper system, then that form of democracy will be nothing else than the oppression of defenceless minorities by the democratic process.

This, in the minds of fair people, can be anything but what people are made to believe, is democracy in its glorious practice.

The recognition and application of the Islamic Personal Law, amongst other things, is inextricably linked to the entrenched Bill of Rights or entrench rights in the new constitution of South Africa and not to the political statements or promises made by political parties or political organisations especially in the era of the power struggle within the new South Africa.

It is with these thoughts in mind that the apparatus of implementation and application of the Islamic Personal Law should be seen.

The following are proposed:

- Firstly, as previously mentioned, there has to be acceptance of the fundamental principle that Muslim marriages and the *sharī`ah* consequences of Muslim marriages will be recognised as valid in South Africa.

  Thereafter those rights should either be entrenched clauses of a Bill of Rights or such rights must be entrenched in the new constitution of the country.

  A draft of this recommendation will follow later under the Appendices.

- Secondly, the establishment of the following:
  - A Permanent Muslim Board of Islamic Personal Law, the basic constitution of which should be as follows:
    - that the said Board should consist of at least five Muslims who have a degree in *sharī`ah* from an Islamic law University or an recognised Islamic law institution of higher Islamic learning of post Matriculation level and where the medium of instruction is preferably Arabic. In any event, any such expert as mentioned herein, must be proficient in Arabic. Such degree must be obtained in a predominantly Muslim country.
    - that the said Board shall have the sole legal power to draw up the marriage and divorce laws and its relevant consequences according *sharī`ah* and they will not be restricted to any *madhhab*, (school of law) but should be from any of the

madhāhib (schools of law) of the *Ahlu Sunnah Fiqh madhāhib* for this purpose.

They may also refer to the Family laws of Muslim countries on condition that such laws which they will incorporate will be in conformity with the *sharī`ah* as in the *Ahlu Sunnah* understanding and practice in *Fiqh*.

- the said Board will be empowered to make such amendments as required or repeal such laws as the need arises. They may act herein solely by themselves, but bound to the *sharī`ah* restrictions in such amendments and repeal of legislation.

  They may also be guided and advised herein by the *quḍāh* (Muslim judges) of the Muslim Family Court. They may also, should they so deem it necessary, refer to *sharī`ah* higher authorities in Muslim countries.

- the said Board submits such legislation to the relevant authority for the administrative enactment into law. Such authority to be, preferably, the signing into law authority. The said authority must not have the right to amend or repeal or alter any of the legislation presented save with the full approval of the said Board and the said Board must be guided only by the *sharī`ah* in such a situation.

  This right has to be entrenched in a suitable form in a suitable form of law.

- the Secretary of the said Board must be a Muslim and will not be a decision maker of the said Board nor partake in its actual law and decision making processes.
- the sitting *quḍāh* of the Muslim Family Court may serve on commissions investigating amendments to *nikāḥ, ṭalāq* (divorce) and consequences relating thereto.
- membership of the Board should be for a minimum of five years with permissibility of being re-appointed for another term of five years.
- the Board is requested by the authorities to recommend the *quḍāh* to the Muslim Family Court and the said Board shall compulsorily follow the guidelines of *sharī`ah* in their recommendations.
- the Board shall function strictly according to *sharī`ah* only in all its operations.
- the Board must see that all Muslims who seek redress or relief from the Muslim Family Court can do so. No one must be denied access to the Court in matters the *sharī`ah* prescribes access is to be had.

- a Muslim Family Court shall be founded by legislation and should function according to *sharī`ah* only.

  The said Court will operate as follows:

  - the said Court will have jurisdiction throughout the country and will have branches in the regions where so required.

- the said Court shall hear, give rulings and issue orders in all matters pertaining to *khiṭbah* (engagement), *nikāḥ* (marriage) and all its consequences, including all contracts relating to *nikāḥ* and its consequences, all forms of *ṭalāq* (divorce) and *faskh* (annulment), division of property on *ṭalāq* or *faskh*, all matters relating to *ṣadāq* (dowry) and arising from it and all such matters pertaining or relevant to these issues.
- all matters of *khiṭbah* (engagement) shall be recorded in the register of the said Court.
- all parties wishing to marry shall apply to the said Court for a licence to marry and if granted by the said Court, may be married by a Muslim marriage officer so appointed by the Permanent Board of Islamic personal law and so registered with the said Board.
- all *ankiḥah* shall be registered by the Registrar of the said Court who shall forward a copy to the Permanent Board of Islamic Personal Law and such copies to such authorities deemed necessary for administrative purposes.
- a further *nikāḥ* or *ankiḥah* of an already married man shall only be done through the Muslim Family Court and according to its procedures in such matters. Failure to abide by these rules will be an offence.

- the said Court will have the right, so duly declared in law, to punish offences in the field of its operations and for any form of contempt of Court.
- all Muslim births and deaths shall also be registered with the said Court and the said Permanent Board of Islamic Personal Law. Likewise, shall the two said bodies, keep full records of the *`aṣabāt* (agnate) relatives of all minors and of all Muslim women.
- the said Court shall keep a register of all those who convert to the Islamic Faith and shall, after the required conditions have been met, issue a certificate to such a convert. The Court shall also keep a register of those who leave the fold of Islām. Such registers shall be open for inspection by the public on application to the Registrar of the Court.
- the said Court shall publish, at least two weeks before the actual *nikāḥ* (marriage), but not later than the date of the signing of the *`aqd al nikāḥ* (marriage contract), the personal details of each of the marrying parties for public information.
- the Court shall also keep a register of all children who are foster parented in order that the *sharī`ah* law herein is observed.
- the Court will sit permanently in the capitals of major regions like, Cape Town, Johannesburg, and Durban and Circuit sessions in Pretoria, Port Elizabeth, Northern Cape and Pietermaritzburg.
- there shall be an Appeal Division of the Muslim Family Court presided over by three senior *sharī`ah* graduates from Muslim

Sharī`ah* Universities or Muslim *Sharī`ah Colleges of Muslim countries. They must be proficient in Arabic and must be graduated in comparative Islamic Personal Law, comparative *Fiqh* and Islamic Jurisprudence principles (*Usūl al Fiqh*). The decision of this Division will be final and not subject to any review by any body in South Africa. This must be entrenched in law.

- it is further recommended that the Muslim Family Court be empowered to levy sentence for offences in the Islamic Personal Law code breaches. Such sentences may take the form of accepted forms of rebuke, fines, community work and imprisonment.

Chapter 7

CONCLUSION

Muslims have been in South Africa for about three centuries now. Their arrival here, as Muslims, was not planned as such, but was rather aimed at destroying them and their religion due to their opposition to Dutch colonial rule in their fatherland. This philosophy appears to have been the foundation of discrimination against Muslims and their religion in this country, an example of which is that after nearly three centuries, Islamic Personal Law, amongst other Islamic laws, is never recognised as yet.

As pointed out in chapter 1 of this thesis, Islamic law is a peculiar form and system of law based on divine commands. An issue like *nikāḥ* (marriage), for example, is a religious as well as an administrative law, both inextricably linked. There is no such parallel in other systems of law in this country. The principles, format and scope of the Islamic law are cardinally different from Roman Dutch law and as such is incapable of being incorporated into it and still retain its validity, content and legal force. This is apart from such incorporation being forbidden in the Islamic law as shown in this thesis in chapter 6.

The South African Legislature was calculatedly discriminatory to Muslims when it legislated certain indigenous African customary marriage consequences as valid in certain cases. The Courts did no better, calculatedly refraining from departing from its legal philosophy and law as shown in the court cases quoted in chapter 6.

As a consequence, certain Muslim organisations and societies tried to organise Islamic personal law, individually, into some kind of workable form. This was bound to give rise to conflict and disjointed administration as each followed its own style and *madhhab* (Jurisprudence school). Thus what is valid in the north of South Africa might not be so in the south. These organisations and societies are only responsible to themselves and there is no body that oversees or supervises these organisations. Above all, there is no system of appeal or review in Islamic Personal Law matters in South Africa as is normal, usually, in countries where there is recognition of Islamic Personal Law.

There is serious conflict in the personal lives of Muslims with regards to Muslim family laws. Since these laws are not recognised legally in South Africa, a Muslim *nikāḥ* is an illegitimate union with all the offspring being illegitimate in terms of current South African law.

A disastrously serious denial of rights, obligations and privileges result from the non-recognition of Islamic Personal Law. Any order issued by a Muslim jurist or theologian etc. in matters of Islamic Personal Law cannot be administratively executed.

