ADMINISTRATION OF ISLAMIC LAW OF SUCCESSION, ADOPTION, GUARDIANSHIP, LEGACIES AND ENDOWMENT IN SOUTH AFRICA.

BY

ABDUL KARIEM TOFFAR

submitted in fulfilment of the requirements for the degree of

DOCTOR OF PHILOSOPHY

in the Department of Islamic Studies, Faculty of Arts at the

UNIVERSITY OF DURBAN-WESTVILLE

PROMOTER:

PROFESSOR DR S S NADVI

HEAD: DEPT OF ISLAMIC STUDIES

UNIVERSITY OF DURBAN-WESTVILLE

JOINT-PROMOTER:

ASSOCIATE PROFESSOR S DANGOR

DEPT OF ISLAMIC STUDIES

UNIVERSITY OF DURBAN-WESTVILLE

JOINT PROMOTER:

ATTORNEY M S OMAR

ATTORNEY OF THE HIGH COURT OF SOUTH AFRICA

OCTOBER 1998

200 TOF Rel of law Rand

DEDICATION

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

Likewise do I dedicate it to my wife and children who bore much discomfort during my working on this thesis.

I would also like to dedicate it to all muslims who love their Faith and serve it sincerely and with honour.

ACKNOWLEDGEMENT

I wish to acknowledge my thanks to Professor Dr S S Nadvi, Head of the Department of Islamic Studies, my promoter, Associate Professor S Dangor, my joint-promoter and Attorney MS Omar, my joint-promoter whose advice and guidance offered me towards the completion of this doctoral thesis, were invaluable.

I likewise wish to thank all instances, private and public, local and foreign for their assistance in supplying various forms of required information without which this thesis could not have been completed.

UNIVERSITY OF DURBAN-WESTVILLE LIBRARY
BRN. 198958
CLASS No. 297.14 TOF

TABLE OF CONTENTS

INTRODUCTION 1

CHAPTER 1: THE ORIGIN AND DEVELOPMENT OF ISLAMIC LAW . . 6
1 The *Sharī'ah* 6
1.1 Definition Of *Sharī'ah* 6
1.2 Peculiarities Of *Sharī'ah* 7
1.2.1. A Short History Of The Development Of Shari'ah 8
1.2.2. General Structure Of *Sharī'ah* 13
1.3. AL-*FIQH* 17
1.3.1 Definition of *Fiqh* 17
1.3.2 The Sources of *Fiqh* 19
1.3.3 The Primary Sources Of *Fiqh* 20
1.3.3.1 The *Qur'an* 20
1.3.3.2 The *Hadith* Or *Sunnah* 24
1.3.4 The Secondary Sources Of *Fiqh* 30
1.3.4.1 *Shurūt* (Conditions) Of The *Mujtahid* . . . 32
1.3.4.2 *Al-Ijmā'* (Juristic Consensus Of Opinion) 34
Analysis Of The Definition Of *Ijmā'* . . . 35
1.3.4.3 *Al-Qiyas* (Analogical Reasoning) 39
1.3.4.4 *Al-Istiḥsan* (Refined Analogy) 40
1.3.4.5 *Al-Istiṣlah* Or *al-Maṣāliḥ al-Mursalah* (Public Interest) 42
1.3.4.6 *Sadd Al-Dharā'i* (Blocking The Ways To Evil And Sin) 43
1.3.4.7 *Al-'Urf* (Custom) 45
1.3.4.8 *Qawl* Or *Madhhab* (School Of Law) Of A *Ṣaḥābī* 47
1.3.4.9 *Al-Istiṣḥab* (Confirming An Existing Situation) 48
1.3.5 *Adwar Al-Fiqh* (Stages Of Development Of *Fiqh*) 50
1.3.5.1 *Ahd Nabawī* (The Prophetic Era) 50
1.3.5.2 *Ahd Ba'd Ahd al-Nabawī* (Post Prophetic Era) 51

CHAPTER 2: *AL-WILAYAT* (GUARDIANSHIP) AND *AL-TABANNĀ* (ADOPTION) 58
1 *AL-WILAYAT* 58

1.1 Definition 58
1.2. Kinds Of *Wilāyat* 58
1.2.1 *Al-Wilāyat ʿalā al-Nafs* (Guardianship Over Persons) 60
1.2.2 *Al-Wilāyat ʿAlā al-Māl* (Guardianship Over Wealth And Possession) 91
2 *AL-TABANNĀ* (ADOPTION) 100
2.1 Definition 100
2.2 Adoption In Judeo-Christian Tradition 101
2.3 Adoption In Pre-Islamic Arabia 104
2.4 The Abrogation Of *Tabanna* 105

CHAPTER 3: *AL-MĪRĀTH* (SUCCESSION) 112
1 *Al-Mīrath* In *Sharīʿah* 112
1.1 Definition 112
1.2 *Mīrath* Of *Ahl al-Kitāb* 114
1.2.1 Jewish Law Of Succession 118
1.2.2 Succession In Christianity 120
1.3 Pre-Islamic Arabian Practice In *Mīrath* (Succession) 123
1.4 *Mīrath* In Islām 125
1.5 *Mashruʿiyyah* (Legal Standing) Of *Mīrath* 126
1.5.1 Quranic Revelations On *Mīrath* 127
1.5.2 Technical Terms Pertaining To *Mīrath* 131
1.5.3 Aim Of *Sharīʿah* In The Organisation Of *Tarikāt* (Estates) 135
1.5.4 *Asbāb al-Mīrath* (Causes Of Succession) . . . 150
1.5.5 *Mīrath al-Anbiyā* (Succession Of The Prophets (A.S) 155
1.5.6 *Shurūṭ al-Mīrath* (Conditions Of Succession) . 156
1.5.7 The Islamic Philosophy In *Mīrath* 183
1.5.8 *Aḥkām al-Mīrath* (Laws Of Succession) 188
A) *Anṣibah al-Mīrath* (Shares In Succession) . . 188
B) *Al-Ḥajb* (Exclusion Or Diminished Shares) . . 270
C) *Al-ʿAwl* (Share Devaluation) 275
D) *Al-Radd* - Redistribution 285
E) *Al-Munāsakhah* (Share Transfer) 292
F) *Al-Takhāruj* (Agreement Of Exit Of An Heir Or

Heirs) 293
G) *Masā'il Mulaqqabāt* (Titled Problems) 299

CHAPTER 4: *AL-WASĀYĀ* (LEGACIES) 307
1. *Al-Wasāya* 307
1.1 Definition 307
1.2 *Mashrū'iyyah al-Waṣiyyah* (Validity Of Legacy) . . 308
1.3 Permissible Amount For *Al-Waṣiyyah* 312
1.4 *Arkān al-Waṣiyyah* (Principles Of Legacy) 314

CHAPTER 5: *AL-WAQF* (ENDOWMENT) 334
1 *Al-Waqf* (Endowment) 334
1.1 Definition 334
1.2 *Mashrū'iyyah al- Waqf* (Validity of Endowment) . . 335
1.3 *Aḥkām 'Ammah li al-Waqf* (General Laws of Endowment) 337
1.4 *Waqf Fī Al-Ma'siyah* (Endowment On Sinful Instances) 342
1.5 Matters Pertaining To The Administration Of A *Waqf* 343
CHAPTER 6: ADMINISTRATION AND IMPLEMENTATION OF ISLAMIC LAWS OF SUCCESSION, ADOPTION, GUARDIANSHIP AND ENDOWMENT IN SOUTH AFRICA. 350
1. Brief Sketch the of History of South African Law . 353
2 The South African Constitution Processes And Its Effects On *Sharī'ah* And Muslims 355
3. The South African Constitutional Position In The Nineties 358
3.1 Analysis of the Interim Constitution of South Africa with Regards to Muslims and Muslim Life 359
3.1.1 Analysis Of The Final Constitution Of South Africa With Regards To Muslims 363
4 Religious / Cultural Rights In The Constitutions Of Selected Countries 367
4.1 Accommodation of Religious and / or Cultural Rights in Constitutions of NonMuslim Countries 367
4.2 Religion And Cultural Freedom In The Constitutions Of Muslim Countries 370
5 Roman Law Relating to the Law of Persons 373
5.1 The Roman Family 373

5.2 Legitimacy Of Children 375
5.3 Adoption 376
5.4 Tutelage (*Tutela*) And Curatorship (*Cura*) 377
5.6 *Fideicommissa* (Trusts) 383
5.7 Codicils 384
6 Aspects Of Indigenous Law Having Bearing On This Thesis 384
6.1 Property And Persons in Indigenous Law 384
6.2 Indigenous Succession 385
7 The Current South African Family & Succession Laws & Matters Relating Thereto 389
7.1 Guardianship 389
7.2 Adoption In South African Law 395
7.3. SUCCESSION 399
8. The Position Of Muslim Family Law In Some Muslim Countries 426
8.1 *Al-Wilāyah* 427
8.2 *Al-Ḥaḍanat* 429
8.3 *Al-Tabannā* 435
8.4 *Al-Mīrath* 436
8.5 Laws Relating To *Al-Wasaya* 445
9 Recommendations For The Application Of *Al-Wilāyah*, *Al-Tabannā*, *Al-Mīrath*, *Al-Waṣāyā* And *Al-Waqf* 452
10 Basic Structure Of Muslim Personal And Family Law In South Africa 457
10.1 Basic Recommendations For *Wilāyah* (Guardianship) 459
10.2 Regulations And Conditions For *Al-Kafālah* And For The *Laqīṭ* 462
10.3 Regulations For Legitimacy And *Al-Iqrār Bi Al-Nasab* (Acknowledgment Of Lineage) of Muslim Children 463
10.4 Regulations For *Al-Mīrath* 464
10.5 Recommendations For *Waṣāyā* 472
10.6 Recommendations For Creating *Awqāf* 477

CONCLUSION 481

APPENDICES 487

APPENDIX 1 488
APPENDIX 2 492
APPENDIX 3 501

GLOSSARY 506
ARABIC WORDS 506
LATIN WORDS 522

BIBLIOGRAPHY 523
ARABIC REFERENCES 523
ENGLISH REFERENCES 532
ARTICLES, REPORTS AND STATEMENTS 536
SOUTH AFRICAN LAWS 537
SOUTH AFRICAN COURT CASES 538

FOREIGN LAWS 539
Constitutions: 539
Personal Law Codes Of Muslim Countries And Of Singapore 539
UNITED NATIONS RESOLUTIONS / CONVENTIONS 540

INTRODUCTION

The ancestors of the South African Muslim community arrived in South Africa from Indonesia and India in 1654. The notable *Shaikh* Yusuf, whose real name is *Shaikh* ʿĀbidīn Tādia Tsoessop and who rebelled against Dutch colonial rule in Java, arrived here in 1694 as a political prisoner.[1] He was previously imprisoned in Ceylon (the present day Sri Lanka) and was later transferred from there to the Cape of Good Hope as an exile.[2] He died in 1699 at Zandvlei at the Cape. Save for his daughter and two companions, all of his accompanying party returned to Bantam, Java, after his death.[3]

The first Muslim occupation of houses took place in 1790 in the *Bo-Kaap* where the new growing Muslim community took up residence.[4]

In a country which was hostile to both their race and religion, these new Muslims had to face the challenge of maintaining their identity and devise ways and means to achieve this. Mosques and *madāris* (sing. *madrasah* - Islamic religious schools) were to carry out this vital function. Since most of the *a'immah* (sing. *imām* - one who leads the prayers) were poorly versed in *sharīʿah* (Islamic Law), there was a need for proper *'ulamā'* (scholars) to be trained abroad. The perpetual disputes between *a'immah* and legal battles which accompanied it, is evidence of the serious weakness of the *a'immah* then.

Mosque *a'immah* established the Muslim Judicial Council in Cape Town in 1945, primarily to settle the *Jumuʿah* question which had raged for decades and seriously divided the community.[5] This brought a partial improvement in the situation. The Council later began to concern itself in mosque and Muslim matters which

---

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

2 Davids A: *The Early Muslim at the Cape*, Cape Town, Muslim Assembly, 1977, p. 5.

3 Ibid, p. 6.

4 *Mosques of Bo-Kaap*, p. xvi.

5 Ibid, p. 56.

necessitated sending men for studies to Islamic institutions in Egypt and Saudi Arabia. The absence of a system of grading and vetting the returning students again brought serious problems. A near parallel system developed in Transvaal (nowadays, Gauteng, Mpumalanga, Northwest and Northern provinces) and Natal (now KwaZulu Natal) with the establishment of the *Jam'iyāt al-'Ulamā'* of Transvaal in 1923 and in Natal in 1950.[1] These two bodies look after mosques, *madāris* and personal law matters. The absence of a vetting and registration system is also causing problems in those regions as well.

The Islamic Unity Convention (IUC), which is a national Muslim body and founded in Cape Town in March 1994, is of the opinion that registration of Muslim jurists will ensure proper application and administration of Muslim Personal Law in South Africa. To this end it had asked the South African government to institute a registration system in the same manner as attorneys and advocates are registered.[2]

Muslims follow Islam as a way of life. The word "Islām" technically means "submission to Allāh (God Almighty)". Islām is thus "the open submission to the *sharī'ah* and following that which the Prophet Muḥammad (s.a.w.s)[3] brought".[4]

Islām, thus, regulates all spheres of a Muslim's life - from birth till death. The Islamic legal system is based on revelation

---

1 Mahida E M: *History of Muslims in South Africa - A Chronology*, Durban, Arabic Study Circle, 1993, pp. 56 - 58 and 70 - 71.

2 *Islamic Unity Convention News*, Rylands Estate, Athlone, Published by the IUC Public Relations Office, Johannesburg, Transvaal, Shawwāl 1415 AH corresponding to March 1995, p. 4 - 6.

3 S.A.W.S. is an abbreviation for *sal-lallahu 'alaihi wa sallam*, which is the Arabic for "the peace of blessings of God be upon him."

4 Ibn Manzūr al-Ifriqi: *Lisān al-'Arab*, Cairo, Dār al-Ma'ārif, undated, Vol 3 p. 2080.
'Abādī M D: *Al-Qāmūs al-Muḥīṭ*, Cairo, Matba'ah Muṣṭafa al-Ḥalabi, 1952, 2nd ed., Vol 4 p. 131.
Al-Munjid Fī al-Lughah Wa al-'Ilām, Dār al-Mashriq Beirut, al-Maktabah al-Sharqiyyah, 1975, 23rd ed., p. 347.

of divine origin which regulates all aspects of Muslim existence from worship, ethics and morality, human interaction and laws for all spheres of life, including the law of persons and family law. In an Islamic State, thus, all laws must conform to the Islamic legal system. This makes Islam a religion as well as a political and social phenomenon. Some scholars have realised this and speak of the Prophet (s.a.w) bringing a religious as well as social order into existence[1] while others mention that he was both a prophet and a statesman.[2] A scholar, Professor De Santillana,[3] referred to Islam as follows: "...this law is at the same time a social duty and a precept of faith; whosoever violates it, not only infringes the legal order, but commits a sin, because there is no right in which God has not a share. Juridical order and religion, law and morals, are the two aspects of the same will, from which the Muslim community derives its existence and its direction; every legal question is in itself a case of conscience, and jurisprudence points to theology as its ultimate base."[4]

South Africa has now constitutionally accepted the reality of a permanent Muslim presence in the country and that this community has a peculiar system of family law and way of life. The interim constitution[5], for instance, recognised this when it stated: "Nothing in this Chapter shall preclude legislation recognising - a system of personal and family law adhered to by persons

---

1 Nanji A A: *The Muslim Almanac*, New York, Gale Research Inc., 1996, p. 28.
Esposito J L: *Oxford Encyclopaedia of the Modern Islamic World*, Oxford, Oxford University Press, 1995, Vol 2 p. 244.

2 Houtsma M T *et al*: *The Encyclopaedia of Islam*, Leyden, J Brill Ltd., 1934, Vol 4 p 350 - under the heading *Shi'ah*.

3 Professor David De Santillana was professor of History of Political and Religious Institutions of Islam at the University of Rome.

4 Arnold T & Guillaume A: *The Legacy of Islam*, Oxford, Oxford University Press, 1931, 1st ed., Article : *Law and Society*, p. 288 by D De Santillana.

5 *Constitution of the Republic of South Africa No. 200*, 1993, Government Printer, Pretoria.

professing a particular religion; and the validity of marriages concluded under a system of religious law subject to certain procedures."[1] There is no clear and unambiguous statement in the constitution which compels the systems of family law to be restricted to the limitations of the Bill of Rights (BOR) of the South African interim constitution. However, this uncertainty was removed by the working draft copy of the proposed new constitution of South Africa[2] where it is stated: "The Constitution does not prevent legislation recognising the validity of marriages concluded under a system of religious law [or other recognised traditions], or a system of personal and family law adhered to by persons professing a particular religion to the extent that the system is consistent with the Bill of Rights."[3] This last mentioned clause had been accepted and effectively legislated into law[4] which will or might probably force MPL into a modern western liberal democratic jacket permanently, if a change is not made to the constitution.

There had been, to date, no proper testing of Muslims' feelings in this matter. In fact, the issue will apparently be forced onto the Muslim public through the law process which is anything but democratic nor consistent with freedom of choice, the socalled hallmarks of the democratic process. This appears to be the thinking of the constitutional advisers and constitution making politicians who are confronted with the conflict between *shari'ah* and South African law, especially the conflict between these two systems of law as it occurs in situations of Muslims who marry according to *shari'ah* and then either register that marriage in terms of South African law or undergo a civil marriage after the Muslim marriage.

---

1 *Act 200 of 1993*, Chapter 3 - Fundamental Rights, Section 14 (3)(a)(b).

2 *Working Draft of the New Constitution*, Cape Town, 22 November 1995.

3 Ibid, Chapter 2 - Bill of Rights - Section 14(3).

4 *Constitution of the Republic of South Africa*, Act 108 of 1996, Chapter 2, Article 15 (1) (3)(a)(b).

This thesis will, thus, deal with the consequences of marriage, namely, *al-wilāyat* (guardianship), *al-tabannā* (adoption), *al-mīrath* (succession), *al-wasāyā wa al-'iṣā'* (legacies and curatorship) and *al-waqf* (endowment) as in *sharī'ah*. The smooth, correct, proper, full and efficient functioning of MPL cannot be achieved unless the laws relating to these are incorporated into the MPL system. The incorporation of MPL into the South African legal system would be a disaster for Muslims. The previous minority white administration apparently proposed this instruction to the South African Law Commission (SALC). The SALC was clearly in favour of incorporation as it 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]

It appears that the new South African government might follow the previous white minority government's policy in MPL matters in this regard. This will be a serious error as well as breach of international covenants in this matter. This issue will be dealt with in detail in the final chapter of this thesis.

Since most of the sources for this thesis are in Arabic, Arabic terms will be used followed by their English meaning. There is a glossary of these terms at the end of this thesis.

---

1 The South African Law Commission: *Nineteenth Annual Report - 1991*, Pretoria, Government Printer, p. 31. (Project No. 59).

CHAPTER 1

THE ORIGIN AND DEVELOPMENT OF ISLAMIC LAW

This chapter will deal with *sharī'ah* as to its structure and peculiarities, followed by *fiqh* (Islamic jurisprudence) and its sources, both primary and secondary and ends with the *adwār fiqhīyyah* (stages of the development of *fiqh*).

1 The *Sharī'ah*

1.1. Definition Of *Sharī'ah*:

Islamic Law is called *sharī'ah*. Literally, *sharī'ah* means "the way 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 the *Shāri'* (Supreme Legislator i.e God Almighty), legislated as law for His *'ibād* (servants)."[2] Another scholar defines *sharī'ah* as "all the commands and laws, both beliefs and actions which Islām commands to be followed and executed with the purpose of achieving a sound social order"[3]. The *Qur'ān* uses the terms *sharī'ah* as the religious law:

"*Then We put you on the (right) Way of Religion (shari'ah), so follow that Way...*"[4]

"*...And follow not their vain desires, diverging from the Truth that has come to you (Muhammad). To each among you*

---

1 *Lisān al-'Arab,* Vol 4, p. 2238.

2 Zaidān A K: *Al-Madkhal li Dirāsah al-Sharī'ah al-Islamīyyah,* Baghdād, al-Matba'ah al-'Āni, 1969, 4th ed., p. 38.

3 Zarqā M A: *Al-Madkhal al-Fiqhī al-'Āmm,* Damascus, Matba'ah al-Hayāh, 1964, 8th ed., Vol 1, p. 30.

4 *Al-Qur'ān,* Chapter 45: 18.

(of mankind) We prescribed a Law (shir'atan) and a Way of life (minhājan)..."[1]

The reason why this law is termed *sharī'ah* is due to it resembling the purpose of the watering place, for as water refreshed the physical body and is vital for the sustaining of life, so is the *sharī'ah* for it gives life to and refreshes the *rūḥ* (soul) and *'aql* (mind)[2]. There is thus an intimate link between the literal and legal meaning of the word *sharī'ah*.

1.2 **Peculiarities Of *Sharī'ah*:**

Being a divine based law which embodies theological as well a practical laws, *sharī'ah* aims at the salvation in the Hereafter and achieving a balanced life for human beings in full harmony with their environment and for achieving a proper balance of human life on earth. Islām, being the religion from where the *sharī'ah* is derived, has certain reformative aims in society and they are, principally:

- through belief in an Almighty God, and *hidayah* (guidance), freeing mankind from superstition and slavish imitation of systems and ways of beliefs and life which are harmful to them in this world and the Hereafter, and encouraging the acquisition of knowledge and clear thinking with proofs.
- reforming the individual, purifying of the human soul and inculcating morality which aims at the spiritual control of physical life, especially greed and passions, the latter of which, if uncontrolled and undisciplined, interferes with the divinely ordained duties and obligations. The system employed by Islam is one of sincere and committed worship which continuously reminds the individual of the existence of his Creator and which instils in him a striving for

---

1 *Al-Qur'ān*, Chapter 5: 48.

2 *Al-Madkhal li Dirāsah al-Sharī'ah al-Islamiyyah*, p. 38.

attaining virtue, righteousness, wholesomeness and abstention from evil, vice and sin.

- reforming society generally through its uniform belief system and communal ceremonies as well as its behaviour and conduct in such a manner that societal peace and justice are embedded in society, protection of all is guaranteed - including acceptable freedoms - and human dignity and honour are respected.[1]

Hurriyah (freedom) is, thus, a principle in *shari'ah* which the *Shari'* did not restrict. Islām came to free mankind from all forms of *'ubudiyyah* (worship), whether it be worship of false gods, worship of people to people, worship of lusts and pleasures and the worship of power and wealth. Thus, *hurriyyah*, in Islām, sprouts from the full obedience to *Allah* (God Almighty) while, in secular and atheistic systems, freedom has no relation to God as He is relegated to temples only. Secular and atheistic systems thus depart from the point that the individual is master of the universe and creator of the administrative, political, economic and other disciplines in life. Religion, and thus God, has no place herein as the world and religion are completely and permanently separate.[2]

1.2.1. A Short History Of The Development Of Shari'ah:

As may be known, Islām never claimed to be a new religion, but the religion of Ibrahim (Prophet Abraham - a.s.) and of his ancestors[3]. It claims to be the religion of the previous Prophets[4] (a.s) in essence and to rectify the additions and corruptions[5] that entered the divine texts.

---

1 *Al-Madkhal al-Fiqhi al-'Amm*, Vol 1, p. 30.

2 'Afifi M S: *Al-Mujtama' al-Islami wa Huquq al-Insan* Makkah, Idārah-al Ṣahāfah wa al-Nashr - Rābita al-'Ālami al-Islami, 1406 AH, pp. 15 - 16.

3 *Al-Qur'an*, Chapter 22: 78.

4 Ibid, Chapter 3: 84.

5 Ibid, Chapter 7: 162.

Muḥammad bin ʿAbd Allāh was born in Makkah (Mecca) about 570 C.E.[1] In about 610 C.E., on a night in Ramaḍān, the 9th Muslim month, he received the first revelation of the *Qur'ān*[2]. These revelations continued for 13 years in Makkah and 10 years in Madīnah.[3] He died at Madīnah in 632 CE.[4] All *āyāt* (verses) of the *Qur'ān* were recorded during his lifetime by appointed scribes apart from huge numbers of *ṣaḥābah* (companions) of the Prophet (s.a.w.s), during his lifetime, committing the *Qur'ān* to memory. The *Qur'ān* was recorded on bark, bones, sheet, skins etc. during the Prophet's (s.a.w.s) lifetime. It was during Abū Bakr al-Siddiq's (d. 13 AH)[5] reign that it was compiled into one book which went to ʿUmar ibn Khattāb, the second caliph, after Abu Bakr's death and after ʿUmar's death, to his daughter Ḥafṣah bint ʿUmar, one of the wives of the Prophet (s.a.w.s). The Prophet (s.a.w.s) allowed his followers to record the *Qur'ān* during his lifetime, but nothing else of his verbal or practical instructions.[6] There were exceptions to people from distant lands visiting

---

1 *The Muslim Almanac*, p. 3.
Rahman H: *Chronology of Islamic History*, London, 1989, Introduction p. 5.

2 Khan M A: *Muḥammad - The Final Messenger*, Lahore, Sh. Muḥammad Ashraf, 1983, p. 69.
Glasse C: *The Concise Encyclopaedia of Islām*, London, Stacey Int., 1989, p. 192. Topic: *Islam*.

3 *Al-Madkhal li Dirāsah al-Sharīʿah al-Islamīyyah*, p. 108.

4 *Oxford Encyclopaedia of the Modern Islamic World*, Vol 2 p. 162, Topic: *Islam - An Overview*.
The Concise Encyclopaedia of Islam, p. 192
The Muslim Almanac, p. 7.

5 Ameer A S: *A Short History of the Saracens*, New Delhi: Kitab Bhavan, 1981, p. 26.

6 *Al-Madkhal li Dirāsah al-Sharīʿah al-Islamīyyah*, p. 108, 117.

Madinah. This was to prevent people mixing the *Qur'ān* with the prophetic precepts or practice while the *Qur'ān* was still being revealed.

The *Qur'ān* was revealed piecemeal for 23 years; sometimes in answer to a question, sometimes because of a happening and sometimes without any reason. During the time of revelation, when a need arose for a ruling, the Prophet (s.a.w.s) resorted to *ijtihād* (juristic extraction) as in the case of the Battle of Badr when he had prisoners of war and no revelation had yet been received in relation to prisoners of war.[1] He (s.a.w.s) also consulted the *ṣaḥābah* in this regard.[2] If his *ijtihād* (juristic extraction) was correct, it would remain law by *sunnah* (prophetic example or practice) and if not, revelation would cancel that prophetic practice. This happened at Badr when the Prophet took prisoners of war, on the basis of his *ijtihād*. This was the wrong decision and he was rectified in revelation soon thereafter.[3] The *Qur'ān* gives the reason as:

"*It is not permitted for a Prophet that he should have prisoners of war until he had thoroughly subdued the land....*"[4] In addition, all problems the Muslim encountered, had to be referred to the Prophet (s.a.w.s) for ruling. He (s.a.w.s) was thus the *marji' al-hukm* (final authority in legal matters) in *sharī'ah*. Even if the *ṣaḥābah* were outside Madīnah, on a journey, they had to refer the problems they encountered to him as well as

---

1 *Al-Madkhal li Dirāsah al-Sharī'ah al-Islamiyyah*, pp. 109 - 110, 117.

2 Khandahlawi M Y: *Ḥayāh al-Ṣaḥābah*, Damascus, Dār al-Qalam, 1983, pp. 41 - 42.

3 *Muḥammad - The Final Messenger*, p. 162.

4 *Al-Qur'ān*, Chapter 8: 67.

what they did under the circumstances. If they were correct he (s.a.w.s.) approved (*'aqarra*) their actions or rectified their wrong decisions.[1] Thus, in the Prophetic era, the system of *tashri'* (law enactment) was primarily *wahy* (revelation). Even the Prophet's *ijtihād* (juristic inference) was subject to *wahy*. The actions of the *ṣaḥābah* were subject to *wahy* all the time. We can thus say that in the era of the Prophet (s.a.w.s) the sources of *sharī'ah* were, primarily, the *Qur'ān* with the *ḥadīth* (prophetic precepts) and *sunnah* (prophetic practice) as secondary and supporting, usually explanatory, sources.

After the death of the Prophet (s.a.w.s), in about the year 632 C.E.[2], the pattern of *sharī'ah* developed a subsidiary pattern in that the principles enunciated in the *Qur'ān* and the known principles the Prophet (s.a.w.s) laid down in the *ḥadīth* and the *sunnah* were used to solve the "new" issues which occurred in the Islamic State. "New" here means "that which is not mentioned by name in the *Qur'ān*, nor given ruling on it by the Prophet (s.a.w.s) during his lifetime". *Sharī'ah* thus expanded tremendously, especially when new territories were conquered and Muslims settled there. This process was characterised by the practice of the first caliph Abū Bakr who, if something "new" came to him, he would first look in the *Qur'ān* and if ruling was given on it, he would judge accordingly. If not found in the *Qur'ān* he would rule by any *ḥadīth* or *sunnah* or he would ask of the people if they knew what the Prophet

---

1 *Al-Madkhal li Dirāsah al-Sharī'ah al-Islāmiyyah*, pp. 114, & 116.

2 *Muḥammad - The Final Messenger*, p. 404.
Chronology of Islamic History, p. 5.

(s.a.w.s) did in such a matter. If someone trusted could answer that and a trusted witness confirmed it, he would rule accordingly. If not, he would resort to *ijtihād* (juristic opinion extraction) and rule accordingly.[1] Abū Bakr would, when a major "new" issue occurred, summon the *mujtahidūn* (legal experts who infer laws) of the *ṣaḥābah* of the Prophet (s.a.w.s) and put the issue to them asking them to give ruling on it. They would study it and weigh it in the light of Quranic law and its principles as well as the *ḥadīth* and *sunnah* and its principles. When they had consensus, it was called *ijma' al-ṣaḥābah*[2] (consensus of the companions) or as it is also sometimes called, *ijmā' al-ummah* (consensus of the Muslim nation). This consensus was and is still binding on all Muslims the world over and no new ruling herein is accepted nor allowed in *sunnī* law. This system continued till the death of the second caliph 'Umar ibn al-Khattāb (d. 23 AH)[3] as both the first and second caliphs did not allow the *mujtahidūn* of al-Madīnah to leave without their permission. This was especially 'Umar's practice. This system ended during the *khilāfah* (reign) of the third caliph 'Uthman bin 'Affān as he allowed them to go to the Amṣār (conquered territories) as *mu'allimūn* (teachers), *wu'ād* (preachers), *du'āt* (missionaries), *quḍāt* (judges), *muftūn* (sing. *muftī* experts entitled to give legal opinion) etc.

A new pattern now evolved again. New issues occurred frequently due to the Muslims coming into contact with foreign cultures, religions and

---

1 *Al-Madkhal li Dirāsah al-Sharī'ah al-Islamiyyah*, pp. 120 - 121.

2 *Al-Madkhal al-Fiqhī al-'Amm*, Vol 1, p. 168 - 170.

3 *History of the Saracens*, p. 13.

practices. The practice of *ijtihād* now became widely employed, but all subjected to the *Qur'ān*, the *ḥadīth*, *sunnah* and its principles as well as not breaking the *ijmā' al-ummah* (consensus of the Muslims).[1] These patterns of proofs which evolved are usually called *al-maṣādir al-taba'iyyah* (secondary sources), while the primary sources are called *al-maṣādir al-aṣliyyah* (original sources). It is thus quite wrong to state, as do many orientalists especially, that Islamic law was the work of Muslim jurists at various times in Islamic history.

1.2.2. General Structure Of *Sharī'ah*:

Structurally, *sharī'ah* can be divided into two main spheres of operation and they are the sphere of *al-ḥuqūq al-khāssah* (personal rights) which covers both civil and criminal spheres and *al-ḥuqūq al-'āmmah* (public rights) which encompasses both internal and external State matters such as administrative, monetary/fiscal and constitutional matters, amongst others and international matters.

The pattern of lawgiving and process of lawmaking in the above system is the prerogative of the *Shāri'* which He gave in the *Qur'ān*, which is the revelation from Him to the Prophet Muḥammad (s.a.w.s), and is the basic constitution of Islam and the *ḥadīth*, which is the Prophetic precepts. *Ḥadīth* is sometimes called *sunnah*, by some *'ulamā'* These two sources are the primary sources of law in Islām. In addition, Islām, in its legal system, legislated for *ijtihād* which is the considered juristic law opinion extracted from existing law principles and precedents by those duly qualified to do so. This allows for Islām and *sharī'ah* to fit in with all times with a universal order unknown to

---

1 *Al-Madkhal al-Fiqhī al-'Amm*, Vol 1 pp. 177 - 178.

other systems. The *Qur'an* itself pronounces mostly on principles of law, save in few cases where it goes into details of certain issues to remove any ambiguity or diversified interpretations. Examples of these are *mirath* and some of the *'uqubat* (prescribed criminal punishments).[1]

The *shari'ah* is founded on the following:

- *al-huquq al-khassah*, broadly, operates in the fields of *al-ahwal al-shakhsiyyah* (family law and the law of persons in all its branches), *al-'uqud* (contracts), *al-'uqubat* (criminal law) and such law as relating thereto.
- *al-huquq al-'ammah*, from an internal State point of view, deals with constitutional matters such as freedom of the nation subject to public moral and ethical order and non-curtailment of the freedom of others in the understanding of the *shari'ah*.
- equality before the law.
- principle of *shura* (mutual consultation) in matters in which *shari'ah* allows *shura* between the *hakim* (ruler) and the *mahkum* (governed), usually in matters in which there is no text and which in itself is not repugnant to Islam or its principles.

It is striking that Islam never prescribed a fixed system or pattern of government as this will evolve from time to time and be influenced by time and place. It, however, laid down principles which the State, the *hakim* (ruler) and *mahkum* (the governed) must abide by. In governance, the *shari'ah* granted unlimited executive and administrative powers to *al-imam al-akbar* or *khalifah* (Head of State) including chief *mutawalli* (trustee) of the *bait al-mal* (public treasury), but

---

1 *Al-Madkhal al-Fiqhi al-'Amm*, Vol 1 p. 32.

restricted him to work only within the boundaries of *sharī'ah* and made him a subject just like all the other people of the State. Thus, in the case of the *bait al-māl,* for example, the *ḥākim* (ruler) must expend revenue for the benefit of the public and its welfare. He does not have special personal powers or rights which distinguish him from other citizens of the State. If anything, he is the servant of the people, serving them through governance by application of *sharī'ah.* There is, thus, no place for authoritarianism in this setup, but only joint and equal partnership of the *ḥākim* and the *maḥkūm. Allāh* is the actual ruler of the Muslims. He appointed a vice-regent on earth to execute this task, the absolute first one being Ādam (a.s.)[1] as the *Qur'ān* states:

"Behold! Your Lord said to the angels: "I will create a vice-regent on earth..."[2] and the first one in the Islamic order being the Prophet Muḥammad (s.a.w.s) and thereafter the *khulafā'* (the caliphs or rulers). In this vein the *Qur'ān* states clearly and unambiguously:

"Obey Allāh, obey the Messenger and obey the righteous (Muslim) rulers amongst you..."[3] This is not blind obedience, but obedience subject to *sharī'ah* as the Prophet (s.a.w.s) ruled:

---

1 "a.s" is the abbreviation for the Arabic "'alaihis salām", which means "peace be upon him." This is used for all the Prophets.

2 *Al-Qur'ān*, Chapter 2: 30.

3 Ibid, Sūrah 4: 59.

"There is no obedience required to any person if such of obedience necessitates the disobedience of the laws of the Creator."[1]

The classical example of governance in Islām is expressed by Abū Bakr Siddiq, the first *khalīfah* of the Islamic State, who, on being elected to high office said:

"Behold me, behold me charged with the care of government. I am not the best among you. I need your advice and your help. If I do well, support me, if I err, 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]

In international State matters, the *sharī'ah* expounds the following principles:

- all nations are equal in human rights.
- relations between the Islamic State and other States must be based on justice in both peace and wartime.
- the accepted and 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.

---

1 Ibn Kathīr I D: *Tafsīr al-Qur'ān al-'Aẓīm*, Beirut, Dār al-Andalus, 1966, 1st ed., Vol 2,p. 326.
Al-Qurtubī A A: *Al-Jāmi' li Aḥkām al-Qur'ān*, Cairo, Al-Maktabah al-'Arabīyyah, 1967, 3rd ed., Vol 5, p. 259.

2 Al-Suyūtī J D: *Ta'rīkh al-Khulafā'*, Cairo, Matba'ah al-Madanī, 1964, 3rd ed., p. 69.
A Short History of the Saracens, pp. 21 - 22.
Ḥayāh al-Ṣaḥābah, Vol 2, p. 12.
'Azīz A: *Abū Bakr - The Caliph*, Karachi, Ghanzafar Academy, 1978, 1st ed., p. 66.

- retributive action of like nature as an offensive act committed is valid and possible, save if it contradicts *sharī'ah* principles.[1]

Sharī'ah is thus not a creation of society nor a result of the evolution of societal existence and its interactions with others, as secular societies are, but its author is *Allāh* who perfected every created thing[2]. *Sharī'ah* had now been explained fully and shown to cover the broad spectrum of law in Islam. The part of *sharī'ah* that has to do with the practical laws of human action and interaction is called *fiqh*. We shall now deal with *fiqh* as understood and accepted by *ahl al-sunnah* or *ahl al-sunnah wa al-jamā'ah*, commonly called *sunnī fiqh* (*sunni* jurisprudence). *Sunnis* make up the vast overwhelming majority of Muslims in the world.

1.3. AL-*FIQH*:

1.3.1 Definition of *Fiqh*:

The word *fiqh* is derived from the arabic root verb *faqaha* which means "to be enveloped in knowledge" while *faqiha* means "to know".[3] Some scholars state that *fiqh* literally means "knowledge of something and understanding it" or "understanding the implication of the speech of the speaker."[4] The *Qur'ān* uses the literal meaning of *fiqh* to mean "to understand", as with Mūsā (a.s) when instructed by *Allāh* (God

---

1 *Al-Madkhal al-Fiqhī al-'Amm*, Vol 1 pp. 33 - 51.

2 'Awdah 'A Q: *Al-Tashrī' al-Jana'ī al-Islāmī - Muqaranan bi al-Qānūn al-Waḍ'ī*, Beirut, Dar al-Kātib al-'Arabī, undated, Vol 1 p.22.

3 *Al-Munjid* p. 591.

4 *Al-Madkhal li Dirasah al-Sharī'ah al-Islamiyyah*, p. 62. *Al-Mawsū'ah al-Fiqhīyyah*, Kuwait, Ministry of Awqāf and Islamic Affairs, 1995, Vol 32, p. 193.

Almighty) to go to Egypt to take *Banū Isrā'īl* (the Israelites) from bondage and praying, saying:
"...and remove the impediment from my speech so that they may understand (yafqahuna) what I say...."[1] The same meaning is expressed by the Prophet (s.a.w.s) when he said, as narrated by Mu'awiyah and transmitted by al-Bukhāri, Muslim and ibn Mājah:
"He for whom Allāh desires good, (He) grants him understanding of the dīn (yufaqqihu fi al-dīn) (i.e. Islām, the Faith)."[2]

There is a variation in the *sharī'ah* meaning of the term *fiqh*, but there is no fundamental differences in this definition, thus, some define it to be "knowledge of the practical applied laws of the *sharī'ah*, with its proofs."[3] An example of the variation is that of Abū Hanīfah[4] (born 80 AH/699 CE)[5] who defines *fiqh* as "knowledge of what your rights are and what your obligations are."[6] We can thus say that *fiqh* is the body of those laws which the *Shāri'* enacted through his Messenger Muḥammad (s.a.w.s) and all those laws which are derived from that source and which has a practical and applied value as far as the daily lives

---

1 *Al-Qur'ān*, Chapter 20: 27 - 28.

2 Al-Mundhiri A M: *Al-Targhib wa al-Tarhib min al-Hadith al-Sharif*, Cairo, Matba'ah al-Sa'ādah, 1960, 1st ed., Vol 1, p.70.

3 Makhlūf M H: *Bulugh al-Sūl fi 'Ilm al-Usul* Cairo, Matba'ah Muṣṭafā al-Ḥalabī, 1966, 2nd. ed.,p. 189.
Al-Madkhal al-Fiqhī al-'Āmm, Vol 1 p. 59.
Al-Mawsū'ah al-Fiqhīyyah, Vol 32, p. 193.

4 a senior *mujtahid* (legist) in *sharī'ah* and especially *fiqh* who was the founder of the *Hanafī* school of jurisprudence.

5 Maḥmaṣāni S: *Awḍa' al-Tashri'iyyah Fī al-Duwal al-'Arabīyyah*, Beirut: Dar al-'Ilm Li al-Malāyin, 1981, 4th ed. p. 117.