The problem is further compounded when Muslims, who after entering into a *nikāḥ*, also enter into a civil marriage. Many do not know that when this is done, the consequence of such a civil marriage is only South African law. Islamic Personal Law has no place in this situation as the court cases, quoted in chapter 6, clearly showed. Such Muslims have serious problems when they, for example, wish to draw up a Muslim Will. The matter is still further compounded when the *zawjah* (wife) so married i.e both by Islamic law and South African law, obtains a civil divorce which may or may

not agree with Islamic Personal Law and the *zawj* (husband) refuse to grant a *ṭalāq* (Muslim divorce).

The *`Ulamā'* will also not accept a civil divorce, generally speaking. There will thus be confusion in rights, obligations, privileges as well as the *al ḥalāl wa al ḥarām* (the lawful and unlawful) as in the Islamic law concept.

This is untenable.

An argument that is sometimes raised by secularists States against granting any legal recognition to minorities, such as a Muslim minority, is that there has to be uniformity in the law and anything which upsets the standards of that uniform law should be rejected.

Here uniformity is used to deny human rights or oppress minorities in the name of the law. In the case of Muslims, it is specifically a denial of the freedom of the practice of their religion in community with their co-religionists. Uniformity of the law here is calculatedly unjust and oppressive.

Another related secularist argument used with the "uniformity" idea, is that granting minorities rights, such as, for example, recognition of Islamic Personal Law, will be to grant "special privileges" to them which again mitigates against "fairness and justice" to all in a uniform system. This, again, is a misplaced argument as unfair and unjust treatment will result to minorities if they are to be forced into an assimilated mass by the command of the law. Apart from this fact, in the case of Muslims and Islamic Personal Law, the latter will be applicable to Muslims only and Non-Muslims will have nothing to do with it whatsoever.

It had been pointed out in this thesis and especially in appendix 2, that certain Muslim minorities have some minimal form of recognition and application of Islamic

Personal Law in their countries. This system of invariable incorporation of this law into the secular law system of that specific country and its application by, invariably, Non-Muslim courts, as in India, causes serious problems at times. Singapore may be singularly different in that the 16% of Muslims of that State control their own Islamic Personal Law as well as some other forms of Islamic law, through a special administrative apparatus, sanctioned in law. It is interesting to note that the Singaporean Muslim Administration enacts the laws themselves and it is then sent to the responsible cabinet Minister who presents it to the president for signing it into law. The Non-Muslim government and its apparatus have no say in this matter.

It is possible to administer Islamic Personal Law in South Africa properly and in accordance with the requirements of the Islamic law. This had been shown in this thesis by highlighting the major problem areas and recommending what action is to be taken as well as what system of administration should be used to implement Islamic Personal Laws including how it is to be constituted. It had been clearly proven in this thesis that Islamic Personal Law cannot be assimilated or incorporated into any Non-Muslim system of law.

However, the South African authorities should, when legally recognising Islamic Personal Law, avoid the pitfalls in this field and not repeat the errors nor encourage anomalies which certain Non-Muslim countries have in their systems of law in relation to the Islamic Personal Law as shown in Appendix 2.

South Africa is lagging far behind many countries in this matter, is out of step with international Resolutions of the United Nations in this matter, as well as seriously compromising its moral stand by continuing to deny giving proper, correct and effective legal recognition of Islamic Personal Law.

The major political parties and organisations have expressed a varying degree of willingness to accord legal recognition to Islamic Personal Law. Care should be taken that this matter should remain a purely Muslim religious issue and should under no circumstances be made a political or other issue.

Finally, 1994 is a double historic year for Muslims in South Africa - it will be the tricentenary of the arrival of *Shaikh* Yūsuf of Java here, one of the great pioneers of Islām in South Africa, as well as the start of a new order in South Africa. Proper legal recognition of the Islamic Personal Law in that year, will end the three centuries of utter hardship, anguish and anxiety Muslims had to bear in denial of their basic family rights in their own country.

GLOSSARY

A`immah	plural of *Imam*. One who lead the prayers or senior Muslim jurists in Islamic Law.
Adab	plural of *Adab.* good manners, etiquette.
`Adalah	justice.
`Adil	just.
Af`al	actions, deeds.
Ahadith.	pl of *Hadith*. Record of the sayings and practices of Prophet Muhammad (S.A.W.S),
Ahkam	pl. of *Hukm*, laws, injunctions.
Ahl al Kitab	People of the Book, meaning Jews and Christians.
Ahliyyah	having legal capability to execute a legal act.
Ahsan	best.
Ahwal al Shakhsiyyah	personal law.
`Aib	a defect, fault.
Ajnabi	a stranger (masc.).
Ajnabiyyah	a stranger (fem.).
Ajza'	pl of *Juz,* parts.
Akh li Abb	consanguine brother.
Akh li Umm	uterine brother.
Akhras	dumb.
Al Ijma`	juristic consensus of opinions.
Al Talaq al Ba'in	irrevocable divorce.

Al Qiyās	analogical reasoning.
Al Kafā'ah	equality in standing and status.
Al Istiṣḥāb	acceptance of an existing situation until the contrary can be proven.
Al Istiḥsān	one of the secondary sources of Islamic law. An inference, in the best interest of the *Ummah*, as long as it does not negate the established Islamic principle.
Al Ṭalāq al Raj`ī	revocable divorce.
Al Istiṣlāḥ	a secondary source of Islamic law. A legal term implying "seeking a solution to a problem which has no ruling yet in the best interest of the *Ummah.*
Al Barā'ah al Aslīyyah	original innocence (i.e. everyone is taken as innocent until proven guilty).
Al Khulafā' al Rāshidūn	the four righteous caliphs (i.e Abū Bakr, `Umar, `Uthmān and `Ali). (R.A.)
Al Ibāḥah al Aslīyyah	original permissibility (i.e everything is lawful until the contrary is proven).
Al Ijtihād	judicial inference by way of reasoning in the light of the original source.
Al Ummah al Islāmiyyah	the Muslim Nation (i.e all the Muslims in the world).
Al `Urf	custom.
Al Siyāsah al Shar`īyyah	constitutional law.
`Alaqah	a blood clot.
`Āmm	general.
Amṣār	pl of *Miṣr*, meaning cities.
`Aqd al Bai	contract of sale.
`Aqd	a contract.
`Aqd al Nikāḥ	marriage contract.

`Aqidān	singular: *`Āqid* two contracting parties.
`Āqil	sane.
`Aql	sanity/logic.
Aqwāl	sayings/rulings.
`Ār	disgrace.
Arkān	principles, pillars.
Armalah	pl. *Armalāt*, a widow.
Armalāt Ḥā'ilah	non-pregnant widows.
`Aṣabāt	agnates.
Ashhur	pl. of *Shahr*, months.
`Āsib	agnate.
`Aṭiyyah	a gift.
Awliyā	guardians.
`Awrah	a part of the body legally prescribed to be covered.
Āyah	pl. *Āyāt*, a verse of the *Qur'an*.
`Azl	coitus interruptus.
Azwāj	spouses.
Bā'in	irrevocable (masc).
Bā'inah	irrevocable (fem).
Ba`l	husband.
Bai` al Salam	a kind of sale in which goods are delivered at a future date.
Bainūnah	irrevocability.
Bainūnhah Ṣughrā	irrevocability of a minor degree.
Bait al Māl	public treasury.

Balāghah rhetoric.

Bāligh pubescent, one who becomes of age.

Bāṭil invalid/void.

Bid`ī innovative i.e against the practice or ruling of the Prophet (S.A.W.S).

Bikr a virgin woman.

Bu`ūl* pl of *Ba`l, husbands.

Bulūgh puberty.

Daiyyūth a man who does not care about his wife's moral life, especially her extra-marital sexual life.

Dalīl Shar`ī an Islamic legal proof.

Dār al Islām A State governed under Islamic laws.

Dār al Ḥarb A Non-Muslim state with which the Islamic State is at war.

Ḍarar harm.

Ḍarūrah necessity.

Dawām permanency.

Dhakar male.

Dharā`i'* pl. of *Dharī`ah, locking of ways and may means which may lead evil and sin.

Dhukūrah masculinity.

Dirham a silver coin.

Diyānah religious-wise in matters of dispensation as opposed to *qaḍā'* (judicial-wise).

Faqīh a jurist.

Faskh annulment.

Fatāwā pl of *fatwā*, legal dispensations.

Fatāwā	pl of *fatwā*, legal dispensations.
Fi`l	an act.
Fiqh	Islamic Jurisprudence.
Firāq	separation.
Fuqahā'	pl of *Faqīh* jurists.
Ghāfil	negligent or heedless.
Ghaibah	absence.
Ghair Mu`tamad	not accepted/not applicable. (specifically applying to conflicting verdicts in a School of Thought).
Ghair Lāzim	non-binding.
Ghiyāb	absence.
Ḥabs	imprisonment.
Hadāyā	pl of *Hadīyah*, gifts.
Ḥadd	pl *Ḥudūd*, meaning a punishment prescribed by the *Qur'ān* of the Prophet (S.A.W.S).
Hadm	destruction.
Ḥaiḍ	menstruation.
Ḥaiḍah	a single menstrual period.
Ḥakam	an arbitrator (masc).
Ḥakamān	two arbitrators (masc).
Ḥalāl	lawful/valid.
Ḥāmil	pregnant.
Ḥaml	pregnancy.
Ḥaqq	a right.
Ḥarām	forbidden, unlawful.

Hasan	good.
Hazil	joker
Hibah	a gift.
Hiyad	menstrual cycles.
Hudud	fixed criminal punishments.
Hukm	a ruling.
Hukm Shar`i	Islamic legal injunction or ruling.
Hukum Ihtiyat	ruling of caution. sake.
Hukumah	government.
Huquq	rights.
Huquq ghair Madiyyah	non-material rights.
Hurr	free.
Husn al Mu`asharah	good way of living.
`Ibadat	pl of *`Ibadah*, worship, act of worship, ritual.
`Iddad	pl of *`Iddah* periods of waiting for Muslim divorceé and widows before they may remarry.
Al *`Iddah al Raj`iyyah*	period of waiting of a divorceé in a revocable divorce situation.
Ifta	legal dispensation or opinion.
Ihram	pilgrim's garb.
Ihsan	goodness, beneficence, performance of good deeds.
Ijab	offer of marriage.
Ijma` Sarih	clear judicial consensus of opinion.
Ijazah	permission.
Ijhad	abortion.

Al *Ijma` al Iqlimi*	regional judicial consensus of opinion.
Al Ijma` al Mahalli	local judicial consensus of opinion.
Ijma` al Ummah	universal judicial consensus of opinion.
Ijma`	juristic consensus.
Al Ijma` al Sukuti	silent judicial consensus of opinion.
Ijtihad	inference of Islamic laws from the *Qur'an* and or *Sunnah*.
Ilhad	atheism.
`Illah	reason for a given ruling.
Iman	belief, Faith.
Iqrar	pl *Iqrarat* approval. assent, consent.
Irth	estate of the deceased or inheritance.
`Isa	Prophet Jesus (A.S).
'Isa'	an instruction of a person for an act to be done after his death, like marrying off his daughter after his death.
`Isar	difficulty.
Ishhad	evidence/witnessing.
Islah	to make good or reform.
Isqat al Haml	abortion.
Istihadah	continuous or irregular menstrual blood discharges.
Istihsan Darurah	a secondary source in Islamic law by which a ruling is given under the compulsion of necessity.
Istihsan Qiyasi	a secondary source in Islamic law based on analogical reasoning in the best interest of the community under the compulsion of a certain situation.
Istihbab	agreeable.

Istirja'	withdrawal/repeal.
`Itirad	opposition/objection.
`Iwad Mali	monetary compensation.
`Iwad	compensation.
Jahannam	Hell.
Janin	foetus.
Jannah	Paradise.
Jibril	Archangel Gabriel (A.S)
Jihad	active struggle in the way of *Allah*, one aspect of which is war for the sake and benefit of Islam.
Jinn	an invisible being.
Juz	a part.
Kafa'ah	equality in status.
Kaffarah of Yamin	compensation for breaking an oath.
Kaffarah	penalty/compensation.
Kaffaratan	two penalties or compensation.
Khalah	maternal aunt.
Khalifah	caliph/successor.
Khass	special/private.
Khatib	fiancé.
Khilaf	difference of opinion.
Khitbah	engagement.
Khiyar	choice.
Khul`	a form of divorce demanded by a wife.
Khulwah	seclusion.

Al Khulwah al Sahihah	true seclusion.
Kifayah	sufficiency.
Al Kinayah al Khafiyyah	indirect declaration of intent, not clearly expressed.
Al Kinayah al Zahirah	indirect but clearly expressed intent.
Kinayat	indirect expressed intent.
Kiswah	clothing.
Kitab	a book.
Kitabi	a male belonging to the People of the Book. (a Jew or Christian male).
Kitabiyah Ankihah	marriages to women of the People of the Book.
Kitabiyah	a woman belonging to the People of the Book. (a Jewess of Christian woman).
Lazim	binding.
Li`an	mutual imprecation in the case of adultery of a woman and the husband has not the required number of witnesses and he actually witnessed the actual adulterous act of his wife.
Lobola	African customary marrige bride price
Ma`qul	logic proof.
Ma`ruf	good/kind/just in married life.
Madani	belonging to the city of al Madinah.
Madarrah	that which is harmful or detrimental.
Al Madhahib al Fiqhiyyah	schools of law.
Madhush	surprised.
Mafqud	a missing person.
Mafsadah	harm/detriment.
Mafsukh	cancelled/annulled.

Maḥbūs	imprisoned.
Mahr Mithl	dowry of woman equal to that of what is generally in her family or of a woman of her standing.
Mahram	a male person a woman is not allowed to marry.
Majhul	unknown.
Makhṭūbah	fianceé.
Makkī	pertaining to Makkah.
Māl	wealth.
Man` al Ḥaml	contraception.
Manāfi`	benefits/usufructs.
Mandūb	permissible.
Māni` Shar`ī	prohibited according to Islamic law.
Māni` Tabī`ī	a natural prohibition.
Māni` Haqīqī	a real prohibition.
Mansūkh	cancelled.
Maraḍ	illness.
Maraḍ al Mawt	sickness during which one dies.
Marāsil	sing. *Mursal* a category of weak Prophetic traditions.
Marīḍah	a sick woman.
Maṣaliḥ	sing. *Maṣlaḥah*, benefits, interests.
Mashī`ah	the Will of someone, usually that of God
Mashrū`	valid/lawful.
Mashrū`īyyah	validity.
Masīḥīyūn	sing. *Masīḥī*, (m.) christians.
Masjūn	imprisoned.

Matti`u — enjoy!

Mawqūf — a situation where a jurist does not express an opinion on a given situation or a situation where a guardian's consent is required for the proper enactment of a contract.

Mirāth — deceased estate or inheritance.

Mu'ajjal — deferred.

Mu`ajjal — paid immediately.

Mu`āmalāt — everyday social transactions with legal implications, civil law by some definitions.

Mu`āsharah Zawjīyyah — married life.

Mu`āsharah — intimate association.

Mu`taddah — a woman observing the period of waiting due to either divorce or death of her husband.

Mubāḥ — permissible.

Muddah al Tarabbus — period of waiting (in divorce or death of a husband).

Mudghah — a lump (an embryo before it becomes a foetus).

Mufassir — exegetist.

Mufawwid — a husband who cedes the right of divorce to his wife.

Muftī — learned Muslim jurist who gives legal opinions.

Muḥaddithūn — learned Muslim scholars of the Prophetic precepts.

Muḥarram — the first Muslim month of the Islamic calender.

Muḥarramāt Mu'abbadah — women a man can never ever marry.

Muḥarramāt — women prohibited in marriage to a man.

Muḥarramāt Mu`aqqatah — women a man may not marry at a given time due to a prohibition existing then, but whom he may marry if such a prohibition no longer exists.

Mujāhid — pl. *Mujahidun,* one who fights the holy war.

Mujtahid	pl. *Mujtahidun*, independent legist.
Mukallaf	pubescent/legally responsible.
Mukhtala`ah	a woman divorced by compensation method (*khul`*).
Mukhti'	one who commits an error.
Mukrah	one coerced into an act.
Mukrih	one who coerces someone else.
Mulā`anah	mutual imprecation.
Mumayyiz	discerning of age i.e. from seven years upwards but before puberty.
Munāfiq	pl. *Munāfiqūn*, hypocrite.
Muqtaḍayāt al `Aqd	requirements of the contract.
Murāja`ah	reconciliation.
Muṣāharah	affinity, relationship by marriage.
Muṣhaf	the Qur'an.
Mushrik	a polytheist (masc).
Mushrikah	a polytheists.(fem).
Mushrikāt	polytheists (fem).
Mushrikūn	polytheists (masc).
Mustaḥab	preferred/preferable.
Mustaḥāḍah	the woman with continuous or irregular menstrual discharge.
Mut`ah of Tafrīq	gift given to a divorceé on the eve of her divorce.
Mut`ah	a form of temporary marriage forbidden according to the *Sunnī* Schools of law.
Muṭallaqah	a divorceé.
Muṭalliq	a divorcé.