6 *Al-Madkhal li Dirāsah al-Shari'ah al-Islamiyyah*, p. 62.

of people are concerned. By way of example, rules of the validity or otherwise of *ṣalāh* (daily prayers) and *al-ta'āqud* (contracting of contracts) are all to be found in *fiqh* for they deal with acts of the daily lives of people.

1.3.2. **The Sources of Fiqh:**

The sources of *fiqh* are, for convenience sake, divided into *al-maṣādir al-aṣliyyah* (primary sources) and *al-maṣādir al-taba'iyyah* (secondary sources). The primary sources are of two kinds, namely, the *Qur'ān*, which is called *al-waḥyu al-matlū* or the directly revealed law and the *ḥadīth/sunnah* which are the prophetic precepts and called by some *fuqahā'* (jurists), *al-waḥyu ghair matlū* (indirect revelation). The secondary sources are founded on the principle of ijtihad of a *mujtahid* who is an independent Muslim legist in *sharī'ah*. The disciplines in which *ijtihad* are used, are *ijmā'* (juristic consensus of Muslim legists) in its various forms (which will be dealt with later on) and *ra'i ijtihādi* (considered derived juristic opinion of a Muslim legist) of which *qiyās* (analogy) is the primary source.[1] The *mashrū'iyyah* (legality) of *ijtihād* as a source of law is confirmed in both the prophetic era and thereafter.

As for the prophetic era, when the Prophet (s.a.w.s) appointed Mu'ād bin Jabl as governor of Yemen and asked him how he will conduct himself in *qadā* (the judicial process). Mu'ād replied that he would first judge with what is in the *Qur'ān* and if not found therein, then by what is known to him of *ḥadīth* or *sunnah* and if not found there, he will

---

1 *Al-Tashri' al-Jana'i al-Islami*, Vol 1 p. 164.
Al-Madkhal li Dirāsah al-Islamiyyah al-Shari'ah, p. 183.
'Abd al-'Azīz A R: *Al-Qaḍā wa Nizāmuhū fi al-Kitāb wa al-Sunnah*, Makkah, Umm al-Qurā University, 1984, p. 321.

exercise *ijtihād*. This the Prophet very gladly accepted and endorsed.[1] Another example in the era of *al-khulafā' al-rashidūn* (righteous caliphs) is that of 'Umar ibn Khattab, the second *khalīfah*, who on appointing Abu Musā al-Ash'arī as *qāḍī* (judge) told him: "...that which is not in the Book of *Allāh* (i.e. the *Qur'ān*) nor in the *sunnah*, then know those (issues) which resemble on another and make *qiyās*..."[2]

With this practice, specifically, *shari'ah* became permanently relevant to Muslims for all times as issues of any nature can be weighed and judged in terms of *shari'ah*.

1.3.3 **The Primary Sources Of Fiqh:**

1.3.3.1 **The *Qur'ān*:**

(a) **Definition of Qur'an:**

The word *Qur'an* is derived from the Arabic verb *qara'a* which means "to read". It is called *Qur'ān* due to it (revelation) having been gathered in one book and joined one part to the other.[3] It is also called *Kitāb Allāh* (the Book of *Allāh*) due to it being the exalted revelation from the Almighty *Allāh*, and it is sometimes called *al-Furqān* which means "that which distinguishes between right and wrong."[4] The *Qur'ān* itself uses this term to describe itself.[5] The *Qur'ān* is defined

---

1 Al-Sijistāni AD: *Sunan Abi Dawud*, Cairo, Matba'ah Mustafa al-Halabi, 1983, 2nd ed., Vol 2,p. 297.
Al-Khadarī M: *Usūl al-Fiqh*, Cairo, al-Maktabah al-Tijāriyyah al-Kubrā, 1969, 6th ed., p. 4.

2 *Usul al-Fiqh*, p. 4.

3 *Al-Munjid*, p. 617
Al-Qadā wa Nizāmuhu, p. 322.

4 *Al-Munjid*, p. 579.

5 *Al-Qur'an*, Chapter 2: 185.

as: "The Divine Word, revealed to the Prophet Muḥammad (s.a.w.s) and recorded in the *muṣḥāf* (the *Qur'ān*) and transmitted to us by *tawātur* (continuous uninterrupted transmission)". This is the definition most of the scholars of both *fiqh* and Arabic subscribe to.[1] A near similar definition is given by al-Āmidī.[2] Another scholar defines it as "the revelation from *Allāh*, revealed to Muḥammad (s.a.w) in Arabic, used as law and transmitted to us by *tawātur*, beginning with *Sūrat al-Fātiḥah* and ending with *Sūrat al-Nās*".[3] From these definitions we can state that the *Qur'ān* is "that Book of *Allāh* which was revealed to the Prophet Muhammad (s.a.w.s), by *Allāh*, words and order starting from *Sūrat al-Fātiḥah* and ending with *Surat al-Nās* and which was transmitted to us by *tawātur.*" *Tafsīr* (Quranic exegesis) is included herein as it existed from the Prophetic era itself, he (s.a.w.s) being the first exegetist.[4] This fact is supported by the *Qur'ān* itself when it states: *"And thus have We inspired in you (Muḥammad) a spirit of Our command. You did not know what the Scripture was nor the*

---

1 Ṣaliḥ S: *Al-Mabaḥith fi 'Ulūm al-Qur'an*, Beirut, Dar al-'Ilm li al-Malāyin, 1984, 3rd ed., p. 21. *Al-Madkhal li Dirāsah al-Sharī'ah al-Islāmiyyah*, p. 184. Kanūn A A *et al*: *Buḥūth Fī al-Qur'ān al-Karīm*, Cairo, Majma'ah al-'Ulyā li Iḥtifāl bi al-'Īd al-Alfi li al-Azhar, 1983, p. 51.

2 Al-Āmidī S D: *Al-Iḥkam fi Usul al-Aḥkam*, Cairo, Matba'ah Muṣṭafā al-Halabī, Vol 1 pp. 120 - 121.

3 Imam M K D: *Uṣul al-Fiqh al-Islami*, Beirut, al-Mu'assasah al Jam'iyyah, 1996, 1st. ed., p. 140.

4 *Al-Mabaḥith fi 'Ulūm al-Qur'an*, p. 289.

Faith..."[1]. The status of Quranic law is *ilzām* (compulsory status) by consensus of all sects, both *kalāmi* (theological) and *fiqhi* (juridical).[2]

(b) **A Short Analysis Of The *Qur'ān*:**

Muslims have consensus that the *Qur'ān* is the constitution of the Muslims and the first source of law.[3] A constitution gives law in generality. Details are seldom provided. The *Qur'ān*, which is already 1400 years old, is no exception to this rule. It is thus noted that, for example, two of the basic duties, *ṣalāh* and *zakāh* (annual compulsory alms)[4] are mentioned and prescribed, but virtually no details of its performance given. This the Prophet (s.a.w.s) had to do. The *Qur'ān* states:

"*Oh Messenger! Proclaim the (message)* sent to you from your Lord."[5]

"*We sent down to you al-dhikr (reminder i.e the Qur'ān), so that you may explain to mankind what was sent down to them, so that they may meditate.*"[6] The Prophetic instructions in these cases are the key to the interpretation of the *Qur'ān*.[7]

As far as the structure of the *Qur'ān* is concerned, it consists of 114 *suwar* (chapters

---

1 *Al-Qur'ān, Chapter 42*: 52.

2 *Usul al-Fiqh al-Islāmi*, p. 142 - 143.

3 *Al-Madkhal li Dirāsah al-Shari'ah al-Islāmiyyah*, p. 184.

4 *Al-Qur'ān*, Chapter 9: 18.

5 Ibid, Chapter 5: 67.

6 Ibid, Chapter 16: 44.

7 *Al-Madkhal al-Fiqhi al-'Amm*, Vol 1 p. 70.

- sing. *surah*), each having a name derived from a happening or wording in the *surah*, like *Surah al-Baqarah* (chapter of the Cow) taking its name from a happening with a cow in the chapter. These 114 *suwar* are again divided into 30 *ajza'* (parts - sing *juz*), each getting its name from the first word or phrase of the *juz*. As far as division of *ayat* (verses - sing. *ayah*) are concerned, the main division is *ayat Makkiyyah* (verses revealed in Mecca) and *ayat Madaniyyah* (verse revealed in Medina). This is the indication where revelation took place. *Makki suwar* which are usually comprised of short *ayat*, exhorts to truth, virtue and righteousness, sets the principles of beliefs and theology, speak of the previous Prophets (a.s), *Jannah* (Paradise) and *Jahannam* (Hell) and debate with the *mushrikun* (pagans) on their false and erroneous beliefs. *Makki suwar* are usually not long.

On the other hand *Madani suwar* (Medinite chapters) are long, deal with issues of law in all spheres, including the State, *jihad* (holy war) and debates with the *munafiqun* (hypocrites) as well as the *Ahl al-Kitab* (the People of the Book) etc.[1] *Ayat* of the *Qur'an* are, basically, of three major kinds and they are *ayat kulliyah* which mentions the general principles and bases of law from which other laws flow, like the command of *shura* (mutual consultation) *"..and consult them in their affairs.."*[2]. Another category is the *ayat ijmaliyyah* which are *ayat* (verses) mentioning

---

1 *Al-Mabahith fi 'Ulum al-Qur'an*, p. 183.

2 *Al-Qur'an*, Chapter 3: 159.

laws generally without supplying any details like *"...but Allah has permitted trade and forbade usury.."*[1] The *sunnah* explains what kind of trade is valid and what is intended by usury. The last category are the *āyāt tafṣiliyyah* which deal in detail with certain issues like the punishment for *qadhf* (slander) *"and those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty lashes, and reject their evidence ever after; for such men are wicked transgressors."*[2] Thus, basically, the *Qur'ān* consists of *āyāt* of *'aqīdah* (beliefs) and its principles, purification of the soul and human conduct and those dealing with *'ibādāt* (worship) and *mu'āmalāt* (human dealings in all its spheres).[3]

1.3.3.2 **The Hadith Or Sunnah:**

This is the second primary source of *fiqh* according to all the *'ulamā', fuqahā,' usūliyūn* (authorities in the principles of jurisprudence - sing *usūlī*) and other scholars of *sharī'ah*. *Hadīth* is sometimes taken to be synonymous with *sunnah* and many a time they are used rather loosely. Usually, *ḥadīth* means the sayings and rulings of the Prophet (s.a.w.s) while *sunnah* specifically refers to his (s.a.w.s) actions. In this thesis, these meanings will be used as indicated.

---

1 *Al-Qur'ān*, Chapter 2: 275.

2 Ibid, Chapter 24: 4.

3 *Al Qaḍa wa Niẓāmuhu*, pp. 319 - 320.
Al-Madkhal li Dirāsah al-Sharī'ah al-Islamiyyah, p. 186 - 189.

(a) **Definition:**

Ḥadīth, literally in Arabic, means "new" as opposed to "old. It also means "a report" of something[1], or a conversation.[2] The *Qur'ān* uses the word *ḥadīth*, literally, meaning the *Qur'ān*[3] itself, the Message[4], and a narration[5]. The Prophet (s.a w.) used the term to mean a religious communication, a conversation and a secret[6]. In the *sharī'ah*, *ḥadīth* means specifically the sayings and actions of the Prophet (s.a.w.s).[7] This automatically include the *iqrārat* (affirmation of actions) by the Prophet (s.a.w.s). *Sunnah*, in its literal arabic meaning means "a way of life or pattern of life or existence."[8] In the *sharī'ah*, it means "the actions and way of life of the

---

1 *Qāmus al-Muḥīt*, Vol 1 p. 170.
Al-Munjid, p. 121.

2 'Azamī M M: *Studies in Ḥadīth Methodology and Literature*, Indianapolis, American Trust Publications, 1977, p. 1.
Ṣāliḥ S: *'Ulūm al-Ḥadīth*, Beirut, Dar al-'Ilm li al-Malāyīn, 1969, 5th ed., p. 5.

3 *Al-Qur'an*, Chapter 39: 23.

4 Ibid, Chapter 68: 44.

5 Ibid, Chapter 6: 68.
Ibid, Chapter 20: 9
Ibid, Chapter 66: 3.

6 *Studies in Ḥadīth*, p. 2.

7 Ṣaliḥ S: *'Ulum al Ḥadīth*, Beirut, Dar al-'Ilm li al-Malāyīn, 1969, 5th ed., p. 5.

8 *'Ulūm al-Ḥadīth*, p. 6.
Al-Munjid, p. 353.
Studies in Ḥadīth, p. 3.

Prophet (s.a.w.s)". In this sense, thus, *sunnah* is a specialised part of *hadith*.[1]

(b) Peculiarities Of Hadith:

Hadith, as explained, is the key to the *Qur'an* and explains its principles and generalities.[2] The Prophet (s.a.w.s) was commanded by *Allah*:

"*Oh Messenger! Proclaim the (Message) which has been sent to you from your Lord.*"[3]

This he did alone until he died.[4] In *al-hijjah al-wada'* (the farewell pilgrimage), the Prophet (s.a.w.s), according to Jabir bin 'Abd Allah, gave his final message to the thousands of Muslims assembled on 'Arafat saying after each set of instructions: *"Did I deliver the message?"* The multitude answered: "*You conveyed, delivered and advised..*"[5]

We notice the nature of *hadith* in the following *hadith* examples. Maryam's[6] mother prayed for a son, but instead Maryam was born. Her mother prayed:

"*...and I seek refuge with You (Allah) for her and her offspring from the accursed*

---

1 *'Ulum al-Hadith*, p. 6.

2 *Buhuth fi al-Qur'an wa al-Sunnah*, p. 129. Ba Billi M: *Fi al-Tashri' al-Nabawi*, Beirut, Dar al-Irshad, 1969, 1st ed., p. 36.

3 *Al-Qur'an*, Chapter 5: 67.

4 *'Ulum al-Qur'an*, p. 289.

5 Al-Mundhiri Z D: *Mukhtasar Sahih Muslim*, Damascus, al-Maktab al-Islami, 1977, 3rd ed., p. 188.

6 Mary, mother of the Prophet Jesus (a.s).

Satan."[1] Abu Hurairah narrated that the Prophet (s.a.w.s) said:

"Every new born is touched by Satan at birth causing him to cry save Maryam and her son."[2]

This explains the meaning of the word "refuge" in the *Qur'an*. *Hadith* can also be an independent source of law, but concurring with the *Qur'an* in principles.[3] Ibn 'Abbas as well as ibn 'Umar narrated that the Prophet (s.a.w.s) "obligated *zakah al-fitr...*"[4] Ibn Majah and al-Dar Qutni also transmitted the narration of ibn 'Abbas.[5] *Zakah al-fitr* is a welfare charity which agrees with the welfare principles of the *Qur'an*. 'Imran bin Husain narrated that the Prophet (s.a.w.s) also allotted one sixth of the estate of a grandson to his grandfather as no other ascendants were found.[6] This is in accordance of the principle of *wilayat* where parents succeed their deceased children which is a Quranic principle.

Hadith is a secondary source to the *Qur'an* and does not depart from its general principles. An example is the Prophet's

---

1 *Al-Qur'an*, Chapter 3: 36.

2 Al-Bukhari M I: *Sahih al-Bukhari*, Cairo, Matba'ah Mustafa al-Halabi, undated, Vol 6 p. 42.

3 *Fi al-Tashri' al-Nabawi*, p. 36.

4 *Sunan Abi Dawud*, Vol 1,p. 407
Sahih al-Bukhari, Vol 2,p. 153.
Sabiq S: *Fiqh al-Sunnah*, Beirut, Dar al-Kitab al-'Arabi, 1969, 1st.ed., Vol 1, p. 412.

5 *Fiqh al-Sunnah*, Vol 1, p. 412.

6 *Sunan Abi Dawud*, Vol 2,p. 121.

prohibition, as narrated by Jabir bin ʿAbd Allāh, of trading in any manner with alcoholic drinks, carrion or swine.[1] This is in keeping with the prohibition laws as well as avoiding loopholes being created with usage of these forbidden substances.

Hadīth also complements or explains Quranic duties. The *Qur'ān*, orders:

"And perform (properly) the hajj and ʿumrah".[2]

The borders from where pilgrimage rites have to be observed was not mentioned. Ibn ʿAbbas narrated that the Prophet (s.a.w.s) gave the *mawāqīt* (sing *mīqāt* - pilgrimage boundaries) as Dhū al-Hulaifah for those from al-Madīnah, al-Juhfah for Syria, Qarn al-Manāzil for al-Najd and Yalamlam for those from Yemen.[3] Besides these peculiarities, *hadīth* may deal with superogatory acts, which are exhorted to, but which are optional. Examples being the way of eating, drinking, sitting of the Prophet (s.a.w.s). These acts do not enter the realm of *tashrīʿ* (legislation).[4]

The *Qur'ān* itself commands with the following of the *hadīth* and *sunnah*[5], thus necessitating its following as law:

---

1 *Mukhtaṣar Ṣaḥīh Muslim*, p. 249.

2 *Al-Qur'an*, Chapter 2: 196.

3 *Mukhtaṣar Ṣaḥīh Muslim*, p. 173 - 174.

4 Zaidān A K: *Al-Wajīz fī Uṣūl al-Fiqh*, Baghdād, Matbaʿah Salmān al-ʿAzamī, 1967, 3rd ed., p. 194.
Al-Madkhal li Dirāsah al-Sharīʿah al-Islāmiyyah, p. 194.

5 *Uṣūl al-Fiqh al-Islāmī*, p. 155.

"Say (Oh Muḥammad): If you (the Muslims) love Allāh, follow me, Allah will love you and forgive you your sins..."[1]

"Your comrade does not err, nor is (he) deceived, it is but inspiration that is inspired (in him)."[2]

".....and whatever the Messenger gives you, take it and whatever he forbids you from, abstain (from it)...."[3] Similar *āyat* (verses) appear elsewhere in the *Qur'ān.*[4] These *āyat* are general and do not mention any exclusion according to the rules of *tafsīr* (Quranic exegesis) and *usūl* (jurisprudence principles). The *Qur'ān* as well as the *ḥadīth* and *sunnah* have to be followed. There is also *ijmā'* hereon.[5]

In classification, *ḥadīth* falls into three classes, namely, *al-mutawātir* (numerously reported texts which makes lying inconceivable).[6] This grade is again divided into *mutawātir bi al-lafẓ* (numerously reported by text) and *mutawātir bi al-ma'nā* (numerously reported in meaning). Hereafter follows *al-mashhūr* (famous or well known text) and then the *āḥād* (singularly reported texts) category, which has many kinds. Some *'ulamā'* (scholars) classify *al-mashhūr* with *al-*

---

1 *Al-Qur'ān,* Chapter 3: 31.

2 Ibid, Chapter 53: 2 - 5.

3 Ibid, Chapter 59: 7.

4 Ibid, Chapter 14: 4.
Ibid, Chapter 16: 44 & 64.

5 *Usūl al-Fiqhī al-Islāmī*, p. 155.

6 Ibid, p. 157.

ahad category, like al 'Azami. *Hadith Qudsi* is a form of *hadith* with direct expression of *Allah* and usually deals with issues of the way of life of Muslims, like Abu Dharr narrating from the Prophet (s.a.w) on the issue of injustice.[1]

1.3.4. **The Secondary Sources Of *Fiqh*:**

As pointed out earlier, the secondary sources are based on *ijtihad* and as such started after the death of the Prophet (s.a.w.s). In fact, the principle of *ijtihad* was practised by the Prophet (s.a.w.s) during his lifetime when no *wahy* existed and a situation needed urgent ruling. It also had the Prophet's (s.a.w.s) sanction during his era as the *hadith* relating to Mu'ad bin Jabl, previously quoted, indicates. *Ijtihad* is based on Quranic, *hadith* and *sunnah* principles. It is thus the domain of those learned in *shari'ah*. There is, thus, no place for *hawa* (unqualified opinion not based on *shari'ah*). All *'ulama'*, *fuqaha' mujtahidun*, usuliyun and other Muslim scholars of the different branches of *shari'ah*, universally condemn, reject and rule as inadmissible *hukm wahmi* (rulings based on *hawa* - uninformed opinion).[2]

The *Qur'an* itself makes a distinction between *'ilm* (knowledge) and *hawa*.

"*Are those who know equal to those who do not know..?*"[3]

Allah has praised and honoured those who have knowledge:

---

1 *Studies in Hadith*, pp. 43 - 46.

2 Khallaf A W: *Masadir al-Tashri' fi Ma la Nassa Fiha*, Kuwait, Dar al-Qalam, 1970, 2nd ed., p. 8.
Al-Jawziyyah, I Q: *'Alam al-Muwaqqi'in 'An Saiyid al-'Alamin*, Cairo, Maktabah Kulliyat al-Azhariyyah, 1968, p.67.

3 *Al-Qur'an*, Chapter 39: 9.

"Allah will raise to (suitable ranks and degrees), those of you who believe and who have been granted knowledge."[1]

He has likewise condemned *hawa*:

"....so judge you between people in truth (and justice) and do not follow your lust (of your heart), for it will mislead you from the Path of Allah..."[2]

The Prophet (s.a.w.s) himself warned against the unlearned dabbling in *sharī'ah*. Abū Hurairah narrated that the Prophet (s.a.w.s) said:

"He who leads to the way of Truth and righteousness, has a reward equal to the reward of those who follow that (guidance) without the reward of the doer lessening. And he who leads away from Truth and righteousness carries the burden of all those who follow that (sinful) way without their sins lessening."[3]

Abū Sa'id al-Khudarī narrated that the Prophet (s.a.w.s) said:

"Do not lie about me...narrate from me (but) he who lies about me (of what I say), deliberately, let him know he will enter Hell." Similar texts are narrated by Samrah bin Jundab and al-Mughīrah bin Shu'bah.[4] The unqualified in *sharī'ah* are, thus, not allowed to pronounce or work with that law. The learned in *sharī'ah* are those empowered and recognised in *sharī'ah* to pronounce on law. The *Qur'an* states:

"If they would only refer it to the Messenger and those amongst them who hold command, those of them

---

1 *Al-Qur'an*, Chapter 58: 11

2 Ibid, Chapter 38: 26.

3 *Mukhtasar Sahih Muslim*, p. 492.

4 Ibid.

who investigate matters would know about it...."[1] Al-Qurtubī and others state in their celebrated exegesis works that matters which people do not know the ruling of must be referred to the Prophet (s.a.w.s) during his lifetime and to those Muslims who are *'ulamā'* and *fuqahā'* for opinion later. In the *āyah* mentioned, the verb *yastanbitūnahu* means "extracting" indicating that those who are empowered to deliver judgment are to be consulted.[2]

1.3.4.1 ***Shurūt* (Conditions) Of The *Mujtahid*:**

To work with *sharī'ah* and especially the onerous and responsible task of extracting *hukm*, special persons called *mujtahidūn* are required. Apart from being a Muslim, a *mujtahid* must fulfil several conditions. He must have knowledge of the following:

- Arabic as to understand Arabic properly and correctly. This includes the knowledge of *naḥw* (grammar), *ṣarf* (etymology) and *balāghah* (rhetoric) with all its branches.
- the *Qur'ān* as it is the fundamental source of the *sharī'ah*. He must know the ayat of *aḥkām* (laws) in depth as the laws are extracted from these. He must also know the rulings of the *fuqahā'* in all these *āyāt* as well as the *asbāb al-nuzūl* (reasons for the revelations) and whether an *āyah* is *nāsikhah* (still valid in law) or whether it is *mansūkhah* (abrogated).
- the *sunnah* as to *ḥadīth ṣaḥīḥ* (authentic *ḥadīth)* and *ḥadīth ḍa'īf* (weak *ḥadīth*) as well as its grade, namely, whether it is *mutawātir*, *mashhūr* or *āḥād ḥadīth*. He must

---

1 *Al-Qur'ān*, Chapter 4: 83.

2 *Tafsīr ibn Kathīr*, Vol 2 p. 347.
Al-Jāmi' li Aḥkām al-Qur'ān, Vol 5 p. 291.

also know the causes for the *hadīth* to be found as well as its meaning and strength of text, selection process of texts, cancellations that occurred in application of these texts, knowledge of *hadīth* dealing with law matters and the law extracted from it. Also to know *'ulūm al-ḥadīth* (science of *ḥadīth*) and *'ilm naqd al-ḥadīth* (science of criticism of *ḥadīth*).

- *usūl al-fiqh* (principles of jurisprudence) because every *mujtahid* must be a *faqīh*. He must know all the proofs in *sharī'ah* and its order of standing as well as the approved way of extraction of *ḥukm* such as proofs derived from word usage and its procuring as well as the law of selection of proofs.
- *ijmā'* and know all issues on which there is already *ijmā'* and specifically *al-ijmā' al-ummah* so as not to breach the consensus of the *ṣaḥābah*.
- the *maqāsid* (aims) of the *sharī'ah*. He must know the *'ilal al-ḥukm* (reasons for the laws), as well as the *maṣālih* (approved or sanctioned benefits) of the Muslims within the ambit of the *sharī'ah* so that he can extract laws for application to the people by way of *qiyās* or by *maṣalih* (approved benefit) or by *'adat* (customs or approved practices) of the people in their dealings with one another.
- finally, he must be naturally inclined to *ijtihād* for if he is not so, the other *shurut*

(conditions) will have no meaning or value.[1] The most important of these *al-maṣādir al-tabaʿiyyah*, is *ijmāʿ* of which the *ijmāʿ al-ṣaḥabah* (consensus of the companions of the Prophet (s.a.w.s) or *ijmāʿ al-ummah* (the consensus of the Muslims) is the most important.

1.3.4.2. <u>*Al-Ijmāʿ* (Juristic Consensus Of Opinion):</u>

Ijmāʿ literally means *ʿazm* and *taṣmīm* which in turn means "firm of intention". It also means *ittifāq* which means "agreement".[2] In the *sharīʿah*, *ijmāʿ* is defined as:

"the full agreement of the *mujtahidūn* of the entire Muslim *ummah* (nation) on a *sharīʿah* ruling after the death of Prophet s.a.w.s)".[3]

Other scholars have slightly varying definitions which is not fundamentally different from the above one.[4] The vast majority of *fuqahāʾ* rule *ijmāʿ* as a source of *sharīʿah*. The *nazzam*, *shīʿah* and *khawārij* reject this.[5]

---

1 Al-Zakhili W: *Al-Ijtihad Fi al-Sharīʿah al-Islamiyyah*, In the Book *Al-Ijtihād Fī al-Sharīʿah al-Islāmiyyah*, Part 2, published by The Islamic University of Imām Muḥammad Saʿūd, Riyād: 1981, pp. 180 - 185.
Al-Ṭūfī N D: *Sharḥ Mukhtaṣar al-Rawḍah*, Beirut: Muʿassasah al-Risālah, 1989, Vol 3 pp. 577 - 584.
Wajīz fī Usūl al-Fiqh, pp. 315 - 318.
Usūl al-Fiqhī al-Islamī, pp. 310 - 314

2 *Lisān al-ʿArab*, Vol 1, p. 681.
Qāmus al-Muḥiṭ, Vol 3, p. 15.
Al-Munjid, p. 101.

3 *Al-Iḥkam*, Vol 1, p. 148.
Al-Madkhal al-Fiqhī al-ʿAmm, Vol 1, p. 71.
Wajīz Usūl al-Fiqh, p. 150.

4 *Sharḥ Mukhtaṣar al-Rawḍah*, Vol 3 p. 6.
Usūl al-Fiqhī al-Islamī, p. 164.

5 *Sharḥ Mukhtaṣar al-Rawḍah*, Vol 3 p. 14.

(a) **Analysis Of The Definition Of *Ijmā'*:**

- all the *mujtahidūn* must concur on the *ḥukm* reached. If any one dissents, no *ijmā'* is founded, but a majority and minority view.
- the participants in this process must be *mujtahidūn*. If *'ijmā'* is claimed and the participants or some of them, even one, was not a *mujtahid*, then no *'ijmā'* is founded. In fact no ruling is founded at all.
- the *mujtahidūn* must be Muslims. Nonmuslims, even if they are jurists in their system of law, cannot found *'ijmā'*. In fact, they cannot partake of any process of *shari'ah*.
- the *ḥukm* of the *mujtahidūn* must be founded after the death of the Prophet (s.a.w.s) as during his lifetime, he was the *marji' al-ḥukm* and no one else shared herein.
- the *mujtahidūn* must decide on a *ḥukm shar'i* i.e. a matter pertaining to *sharī'ah* which has no ruling yet in *sharī'ah*. A law or ruling in the *Qur'ān* or *sunnah* precludes the founding of *ijmā'*.
- *ijmā'* must have a *mustanad shar'i* i.e. a supporting proof of *sharī'ah*. *Ijmā'* based on other than a *mustanad shar'i*, like *wahm* (uninformed opinion), is void.[1]

Malikis singularly rule that the *ijmā' ahl al-Madīnah* (consensus of the *mujtahidūn* of al-Madinah) is also *ijmā'* and necessary to be followed as *ijmā'*.[2]

---

1 *Wajīz fi Usul al-Fiqh*, pp. 150 - 152.
Al-Madkhal al-Fiqhi al-'Āmm, Vol 1, p. 71.

2 *Usul al-Fiqhi al-Islami*, p. 165.

(b) **Proof Of The Validity Of Ijmā':**

The validity of *ijmā'* is confirmed by the *Shari'* in the *Qur'ān* itself. *Allah* says: *"And whoso opposes the Messenger after the Guidance (of Allāh) as 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."*[1]

The *āyah* warns Muslims against following a way other than the way of the Muslims, which is the only correct way for them. Ways other than this are false ways and forbidden. Thus, the *hukm* that the *mujtahidūn* of the Muslim *ummah* agree upon, is the proper and correct way of the Muslims and must be followed and this is exactly what *ijmā'* is.[2]

(c) **The Types Of *Ijmā'*:**

There are two kinds of *ijmā'*, namely *al-ijmā' al-sarih* (clear consensus) and *al-ijmā' al-sukūtī* (silent consensus). *Al-ijmā' al-sarih* is that *ijmā'* which is unambiguously clear and known publicly, while *al-ijmā' al-sukūti* is not so.[3]

The binding form of *ijmā'* which permanently binds the entire Muslim *ummah* (nation) for all times is *al-ijmā' al-ummah* or the consensus of the *sahabah* the of Prophet (s.a.w.s). This kind of *ijmā'* was founded during the reign of the first caliph Abū Bakr

---

1 *Al-Qur'ān*, Chapter 4: 115.

2 *Al-Ihkam*, Vol 1, p. 150.
Al-Qadā Wa Nizāmuhū, pp. 354 - 355.
Wajīz fī Usūl al-Fiqh, p. 152 - 153.

3 *Sharh Mukhtasar al-Rawdah*, Vol 3 p. 126.

Siddiq[1] and was a corner stone of legislation during his time as well as that of 'Umar[2], his successor. The climate of governance was such that that was the best way for all, apart from the fact that the *sahābah* of the Prophet (s.a.w.s) disliked conflicts and disputes amongst the Muslims.[3] *Ijmā'* was difficult to procure during the reign of the third and four caliphs of *al-khilāfah al-rāshidiyyah* (reign of the four rightly guided caliphs) as the senior fuqaha' and the *mujtahidūn* were allowed to leave for the conquered territories by the third *khalifah* 'Uthmān (d. 34 AH)[4].

Two kinds of *al-ijmā' al-sarih* are localised forms of *ijmā'* and they are *ijmā' al-iqlīmi* (regional consensus) and *ijmā' al-mahalli* (local consensus). *Ijmā' al-iqlīmi* is the consensus of the *mujtahidūn* of a region like the Middle East and South East Asia etc. Their *ijmā'* binds their region only while *ijmā' al-mahalli* binds a specific locality like a country or a province or even a city.[5]

Al-ijmā' al-sukuti (silent consensus) is formed when some or even one *mujtahid* gives a ruling on a *hukm shar'i* (*shari'ah* ruling) and such a *hukm* reaches the other *mujtahidūn* and they do not express any opinion thereon

---

1 *Usul al-Fiqhi al-Islami*, p. 169.

2 *Hayat al-Sahabah*, Vol 2 pp. 45 - 46.

3 Ibid, Vol 2, pp. 7 - 9.

4 *History of the Saracens*, p. 48.

5 *Al-Wajiz fi Usul al-Fiqh*, p. 150.

nor do they criticise the *ḥukm*.[1] The *fuqahā'* differ on the standing and application of such *ijmā'* as follows:

- most *ḥanafis*[2] and the *ḥanbalis*[3] rule this as just as binding as *al-ijmā' al-ṣarīh*.
- some, like Mālik[4] (born 95 AH/713 CE)[5] and al-Shāfi'i[6] (born 150 AH/767 CE)[7], rule it to be plain *ijtihād* and not even of the strength of *hadīth*.
- others, like some *ḥanafis* and some *shāfi'īs* rule it to be compulsory to be followed, but its degree is like that of *hadīth*.[8]

Having dealt with the most important form of *ijtihād* above, the other forms of *ijtihad* will now be dealt with.

---

1 *Usūl al-Fiqhi al-Islami*, p. 170.
Sharḥ Mukhtaṣar al-Rawḍah, Vol 3 p. 126.

2 a senior School of Sunni *Fiqh* (jurisprudence) founded by Nu'mān bin Thābit al-Kūfī, commonly known as Abū Ḥanīfah. His followers are called *ḥanafis*.

3 another senior *Sunni Fiqh* School founded by Abū 'Abd Allāh Ahmad bin Ḥanbal bin Hilāl bin Asad al-Shaibānī, commonly called Aḥmad in the law works. His followers are called *ḥanbalis*.

4 His real name is Mālik bin Anas al-Asbahi and leader and founder of the *Sunni Maliki* School of *Fiqh*. He was the *Imām* (leader) of *fiqh* (jurisprudence) in Madīnah during his time. His followers are called *mālikis*.

5 *Awḍa' al-Tashri'iyyah*, p. 121.

6 He is Abu 'Abd Allah Muḥammad Idris al-Shafi'i and founder of the *Shāfi'ī Sunnī Fiqh* School. His followers are called *shāfi'īs*.

7 *Awḍa' al-Tashiri'iyyah*, p. 122.

8 *Al-Wajiz fi Usul al-Fiqh*, pp. 154 - 155.

1.3.4.3 *Al-Qiyas* (Analogical Reasoning):

The word *qiyās* is derived from the Arabic verb *qāsa* which means *taqdir* or *muqāranah*. Literally, *qiyās* means "to compare or measure or estimate similar things."[1] 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 *sharī'ah*."[2] Examples hereof are:

- *Allāh* prohibited a man marrying a mother and her daughter as well as marriage to two sisters simultaneously due to the nearness of relationship. The Prophet (s.a.w.s) prohibited marriage to a woman and her *'ammah* (paternal aunt) at the same time as well as to a woman and her *khālah* (maternal aunt) at the same time. This is a *qiyās* ruling based on nearness of blood relationship.
- *Allāh* prohibited the *nikāḥ* (marriage) to an *umm murdi'ah* (foster mother) and *ukht min al-raḍa'ah* (foster sister). The Prophet (s.a.w.s) extended the prohibition to include all relatives who are related by *nasab*. This is *qiyās* of the *qarābah nasabiyyah* (blood relations) on the *qarābah bi al-raḍā'ah*

---

1 *Lisān al-'Arab*, Vol 5 p. 3793.
Qāmūs al-Muḥīṭ, Vol 2 p. 252.
Al-Munjid, p. 662.
Al-Rabī'ah A Z: *Adillah al-Tashri' al-Mukhtalif Fi al-Ihtijāj Bihā*, Beirūt, Mu'assasah al-Risālah, 1979, 1st ed., p. 9.

2 Al-Anṣarī A Y: *Ghayah al-Usūl Sharḥ Lubb al-Usūl*, Cairo: Matba'ah Muṣṭafā al-Ḥalabī, 1941, final ed., p. 110.
Ibn Taiyib A Ḥ: *Al-Mu'tamad Fī Usūl al-Fiqh*, Beirut: Dār al-Kutub al-'Ilmiyyah, 1983, 1st ed., Vol 2 p. 443.
Bulūgh al-Sūl, p. 88.
Maṣādir al-Tashri' al-Islāmi, p. 19.

(relations through fostering).[1] In similar vein the *fuqahā'* applied *qiyas* to *al-waqf* applying the laws of *al-wasāyā* to it due to their similarity, and also applied the laws of *al-bai'* (sale) on *al-ijārah* (leasing) by *qiyās* as *al-bai'* (sale) is the transfer of ownership while *al-ijārah* (lease) is the transfer of benefit without ownership.[2]

1.3.4.4 ***Al-Istihsān* (Refined Analogy):**

Istihsān is derived from *istaḥsana* meaning "to think something to be good".[3] In the *sharī'ah, al-istihsān* means: "the suspension of the *hukm* by *qiyās* for a *hukm* better than it or which necessitates it."[4] This is a standard definition; there are some variations by *fuqahā'* based on the scope of their application of this law. From the above definition, *al-istihsān* can be seen as the opposite of *qiyās*. *Al-istihsān* are of two kinds;

- *istihsān qiyāsi*, and
- *istihsān darūruah*.

Istihsān qiyāsi is actually a form of finer *qiyās* which *hanafi fuqahā'* (*hanafi* jurists) call *al-qiyās al-khafi*. *Al-istihsān* is thus the departure from *al-qiyās al-zāhir* (apparent analogy) to a more refined form which is stronger and more just. An example of this is that one of the accepted law principles in

---

1 *Usūl al-Fiqh*, pp. 248 - 249.

2 *Al-Madkhal al-Fiqhi al-'Amm*, Vol 1 pp. 77 - 78.

3 *Lisān al-'Arab*, Vol 2 p. 879.
Qāmūs al-Muhīt, Vol 4, p. 215.
Al-Munjid, p. 134.

4 *Masādir al-Tashrī'* al-Islami, p. 71.
Adillah al-Tashri', pp. 157 - 158.
Al-Madkhal al-Fiqhi al-'Amm, Vol 1 p. 83.
Usūl al-Fiqhi al-Islāmi, p. 210.

shari'ah is that a person's *iqrar* (admission) of an act is taken as valid for him and not for others. Thus, if someone claims that he and his brother owe someone, the claimant's claim is taken against him as an acknowledgement but not that of his brother until the brother himself acknowledges that. From this rule, if someone claims to be the *wakil* (agent) of another in the matter of collecting a debt of a *da'in ghaib* (absent creditor) and the *madin* (debtor) accepts that *wikalah* (agency), he is under obligation to hand the money to the *wakil* as he acknowledged the *wikalah*. This is by *qiyas*. However, by *al-istihsan* the *madin* must not pay the *wakil*, for the *da'in* (creditor) might return and disclaim any instruction given to the *wakil*. This is to protect the rights of the parties involved and prevent fraud. In essence, thus, *al-istihsan*, is actually another form of *qiyas*.

Al-istihsan al-darurah is the departure from *qiyas* due to necessity or *maslahah* (benefit) demanding it to prevent hardship or need. As the *wadi'* (depositee) is the same as the *amin* (one you entrust with something) in that, if anything is placed in their care and it perishes or is destroyed without negligence on their part, then they are not bound to compensate the owner. On the basis of this principle, the *fuqaha'* differentiated between the *ajir khass* who is a permanent employee and the *ajir mushtarak* who is that employee who sells his labour to different people and is not in their continuous permanent employ, like someone doing carpentry for different people. In the case of the *ajir mushtarak*, the *fuqaha'* obligate on him compensation if the goods of the owners are destroyed or lost while in his care save in

circumstances which are beyond his control like a fire not caused by him or by his carelessness. The reason for this *ḍamān* (liability) is to prevent him taking too much work due to greed for profit and causing harm to the owners. This is by ruling of *al-istiḥsān al-ḍarūrah*. *Ḥukm al-qiyās* (ruling by analogy) will absolve him and cause harm and loss to the owners.[1]

1.3.4.5 ***Al-Istiṣlāḥ* Or *al-Maṣālih al-Mursalah* (Public Interest):**

Al-istiṣlah literally means "acquiring benefit"[2]. In *sharī'ah* it means: "founding *sharī'ah* laws based on the principle of benefit to Muslims where such an issue has no ruling by any *sharī'ah* text nor *ijmā'* and there is a need for such a *ḥukm*."[3] *Al-istiṣlah* is based on the principle of *jalb al-manfa'ah* (procuring benefit) and *sadd al-mafsadah* (preventing harm and evil) from the Muslims.[4] In its application, the *fuqahā'* who use *al-istiṣlah*, use it in all spheres of Muslim life and activity - *al-dīn* (religious duties), *al-nafs* (persons), *al-'aql* (the mind), *al-nasl* (offspring), and *al-māl* (wealth and possessions) on condition that *halal* (the lawful) is not made *haram* (unlawful) and *vice versa*.

On reviewing the entire *sharī'ah* structure and its laws, one finds that the *sharī'ah* is based on the principle of *jalb al-manfa'ah* and

---

1 *Al-Madkhal al-Fiqhī al-'Amm*, Vol 1 pp. 84 - 89.