Muwakkilah	a female agent or representative.
Nafaqah	maintenance/support.
Nāfidh	executed (of a contract) or to be legally implemented.
Naqṣ	decrease, loss, defect.
Nasab	lineage.
Naṣārā	the early non-trinitarian christians.
Nāsikh	something that cancels (something else) out.
Nāṣir	helper.
Nifās	puerperium
Nikāḥ	marriage.
Nikāḥ Fāsid	an invalid marriage.
Nikāḥ Ṣaḥīḥ	a correct marriage.
Nikāḥ Bāṭil	a void marriage.
Nīyyah	intention.
Nuṣrah	help/assistance.
Nuṭfah	a drop.
Qabūl	acceptance.
Qaḍā'	judiciary.
Qadhf	slander.
Qāḍī	judge.
Qarīb	a relative.
Qatl	killing, murder.
Qatl al Nafs	murder or killing of a living being.
Qawl	ruling.

Qinṭār	a heap of gold.
Qiyās	analogy
Qurr'	pl. *Qurū'*,the menstrual period or the non menstrual period.
Rabībah	daughter of woman you marry and you are not her father.
Raḍā`ah	fostering.
Raj`ah	revocability (of divorce).
Ribā	usury or interest.
Riddah	apostasy.
Rūḥ	soul.
Rukn	principle/pillar.
Ṣadāq	dowry.
Sadaqah	charity.
Sadd	prevention.
Ṣaghā'ir	minors.
Ṣaghīr	male minor.
Ṣaghīrah	female minor.
Ṣaḥābah	sing. *Sahabi*,companions of the Prophet (S.A.W.S).
Salaf	pl *Aslaf*, predecessors of learned Muslim scholars.
Ṣalāh	goodness.
Salāmah	soundness.
Salawāt	blessings.
Ṣadāq Mufawwad	a dowry which had not been mentioned or specified in the marriage contract.
Ṣarāḥ	clear

Ṣarāḥah	clarity.
Ṣarīḥ	clear.
Shahādah	evidence.
Shāhid	a male witness
Shāhidah	a female witness.
Shāhidān	two male witnesses.
Shahr	a month.
Shakk	doubt
Shām	Syria.
Shaqīq	full brother.
Shaqīqah	pl. *Shaqiqat*, full sister.
Sharī`ah	the Islamic Law.
Shart	pl. *Shurūt*, a condition.
Shighār	a form of unlawful marriage prevalent in pre-Islamic Arabia.
Shubhah	doubt.
Shurūt Ṣaḥīḥah	legally sound and acceptable conditions.
Shurūt Nafādh al `Aqd	conditions necessary for the execution of a contract.
Shurūt ghair Mashrū`ah	unlawful conditions.
Shurūt Mashrū`ah	lawful conditions.
Shurūt al Nafādh	conditions of execution (of a contract).
Shurūt Bāṭilah	void conditions.
Ṣīghah	formula.
Ṣiyām	fasting.
Siyar	Islamic international law.

Subh	early morning (pre- dawn).
Sukna	lodgings.
Sultan	Islamic authority or Ruler.
Surah	pl. *Suwar*, a chapter of the *Qur'an*.
Ta`addut al Zawjat	polygamy.
Ta`liq	conditional (in matter of divorce pronouncement).
Tabi`i	pl. *Tabi`un*, a student of a companion of the Prophet (S.A.W.S).
Tafsil	detail.
Tafsir	Quranic exegesis or commentary.
Tafwid	ceding of the right of divorce by the husband to his wife.
Tahdid al Nasl	birth control.
Tahkim	process of a woman who appoints the Muslim ruling authority or his deputy to marry her off to her groom. This is for the Muslim woman who has no Muslim male relatives.
Tahlil	making an unlawful marriage legal by a certain unlawful process in order to circumvent the requirements of the law herein.
Tahrim	prohibition.
Talaq Ba'in	irrevocable divorce.
Talaq Ba'in Kubra	irrevocable divorce of a major degree.
Talaq Ba'in Sughra	irrevocable divorce - minor degree.
Talaq Sunni Hasan	proper divorce according to directives of the Prophet (S.A.W.S).
Talaq `Ala al Mal	divorce by offering financial compensation.
Talaq Sunni	divorce according to the instructions of the Prophet (S.A.W.S).

Ṭalāq Sunnī Aḥsan best divorce procedure according to the instructions of the Prophet (S.A.W.S).

Ṭalāq Rāj`ī revocable divorce.

Ṭalāq divorce.

Ṭalāq Li`ān divorce by mutual imprecation.

Ṭalāq Bid`ī divorce in conflict with the instructions of the Prophet (S.A.W.S).

Ṭalāq Mu`allaq conditional divorce.

Ṭalāq al Batt a form of irrevocable divorce.

Ṭalāq Ẓihār a form of divorce in which the divorcé compares his wife to his mother implying prohibitive range of married partners.

Ṭalāq al Fār divorce enacted by a husband during an illness from which he eventually dies usually intending to rob his wife of her share in his estate.

Ṭalāq Muḍāf divorce conditional on a future date or happening.

Ṭalāqat divorce pronouncements.

Talfīq devising an invention for inter-mixing rules of Schools of law.

Ṭalqah a single divorce pronouncement.

Ṭalqatān two divorce pronouncements.

Tamkīn ability.

Taqsīm division.

Tarikah deceased estate, inheritance.

Tartīb sequence or order.

Taṭlīq judicial divorce.

Tawātur A *Ḥadīth* reported by many/a report reported by a large number of people.

Tawbah Nasuhah	sincere repentance.
Tawḥīd	absolute Oneness of God.
Tawqīf	abstaining from giving a ruling.
Thayyib	a non-virgin woman.
Tuhr	pure state of a mature woman between her menstrual cycles.
Ukht li Abb	consanguine sister.
Ukht li Umm	uterine sister.
`Ulamā'	learned scholars/theologians in Islām.
`Umrah	the lesser pilgrimage to Makkah.
`Uqūbāt	punishments.
`Urf Bāṭil	invalid custom.
`Urf Ṣaḥīḥ	valid custom.
`Urf	custom.
Uṣūl al Fiqh	principles of Islamic jurisprudence.
Uṣūlī	pl. *Uṣūliyūn,* Muslim expert in the principles of Islamic jurisprudence.
`Uyūb	defects, faults.
Wafāt	death.
Wājib	necessary.
Wakīl	agent or representative.
Wakīlān	two male agents.
Walad Zinā	illegitimate child, a child born out of wedlock.
Walī	guardian
Wāqif	one who makes an Islamic endownment.

Warathah	heirs
Wārith	an heir (masc)
Waṣī	legal guardian.
Wasīyyah	legacy.
Wikālah	agency.
Wilāyah	guardianship.
Wilāyah Mujbirah	guardianship of a father or paternal grandfather over a minor child or grandchild.
Wujūb	necessity.
Yamīn	oath.
Zakāh al Fiṭr	necessary alms payable by all Muslims at the end of the fast of *Ramadan*.
Zakāh	compulsory alms payable annually by all Muslims for all assets and cash which exceed the permissible normal amounts of exemption.
Zawj	husband.
Zawjah	wife.
Zawjān	two husbands.
Zawjāt	wives.
Zawjīyyah	marriage.
Ẓihār	a form of divorce in which the husband implies that his wife is his mother meaning that she is not his wife.
Zinā	adultery or fornication.
Zunāt	sing *Zānī*, adulterer or fornicator.
Zāniyah	pl *Zawānin*, adulteress, fornicator (fem).

APPENDICES

There will be three appendices.

These will be;

- Appendix I dealing with legislative recommendations requiring and guaranteeing complete, full, unrestricted, sound, correct and proper functioning of the *sharī`ah* laws for Muslims in South Africa.
- Appendix 2 dealing the status if Islamic personal of some Muslim minorities in Non Muslim States.
- Appendix 3 dealing with the Jurisprudence sects mentioned in this thesis.

APPENDIX 1

- The following clause is to be incorporated and entrenched in the Constitution of South Africa or in a Bill of Rights.

"Any law, regulation, rule or the like so contained in this Constitution/Bill of Rights which clashes with the practice and/or application of the tenets or laws of the Islamic Faith generally and specifically with the practice and application of the Islamic Personal Law shall not be applicable to persons, minors or majors, of the mentioned Islamic Faith nor will the Constitutional Court of the Republic of South Africa have the power to intervene in any way whatsoever to alter or negate any law, rule or regulation pertaining to the implementation or functioning of the Islamic Personal Law and such laws having relation with it nor any Court in the Republic.

Such matters pertaining to the Islamic Faith and the application of its Personal Law especially shall be fully, completely and exclusively the responsibility of the Muslim Administration and its functioning departments."

- "There shall be a Muslim Administration section in the Ministry of Home (Internal) Affairs, under the Minister of Home Affairs and such a Muslim Administration shall be a completely autonomous Administration which shall be run by Muslims only in all matters of the Islamic *sharī`ah* as required by that *sharī`ah*. The State nor any of its the organs; legislative, executive or judicial, shall have any power to abrogate any law enacted by due process by that entire Administration.