2 *Lisān al-'Arab*, Vol 4 p. 2479.
Qāmūs al-Muḥīṭ, Vol 1 p. 243.
Al-Munjid, p. 432.

3 *Maṣādir al-Tashrī' al-Islāmi*, p. 85.
Adillah al-Tashrī', p. 190.

4 *Sharh Mukhtaṣar al-Rawḍah*, Vol 3 p. 204.

sadd mafsadah. For example, the entire system of the *Sharī'* in *al ḥalāl wa al-ḥarām* (the lawful and unlawful) is based on this principle in all matters be it theological, like ordering with virtue and abstention from sin, or in economics, like permitting fair trade and prohibiting *ribā* (usury), commanding with *nikāḥ* and prohibiting *sifāḥ* (lewdness) in family life, ruling that the *qadā*, in the administration of justice, function independently from people's whims to secure fairness etc. In this sense, *al-istiṣlāḥ* is not *bid'ah* (an innovation) nor in conflict with *sharī'ah*.[1] The concept of *al-istiṣlāḥ*, features in the *Qur'ān* itself:

"Say: My Lord has forbidden only those indecencies (such of them) that are apparent and such as are within (hidden): (and He forbade) sin, wrongful oppression and that you should associate with Allāh that which no warrant has been revealed, and that you say nothing concerning Allāh of which you have no knowledge."[2]

1.3.4.6 <u>*Sadd Al-Dharā'i* (Blocking The Ways To Evil And Sin):</u>

Dharā'i is the plural of *dharī'ah* which, literally, means "a way which is resorted to by a person in any matter."[3] In the *sharī'ah* it means: "ways and means of preventing any evil or sin or blocking the ways and avenues which may

---

1 *Adillah al-Tashrī'*, p. 190.
Al-Qadā wa Nizāmuhu, pp. 374 - 375.
Al-Madkhal al-Fiqhī al-'Amm, Vol 1 pp. 98 - 100.

2 *Al-Qur'ān*, Chapter 7: 33.

3 *Qāmus al-Muḥiṭ*, Vol 3 p. 24.
Al-Munjid, p. 235.

lead to evil and sin."[1] Many a time we find in *sharī'ah* that the *Shāri'* prohibited an act, not because the act itself was sinful, but the act is open to abuse and can lead to sin. Examples are: prohibition on reviling the pagans so that they may not revile *Allāh*[2] and He prohibited the *mu'taddah* (woman in period of waiting) to marry at *ṭalāq* (divorce) or *wafāt* (death) of her spouse as to prevent mixing or confusion in *nasab*.[3] There are examples (s.a.w.s) of the practice of *sadd al-dharā'i* by the Prophet (s.a.w). He (s.a.w.s) prohibited the *madīn* of paying his *da'in* (creditor) in kind in addition to repaying his loan to prevent *riba* from being practised in an obscure way. The *saḥābah* of the Prophet (s.a.w.s) ruled *irth* (inheritance) to be due to the *mutallaqah bā'inah* (irrevocably divorced woman) when her husband divorces her in a state of illness from which he eventually dies, in order to prevent him from using *ṭalāq* as a means of denying his wife her rightful share of his *tarikah* (estate).[4] Some *fuqahā'* deal with *sadd al-dharā'i* under *al-istiṣlāh* as they consider it of that category.[5]

---

1 *Al-Madkhal al-Fiqhī al-'Amm*, Vol 1 p. 106.
Al-Madkhal li Dirāsah al-Sharī'ah al-Islāmiyyah, pp. 203 - 204.
Al-Qarārāt wa al-Tawṣiyyāt, Majlis Majma' al-Fiqh al-Islāmī, Abū Dhabi, 1415 AH / 1995 CE, p. 19.

2 *Al-Qur'an*, Chapter 6: 108.

3 Ibid, Chapter 2: 235.

4 *Al-Madkhal li Dirāsah al-Sharī'ah al-Islamiyyah*, p. 204.

5 *Al-Madkhal al-Fiqhī al-'Amm*, Vol 1 p. 107.

1.3.4.7 **Al-'Urf (Custom):**

'Urf literally means *ma'rifah* which means "knowledge".[1] The *Qur'ān*[2] uses *'urf* to mean "good and virtuous": "Practise forgiveness, (and) command good ('urf)..."[3] Some *mufassirūn* (exegetists) state that *al-'urf* in this *ayah* means "abstention from sin, acknowledging your kin and preparing for the Hereafter".[4] In the *sharī'ah, al-'urf* is defined as: "that which the people accept and practice be it by word, practice or abstention."[5]

Al-'urf is of two kinds, namely, *al-'urf al-ṣaḥīh* (proper and lawful custom) and *al-'urf al-fāsid* (invalid custom).

'Al-urf al-ṣaḥīh is that kind of *'urf* which does not clash with any *sharī'ah* laws of *ḥalāl* and *ḥarām* nor does it abrogate any of the *mabādi'* (principles) of *sharī'ah*. On the other hand, *al-'urf al-fāsid* is that practice which abrogates *sharī'ah* laws.[6] Before *al-'urf* is acceptable by *sharī'ah*, it must conform to certain *shurūṭ* which are:

- the *'urf* must be practised in the land or locality.

---

1 *Lisān al-'Arab*, Vol 4 p. 2899.
Qāmūs al-Muḥīṭ, Vol 3 p. 178.
Al-Munjid, p. 500.

2 *Tafsīr ibn Kathīr*, Vol 3, p. 267.
Al-Nasafī A A: *Tafsīr al-Nasafī*, Cairo, Dar Ihya al-Kutub al-'Arabiyyah, undated, Vol 2, p. 91.

3 *Al-Qur'ān*, Chapter 7: 199.

4 *Al-Jāmi' li Aḥkām al-Qur'ān*, Vol 7 p. 344.

5 *Al-Qadā wa Nizāmuhu*, p. 375.
Al-Madkhal li Dirāsah al-Sharī'ah al-Islāmiyyah, p. 205.
Al-Madkhal al-Fiqhī al-'Āmm, Vol 1, p. 142.

6 *Qararāt wa al-Tawṣiyyat*, Majma' al-Fiqh al-Islami, Kuwait, 1988 - 1985, *Fatwā* No: 9, p. 97.

- the *'urf* must not clash with any *shari'ah* laws already applicable in *shari'ah* and must not undo any of the laws of *halal* and *haram*.

One of the peculiarities of *al-'urf*, is that it changes with changing circumstances while one form may be present in a certain country and not in another. Uniformity in *'urf* is thus never found.

Recognising *'urf* is beneficial to people and the latter is a principle in *shari'ah* itself as the *Shari'* had incorporated *'araf* (customs) of the people into *shari'ah* when these were not repugnant to *shari'ah* and its *maqasid* (aims). *Al-'urf*, thus, cannot be a *bid'ah* (innovation). Non recognition of *al-'urf* will bring hardship to people which in itself is at variance with the *maqasid* (aims) of *shari'ah*. The *Qur'an* itself states:

"He (God) had chosen you and has imposed no difficulties on you in the religion (of Islam).."[1]

Elsewhere in *Qur'an*, a similar meaning is expressed.[2]

The *mashru'iyyah* of *al-'urf* is taken from the aims and qualities expressed in the *ayah* on *'urf* mentioned previously, but most take the text of ibn Mas'ud stating: "*that which the Muslims see as good, is good for them.*" *Al-qawa'id al-fiqhiyyah* (fundamental legal principles) are extracted from or based on *al-'urf* (custom) namely:

- custom is law.
- word usage is subject to the customary meaning of such words.

---

1 *Al-Qur'an*, Chapter 22: 78.

2 Ibid, Chapter 5: 6.

- that which is accepted by custom is as that which had been legally set.
- specification by custom is as specification by *shari'ah* text.

An example of *'urf* is the usage of traders who register sales in their records without *ishhad* (witnessing).[1]

The *Majma' al-Fiqhi al-Islami*[2] declared in their *fatwa* that the *faqih* and the *mufti* must not just consult and depend on *fiqh* works, but must take cognisance of the changing *al-'araf* in their societies (in matters of a judicial and dispensation nature).[3]

1.3.4.8 **<u>*Qawl* Or *Madhhab* (School Of Law) Of A *Sahabi*:</u>**

By this is meant the *fatwa* (legal dispensation) of a *sahabi* of the Prophet (s.a.w.s) who is a *mujtahid*. After the Prophet (s.a.w.s) death, the learned in *shari'ah* of his *sahabah*, gave *fatawa* (legal dispensations in *shari'ah*) to those who asked them for *hukm* on a given *mas'alah* (problem). This authority is given in the *Qur'an*[4] as previously stated. The narration of a *sahabi* of the Prophet (s.a.w.s) is *hadith* or *sunnah* and not classifiable under *qawl al-sahabi*. It is the individual *fatwa* that

---

1 *Masadir al-Tashri'*, pp. 146 - 147.
Al-Madkhal li Dirasah al-Shari'ah al-Islamiyyah, pp. 205 - 207.
Al-Madkhal al-Fiqhi al-'Amm, pp. 143 - 148.

2 This is the *Fiqh* Academy of the Organisation of the Islamic Conference (OIC) with headquarters in Jeddah, Saudi Arabia. The OIC is the Muslim "UN" as the overwhelming majority of muslim countries belong to it. The *Fiqh* Academy consists of the *muftun* (pl of *mufti*) of the muslim countries.

3 *Qararat wa al-Tawsiyyat, Majma' al-Fiqhi al-Islami, Fatwa No: 9* issued in Kuwait in December 1988, p. 97.

4 *Al-Qur'an*, Chapter 4: 83.

is under discussion here. It is a rule that a *ṣaḥābi* of the Prophet (s.a.w.s) of equal standing in *shari'ah* is not obliged to accept the ruling of his counterpart.

The *fuqahā'* differ on the use of the *qawl al-ṣaḥābi*. Some maintain that the *fatwā al-ṣaḥābi* must take precedence over the *ijtihad al-mujtahid* (legal opinion of a legist). Their reasoning is that these people were present with the Prophet (s.a.w.s) when the revelation was being revealed and thus their margin of error in judgment is much smaller than those who were not present with the Prophet (s.a.w.s). Abu Ḥanīfah, Mālik, al-Shāfi'i and Ahmad bin Hanbal (born 164 AH/780 CE)[1] all subscribe to this. *Qawl al-ṣaḥābi* is one of the principles of the *Ḥanbali madhhab* (*Ḥanbalī* school of jurisprudence). The other group state that it is necessary to follow the *Qur'ān* and the *sunnah*. *Ijtihād*, according to them, is subject to error as the human factor enters and as such there is no difference between a *ṣaḥābi* of the Prophet (s.a.w.s) and other *mujtahidūn* of later eras.[2] Some *fuqahā'* rule that when *qiyas clashes with qawl al-ṣaḥābi*, the latter is used. *Qawl al-ṣaḥābi* also restricts the meaning of a Quranic *ayah* of general meaning.[3]

1.3.4.9 **<u>*Al-Istiṣḥāb* (Confirming An Existing Situation):</u>**

Al-istiṣḥāb is the noun of *istaṣḥaba* which literally means "to have something or someone accompanying you or ask someone to accompany

---

1 *Awdā' al-Tashri'iyyah*, p. 124.

2 *Al-Madkhal li Dirāsah al-Shari'ah al-Islamiyyah*, pp. 208 - 209.
Al-Qadā wa Nizāmuhu, pp. 370 - 382.

3 *Sharḥ Mukhtaṣar al-Rawḍah*, Vol 3 pp. 185.

you."[1] 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."[2] As *al-istishab* only confirms a previous situation or condition, it is the weakest of all forms of *ijtihad*. It is not allowed to resort to it save after having searched for a proof pertaining to a given situation and only after finding none, may recourse be made to *al-istishab*. *Malikis*, most *Shafi'is* and *Hanbalis* accept *al-istishab* as a valid *shari'ah* proof, while *Hanafis* reject it.[3]

Three of the *al-qawa'id al-kulliyah* emanate from *al-istishab* and they are:

- all things are *halal* until it is proven *haram* by proper process of *shari'ah*. This principle is supported by the *Qur'an*:

  "He it is who created for you all that is on the earth..."[4] and also, *"...and has made of service unto you whatsoever is in the heavens and whatsoever is on the earth."*[5]

  The same rule of validity is found in *al-mu'amalat* in that all *'uqud* are valid when no *shari'ah* text or precedent prohibits it.

---

1 *Lisan al-'Arab*, Vol 4 p. 2401.
Qamus al-Muhit, Vol 1 p. 95.
Al-Munjid, p. 416.
Adillah al-Tashri', p. 275.

2 *Adillah al-Tashri'*, p. 275 - 276.
Al-Madkhal li Dirasah al-Shari'ah al-Islamiyyah, p. 213.

3 *Al-Qada wa Nizamuhu*, pp. 376 - 378.
Masadir al-Tashri' al-Islami, pp. 151 - 153.

4 *Al-Qur'an*, Chapter 2: 29.

5 Ibid, Chapter 45: 13.

- a known or established situation or issue is not ruled invalid by a doubt. Thus, if it is known that someone is married to someone, that *nikaḥ* is existent and doubt does not cancel it nor interfere with its consequences.
- in the *qaḍa* process, any person is innocent until proven guilty by due process established by *shari'ah*. Likewise, if someone claims any right from someone else, he is taken as not to have that right until his claim had been proven by a *shari'ah* process.
- an existing situation remains. From here the rule that a person known to be alive or to have been alive, is not presumed dead until proven so. This is one of the main laws of the *mafqud* (missing person).[1]

1.3.5 ***Adwar Al-Fiqh* (Stages Of Development Of *Fiqh*):**

The development of *fiqh* has two main spheres, namely the *ahd al-nubuwwah* (prophetic era) and the *ahd ma ba'd al-nubuwwah* (the post prophetic era). Both had their peculiarities. These two eras, especially the latter one, took time to develop. These developments will now briefly be dealt with to complete this chapter and give a composite view the development of *fiqh*.

1.3.5.1 ***Ahd Nabawi* (The Prophetic Era):**

This era is characterised by the strong central figure of the Prophet (s.a.w.s) who received revelation and to whom all referred all matters of law. There was, thus, in this era, the completion of revelation with the Prophet

---

1 *Al-Madkhal li Dirasah al-Shari'ah al-Islamiyyah*, pp. 213 - 214.

(s.a.w.s) interpreting it by word and deed.[1] The revelation itself had peculiar and interesting traits, like the *Makkī* revelations having to do with everything besides law, while the *Madanī* (Medinite) era dealt virtually completely with law. The revelation in its entirety of 23 years is noted for its *tadarruj* (gradual) approach to matters of law, for example, intoxicants being phased out and ruled unlawful by three different sets of *āyat* at different times.[2] This is the issue of *naskh* (abrogation). Removing *haraj* (hardship) from people which the *Qur'an* itself manifest like exemption for *ṣiyām* (fasting) in *Ramaḍān*[3] and exemption for trade in the absence of witnesses whilst on travel.[4] *Ijtihād* was very limited and not independent as it was subject to revelation as pointed out earlier.[5] These are the main peculiarities of the prophetic era.

1.3.5.2 <u>Ahd Ba'd Ahd al-Nabawi (Post Prophetic Era):</u>

This era is divided primarily into the era of *al-khulafa' al-rāshidun* and that after them. The era of the *al-khulafā' al-rashidun* is characterised by the continuation of the Prophetic style in *shari'ah*, basing *ahkam* on

---

1 Al-Dhahabi H: *Al-Shari'ah al-Islamiyyah - Dirasah Muqāranah Baina Madhāhib Ahl al-Sunnah wa al-Shi'ah*, Cairo, Maktabah Wahbah, 1991, 3rd ed., p. 11 - 12.

2 *Al-Qur'an*, Chapter 2: 219.
Ibid, Chapter 4: 43
Ibid, Chapter 5: 90.

3 Ibid, Chapter 2: 184 - 185.

4 Ibid, Chapter 2: 283.

5 *Al-Madkhal li Dirasah al-Shari'ah al-Islamiyyah*, pp. 108 - 117.
Al-Madkhal al-Fiqhi al-'Amm, Vol 1 pp. 159 - 166.
Al-Khadari M: *Ta'rikh al-Tashri' al-Islāmi*, Cairo, al-Maktabah al-Tijāriyyah al-Kubrā, 1970, 9th ed., pp. 7 - 13, 15 - 23.

Qur'ān and *sunnah* and the founding of *al-ijmā' al-ummah* and the rise of the *mujtahidūn* who all founded their rulings on the existing *shari'ah* principles and precedents set by the *Qur'ān* and by the Prophet (s.a.w.s) himself during his lifetime. The latter two procedures are obvious as *wahy* had permanently ceased and so also prophethood. There was thus not an independent system of law being invented as is common knowledge amongst so many orientalists and the like, but the "new" (that which was not mentioned by name in existing *shari'ah* texts) situations that arose were dealt with in terms of the known *shari'ah* principles and procedures. *Ijtihād* became very important to bring all acts into *shari'ah* ambit.[1]

As for the post *al-khulafā' al-rashidūn* era, this is best explained by the stages *fiqh* passed through in its accommodation with the lives of people and the State but staying within the spheres mapped out by the *fuqaha'* of the era of the *al-khulafā' al-rāshidūn*.

There were, basically, four main stages this process passed through. The first of these phases is the period of the middle of the first century *hijrah* to the second century. This saw the dispersing of the *sahābah* and the *fuqaha'* through the lands with their *al-madāris al-fiqhiyyah* (juridical schools). Ibn Mas'ūd in Irāq, Zaid bin Thābit and ibn 'Umar in al-Madīnah and ibn 'Abbās in Makkah were the main *fuqahā'* of this era from whom the Muslims

---

1 *Al-Madkhal al-Fiqhi al-'Amm*, Vol 1 pp. 167 - 170.
Al-Madkhal li Dirāsah al-Sharī'ah al-Islāmiyyah, pp. 118 - 121.
Ta'rīkh al-Tashri' al-Islāmi, pp. 87 - 90.
Al-Sharī'ah al-Islāmiyyah, pp. 12 - 13.

learnt.[1] After them their students, the *fuqaha' al-tabi'in* (second generation jurists who graduated from the companions of the Prophet) carried on. Ibn Musaiyib in al-Madinah, 'Ata'a ibn Abi Rabbah in Makkah, Ibrahim al-Nakha'i (one of Abu Hanifah's teachers) in al-Kufah, al-Hasan al-Basri in al-Basrah, Makhul in al-Sham[2] and Tawus in al-Yaman. This era saw the crystallisation of the two major schools of thought in *fiqh*, namely, *ahl al-hadith* (followers of the purely textual system of law) and *ahl al-ra'i* (followers of juristic rulings). The *ahl al-hadith* having risen in al-Madinah needed virtually no analogical deductions in law as their lives were plain and simple, while the *ahl al-ra'i* arose in provinces where ancient civilisations existed previously and where a profusion of cultures and customs existed, notably Iraq.[3] *Fiqh* now became *iftiradi* (suppositional) as opposed to the only *waqi'i* (law according to actual happenings) model. Instruments of *ra'i* (analogical deduction) were profusely used such as *al-qiyas* (analogy), *al-istislah* (procuring of public benefit) and *al-istihsan* (a refined form of analogy). *Fiqh al-shi'ah* (*shi'ah* jurisprudence) of which the *zaidiyyah*, the nearest to *ahl al-sunnah* (sunnis) and founded by Zaid bin 'Ali Zain al-'Abidin from whom Abu Hanifah reportedly learnt, appeared.[4]

---

1 *'Alam al-Muwaqqi'in*, Vol 1 p. 21.

2 the old Roman province of Syria.

3 *Al-Shari'ah al-Islamiyyah*, pp. 13 - 14.

4 *Al-Madkhal al-Fiqhi al-'Amm*, Vol 1 pp. 177 - 182. *Al-Madkhal li Dirasah al-Shari'ah al-Islamiyyah*, pp. 132 - 136.

The next period is from the second century till the fourth century *hijrah*. This is called the golden era of *fiqh* in which it became voluminous in content and scope. Many *madhāhib fiqhiyyah* (schools of law) were founded, amongst them the known schools of *ḥanafiyyah, mālikiyyah, shāfi'iyyah and ḥanbalis*. *Al-fiqh al-iftirādi* (suppositional jurisprudence) increased greatly but, at times dealt with issues which were impossible to occur in reality. Substantial recording of the *al-madhāhib al-fiqhiyyah* took place like Muḥammad bin Ḥasan al-Shaibāni recording and systemising the *ḥanafi madhhab* (*ḥanafi* juridical school). Mālik's *Muwatta'* as well as al-Shāfi'i's *al-Umm* also appeared. *Usūl al-fiqh*, previously used by the savants of *fiqh* but unrecorded was now recorded. The first book on this subject being *Risālah al-Usūl* by al-Shāfi'i. The *al-qawā'id al-fiqhiyyah* formulated from the *Qur'ān* and *sunnah* of the Prophet, used by the savants of *fiqh* (jurisprudence) in previous eras, were also recorded in this era.[1]

In the next era, which covers the period of the middle of the fourth century till the seventh century *hijrah*, *ijtihād* slowed down considerably. The *fuqaha' al-madhāhib* (jurists of the juridical schools) now resorted to refinement of their respective sectarian *fiqh* works. This also applied to the presently known *madhāhib fiqhiyyah* of the *ḥanafis, mālikis, shāfi'is and ḥanbalis*. The door of *ijtihād* was

---

1 *Al-Madkhal al-Fiqhi al-'Amm*, Vol 1 pp. 182 - 187. *Al-Madkhal li Dirāsah al-Shari'ah al-Islāmiyyah*, pp. 141 - 145.

closed by the *fuqaha'* of the four *madhahib*[1] fearing the ignorant dabbling in *ijtihad* and distorting the entire system of *shari'ah* and not that *ijtihad* had ended. This fear was based on the general slackening and weakening of the general Muslim public's attention to *shari'ah*. Sectarianism arose in this era in that *fuqaha'* of each *madhhab* paying attention to their own school only and imitating the previous masters and doubting their own juristic capabilities. In this era, also, the Islamic State, began employing sectarian law for administration of the all facets of Muslim life.[2] The Abbasides, for example, used the *hanafi* code. *Tadwin* (recording) of works were minimal as *ahkam* arrived at by the predecessors were used which gave rise to *taqlid* (imitation) of a specific *madhhab*. A form of *ijma' al-jama'ah* (group consensus) in *fiqh* came to the fore and based on the *shura* (mutual consultation) of *fuqaha'*. *Malikis*, especially, made use of this and adapted their *al-ahkam al-ijtihadiyyah* (laws based on juristic inference) when *'araf* of the people changed but subject to *shari'ah* laws herein. *Kutub fatawa* (books of legal opinions) also made their appearance. Strong sectarianism prevailed with *fuqaha'* of one *madhhab* discussing and criticising the rulings and views of other *fuqaha'* of other *madhahib*. This sometimes reached awkward proportions. Noticeably absent from this foray were the *malikis*.[3]

---

1 they are the *hanafis, malikis, shafi'is*, and *hanbalis*.

2 *Al-Shari'ah al-Islamiyyah*, pp. 14 - 15.

3 *Al-Madkhal al-Fiqhi al-'Amm*, Vol 1 pp. 187 - 196. *Al-Madkhal li Dirasah al-Shari'ah al-Islamiyyah, pp. 140 - 149.*

The next phase covered the period from the seventh century *hijrah* till the appearance of the *Al-Majallah al-'Adliyyah* in 1286 *hijrah*. During this period, *fiqh* became static and eventually petrified due to the neglect of the application of *ijtihad*.[1] Despite this general trend, some brilliant *fuqaha'* appeared from time to time. A system of rectification and editing of *fiqh* works now continued. *Fiqh* was now studied from a specific book of a *madhhab* and understood as it was with no reference to other *madhahib* nor the *shari'ah* generally nor *fiqh* in its wide sense. Compilations in *fiqh* were very limited. The system of *mutun* (texts) appeared in which a huge work was condensed to a very small booklet and sometimes set completely to rhyme. A *faqih* would explain the work which was then called a *sharh* (explanation) of the work and another *faqih* would comment on that *sharh* (explanatory text) and his work was then called a *khashiyah*. Another *faqih* would write notes on the *khashiyah* which was called a *taqrir*. This system gave rise to note writing on texts.

During this era the *al-kutub al-fatawa* became numerous. These works' subject matter was listed as it appeared in *fiqh* works, but they were always strictly sectarian in content. An example hereof is *Al-Fatawa al-Tartariyyah*. During this period the 'Uthmani (Ottoman) *sultan* issued *iradat sultaniyyah* (royal sultanate decrees) where administrative rules for certain *fiqh* issues were introduced, like limiting the time during which a case had to be raised. This is called *taqadum*. Sometimes the *hukm marjuh* (weaker juridical ruling), when the need arose

---

1 *Al-Shari'ah al-Islamiyyah*, p. 15.

for it, was sanctioned by such *iradat* (decrees). The latter right a Muslim ruler has in *shari'ah*. Towards the end of this era, *taqnin* (codification) came into being. *Fiqh* laws were now amended and rulings from other *madhahib* were used. This came too late to re-enliven *fiqh* and rid Muslim society of the narrowness of negative sectarianism. The *Uthmani* State used, basically, *hanafi* law for centuries.[1]

Following the latter *Uthmani* pattern, the Arab States took to codification. In 1920 Egypt codified *fiqh* laws pertaining to Muslim family life and enacted it as Act 25. In 1929 laws of *talaq*, court procedure, *nasab* etc were codified while Act 77 of 1943 dealt with *mirath* and Act 71 of 1936 dealing with *wasaya* (legacies). Act 48 of 1946 as well as Act 180 of 1952 dealt with *waqf*. In Iraq Muslim family law was codified as Act 188 of 1959 and dealt with *nikah*, *sadaq* (dowry), *talaq*, *nafaqah*, *hadanah*, *nasab*, *mirath* and related matters. Jordan codified its family *fiqh* laws as Act 92 of 1951 and which deals with most aspects of Muslim family life such as *nikah*, *talaq* etc. Syria codified its Muslim Family Law Act as Act 59 of 1953 wherein both *mirath* and *wasaya* are incorporated.[2]

---

1 *Al-Madkhal li Dirasah al-Shari'ah al-Islamiyyah*, pp. 150 - 152.
Al-Madkhal al-Fiqhi al-'Amm, Vol 1 pp. 197 - 204.

2 *Al-Madkhal li Dirasah al-Shari'ah al-Islamiyyah*, p. 153.

CHAPTER 2

AL-WILĀYAT (GUARDIANSHIP) AND *AL-TABANNĀ* (ADOPTION)

1 *AL-WILAYAT*

1.1 Definition:

The word *wilāyat* is derived from the Arabic verb *waliya* which means *nāṣir* i.e. a helper.[1] *Wilāyat* literally means *nuṣrah*, and its noun agent is *walī*.[2] In *sharī'ah*, *wilāyat* is defined as "the right in *sharī'ah* by which a person has the full authority over another person's affairs."[3]

1.2. Kinds Of *Wilāyat*:

Wilayat is divided into two main divisions, namely:

- *al-wilāyat al-'ammah* (public guardianship), and
- *al-wilāyat al-khāṣṣah* (specialised or personal guardianship).

Al-wilāyat al-'ammah is the *wilāyah* of *al-imām al-akbar* (i.e the *khalīfah* - caliph or ruler of the Muslims), or the *sulṭān* (Muslim ruling authority) or the *qāḍī* (Muslim judge). Their *wilāyat* encompasses all the persons that fall under their jurisdiction.

Al-wilāyat al-khāṣṣah is the *wilayat* the *abb* (father) over his *walad sharī'* (legitimate child) or of the *jadd, abb al-abb* (paternal grandfather) over his *ḥafīd sharī'* (paternal grandchild). It is likewise the *wilāyat* of the *waṣī* (curator) or that of the *qaiyim* (righteous Muslim

---

1 *Lisān al-'Arab*, Vol 6 p. 4920.
Qāmūs al-Muḥīṭ, Vol 4 p. 404.

2 *Lisān al-'Arab*, Vol 6 p. 4920.

3 Al-Husarī A: *Al-Wilayah wa al-Wiṣāyah wa al-Talāq*, Cairo, Maktabah al-Kulliyāt al-Azhariyyah, 1969, p.1.

person) or the *wilāyat* of the *mutawalli*[1] (manager) of a *waqf*.[2]

Al-wilāyat is further classified, as regards its applicable powers and scope into two, namely:

- *al-wilāyat al-dhātiyyah* (natural guardianship),and,
- *al-wilāyat al-muktasibah* (acquired guardianship).

Al-wilāyat al-dhātiyyah is that form of *wilāyat* which is natural to the person and he does not acquire it. This form of *wilāyat* cannot normally be revoked nor can it be refused. An example hereof is the *wilāyat* of the father over his *walad sharī'*.

Al-wilāyat al-muktasibah is, as its name indicates, acquired by someone and may be revoked or can be refused. An example hereof is the *wilāyat* of the *wasi* (curator) and the *qādi*.

Al-wilāyat is further classified, as far as its effect on persons are concerned, into two:

- *al-wilāyat 'alā al-nafs* (guardianship over persons),
- *al-wilāyat 'alā al-māl* (guardianship over wealth and possessions).[3] Some, like the late *shaikh* Abū Zahrah classify it into three, namely *al-wilāyat 'alā al-nafs*, *al-wilāyat 'ala al-māl* and *al-wilāyat al-tarbiyah* or *al-wilāyat al-ḥadānah*.[4]

It is, thus, obvious that *wilāyat* has mostly to do with the *wilāyat* on persons in its various forms.

---

1 *Waqf* (endowment) property is never owned by a trustee as the case may be in secular law. A *mutawalli* only manages a *waqf* and as such the term "manager" is more suitable here.

2 *Al-Wilāyah wa al-Wiṣāyah*, p. 2.

3 Ibid, pp. 2 - 3.

4 Abū Zahrah M: *Al-Aḥwāl al-Shakhsiyyah*, Cairo, Dār al-Fikr al-'Arabi, 1950, p. 406.

1.2.1 ***Al-Wilāyat ʿalā al-Nafs*** **(Guardianship Over Persons):**

There are two categories under this heading, and they are *wilāyat al-ḥifẓ wa al-tarbiyah* (guardianship of protection and upbringing) and *wilāyat al-nikāḥ wa al-tazwij* (guardianship of marriage) in its various forms. By *wilāyat al-ḥifẓ wa al-tarbiyah* is meant the guardianship of protection and upbringing of sagha'ir (minors). The *fuqahā'* have defined this period of upbringing as from birth and as far a males are concerned, until "he reaches a stage where he has attained some independence like eating, dressing and performing the ablutions by himself". This age is ruled by some of the *fuqahā'*, like *hanafis*, as seven years[1] while others rule nine years as the maximum. For females, some *fuqahā'* rule it to be nine years while others rule eleven years.[2] This difference of opinion is due to *ijtihād* as there is no Qur'anic nor *sunnah* law herein[3]. *Wilāyat* on persons is based on two important considerations, namely, the protection and upbringing of minors and the special protection for females minors until puberty and till their *nikāḥ*.[4] The expenses incurred in *ḥaḍānah* is for the father to bear and in his absence the Muslim male who succeeds to the *wilāyat* after him. *Ḥaḍānat* is thus a joint kind of care for the *saghīr* (minor) by both his *umm* (mother), and father or he who deputises for him by *sharīʿah* laws.

---

1 Al-Zailaʿī F D: *Tabyīn al-Haqā'iq – Sharḥ Kanz al-Daqā'iq*, Cairo, Dār al-Kitab al-Islāmi, 1313 AH, 1st ed., Vol 3 p. 48.

2 *Al-Wilāyah wa al-Wiṣāyah*, pp. 9 - 10.

3 Jādd al-Haqq A J: *Buḥuth Wa Fatāwā Islāmiyyah Fī Qaḍāyā Muʿāsarah*, Cairo, General Secretariat of the Higher Council of Islamic Missionary Work, Al-Azhar University, 1994, Vol 2 p. 454.

4 Al-Wilāyah wa al-Wiṣāyah, pp. 9 - 10.

(a) *Hadānat al-Saghīr* (Custody Of The Minors):

Hadānat al-saghīr means the custodial care of a minor. The word *hadānat* and *hidānat* is derived from the verb *hadāna* which means "to attach to oneself and protect as does a brooding bird with its eggs when it draws it to its body and spreads its wings over it". The linguist al-Jawhari gives this explanation. It also means "to keep to your chest and embrace." *Hadānat al-sabi* means "to rear a child". The *hādin* and *hādinat* are taxed with the responsibility of bringing up a minor child.[1] *Hidanat* is thus the rearing and upbringing of *sagha'ir* (minors) while *hadānat* is the place where this is done.[2] The linguistic meaning of *hadanat* has the attributes of caring, protection, rearing and upbringing which the *shari'ah* prescribes. The *shari'ah* sources use the word *hadanat* in their works as it has the same meaning as *hidanat.*[3] In the *shari'ah, hadanat* is defined as "the attaching of a *saghir* to a person due to the latter's capacity to care for himself and for such a (mature) person to protect, care, rear

---

1 *Lisān al-'Arab*, Vol 2 p. 911.

2 *Al-Munjid*, p. 139.

3 Al-Juzairi A R: *Kitab al-Fiqh 'ala al-Madhahib al-Arba'ah*, Cairo, al-Maktabah al-Tijāriyyah al-Kubrā, Vol 4, p. 591.

and bring up to *saghir*."[1] Since this *amānah* (trust) is to be entrusted to a responsible person who is to care for a weak and defenceless *saghir*, to shape his early vision of life and matters related thereto, the *shari'ah* has given this right to the *umm* of the *saghir* (minor) and the *maḥārim* (prohibitive range)[2] women of her, due to the mother and these *maḥārim* being best suited for this task.[3] The *fuqahā'* state that the mother has more ability in rearing a *saghir* and is better equipped, more compassionate, and accommodating to a defenceless *saghir* than the father. They further mention that the *maḥārim* women on the mother's side precede the *maḥārim* on the father's side due to the former being like the mother in nature towards the *saghir*.[4]

---

1 Al-Kāsānī A D: *Kitāb al-Bada'i al-Sanā'i fi Tartib al-Sharā'i*, Beirut, Dār al-Maktab al-'Ilmiyyah, 1986, 2nd ed. Vol 3, p. 40.
Al-Mawsulī A M: *Al-Ikhtiyār li Ta'lil al-Mukhtār*, Cairo, Matba'ah Muṣṭafā al-Ḥalabī, undated, Vol 4 p. 14.
Al-Baqā'ī Ù B: *Faid al-'Ulāh al-Mālik Fi Hāl al-Faz 'Umdah al-Sālik wa Addah al-Manāsik*, Cairo, Matba'ah Istiqāmah, 1955, Vol 2, p. 219.
Al-Husainī T D : *Kifāyah al-Akhyār fi Hal Ghayah al-Ikhtiṣār*, Cairo, Dār al-Iḥyā al-Kutub al-'Arabiyyah, undated, Vol 2, p. 151.
Al-Jazā'irī A B: *Minhāj al-Muslim*, al-Madīnah, 1969, 3rd ed., p. 465.
Al-Birrī Z A: *Aḥkām al-Awlād*, Cairo, Dār al-Qamariyyah li al-Tibā'ah, 1964, p. 39.

2 i.e. those women who are permanently prohibited to the male minor in marriage.

3 Al-Tanūkhī S S: *Al-Mudawwanah al-Kubrā li al-Imām Mālik*, Beirut, Dār al-Fikr, undated, Vol 2 p. 259.
Nawawī A Z: *Rawḍah al-Ṭālibin*, Beirut, Dār al-Kutub al-'Ilmiyyah, undated, Vol 6 p. 504.
Al-Sharī'ah al-Islāmiyyah, p. 404.

4 *Aḥkām al-Awlad*, p. 39.
Al-Sharī'ah al-Islāmiyyah, p. 404.
Al-Wilāyah wa al-Wisāyah, p. 4.

The father has the *wilāyat ʿalā al-nafs wa ʿalā al-māl* over the *saghīr* in these formative years.[1] In real terms this is actually more of a responsibility than a right.

(i) Definition Of A *Saghīr*:

A *saghīr* is also called a *ṭifl* (fem *ṭiflah*) if of tender age. This is the *infans* in secular law. There is consensus by the *fuqahā'* that *ḥaḍānat* takes place from birth, but they differ on the termination of this care period as pointed out previously. At the end of this period, *ḥanafis* rule that both the *saghīr* (male minor) and *saghīrah* (female minor) must go and live with their father as he is capable to see to their upbringing from this point of time[2]. The deciding issue here appears to be discipline. Mālik rules that the *saghīr* may stay with his mother until *bulūgh* (puberty) while the *saghīrah* shall stay with the mother until she marries and her *nikāḥ* (marriage) is consummated.[3] Mālik is of the opinion that children do not have the ability to choose where to

---

1 *Al-Wilāyah wa al-Wiṣāyah*, p. 3.

2 *Badā'iʿi al-Ṣanā'iʿi*, Vol 4 pp. 42 - 43.
Ibn ʿĀbidīn: *Al-Durr al-Mukhtār ʿala Matn Tanwir al-Abṣār*, Vol 2 p. 1054 (No publisher or printer mentioned probably an old Ottoman era work) .

3 Kenny J (translator): *The Risāla - Treatise on Maliki Law of ʿAbd Allāh ibn Abī Zaid al-Qairawāni*, Minna (Nigeria), Islamic Education Trust, 1992, 1st ed., p. 134.
Shawqāni M A: *Nail al-Awṭār - Sharh Muntaqā al-Akhbār Min Ḥadīth al-Saiyid al-Akhyār*, Cairo, Matbaʿah Muṣṭafā al-Ḥalabi, undated, final ed., Vol 5 p. 371.

live at the end of their *ḥaḍānat*.[1] Al-Shāfi'i[2] and Aḥmad permit the *sagha'ir*, at the end of their *ḥaḍānat*, to choose with which parent they wish to reside.[3] The latter two *fuqahā'* based their ruling on a *ḥadith* of the Prophet (s.a.w.s) narrated by Abū Hurairah and transmitted by Aḥmad, al-Tirmidhi, al-Nasa'i and ibn Mājah.[4]

When boys reach the end of their custodial period, *wilāyat 'ala al-nafs* ends for them by consent of all the *fuqahā'*. When girls reach *bulugh*, the *fuqaha'* differ on their capacity to contract their *nikāḥ*. There is no restriction on any other form of *'aqd* they wish to contract. The *ḥanafis* rule that a *bikr mukallaf* (pubescent never married virgin female) has the right to contract her own *nikaḥ* and that the intervention of the *wali* is good to avoid accusations of loose morals, but is not required. Her *wali* has no right of *'itirāḍ* (objection) if she marries within her rank and with a *ṣadāq mithl*

---

1 Ibn Qudāmah A M: *Al-Mughni*, al-Riyad, Maktab al-Riyad al-Hadithah, undated, Vol 7, p. 615.

2 *Rawḍah al-Ṭalibin*, Vol 6 p. 509.
Kifāyah al-Akhyār, Vol 2 p. 151.
Al-Anṣarī Z: *Minhāj al-Ṭullāb*, Cairo, Maktabah Muṣṭafa al-Halabi, undated, p. 110.

3 *Al-Mughni*, Vol 7 p. 613.
Mughniyyah M J: *Al-Fiqh 'ala al-Madhahib al-Khamsah*, Beirut, Dār al-'Ilm li al-Malāyin, 1979, 6th ed., Part 2, p. 379.

4 Ibn al-Athir M D: *Jami' al-Usul fi Ahadith al-Rasul*, Damascus, Maktabah al-Halwāni, 1970, 1st ed., Vol 3 p. 613.

(customary dowry in a family) or more. *Hanafis* base their argument on two Quranic texts which, according to their interpretation, attribute the act of *nikāḥ* to women.[1] They further state that women may contract any contract by consent of all *fuqahā'* so they should be able to contract their own *nikāḥ* also. *Ḥadīth* referring to *wilāyat* on women in *nikāḥ* must be construed to mean women who have no *ahlīyyah* (legal standing).[2] All the other *fuqahā'* rule that the *bikr mukallaf* (never married virgin) may not contract her *nikāḥ* without the consent of her *walī*, but she must consent to the *nikāḥ* herself. A forced *nikāḥ* without the woman's consent is void in standing according to *ḥadīth* text of Ḥansā bint Juth'am and ibn 'Abbās.[3] They quote Quranic texts that show that *wilāyat* is in male hands[4] as well as *ḥadīth* texts by 'A'ishah stating that the marriage of a woman without the consent of her *walī* is void but her *ṣadāq* is due to her if that marriage was consummated and if her *walī* refuses consent, (then) the *sultān*

---

1 *Al-Qur'ān*, Chapter 2: 230.
Ibid, Chapter 2: 232.

2 *Badā'i al-Sanā'i*, Vol 2 pp. 241 - 243.
Al-Mughnī, Vol 6 p. 449.
Sābiq S: *Fiqh al-Sunnah*, Vol 2 pp. 128 - 129.