The President of the Republic of South Africa shall assent to such proper decisions of the said Muslim Administration and sign them into law and will *ipso facto* become operational when published in the Government Gazette. All communications between the President of the Republic of South Africa and the said Administration shall take place through the Minister of Home Affairs.

The State may only appoint a Muslim person, with proven reasonable knowledge of the *sharī`ah*, to be Secretary to the Muslim Administration. This clause may not be amended in such a manner as to render it to be in conflict with the Muslim concept of *sharī`ah*."

- The following Bill to be enacted by Parliament;

  The Muslim Administration Act of the Republic of South Africa:

  Short Title of Bill: The Muslim Administration Act.

PART 1

1. This Act will be called the Muslim Administration Act of the Republic of South Africa and will become law when signed by the President of the Republic of South Africa and gazetted in the Government Gazette.

2. Definitions:

   Unless otherwise indicated, the following words will have the following meanings;

   - "*Ahlīyyah*" will mean legal contractual ability as in the *sharī`ah* understanding of that term.

- "*Ankiḥah*" will mean Muslim marriages as understood in the *sharī`ah*.
- "Board" will mean the Permanent Board of Islamic Personal Law.
- "Court" will mean the Muslim Family Court.
- "*Faskh*" will mean annulment of a Muslim marriage.
- "Government Gazette" will mean the Government Gazette of South Africa.
- "*Khiṭbah*" will mean a Muslim engagement between two Muslim persons.
- "*Khul`*" will mean redemption of a Muslim marriage as understood in the *sharī`ah*.
- "*Murtadd*" shall mean an apostate from Islam be such an apostate male or female.
- "Majority Muslim Country" will mean a country in which the Muslims are in majority.
- "Muslim" will mean a person, male or female, who accept the *Qur'ān* and *Sunnah* fully and unconditionally without any form of interpretation which nullifies any law so contained in the those two sources.
- "*Nasab*" will mean Affinity as understood in the *sharī`ah*.
- "President" shall mean the President of South Africa.
- "*Qāḍī*" shall mean a Muslim judge of the Muslim Family Court.
- "*Quḍāh*" shall mean Muslims judges of the Muslim Family Court.
- "*Ṣadāq*" will mean dowry as in the *sharī`ah*.
- "*Ṣaduqāt*" shall mean dowries as in the *sharī`ah* sense.
- "*Sharī`ah*" will mean the *sharī`ah* of Islam.

- "*Ṭalāq*" will mean divorce as in the *sharī`ah*.
- "*Taṭlīq*" will mean judicial divorce as in the *sharī`ah* understanding.
- " *`Uqūd*" will mean contracts as understood in the *sharī`ah*.

3. The Muslim Administration will consist of the following organs;

- The Permanent Board for Islamic Personal Law .
- The Muslim Family law Court.

4. Composition:

- The Permanent Board of the Islamic Personal Law shall consist of the following;

  i) five Muslim graduates in *sharī`ah* from an Islamic *Sharī`ah* College or Sharī`ah University of a majority Muslim country who have at least a four year degree in sharī`ah and comparative Islamic Personal Law must be one of the major subjects of the degree. In addition hereto, the said graduate must be proficient in Arabic to the level prescribed for such a degree in an Arabic speaking country.

  ii) the most senior in qualifications and experience in working with the *sharī`ah* shall be appointed as Head of the Board. iii) members of the Board must be of such sound character as prescribed in the *sharī`ah* and must not previously have been guilty of any crime or engaged in any form of conduct which is contrary to the *sharī`ah* requirements.

  iv) the said Board will have the power to formulate the laws of operation of the Islamic Personal Law and such a Bill is to be

forwarded to the Minister of Home Affairs for presentation to the President for assent and promulgation.

v) such a law will become operational when published in the Government Gazette.

vi) the said Board will have the following functions;

- the Head of the Board will have an ordinary vote and a casting vote in cases of a tie in voting.
- a quorum of the Board shall be three members including the Head of the Board.
- the Board will meet at such times as the Head decides or when three members of the Board call for a meeting.
- all meetings of the Board will be closed meetings, but the Head may allow any of the *Quḍāh* of the Muslim Family Court to sit in on meetings should he deem that such attendance would be beneficial or in the interest of the workings of the Board and/or the Muslim Administration.
- the Secretary of the Board will be responsible for all minutes of all meetings and all administration work of the said Board.
- Board members will serve for five years and may be re-appointed.
- no member of the Board is to absent himself from the Republic for more than a fortnight without the consent of the Head of the Board.

- a member of the Board may be placed in retirement by the President if he becomes incapacitated mentally or physically in such a manner as to make his execution of his duties impossible. The President may then appoint a suitable substitute member on the recommendation of the Board who will serve out the remaining term of the retired member. A member may retire voluntarily or due to ill-health or any other viable reason. In this case the President shall follow the same procedure as immediately hereinabove in matter of appointment of a substitute member. If any member is granted leave for more than one month, then a substitute member shall be appointed temporarily by the President for the duration of absence of that particular member of the Board.
- the Board will operate the *sharī`ah* as according to the Sunnī Doctrine of interpretation of *sharī`ah*.
- the Board will have the following powers;
    - the Board will use the Seal of the Muslim Administration and will make use of it on official documents only.
    - a document of the Board will be valid if signed by the Head of the Board.

- administrative documentation of a non-*sharī`ah* nature authorised by the Board shall be valid when signed by the Secretary of the Board.
- documentation submitted to a State official or department shall be valid when authorised by the Board and signed by both the Head of the Board or his authorised deputy and the Secretary of the Board.
- the Board will be authorised to formulate a code of Islamic Personal Law for application on all Muslims in the Republic of South Africa. Such a code shall have to conform to the *sharī`ah* as per the *Sunnī* doctrine.
- the Board may consult with suitably qualified Muslims in and outside the Republic during this process. The Board will have to consult with the *Quḍāh* of the Muslim Family Court in the drawing up of the Islamic Personal Law code for South Africa. This will include the initial formulation of the code and subsequent amendments and repealing of laws of the said code.
- the Board shall appoint the *Quḍāh* of the Muslim Family Court to sit as a Commission in any matter of *sharī`ah* affecting the sphere of operations of the Board.
- The Board shall compulsorily function according to its mandate and shall act and execute its duties as

required in the *sharī`ah*. If the Board, at any time, transgresses this rule, its action may be invalidated by application to the Court by any Muslim with *ahlīyyah*.

5. A Muslim Family Court shall be founded and the *Quḍāh* of the said Court will be appointed by the President on the recommendation of the Permanent Board of the Islamic Personal Law. Such *quḍāh* shall be;
   - be appointed by the President and such q*uḍāh* must be Muslims of the *Sunnī* doctrine of Islām and have the same minimum qualifications as members of the Permanent Board of Islamic Personal Law.
   - A Chief *Qāḍī* will be appointed from the *quḍāh* who must be the highest qualified candidate for *quḍāh* in *sharī`ah*, but specifically in *fiqh* and more specifically in comparative Islamic Personal Law and *fiqh*. He must have obtained his first degree in a Muslim Arab country's *Sharī`ah* College or *Sharī`ah* University of post Matriculation level.
   - The Court shall apply the *sharī`ah* in all matters whereby it has powers of jurisdiction as per the legislation in force at a given time.
   - all oaths shall be administered as per the requirements of the *sharī`ah*. All Muslim persons must swear on oath. No affirmation is allowed for them.
   - the Islamic law of evidence shall apply as set out in the Islamic Personal Law code.
   - The Court will have the following powers;

- administer and rule all matters relating to *khiṭbah*.
- all matters relating to *nikāḥ* and incidental thereto, including the *ṣadāq* and matters relating to the *ḥakamān*.
- all matters of *ṭalāq* or of a *ṭalāq* nature as in the *sharī`ah*.
- all matters relating to *nasab* .
- all matters relating to marital property.
- issue summons and warrant of arrest of the defaulters upon whom summons have been issued.
- give effective judgment in all matters under its jurisdiction.
- try persons for offences under the Islamic Personal Law code and if found guilty convict such persons in such manner as is amenable to *sharī`ah* and prescribed in the Islamic Personal Law's code of Offences and Punishment.
- the Court shall sit permanently in some Centres of the Republic and in circuit session in other centres as set out in the Islamic Personal Law code in operation at any give time.
- keep records of all *`uqūd* of *ankiḥah*, *Saduqāt, ṭalāq, taṭlīq, Khul`, faskh*, births, deaths, conversions to Islām, *murtadd* persons from Islām, *nasab* of Muslim persons and all such records, certifications and documents related to these issues.
- issue decrees in matters under its jurisdiction and such matters as requiring hukm in *sharī`ah*. This will include the position of minors in all its aspects as well as all those persons who fall under this rule in the *sharī`ah*.