3 Ibn Qaiyyim al-Jawziyyah: *Zād al-Ma'ād Fī Hadyi Khair al-'Ibād*, Makkah, al-Matba'ah al-Misrīyyah, undated, Vol 4, p. 2.
Jāmi' al-Usūl, Vol 11, p. 464.

4 *Al-Qur'ān*, Chapter 2: 221 & 232.
Ibid, Chapter 24: 32.

(ruling Muslim authority) is the *walī* of the one without a *walī*.[1] This text is also transmitted by Aḥmad and ibn Mājah. This view of *wilāyat* is also the view of ʿUmar and ʿAlī (d. 40 AH)[2], the fourth *khalīfah*, of the *fuqahā'* of the *ṣaḥābah*, and ibn Musaiyib and Ḥasan al-Baṣrī of the *fuqahā'* of the *tabiʿūn*. It is also the view of the *fuqahā'* al-Thawrī, Mālik, ibn Ḥazm, al-Ṭabarī *et al*.[3] Irrespective of the differences between the *fuqahā'* in this matter, *ḥadīth* texts are transmitted by ibn ʿAbbās reveal that the Prophet (s.a.w.s) required the consent of women being married off and ʿAbd Allāh bin Buraidah narrated the case of a woman whose father had married her off without her consent and the Prophet (s.a.w.s) gave her a choice in the matter - either having it annulled or carrying on with the *nikāḥ*.[4]

All the *fuqahā'* agree that the non *mukallaf* (non pubescent) child and one who is *mukallaf*, but mentally defective

---

1 *Sunan Abī Dawūd*, Vol 1, p. 566.
Al-Tirmidhī A: *Sunan al-Tirmidhi*, al-Madinah, al-Maktabah al-Salafiyyah, undated, Vol 2, p. 370.

2 *History of the Saracens*, p. 48.

3 *Fiqh al-Sunnah*, Vol 2 pp. 125 - 127.
Al-Mughni, Vol 6 p. 449.
Al-Qurtubī M: *Bidāyah al-Mujtahid Wa Nihāyah al-Muqtaṣid*, Cairo, Maktabah al-Kulliyāt al-Azhariyyah, 1966, Vol 2 pp. 5 - 8.
Ibn Ḥazm A M: *Al-Muḥallā*, Cairo, Dar al-Turath, undated, Vol 9, pp. 451 - 455.

4 *Fiqh al-Sunnah*, Vol 2 pp. 119 - 120.
Zād al-Maʿād, Vol 4 p. 2.
Mukhtaṣar Ṣaḥīḥ Muslim, pp. 208 - 209.

in any degree or form, is subject to the *al-wilāyat al-ijbār* (compulsory guardianship) of their *walī* who can marry them off without their consent if it is in their interest. This applies especially to the mentally defective. In the case of a *saghīr ʿaqil* (sane minor) whether male or female, the *nikāh* enacted by their *walī* is valid with the *saghīr* having a choice at becoming *mukallaf* but not the *saghīrah*. Al-Shāfiʿī, states that the *saghīrah* should not be married off before she becomes *mukallaf* so that she can consent to her *nikāh*. It is conditional in the *nikāh* of the *sagha'ir* that they be married off only if it is in their interest and then to someone of their societal standing and rank.[1]

Some *fuqahā'* rule that only the father and paternal grandfather may marry off a *saghīr*, the reasoning being here that they will not, usually, place their children's lives in jeopardy. *Inkāh* (marrying off) *sagha'ir* is now forbidden in the Muslim world due to the fear of materialism intervening in this

---

1 *Fiqh ʿalā al-Madhahib al-Arbaʿah*, Vol 4, pp. 26 - 36.
Al-Marghinānī A H: *Al-Hidāyah - Sharḥ Bidāyah al-Mubtadī'*, Cairo, Matbaʿah Mustafā al-Halabī, undated, Vol 1 p. 198.
Al-Mālikī Khalil bin Isḥaq: *Mukhtaṣar Khalil Fi Fiqh al-Imām Mālik*, Cairo, Matbaʿah Mustafā al-Halabī, 1922, pp. 99 - 100.
Al-Khaṭīb S D: *Al-Iqnāʿ Fi Ḥal Alfāz Abī Shujāʿah*, Cairo, Matbaʿah Mustafā al-Halabi, 1940, final ed., Vol 1 p. 78.
Al-Maqdisi M D: *Al-Muqniʿ*, Cairo, al-Matbaʿah al-Salafīyyah, undated, p. 208.
Al-Wilāyah wa al-Wisāyah, p. 17.

matter and *sagha'ir* being subjected to harm. Institutions of State exist for the protection and welfare of *sagha'ir* nowadays. In *hanafi fiqh*, only minors have *wilayat al-tazwij* over them. Those who have this right are, the *ibn* (son) how lowsoever followed by the father, the father's father how highsoever, the *akh* (brother) and the *'amm* (paternal uncle), the *shaqiq* (full category) preceding the consanguine category. If none of these *'asabah* (agnates) are found, females succeed and they are the mother and the rest of the *arham* (uterine relatives).[1]

Malikis differ amongst themselves on the order of males meriting *hadanat* after the meriting females. The most suitable pattern hereof is the father then the *wasi* (curator appointed by the guardian), then the *akh shaqiq* (full brother) followed by the *akh li abb* (consanguine brother), then the *jadd sahih* (father's father). Hereafter the *qadi*.[2] Some *malikis* place the *ibn akh shaqiq* (son of the full brother) before the *akh li abb*, but let the *jadd sahih* precede the *ibn akh shaqiq*. Then the *'amm* (paternal uncles) who is followed by his son.[3] *Shafi'is* list them as the

---

1 Al-Zakhili W: *Al-Fiqh al-Islami wa Adillatuhu*, Cairo, Dar al-Fikr, 1987, Vol 7 p. 747.
Al Wilayah wa al Wisayah, pp. 25 - 27.

2 *Al-Fiqh al-Islami wa Adillatuhu*, Vol 7 p. 747.

3 *Fiqh 'ala al-Madhahib al-Arba'ah*, Vol 4 p. 595.
Al-Mudawwanah al-Kubra, Vol 2 p. 260.

father, then the paternal grandfather how highsoever, then the *akh shaqīq*, then the *akh li abb*, followed by their respective sons, then the *'amm shaqīq* (full paternal uncle) followed *'amm li abb* (consanguine uncle) and followed by their respective sons and thereafter all the *'aṣabah* (residuaries) as in *mīrāth* (Islamic succession law).[1] There is no *ḥaḍānat* for the non *mahram*.[2] *Ḥanbalis* list them as the father, followed by the father's father how highsoever, then the *ibn* followed by the *ibn al-ibn* (son of the son) how lowsoever, then the *ikhwah* (brothers), first the *ashiqqā'* (full category) followed by the consanguine category and finally their respective sons how lowsoever. In another *ḥanbalī* pattern, the *ibn* precedes the grandfather and making no distinction in rank between the latter and the *ikhwah* (brothers). The *sulṭān* ranks last in some narrations.[3]

(ii) <u>The *Mashrū'iyyah* (Legality) Of *Ḥaḍānat*:</u>

The protection of the *saghā'ir* and *ḍu'afā'* (the weak), in general terms, is a duty imposed by the *Qur'ān*:

"*And why should you not fight in the cause of Allāh and of those who, being*

---

1 Al-Nawawī A Z: *Minhāj al-Ṭālibīn wa 'Umdah al-Muftīn Fī Fiqh Madhhab al-Imām al-Shāfi'ī*, Cairo, Maktabah Muṣṭafā al-Ḥalabī, undated, p. 96.
Kifayāh al-Akhyār, Vol 2 p. 51.

2 *Rawḍah al-Ṭālibīn*, Vol 6 p. 516.

3 *Al-Muqni'*, p. 208.
Al-Mughni, Vol 6 pp. 457 - 460.

weak, are ill treated - men, women and children."[1]

Parents, specifically, are responsible for the rearing of their children by Quranic law:

"The mother shall give suck to their offspring for two complete years for those who wish to complete the terms (of suckling). But he (the father) shall bear the cost of their (children's) food and clothing on equitable terms."[2]

Hadānat is actually founded on *sunnah*. Barā'ah bin 'Āzib narrated that the Prophet (s.a.w.s) awarded custody of the daughter of Hamza to her *khālah* after 'Alī, Ja'far and Zaid contested custodial rights at the Prophet (s.a.w.s). He (s.a.w.s) said: "The *khālah* is in the place of the mother."[3] 'Abd Allāh bin 'Amr narrated that a woman told the Prophet (s.a.w.s): "This child I carried (in pregnancy), he drank from me and my house was his shelter. Now his father wants to take him away from me after he had divorced me." The Prophet (s.a.w.s) replied: "You have more right to him (the child) than your husband as long as you do not remarry."[4]

---

1 *Al-Qur'ān*, Chapter 4: 75.

2 Ibid, Chapter 2: 233.

3 *Nail al-Awtār*, Vol 6, p. 368.
Jāmi' al-Usūl, Vol 3, p. 615.

4 *Sunan Abī Dāwud*, Vol 1 p. 574.
Jāmi' al-Usūl, Vol 3 p. 614.
Nail al-Awtār, Vol 6 p. 369.

(iii) **Persons Having The Right To *Ḥaḍānat*:**

The established right of *ḥaḍānat* of a *saghīr*, in *sharī'ah*, is accorded to women from the earliest age of such minors due to women, according to *sharī'ah*, being best inclined for this very important duty due to their *'aṭf* (affection), *ḥanān* (compassion) *ri'āyah* (guidance), *shafaqah* (pity and compassion) and *ṣabr* (patience) in the *tarbiyah* (upbringing) of the of the *saghīr* (minor). These qualities are required for the various early stages a *ṭifl* passes through to *tamyīz* (discernment age) which is 7 - 9 years. This right follows a set pattern and there are some differences amongst the *fuqahā'* in the precedence of some persons meriting *ḥaḍānat*. These persons are: the *umm al-saghīr* (mother of the minor), followed by the *umm al-umm* (maternal grandmother) how highsoever, then the *umm al abb* (paternal grandmother) how highsoever, then the *shaqīqāt* (full sisters) of the *saghīr*, then *akhawāt li umm* (uterine sisters) of the *saghīr*, then the *akhawat li abb* (consanguine sisters), the latter superseding the *khālah* due to *qurbah* (nearness of relationship). If no *akhawāt* mentioned are found, then the *banāt* of these *akhawāt* come in the same order as the *akhawāt* (sisters), namely, first the *banāt shaqīqāt* (daughters of the full sisters) then the *banāt akhawāt li umm* (daughters of the uterine sisters). Hereafter follow the *khālāt*

shaqiqat (full maternal aunts i.e full sister of the mother of the *saghir)*, followed by the *khalat li umm* (uterine maternal aunts) and then the *khalat li abb* (consanguine maternal aunts) and then the *banat akhawat li abb* (daughters of the consanguine sisters).

If none of these women are found, then the *bint akh shaqiq* (daughter of the full brother) succeeds to the right of *hadanat*, followed by *bint akh li umm* (daughter of the uterine brother) followed by the *bint akh li abb* (daughter of the consanguine brother). If none are found, then the *khalah umm al-saghir* (maternal aunt of the mother of the minor) succeeds, followed by the *khalah abi al-saghir* (maternal aunt of the father of the minor) followed by the *'ammat abi al-saghir* (paternal aunts of the father of the minor). After her follows the *khalah abi li umm li al-saghir* (maternal uterine aunt of the father of the minor) followed by the *khalah abi li abb li al-saghir* (maternal consanguine aunt of the father of the minor). This is the *hanafi* pattern.[1] In some rulings, the *khalat* (maternal aunts) precede the *'ammat* (paternal aunts).[2] This pattern of *hadanat* favours women which conforms to the *hadith* of *hadanat* (custodial care) quoted earlier.

---

1 *Ahkam al-Awlad*, p. 40.
Al-Wilayah wa al-Wisayah, p. 4.
Al-Durr al-Mukhtar, Vol 2 pp. 1050 - 1051.

2 *Al-Ahwal al-Shakhsiyyah (Abu Zahrah)*, pp. 406 - 407.

There is consensus amongst the *fuqahā'* that the *umm* (mother) takes precedence in *ḥaḍānat*.

As mentioned earlier, the *fuqahā'* differ on precedence in *ḥaḍānat*. Al-Shāfi'i and al-Hādi place the father as well as the *ajdād* (grandfathers) before the *khālah*. Al-Nāṣir, Mu'aiyid bi Allāh and most *fuqahā'* of the *shāfi'is* and one of Abū Ḥanifah's views places the *akhawāt* before the *khālah*.[1] In the *shāfi'i* and *ḥanbali* systems, the mother is followed by all the *ummahāt al-umm* (mothers of the mother) how highsoever, followed by the father and then the *umm al-abb* (mother of the father), then the *jadd* (paternal grandfather) followed in turn by his *ummahāt* (mothers) how highsoever. Hereafter follows the *akhawāt shaqiqāt* (full sisters) followed by the *akhawāt li abb* (consanguine sisters) and then by the *akhawāt li umm* (uterine sisters), then the *khalāt* (maternal aunts) followed in turn by the *'ammāt* (paternal aunts). In another ruling, Aḥmad rules that the *ukht li umm* (uterine sister) and *khālah* (maternal aunt) precede the father.[2]

Mālik rules that the *saghir* be returned to his father on reaching *tamyiz* while the *saghirah* may remain with her mother till her *nikāḥ* marriage, according to one ruling, and till the

---

1 *Nail al-Awtār*, Vol 6 p. 368.

2 *Al-Mughni*, p. 271.
Kifāyah al-Akhyār, Vol 2 p. 152.

nikāḥ is consummated, according to another ruling. This is subject to the mother not remarrying.[1] Another ruling attributed to Mālik states that the *saghīr* remains with the mother until he reaches *bulugh* when his *ḥaḍānat* ends[2] whether he matures as a sane or mentally defective person. His maintenance is, however, still compulsory on the father.[3] Abu Ḥanifah allows the *saghīrah* to remain with her mother until she becomes *bālighah* (pubescent) or marries. When she is *bālighah* and unmarried, she returns to her father.[4]

Some *fuqahā'*, like the *ḥanafis*, rule, that when the females meriting *ḥaḍanat* are exhausted, the *maḥārim* males succeed to this right. They follow in the same line as in *mirath* and they are, thus, the father, the *jadd - abb al-abb* how highsoever, the *akh shaqīq*, the *akh li abb*, followed by their sons in the order mentioned, then the *'amm shaqīq* (full paternal uncle), then the *'amm li abb* (consanguine paternal uncle), the *ibn 'amm shaqīq* (son of the full paternal

---

1 *Al-Mughni*, Vol 7 p. 617.

2 *Al-Fiqh 'alā al-Madhāhib al-Khamsah*, p. 380.

3 *Fiqh 'alā al-Madhahib al-Arba'ah*, Vol 4. p. 599.

4 *Tabyīn al-Ḥaqā'iq*, Vol 3 p. 48.
Al-Mughnī, Vol 7 p. 616.

uncle) if he[1] merits *ḥaḍānat* (custodial care).[2]

When none of the *'aṣabāt maḥārim* (agnates of prohibited marriage range) are found, *ḥaḍānat* is transferred to the *maḥārim* of the *ghair 'aṣabāt* (non agnate) category. First in line here is the *abb al-umm* (mother's father), then her (minor's) *akh li umm* (uterine brother), then the *'amm* (paternal uncle) followed by the *khāl shaqīq* (full maternal uncle), then the *khāl li abb* (consanguine maternal uncle) and then the *khāl li umm* (uterine maternal uncle). These persons have the *wilāyat al-tazwīj* and as such must have the right of *ḥaḍānat* also.[3]

(iv) <u>*Shurūṭ* (Conditions) Of *Ḥaḍānat*:</u>

The following *shurūṭ* must be found in the *ḥaḍinat* (female meriting *ḥaḍānat*). If one or more of the *shurūṭ* are missing, the next person in line is considered for *ḥaḍānat*.

- to be a *Muslimah* (Muslim woman). This is the view the vast majority of *fuqahā'* who ruled so due to the tremendous influence of the *umm* on the child in religious beliefs and

---

1 cousins, irrespective of category, when they are entitled to *hadanat* (custodial care), they may only have a *saghir* (minor) of their own sex as they (cousins) are not *maharim* (persons of the prohibited category in marriage).

2 *Al-Durr al-Mukhtar*, Vol 2 p. 1051.
Al-Wilāyah wa al-Wisāyah, p. 5.
Aḥkām al-Awlad, p. 43.

3 *Al-Wilāyah wa al-Wisāyah*, p. 5.

practice. *Ḥanafis* are the only exception hereto, save that they rule that if the nonmuslim *al-umm al-ḥāḍinat* (custodial mother) appears to influence the Muslim *saghīr's* religion, beliefs or practices, she is immediately relieved of *ḥaḍānat*.

- that she be *maḥram* to the *saghīr*. Thus, the mother, *ukht*, *khālat* and *ʿammāt* qualify. The non related *mahram* woman like the *umm al-raḍāʿah* (foster mother) and the *ukht al-raḍāʿah* (foster sister) have no natural right to *ḥaḍānat* and, thus, also an *ajnabīyyah* (completely unrelated woman) has no right to it in the first place.
- that she be *mukallafah* as someone younger requires the attention of a *walī*.
- that she be *ʿaqilah* (sane) and not *majnūnah* (insane) nor *maʿtūʿah* (autistic or mentally deficient) as such a person is incapable of executing the onerous task of *ḥaḍānat*.
- that the *saghir* is safe in her care. This means he must be in her presence all the time and she does not leave him alone or leave him in the care of other persons who do not look after him properly during her absence from him.
- that she be of sound moral conduct, good manners and habits. If she is not, the *saghīr* will be corrupted which defeats the aim of *ḥaḍānat*.

- that she be unmarried or if married, then married to a man who is *mahram* to the *saghīrah*. This is the *ḥanafī* view. The other *fuqahā'* have different rulings hereon ranging from the right of *ḥaḍānat* not ending with the remarriage under any condition (*mutlaqan*), to ending it when she marries him at any time, to the ending of *ḥaḍānat*, to continuation of the right of *ḥaḍānat* even when she marries a relative of the *saghīrah* and even if he is not of the *maḥārim* to the *saghīrah*.
- that she does not live with anyone, even a relative, irrespective of what degree or strength of relationship, if such a person angers or upsets the *saghīr*.
- that she not be a *murtaddah* (an apostate from Islām).

It should be noted, that when a woman lacks a *sharṭ* (condition) for *ḥaḍānat* and she qualifies later on, the right of *ḥaḍānat* is returned to her. The contrary also applies.[1]

(v) <u>***Shurūṭ* Of The *Ḥāḍin* (Male Meriting *Ḥaḍānat*):**</u>

The *ḥāḍin* must fulfil the following *shurūṭ*. If one or more of those *shurūṭ* are not found, the next in line takes over the ḥaḍānat:

---

1 *Aḥkām al-Awlād*, pp. 42 - 43.
Al-Wilāyah wa al-Wiṣāyah, pp. 6 - 7.
Al-Aḥwāl al Shakhsiyyah, p. 413.
Al-Durr al-Mukhtar, Vol 2 pp. 1042 - 1043.

- he must be a Muslim, *mukallaf* and *ʿāqil* for the same reasons as the *ḥādinat* and that he has the *qudrah* (strength and means) to see to the upbringing of the *saghīr*.
- that he be of sound moral and decent conduct and ways. If he is a *fāsiq* (evil or sinful person) he has no right to *ḥaḍānat*.
- that he be *ʿāsib* (near blood relation of the agnate category) to the *saghīr* or the nearest in rank as in the *mirath* scale of precedence.
- that he be *maḥram* to the *saghīrah* placed under his *ḥaḍānat*. Thus, the *ibn ʿamm* or ibn *ʿammah* (paternal cousin) or *ibn khāl* or *ibn khālah* (maternal cousin) do not qualify for the *ḥaḍānat* of their female cousin, maternal or paternal.[1] If two persons are found meriting *ḥaḍānat*, then the one nearest in grade and degree of relationship takes preference.[2] When no one is found meriting *ḥaḍānat*, the *qādī* may place the *saghīr* with any Muslim male or female who is capable of looking after the *saghīr* and who is righteous and of sound and moral conduct.[3]

---

1 *Aḥkām al-Awlād*, pp. 43 - 44.
Al-Wilāyah wa al-Wiṣāyah, p. 83.

2 *Aḥkām al-Awlād*, p. 44.
Al-Wilāyah wa al-Wiṣāyah, pp. 5 & 12.

3 *Aḥkām al-Awlād*, p. 44.
Al-Sharīʿah al-Islāmiyyah, p. 406.

The patterns of persons meriting *ḥaḍānat*, mentioned previously, applied in a society where those rules could be applied. Family life had changed considerably these days and the rule of *maṣlaḥah al-saghīr* (interest of the minor) should be the overriding factor in deciding where to place the *saghīr*. The *qāḍī* should be allowed to decide this. This is not a new rule or departure from *sharī'ah* as rulings in this vein have been mentioned above.

There is also some difference amongst the *fuqahā'* on the issue of domicile of the *ḥāḍin* and the *ḥāḍinat*. The basic rule is that the *nasab* of the *saghīr* must be safeguarded, access to the other parent must not be denied when not permitted by *sharī'ah*, nor should the *saghīr* be disadvantaged by the process nor should there be danger on the route he is travelling on. Only the actual parents of the *saghīr* has the right to transfer him to another country and no one else. The *umm al-saghīr* may leave the domicile of the child's father, even without his consent, if she is returning to her own country where she married the child's father,[1] whether such a country is near or far from the domicile of the *saghīr*. This is *ḥanafī* law. *Mālikī*, *shāfi'ī* and

---

1 *Al-Fiqh 'alā al-Madhāhib al-Khamsah*, p. 381.

ḥanbalī law rules the father having the right over the *saghīr* whether he or his mother wish to travel with him. *Ḥanafī* and *ja'farī*[1] law disallow the *saghīr's* father of migrating with his *walad saghīr* (minor child) when the mother is the *ḥāḍinat* of the child[2]. This is subject to it being in the *saghīr's* welfare and interest. Transfer to any other country, requires the consent of the *abb al-saghīr* (minor's father). An exception to this is a "near" country which is such that the father can travel to it in the morning and return in the evening.[3]

(vi) **<u>*Ḥaḍānat* Between *Ḥaqq* (A Right) And *Wājib* (A Necessary Duty):</u>**

Ḥaḍānat is a *ḥaqq* of both the *ḥāḍinat* and the *saghīr* but that the right of the *saghīr* is stronger than that of the *ḥāḍinat* at times. The *umm al-saghīr* (mother of the minor) cannot refuse *ḥaḍānat* and can be compelled to do so if there are no *maḥārim* to the *saghīr* according to some *ḥanafis*[4], while the *shāfi'is*, Mālik and Aḥmad, in one of

---

1 the *fiqh* system of the *imāmiyyah* which does not fundamentally differ from that of *ahl al-sunnah* (see *Al-Madkhal li Dirasah al-Shari'ah al-Islamiyyah*, p. 176).

2 *Fiqh 'alā al-Madhahib al-Khamsah*, p. 381.

3 *Aḥkām al-Awlād*, pp. 46 - 47.

4 *Al-Durr al-Mukhtar*, Vol 2 p. 1047. - Taj A R: *Aḥkām al-Aḥwāl al-Shakhṣiyyah Fi al-Shari'ah al-Islāmiyyah*, Cairo: Dar al-Kitāb al-'Arabi, 1955, p. 433.

their rulings, rule it a right to the *umm al-saghīr*.[1]

Some *fiqh* laws emanate from this such as the validity of a *zawjah* (wife) foregoing her right to *ḥaḍānat* in return for *ṭalāq* from her husband when there is no reason for *ṭalāq*. However, the *saghīr's* father does not succeed to *ḥaḍānat*, but the nearest female in the line of right of *ḥaḍānat* succeeds in this case. If, however, the mother of a *saghīr* contractually absolves herself from *ḥaḍānat*, such a contract is invalid as she is usurping the right of someone else, namely that of the *saghīr*.

If a *ḥāḍin* or *ḥāḍinat* is appointed to the *ḥaḍānat* of a *saghīr* and they are entitled to it *shar'an* (by *sharī'ah*), he or she cannot refuse that duty and can be compelled to carry it out. This is so due to the right the defenceless *saghīr* has to *ḥaḍānat* and his right to his welfare and interest being taken care of. This rule is applicable when there is no one else to assume *ḥaḍānat*. If a *murḍi'* (wet nurse) is suckling the *saghīr*, she is not to interfere with the *ḥaḍānat* of the *saghīr* (minor).[2] The same rule applies when the *umm al- murḍi'* (nursing mother) suckling her *saghīr* remarries (another man) and no one is found to suckle the *saghīr* or the *saghīr* does not take to another wet nurse. The

---

1 *Al-Aḥwāl al-Shakhṣiyyah (Abu Zahrah)*, p. 413. *Al-Fiqh al-Islāmi wa Adillatuhu*, Vol 7, p. 718.

2 *Aḥkām al-Awlād*, p. 48.

new *zawj* cannot prevent his *zawjah* from suckling her *saghīr* from the previous *nikāḥ*.[1] This again shows that the interest of the *saghīr* is paramount.

(vii) ***Istiḥqāq Ajr Al-Ḥaḍānat*** **(Custody Meriting Payment):**

The basic rule is that a mother of a *saghīr*, as long as she is the wife of the father of the minor, or a *mu'taddah ṭalāq al-raj'i* (divorcee in period of stay of revocable divorce), cannot demand payment from the child's father for *ḥaḍānat* as the father of the minor provides for her in these cases. *Ḥanafis*, specifically, rule no payment due to a *mutallaqah ba'inah* (wife divorced irrevocably) and still in *'iddah* (period of stay in divorce). If her *'iddah* of stay) is over, she merits payment as there is no *nikaḥ* bond present.[2] The latter rule is also applicable to any woman, other than the *saghīr's* mother or woman of her line who has to succeed to *ḥaḍānat*. Payment is calculated from the time of duty of *ḥaḍānat*, even before the *qāḍi* had ruled on the *ḥaḍānat*. The one on whom the maintenance of the minor is due, is to pay the costs for *ḥaḍānat*.[3]

Any woman meriting *ḥaḍānat* should be paid for her services to the *saghīr*, save the mother of such a *saghīr*, who is

---

1 *Al-Mughni*, Vol 7 p. 635.

2 *Al-Fiqh al-Islami wa Adillatuhu*, Vol 7 p. 734.

3 *Ahkām al-Awlad*, p. 48.

still the wife of the child's father.[1] If the child has money, payment is taken from it. If not, the minor's father has to pay.[2] Should a non-related person offer to pay for the *ḥaḍānat*, it is refused and *ḥaḍānat* is given to the woman meriting it with the customary fee paid to her. This is *ḥanafī* law.[3] Other *fuqahā'*, like *shāfi'īs*, rule that it is not necessary for the *umm ḥādinat* to suckle her *saghīr* nor can she be compelled if she refuse to do so. The minor's father is, then, under obligation to find a *murḍi'* to suckle the *saghīr*. The majority of the *shāfi'ī* jurists rule that the *umm ḥaḍinat* of the *saghīr* must suckle him when no *murḍi'* can be found.[4] Others, like *ḥanbalis* rule that suckling is not the mother's duty, but for the minor's father to see to. This right of the mother is such whether she is married to the *saghīr's* father or is divorced from him and is based on *ḥanbalī* concept that suckling is not part of *ḥaḍānat*. Al-Thawrī endorses this view also.

If the mother of the *saghīr* offers to suckle him on payment of the customary fee, she must receive preference whether she is still the *saghīr's* father's wife

---

1 *Al-Fiqh al-Islāmī wa Adillatuhu*, Vol 7 p. 735.

2 *Al-Fiqh 'alā al-Madhāhib al-Khamsah*, pp. 380 -381.
Al-Fiqh al-Islāmī wa Adillatuhu, Vol 7 p. 736.

3 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 4 p. 602.

4 *Kifāyah al-Akhyār*, Vol 2 pp. 154 - 155.

or not or whether the father procured a *murḍi'* free of charge. If the mother's fee exceeds the customary fee and the minor's father procured a *murḍi'* free of charge or for the customary fee, the mother loses her right to suckle her minor child.[1] *Mālikis* rule no payment for the *ḥaḍinat* whether she be the mother of the *saghīr* or not. The poor mother can take from her minor child's money for her maintenance. The minor's father is to pay the *nafaqah al-saghīr* (maintenance of the minor) which the *qāḍī* is to determine. If both mother and father of the *saghīr* are well off, no *sukna* (lodgings) is paid for by the father to the *umm ḥāḍinat*. If she is poor, the minor's father is obligated to pay for her lodgings and the *qāḍī* determines this.[2] This apparently means when the mother and father are not living in one house. If the husband is well off and can afford domestic help for his *ḥāḍinat*, and the *saghīr* and other *saghā'ir* (minors) of him by her, she and they merit it.[3]

---

1 *Al-Mughni*, Vol 7 pp 627 - 629.

2 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 4 p. 603.

3 *Aḥkām al-Awlād*, p. 51.

(b) **Wilāyat al-Fāsiq (Guardianship Of The Non Righteous Person):**

A *fāsiq* is a person who is "sinful, immoral and who acts unlawfully in *sharī'ah* terms."[1] The opposite of *fāsiq* is *'ādil* (righteous). The majority of the *fuqahā'* rule that a *fāsiq* has no right to *wilāyat* since he does not possess the *amānah* (trust) which is necessary for *wilāyat*. The evidence of a *fāsiq* is also not acceptable in *shari'ah* due to his *fisq* (sinful nature).

Only the *ḥanafis* hold that *wilāyat* of a *fāsiq* as well as his evidence are valid. They reason that a *fāsiq* has *wilāyat* over himself and can thus be *wali* for someone else. They also claim that the *Qur'ān*[2] granted *wilāyat* to the *awliyā* without specification as to *'adl* or *fisq*.[3] However, some of the later *fuqahā'*, specifically the *shāfi'is* changed their ruling to allowing the *fāsiq* person *wilāyat* over his daughter when the *sulṭān* was himself a *fāsiq*, for the latter would, in any case, succeed to the *wilāyat*.[4] *Ḥanbalis* insists that being *'ādil* in public is the minimum requirement for right to *wilāyat*.[5] The ruling of the majority of the *fuqahā'* in this matter is to prevent the *fāsiq* from exercising his *wilāyat* criminally, especially in relation to marrying

---

1 *Qāmūs al-Muḥit*, Vol 3, p. 285.
Al-Munjid, p. 583.

2 *Al-Qur'an*, Chapter 24: 32.

3 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 4 p. 53.
Al-Wilāyah wa al-Wiṣāyah, p. 30.
Kifāyah al Akhyār, Vol 2 p. 50.

4 *Kifāyah al-Akhyār*, Vol 2 p. 50.

5 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 4 p. 53.

off his daughters, and more specifically, the minors, to irreputable men in exchange for money or other worldly gains. The majority view appears to be nearer *sharī'ah* principles and the interest of minors, specifically. If the *fasiq* becomes *rāshid*, he resumes *wilāyat* normally by consensus.[1]

(c) ***Wilāyat Al-Laqīṭ*** **(Guardianship Over The Foundling):**

The word *laqiṭ* is derived from the arabic verb *laqaṭa* which means "to pick up (something)." It also means "a newly born child that is discarded."[2] In the *sharī'ah*, a *laqīṭ* (fem *laqiṭah* - foundling) is defined as "a name given to a living infant whose parents discarded him fearing poverty or escaping the accusation of adultery or fornication[3] or it is the name attributed to a *ṣabī mumaiyiz* (discerning child), but not *mukallaf* yet or an insane person, even if *mukallaf* as he needs protection and care."[4] The *laqīṭ*, has thus no known *nasab*.[5] The *wilāyat* of a *laqīṭ* or *laqīṭah* as to person and possessions devolves on the *sulṭān*.[6] The *sulṭān*, thus, has the *wilāyat* of marriage and *taṣarruf al-amwāl* (right of disposal of property and

---

1 *Kifāyah al-Akhyār*, Vol 2 p. 51.
Al-Wilāyah wa al-Wiṣāyah, p. 31.

2 *Qāmūs al-Muḥīṭ*, Vol 2 pp. 397 - 398.
Al-Munjid, p. 730.

3 *Al-Sharī'ah al-Islāmiyyah*, p. 384

4 Zaidān A K: *Aḥkām al-Laqīṭ Fī al-Sharī'ah al-Islāmiyyah*, Baghdād, Matba'ah Salmān al-'Aẓami, 1968, 1st ed. pp. 3 - 4.

5 *Tabyīn al-Haqā'iq*, Vol 5 p. 767.

6 *Al-Sharī'ah al-Islāmiyyah*, p. 385.

possessions) of the *laqīṭ*. Thus, if the *laqīṭ* has no possessions and wealth, the *sulṭān* must see to his needs of maintenance from the *bait al-māl* and if he has wealth of his own, the *sulṭān* must use of it for the *laqīṭ's* maintenance and needs which includes his *ṣadāq*.[1] This kind of *wilāyat* is called *al-wilāyat al-ijbāriyyah* (compelled guardianship).[2]

The founder of a *laqīṭ* is called a *kafil*, meaning "protector or legal guardian, especially of an orphan"[3]. He is also called the *multaqiṭ* (founder of a foundling).[4] He is responsible for the protection and upbringing of the *laqīṭ*. The same rules applicable to the *wali* applies to the *kafil al-laqīṭ* (protector or guardian of a foundling).[5] The *kafil al-laqīṭ* cannot use of the possessions of the *laqīṭ* save with the permission of the *qādi*.[6] This is due to the ruling of the Prophet (s.a.w.) who said: "The *sulṭān* is the guardian of him who has no guardian".[7] The *laqīṭ* is

---

1 *Tabyīn al-Haqā'iq*, Vol 5 p. 765.
Nawawi A Z: *Al-Majmū' - Sharh al Muhadh-dhab*, Beirut: Dār al-Fikr, undated, Vol 15 p. 287.

2 *Al-Wilāyah wa al-Wiṣāyah*, p. 15.

3 *Al-Munjid*, p. 691.

4 *Al-Shari'ah al-Islāmiyyah*, p. 385.

5 *Aḥkām al-Laqīṭ*, pp 14 - 15.
Kifāyah al-Akhyār, Vol 2 p. 9.
Al-Shari'ah al-Islāmiyyah, p. 385.

6 *Al-Shari'ah al-Islāmiyyah*, p. 385.

7 *Sunan Abi Dawud*, Vol 1 p. 522.
Sunan al-Tirmidhi, Vol 2 p. 381.
Al-Qurtubi A M: *Al-Jāmi' li Aḥkām al-Qur'an*, Cairo, Dār al-Qalam, 1966, 3rd ed., Vol 11 p. 457.

also classified under the general ruling of *birr* (virtuous deeds) and *taqwā* (piety) to which all Muslims are exhorted to. The *Qur'ān*, thus, says: *"Help one another in righteousness and piety.."*[1] In real terms, the *laqiṭ* is the responsibility of the Muslim community which relegates this to a duty of the *fard kifāyah* (communal duty) category.[2] There is consensus amongst the *fuqahā'* that there is no *tawāruth* (succession rights) between the *kāfil al-laqiṭ* and a *laqiṭ* due to there being no blood relationship between them.[3] The *laqiṭ* may receive a *waṣiyyah* from his *kāfil*.

(d) **<u>*Wilāyat* (Guardianship) Over The *Walad al-Zinā* (Illegitimate Child):</u>**

The *sharī'ah* distinguishes between consequences from a valid *nikāḥ* and those besides it. This is due to the fact that ethical and moral laws related to *nikāḥ* are inseparable from the entire corpus law. The *Qur'ān* states: *"...The things my Lord has indeed forbidden are indecent deeds, whether open or secret..."*[4] and in another *āyah*: *"Those who avoid the greater sins and indecencies..."*[5] It has, further, prescribed duties which ensure and assist practically in abstention from these sins and indecencies: *"...for prayer restrains from shameful*

---

1 *Al-Qur'ān*, Chapter 5: 2.

2 *Kifāyah al-Akhyār*, Vol 2 p. 9.

3 *Al-Fiqh 'alā al-Madhāhib al-Khamsah*, p. 370.

4 *Al-Qur'ān*, Chapter 7 : 33.

5 Ibid, Chapter 42: 37.

deeds..."[1] Sexual sins outside and in marriage are serious criminal offences in Islamic criminal law.[2] Lawful sexual gratification and procreation is thus only exercised within a valid *nikāḥ* which gives rise to *nasab*[3] with its resultant obligation of maintenance in all its forms as well as upbringing and protection of the *awlād* (children).

Protection of *nasab* is a cornerstone of family life and its inter familial rights and privileges, duties and obligations. *Nasab* means "to be related to". It specifically means "to be related (lawfully) to your father."[4] A child can, thus, by *sunnī* law, never be illegitimate in relation to his mother as there is no doubt of her motherhood to him as she carries him and gives birth to him. In *shī'ah* law the child born out of wedlock is illegitimate to both natural parents.[5] A child is thus, by *sunnī* law, legitimate or illegitimate in relation to his father's marital status at his conception.[6] The biological father of an illegitimate child and all his relatives, males and females, have

---

1 *Al-Qur'ān*, Chapter 29 : 45.

2 Ibid, Chapter 17: 32
Ibid, Chapter 24: 2.
Mukhtaṣar Ṣaḥīḥ Muslim pp. 276 - 277.

3 *Al-Sharī'ah al-Islāmiyyah*, p. 368.

4 *Lisān al-'Arab* Vol 6 p. 4405.
Qāmūs al-Muḥīṭ Vol 1 p. 136.

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

6 'Uthmān A: *Āthār 'Aqd al-Zawāj Fī al-Sharī'ah al-Islāmiyyah*, Riyāḍ, Research Committee of *Imām* Muḥammad bin Sa'ūd Islamic University, 1981, p. 365.

no *sharī'ah* sanctioned relationship to such a child by the overwhelming majority ruling of the *'ulamā* and *fuqahā'* in *sharī'ah*. This is so because no *nasab* is attributed to that child in relation to them. The *wilāyat* of such an illegitimate child is for the male line of his mother starting with the mother's legitimate father.[1] There is a pattern of *mīrāth* for such a child which will be dealt with under the chapter of *mīrāth* later on.

Should an illegitimate child be abandoned by his biological parents, the laws of the *laqiṭ* will apply to him. It is, thus, noticed that the illegitimate child, although denied *nasab* of his biological father, is not left to wander the streets and become a nuisance to himself and a danger and liability to society. There is provision for him. This also serves as a warning to would be trespassers of the sanctity of procreation and sexual gratification, both males and females, of what they will impose on innocent offspring if they transgress the law in this field. There is no legitimisation of illegitimate children in *sharī'ah* by majority ruling. What was created unlawfully, remains so and cannot be undone.

This *sharī'ah* system is cardinally and markedly different from secular law systems where the legitimacy and illegitimacy are the same as far as rights (including succession rights) of children in relation to their natural (biological) parents are concerned

---

1 Ḥuṣarī A: *Al-Tarikat wa al-Waṣāya fī al-Fiqh al-Islāmī*, Ammān, Maktabah al-Aqṣā, 1972, undated, pp. 232 - 236.

such as is the case, for example, in Scotland after 1968.[1]

1.2.2 *Al-Wilāyat ʿAlā al-Māl* (Guardianship Over Wealth And Possession):

(a) Definition:

Al-wilāyat ʿalā al-māl is also called *al-ḥajr*. *Al-ḥajr*, literally, means *al-manʿ* which means "prevention".[2] In the *sharīʿah*, *al-ḥajr* means "the prohibition on certain persons of entering into or executing any form of *ʿaqd* or that which is in its meaning." This is the composite ruling extracted from the definitions of the *fuqahāʾ*. Some *fuqahāʾ*, like the *ḥanafis*, define *al-ḥajr* as "a specific prohibition on a certain person from entering into or executing a specific act". *Mālikis* define it as "the prohibition on someone from executing a legal act which exceeds his capacity (*quwwatihi*). *Shāfiʿis* define it as "the prohibition of administering your wealth due to special reasons (*asbāb maḥṣūṣah*)", while the *ḥanbalis* define it as "the prohibition of an owner of administering his wealth whether such a prohibition is from *sharīʿah* or the *hākim* (lawful Muslim ruling authority)".[3] *Al-ḥajr* is applied in four spheres, namely, *al-sughr* (minority), *al-junūn* (insanity), *al-safah* (prodigality) and *al-*

---

1 Smith Sir Thomas *et al*: *The Laws of Scotland - Stair Memorial Encyclopaedia*, Edinburgh, Law Society of Scotland, Butterworths, 1989, Vol 25, pp. 207 - 208.

2 *Qāmus al-Muḥiṭ*, Vol 2 p. 4.
Al-Munjid, p. 119.
Al-Fiqh ʿalā al-Madhāhib al-Khamsah, p. 639.