- all such other matters as permissible by *sharī`ah* and required under the Islamic Personal Law code in operation.
- The Chief *Qāḍī* shall administer all functions of the Court and will delegate such duties to such *quḍāh* of the Court as he deems fit and as they are, in his opinion, capable of. A Muslim Registrar shall be appointed by the President for the Court and such an official shall be the administrator of the Court. He should have knowledge of Islamic Personal Law. The Head of the Board and Chief *Qāḍī* will advise the President on such an appointment.
- The Chief *Qāḍī* together with two other senior *quḍāh* shall sit as the Appeal Division in matters of the Islamic Personal Law code sent for appeal by the general division of the Court.

APPENDIX 2

STATUS OF MUSLIM PERSONAL LAW IN SOME MUSLIM MINORITY COMMUNITIES IN NON MUSLIM COUNTRIES:

In the Introduction to this thesis, a brief account had been given of Islamic Personal Law that are in operation in certain Non-Muslim States.

In this appendix, a more detailed presentation of the functioning of the Islamic Personal Law, or parts of if, in certain Non-Muslim States, is discussed.

This is deemed necessary so that South Africa do not commit the errors other States committed or are still committing nor that she looks for a short cut in this matter taking the example of others.

1) The Netherlands:

The Netherlands had a long colonial history of ruling Muslim lands. Its attitude to the Islamic Personal Law in its own country is thus of importance. It also had a long "mother-country" relationship with South African Whites. There is a sizeable Muslim minority in the Netherlands. There is no official statutory recognition of the Islamic Personal Law, but Dutch Courts give rulings in Islamic Personal Law matters. "Dutch Courts will apply the parties' common national law to a divorce petition."[1]

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[1] Statement No: 152/189 dated 04/04/89 issued by Ministerie van Justitie s'Gravenhage, p. 1.

This is according to Article 6 of The General Provisions Act of 1829. A dissolution of marriage obtained outside the Netherlands after "proper process" will be recognised if pronounced by a court or other authority having jurisdiction.[1] Unilateral dissolution of marriage outside the Netherlands by the husband only will only be recognised if in conformity with the husband's Personal Law and is valid at the place where it is effected and it is evident that the wife expressedly or implicitly agreed or acquiesced in the dissolution of the marriage.[2] (The latter rule is in conflict with the *sharī`ah*). A unilateral divorce pronounced by a husband in the presence of a Consular official on Netherlands soil is not recognised by Dutch Courts.[3]

2) Australia:

Official 1986 totals of Muslims in Australia are;

New South Wales: 57 551.

Victoria: 37 965.

Queensland: 3 731.

Muslims in South Australia & Western Australia are grouped under "other religions".[4]

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1 Ministerie van Justisie op. cit. p. 3.

2 Ibid, op. cit. p. 3.

3 Ibid, op. cit. p. 3.

4 B Hunter (Editor): The Statesman Year Book, London, The Macmillan Press Ltd., 1991/1992, 128th ed., p.136.

The Australian Bureau of Statistics (ABS) gives Muslim population as 109 500 in 1986. This leaves 10 253 for South and Western Australia, Tasmania and Northern Territories. AFIC[1] gives the Muslim population as 250 000 in 1982. Current estimates are "at least" 300 000.[2] Disparity is caused due to "religion" being optional to be declared during census. These figures are important to understand the following issue.

The Australian Federal Government on 2nd August 1989 noting "the fact that Australia is a multicultural society made up of people of differing cultural backgrounds and from ethnically diverse communities", instructed the Australian Law Reform Commission (ARLC) to look into;

- laws relating to marriage, divorce and matrimonial causes, parental rights and obligations and guardianship of children, including the Marriage Act of 1961 and Family Law Act of 1975.
- laws relating to formation and performance of contracts.....
- laws creating offences.[3] These are very wide terms of reference. Note should be taken of the small community of Muslims in Australia (there are about 16 million people in Australia) and yet their system would also be investigated. The Australian government also concedes that cultural differences bring forth diversity in lifestyle of people which should be legally accommodated. The ALRC's report had now been

1 AFIC stands for The Australian Federation of Islamic Councils, an umbrella Federal Muslim organisation in Australia.

2 Australian Muslim Times, Sydney, No: 003, 23 Rajab 1411 corresponding to 8 February 1991, p. 1.

3 Australian Law Reform Commission: Discussion Paper 46: Multiculturalism, Family Law, January 1991, p. viii - Terms of Reference - .

published and of its main recommendation as far as Muslims are concerned are;

- that a polygamous marriage enacted in Australia shall not be recognised at all. This is an anomalous position which is inconsistent with the principle that the law should recognise and protect the relationships people choose for themselves. There is also inconsistency between recognising as valid a person's second formally contracted marriage and government policy that attributes some of the consequences of a marriage to a *de facto* relationship (a "living together" relationship) that may be concurrent with a marriage of one of the parties or, indeed, with another *de facto* relationship. The latter relationship is totally unacceptable in the Muslim community, but a polygamous union not. There is further anomaly in this matter in that The Australian Family Law recognises a polygamous marriage validly contracted overseas and deemed it a valid marriage. If a polygamous marriage is contracted overseas while domiciled there and it is valid in that domicile, such a polygamous marriage will also be valid in Australia even if the parties to it are residents of Australia and returned there to resume residence.[1]
- in matters of divorce the report states;

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1 The Australian Law Reform Commission: Report 57 - Multiculturalism And The Law, Sydney, Alken Press, 1992, pp. 93 - 94.

Recognising religious and customary divorce as legally valid would be consistent with the principles underlying the Commission's recommendations. Criteria will have to be established to determine the circumstances in which such divorces would be valid.[1]

- pre-marriage contracts on property distribution, in the event of the dissolution of the marriage, should be enforceable. (Presently it is not so).[2]

One can notice from the above recommendation on polygamy how self-defeating it is which comes down to a simple rule of denying operation of the exception of polygamy in Muslim society but yet parties domiciled or resident in Australia may do so in a domicile where it is valid. According certain rights and privileges of a valid marriage to "living together" situations and denying it to a polygamous marriage is prejudicedly unfair and anomalous.

It is interesting to note the clear bias in Australian law presently. A person may marry as often as he wishes provided the first marriage was legally terminated.

A married person may simultaneously have a marriage like relationship with another woman and have children from more than one partner. An

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1 Australian Law Reform Commission, Report 57, op. cit. p. 104.

2 Ibid, op. cit. p. 113.

unmarried person may have marriage-like relationships with more than one partner.[1]

The above reflects the actual legal status of a polygamous union. A monogamous Muslim marriage contracted overseas is apparently valid in Australia, if it is valid in the domicile it was contracted in.
One of the antagonist of recognition of polygamous marriages enacted in Australia, is the General Synod of the Anglican Church of Australia in its submission of 1991 to the ALRC.[2]

A polygamous union enacted in Australia, however, and recognised as valid in the contracting parties' domicile may also be recognised as valid in Australia for some purposes as ruled in Haque vs Haque (1962) 108 CLR 230.
If it is not so, such a union will be recognised as a *de facto* relationship for certain purposes.[3]

3) Canada:

The Canadian Muslim Association presented a brief to the Federal Government relating "to giving legal expression to Muslim Personal Law." The request was refused and the Foreign Ministry "do not forsee such being done in the near future."[4]

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1 The Australian Law Reform Commission, Discussion Paper 46, op. cit. p. 27.

2 Ibid, op. cit. p. 27.

3 Ibid, op. cit. p. 27.

4 Statement Ref: JLA - 0739, dated 28/5/1992, Department of External Affairs, Ottawa, Canada.

4) The United Kingdom:

The British Muslim community, virtually all of migrant origin, totals 1.5 million.[1] No official recognition for *sharī`ah* is accorded by the Mother of Parliaments. However Muslims have held seminars in which their views were put forward. Thus the Lord Chancellor's Review of Family and Domestic Jurisdiction held in London on 4 September, 1986 declared: "Whatever the opinion chosen for the future family system in England and Wales, the concerns of the Muslim families and individuals must be taken into account as part of the general accommodation of culture and religious minorities..." The seminar further decided that there be "mandatory reference to religious and cultural factors including consultation with religious authorities, in conciliation and welfare stage", and "including Muslim lay members in conciliation and divorce court welfare services", amongst other things.[2]

5) India:

Muslims number 75,6 million or 11.36% of India's total population.[3] Muslim sources in India give it as 20% according to the 1981 census.[4] Islamic Personal Law in its entirety was operating in India until the early days of British Colonial rule, but later many Islamic Laws were changed and other

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1 The Islamic Academy: Muslim Education Quarterly, Cambridge, 1991, Vol 9 No. 1, p. 59, Article "The Shari`ah Family Law Courts in Britain...." by Dr M I H I Surty.