3 *Fiqh ʿalā al-Madhāhib al-Arbaʿah*, Vol 2 pp. 346 - 347.

iflās (insolvency). This is the majority decision.[1]

(b) **Mashrū'iyyah (Legality) Of *Al-Hajr*:**

Al-ḥajr is valid by *Qur'ān*, *sunnah* and *ijmā'*. As for the *Qur'ān*: "*To those weak of understanding, give not your property (wealth) which Allāh has assigned to you to manage*"...[2] As for the *sunnah*, what 'Urwah bin al-Zubair narrated that 'Ali ibn Abi Ṭalib requested the *khalifah* 'Uthmān bin 'Affān, to place 'Abd Allāh bin Ja'far under *al-ḥajr* due to his incapacity to administer his possessions and property. 'Uthmān ordered that this be done. This report is transmitted by al-Shāfi'i.[3] Abū Ḥanifah and one of his students, the *faqih* Zufar rule that only *junūn* (insanity) and immaturity (i.e non pubescence) allows *al-ḥajr*.[4]

(c) **Al-Hajr On The *Saghir* (Minor) And The *Mukallaf* (Mature) Person:**

There is *ijmā'* that the *saghir* is a case for *al-ḥajr*. All *saghā'ir* are *maḥjūr 'alaihim* (placed under *al-ḥajr*).[5] There is *khilāf* (difference in ruling) amongst the *fuqahā'* on *al-ḥajr* on a *mukallaf* person. The majority of *fuqahā'* rule that if such persons cannot manage their affairs properly, they should be *maḥjūr 'alaihim* (placed under curatorship) in their own interest. This is the view of 'Uthmān, 'Ali, 'Abd Allāh bin Zubair, 'Abd

---

1 *Al-Fiqh 'alā al-Madhāhib al-Khamsah*, p. 639.

2 *Al-Qur'ān*, Chapter 4: 4.

3 *Nail al-Awṭār*, Vol 5 pp 276 - 277.

4 *Al-Wilāyah wa al-Wiṣāyah*, pp. 153 - 154.

5 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 2 p. 348.

Allāh bin Ja'far, Shuraiḥ, 'Aṭa'a, Abu Yusuf and Muḥammad al-Shaibāni of the *ḥanafis*. Abu Ḥanifah and the *ẓāhiriyyah* oppose this. The majority base their argument on the ruling of 'Uthmān, previously mentioned.[1] These *fuqahā'* also applied the *Qur'ān* in their ruling: *"...If the party liable is mentally deficient or weak or unable himself to dictate, let his guardian dictate faithfully..."*[2]

(d) *Al-Ḥajr* Prior To *Taklīf* (Maturity):

There is *ijmā'* that a *ṣabī ghair mumaiyiz* (non discerning boy) and a *ṣabiyyah ghair mumaiyizah* (non discerning girl) are *maḥjur 'alaihim* due to them not having the capacity to understand the meaning of words and its consequences nor that of their actions.[3] The age of discernment is seven to nine years of age. There is difference of opinion amongst the *fuqahā'* as to the standing of a *ṣabi mumaiyiz* and a *ṣabiyyah mumaiyizah* (discerning girl). Abu Ḥanifah rules that an act which may harm such a person like giving a gift to someone or borrowing from someone is not enacted. A beneficial act, like accepting a gift or entering the fold of Islām is acceptable, even if the *walī* does not endorse it. In *'uqūd* in which reciprocity is found like *'aqd al-bai'* (contract of sale) etc., the interest of the *saghīr* must be seen to before such an act is condoned. If there is no interest for the *saghīr* in that act, it will be null and void.

---

1 *Nail al-Awṭār*, Vol 5 p. 277.

2 *Al-Qur'ān*, Chapter 2: 282.

3 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 2 p. 348.

The *ḥanafī* ruling is basic to rulings of other *fuqahā'* like *mālikis*, save that with the latter the mentioned *'uqūd* are enacted *mawqūfan 'alā idhn al-walī* (enactment rest on the approval of the guardian to such contracts). Contracts in which there are no dual exchange (*'uqūd la 'iwaḍ fīhā*), like *'aqd al-hibah* (contract of gift) or *ṣadaqah* (charity) are invalid and have no consequences. *Ḥanbalis* share the basic rules of *mālikis* ruling that only at *rushd* (discernment and sound judgment) are the possessions of a person given him to work with.[1] *Shāfi'is* are singularly distinguished in that they rule that any *ṣabī* (minor) *mumaiyiz* (discerning) or *ghair mumaiyiz* (non discerning) cannot enact any legal act be it *nikāḥ* or any other act as he has no *'ibārah* (legal standing) nor *wilāyah* over himself by himself but is subject to the *wilāyah* of someone else. His *'ibādah* (worship), however, is correct as that is not subject to the *wilāyah* of his *walī*.[2]

(e) <u>Time Of Cessation Of *Al-Ḥajr*:</u>

The vast majority of the *fuqaha'* are agreed that when a *ṣabī* (male minor) or *ṣabiyyah* (female minor) reaches puberty and has *rushd* (discernment) his or her possessions are given to him or her to manage on his or her own. *Rushd* means *ḥusn taqdir* (sound mental judgment).[3] As stated, the *ẓāhiriyyah* only require sanity and puberty as requirements for

---

1 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 2 pp. 263 - 266.

2 Ibid, Vol 2 p. 365.

3 *Qāmus al-Muḥīt*, Vol 1 p. 305.

emancipation of both a *ṣabī* and *ṣabiyyah* as far as *taṣarruf* (dealings) with their possessions are concerned. Ibn Ḥazm quotes the *ḥadīth* narrated by 'Umar ibn Khaṭṭab that the Prophet (s.a.w) said: "*three persons are not responsible for their actions; the insane until he becomes sane, the sleeping person until he awakes and the minor until he reached puberty.*" Thus, no *al-ḥajr* is allowed on a person who reached puberty and is sane.[1]

Taklīf is known by age or by physical signs. Abū Ḥanīfah rules that signs of puberty in males are physical sexual signs like passing of semen and capable of impregnating a woman, while for females, such signs are *ḥaiḍ* (menstruation) and *ḥaml* (pregnancy). If none of these signs are found, age is the deciding factor herein. Ḥanafis rule this age to be fifteen years while Abū Ḥanifah rule eighteen years for males and seventeen years for females. Most *fuqahā'*, like *shāfi'is* and *ḥanbalis* agree that fifteen years is the age of puberty. They also agree with the general physical signs of puberty mentioned previously, but include genital hairs, but not the first soft initial hairs. *Mālikis* add to these signs, deepening of the voice for males and strong smell of sweat, especially under the armpits. Facial hair is not a sign of puberty as it can precede actual puberty. If no sign of puberty is found, puberty is taken to have been reached when the eighteenth year has been completed. Another view is that the eighteenth year had started.[2] This is also the

---

1 *Al-Muḥallā*, Vol 8 p. 279.

2 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 2 pp. 250 - 252.

view of some of the *ṣaḥābah* and of the *fuqahā'* Mujāhid and ʿAbd Allāh al-Ḥasan.[1]

Abu Ḥanifah and his two senior companion *fuqahā'*, Abū Yūsuf and Muḥammad al-Shaibānī agree that puberty is not the only criterion for delivering the possessions of a person to him to manage himself. They insist on what they call *la budda min thubūt al-rushd baʿda al-ikhtibār* (sound judgment is established by testing). Abū Ḥanifah rules that one has to wait till the person reaches twenty five years before handing him his possessions even if he did not yet, by then, reached *rushd*, but he must be sane. *Ḥurriyah* is also a requirement but there are no slaves anymore now. *Safah* is not a requirement for Abū Ḥanifah. Abū Yūsuf and Muḥammad al-Shaibānī rule that *al-ḥajr* continues if *rushd* is not reached, even until the death of the person concerned. *Ḥanbalis* share the views of Abū Yūsuf and Muḥammad al-Shaibānī, basically.

One *ḥanbalī* view is that *rushd* must be attained in both righteousness in the *dīn* and in *idārah al-māl* (handling and administration of wealth).[2] *Shāfiʿis* share the *ḥanbalī* view of *rushd* in both righteousness in *dīn* and *idārah al-māl* (handling and administration of wealth), thus, the person should not exhibit *tabdhīr* (squandering), or *ghubn* (criminal fraud) nor be guilty of *infāq fi al-shahawāt al-muḥarramah* (spend on immoral and forbidden acts).[3] *Mālikis* require *rushd* for emancipation

---

1 *Al-Muḥallā*, Vol 8 p. 280.

2 *Fiqh ʿala al-Madhāhib al-Arbaʿah*, Vol 2 p. 352.

3 Ibid, Vol 2 p. 353.

and do not differ basically from the *shāfi'īs* and *ḥanbalis* save that *mālikis* require, in the case of females, that they live with their spouses in the marital home.[1] This is due to the *mālikī* ruling that females, under *wilāyah al-ḥifẓ wa al-tarbiyah*, stay with their mother until they marry.

(f) **The *Safih* And The *Hukm* (Ruling) Relating To Him:**

The majority of the *fuqahā'* rule *safah* as being ground for *al-ḥajr*. The definition of *safah* differs from *madhhab* to *madhhab*. Abū Ḥanīfah defines it as "one who is unable to administer and control his finances and squanders it on nonsensical purchases or on forbidden acts in *sharī'ah*, like gambling". Spending all money on *ṣadaqah* (charity) is also *safah* as one is only to spend what is in excess of your needs for charity by Quranic law[2]. The *qāḍī* declares someone a *safih*. There is no *al-ḥajr*, according to him, on a *mukallaf*, *'āqil* and *ḥurr* person even if he is *safih*. If the person becomes *mukallaf* and is deficient in the administration of his finances, he is handed possession at age twenty five years. This view of Abū Ḥanīfah is *ghair mufta bihi* (inapplicable) in *ḥanafī fiqh*.[3] Abu Yūsuf and Muḥammad of the *ḥanafis* rule *al-ḥajr* on all persons exhibiting *safah* and such continue until they show *rushd*. Abū Yūsuf insist that the *qāḍī* must declare someone a *safih* while Muḥammad is of opinion

---

1 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 2 p. 354.

2 *Al-Qur'ān*, Chapter 2: 219.

3 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 2 pp. 367 - 368.

that the exhibition thereof is enough for placing the person under *al-ḥajr*.[1]

The *waṣiyyah* of a *safih* is valid. This is probably due to it benefitting him in the Hereafter. All *'uqūd*, subject to cancellation are invalidated when enacted by a *safih*, but other *'uqūd*, like *nikāḥ* and *ṭalāq* are enacted when the *safih* is *'āqil*, *mukallaf* and *ḥurr*. All acts to do with *'ibādat* requiring payment, like *ḥajj* and *'umrah* (lesser pilgrimage) as well as *kaffārāt* (penances) must be paid from the *safih's* finances by the *walī* or *waṣi*. If the *safih* is married *nikāḥ ṣaḥiḥ* (properly and correctly), *nafaqah* for him and dependants are taken from his own finances.[2] This is the position of *ḥanafī fiqh*.

Some *fuqahā'*, like *mālikis*, opine that *al-ḥajr* is imposed on all *saghā'ir*, males and females. If *safah* appears shortly after *taklīf*, i.e during a year after *taklīf*, the *abb al-walad* (father of the minor) places him under *al-ḥajr* by himself as he has that right due to the *sughr* (minority status) of the child. If *safah* continues for longer than a year after *taklīf*, the *qāḍī* must declare him a *safih*. Females attain *rushd* on marrying and setting up house with their spouse.[3] If they do not marry, *mālikis* differ on their fate. Some rule forty, others fifty and still others sixty years before *al-ḥajr* is lifted as far as *idārah al-māl* (administration of wealth) is

---

1 *Al-Wilāyah wa al-Wisāyah*, p. 162.

2 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 2 p. 368.

3 *Al-Fiqh al-Islāmī wa Adillatuhu*, Vol 7 p. 749.

concerned.[1] This is pure *ijtihād*. There is no *sharī'ah* text on this.

Still other *fuqahā'*, like *shafi'is* rule that *al-ḥajr* is imposed on all those who spend their wealth on non beneficial causes or on forbidden pleasures - harmful to the body and the *din*, like sensual misdemeanours, wine drinking or on detestable acts, like smoking or bad administration of possessions and wealth. *Ṣadaqah* of the *safih* is valid, however, on condition such the *safih* is *'āqil* and *mukallaf*. *Al-ḥajr* continues, as for other *madhāhib* until the *saghīr* reaches puberty and is sane and sound of judgment. The *qāḍi's* intervention is not required for declaring someone *safih*. However, when an *'āqil* and *mukallaf* person becomes a *safih*, the *hukm qāḍī* (ruling of the Muslim judge) is required. This ruling does not affect his actions prior to the *qāḍi's* ruling. All contracts affecting personal life like *nikāḥ*, *ṭalāq* and the like of the *safih* are valid provided his *walī* consents thereto. Any other *'aqd* enacted by a *safih* is invalid and has no legal consequences, even if the *walī* consents thereto. *Ḥanbalis* share the *shafi'i* views on validity of *'uqūd shakhṣiyyah* (contracts of a personal law nature), like *nikāḥ*, *iqrār bi al-nasab* (acknowledgement of linage) etc but require the *hukm qāḍi* on the *safah* of someone. All *'ibādāt* are compulsory on the *safih* as on other Muslims. *Ḥanbalis* rule *iqrār bi al-dain* (acknowledgment of debt) of a *safih* as valid.

---

1 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 2 p. 268 - 269.

Some *fuqahā'* rule that the *ḥākim* or *qāḍī* or their deputy must act for the *majnūn* and *ma'tū*, Mālik insist that the father or his *waṣī* comes first then the *qāḍī* or his appointee. *Ḥanafis*, specifically, rule that those who lapse in and out of insanity states are judged as to the state they are in at a specific time.[1]

2 *AL-TABANNĀ* (ADOPTION)

2.1 Definition:

The word *al-tabannā* is derived from the Arabic word *banā*, from which the arabic word *ibn*, meaning "a son" is derived. *Tabannā* means "to take someone as your child."[2]

There are various other definitions of adoption. Some authorities define it as "the institutionalised practice through which an individual belonging, by birth to one kinship group, acquires new kinship ties that are socially defined as equivalent to the congenital ties."[3] Another define it as "the creation of a relationship of a parent and child between individuals who do not naturally have that bond..."[4] Tizard sums it up plainly in her definition when she says that "the essence of adoption is that a child not born to you is incorporated into your family as though he were your

---

1 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 2 pp 366 - 372.

2 *Lisān al-'Arab*, Vol 6 p. 364.
Al-Munjid, p. 50.

3 *International Encyclopaedia of the Social Sciences*, USA, MacMillan & Co., 1968, Vol 1 p. 96.

4 Dicania M: *The Encyclopaedia of Marriage, Divorce & Family*, New York, 1989, p. 23.

UNIVERSITY OF DURBAN LIBRARY

own."[1] Similar definitions, in principle, are mentioned by other authorities.[2]

From the definitions quoted, it is clear that adoption is an artificial act creating "natural" family ties due to "common social acceptance" thereof. In fact, it is an unnatural act in the sense that it usurps the natural position and rights of natural biological parents and the acquired "parents" are made the real parents. As can be observed later on in this section of this chapter, *shari'ah* does not accept naturalisation of the unnatural in the matter of *nasab*, the latter of which is a natural, normal and logical rule.

2.2 Adoption In Judeo-Christian Tradition:

Adoption was an ancient practice in the ancient Near Eastern civilisation of the second millennium. The Bible, according to some scholars, have traces of this custom.[3] Sorgan, founder of Babylon, was an adopted child. Oedipus, Paris and Tristan and other early literary notables were adopted children. The Christian apostle Paul made frequent reference to adoption and placed special significance on the practice.[4] Biblical texts appear to support the occurrence of adoption in the Old Testament times. Of these texts are: "...*But Abraham said: Oh Lord God...for I continue childless and the heir of my house is Eliezer of Damascus...thou hast given me no offspring and a slave born in my house will*

---

1 Tizard B: *Adoption: A Second Chance*, London, Open Books, 1977, p. 1.

2 *Encyclopaedia Brittanica*, London, Encyclopaedia Inc, 1987, Vol 1 p. 105.
Encyclopaedia Canadiana, Toronto, Grolier Publications, 1972, Vol 1 p. 10.

3 *New Catholic Encyclopaedia*, New York, McGraw-Hill Book Co., 1967, Vol 1 p. 136.
Khayyāṭ A A: *Al-Mujtama' al-Mutakāfil Fī al-Islām*, Ammān, Maktabah al-Aqsā, 1972, p. 251.

4 *Catholic Encyclopaedia*, Vol 1 p. 136.

be my heir".[1] From the text it appears that even a slave could be made heir when there was no son. Another case is that of Sar'ai (Sarah) giving Agar (Hagar) to Abraham as a concubine and to bear him a child that the childless Sar'ai could accept. "*...and Sar'ai said to Abram (Abraham), Behold now, the Lord has prevented me from bearing children; go in to my maid, it may be that I obtain children by her...*"[2] A similar case is true for the birth of Dan and Nephthali, sons of David whom Bala, Rachel's maid bore.[3] Still other cases of possible adoption were the cases of the sons of Joseph born in Egypt before Jacob came to Egypt, Ephraim and Manas'seh, so adopted by Jacob.[4] Moses was adopted by Pharaoh's daughter[5] and Esther adopted by Mordechai[6]. The latter case is claimed not to be Israelite practice due to occupation in foreign lands.[7]

A further metaphorical adoption is that which existed between *Yahweh* (God in Hebrew) and the Israelites, they being the children of *Yahweh*. "*And you (Moses) shall say to Pharaoh, thus says the Lord, Israel is my first born son and I say to you; Let my son go that he may serve me*"[8], and "*Is He not your father who created you...*"[9] The New Testament continues this metaphorical theme when

---

1 *The Holy Bible - Revised Standard Version*, London, Bible Society of South Africa, Collins Clear Type Press, 1984, Genesis 15: 2 - 3.

2 Ibid, Genesis 16: 2.

3 Ibid, Genesis 30: 3 - 8.

4 Ibid, Genesis 48: 3 - 5.

5 Ibid, Exodus 2: 1 - 10.

6 Ibid, Esther 2: 7 & 15.

7 *Catholic Encyclopaedia*, Vol 1 p. 136.

8 *Holy Bible*, Exodus 4: 22 - 23.

9 Ibid, Deut. 32: 6.

Paul says: "...*that we are the children of God*..."[1] and "....*so that we might receive adoption as sons.*"[2] A similar thought is expressed elsewhere.[3] The thought and practice of adoption is thus not foreign to the Judeo-Christian Faith which forms the majority of people in the modern democratic liberal western world. Despite Old Testament narrations, adoption amongst ancient Jews was rare due to polygyny being lawful as well as freedom to divorce and to remarry. Childlessness was thus rare. Rabbis rule that "who ever raises an orphan in his home is deemed by Scriptures as his parent", citing Naomi taking Obed as her son as she reared him.[4]

However, the legal concept of adoption finds no place whatsoever in biblical or talmudic jurisprudence. Voluntary acceptance of another parent's child, rendered him your child and although Jewish law gave no formal recognition to adoption, voluntary assumption of parents existed even in ancient times. According to Jewish tradition, it is a privilege to give proper education and upbringing to parentless boys of unusual ability and promise.[5] Adoption is an unknown legal institution in Jewish law. *Halakhah* (the legal part of Talmudic and later Jewish literature)[6] rules that personal status of parent and child is based on the natural family relationship only and, thus, there is no way artificial relationships can be created legally or by fiction. A guardian is appointed to look after the welfare and

---

1 *Holy Bible*, Romans 8: 16.

2 Ibid, Galatians 4: 5.

3 Ibid, Ephesians 1: 5.

4 Ibid, Ruth 4: 17.

5 Gottlieb N: *A Jewish Child is Born*, New York, Bloch Publishing Co., 1960, p. 76.

6 Roth C & Wigoder G: *The New Standard Jewish Encyclopaedia*, London, W H Allen, 1970, p. 825.

upbringing of a parentless Jewish child, but the rights of the natural parents are in no way affected by this process, which some call "adoption". It is, in practice, fostering.[1]

Modern Israel legalised adoption of children under law 5720/1960. All parties, including the natural parents, must agree to the adoption and such an adoption severs all bonds with the natural parents and creates new legal family ties. However, the consequences of blood relationships between the adoptee and his natural parents are not affected by adoption so prohibitions in family law remains.[2] The Jewish scriptural and religious law had, thus, been breached in this regard, with a palliative of retention of consequences of blood relationships. The Israeli adoption law could possibly be a purely political act to help increase Jewish settlement in occupied Palestine. The continuing prohibition on consequences of Jewish blood relationships appears to support this view.

2.3 Adoption In Pre-Islamic Arabia:

The custom of *tabannā* was known and prevalent in pre-Islamic Arabia. The practice was to adopt children born from other natural parents and assimilate them into the new family, giving them their name and taking and calling them their children. These adopted children became, thus, like biological children to such an extent that they succeeded to the estate of the adopter and even had the laws of *ḥurmah al-nasab* (prohibition of lineage) applied to them. This was the practice when the Prophet (s.a.w) was born. In fact, when he (s.a.w) married Khadījah bint Khuwailid, his first wife, she gave him a slave called Zaid bin al-Ḥārithah, whom the Prophet (s.a.w) immediately set free and adopted calling

---

1 *Encyclopaedia Judaica*, Jerusalem, Keter Publishing House, 1972, Vol 2 p. 302.

2 Ibid.

him Zaid bin Muḥammad (Zaid, the son of Muhammad).[1] Zaid became of the choicest *ṣaḥābah* of the Prophet (s.a.w) during the prophetic era.

2.4 The Abrogation Of *Tabannā*:

Islām and its family (personal) law only recognises a *nikāḥ sharī'* (Muslim marriage) as the only institution in society in which intimacy and procreation can take place. There is, thus, a system of *nasab* and descent from and belonging to someone. Family relationships, in Islam, is thus based on affinity and consanguinity.[2] Before proceeding further, it is necessary to understand what *nasab* really means in Islām.

Nasab has to do with the relationship of children to their father as far as legitimacy is concerned.[3] It is forbidden to claim parentage from a man who is not your real legitimate father. Abū Waqqāṣ narrated that the Prophet (s.a.w) said: "*whosoever claims fatherhood from a man and he knows that that man is not his father, Paradise is forbidden for him*".[4] Al-Bukhārī and Muslim also transmit: "*whosoever claims fatherhood from other than his (own) father, on him is the curse of Allāh and all the Angels and all the people. Allāh does not accept*

---

1 *Al-Jami' li Aḥkām al-Qur'an*, Vol 14 p. 118.
Al-Mujtama' al-Mutakāfil fi al-Islām, p. 251.
Qutb S: *Fī Zilāl al-Qur'ān*, Makkah, 1972, 15th ed., Vol 6 p. 123.
Arnold T W: *The Preaching of Islam*, Lahore, M S Ashraf Publishers, 1979, p. 12.

2 *Al-'Ilm*, Durban: Department of Islamic Studies, 1994, Vol 14, Article: "The Muslims in South Africa - Problems and Concerns of a Minority Community", by S E Dangor p. 123.

3 Al-Qardawi Y: *Al-Ḥalal wa al-Ḥaram Fi al-Islam*, Beirut: al-Maktab al-Islāmi, undated, 5th ed., p. 219.

4 *Mukhtaṣar Ṣaḥīḥ Muslim*, p. 19.

from him any repentance nor any penitary compensation".[1] Parentage is thus by valid *nikāḥ* and *nasab* one of its legal consequences. The Prophet (s.a.w) ruled "*al-walad li al-firash*" - a child is attributed to the married partners.[2] Besides this, an individual's *nasab* is confirmed if his father does not negate his *nasab* to him by *mulā'anah* (mutual imprecation) in which case he is actually accusing his wife of *zinā* (adultery), or it is proven by *shahādah* (evidence) acceptable in *shari'ah*, that he has *nasab* to a certain man.[3] His *nasab* is also established if a man accepts him as his son and he accepts that claim and there is *baiyinah shar'iyyah* (acceptable *shari'ah* proof) for this claim.[4]

The abrogation of *al-tabanna*, in *shari'ah*, had to be clear, unambiguous and irrevocable and as such the *Shāri'* took a firm, decisive and unambiguous stand in this regard. Zaid bin al-Ḥārithah, known as Zaid bin Muḥammad, who was the *mawlā* (freed slave) of the Prophet (s.a.w) was married off to the maternal cousin of the Prophet (s.a.w), Zainab bint Jaḥsh, a Qurashite, and, thus, of the most noble of Arab ladies in rank and standing. Perhaps the Prophet (s.a.w) intended with that marriage to draw Zaid closer into his (s.a.w) familial line. The marriage was doomed to die due to Arab indifference to freed slaves and their poor standing in

---

1 Ṣabūni M A: *Rawā'i'u al-Bayān - Tafsīr Āyat al-Aḥkām al-Qur'ān*, Damascus & Makkah, Maktabah al-Ghazālī, 1980, 1st ed., Vol 2 p. 263.

2 Ṣan'ānī M: *Subul al-Salām - Sharḥ Bulūgh al-Marām Min Adillah al-Aḥkām*, Matba'ah Mustafā al-Halabī, 1960, 4th ed., Vol 3 p 210.
Al-Sharī'ah al-Islamiyyah, p. 369.

3 *Athar 'Aqd al-Zawāj*, pp. 365 - 367.
Mohammedan Law, pp. 370 - 371.

4 *Aḥkām al-Awlād*, pp. 26 - 27.
Al-Sharī'ah al-Islāmiyyah, p. 376.

Arab society then. Divorce was inevitable. The Prophet (s.a.w) tried hard to forestall it but failed. Zainab made the *nikāḥ* a physical situation and nothing more.

This situation is untenable and uncondonable in *sharī'ah*. One of the basic laws of *nikāḥ*, in Islam, is *imsāk bi al-ma'rūf aw tasrīḥ bi al-iḥsān* - remaining married and keeping the laws of *nikāḥ*, or to separate amicably if this cannot be done.[1] *Talāq* had to follow, inevitably, as the case became hopeless, even with the Prophet (s.a.w) trying to save it. This caused anguish to the Prophet (s.a.w). To add to this anguish, on Zainab being divorced, the Prophet (s.a.w) was instructed by *Allāh* that he should marry Zainab, something unheard of in Arab society then as adopted children became your own and as such, their "in-laws" cannot marry the spouse of their adopted children. Thus was it revealed to the Prophet (s.a.w): *"Behold! You said to the one who has received the grace of Allāh and your favour, retain (in wedlock) your wife and fear Allāh. But you (Muḥammad) did hide in your heart that which Allāh was about to make manifest; you feared the people but it was more fitting that you should fear Allāh. Then when Zaid had dissolved (his marriage) with her, We joined her in marriage to you in order that (in future) there may be no difficulty to the believers in (the matter of) marriage with the wives of their adopted sons, when the latter have dissolved (the marriage) with them. And Allāh's command must be fulfilled."*[2]

The issue of adopted children and their position in law became very clear now. The *Sharī'* revealed: *"...and He (Allāh) has not made your adopted sons, your (own) sons. Such is (only) your (manner of) speech by your mouths. But Allāh tells (you) the Truth and He shows the (right) way. Call them by the names of their fathers;*

---

1 *Al-Qur'ān*, Chapter 2: 229.

2 Ibid, Chapter 33: 37.

that is more just in the sight of Allāh. But if you do not know their fathers' names, (then they are) your brothers in Faith or your mawali (protected clients)."[1]

The Prophet's (s.a.w) own sons all died before *taklīf* (puberty). He, thus, had no sons. This the *Qur'an* confirms: *"Muḥammad is not the father of any of your men, but (he is) the Messenger of Allāh and the seal of all the Prophets..."*[2] With these laws, the *Sharī'* the Legislator, abrogated the system of *al-tabannā* practised in Arabia since ancient times and recognised only the real and natural *ubūwwah* (parentage). The *Sharī'* did so for factual and natural reasons for *al-tabannā* is an imaginary process of family creation and belies actual nature and natural phenomena. *Al-tabannā*, is not a natural process in essence. Speech or actions in this process does not change the natural reality nor can it make an unrelated stranger a blood relation nor can there be the same parental affection as for natural children nor can the make-up of an adoptee be like that of one's own natural children. Due to this, *al-tabannā* is an artificial act. This artificiality the *sharī'ah* recognises.[3] The natural parents of an adoptee, remains his parents, which is sound biological law, and their mutual rights remain unchanged.

Having ruled as such in this matter, the *sharī'ah* did not overlook the plight of minor children who might be in need of care or the charity of childless couples in giving the gift of substitute parenthood, love and care to those who have never known parentage or whose parents are unknown of those very unfortunate children that had been abandoned and deserted by their own natural parents, nor did the *sharī'ah* overlook the magnanimity

---

1 *Al-Qur'ān*, Chapter 33: 4 - 5.

2 Ibid, Chapter 33: 40.

3 *Al-Ḥalāl wa al-Ḥarām fi al-Islām*, p. 216.

of parents with children who wish to give the gift of love and affection, care and upbringing to a parentless child.

Islām accepts and encourages *kafalah al-muḥtaj* (protection of the needy) or *kafālah fī al-riʿayah wa al-tarbiyah* (protection in upbringing and education).[1] In fact, it is a duty of the Muslim society as a whole to see to these children in need. The *Sharīʿ* points to this in general terms when He speaks of mutual relations between Muslims:

"*Muḥammad is the Messenger of Allāh; and those who are with him are strong against the unbelievers (but) compassionate amongst one another...*"[2] Also, "*The believers (Muslims) are but a single brotherhood, so make peace and reconciliation between yourselves.*"[3]

"*And they feed for the love of Allāh, the indigent, the orphan and the captive.*"[4]

"*...To spend of your substance, out of love for Him, for your kin, for orphans, for the needy, for the wayfarer, for beggars and for the ransom of slaves....*"[5]

The Prophet (s.a.w) himself gave several instructions to Muslims in their social relationships. Of these are what Abū Mūsā narrated that the Prophet (s.a.w) said: "*The Muslims are like a brick wall, one strengthens and supports the other one.*"[6] Abū Hurairah narrated as transmitted by Muslim and al-Tirmidhī that the Prophet (s.a.w) said: "*Be the servants of Allāh as brothers; the Muslim is the brother of the other Muslim - he does not*

---

1 *Al-Ḥalāl wa al-Ḥarām fī al-Islām*, p. 218. *Al-Mujtamaʿ al-Takāful al-Islāmi*, p. 255.

2 *Al-Qur'ān*, Chapter 48: 29.

3 Ibid, Chapter 49: 10.

4 Ibid, Chapter 76: 8.

5 Ibid, Chapter 2: 177.

6 *Mukhtaṣar Ṣaḥīḥ Muslim*, p. 472.

do him an injustice nor betray him nor despise him....."[1] Anas narrated as transmitted by al-Bukhāri and Muslim that the Prophet (s.a.w) said: "*Your Faith is incomplete until you love for your brother that which you love for yourself.*"[2] 'Ā'ishah, wife of the Prophet (s.a.w) said that the Prophet (s.a.w) said: "*Verily Allāh is most kind and gentle and loves kindness and gentleness, and He rewards for kindness and gentleness...*"[3]

Islām, thus, while it refuses to accept *al-tabannā*, meaning the full assimilation into a family of a non-related person, it encourages and exhorts, nay, commands the care and upbringing of parentless children or foundlings. Out of Faith, love and affection, such children are cared for and looked after for the sake of *Allāh* and safe social order and not for any material reason or gain. Islam thus allows fostering. The issue of *luqaṭa'* had been dealt with as far as maintenance and upbringing is concerned. Since they are called by the names of their natural parents, they remain those parents' children and all such rights and privileges as well as duties and obligations between them remain intact. Thus, if such a fostered child wish to return to his natural parents there is no prohibition in *shari'ah* for such a return, neither the foster parent nor the State nor any of its organs can stop that or interfere with that.

A foster child is not a natural child of the fostering parents. Thus, in terms of *mirath* in Islam, such a child does not inherit from his foster parents by

---

1 Al-Nawawi A Z: *Riyaḍ al-Ṣalihin min Kalam Saiyid al-Mursalin*, Cairo: Matba'ah Mustafā al-Halabi, 1979, 2nd ed., p. 131.
Minhāj al-Muslim, p. 111.
Mukhtaṣar Ṣahih Muslim, p. 473.

2 *Riyaḍ al-Ṣalihin*, p. 131.

3 *Mukhtaṣar Ṣahih Muslim*, p. 474.

way of a *naṣib* (share). A foster child, may, like any other person, receive of the *waṣiyyah* of the *mūṣi* (legator). By *sharī'ah* a *muwarrith* or *muwarrithah* must leave a minimum of two thirds of their entire *tarikah* (estate) to their lawful heirs in *sharī'ah*. An unrestricted maximum of one third is allowed for *waṣāyā*. Thus, a foster child or foundling may even receive, theoretically, more than a lawful heir from a *tarikah*. The issue of *mīrāth* and *waṣāyā* will be dealt with later. There can, thus, be no accusation that *sharī'ah* is cruel and disinterested in the care of children in need. In fact, the *sulṭān* is responsible for them as the Prophet (s.a.w) ruled: "*Each one of you is a guide and responsible for those he leads, the Imam (leader of the Muslims) is a guide and is responsible for those under his authority...*"[1]

---

1 *Mukhtaṣar Saḥiḥ Muslim*, pp. 327 - 328.
Al-Azdi I A H: *Jam' al-Nihāyah fī al-Badi' al-Khair wa Ghāyah*, Beirut: Mu'assasah al-Kutub al-Thaqāfiyyah, 1986, 1st ed., pp. 60 - 61.
Riyād al-Sālihīn, p. 315.

CHAPTER 3

AL-MIRATH (SUCCESSION)

1 *Al-Mirath In Shari'ah:*

The systemising of *al-mirath* is one of the most outstanding achievements of the *fuqaha'* of Islam and its intricacy and balanced laws and rules show legal genius of a nature which has very few parallels in law. The subject matter is vast and technical terminology relatively numerous. The subject matter will be dealt with here in the order it is usually presented in standard *fiqh* works.

1.1 Definition:

The arabic word *mirath* is the noun of the arabic verb *waritha* which means "inheriting from someone". *Mirath* is also termed *wirth, wirathah, irth* and *warithah.*[1] The noun agent of *waritha* is *warith* (fem. *warithah*) meaning an "heir". A person leaving behind an estate is called a *muwarrith* or a *muwarrithah* (testatrix). When, in this thesis, *muwarrith* is used, it shall mean both *muwarrith* and *muwarrithah*, unless otherwise indicated. The estate of a deceased is termed *tarikah.*[2] In secular law, the normal secular definition of inheritance is "the devolution of property upon death of its owner".[3] Late Middle English definition of succession is "the process by which a person succeeds to another in the occupation of an estate, throne etc.; the fact of succeeding according to custom or law to the rights and liabilities

---

1 *Lisan al-'Arab*, Vol 6 p. 4808.
Qamus al-Muhit, Vol 1 p. 126.
Al-Munjid, p. 795.

2 *Qamus al-Muhit*, Vol 3 p. 306.
Al-Munjid, p. 61.

3 *Encyclopaedia Brittanica*, 15th ed., Vol 21 p. 575.
Encyclopaedia Americana International, Connecticut, Grolier Inc., 1988, Vol 15, p. 176.

of a predecessor; the conditions under which this is done."[1] Another definition reads as " order or right to succeed to a property, title or throne, the act or process of becoming entitled to a deceased person's property or title.."[2] A similar meaning is given by Webster's dictionary.[3] In *sharī'ah, mīrāth* and its synonyms appear to be used loosely. Some *fuqahā'* call it *'ilm al-farā'iḍ* (science of ordained quotas i.e shares), while others call it *tarikah* and still others call it *irth* (succession). Most of the former *fuqahā'* call *mirāth al-farā'iḍ* and the chapter dealing with it is called *kitāb al-farā'iḍ* (book or chapter of ordained quotas i.e shares).[4] Ibn Ḥazm calls this section *Kitāb al-Mawārith* (book or chapter of succession) and not *kitab al-farā'iḍ* as other *fuqahā'* call it.[5] In defining the subject matter of *mīrāth*, the *fuqahā'* have the following definitions:

Some *fuqahā'*, like some of the *ḥanafis*, define *irth* (i.e *mirath* - succession) as "the transfer of possessions from a person to another person by way of possession through transfer"[6] while ibn 'Abidīn, also a *ḥanafī faqīh* (*hanafi* jurist), defines it as "that

---

1 Brom L (editor): *The New Shorter Oxford English Dictionary*, Oxford, Clarenden Press, 1994, 3rd ed., Vol 2 p. 3128.

2 Procter P (editor-in chief): *Longman New Universal Dictionary*, Essex, Longman, 1982, p. 978.

3 Grove P B: *Webster's Third New International Dictionary of the English Language* - unabridged, London, G Bell & Sons Ltd., 1959, Vol 2 p. 2282.

4 *Al-Ikhtiyar*, 2nd ed., Vol 4 p. 84.
Al-Shāmi S U: *Faid al-'Alah - al-Mālik fi Hall al-Faz 'Umdah al-Sālik wa Addah al-Nāsik*, Cairo, Matba'ah al-Istiqamah, 1955, Vol 2 p. 120.
Bidāyah al-Mujtahid, Vol 2 p. 336.
Al-Mughnī, Vol 6 p. 165.

5 *Al-Muḥallā*, Vol 9 p. 252.

6 *Al-Ikhtiyar*, Vol 4 p. 85.

which a deceased leave behind of possessions (*al-amwāl*) free from any claim of a third party." Some others, like *mālikis* define it as "a right (*al-ḥaqq*) which accepts division and which is confirmed to him who merits it after the death of him (who leaves such a right)".[1] Still others, like *shāfi'is* define it as "a fixed share by *shari'ah* to an heir"[2]. Ibn Qudāmah of the *ḥanbalis* defines it as "the division of an estate" (*qismah al-mīrāth*).[3]

From the definitions quoted, it is clear that the ḥanafis, generally, exclude rights from *mīrath* (succession) while most of the others include it. The *ḥanbalis'* definition apparently includes *ḥuqūq*. There is, thus, basic consensus that *mīrath* has to do with the possessions a deceased left behind to which his heirs succeed. *Mirath*, in *shari'ah*, deals with knowledge of the heir and non heir, the share of each heir and the calculation thereof.[4]

1.2 ***Mīrath* Of *Ahl al-Kitab*:**

The *ahl al-kitāb* are the "people of the Book" i.e. those who received divine revelation before. They are the *yahūd* (Jews) and the *naṣārā* (lit. "helpers" - the followers of Jesus Christ). There is *khilāf* (difference of opinion) as to whether *masiḥiyūn* (Christians) are classified as *naṣārā*. Apparently 80% of South Africans profess Christianity.[5] Since the Muslims and these

---

1 *Al-Tarikāt wa al-Waṣāya*, pp. 7 - 8.

2 *Kifayah al-Akhyār*, Vol 2 p. 17.
Faid al Ala al-Mālik, Vol 2 p. 120.

3 Qudāmah M D: *'Umdah al-Fiqh*, Makkah al-Mukarramah, Maktabah al-Nahḍah, undated, p. 101.
Al-Muqni' , p. 180.

4 *Al-Fiqh al-Islāmī wa Adillatuhu*, Vol 8, p. 243.

5 *Africa South of the Sahara*, England, New Zealand & Japan, Europa Publications Ltd., Staples Printers, 1997, 26th ed., p. 914.

people form the apparent majority of people in South Africa, it is pertinent to know their stand in *mirath* in terms of their scriptures. Inheritance for Jews, in the Old Testament, was essentially a land holding issue of the promised land allotted to the children of Israel after God brought them out of Egypt. It was a possession of a natural territory where the Jewish theocracy should be practised and maintained.[1] The Bible states: "*By faith Abraham obeyed when he was called to go out to a place which he was to receive as an inheritance; and he went out, not knowing where he was to go. By faith he sojourned in the land of promise, as in a foreign land, living in tents with Isaac and Jacob, heirs with him of the same promise.*"[2] Inheritance for them was, thus, a reward after bondage in Egypt as for, then, being God's chosen people. "*And I will bring you unto the land of which I swore to give to Abraham, to Isaac and to Jacob; I will give it to you for a possession. I am the Lord.*"[3]

This inheritance, obtained by divine infeftment, was to be such and is conditional upon fidelity of their (Jewish) covenant with God. It was defiled by their crimes and impieties. "*..and the land became defiled, so that I punished its iniquity, and the land vomited out its inhabitants.*"[4] "*And I will doubly recompense their iniquity and their sin, because they have polluted my land with the carcases of their detestable idols and have filled my inheritance with their abominations.*"[5] The land (the inheritance) is clearly God's land,

---

1 Hastings J (Editor): *Dictionary of the Bible*, New York, T & T Clark, 1899, pp. 470 - 471.

2 *Holy Bible*, Hebrews 11: 8 - 9.

3 Ibid, Exodus 6: 8.

4 Ibid, Leviticus 18: 25.

5 Ibid, Jeremiah 16: 18.

"...*for the land is mine; you are strangers and sojourners with me...*"[1] This situation underwent further development and spiritualised another sphere, not only was the land claimed as inheritance, but *Jovah* (God) Himself.[2] The priests and Levites were to be inheritors of *Jovah* (God) and allowed to eat from the offerings made to Him. This thought further developed Israel, the people, becoming the inheritance of *Jovah* (God) Himself, chosen to be a peculiar people unto Himself and above all other peoples that are on the face of the earth. "*For the Lord's portion is his people...*"[3] Later universalism even includes the Gentiles "...*and the Lord of hosts has blessed, saying, Blessed be Egypt my people and Assyria, the work of my hands and Israel my heritage.*"[4] This is the Judaism concept of their most important joint inheritance.

The *Qur'an*, confirms the original standing of the Jews. "*Oh Children of Israel! Call to mind the (special) favour which I bestowed upon you and that I preferred you above all others.*"[5] It confirms, like the Bible, that the Jews committed serious sins and iniquities, like worshipping the calf,[6] their rebellion against God's law[7] and their transgressions.[8] Due to the endless transgressions of Israel, their status of the chosen people was revoked by God. The *Qur'an* states:

---

1 *Holy Bible*, Leviticus 25: 23.

2 *Dictionary of the Bible*, p. 471.

3 *Holy Bible*, Deuteronomy 32: 9.

4 Ibid, *Isaiah* 19: 25.

5 *Al-Qur'an*, Chapter 2: 47.

6 Ibid, Chapter 2: 51.

7 Ibid, Chapter 2: 57.

8 Ibid, Chapter 2: 59, 61 & 85.

"Thus they have drawn on themselves wrath upon wrath..."[1] *"But because of their (Israel's) breach of their covenant, We cursed them...."*[2]

There is a different physical law of succession between the Israelites. There is a clear system of succession in the deceased's estate. The order of succession is mentioned in the *Pentateuch*, in revelation to Moses on the query of the daughters of Zelo'phad, the latter who had no sons.[3] The situation was: *"If a man dies and has no sons, then you shall cause his inheritance to pass to his daughter. And if he has no daughter, then you shall give his inheritance to his brothers. And if he has no brothers, then you shall give his inheritance to his father's brothers. And if his father has no brothers, then you shall give his inheritance to his kinsmen that is next to him of his family, and he shall possess it. And it shall be to the people of Israel a statute and ordinance, as the Lord had commanded Moses."*[4] No mention is made of a father inheriting his son, but the *Mishnah* lays that down. The Jewish law excludes the daughters of a deceased father if there is a son or sons. A daughter, thus, only inherits when there is no son. However, she was enjoined to marry only into the tribe of her father.[5] The latter rule is confirmed in the Bible *"This is what the Lord commanded the daughters of Zelo'phad; Let them marry whom they think best, only, they shall marry within the family of the tribe of their father. The inheritance of the people of Israel shall not be transferred from one tribe to another; for every one of the people of Israel*

---

1 *Al-Qur'ān*, Chapter 2: 90.

2 Ibid, Chapter 5: 13.

3 *Holy Bible*, Numbers 27: 1 - 5.

4 Ibid, Numbers 27: 8 - 11.

5 *Encyclopaedia Judaica*, Vol 15 p. 475.

shall cleave to the inheritance of the tribe of his fathers."[1] A father without sons, is under obligation to marry his daughter to one of his kinsmen, violation of which is punishable by death.[2]

1.2.1 **Jewish Law Of Succession:**

- Jewish succession law is parenthetic, conferring right of succession on the deceased's kin in the agnate line of descendants and ascendants. Degree of kinship affects inheritance and the nearest in kinship excludes the distant in kinship.
- the mother's family is not kin and thus she does not inherit from her sons nor will her brothers or other relatives of her. Her sons do succeed to her estate.
- illegitimate Jewish relatives of a deceased are kin and legal heirs, but not that of a bondwoman[3] or a non-Jewess. The latter follow their mother in status.
- children of a predeceased son, gets his share of inheritance from their paternal grandfather, even if it is one child and even if it is only a female. *Sadducees*[4] differ herein. A son predeceasing his mother does not inherit from his mother as it will transmit to his brothers on his father's side.
- the first born Jewish son, even if he is a *mamzer* (illegitimate child) gets double the share of the estate (primogeniture rule). This is based on biblical text: "...*but he shall acknowledge the*

---

1 *Holy Bible, Numbers* 36: 6 - 7.

2 *Encyclopaedia Judaica*, Vol 15 p. 475.

3 This is significant as it excludes Ishma'el, son of Abraham by Hagar, from the inheritance of the land of Israel and perhaps explains the central issue of the Palestinian - Israeli problem.

4 a Jewish sect which does not believe that there is a resurrection after death. See *Holy Bible* Mark 13: 18.

first born, the son of the disliked by giving him a double portion of all that he has, for he is the first issue of his strength..."[1] The others get an equal share. The predecease rule takes effect when the son predeceases his father. The inheritance is only what the father possess at his death.

- the husband is heir to his wife and he takes precedence over all other heirs, even if his marriage to her was a prohibited marriage. Her inheritance is what she possess at her death. This, in practice, excludes all the wife's relatives from her estate. Rabbinical rules, and not biblical law, in the form of *takkanot* (sing *takanah* - regulations which supplements the Torah)[2] adopted some new rules in this matter limiting the husband's succession powers to his wife's estate.
- the wife cannot legally succeed to her husband's estate as she is not regarded as a legal heir herein. She will only receive her dowry increment, her own property brought to the marriage as well as marriage contractual obligations of her husband to her (i.e his *kettubah* obligations). In addition, she is entitled to maintenance from her husband's estate until her death or remarriage. The *takkanot* of Toledo restricted this to a maximum of a half of the husband's estate, which strengthened the deceased's children's hand in this matter.
- daughters do not inherit when there is a son or sons of the deceased, according to Jewish law. Jewish scholars imposed obligations on the father for his daughters' welfare. There is no biblical

---

1 *Holy Bible, Deuteronomy* 21: 17.

2 *The New Standard Jewish Encyclopaedia*, p. 1825.

text to support these rulings. The obligation is for maintenance of the daughters and providing their dowry for marriage. Daughters are maintained until they reach maturity or are betrothed. This maintenance must come from their father's deceased estate. If they have no brothers, then the daughters inherit the entire estate and the previously mentioned rules lapse.

- sons are obliged to give their sisters part of their father's estate for their dowry. This is called *issar nekhasim*. A disputed ruling is that a daughter may also have this right from her mother's estate. This payment is also necessary to such an extent that she may seize sold assets from third parties.[1]
- if a man dies childless, his brother was to marry his widow. The first born from this marriage was taken as the first born of his deceased brother. The brother could refuse to do this. The estate would then go to the kinsmen.
- land could not be sold in perpetuity and if so sold, could be redeemed by the next of kin.[2]

The modern Israeli law of succession No: 5725 of 1965 had significantly changed Jewish law and introduced new laws which conflict with biblical and other forms of Jewish laws.[3]

1.2.2 **Succession In Christianity:**

Though Jewish law should have been continued by Christianity as according to the Bible, Jesus Christ said: "*Think not that I have come to abolish the law of the prophets; I have come not to abolish them,*

---

1 *Encyclopaedia Judaica*, Vol 15 pp. 475 - 482.

2 *Holy Bible, Leviticus* 25: 23 - 24 & 25.

3 *Encyclopaedia Judaica*, Vol 15 pp. 475 - 482.
Douglas J D: *The Illustrated Bible Dictionary*, Sydney, Hodder and Stoughton, 1980, Vol 2 p. 691 - 692.

but to fulfil them"[1], it took a new turn in this matter. Christianity developed an eschatological hope and the fulfilment of Christ's inheritance promises.[2] The possession of the Kingdom of God is now the inheritance of the believing people. "*Then the King will say to those at his right hand, come, oh blessed of my Father, inherit the kingdom prepared for you from the foundation of the world.*"[3] "*Do you not know that the unrighteous will not inherit the Kingdom of God...*"[4] Other New Testament texts have the same theme.[5] This promised inheritance is based on the death of the *muwarrith* (Christ)[6] and will be received in heaven.[7] Further, the New Testament claims fulfilment of the inheritance process made to Abraham and fulfilled, according to Christian belief, in Jesus Christ in that he inherited the vineyard of Israel.[8] The inheritance of Abraham was thus received by Jesus Christ. "*...Now the promises were made to Abraham and to his offspring.....and to your offspring which is Christ.*"[9] This inheritance Christ shares with believing Christians. "*And if you are Christ's, then you are of Abraham's offspring, heirs according to*

---

1 *Holy Bible, Matthew* 5: 17.

2 *New Catholic Encyclopaedia*, Vol 7 p. 516.

3 *Holy Bible, Matthew* 25: 34.

4 Ibid *1 Corinthians* 6: 9.

5 Ibid, *Galatians* 5: 21 & *Ephesians* 5: 5.

6 Ibid, *Hebrews* 9: 15 - 17.

7 Ibid, 1 *Peter* 1: 4.

8 Ibid, *Isaiah* 5: 1 - 7.

9 Ibid, *Galatians* 3: 16.

promise."[1] Thus, according to Christian belief, the promise to Abraham attained full development from a purely physical promised land as inheritance, which was for sustaining earthly life, being now transformed into the concept of Christian salvation - the sharing in the divine sonship of Christ and the Kingdom of the Father.[2]

One notices, in the Jewish law, a natural earthly system of inheritance being present alongside a later developed eschatological concept. In the Christian concept, a new divine inheritance supersedes and blots out the entire divine concept of earthly human succession in any form. This is a radical departure from Jewish law concepts in succession law. In fact, Christianity left all the law making to humans and even to pagans as Christ is alleged to have replied to the Pharisees, according to the Bible; "*Render unto Caesar what is Caesar's and to God the things that are God's*".[3] This theme is reported elsewhere in the New Testament, where, at times, the concept of subjecting oneself to authority is, in the least, encouraged and exhorted to, such as in Ephesians where it is said: "*Be subject to one another out of reverence for Christ. Wives, be subject to your husbands as to the Lord...Slaves be obedient to those who are your earthly masters...*"[4]

Western civilisation, having drawn from the Judeo-Christian ethic, belief and practice had taken from these principles in many instances of their lives, including laws and politics. Western

---

1 *Holy Bible, Galatians* 3: 29.

2 *New Catholic Encyclopaedia*, Vol 7 pp. 516 - 517.

3 *Holy Bible, Matthew* 22: 21.

4 Ibid, *Ephesians* 5: 21 - 22 & 6: 5.

civilisation should thus be seen against this background when it comes to its secular law systems and values. In addition, the history and clashing encounters over the ages between the Judeo-Christian system and Islam should be borne in mind when the Islamic system of laws are examined and analysed.

1.3 Pre-Islamic Arabian Practice In *Mīrāth* (Succession):

Before proceeding with *mīrāth* proper, we will review the pre-Islamic Arabian practice in this matter. Pre-Islamic Arabia was pagan, yet the concept of *Allāh* was known to them. The *Qur'ān* bears testimony to this: *"If you (Muḥammad) ask them, who is it that created the heavens and the earth. They will certainly say, Allāh".*[1] A similar thought is expressed elsewhere in the *Qur'ān.*[2] They were aware that *Allāh*, created them. *"If you ask them, who created them, they will certainly say Allāh..."*[3] Their intercession through idols, made them pagans. *"They (pagans) serve besides Allāh, who can hurt them not nor profit them and they say: these are our intercessors with Allāh...."*[4] The prevalent custom in pre-Islamic Arabia, as both al-Ṭabarī and ibn Ḥajr report, was that the *tarikah* of a deceased person devolved only on the males in equal shares while females never inherited anything. A person had the right to make a *waṣiyyah* (legacy) or instruct on *hadāyā* (gifts) to be distributed after his death.[5] Ibn Kathīr states that both females and children were excluded from the *tarikah*

---

1 *Al-Qur'ān*, Chapter 31: 25.

2 Ibid, Chapter 39: 38; 43: 9.

3 Ibid, Chapter 43: 87.

4 Ibid, Chapter 10: 18.

5 Al-'Alī S A: *Muḥāḍarāt fī Ta'rikh al-'Arab*, Baghdād, Matba'ah al-Irshād, 1968, Vol 1 p. 165.

of a deceased in pre-Islamic Arabia.[1] Succession rights were, thus, restricted to males only.

There is a similarity between pre-Islamic Arabia and Jewish law of succession where a father with a son had to exclude his daughter from his estate. This is an interesting similarity, for, Prophet Ibrāhīm's [Abraham (a.s)] son Ismā'īl (Ishmael), dwelt in the desert of Arabia and brought the Judaic law with him. "*So Abraham rose early in the morning, and took bread and a skin of water and gave it to Hagar, putting it on her shoulder, along with the child, and sent her away. And she departed and wandered in the wilderness of Beer-Sheba.*"[2] Ismā'īl grew up and lived "in the wilderness of Parān..."[3] The word "Parān" is of Arabic origin. "F" stands for "P" in English, like Falistīn for Palistīn (Palestine). Arabs called the place of residence of Hagar and Ismā'īl *Fārān* which means "two refugees" as they believed them to be runaways from their family. *Fārān* is, thus, the arabic for the Biblical word *Parān*. On this place becoming a permanent settlement for Egyptian-Syrian trade, it became known as *Bakkah* to which the *Qur'ān*[4] also refers by that name. This place is mentioned in the Bible as Beth-ar-am which is, in Arabic, *Bait al Ḥarām*, afterwards called Makkah (Mecca).[5] Prophet Ibrāhīm's (a.s) presence in Arabia, in Makkah (Mecca) itself, is confirmed in the *Qur'ān*: "*Oh our Lord! I have made some of my offspring to dwell in a valley without cultivation by Thy Sacred House in*

---

1 *Tafsīr ibn Kathīr*, Vol 2 p. 207.

2 *Holy Bible, Genesis* 21: 14.

3 Ibid, *Genesis* 21: 21.

4 *Al-Qur'ān*, Chapter 3: 96.

5 Ahsan S A: *The Last Prophet*, Karachi, Siddiqi Trust, Publication No. 40, undated. pp. 22 - 23.

order that they may establish regular prayer..."[1]. Makkah (Mecca) lies in an arid valley surrounded by arid hills.

1.4 ***Mīrāth* In Islām:**

Islām is not a religion in the normal concept of religion, but is both a religion, a social and a political order as the Prophet (s.a.w) was both a Prophet and a Statesman as stated in the Introduction. Placing *shari'ah* in proper perspective, Dr Zarqā states, in comparative tone, that there are, besides the secular law systems, three other divine systems of law and they are:

- a system that is strictly spiritual, morally inclined and which has no system of law comparable to secular (State) law. This is Christianity as found in the gospels.
- another system which pertains purely to a specific time or group like the laws of Judaism, which has a system of laws which was fitting for its time.
- the last system is a system of law based on firm and complete principles for all times and situations, expected measures (of happenings) as well as spiritual laws for every condition as well as such laws linked to special customs and traditions and which allows for the evolution and progress of such custom based laws as time passes on but which is conditional on *'adl* (justice) and *inṣāf* (equity). This system of laws is the *sharī'ah* of Islām.[2]

One notices again that Islam and Judaism have commonalities in divine law procedures and application, whereas Christianity, one of the major influences in western society, is singularly distinguished as having virtually none. This, amongst other issues, eventually had to give rise to

---

1 *Al-Qur'ān*, Chapter 14: 37.

2 *Al-Madkhal al-Fiqhī al-'Amm*, Vol 1 p. 29.

secularism. It is thus clear that the concept of western inheritance law, as well as their secular law, is not related to the religion of the majority of westerners who profess or claim to profess that Faith.

1.5 ***Mashrū'iyyah* (Legal Standing) Of *Mirath*:**

Mīrāth is confirmed by the primary sources of *shari'ah*. The *Qur'ān* states *"Allāh directs you as regards your children's (inheritance)..."*[1] As for the *sunnah*, Abū Hurairah narrated that the Prophet said: *"...He who dies and leaves a debt behind and did not leave anything to settle it, (it) is necessary for us to settle it and whoso leaves an estate, such will be for his heirs"*.[2] Ibn 'Abbās narrated that the Prophet (s.a.w) said: *"Give the shares of inheritance to those meriting it (by shari'ah) and what remains of it (give) it to the nearest 'aṣib (agnate residuary male))"*.[3] The Prophet ordered the Muslims to learn *'ilm al-mīrāth* (science of succession). 'Abd Allāh 'Amr bin al-'Ās narrated that the Prophet (s.a.w) said: *"Three kinds of knowledge are compulsory and others besides that are optional - āyāt muḥkamah (law verses of the Qur'ān), sunnah qā'imah (required sunnah practice) and farīḍah 'ādilah (fair distribution of an estate)"*.[4] 'Umar ibn

---

1 *Al- Qur'ān*, Chapter 4: 11.

2 *Jāmi' al-Usūl*, Vol 9 p. 630
Mukhtaṣar Ṣaḥīḥ Muslim, p. 263.

3 Riḍā S R: *Majmū'ah al-Ḥadīth al-Najdiyyah*, al-Madinah, al-Maktabah al-Salafiyyah, 1383 AH, 3rd ed., p. 175.
Al-Zabīdī A A: *Al-Tajrīd wa al-Ṣaḥīḥ li Aḥādīth al-Jami' al-Ṣaḥīḥ*, Cairo, Matba'ah Muṣṭafā al-Ḥalabi, undated, Vol 2 p. 150.
Subul al-Salām, Vol 3 p. 98.

4 *Sunan Abi Dawūd*, Vol 2 p. 118.
Al-Jāmi' li Aḥkām al-Qur'ān, Vol 5 p. 56.
Tafsīr ibn Kathīr, Vol 2 p. 212.
Al-Fawzān S F: *Al-Taḥqiqāt al-Mardiyyah Fi al-Mabahith al-Fardiyyah*, Riyād, Maktabah al-Ma'ārif, 1986, p. 15.

Khattab is reported to have said: "*Learn mirath (succession law) for it is your religion.*"[1] There is *ijma'* by all the *fuqahā'*, as reflected in their works, that *mirath* is a part of *shari'ah*. The known *āyat*[2] on *mirath* was preceded by other *āyat* in the gradual rectification process of the unfair and unjust pre-Islamic era.

1.5.1 Quranic Revelations On *Mirath*:

There were basically three situations affecting *mirath* in the Muslim community of al-Madinah. One was a temporary emergency measure which was later cancelled, one is disputed as to its legal standing presently and the other is the last and permanent law. The cancelled temporary measure was the issue of *ta'akhi* or *mu'akhat* (joining in brotherhood) of a *muhajir* (emigrant from Makkah) to an *ansari* (settled Muslim of al-Madinah) by the Prophet (s.a.w). The purpose here was to let the parties share equally in all possessions, even in succession. This measure was necessary to offset the enormous social problem that would arise with a serious disadvantaged immigrant Makki (Meccan) population amongst a settled community of the Ansar. The believing nature of both parties made this measure easily acceptable and workable. Wives and children, could not be shared. This was a practical expression of the Prophet's (s.a.w) teaching: *"A Muslim is the brother of the other Muslim."*[3] Dr Khan sums it up accurately when he describes the situation. "*It was a rare and unique scene of ideal love, kindness and sympathy which Islam presented by cementing the two people, quite alien in race and culture, along a path of*

---

1 *Al-Mughni*, Vol 6 p. 165.

2 *Al-Qur'an*, Chapter 4: 11 - 14, 176.

3 Khan A M: *Muhammad, the Final Messenger*, Lahore, Sh. M Ashraf, 1983, pp. 114 - 115.

fraternity and brotherhood."[1] The *Qur'ān* confirms this issue : "*Those who believed and emigrated and fought for the Faith with their property and their persons in the cause of Allāh as well as those who gave (them) asylum and aid. These are all friends and protectors of one another."*[2] This situation was ended after the Battle of Badr when the *muhajirun* (emigrants from Makkah) were no longer in need of this arrangement.[3] Revelation ended the situation: "*But the kindred by blood have prior rights against each other in the Book of Allāh (Qur'ān)."*[4] *Ta'akhi* thus ended permanently.[5]

As is now known, in pre-Islamic Arabia, females and children were excluded from *mirath* on grounds that males carried arms and fought for the tribe for its honour and brought in booty.[6] This issue the *Qur'ān* addressed with three laws.

Firstly sex discrimination was removed in the *mīrāth*. The *Qur'an* states: *"From what is left by parents and those nearest related, there is a share for men and there is a share for women, whether the property (estate) be small or large - a determinate share."*[7] This law is non definitive and was repealed later by the *āyāt al-mīrāth* (verses of succession).[8]

---

1 *Muḥammad - the Final Messenger*, p. 115.

2 *Al-Qur'ān*, Chapter 8: 72.

3 *Muḥammad - the Final Messenger*, pp. 115 - 116.

4 *Al-Qur'ān*, Chapter 8: 75.

5 *Tafsīr al- Nasafi*, Vol 2 p. 114.
Al-Jāmi' li Aḥkām al-Qur'ān, Vol 8 p. 56.

6 *Fi Zilāl al-Qur'an*, Vol 4 p. 253.

7 *Al-Qur'ān*, Chapter 4: 7.

8 Ibid, Chapter 4: 11 - 12, 176.

Secondly, an obligation of *waṣiyyah* for wives when the husband deceases was imposed: "*Those of you who die and leave widows should bequeath for their widows a year's maintenance without expulsion (from the residence)...*"[1] The majority of the *mufassirūn* (exegetists) state that this *āyah* is abrogated by the Quranic law of *'iddah al-wafat*[2] and *āyāt al-mīrāth*[3] (verses of succession) while Mujāhid rule it is still applicable.[4]

Thirdly, there was a *wasiyyah* benefitting certain near relatives of the deceased. "*It is prescribed, when death approaches any of you, if he leaves any goods, that he make a bequest to parents and next of kin according to reasonable usage...*"[5]

The *mufassirūn* and *fuqahā'* differ on the legal standing and application of this *āyah*. They all agree that this process was compulsory before the revelation of the *āyāt al-mīrāth*[6]. It was, however, cancelled by the *āyāt al-mīrāth*. This is the view of ibn 'Umar, Abū Mūsā, Sa'īd bin Musaiyyib, al-Ḥasan, Mujāhid, 'Aṭā'a, 'Ikramah, al-Rabi' bin Anas, amongst others. Others maintain that the *āyat al-mīrāth* brought clear and specific shares to some persons mentioned in the said *āyah* of *waṣiyyah* with one third remaining as *waṣiyyah* to the remaining relatives who do not get of the shares mentioned in the final *āyāt al-mīrāth*.[7] Those subscribing to this

---

1 *Al-Qur'ān*, Chapter 2: 240.

2 Ibid, Chapter 2: 234.

3 Ibid, Chapter 4: 11 - 12, 176.

4 *Al Jāmi' li Aḥkām al Qur'ān*, Vol 3 p. 226.

5 *Al-Qur'ān*, Chapter 2: 180.

6 Ibid, Chapter 4: 11 - 12, 176.

7 Ibid, Chapter 4: 11 - 12.

view are ibn ʿAbbās, Masrūq, Ṭawūs, al-Daḥḥāk, Muslim bin Yasar, al-ʿAlā bin Ziyād, Saʿīd bin Jubair, Qatadah and Muqātil bin Ḥayyān.[1] This issue will be dealt with further, later, under *wasaya* (legacies).

The last *āyāt* which were revealed in *mīrāth* matters are those of *Surah al-Nisā'*: *"Allāh (thus) directs you as regards your children's (inheritance): to the male a portion equal to that of two females. If only daughters, two or more, their share is two thirds of the inheritance; if one (daughter), her share is a half. For parents, a sixth share of the inheritance to each if the deceased left a child. If he left no children and the parents are the (only) heirs, the mother has a third. If the deceased left brothers (or sisters), the mother gets a sixth. (The distribution in all cases is) after the payment of legacies and debts. You know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by Allāh. And Allāh is All-Knowing, All-wise. In what your wives leave, your share is a half if they leave no child. But is they leave a child, you get a fourth after payment of legacies and debts. In what you leave, their (wives') share is a fourth if you leave no child. But if you leave a child they get an eighth after payment of legacies and debts. If the man or woman whose inheritance is in question has left neither ascendants or descendants, but has a brother or a sister, each one of them gets a sixth. But if they are more than two, they share in a third, after payment of legacies and debts, so that no loss is caused (to any one). This is ordained by Allāh. And*

---

1 *Tafsīr ibn Kathīr*, Vol 1 p. 372.
Al-Jāmiʿ li Aḥkām al-Qur'ān, Vol 2 pp. 259 - 260.

Allāh is All-Knowing, Most-Forbearing."[1] The very next *āyah* re-emphasises the ordained law: "*These are the limits set by Allāh...*"[2] and is followed by a serious admonishment for those who disobey this law.[3]

There are *sunnah* texts on issues expressed above and these will be quoted as the subject matter is being dealt with and discussed.

1.5.2 Technical Terms Pertaining To *Mirath*:

Before proceeding, it is necessary to explain relevant terminology which will often be encountered in this chapter. These terms and their explanations are as follows:

(a) *Ashāb al-Furūd* (Heirs With A Fixed Share):

Ashāb al-furūḍ means persons who have a fixed share from a *tarikah*. The singular is *ṣāḥib al-farḍ* (a person with a fixed share). These are, of the males[4], *abb al-mayyit* (father of the deceased), the *jadd ṣaḥiḥ* (true grandfather i.e father's father) how highsoever, the *akh li umm* (uterine brother), and the *zawj* (husband). From the females, we have the *zawjah* (wife), *bint sulbiyyah* (own daughter), *bint al-ibn* (daughter of the son) how lowsoever, the *ukht shaqīqah* (full sister), the *ukht li abb* (consanguine sister), the *ukht li umm* (uterine sister), the *jaddah ṣaḥihah* (grandmother) of both the father and

---

1 *Al-Qur'ān*, Chapter 4; 11 - 12.

2 Ibid, Chapter 4: 13.

3 Ibid, Chapter 4: 14.

4 all males must be legitimate to the *mayyit* (deceased). Thus, if you were conceived out of wedlock, you are not related to that person. All the relatives, males and females of that male will then be unrelated to you in terms of *sharī'ah*.

mother's side, i.e mother's mother and father's mother.

(b) **The *Ikhwah* (Brothers):**

They are of three kinds, namely, the *banū ʿayān*, the *banū ʿallāf* and the *banū akhyāf*. The *banū ʿayān* are the children from the same *umm* and *abb*. They are called *ashiqqāʾ* (sing. *shaqīq*) meaning full brothers. The females are called *shaqīqāt* (sing. *shaqīqah*) meaning full sisters. The *banū ʿallāt* are those children from the same *abb* but different *ummahāt* (mothers). The males, of this category, are called *ikhwah li abb* (sing. *akh li abb*) or consanguine brothers. The females of this category are called *akhawāt li abb* (sing *ukht li abb*) or consanguine sisters. The last group is called the *banū ʿakhyāf* and they are the children from the same *umm*, but different *ābāʾ* (fathers). The males are called *ikhwah li umm* (sing. *akh li umm*) or uterine brothers and the females are called *akhawāt li umm* (sing *ukht li umm*) or uterine sisters. The *mīrāth* of all these categories are different, hence the categories. Usually these children are referred to, collectively, in *mirath* as *ikhwah*, and if not, the gender type is used if so required.

(c) **The *Jadd Ṣaḥīḥ* (True Grandfather):**

He is the grandfather who relates to the deceased in a continuous male line without a female interrupting that male line. An example is the *abb al-abb* (father of the father), how highsoever.

(d) **The *Jaddah Ṣaḥīḥah* (True Grandmother):**

She is the grandmother who does not relate to the deceased through a *jadd fasid* (untrue grandfather). An example being the *umm al-umm* (mother's mother) or *umm umm al-umm* (maternal great grandmother) or the *abb al-umm* (father's mother).

(e) **The *Jadd Fāsid* (Untrue Grandfather) And *Jaddah Fāsidah* (Untrue Grandmother):**

The *jadd fāsid* is he who relates to the deceased through an female like the father of the mother of the deceased and the *jaddah fāsidah* is she who relates to the deceased through a *jadd fāsid* like your mother's father's mother. This makes them of the *arham*. They usually do not normally inherit, but if they do, they are last in line when all categories had been exhausted. There is a difference of opinion amongst the *fuqaha'* whether these people should inherit at all.[1] This will be dealt with later on.

(f) **The *'Aṣabah* (Residuaries):**

The *'aṣabah*[2] (sing. *'aṣib*) are the residuaries of a deceased. *'Asabah*, literally, means "the sons of a father and relatives of your father".[3] They are of two main categories, namely, the *'aṣabah nasabiyyah* (residuaries due to *nasab* i.e lineage) and *'aṣabah sababiyyah* (residuaries due to clientage). The latter category includes the

---

1 Ibn Muflih S D: *Kitab al-Furu'*, Beirut, 'Alam al-Kutub, 1985, 4th ed., Vol 5 p. 4.
Al-Tarikāt wa al-Waṣāyā, pp. 245 - 247.

2 *'asabah* refers to both males and females. If only females are spoken of we speak of *'asabāt*.

3 *Qāmus al-Muḥiṭ*, Vol 1 p. 109.
Al-Munjid, p. 508.

systems of *walā' al-'itāq* (freed slaves system) and the *walā' al-muwālāt* (contractual clientage) of a free person with no relatives, usually free converts to Islam. The system of *'aṣabah sababiyyah* is no longer operable in *mīrāth* nowadays, due to the abolition of slavery and need for *walā' al-muwālāt* (contractual clientage) having fallen into disuse, generally. Consequently, the issue of *'aṣabah sababiyyah* will not be dealt with in this thesis.

(i) <u>The *'Aṣabah Nasabiyyah*:</u>

These are the residuaries due to *nasab* to the deceased. They are both males and females and are of categories. The first group is the *al-'aṣabah binafsihi* or independent residuaries. This kind of *'aṣib* does not require any one else to create the status of *'uṣubah* (residuary status) with that person. These *'aṣabah* are those males who relate to the deceased without a female interrupting that line like an *ibn sulb* (own son) or *ibn al-ibn* (son of the son), the *abb*, the *jadd ṣaḥīḥ* the *akh shaqīq* (full brother), the *akh li abb* (consanguine brother), the *'amm* (paternal uncle) and the *ibn al-'amm* (paternal male cousin).[1] The next group is *al-'aṣabah bi ghairihi*. These are those *'aṣabāt* (female residuaries) whose share is half of the *tarikah*, if she is alone and two thirds if they are two and more. If they are found with their

---

1 *Kitāb al-Furu'*, Vol 5 p. 12.
Al-Tahqiqāt al-Mardiyyah, p. 108.

ikhwah, they will become *ʿaṣabah* together with them. These females are four in number and they are, the *bint* or *banāt sulbiyyah* (own daughter or daughters), the *bint* or *banāt al-ibn* (own daughter or daughters of the son), the *ukht shaqiqah* or *akhawāt shaqiqāt* (the full sister or full sisters) and the *ukht li abb* or *akhawāt li abb* (consanguine sisters).[1] The last group is the *al-ʿaṣabah maʿa al-ghair*. These are those *ʿaṣabah* who become *ʿaṣabāt* with another female like the ukht shaqiqah or the *ukht li abb* with the *bint* or *banāt sulbiyyah* (own daughters of a deceased) or with the *bint* or *banat al-ibn* (daughter or daughters of the son).[2]

1.5.3 Aim Of *Sharīʿah* In The Organisation Of *Tarikat* (Estates):

The first aim of the *Sharīʿ* is to create a bond, through *mīrath*, between the Muslim members of a family in order that cooperation between them be facilitated and wealth is one of the necessary requirements for this practical cooperation and binding force in affection. Thus nonmuslims and murderers are excluded from this system as the most important principle of *mīrath* is *tanāṣur* (mutual assistance) and *muwālāt* (contractual clientage). This issue is clear from the *Qurʾān*: "...*those who gave them asylum and aid - these are (all) friends*

---

1 ʿAbūd M U: *Al-Wajīz fī al-Mīrath ʿalā al-Madhahib al-Arbaʿah*, Cairo, al-Azhar, 1995, p. 28.
Al-Tahqīqāt al-Mardiyyah, p. 109.

2 *Minhāj al-Muslim*, p. 475.
Al-Tahqīqāt al-Mardiyyah, p. 110.
Al-Wajīz fī al-Mīrāth, p. 29.

and protectors of one another..."[1], and "*The believing men and women are protectors of one another..."*[2]

The second aim is that *mīrath* takes care of both the *muwarrith*[3] and the heirs of the *muwarrith*. The system allows the *muwarrith* to bequeath a maximum of one third of his *tarikah* for *waṣāyā* without seeking consent from his heirs and, thus, a minimum of two thirds of the *tarikah* must go to the heirs. Mu'ād bin Jabl narrated, as transmitted by Aḥmad, ibn Mājah and al-Dāra Qutni, that the Prophet (s.a.w) said: "*Allāh allowed you a third of your wealth at the end of your lives (to dispose of in charity) as in increase of your good deeds.*"[4] The heirs are obligated, in *shari'ah*, to take their allotted share. What they do with it afterwards is their personal matter.

Further, the *Shāri'* had obligated that the debts of the deceased be paid from the *tarikah*[5] and absolved the heirs from it as no one carries the burden of another in *shari'ah* - "*...nor can the bearer of burdens bear another's burden.*"[6] The *Shāri' (Allāh)* has, further, ruled that the heirs can only succeed to what is left of the *tarikah* after the debts and *waṣāyā* (legacies) had been dealt with[7], thus protecting the rights of third parties.

---

1 *Al-Qur'ān,* Chapter 8: 72.

2 Ibid, Chapter 9: 71.

3 in this thesis, the term *muwarrith* (testator) will also include *muwarrithah* (testatrix). A matter referring to a specific one of the two will be so indicated.

4 *Subul al-Salām*, Vol 3 p. 107.

5 *Al-Qur'ān,* Chapter 4: 11 - 12.

6 Ibid, Chapter 35: 18.

7 Ibid, Chapter 4: 11 - 12.

Thirdly, the *Shārī'* applied the principle of the nearest kin in distribution of a *tarikah* as the bonds of affection and *tanāṣur* (mutual assistance and help) is strongest in that sphere of the family. Thus, the *furū'* (descendants) of a deceased comes first, then the *usūl* (ascendants), then the *'aṣabah.* The pattern of distribution of a *tarikah* of a deceased makes that clear.

Fourthly, the *Shārī'* made no distinction between the sexes in the right to succeed to a *tarikah* they merit. However, He did not rule equal shares to males and females simply because He obligated the males with full maintenance of their *zawjāt* (wives), even if they (the latter) are self-sufficient as well as to their children. This maintenance includes, *sukna* (lodgings), *kiswah* (clothing), sustenance[1] (of food and drink) as well as medical care and education expenses. Wives and females do not spend anything in this sphere. Their share is a clear asset for them. To have ruled equal shares in this system would mitigate against justice and equity as males would be seriously disadvantaged in the system.[2] The *Qur'an* states: *"Men are the protectors and maintainers of women.."*[3] This is not a weapon a *zawj* has over his *zawjah.* It is purely a duty on him which he agrees to as part of his marriage contract.

Muslim women are, further, protected by a system of independence in their personal property's administration and there is no such thing, nor had there ever been, marital power and control of a *zawj* over his *zawjah's* possessions or its administration

---

1 *Al-Qur'ān*, Chapter 2: 233.
Ibid, Chapter 65: 6 - 7.

2 *Al-Tarikāt wa al-Waṣāya*, pp. 240 - 245.

3 *Al-Qur'ān*, Chapter 4: 34.

in *sharī'ah*.[1] On marrying, the *zawjah* is to receive a *ṣadāq* (dowry)[2] which she specifies, and which should be somewhat substantial as wifehood and motherhood will severely limit her time in enriching herself. She is not required to relinquish it on *ṭalāq* (divorce) or *faskh* (annulment) of her *nikāḥ*.[3] Only when she has no reason for being relieved from the *nikāḥ* that she and her *zawj* may negotiate[4] what is to be done with it. He can let her have it or take some of it or all of it. When a *zawj* divorces his *zawjah* he cannot claim the *sadaq* back either.[5]

Mīrāth is, thus, a familial succession (save the uterine category), and is a consequence of a *nikāḥ ṣaḥīḥ* (correct marriage) and not an independent subject matter on its own, as *ṣalāh* (prayer) is, for example. This is the perpetual serious mistake many persons make when comparing shares of males and females in *mīrāth*.

(a) <u>Time Of Succession To A *Tarikah*:</u>

Since *tarikah* is what a deceased leaves behind of his possessions, his ownership thereof must cease before anyone else can assume ownership thereof. This can, in *sharī'ah*, only be done in three different ways, namely, by exchange, such as by *bai'* (sale) and *hibah* (gift) during your lifetime, and *waṣiyyah* and *mīrāth* on your death. It, thus, stands to reason, that the *muwarrith* or *muṣī* (legator) must have died *ḥaqiqatan* (in reality, i.e. physically dying in the presence

---

1 *Al-Qur'ān*, Chapter 2: 188.

2 Ibid, Chapter 4: 4.

3 Ibid, Chapter 4: 20.

4 Ibid, Chapter 2: 229.

5 Ibid, Chapter 4: 20.

of people) or *ḥukman* (being declared dead by the competent authority, like the *qāḍi*) as is the case with the *mafqūd* (missing person). The *fuqahā'* agree that, in the case of *mawt ḥaqiqatan* (physical death in the presence of people), there are two cases. Either the person dies of *al-mawt al-'adi* (death without a sickbed or sudden death) and death due to a sickbed called *maraḍ al-mawt* (death from a sickbed). In any event, the basic rule is that the *muwarrith* must have died so that succession takes place correctly so as not to have two full owners at the same time.[1]

(b) ***Mawt Biduni Maraḍ al-Mawt*** **(Sudden Death):**

This is death without a sickbed. The *fuqahā'* differ on the time of succession in this kind of death. Some, like the *ḥanafis*, have three views in this regard, whilst al-Shāfi'i concurs with one of the *ḥanafi* views. Muḥammad al-Shaibāni, the *ḥanafi faqih*, rule that the *tarikah* of one dying a sudden death is transferred to his heirs in the last part of the life of that person (*akhir juz min ḥayātihi*). This is also the ruling of the *ḥanafi mashā'ikh (shaikhs)* of Irāq. Abū Yūsuf of the *ḥanafis* and the other view of Muḥammad al-Shaibāni states that succession takes place at the actual death of that person. This is also the ruling of the *mashā'ikh (shaikhs)* of Balkh. This latter ruling is to offset the confused ownership in this case. The other view of some other *hanafis* is that succession takes place at actual death, not before it nor after it.[2]

---

1 *Al-Tarikāt wa al-Waṣāyā*, p. 14.

2 Ibid, p. 15.

(c) **Succession To The *Tarikah* In *Marad al-Mawt*:**

The *fuqahā'* differ on the time of succession of heirs to the *tarikah*. Some, like Abū Hanīfah, opine that this succession is sometimes attached to the value of the *māliyyah al-tarikah* (value of the estate), and sometimes to the actual physical assets or *'ain al-tarikah*. His senior *fuqahā'* companions, Abū Yūsuf and Muḥammad al-Shaibānī opine that the heirs' succession is simple succession to the *qīmah* (value) of the *tarikah* to be determined by experts. They all agree that the succession takes place at the beginning of the *maraḍ al-mawt*.[1] *Hanafis* further differ on the degree of this right of the heirs in this case. The *mutaqaddimūn* (earlier) *ḥanafis* rule ownership of *mulkiyyah al-tarikah* (ownership of the estate) while the *muta'akh-khirūn* (later) *hanafis* rule it to be only succession (*mujarrad haqq fī al-khilafah*). This is to protect the heirs who may intervene to prevent their *muwarrith* of disposing of more than one third of his *tarikah* in *waṣāyā* as well as allowing him to dispose of no more than a third for *waṣāyā*.[2]

(d) **Succession To A *Tarikah Mashghul Bi al-Duyun* (Indebted Estate):**

A *tarikah* may be *mashghul bi al-duyun* (have debts attached to it) which may be partial, i.e. there are still assets free of debt or the debts may exceed the *tarikah* itself. The *fuqahā'* differ on succession of the heirs to the *tarikah* in these cases. In the case of partial indebtedness of the *tarikah*, the

---

1 *Al-Tarikāt wa al-Wasāyā*, pp. 15 - 16.