2 Muslim Education Quarterly, op. cit. p. 66.

3 The Statesman's Year Book, op. cit. p. 647.

4 Statement by Shaikh Abū Ḥasan `Alī Nadvī Ref: 483 dated 12/12/1991.

laws substituted in their place. Islamic Personal Laws were removed, but Muslims protested when these laws were amended "to rectify the position." Islamic Personal Law is administered by the General Courts and the Appeal Court hears appeals. Islamic Personal Law thus has no special standing. Generally the *Ḥanafī* law is applicable for *Sunnīs* and *Ja`farī* law for the *Shī`ah* groupings. These laws are drawn up by Muslim jurists and codified by the Parliament of India. First codification in India was in 1937. This system of application had a serious repercussion when the Indian Appeal Court ruled contrary to *Ḥanafī* law in a case of *nafaqah* in a *ṭalāq bā'in* case. Strong Muslim protests forced the Indian Parliament to pass enacting legislation rectifying the situation.[1] The above case is that between Muhammad Ahmad Khan vs Shah Banoo Begum decided under sections 125 and 127 of the Indian Criminal Procedure Code of 1973. The Muslim Divorce Bill 1986 rectifying the situation was signed by India's President on 9th May 1986.[2] The above case caused the *`Ulamā'* to take a new approach to safeguarding Islamic Personal Law. An All India Islamic Personal Law Convention to protect Islamic Personal Law was convened in 27th December 1972. The *`Ulamā'* established Muslim courts to hear and settle Islamic Personal Law cases to thwart any attempt at forcing Muslims to accept secularist rulings of the Indian courts.[3]

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1 Statement by Shaikh Abū Al Ḥasan 'Alī Nadvī Ref: 483 dated 12/1/2/1991.
Statement by Shaikh Madanī, Jamī`ah al `Ulamā Hind, New Delhi, Ref: JUH/65/92/1697 dated 29/2/1992.

2 Islamic Legal Philosophy, op. cit. p. 366.

3 Ibid, op. cit. pp. 365 - 366.

6) The Philippines:

Muslims totalled 1 584 963 in 1970. The total population in 1991 was 62 868 000.[1] Presidential Decree 1083 known as the Code of Muslim Personal Law of Philippines of 1977 brought official recognition of Islamic Personal Law to the Philippines. *Talfīq* (eclectic selection) was incorporated into the Code which means that parties could follow one *madhhab* (sect) in *nikāḥ* (marriage) and another in *tarikah* (inheritance). Note should be taken that the Sultanate of Saluj promulgated its Diwan Tausog in 1878 and a more comprehensive one was promulgated by the Sultanate of Magindanao in 1886. These are *Shāfi`ī* codifications.[2] Islamic Personal Law is thus not foreign to the Philippines.

7) Thailand:

The total Muslim population of Thailand in 1983 was 1 869 427.[3] The total Thai population in 1980 was 46 961 338.[4] In Thailand *Quḍāh* (Muslim judges) sit as local functionaries in the Courts of Law with judges during trial proceedings and offer advice. There is a special Adviser in Islamic Affairs to the Government and a Central as well as Provincial Islamic Committees. This was established in 1943. There are special concessions allowing application of Muslim laws in matters of Family relations and

1 The Statesman's Year Book, op. cit. pp. 1008.

2 Islamic Legal Philosophy, op. cit. p. 352.

3 The Statesman's Year Book, op. cit. p. 1082.

4 Ibid, op. cit. p. 1188.

Inheritance. This is mainly in the four southern provinces, namely, Yala, Narathiwat, Pattani and Satun.[1] This was established in 1944.

8) Singapore:

In August 1988, 16% of Singaporeans were Muslims.[2] In 1957, the Muslim Ordinance relating to appointment of Registrar of Muslim marriages and a Chief *Qāḍī* (Muslim judge) and amending various laws, were introduced. In 1966 The Administration of Muslim Law Act, Act 27 of 1966 was introduced. Other legislation affecting Muslims were also introduced later.[3] The Administration of Muslim Law Act is a comprehensive Act dealing with an extremely wide spectrum of Muslim affairs, ranging from *Zakāh al Fiṭr* (end of *Ramaḍān* alms) to all the branches of Islamic Personal Law, Mosques and Islamic Schools. There are special *Sharī`ah* Courts dealing with these matters and the *Majlis Ugamā Islām* is the overall Muslim body controlling Muslim affairs.[4] Singapore must be unique in this matter in the world. It is interesting to note that the world community has never declared this system of Singapore as a separatist policy or something akin to apartheid.

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1 Islamic Legal Philosophy, op. cit. pp. 353, 356 - 357.

2 The Statesman's Year Book, op. cit. p. 1082.

3 Islamic Legal Philosophy, op. cit. pp. 354 - 355.

4 Ibid: 352 - 353.
Statement Ref: SH CT/85/69. V4 dated 19/02/1991 by Hadj Abū Bakr, President of the Syriah Court (Sharī`ah Court) of Singapore.

9) Sri Lanka:

Islamic Personal Law operated here since 1770 when Code No: 8 dealing with special laws affecting the "Moors and other Mohammedans" were introduced. From 1806 till 1910 various amendments were made to the above including extending the legislation to other areas. In 1929 the Muslim Marriage and Divorce Registration Ordinance No: 27 was introduced and in 1931 the Muslim Intestate Succession and *Waqfs* Ordinance No: 10 came into existence. By the more updated and comprehensive Act 13, The Muslim Marriage and Divorce Act was introduced in 1951.[1] *Quḍāh* of Sri Lanka are recognised officials. They solemnise and register marriages. They also mediate and arbitrate in disputes in married life.[2] The *Sharī`ah* Court established in Sri Lanka consists of the following five divisions;

- Board of *Quḍāh*.
- *Quḍāh* Court.
- Special *Qāḍī* Court.
- *Waqf* Tribunal.
- *Waqf* Board.[3]

From the above, one notices immediately the wide discrepancy between the countries that have European descendant inhabitants and European derived law and governments and those who do not, in spite of having had a spell of colonial rule by these European powers. The Asian countries did not exhibit an anti-Muslim bias.

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1 Islamic Legal Philosophy, op. cit. pp. 356 - 357.

2 Ibid, op. cit. pp. 352 - 353.

3 Ibid, op. cit. p. 354.

The unfairness and anomalies in the European systems are very pronounced viewed against the South East Asian background.

The customs and traditions which formulated European laws and the history of that system and the former and even current animosity between Christianity and Islām, are the main reasons for this problem experienced by Muslims living as minorities under Non-Muslim European modelled systems of government.

It should be noted that in some of the mentioned Muslim minorities' cases cited, they have little say in the actual functioning of their Personal Law, although such is recognised legally.

A typical case is India where secular courts administer Muslim Personal Law.

This is against *sharī`ah* requirements as discussed in this thesis and causes serious problems as depicted in the celebrated divorce case of Khan vs Begum where the Indian Appeal Court awarded maintenance to Begum in conflict with *Ḥanafī* doctrine which is applicable to *Ḥanafis* in India.

South Africa should not resort to the piece-meal approach for the implementation and administration of Islamic Personal Law as some Non-Muslim countries had when they decided to legalise Islamic Personal Law in certain respects only.

This system creates more conflict and does not solve the problem of Islamic Personal Law which is diametrically in conflict with other secular laws.

Muslims must therefore have full control over this matter which is vital to their lives and those who are going to enforce it must be properly qualified.

APPENDIX 3

MADHĀHIB (SCHOOLS) OF *FIQH* (ISLAMIC JURISPRUDENCE)

In the chapters of this thesis, mentioned was made of various schools in Islamic Jurisprudence. This appendix on some of the major schools will assist in the understanding of these schools.

There were three major movements in Islamic history - the *Sunnī*, *Shī`ah* and *Khārijī* movements. Only the *Sunnī* and *Shī`ah* schools were both theological as well as *Fiqh* School of Thought and are still in existence while the *Khārijī* movement was only a theological movement and is virtually non-existent now.

Within the *Sunnī* system, there were a large number of *mujtahidūn* (legists) and *Fuqahā'* (jurists). Some of them did not leave anything of their works as their students did not record their teachings. However some of their rulings are found in existing *Sunnī fiqh* works as quotations or comparisons or judgments.

The major *Sunnī Fiqh* (law) Schools that are in existence are;

- the *Ḥanafī madhhab* (law school) founded by Nu`mān bin Thābit who was born in al Kūfah, southern Irāq in 80 A.H. He is commonly known as Imām Abū Ḥanīfah.
- the *Mālikī madhhab* founded by Mālik bin Anas who was born in Madīnah, Arabia, in 93 A.H.