2 Ibid, pp. 16 - 18.

majority of the *ḥanafis*, including Abū Ḥanīfah, rule that the heirs succeed only to that portion of the *tarikah* which is free from debt. The debts part remain part of the property of the deceased until they are settled or the creditors absolve the deceased from his *duyūn*. The basic reasoning here is what is in the *āyah* "....*after the payment of legacies and debts.*"[1] The settling of debts precede the distribution of the *tarikah*.[2] This is also the view of the *mālikis* and *ḥanbalis*. The *shāfi'is*, *ja'fariyyah* and the more famous view of the *ḥanbalis*, states that the heirs succeed to the entire *tarikah*, debts and all, even if it is *mustaghraq bi al-duyūn* (insolvent) and it is not necessary to first settle the debts. Their reasoning is that the *madīn* (debtor) deceased owned his possessions with the debts and his ownership did not cease with that during his lifetime. Thus, the *tarikah* can be succeeded to, debts and all.

This ruling is based on the understanding that the rights of the heirs and the creditors must be protected. Thus, the heirs, in this case, has the right of *taṣarruf* (right of dealing) in the *tarikah* as they wish subject to such *taṣarrufāt* (dealings) being void when it is *muqabil al-naqḍ* (invalid) or *mafsūkh* (cancelled) when the heirs fail to honour their obligations attached to the *tarikah* by way of debts. From this ruling the rights of the deceased, the heirs and the creditors are safeguarded. The right of the creditor is

---

1 *Al-Qur'ān*, Chapter 4: 11.

2 *Al Jāmi' li Ahkām al Qur'ān*, Vol 5 p. 61.

attached to the value of the *tarikah* and not the *'ayan al-tarikah* (assets of the estate).[1]

(e) **Huqūq Mu'allaqah Bi Al-Tarikah (Rights Attached To An Estate:**

There are four such rights attached to a *tarikah* and they are:

- *tajhīz al-mayyit* (burial of the deceased).
- *qaḍā duyūn al-mayyit* (settling of the debts of a deceased).
- *tandfidh waṣāyā al-mayyit* (execution of the legacies of the deceased).
- *qismah al-tarikah* (distribution to the heirs).[2]

The *fuqahā'* differ as to the order in which these rights should be seen to. They agree that the *qaḍā al-duyūn* (settling of debts) and *tajhīz al-mayyit* (burial of the deceased) precede the *tanfidh al-waṣāyā* (execution of legacies). They also agree that the *qismah al-tarikah* (distribution to the heirs) comes after the *waṣāyā* (legacies) distribution.[3] They actually differ whether the *tajhīz al-mayyit* precedes the *qaḍā al-duyūn*. The *ḥanafis, mālikis* and *shāfi'īs* all rule that the *duyūn 'ainiyyah* (debts attached to physical assets) precede *tajhīz al-mayyit*.[4] This is due to such debts not forming part of

---

1 *Al-Tarikāt wa al-Waṣāyā*, pp. 19 - 22.

2 Ibn Juzai: *Al-Qawānīn al-Fiqhiyyah*, Beirut: al-Maktabah al-Thaqāfiyyah, undated, p. 253.
Abū Zahrah M: *Aḥkām al-Tarikāt wa al-Mawārith*, Cairo: Dār al-Fikr al-'Arabi, 1963, p. 41 - 42.
Al-Wajīz Fī al-Mirath, p. 6.

3 *Aḥkām al-Tarikāt wa al-Mawārith*, p. 73.

4 *Al-Taḥqiqāt al-Mardiyyah*, p. 25.
'Uthaimin M S: *Tashīl al-Farā'iḍ*, Cairo, Maktabah ibn Taimiyyah, 1993, 1st ed., p. 15.

the *tarikah* specifically for *ḥanafis*. *Mālikis* and *shāfi'īs* reason that the creditors have more right to these assets than anyone else. They further reason that, during his lifetime, the deceased did not have more right than the creditor in such assets and he could not do anything, during his lifetime, which would prejudice that creditor's right. Thus, at the *muwarrith's* death, the heirs' position weakened and thus the right of the creditor over such assets is confirmed.[1] These assets are delivered to the creditor.

Other *fuqahā'* like the *ḥanbalis* and some *ḥanafis* rule *tajhīz al-mayyit*, preceding the *qaḍā al-duyūn* as this is the first right seen to.[2] This is also the view of the *ja'fariyyah* who rule *wujūb* (necessity) herein. The latter includes all acts pertaining to burial, like shrouding and perfuming the corpse.[3] The *ẓāhiriyyah* also rule precedence of *qaḍā al-duyūn* over *tajhīz al-mayyit*.[4] Ibn Ḥazm maintains that *qaḍā al-duyūn* precede due to the Quranic *āyah*[5] and what is narrated from the *sunnah* that Muṣ'ab bin 'Umair had his *duyūn* (debts) settled and he was left with only one sheet in which he was buried.[6]

---

1 *Al-Tarikāt wa al-Waṣāyā*, p. 23.

2 Al-Laḥim A K M: *Fiqh al-Mawārith - Dirāsah Muqāranah*, Riyāḍ, al-Maktab al-Ta'āwunī li al-Da'wah wa al-Irshād, 1413 AH, 1st ed., Vol 1 p.20.
Al-Tahqiqāt al-Mardiyyah, p. 24.

3 *Al-Tarikāt wa al-Waṣāyā*, pp. 22 - 24.

4 Ibid, p. 24.

5 *Al-Qur'ān*, Chapter 4: 11.

6 *Al-Muḥallā*, Vol 9 p. 252.
Al-Tarikāt wa al-Waṣāyā, p. 24.

The *fuqahā'* differ when the *zawjah* has deceased as to what right she imposes on her surviving *zawj* in her *tajhīz* (burial). Abū Ḥanīfah rules that the surviving *zawj* must pay for it whether he is poor or rich. Mālik and Aḥmad rule that he is not responsible for anything of her *tajhiz*, not even the burial shrouds as he is obligated in maintenance during the *nikāḥ* and since it ended, this falls away. Burial of the *zawjah* is the responsibility of her *walī*. Al-Shāfi'ī has a ruling mid-way between the above two views, namely, that if the surviving *zawj* is rich, he is responsible for his deceased *zawjah's* burial costs and if he is poor, then not.[1]

(i) <u>The Position Of *Duyūn Allāh* (Debts Of God) And *Duyun Al-'Ibad* (Debts Of People):</u>

The *fuqahā'* agree that *duyūn* are settled before distribution to heirs.[2] *Duyūn Allāh* means debts owing to God and *duyūn 'ibād* means debts owing to people, be they Muslim or not. All the *fuqahā'* agree to these divisions. Examples of *duyūn Allāh* are outstanding *zakāh*, *ḥajj* and *kaffārāt* (penance).

The *ḥanafis* rule that *duyūn Allāh* lapses on the death of a person when he dies and did not instruct his heirs, during his lifetime, to settle them. If he did so, these debts are paid from a third of the *tarikah*, after *tajhiz al-mayyit* and *qada duyun al-'ibad* had been seen to. The *duyūn al-'ibād* must be

---

1 *Al-Taḥqīqāt al-Mardiyyah*, p. 25.

2 *Fiqh al-Mawārith*, Vol 1 p. 27.

settled before division of the *tarikah* to the heirs. The *hanafi fuqahā'* explain that the basic principle in *'ibādat* is intention followed by the actual act. A deceased person cannot comply with these requirements. On the other hand, the creditor takes his possessions from the deceased's belongings which is due to him. There is no such request as for *'ibādah* due to *Allāh*. Further, *'ibādah* is a test from *Allāh* and He is not in need of any person nor their wealth.[1]

Malikis, on the other hand, rule that all debts whether *duyūn Allāh* or *duyūn al-'ibād* must be settled as long as he (the *muwarrith*) acknowledged it in front of witnesses. These debts are settled from the entire *tarikah*. If he did not acknowledge it as indicated, but gave instructions for settling of debts, but gave no acknowledgement of it, then such *duyūn* are settled from one third of the *tarikah* only. Ibn 'Arafah and other *malikis* rule that if a person acknowledges, during his lifetime, that he is indebted to *Allāh*, then such *duyūn Allāh* are settled from his entire *tarikah*, whether he instructed herein or not.

Shafi'is and *hanbalis* share basically these views but they insist that the entire *tarikah* should be used for settling of debts and this must be done before distribution to the heirs. The *zāhiriyyah* agree with the *shāfi'is*, but

---

1 *Al-Qur'ān*, Chapter 2: 267

rule that the settling of debts, whether *duyūn Allāh* or *duyūn ʿibād* be settled before burial expenses are seen to.[1]

(ii) **<u>*Duyūn Al-Sihah* (Undisputed Debts *Duyun Al-Marad* (Debts Incurred During Sickness):</u>**

Duyūn ṣiḥah are incurred during one's lifetime and under the following conditions, according to *ḥanafis*:

- either by proof like witnesses to the enactment of a debt whether the person is healthy or sick, even in *maraḍ al-mawt*.
- a debt acknowledged by a person during his lifetime when he was not sick.
- debts of *maraḍ al-mawt* which is acknowledged by the sick person and confirmed by proof.
- debts of *maraḍ al-mawt* which the sick person acknowledges and no proof is found for it. This refers specifically to *maraḍ al-mawt*.

The latter kind of debts have different rulings in settlement from the *tarikah* when the *tarikah* cannot accommodate all the debts due to *tazākhum* (insolvency of the estate).

It is *ḥanafī* law that the *duyūn ʿainiyyah* (debts attached to objects like something of security) comes first, then *duyūn ṣiḥah* and followed by the *duyūn maraḍ*. Debts are thus of degrees.[2] The *duyūn ʿainiyyah* are settled first

---

1 *Al-Tarikāt wa al-Waṣāya*, pp. 28 - 30.

2 *Aḥkām al-Tarikāt wa al-Mawārith*, p. 51.

followed by the *duyūn ṣiḥah* and if there remain anything, it is divided between the other creditors, each according to the value of the debt percentage-wise. The reason is that the *duyūn ʿainiyyah* and *duyūn ṣiḥah* is stronger, due to proof existing of such a debt, while in the case of *dain al-maraḍ* (debt of illness), only the acknowledgement of the debtor is found and no proof and thus the creditor of *duyūn ṣiḥah* will suffer in repayment if no difference is made between the two kinds of debts. This is against al-*qāʿidah al-fiqhiyyah* (the fundamental legal principle) "*lā ḍarar wa la ḍirār*" - "*there shall be no harm (existing) and no harm shall be caused.*"

The majority of the *fuqahā'* make no distinction between *duyūn ṣiḥah* and *duyūn maraḍ*. All the creditors have the right to take from the *tarikah* what is due to them. The explanation given is that a debt acknowledged by a person in *maraḍ al-mawt* is valid as the act is a valid act in *shariʿah*. A person in *maraḍ al-mawt* is nearer to *Allāh* and wrong doing is far from him. *Duyūn maraḍ al-mawt* (deathbed debts) are thus valid save if there is *dalīl sharʿi* (accepted *shariʿah* proof) which will mitigate against the acknowledgment of debt. The majority of the *fuqahā'*, thus, make no distinction between the two kinds of *duyūn*.[1]

---

1 *Al-Tarikāt wa al-Waṣāyā*, pp. 32 - 33.

(iii) ***Tazahum al-Duyūn Fi al-Tarikah*** **(Debts In An Insolvent Estate):**

This is an insolvent estate. The *fuqahā'* differ on the procedure of settling the debts in this case. The *ḥanafis* rule that *duyūn ṣiḥah* (undisputed debts) be settled first, followed by *duyūn maraḍ al-mawt*. *Mālikis* rule precedence of *duyūn 'ibād* (debts owing to people) which must be settled first and then *duyūn Allāh*,[1] starting with the biggest of debts and proceeding in descending order of amounts owing. Their ruling is such, as, according to them, *Allāh* is not in want of possessions of his creations as He expresses in the *Qur'ān*.[2]

The *shāfi'is* rule precedence of *duyūn Allāh* in this case. The *ḥanbalis* rule that *duyūn 'ainiyyah*, like *rahn* (something physical given as security) precede followed by *duyūn mutlaqan* (debts of the deceased himself) with no distinction between *duyūn Allāh* and *duyūn 'ibād*. If insolvency is found due to both *duyūn Allāh* and *duyūn 'ibād*, both are settled from what remains of the *tarikah* with no distinction between the two kinds of debts. The *ẓahiriyyah* rule that the *duyūn Allāh* be settled first without distinction being made between such debts. What remains must be used to settle the *duyūn 'ibād* debts owing to the people, being divided

---

1 *Fiqh al-Mawārith*, p. 27.

2 *Al-Qur'ān*, Chapter 29: 6.

between them proportionally, each of them to according to the value of his debt. The latter ruling is also the ruling of the *zaidiyyah*.[1]

(iv) **Mulkiyyah (Ownership) Of A *Tarikah al-Madyun* (An Estate With Debts Attached To It:**

All the *fuqaha'* agree that the heirs own the *tarikah* but cannot succeed to it in proper and full ownership until the debts had been settled. They cannot, thus, in a *tarikah madyun* (debt ridden estate) do anything which will give them *de facto* ownership of the *tarikah*, like selling something of it for himself. Some *fuqaha'* allow the heirs to sell of the *tarikah* to settle the debts of the deceased, like the *hanafis*, in one of their rulings.[2] *Shafi'is* share this ruling. *Hanbalis* allow this only with the consent of the creditors, in one of their rulings, while in another *hanbali* ruling, dealing with the *tarikah* in disposing of some of the assets is forbidden. The latter ruling is also one of the views of the *ja'fariyyah*. Other *fuqaha'* (jurists) allow the heirs to deal in the *tarikah* on condition that the rights of the creditors are not prejudiced. This is also one of the rulings of the *hanafis*.[3]

---

1 *Al-Tarikat wa al-Wasaya*, pp. 33 - 35.

2 *Ahkam al-Tarikat wa al-Mawarith*, p. 65.

3 *Al-Tarikat wa al-Wasaya*, pp. 38 - 41.

1.5.4 *Asbāb al-Mīrāth* (Causes Of Succession):

There are two general principles *mīrāth* is based on and they are, the limitation to a certain circle of heirs and prevention of amassing of wealth in the hands of a few. As for the first principle, *mīrāth* restricts the heirs to three categories, namely, *qarābah* (familial relationship), *zawjiyyah* (marriage) and *walā'*(clientage), the latter being of a disputed issue amongst the *fuqahā'*.[1] The principle of *qarābah* is based on *nasab* and the protection of it in relation to the descendants of a deceased. Furthermore, the issue of *ṣilah* (blood relationship) and *mawaddah* (affection) necessitate that *mīrāth* give practical expression to these issues in Muslim community life. Needless to say, these near relations of a person are those who rejoice in your happiness along with you and share in your grief and loss.

As far as *zawjiyyah* is concerned, the *azwāj* (spouses), in the Islamic concept of *nikāh*, are "covers" for one another's chastity. The *Qur'an* says: "*Permitted for you on the night of the fasts is the approach to your wives. They are your garments and you are their garments...*"[2] as well as closeness of relationship. As for *al-walā'*, the nearest of an acquired familial relationship, in the absence of any natural one, brings forth a close relationship in which *tanāṣur* (mutual help) and *ta'āwun* (cooperation) features prominently, thus giving rise to *mīrāth* between the two parties.

---

1 *Minhāj al-Muslim*, pp. 469 - 470.
Bidāyah al-Mujtahid, Vol 2 p. 336.
Al-Iqnā', Vol 2 p. 47.
Bāz A A: *Al-Fawā'id al-Jaliyyah*, al-Riyad, Dār al-Iftā undated. p. 6.

2 *Al-Qur'ān*, Chapter 2: 187.

Islām does not allow nor support a system where wealth is concentrated in the hands of a few. This unsatisfactory and unjust system inevitably gives rise to serious problems in society. The *Qur'an* is clear herein - "*....in order that it may not (merely) make a circuit between the wealthy among you....*"[1] Progenitor succession is, thus, forbidden in Islām. *Mīrath* distributes wealth and spreads it amongst the community and creates economic activity in a wide sphere. This distribution includes women. The *sharī'ah* rule is a calculated fragmentation of estates to prevent the formation of huge single owned entities and concerns and the vices that usually go with it. Social justice is, thus, the norm.[2] The *asbāb al-mīrath* (causes of succession) will now be dealt with.

(a) *Al-Qarābah* (Familial Relationship):

Qarābah is derived from the arabic verb *qaruba* (also *qariba*) meaning "to be near". *Qarābah* is, thus, the lineage of ascent or descent of a person through birth.[3] The *qarābah* (relatives) of a person share rights and obligations amongst themselves despite the wide divergence between their *darajah* (degree) and *quwah al-qarābah* (nearness of relationship) to the person concerned. *Mirath* has, largely, to do with these persons and

---

1 *Al-Qur'ān*, Chapter 59: 7.

2 Ahmad M: *Economics in Islam*, Lahore, Sh. Muhammad Ashraf, 1977, pp. 137 - 138.
Islamic Development Bank: *Lectures in Islamic Economics*, Jeddah, Islamic Research and Training Institute, 1992 - Chapter "Distributive Justice in Islamic" by Dr M A Anas, pp. 150 - 151.
Manan M A: *Islamic Economic Theory & Practice*, Delhi, Mohammed Ahmad Publishing, 1980, p. 182.

3 *Qāmus al-Muhīt*, Vol 1 p. 118.
Al-Munjid, p. 617.

their eligibility for *mīrath*. These categories will be dealt with later on.

(b) ***Al-Zawjiyyah* (Marriage):**

Zawjiyyah, here, refers to two people[1] married correctly with a proper *'aqd al-nikāḥ* (marriage contract). As far as *mīrath* is concerned, it is the enactment of a *nikāḥ* which confers the right to *mīrath*. Consummation and living together after the *nikāḥ*, is not a requirement. This rule is taken from the *Qur'ān*: "*and you (husbands) shall halve half of what your wives leave....*"[2] There is no specification which requires more than what the definition states. This view is further complemented by the *sunnah* in that the Prophet (s.a.w) granted bint Wāshiq inheritance from her spouse who married her and did not specify her dowry nor consummated the *nikāḥ*.[3] This is so due to consummation of a *nikāḥ* not being necessary for its validity. All the *fuqahā'* agree that enactment and contracting of a valid *nikāḥ* brings forth the right to *tawāruth* (mutual succession) between the *azwāj* and this right remains as long as the *nikāḥ* subsists.[4]

---

1 only males born as males and females born as females may marry according to *sharī'ah*. Artificial sex changes by surgical or other physical means do not change the natural male and natural female status in *sharī'ah*.

2 *Al-Qur'ān*, Chapter 4: 12.

3 *Al-Tarikat wa al-Waṣāya*, p. 50.

4 *Āthar 'Aqd al-Zawāj*, p. 110.
Al-Fiqh al-Islāmī wa Adillatuhu, Vol 8 pp. 249 - 250.

(c) ***Al-Walā'* (Clientage):**

Al-walā' means "clientage" and are of two kinds, namely, *walā' al-'itāq* which is the clientage of a free slave who becomes a client with his former master. This system is now extinct and will not be dealt with in this thesis. The other system is *walā' al-muwālāt* or *walā' al-mu'aqqad* which is the clientage of a nonmuslim converting to Islam by the hand of a Muslim and the two contract that the one will inherit from the other, amongst other things.[1] This system was found in the Prophetic era in Arabia and in early Islām. Some *fuqahā'*, like the *ḥanafis*, who rule the continued permissibility of the system, quote from the *Qur'ān*, in support of their argument: "*To (benefit) everyone, He (Allāh) have appointed sharers and heirs to property left by parents and relatives. To those, also, whom your right hand pledged, give their due portion, for truly Allāh is witness to all things.*"[2] *Ḥanafis* opine that this is a reference to *walā' al-muwālāt* (succession through clientage). *Ḥadīth* texts are also quoted in support of this argument. Tamīm al-Dārī narrated, as transmitted by Abū Dāwūd, that he asked the Prophet (s.a.w): *"Oh Messenger of Allāh, what is the sunnah (law) of a man who becomes Muslim through me? The Prophet replied: "You are rightful over him during his lifetime and his death"*[3] This text is criticised as one of the reporters is 'Abd

---

1 *Al-Fiqh al-Islāmī wa Adillatuhu*, Vol 8 p. 251.

2 *Al-Qur'ān*, Chapter 4: 33.

3 *Sunan al-Tirmidhī*, Vol 3, p. 289.

Allāh bin Wahb and he is not a refined reporter[1]. Another variation of this text states that the Prophet (s.a.w) said "*He is your brother and your client and you have right over him during his lifetime and at his death.*"[2] *Ḥanafis*, further, reason that the *'aqd al-muwālāt* (contract of clientage) is a valid contract and resembles *wasiyyah* as a person who has no heir can give away his entire *tarikah* as a *wasiyyah*. The same is applicable to the *'aqd al-muwālāt*.

The majority of the *fuqahā'* reject this, ruling the *'aqd al-muwālāt* as invalid as the heirs are either *aṣḥāb al-furuḍ* or *'aṣabah* which are based on *qarābah* or *zawjiyyah*.[3] There is, thus, no place for the *'aqd al-muwālāt* in *mirāth*. These *fuqahā'* further assert that the validity of the *'aqd al-muwālāt* was abrogated by the *āyāt al-mirāth* in the *Qur'ān*.[4] This is the view of Al-Ḥasan al-Basrī, al-Sha'bī, Mālik and al-Shāfi'ī. The *ḥanafi* stand is taken from the ruling of 'Umar ibn Khaṭṭab and ibn Musaiyib and others in this matter.[5] The *mālikis* and *shāfi'is* give a fourth cause of *mirath*, namely, *jihah al-Islām* which is the *bait al-māl* [(Muslim)

---

1 *Sunan al-Tirmidhī*, Vol 3 p. 289.

2 *Al-Tarikāt wa al-Waṣāyā*, p. 68.

3 *Aḥkām al-Tarikāt wa al-Mawārith*, p. 80.

4 *Al-Qur'ān*, Chapter 4: 11 - 12.

5 *Al-Mughni*, Vol 6 pp. 380 - 381.
Al-Taḥqīqāt al-Mardiyyah, Vol 1 p. 40.
Bidāyah al-Mujtahid, Vol 2 p. 359.

public treasury] making it an heir for all the Muslims by way of *'uṣūbah*.[1]

The *ja'fariyyah* has another form of *walā' al-muwālāt* in that they rule, that if a person has no heir, the *Imām al-Shi'ah* (leader of the *shi'ah*), succeeds to this *tarikah* and can do with it what he so wish. The *Imām's* heirs' do not inherit this (wealth), but it passes on to the next *Imām* on condition he is physically present. If he is hidden, it is divided amongst the poor. The *shi'ah* claim that 'Ali used to spend this kind of money on the poor.[2] This *ja'fariyyah* ruling is akin to the *bait al-mal* in *sunni* law of *mirath*.

1.5.5 ***Mirath al-Anbiyā*** **(Succession Of The Prophets (A.S):**

The above *asbāb al-mirath* are applicable to all people, save the *anbiyā* (prophets). The Prophet (s.a.w) also instructed that his possessions, at his death, is to be given away as *ṣadaqah*. This is the *sunni* view. Abu Hurairah narrated, as transmitted by al-Nasā'i that the Prophet said: "*My possessions are not to be inherited by my heirs. What I leave after the maintenance of my wives and servants, is for charity.*" Another text by 'Ā'ishah narrating that Fatimah bint Muḥammad (s.a.w) asked the *khalifah* Abū Bakr for her share of her father's (s.a.w) estate. Abū Bakr replied that the Prophet (s.a.w) informed: "*We do not inherit and what we leave is charity.*"[3] A similar text in meaning is reported by ibn 'Umar.[4] 'Ā'ishah also narrated "*that the Messenger of Allāh*

---

1 *Al-Fiqh al-Islāmi wa Adillatuhu*, Vol 8 p. 251. *Al-Qawānin al-Fiqhiyyah*, p. 253.

2 *Al-Tarikāt wa al-Waṣāya*. pp. 75 - 76.

3 *Saḥiḥ al-Bukhāri*, Vol 8 p. 185. *Jāmi' al-Usūl*, Vol 9 p. 636.

4 *Nail al-Awṭār*, Vol 6 p. 86.

left no dinar (old Arabian gold coin) nor dirham, (old Arabian silver coin) nor sheep nor camel (i.e no animals) nor did he leave any legacy."[1]

1.5.6 ***Shurūṭ al-Mīrāth* (Conditions Of Succession):**

It is necessary that certain *shurūṭ* be met before the process of *mīrāth* can be enacted. As previously mentioned, there are three main causes for *mīrāth*, namely *qarābah*, *zawjiyyah* and for some, *walā'*. There are also three main *shurūṭ* which have to be met for all the three causes of *mīrāth*. These are:

- that the *muwarrith* had definitely died (*mawt ḥaqīqatan*) or that he is ruled as dead by the judicial process of *sharī'ah* (*mawt ḥukman* - ruling of presumption of death), like in the case of the *mafqūd*.
- proof of the existence of the heir of the *muwarrith* at the death of the latter. Most *fuqahā'* also rule that the unborn heir must be found at the time of the death of the *muwarrith* and proof hereof is his live birth later on. The heir should, thus, exist, *ḥaqīqatan* (in reality), like a person, or *taqdīran* (assumed existence) like a foetus, for example.
- that the heir continue to exist after the death of the *muwarrith*. This *shart* al-Shāfi'i specifically ruled. *Malikis* insist that if the death of a *muwarrith* and his heir is in such a manner as to be impossible to determine who died first, none of the two inherit from one another.[2]

All *fuqahā'*, have besides the above *shurūṭ*, additional *shurūṭ*. *Ḥanafis* have the above first

---

1 *Jāmi' al-Usūl*, Vol 9 pp. 636 - 637.
Mukhtaṣar Ṣaḥīḥ Muslim, p. 260.
Al-Tajrīd al-Ṣaḥīḥ, Vol 2 p. 13.
Sunan Abī Dāwūd, Vol 2 p. 111.

2 *Al-Tarikāt wa al-Waṣāya*, p. 77.
Al-Taḥqīqāt al-Mardiyyah, Vol 1 p. 30.

two conditions and a *shart* that it be known on what grounds an heir will inherit.[1]

Mālikis require the following *shurūṭ*:

- that the heir be not the murderer of his *muwarrith* by *al-qatl al-'amd* (intentional homicide) nor even *al-qatl shib al-'amd* (homicide resembling intentional homicide), the latter of which does not require the penalty as for the first.
- that both the *muwarrith* and the heir be of the same religion.
- that the heir be a free person. (This is now in disuse as slaves are no longer found).
- the confirmed existence of the heir after the death of his *muwarrith*. The *shafi'is* require the following *shurūṭ* (conditions):
- the above *mālikī shart*.
- knowledge of relationship of the heir to his *muwarrith* such as *qarābah*, *zawjiyyah* and *walā'*. Also the grounds on which heir will succeed. This is for the *qāḍi* to decide. Some of these shurut are easily dealt with nowadays with advanced State registrations of persons' personal details.

The *ja'fariyyah* and *zaidiyyah* of the *shi'ah* groupings, basically, share the *shurūṭ* as *ahl al-sunnah*, like *shurūṭ* pertaining to the heir and *muwarrith*, absence of a *māni'* (prohibition) to *mirath* and the like.[2]

---

1 *Al-Tarikāt wa al-Waṣāyā*, p. 77.

2 Ibid, pp. 80 - 81 & 96 - 97.

(a) ***Shurūt Mīrāth al-Haml*** **(Conditions For The Succession Of A Foetus):**

The *fuqahā'* deal with the *mīrāth al-haml* (inheritance of the unborn) under the *shurūt al-mīrāth* in their works. It is deemed expedient to follow the same pattern here.

There is *ijmā'* by the *fuqahā'* that if a child is born and is alive at birth and continues to live after his birth, that such a child can be a *muwarrith* as well as being an heir. They prescribe signs which indicate life and these are a shout, a sneeze, or taking to the breast and the like signs.[1] These signs are, obviously, derived from the limited medical knowledge available when these rulings were made.

The *fuqahā'* differ as to the necessity of *istihlāl* (birth shout) and amount of physical appearance outside the mother, at birth, as to constitute a live child. Some, like Thawrī, al-Awzā'ī, Abū Hanīfah and Abū Sulaimān, rule that if a child is born completely and is alive or is partially born and is alive and died after full emergence from his mother or before his full emergence, or sneezes or not and life is observed, like a movement of an eye or hand or breathing or any sign taken as a sign of life, then such a child is a *muwarrith* as well as an heir. They cite the *Qur'an* as proof and quote: *"Allah directs you as regards your children's (inheritance).."*[2] The child, as described above, is classifiable as a child under this *āyah*.

---

1 *Al-Tarikat wa al-Wasaya*, p. 82.

2 *Al-Qur'ān*, Chapter 4: 11.

Some other *fuqahā'*, like al-Shāfi'ī, rule that the entire child must be born fully and completely and have emerged alive at birth, before he can be *muwarrith* or an heir. This is also the view of Dāwūd and the *zāhiriyyah*[1]. Others, like Mālik, rule that the child has to emerge fully at birth and utter a shout (*yastahil ṣārikhan*).[2] If he does not and even if he eats and drinks, he is not a *muwarrith* nor an heir. *Mālikī fuqahā'* support this ruling of their *Imām* on grounds of the precedent of 'Umar ibn Khaṭṭāb and others who ruled and allotted a share to such a child who shouted at birth.

Another group of *fuqahā'*, like al-Nakha'ī, Shuraiḥ, al-Qāsim ibn Muḥammad, ibn Sīrīn, al-Sha'bī, al-Ḥasan bin 'Alī, al-Zuḥrī and Qatādah rule *istihlāl* a necessary requirement. This is also a reported view of Mālik and one view of Abu Ḥanīfah.[3] Aḥmad and the *ḥanbalis* rule any sign of life as proof of life and entitles that child to all the laws of *mīrāth*. The *ra'i mashhūr* (famous view) of Aḥmad is *istihlāl* at birth. This is also the ruling of ibn 'Abbās, Abu Hurairah, Jābir, Sa'id ibn Musaiyyib, Abu Salamah and others.[4] The *zaidiyyah* and the *ja'fariyyah* prescribe life and a sign indicating it as sufficient for

---

1 *Al-Muḥallā*, Vol 9 p. 309.
Al-Tarikāt wa al-Waṣāyā, p. 92.

2 *Al-Qawānin al-Fiqhiyyah*, p. 259.

3 *Al-Muḥallā*, Vol 9 pp. 308 - 309.
Al-Mughni, Vol 6 p. 317.

4 Al-*Mughni*, Vol 6 p. 316 - 317.

declaring a child alive, at birth. It is not a specific requirement that *istihlal* be occur.[1]

These differences of rulings all centre around the meaning of the word *istihlal*. *Istihlal* is the verbal noun of *istahalla* and its original usage was to see the appearance of the new moon whereat the people rejoiced (especially for the beginning of the fast of *Ramaḍān* and the *'Īdān*[2]). The application of the term at birth has a similarity in that, when a child is born and shout at birth, people gather and rejoice at the live birth.

Thus, *istihlal* means the first shout of a child at birth.[3] The *ḥadīth* of the Prophet (s.a.w), herein, is clear. Abu Hurairah narrated that the Prophet (s.a.w) said; "*When a child is born and shouts, he is an heir.*"[4] Ibn Mājah transmitted a similar text narrated by Jābir.[5] The differences are further compounded by what is reported from the Prophet (s.a.w) that *"every child born is touched by Satan at birth and shouts, save ibn Maryam* (Jesus) and his mother".[6] Some *fuqahā'* made *istihlal* a *shart* while others state its merely a statement of an occurrence for there

---

1 *Al-Tarikāt wa al-Waṣāyā*, pp. 96 - 97.

2 the two *'Id* celebrations marking the end of the fasting month *Ramaḍān* on the first of *Shawwāl* and the culmination of *ḥajj* as well as the commemoration of eh sacrifice of prophet Ibrahim (a.s) (i.e the patriarch Abraham) on the tenth of *Dhul Hijjah*.

3 *Al-Mughnī*, Vol 6 p. 317.

4 *Sunan Abī Dāwūd*, Vol 2 p. 127.
Jāmi' al-Usūl, Vol 9 p. 613.

5 *Al-Mughnī*, Vol 6 p. 316.

6 *Al-Muhallā*, Vol 9 p. 309.

might be a newly born child who does not shout but has other life signs or just simply take to the breast. Denying such a child the fruits of *mīrāth* will be an injustice. Such a child cannot be dead. The main issue amongst the *fuqahā'*, here, appears to be the ascertaining of life at birth and through it, the existence of a live foetus at the death of his *muwarrith*. This matter can now be factually ascertained by medical test and instrumentation.

The issue of multiple births featuring in the above issue of the *fuqahā'* gives no problems to those prescribing life at birth through signs of life. For those who prescribe *istihlāl sarikhan* if, for example, only one shout is heard and its known from whom it came, that child will be a *muwarrith* and an heir. If nothing is heard from the other one and he dies later, he is not a *muwarrith* nor an heir. This issue is also, nowadays, purely academic. When a pregnant wife is left behind, a different procedure is used in the process of distribution. This will be dealt with in the section of distribution of the *tarikah*.

(b) ***Mawāni' al-Mīrāth*** **(Prohibitions Of Succession):**

Mawāni' is the plural of *māni'* which is derived from the arabic verb *mana'a* meaning, amongst other things, "to prohibit".[1] *Mawāni' al-mīrāth*, thus, means, "prohibitions of succession" i.e acts or conditions which prohibit a person from succeeding to a *tarikah*. The principle *mīrāth* functions on is

---

1 *Qāmus al-Muḥīṭ*, Vol 2 p. 89.
Al-Munjid, p. 776.

nuṣrah between members of Muslim society. Any factor which upsets this pattern nullifies the right to *mīrāth*, like an heir murdering his *muwarrith* to speed up receipt of his share of the *tarikah*, for example. The *mawāni' al-mīrāth* are:

1. *al-qatl* or homicide.
2. *ikhtilāf fi al-dīn* or difference in religion.
3. *ikhtilaf fi al-dār* or difference of domicile.
4. *al-riqq* or slavery, which is non existent now and will not be dealt with here.[1]

Some *fuqahā'* have more *mawāni'* but these are either extensions of the mentioned ones or are dealt with in *fiqh* works under special headings.[2] The mentioned factors need explanation as they have a strong prohibitory effect on a person's right to *mīrāth*.

1. <u>*Al-Qatl:* (Homicide):</u>

There is overwhelming agreement amongst the *fuqahā'* that the murderer committing an *al-qatl al-'amd* (deliberate homicide) does not succeed to his share of the *tarikah* of his *muwarrith* whom he murdered. Only Sa'id ibn Musaiyib and ibn Jubair of the *fuqahā'* and the *khawārij* rule necessity of succession of a murderer of his *muwarrith* stating that the *Qur'ān* made no such

---

1 Al-Haithamī S D: *Hawāshī Li al-Shaikh 'Abd al-Ḥamīd al-Sharawāni & al-Shaikh Ahmad bin Qāsim al-'Abādī 'Ala Tuhfāt al-Muhtaj - Sharh al-Minhāj*, Cairo, Dār al-Fikr, undated, Vol 6 p. 417.
Al-Fawā'id al-Jalīyyah, p. 8.
'Umdah al-Fiqh, pp. 107 - 108.
Al-Tarikāt wa al-Waṣāyā, p. 114.
Al-Fiqh al-Islāmī wa Adillatuhu, Vol 8 p. 255.

2 *Al-Fiqh al-Islāmī wa Adillatuhu*, Vol 8 pp. 255 - 257.

exception. The majority of the *fuqaha'* claim proof from the *sunnah* in prohibiting a murderer succeeding to the *tarikah* of his *muwarrith*.[1] Al-Nasā'ī transmitted a report by Abu Hurairah the Prophet (s.a.w) said: *"The murderer does not succeed to the estate* (of his *muwarrith*)."[2] 'Urwah bin Zubair narrated that 'Uhaihah bin al-Julah murdered his minor *'amm* in order to succeed to his *tarikah* adding *"a murderer does no succeed to the tarikah (estate) of his victim, his muwarrith."* Mālik quotes that the *ahl al-'ilm* (scholars *shari'ah)* did not allow succession of the fighters in the battles of *al-Jamal, al-Siffin, al-Harrah* and *Qadid*. Likewise is it the rule that the murderers do not succeed to the *tarikah* of their victim.[3] 'Amr bin Shu' aib narrated that the Prophet (s.a.w) said: "*A murderer does not inherit anything from the estate (of his testator)*"[4]

There are different degrees in homicide and there is quite a difference of opinion amongst the *fuqahā'* as to what kind of killing necessitate prohibition of succession to the *tarikah* of the *muwarrith*. The kinds of killings found in *al-qisās* (homicide) are:

---

1 *Al-Mughni*, Vol 6 p. 291.

2 *Jāmi' al-Usūl*, Vol 9 p. 601.

3 Al-Suyūtī J D: *Tanwīr al-Hawālik - Sharh 'alā Muwatta' Mālik*, Cairo, Maktabah al-Mashhad al-Husaini, undated Vol 2 p. 60.
Jāmi' al-Usūl. Vol 9 p. 603.

4 *Subul al-Salām*, Vol 3 p. 101.
Nail al-Awtār, Vol 6 p. 84.

- *al-qatl al-'amd* (intentional homicide).
- *al-qatl shib al-'amd* (homicide resembling intentional homicide).
- *al-qatl al-khata'a* (accidental homicide).
- *al-qatl al-jari majra al-khata'a* (homicide resembling accidental homicide).
- *al-qatl bi al-tasabbub* (homicide due to a cause).[1]

Besides these, other forms of killings do not fall under this heading and as such do not exclude the perpetrator from succession of his *muwarrith*, like:

- executing someone lawfully in accordance with law.
- killing in legitimate right of self defence. It is justifiable, in *shari'ah*, to protect your person and property as well as the person and property of someone else from unlawful attack.[2]
- death resulting from an act intended to benefit someone's health and so performed on his request but from which he dies, like a surgical operations. *Qasd* (intention) is absent.

These acts are all classifiable under the Quranic *ayah*: "*...nor take the life which Allah has made sacred, except for a just cause...*"[3]

---

1 *Tashri' al-Jana'i al-Islami*, Vol 2, p. 9. *Al-Tarikat wa al-Wasaya*, p. 115.

2 *Al-Tarikat wa al-Wasaya*, p. 118.

3 *Al-Qur'an*, Chapter 17: 33.

(i) **Definition Of The Various Forms Of *Qatl*:**

It is necessary to know the different kinds of *qatl* as to know who and when someone is not entitled to succession rights. There are different kinds of *qatl* and the *fuqahā'* differ on their definitions.

Abū Hanifah defines *al-qatl al-'amd* as killing intentionally with an instrument which breaks the body (*yufarriq al-ajzā'*), like a sword, or fire. Abū Yūsuf and Muḥammad al-Shaibānī defines this kind of killing as killing intentionally with something which, generally will kill, like a big stone or a big stick. This kind of killing is *al-qatl shib al-'amd* for Abū Ḥanīfah. *Al-qatl shib al-'amd* for Abū Yūsuf and Muḥammad al-Shaibānī is striking someone with something that usually does not kill someone, like striking with a small stone or with a whip.[1] The difference in the definitions of *al-qatl al-'amd* by Abū Ḥanīfah on the one hand and Abū Yūsuf and Muḥammad al-Shaibānī on the other hand is that if someone, for example, pushes someone else from a roof or strike him with a big stone or a huge stick, for Abū Ḥanīfah this will be *al-qatl shib al-'amd* while

---

1 *Badā'i' al-Sanā'i*, Vol 7 p. 233.
Al-Hidāyah, Vol 4 pp. 158 - 159.
Al-Ikhtiyār, Vol 5 pp. 23 - 24.
Al-Fiqh al-Islāmi wa Adillatuhu, Vol 8 p. 260.

for the other two it will be *'al-qatl al-'amd.*[1]

Malik, in his accepted view, does not differentiate between *al-qatl al-'amd* and *al-qatl shib al-'amd*, save in the case of a son with his father.[2]

The *shafi'i* definition of *al-qatl al-'amd* and *al-qatl shib al-'amd* is like that of Abu Yusuf and Muhammad of the *hanafis* save that they call the latter kind of homicide, *al-qatl al-'amd al-khata'a.*[3]

Hanbalis, share the *shafi'i* definitions save that they also classify continuous striking until death with an object which normally does not kill, like a small stone or stick, as *al-qatl al-'amd.*[4] Many *fuqaha'* classify *al-qatl al-jari majra al-khata'a* and *al-qatl bi al-tasabbub* as *al-qatl al-khata'a* due to intent being absent. *Al-qatl al-khata'a* are of two kinds; either *khata'a bi al-qasd* (error in aim) like intending to shoot an animal and it actually is a person (like movement in a thicket thought to be

---

1 *Al-Hidayah*, Vol 4 pp. 158 - 159.
Al-Tarikat wa al-Wasaya, p. 116.

2 *Bidayah al-Mujtahid*, Vol 2 p. 393.

3 *Minhaj al-Talibin*, p. 122.
Kifayah al-Akhyar, Vol 2 pp. 157 - 159.
Minhaj al-Tullab, pp. 110 - 111.