- the *Shafi`i madhhab* founded by Muhammad Idris al *Shafi`i* who was born in Ghazzah in Palestine in 150 A.H.
- the *Hanbali madhhab* (law school) founded by Ahmad bin Hanbal who was born in Baghdad in 164 A.H.
- the *Zahiri madhhab* founded by Dawud al *Zahiri*, who was at first a *Shafi`i* follower. His *madhhab* is not widely practised nowadays, but his student ibn Hazm left a voluminous work of *Zahiri fiqh* called al Muhalla which reflects the views and rulings of many *Fuqaha'* and gives the *Zahiri* ruling on *masa'il*.[1]

<u>The *Hanafi Madhhab*:</u>

Its founder, *imam* Abu Hanifah, was born in al Kufah and studied under Hammad ibn Sulaiman who was the student of the famous *Sahabi* `Abd *Allah* ibn Mas`ud (R.A).

Abu Hanifah's *fiqh* is based on *ra'i* (logic) for all *masa'il* (legal problems) in which he found no *shari`ah* text in his time. He used the most *ra'i* in comparison to other *Fuqaha'* of his time.[2]

The *usul* (principles) of his *madhhab* as he himself narrated are as follows;

"I take from the *Qur'an* if I found the ruling in it and if not, then in the *sunnah* of the Messenger of *Allah* (S.A.W.S). If I do not find it there, then from the *fatawa* of the

1 Masa'il: Fiqh problems or questions.

2 Madkhal li Dirasah al Shari`ah al Islamiyyah. op. cit. p. 157.
Al Khadari Bai M: Ta'rikh al Tashri` al Islami, Cairo, Al Maktabah al Tijariyyah al Kubra, 1970, 9th ed., p. 170.

sahabah (R.A.) which I feel to take and when the matter comes to Ibrahim al Nakha'i and al Hasan, (of the *tabi`un*)[1] then I use *ijtihad* (juristic opinion) as they used it."[2]

The full *Hanafi usul* (principles) are thus;

The *Qur'an*, *hadith/sunnah*, *ijma`*,(juristic consensus) *fatawa* (legal opinion/ dispensation) of the *sahabah*, *al qiyas* (analogous reasoning), *al istihsan*, *al `urf* (custom).[3]

His *madhhab* was recorded for posterity by his two famous disciples and students Abu Yusuf and Muhammad al Shaibani, especially the latter. Other famous students were Zufar bin Hudhail and al Hasan bin Ziyad.[4]

*Hanafi*s are found mostly in Asia and the Middle East.[5]

The *Maliki Madhhab*:

It was founded by Malik bin Anas of Madinah in Arabia.

He studied under very prominent and learned *shaikhs* of Madinah including ibn Hurmuz, Rabi`ah al *Ra'i* and Ja`far al Sadiq.[6]

Malik was both *muhaddith* (expert in *hadith*) and *faqih* (jurist).

His legal theorems and its codification were all sound and derived from the *hadith* and *sunnah* of the Prophet (S.A.W.S). His greatest contribution to *fiqh* is the codification

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1 students of the Sahabah.

2 Ta'rikh al Tashri` al Islami, op. cit. p. 170.

3 Abu Zahra M: Ta'rikh al Madhahib al Islamiyyah, Fi Ta'rikh al Madhahib al Fiqhiyyah, Cairo, Dar al Fikr al `Arabi, undated, p. 162.

4 Ta'rikh al Tashri` al Islami, op. cit. p. 171.

5 Shari`ah - The Islamic Law, op. cit. p. 93.

6 Ta'rikh al Tashri` al Islami, op. cit. p. 175.
Ta'rikh al Madhahib al Islamiyyah, op. cit. p. 178.

of *Madani fiqh* (*fiqh* of Madinah), also called *fiq*h *al riwayah*, being *fiqh* derived from the *Qur'an*, *hadith* and *sunnah* texts. These *hadith* and *sunnah* texts are found in *al Muwatta'* which is still available today and is the oldest written *fiqh* work in Islam.

The *usul* (principles) of his *madhhab* (law school) is explained by al Qarrafi, an eminent *Maliki faqih, as follows*;

"The *usul* of our *madhhab* is; the *Qur'an*, followed by the *sunnah*, then the *ijma`* (consensus) followed by the *ijma`* of Madinah.

Hereafter *qiyas* (analogous reasoning), *qawl* (*fatwa* - legal opinion) *sahabi*. *Al istislah*, *`urf* (custom) and *`adat* (practice of people), s*add al dhara'i, al istihsan* and *al istishab*."[1]

*Maliki*s are found mostly in Egypt, Sudan and the Arabian Peninsula and North Africa (the Maghrib).[2]

The Shafi`is:

Its founder is Muhammad Idris al *Shafi`i*, a Qurashite.

He memorised the *Qur'an* at the age of seven and the *Muwatta'* at fifteen. He studied under the *mufti* (Muslim learned authority who gives legal opinion) of Makkah Muslim bin Khalid al Zunji and Sufyan `Uyinah. Later also under Muhammad Shaibani in Baghdad where he studied *Hanafi fiqh* in depth.

He has two *madhhabs*; an "old" one being of Baghdad and a "new" one in Egypt, the latter of which he had to change certain verdicts as the *`urf* (customs) in Egypt was different from that of Baghdad.

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1 Madkhal li Dirasah al Shari`ah al Islamiyyah, op. cit. p. 164.

2 Ta'rikh al Madhahib al Islamiyyah, op. cit. pp. 223 - 224.

His "new *Risalah*" is available as well as *Kitab al Umm*, being an *usul* (jurisprudence principles) work while the "old *Risalah*" is only present in parts in the works of the *Shafi`i fuqaha'*.

As can be expected, the *Shafi`i madhhab* (law school) is mid-way between the *Hanafi* and *Maliki madhahib* (law schools).[1]

The *usul* of his *madhhab* is as follows;

The *Qur'an*, followed by the *hadith* and *sunnah*, even the category of the *ahad ahadith* (singularly reported Prophetic precepts) which are *sahih* (authentic).

Hereafter the *ijma`* (consensus) followed by the *fatawa* (legal opinions) of the *sahabah* which are near to the text of the *Qur'an* and the *hadith* followed by the *fatawa* of the *khulafa' al rashidun* (the righteous caliphs - Abu Bakr, `Umar, `Uthman and `Ali) and their rulings take precedence over *qiyas* (analogous reasoning), which is the last format of proof.[2]

Of his famous students were Ahmad ibn Hanbal, al Tabari, al Muzani and Dawud, who later became Dawud al *Zahiri*.[3]

Shafi`is are found mostly in Yemen, Egypt, Iraq, Syria, Pakistan, Indonesia, Malaysia, Philippines, East and South Africa.[4]

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1 Doi A R: Shari`ah - The Islamic Law p. 103 - 104.

2 Madkhal li Dirasah al Shari`ah al Islamiyyah, op. cit. p. 169.
Ta'rikh al Tashri` al Islami, op. cit. p. 186.

3 Ta'rikh al Tashri` al Islami, op. cit. p. 189.

4 Shari`ah - The Islamic Law, op. cit. p. 107.
Madkhal li Dirasah al Shari`ah al Islamiyyah, op. cit. p. 170.

The *Hanbalis*:

The founder of this *madhhab* (law school) is Ahmad bin Hanbal. He studied under al *Shafi`i* in Baghdad and later developed his own *ijtihad* (juristic) system.

Of his famous students are al Athram, ibn Hajjaj and al Maruzi.[1]

The *Hanbali madhhab* is peculiar in its strong *shari`ah* text based system. It aligned itself as far as possible with the Prophetic era.

The *Hanbalis*' *usul* (principles) are as follows;

The *Qur'an* followed by the *hadith/sunnah*, even weak *hadith* text which are of the *sahih* (authentic) grade, but not rejected texts, thereafter the *fatwa* (legal opinion) of the *sahabah* which has no opposition to it (which Ahmad calls *ijma`*). If there is a difference between the *sahabah* in their *fatawa* (legal opinions), he would take the one nearest to the *Qur'an* and *sunnah*. Hereafter comes the *marasil hadith* (a category of technically weak *hadith*) and then the *qiyas* (analogous reasoning) patterns.[2]

According to al Tusi, *Hanbalis* also accept *al istihsan*, while ibn Qudamah states that both *al istislah* and *al istishab* are also part of the *Hanbali usul*.[3] *Sadd al dhara'i* (blocking of the ways leading to evil and sin) is also an accepted in the Hanbali *usul*.[4]

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1 Al Khadari M: Ta'rikh al Tashri'al Islami p. 190.

2 Madkhal li Dirasah al Shari`ah al Islamiyyah, op. cit. pp. 171 - 172.

3 Masadir al Tashri` al Islami, op. cit. pp. 70, 89 & 152.

4 Ta'rikh al Madhahib al Islamiyyah, op. cit. p. 335.

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