4 *Al-Mughni*, Vol 7 pp. 637 & 650.

that of an animal and it turns out to be a person) and *khaṭa'a fī al-fi'l* (error of act) in that he aims at an object but strikes a person instead. *Al-qatl al-jārī majrā al-khaṭa'a* is presented as a sleeping person falling, during his sleep, onto another person killing him while *al-qatl bi al-tasabbub* is presented as a person digging a well or placing a stone somewhere as to cause an obstruction and this causes some person's death.[1]

(ii) Views Of The *Fuqahā'* On *Al-Qatl* (Homicide):

There is quite a divide between the *fuqahā'* on the definitions of the levels of *qatl* that prohibits the perpetrator thereof from succeeding to the *tarikah* of his *muwarrith*. *Mālikis* rule that *al-qatl al-'amd* whether it be by any intentional act or omission, directed against a human being which is either a hostile act or intrinsically likely to kill, as being *qatl* that prohibits the killer from succeeding to the *tarikah* of his *muwarrith* should the victim be the latter. It should be noted that *al-qatl shib al-'amd* falls under *al-qatl al-'amd* in *māliki* law. However, *al-qatl al- khaṭa'a* of one's *muwarrith* does not preclude the

---

1 *Al-Hidāyah*, Vol 4 p. 159
Al-Ikhtiyār, Vol 5 p. 26
Fiqh al-Sunnah, Vol 2 p. 519.
Al-Mughnī, Vol 7 p. 637.

perpetrator from succeeding as an heir to the *muwarrith's tarikah.*

Mālikis differ when the perpetrator of *al-qatl al-'amd* is a minor or an insane person whether such a person is prohibited from succeeding to his victim's *tarikah*, when he is an heir to that *tarikah*. A group of *māliki fuqahā'* permitting succession and the others prohibiting that.[1] Those allowing it possibly do so due to intent being absent, while those prohibiting it take the killing act as the prohibiting factor and the standing of the person has nothing to do with it. Abū Ḥanīfah rule that *al-qatl al-'amd*, *qatl shib al-'amd*, *al-qatl al-khaṭa'a* and *al-qatl al-jārī majrā al-khaṭa'a* all prohibit the perpetrator heir from succeeding to the *tarikah* of his victim, his *muwarrith*. These are subject to the following *shurūṭ*:

- that the killing was direct, thus death by *sabab* (cause), even if it is *fi'l 'amd* (deliberate act), does not prohibit the perpetrator heir from succeeding to the *tarikah* of his victim, his *muwarrith*.
- that the perpetrator be pubescent and sane, thus, a minor or an insane person does not fall under the above mentioned prohibition.

---

1 *Al-Tashrī' al-Janā'ī*, Vol 2 p. 186.

- that the *qatl* in both cases of *al-qatl al-'amd* and *al-qatl shib al-'amd* be carried out *'udwanan* (in transgression of *shari'ah*), thus no homicide is ruled for self defence.[1]

The *shafi'is'* accepted ruling on prohibition of succession to *tarikah* in the case of one killing one's *muwarrith*, is that irrespective of what kind of homicide is committed, and irrespective of who committed it, whether minor or not, whether the perpetrator is insane or not, the perpetrator is prohibited from succeeding as an heir to the *tarikah* of his victim, his *muwarrith*.[2] The *shafi'is* accepting this view base their ruling on the point that *man'al al-mirath* is to prevent the heir of hastening the death of his *muwarrith*. There are two other views in the *shafi'i madhhab*, which state that justifiable homicide does not prohibited the heir from succeeding to the *tarikah* of his victim, the *muwarrith* and if not justifiable, *man' min al-mirath* is applied.[3]

Hanbalis share the accepted *shafi'i* ruling. The rule is that any *qatl* obligating *qawad* (death penalty) or *diya* (blood money) or *kaffarah*

---

1 *Tashri' al-Jana'i*, Vol 2 p. 186.

2 *Al-Mawsu'ah al-Fiqhiyyah*, Vol 3 pp. 23 - 24.

3 *Tashri' al-Jana'i*, Vol 2 pp. 186 - 187.

(penance) prohibits succession of the heir to the *tarikah* of his victim, his *muwarrith*.[1] Since *qatl* is a criminal offence in *sharī'ah* and the punishment of it exacts, at times, fines, like *diya* and *kaffārah* to which an heir may not succeed or will have to pay into the *tarikah* account of his victim, his *muwarrith*, punishment of *al-qatl* shall be dealt with briefly.

(iii) **Punishment Of *Al-Qatl* (Homicide):**

Qatl is a very serious amd major sin and crime in *sharī'ah*. The *Qur'an* seriously warns against it. *"Whoever kills a believer (mu'min) intentionally, his recompense is Hell, to abide therein (forever) and the wrath and curse of Allāh are upon him and a dreadful chastisement is prepared for him."*[2] Recourse to justice is granted in this matter. *"And if anyone is slain wrongfully, We have given his heir authority (to demand) qiṣāṣ (retribution) or to forgive; but let him not exceed bounds in the matter of taking life for he is helped (by the Law)."*[3] There is *ijmā'* by the *fuqahā'* that in the case of *al-qatl al-'amd*, the following will be resorted to:

---

1 *Tashrī' al-Janā'i*, Vol 2 p. 187.
Al-Mughnī, Vol 6 p. 292.
Fiqh al-Mawārīth, Vol 1 p. 204.

2 *Al-Qur'an*, Chapter 4: 93.

3 Ibid, Chapter 17: 33.

- that the murderer is prohibited from succeeding to the *tarikah* of his victim, his *muwarrith*. This prohibition includes the *mūṣā lahu* (legatee) when he murders his *musi* (legator).
- *kaffārah* which the *walī* of the heirs of the murdered victim may demand for pardoning the murderer.
- *qawad* (death penalty) if found guilty or if found guilty he may be spared if the *walī* of the murdered victim, pardons him.[1] If he is spared, the *ḥakim* (governing authority) must apply *ta'zīr* (punishment) to the murderer, both as punishment and deterrent, Mālik and Laith rule that he be given 100 strokes and imprisoned for a year.[2] This is, of course, *ijtihād*. The prohibition to succession of the murderer is based on the *qā'idah fiqhiyyah* (fundamental legal principle) which reads: "*he whoso hasten on an act before its time, is punished by being prohibited from obtaining it.*"[3] *Ḥadith* texts exist in this prohibition also. Such texts are transmitted by Mālik, Aḥmad, Abu Dāwūd, ibn Mājah and

---

1 *Fiqh al-Sunnah*, Vol 2 p. 521.

2 *Muwatta' Mālik*, Vol 3 p. 76.
Fiqh al-Sunnah, Vol 2 p. 523.

3 *Fiqh al-Sunnah*, Vol 2 p. 521.
Al-Madkhal li Dirāsah al-Sharī'ah al-Islāmiyyah, p. 105.

al-Tirmidhī. These *aḥādīth* have various degrees of weakness due to technical difficulties in their standing.[1]

As for *al-qatl shib al-'amd*, the penalties are, sin for killing without valid cause which is prohibited in the *Qur'ān* and *diya mughallaẓah* (heavy compensation) from the *'āqilah* (family, relatives and kinsmen) of the murderer. In *al-qatl al-khaṭa'a*, *diya mukhaffafah* (light compensation) from the *'āqilah* of the killer and *kaffārah*. This *kaffārah* is freeing of a Muslim slave and if not found, fasting for two lunar months consecutively in penitence. This is due to Quranic law "*..and whoever kills a believer (mu'min) by mistake, it is ordained that he should free a believing slave and pay blood money to the deceased's family unless they remit it freely...*"[2]

The majority of the *fuqaha'* rule that the blood money in the case of *al-qatl al-'amd* need not be paid immediately if pardon is granted by the guardian of the murdered person. Abū Ḥanīfah differ, ruling three years grace

---

1 *Nail al-Awṭār*, Vol 6 pp. 84 - 85.
Sunan al-Tirmidhī, Vol 3 p. 290.
Subul al-Salām, Vol 3 p. 101.

2 *Al-Qur'ān*, Chapter 4: 92.

in paying off the blood money.[1] "*...But if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude. This is a concession and mercy from your Lord...*"[2]

Mālik ruled that the killer in *al-qatl al-khaṭa'a*, succeeds to the *tarikah* of his victim, *his muwarrith*, but not to any of the blood money[3]. All the other *fuqahā'* rule the total exclusion from the *tarikah*, in this case, for *al-qatl al-'amd*, *shib al-'amd* and *al-qatl bi al-khaṭa'a*. *Ḥanafis* rule that any *qatl* that has no sin attributed to it, does not preclude the killer from succeeding to the *tarikah* of his *muwarrith* like a minor or insane killer or a sane person causing the death of someone else unintentionally like a sleeping person rolling onto another person and killing him.[4]

The blood money for deliberate forms of homicide is *diya mughallaẓah* (heavy compensation) and is defined as 100 camels or

---

1 *Tashrī' al-Janā'i*. Vol 2 p. 181.

2 *Al-Qur'ān*, Chapter 2: 178.

3 *Fiqh al-Mawārith*, Vol 1 p. 205.
Al-Mawsū'ah al-Fiqhīyyah, Vol 3 p. 23.

4 *Al-Ikhtiyār*, Vol 5 p. 116.
Al-Mughni, Vol 6 p. 292.

1000 gold *dīnārs* each *dīnār* being a *mithqāl* of pure gold and with *waraq* (money equivalent) being 12 000 *dirhams*. This is the ruling of Mālik and Aḥmad and is the old view of al-Shāfi'ī. Abū Ḥanīfah rule, for *waraq* 10 000 dirhams. The blood money or *sulḥ* (agreement money) agreed on when the guardian of murdered victim in the case of *al-qatl al-'amd*, is paid by the murderer himself. This is the *ijmā'* of all the *fuqahā'*.[1]

The *diyā shib al-'amd* (blood money of probable deliberate homicide) is payable by the *'āqilah* of the killer. This is the view of Abū Ḥanīfah, al-Shāfi'ī and Aḥmad. Ibn Sīrīn, al-Zuhrī, ibn Shubramah, Qatādah, Abū Thawr and others rule penalty and liability for the perpetrator of the homicide and not on the *'āqilah* of the perpetrator of the homicide due to it being of the category of *al-qatl al-'amd*. Abū Ḥanīfah and those agreeing with him, take their ruling from *hadīth* text narrated by Abū Hurairah.[2] Blood money forms part of the *tarikah* of the *maqtūl*.

---

1 *Tashrī' al-Janā'i*, Vol 2 pp. 178 - 179.

2 Ibid, Vol 2 191.

(2) ***Ikhtilāf Fī al-Dīn*** **(Difference In Religion):**

Ikhtilāf, literally, means "disagreement".[1] *Ikhtilāf fī al-dīn*, thus means, difference in religion i.e. having different religions. *Ikhtilāf fī al-dīn* is a prohibition to *mīrāth* in *sharī'ah*.[2] The *sharī'ah* is based on *nuṣrah* and *tanāṣur* between its adherents, the Muslims. They are required to support this principle in all their doings and dealings within the brotherhood of Islam. It is a manifestation common to all other societies too, in practice. The *Qur'ān* makes this clear. "*And the believing men and the believing women are guardians to one another; they command with righteousness and forbid sin.*"[3] "*Verily this ummah (nation) of yours is a single brotherhood and I (Allāh) am your Lord and Cherisher, therefor serve Me (and no other).*"[4] "*The believers are protectors of one another; unless you do this (protect one another) there would be tumult and oppression on earth and great mischief. Those who believe (in Islām) and emigrate and strive for the Faith in the cause of Allāh as well as those who give (them) asylum and aid, those are*

---

1 *Al-Munjid*, p. 193.

2 *Aḥkām al-Tarikāt wa al-Mawārith*, p. 93.
Al-Mudawwanah al-Kubrā, Vol 3 p. 87.

3 *Al-Qur'ān*, Chapter 9: 71.

4 Ibid, Chapter 21: 92.

all the believers.."[1] A similar thought is expressed elsewhere in the *Qur'ān.*[2] The Prophet (s.a.w) further expanded on this theme in *aḥādith.* Anas narrated that the Prophet (s.a.w) said: " *Your Faith is incomplete until you desire for your brother that which you desire for yourself.*"[3] Ibn Mas'ūd narrated that the Prophet (s.a.w) said: "*It is a sin for a Muslim to insult another Muslim and fighting him (unjustly) is disbelief.*"[4] Similar texts, in meaning, are reported by Nu'mān bin Bashīr and 'Umar.[5]

There is *ijmā'* by the *fuqahā'* that a nonmuslim does not succeed to the *tarikah* of a Muslim and the majority of the *fuqahā'* rule that a Muslim does not succeed a nonmuslim's either.[6] This is the view of the majority of the Prophet's *saḥābah*, like Abū Bakr, 'Umar, 'Uthmān, 'Alī, 'Usāmah bin Zaid and Jābir. It is also the view of the *fuqahā'* of the *tabi'ūn* like 'Urwah, al-Zuhrī, 'Aṭa'ā, Ṭawūs, al-Thawrī as well as that of Abū Ḥanīfah and the *ḥanafis*, Mālik, al-Shāfi'ī and Aḥmad. Their proof

---

1 *Al-Qur'ān*, Chapter 8: 74.

2 Ibid, Chapter 49: 10.

3 *Riyaḍ al-Ṣalihin*, p. 107.
Al-Tajrīd, Vol 1 p. 9.

4 *Mukhtaṣar Ṣaḥīḥ Muslim*, p. 23.

5 *Riyaḍ al-Ṣalihin*, pp. 129 & 131.

6 *Al-Qawanin al-Fiqhiyyah*, p. 259.
Aḥkām al-Tarikāt wa al-Mawārith, p. 93.

is the *hadīth* of the Prophet (s.a.w) narrated by 'Usāmah bin Zaid: "*The nonmuslim does not inherit from a Muslim and the Muslim does not inherit form the nonmuslim.*"[1] Abū Dawud transmitted from ibn Shu'aib that the Prophet (s.a.w) said: "*The followers of the two religions do not inherit from one another.*"[2] The "two religions" are the Muslim and nonmuslim faiths and the reason for this is that there is no *nuṣrah* and *tanāṣur* (assistance and mutual help) based on *shari'ah* between these two groups.[3]

It is narrated from 'Umar, Mu'ad and Mu'awiyah that they allow the Muslim to succeed to the *tarikah* of nonmuslim but not vice verse[4]. This is also the view of Muḥammad al-Ḥanafiyyah and 'Alī bin Husain of the *shi'ah*, and, of *ahl al-sunnah,* ibn Musaiyyib, Masrūq, al-Sha'bī, al-Nakha'i and others.[5] Ahmad says that this transmission is incorrect as there is *ijma'* that a Muslim does not

---

1 *Saḥiḥ al-Bukhāri*, Vol 8 p. 194.
Mukhtaṣar Ṣaḥīḥ Muslim, p. 262.
Minhāj al-Muslim, p. 470.

2 *Sunan Abī Dawud*, Vol 2 p. 165.
Nail al-Awtār, Vol 6 p. 82.
Jāmi' al-Uṣūl, Vol 9, p. 599.

3 *Al-Mughnī*, Vol 6 pp. 294 - 295.
Al-Ramli S D: *Nihāyah al-Muḥtāj Ila Sharḥ al-Minhaj fi Fiqh 'alā al-Madhhab al-Imām al-Shāfi'ī*, Cairo, Matba'ah Mustafā al-Ḥalabī, 1962, final ed., Vol 6 p. 27

4 *Fiqh al-Mawārith*, Vol 1 p. 216

5 *Al-Muḥallā*, Vol 9 p. 304.
Bidāyah al-Mujtahid, Vol 2 p. 350.
Al-Fiqh 'alā al-Madhāhib al-Khamsah, p. 499.

succeed a nonmuslim. The said transmission is based on the *hadith* text "*Islām increases and does not decrease*"[1] which is a disputed text as well as open to different interpretations. In succession between nonmuslims, Islām does not interfere and they succeed as they practice amongst themselves. Some *fuqahā'* further rule that if the nonmuslims' religion differ, then each person inherits from his own religion. This is a view reported from Abū Bakr, Mālik and Aḥmad. There are further views hereon which are not applicable to here.[2] The *zaidiyyah* share the view of 'Umar and others while the *ja'fariyyah* agree with the view of Mu'ād and Mu'āwiyah.[3]

(3) *Ikhtilāf Fī al-Darain* (Difference In Domicile):

By *ikhtilaf fi al-darain* is meant difference in domicile in that one lives in the *Dār al-Islām* (Islamic territory) and other in the *Dār al-Ḥarb* (nonmuslim territory). The question arising now is whether a person living in the one territory inherits from the other living in the other. The majority of the *fuqahā'*, like *mālikis, shāfi'is and ḥanbalis* as well as the *zaidiyyah* and *ja'fariyyah* of the *shī'ah* rule that *ikhtilāf fī al-darain* is not a

---

1 *Sunan Abī Dāwūd*, Vol 2 p. 125.

2 *Al-Mughnī*, Vol 6 p. 295 - 296.
Aḥkām al-Tarikāt wa al-Mawārith, p. 93.

3 *Al-Tarikāt wa al-Waṣāyā*, p. 140 & 143.

prohibition to *mīrath* between Muslims.[1] They only rule that the religion of both parties succeeding one another must be the same.

The *ḥanafis* oppose this stating, as ibn 'Abidīn puts it, that two sovereign and independent nonmuslim States have separate sovereignties, power and administrative structures and war can erupt between them and the Muslims. In such a situation (separate sovereignties and the possibility of war), no *tawaruth* (mutual succession) can take place. The majority of the *fuqahā'* reject this reasoning, like Aḥmad of the *ḥanbalis*, who state that there is no text in the *Qur'ān*, nor *sunnah* nor *ijmā'* supporting this stand of ibn 'Ābidīn. In fact, Aḥmad says, the general meaning of the *āyāt al-mīrāth* in the *Qur'ān* supports *mīrāth* between inhabitants of the *dārain* (two domiciles) on condition that their *dīn* is the same. For as Muslims succeed to the *tarikāt* (estates) of Muslims irrespective of *dār* (domicile), this must also be applicable to nonmuslims.[2] This now brings us to the *murtadd*.

(4) <u>*Mīrath Al-Murtadd* (Succession Of The Apostate):</u>

The word *murtadd* is the noun agent of the arabic verb *irtadda* which means "to return to your former Faith after having

---

1 *Aḥkām al-Tarikāt wa al-Mawārith*, p. 98.

2 *Al-Tarikāt wa al-Waṣāya*, pp. 160 - 165.

been a Muslim."[1] It is also used for anyone leaving the fold of Islam. The *Qur'ān* seriously warns against *riddah* (apostasy) "*...and if any of you turn back from their Faith and die in disbelief, their deeds will bear no fruit in this life and in the Hereafter...*"[2] There is thus a complete break with the Faith of Islām when a Muslim apostatises. Since Islām is both Faith and system of life, *riddah*, in the Islamic concept, is more akin to treason against the State rather than pure personal religious apostasy as understood in other Faiths, especially Christianity. Since *tawāruth* is based on *tanasur* amongst Muslims, the *murtadd* from Islām severs that link as he becomes of the disbelievers and there is no *mirath* between them and Muslims.[3]

The *fuqahā'* differ on the ruling as to the *tarikah* of a *murtadd*. Abū Ḥanīfah rule that all his possessions during his period of his Islām is devolved upon his Muslim heirs and all those procured during his apostasy goes to the *bait al-māl*. The reason for this ruling, is that a *murtadd* is dead *ḥukman* (in terms of *shari'ah*) and thus his Muslim heir succeeds to that part of his *tarikah* acquired during his Islām. In his apostasy, the rule of prohibition of

---

1 *Qāmūs al-Muḥīt*, Vol 1 p. 304, *Al-Munjid*, 254 - 255.

2 *Al-Qur'ān*, Chapter 2: 217.

3 *Ahkām al-Tarikāt wa al-Mawārith*, p. 101.

tawāruth between Muslim and nonmuslim is applicable. This part of the *tarikah* is, thus, for the general Muslim public.

Abū Yusuf and Muḥammad of the *ḥanafis* rule that all the possessions of the *murtadd* including his period of apostasy is for his Muslim heirs. Their reasoning is that all the possessions of such a person will eventually be for the *bait al-māl* which will land in the hands of Muslims. The Muslim heirs have more right hereto due to familial relationship. They further contend that the Prophet (s.a.w) distributed the *tarikah* of the apostate from Islām, ʿAbd Allāh bin Ubai bin Salūl, after his death, to his Muslim heirs. ʿAlī did the same in the case of the apostate from Islam, Mustawwid al-ʿIjlī who was killed for apostasy. This is reported by ibn Masʿūd and Muʿād. This is also the view of ibn Musaiyib, ʿAṭā'a, al-Shaʿbī, al-Ḥakam, al-Awzāʿī and al-Thawrī.[1] Other *fuqahā'* like ibn ʿAbbās, Rabīʿah, Mālik, ibn Abi Lailā, Abu Thawr, al-Shāfiʿī and ibn Mundhir, rule that the possessions of the *murtadd* is for the *bait al-māl*. Another view of Aḥmad agrees with that of ʿAlī, namely that the Muslim heirs of the *murtadd* succeeds to his *tarikah*.[2]

---

1 *Bidāyah al-Mujtahid*, Vol 2 p. 350.
Al-Tarikāt wa al-Waṣāyā, p. 177 - 180.
Nail al-Awtār, Vol 6 p. 83.

2 *Al-Muḥallā*, Vol 9 p. 304.
Al-Mughnī, Vol 6 p. 300.
Bidāyah al-Mujtahid, Vol 2 p. 350.
Al-Mudawwanah al-Kubrā, Vol 3 p. 87.

The same rules, as above, generally, apply to the *zanādiqah* (sing. *zindiq* - atheists) and the *munāfiqun* (sing. *munāfiq* - hypocrites), the latter who show Islām in public, but are actually non believers at heart.[1] Mālik differs ruling that the *tarikah* of these people devolve upon their Muslim heirs.[2] A *murtadd* does not succeed to anyone's *tarikah*.[3] This applies when both the *zawjān* (married partners) apostatises. If only one of them apostatises after the *'aqd al-nikāḥ* had been enacted, but before consummation of the *nikāḥ*, the *nikāḥ* is immediately ended and no *mīrāth* takes place between the two as there is no *zawjiyyah*.

When apostasy takes place after consummation of the *nikāḥ*, Aḥmad has two rulings; one is of immediate ending of the *nikāḥ* and the second of waiting until the *'iddah* of divorce had ended and whoever dies of the parties during that time, does not succeed to the other's *tarikah*.[4] When the *zawjan* (the two spouses) apostatises together, there is no *tawāruth* between them whether they remain in the *Dār al-Islām* or migrate to the *Dār al-Ḥarb*. This is the view of Mālik, al-Shāfi'ī and Aḥmad. Abū Ḥanīfah

---

1 *Al-Mughnī*, Vol 6 p. 301.

2 *Al-Tarikāt wa al-Waṣāyā*, p. 181.

3 *Al-Muḥallā*, Vol 9 p. 304.

4 *Al-Mughnī*, Vol 6 p. 294.
Al-Tarikāt wa al-Waṣāyā, p. 184.

precludes *tawāruth* between the two in the *Dār al-Islām* but not in the *Dār al-Harb*.[1]

Should a *murtadd* return to the fold of Islam, the normal pattern of *tawāruth* resumes as the prohibition had been removed. The same rule applies when the *murtadd* reverts to Islam after the death of his *muwarrith* but before the distribution of the *tarikah*. This is the view of ʿUmar, ʿUthmān, Hasan bin ʿAlī, ibn Masʿūd, Jabir bin Zaid, Makḥūl, Qatādah, Ḥumaid, Ishāq and others. Other *fuqahā'* rule that if a *murtadd* reverts to Islām after the death of his *muwarrith*, he cannot succeed to the *tarikah* of his *muwarrith*. This is the ruling of ʿAlī, Saʿīd ibn Musaiyib, ʿAṭā'a, Ṭawūs, al-Zuhrī, Sulaimān bin Yasār, al-Nakha'ī, al-Ḥakam, Abū Zunādah, Abū Ḥanīfah, Mālik, al-Shāfiʿī and its the general ruling of the *fuqahā'* in *sharīʿah*. This is due to the Muslim and nonmuslim not succeeding to one another's *tarikah*[2] a previously reported in *ḥadīth* texts.[3]

1.5.7 **The Islamic Philosophy In *Mīrath*:**

Death is accepted, universally, as the end of the earthly sojourn and also the time of allotment of new ownership of possessions. In Islām, the person, while alive, is free to dispose of his belongings as

---

1 *Al-Mughnī*, Vol 6 p. 302.

2 *Saḥīḥ al-Bukhārī*, Vol 8 p. 194
Muwatta', Vol 2 p. 60.
Mukhtasar Saḥīḥ Muslim, p. 262.

3 *Al-Mughnī*, Vol 6 pp. 298 - 299.

he pleases provided it is in conformity with the *sharī'ah*. At death, the *Sharī's* law takes over and *mirath* takes place according to the laws laid down by Him. The deceased usually leaves relatives behind, sometimes many, and it may cause a problem in distribution of the *tarikah*. In this kind of situation, the pre-determined laws of *sharī'ah* is a help to the *muwarrith* as well as the heirs as they will know the fixed law that will be applicable.[1] This causes less problems in succession.

The economic significance of *mīrath* is that it is anti-capitalistic. The *muwarrith* may only dispose of one third of his entire estate freely for *wasaya* in expression of piety and virtue and the remaining two thirds must go to the prescribed heirs in prescribed shares as in *sharī'ah*. Since there could be many heirs, at times, the principle is that a larger number of people should benefit instead of only one or a few as is the case in certain nonmuslim situations where virtual absolute freedom of testation exists.[2] Distributive effects are generated by the inter-reaction of the systems of *nikaḥ* and *mīrath*. If the coefficient of the relationship between the levels of wealth of the parents is weak, the redistribution impact by *mirath* of all the children succeeding to the estates of both their father and mother increases the redistribution of wealth. "It is pointed out by K E Boulding that, if a person lives till age seventy and wealth is distributed across age barriers, approximately 1/70 of wealth will be distributed at death. If the out capital ratio is 3, then the

---

1 Galwash A A: *The Religion of Islam,* Cairo: al-Doḥa, al-Doha Modern Printing Press, 1963, undated, Vol 2 p. 66.

2 *Islamic Economics in Theory and Practice*, p. 182, *Economics in Islām,* p. 137.

zawj's wealth, through *mīrath*, will generate 3/70 of income annually which is approximately 4%".[1] This ratio may reach between 8 and 10% as older people are usually wealthier than the newly born.[2]

Islām, in its economic philosophy, is against centralisation of wealth as well as its concentration in a few hands. The *Qur'ān* states, "*What Allāh has bestowed on his Messenger (and taken away) from the people of the towns, belong to Allāh, to His Messenger, and to kindred and orphans and the needy and the wayfarer in order that it may not (merely) make a circuit between the wealthy among you.*"[3]

Further, Muslims are exhorted and commanded to pay annually a certain percentage on many kinds of possessions and wealth which was in their ownership for a full lunar year, from such possessions as ranging from gold and silver, to certain kinds of land produce, from production of mines to accumulated money accounts. This is called *zakāh*. Besides this, Islām exhorts to giving in the way of charitable causes and establishing ways and means as well as instances of virtue, goodness and righteousness. The *Qur'ān* refers to these issues. "*Alms are (only) for the poor, needy and those employed to administer (the alms), for those whose hearts have been (recently) reconciled to the Truth, for those in bondage (in order to render themselves free persons), for those in debt and for the wayfarer.*"[4] Also, "*..and in their wealth there is a*

---

1 *Lectures in Islamic Economics*, Jeddah, Islamic Development Bank, 1992, Article: "*Distributive Justice in Islām*" by Dr A Zarqa', pp. 150 - 151.

2 Ibid.

3 *Al-Qur'ān*, Chapter 59: 7.

4 Ibid, Chapter 9: 60.

due share for the beggar and the deprived...."[1] The virtue of charity is further praised "*...and for men and women who humble themselves and for men and women who give in charity...for them Allāh has prepared forgiveness and a great reward.*"[2] "*But if you remit it by way of charity, that will be best for you, if you but knew.*"[3]

The *mīrāth* pattern follows the philosophy of wide distribution, which it does in a framework which secures justice and fairness as well as seeing to the rights of all equitably within the mapped framework. Possessions and property have become highly individualised and families more of a social than an economic unit in modern industrialised societies. The tendency in this sphere is to leave the inheritance system unfettered and as free as possible from governmental rules and regulations. This necessitates giving a free hand in inheritance and bequests, which at times is harmful and disadvantageous to even near relatives of the deceased. An imbalance between individual freedom and responsibility and even fairness and justice then inevitably occurs. This facet is absent in *mīrāth al-Islāmī* (Islamic law succession). In fact, *mīrāth* can give the heirs a start in life which can be an asset in helping to solve the problem of under development and unemployment.[4] This in turn helps to improve social conditions and prevent anti-social behaviour and traits which any responsible government aims to achieve.

---

1 *Al-Qur'ān*, Chapter 51: 19.

2 Ibid, Chapter 33: 35.

3 Ibid, Chapter 2: 280.

4 *Islamic Economics in Theory and Practice*, 183 - 184.

As pointed out earlier, *mīrath* is not an independent subject itself, but rather a consequence of a previous situation, namely, *nikāḥ* and resultant *qarābah*.

There is a universal outcry against certain rules of *mīrath* due to females, at times, receiving half share of males. This is classed as sexist discrimination, nowadays. These critics look at *mīrath* partially or as a complete and independent branch of *sharī'ah*. This is a serious mistake. It is completely wrong to state that it is a permanent feature that females receive half share in *mīrath*. A female may, in certain circumstances, according to *sharī'ah* or juridical rulings, receive the entire *tarikah* or share equally with a male. This will be dealt with later on in this chapter. On the other hand, wives, mothers, daughters and sisters receive half the share of their male counter parts, not because they are females but because males are compelled by *sharī'ah* to provide for them, even, in the case of wives, if they are rich. This provision, called *nafaqah* includes *sukna* (lodgings), *kiswah* (clothing) and food and drink as well as medical care and education for the wives and children.

Sisters and daughters as well as other females, invariably become wives and receive *ṣadāq* (dowry) on marrying[1]. They determine what they want and *sharī'ah* had not prescribed to them herein. This remains their property as well as all gifts they receive during their *nikāḥ* and what they acquire by themselves as well as *tarikah* they might succeed to. Whatever they acquire of fixed assets remain theirs too. In addition to this, they must inherit from their husbands. If equal shares were to be given

---

1 *Al-Qur'ān*, Chapter 4: 4.

under these circumstances, an injustice will be done to males.

The rule, thus, in *mīrath* is that where a female is entitled to maintenance, she receives half the share of a male. If this issue is not found, then there is no discrepancy between the shares of males and females. This is a fair and just system. The *Qur'ān* says "*Allāh commands with justice, the doing of good and giving to kith and kin and He forbids indecent deeds, evil and rebellion.*"[1] *Mīrath* practically expresses this point.

1.5.8 ***Ahkām al-Mīrath*** **(Laws Of Succession)**

A) ***Ansibah al-Mīrath*** **(Shares In Succession):**

All fixed *ansibah* (sing *nasīb* - shares) are mentioned in the *Qur'ān*[2] and these are a half, a quarter, an eighth, a third, two thirds and one sixth.[3] The share of the *jadd* and *jaddah* is by *hadīth* text and *ijmā'* of the *sahābah*.[4] These shares are for the following persons of the *ashāb al-furūd* (persons with a fixed share) category. These are:

(i) ***Nisf al-Tarikah*** **- Half Of The Estate:**

- for the *zawj* when his *zawjah* dies and leaves no *walad* (child) whether male or female. *Walad* means a child from her present *zawj* or from a previous *nikāh*.
- for the *bint sulbīyyah* (own daughter) when she is the only child and you leave behind

---

1 *Al-Qur'ān*, Chapter 16: 90.

2 Ibid, Chapter 4: 11 - 12, 176.

3 Babu Saheb M H: *Al-Farā'id - The Law of Inheritance in Islām*, Singapore, al-Islam Publications, 1979, p. 32.
Al-Wajīz fi al-Mirāth, p. 10.
Al-Mawsū'ah al-Fiqhīyyah, Vol 3 p. 29.

4 *Sunan Abī Dawūd*, Vol 2 p. 161.
Subul al-Salām, Vol 3 pp. 99 & 100.
Jāmi' al-Usūl, Vol 9 pp. 608 - 609.

no *ʿaṣabah* (male residuaries) of the father.

- for the *bint al-ibn*, how lowsoever, when there is no *bint ṣulbiyyah* of the deceased nor any *ʿaṣabah*.
- for the *ukht shaqiqah* of the deceased when there is no *bint ṣulbiyyah*, nor *bint al-ibn*, how lowsoever, nor any *ʿaṣabah*.
- for the *ukht li abb* when there is no *bint ṣulbiyyah* nor *bint al-ibn*, how lowsoever, nor an *ukht shaqiqah*, nor *ʿaṣabah* to the deceased.[1]

(ii) ***Rubʿ al-Tarikah*** - **A Quarter Of The Estate:**

- for the *zawj* when the *zawjah* leaves a child male or female and no *ibn al-ibn* (son of the son), how lowsoever, or a *bint al-ibn* (daughter of the son) how lowsoever.
- for the *zawjah* when the *zawj* deceases and leaves no child as stated immediately above.[2]

(iii) ***Thumun al-Tarikah*** - **An Eighth Of The Estate:**

- for the *zawjah* or *zawjat* (wife or wives) when the *zawj* leaves a child.[3]

(iv) ***Thulth Al-Tarikah*** - **A Third Of The Estate:**

- for the *umm* when there are no *furuʿ* (descendants) of the deceased nor *ikhwah* (brothers or sisters) or only one brother or one sister of the deceased.

---

1 *Minhaj al-Muslim*, p. 472.
Al-Tarikat wa al-Waṣaya, p. 252.
Al-Fiqh al-Islami wa Adillatuhu, Vol 8 pp. 290 -291.

2 *Minhaj al-Muslim*, p. 472.
Al-Tarikat wa al-Waṣaya, p.252.
Muwatta' Malik, Vol 2 p. 48.

3 *Muwatta' Malik*, Vol 2 p. 48.
Bidayah al-Mujtahid, Vol 2 p. 339.
Minhaj al-Muslim, p. 473.

- for the *awlād al-umm* (uterine children - two and more) when the deceased leaves no *wālid* (father) nor a *walad* (a child, male or female), how lowsoever, nor *jadd ṣaḥīh*.[1]
- for the *jadd ṣaḥīh*, under certain circumstances, when found with *ikhwah al-mayyit* (brothers and or sisters of the deceased).[2]

(v) ***Thulthā Al-Tarikah*** - **Two Thirds Of The Estate:**

- for two or more *banāt ṣulbīyyah* and there are no *'aṣabah* of the deceased.
- for two or more *banāt al-ibn*, how lowsoever, when there is no *bint ṣulbiyyah* nor *'aṣabah* of the deceased.
- for two or more *akhawāt shaqīqāt* when there is no *bint ṣulbīyyah* nor *bint al-ibn*, how lowsoever nor *'asabah* of the deceased.
- for two or more *akhawāt li abb* when there is no *bint ṣulbīyyah* nor *bint al-ibn*, how lowsoever, nor *ukht shaqīqah* of the deceased.[3]

(vi) ***Sudus Al-Tarikah*** - **A Sixth Of The Estate:**

- for the *abb* when the deceased leaves a descendant, male or female.
- for the *umm* when the deceased leaves a descendant, male or female or the deceased leaves *ikhwah* (two or more brothers) or

---

1 *Muwatta' Mālik*, Vol 2 p. 49.
Minhāj al-Muslim, p. 473.
Al-Tarikāt wa al-Waṣāyā, p. 253.

2 *Minhāj al-Muslim*, p. 473.
Muwatta' Mālik, Vol 2 p. 52.
Al-Mawsū'ah al-Fiqhīyyah, Vol 3 p. 34.

3 *Al-Mawsū'ah al-Fiqhiyyah*, Vol 3 p. 37.
Al-Tarikāt wa al-Waṣāyā, p. 252.
Minhāj al-Muslim, p. 473.

akhawāt (two or more sisters) or a mixture of the two, two and more.

- for a single *akh li umm* or *ukht li umm* when the deceased leaves no *abb* nor a *walad* (a child, male or female), how lowsoever, nor *jadd ṣaḥīḥ*.
- for the *bint* or *banat al-ibn*, how lowsoever when there is a *bint ṣulbiyyah* with her or them and no *ʿasabah* of the deceased.
- for an *ukht shaqīqāh* when found with a *bint ṣulbiyyah* or *bint al-ibn*, how lowsoever, and there are no *ʿaṣabah* to the deceased.
- for the *ukht li abb* or more when found with an *ukht shaqiqah* in the absence of a *bint ṣulbiyyah* or *bint al-ibn*, how lowsoever or *ʿaṣabah* to the deceased.
- for the *jadd ṣaḥīḥ* when there is no *abb* to the deceased.
- for the *jaddad ṣaḥiḥah* or more when there is no *umm* to the deceased.[1]

It should be remembered that when we speak, later on, on these shares, it will mean the shares of the heirs of the deceased. Thus, hereafter, *umm* would mean mother of the deceased etc.

(1) <u>*Mirath al-Abb* (Succession Of The Father):</u>

The *abb* succeeds in the following cases:

- *mirath* by *farḍ* (fixed share). In this case he gets a sixth of the entire *tarikah*[2] if the deceased left a *farʿ warith* (descendant

---

1 *Al-Fiqh al-Islami wa Adillatuhu*, Vol 8 pp. 292 - 294.
Al-Tarikāt wa al-Waṣāyā, pp. 253.
Minhāj al-Muslim, p. 473.

2 by "entire" *tarikah*, hereafter, shall mean the *nett* estate after all expenses had been met in paying for the *tajhīz al mayyit* (burial expenses), payment of *duyun* (debts) and *waṣāyā* (legacies).

heir), whether male or female or an *ibn al-ibn* how lowsoever. The *Qur'an* states: "*For parents, a sixth share of the inheritance to each if the deceased left a child.*"[1] The word *walad* in the Quranic text is non definitive and, thus, includes both sexes.

- *mirath* by *farḍ* and *ta'ṣib* (residuary status). This is the case when the deceased leaves a female child, like the *bint ṣulbiyyah* or, in her absence, a *bint al-ibn*, how lowsoever, as the only heir of the descendant category. The division is first by *farḍ*; the *abb* receiving a sixth and the *bint* receiving a half. The shares out of 6 will be 1/6 for the *abb* and 3/6 for the *bint*, leaving 2/6 as a residue, which is called the *baqi* in *mirath*. This goes to the *abb* as the nearest *'asib* of the deceased by way of *ta'ṣib*. His *ta'ṣib* is from the *hadith* narrated by ibn 'Abbas: "*Give the due shares of the inheritance to its rightful heirs and what remains (of the estate) give it to the nearest male residuary.*"[2] He sometimes succeeds only by way of *ta'ṣib*. This case arises when the deceased leaves no heir whatsoever, save his *abb* and *umm*. In such a case the *umm* receives 1/3 of the *tarikah* and the *abb* succeeds to the residue which is 2/3 by way of *ta'ṣib*. The *Qur'an* states: "*If no child (is left by the deceased) and the parents*

---

1 *Al-Qur'an*, Chapter 4: 11.

2 'Abd al-Baqi M F: *Al-Lu'lu'u wa al-Marjan Fima Ittafaqa 'alaihi al-Shaikhan*, Kuwait, Ministry of Islamic Affairs, 1992, 2nd ed.,Vol 2 p. 395.
Mukhtaṣar Ṣahih Muslim, p. 262.
Al-Mawsu'ah al-Fiqhiyyah, Vol 3 p. 31.

are the (only) heirs, the mother has a third (of the estate)."[1] No direct mention is made of the *abb's* share and being the only other heir, succeeds to it. The logic here, in share value, is that the *abb* is responsible for the maintenance of his *zawjah*, the *umm*, of the deceased.[2]

(2) **Mīrāth al-Umm (Succession Of The Mother):**

The *umm* has three cases in *mīrāth*, all by way of *fard* and they are:

- a sixth share of the *tarikah* when the deceased leaves a descendant heir, whether male or female.[3] She also gets a sixth when the deceased left *ikhwah* (two and more brothers and or sisters of any degree).[4] There is a difference of opinion amongst the *fuqahā'* as to how many *ikhwah* (brothers and sisters) reduce her share from a third to a sixth.

  The majority of the *fuqahā'* rule that two *ikhwah*, whether only brothers or sisters or one of each, reduce the *umm* from a third to a sixth. Ibn 'Abbās and ibn Ḥazm rule three or more of them reduce the *umm's* share. The issue of dispute is the word *ikhwah*, which is plural of *akh* and the dual is *akhawān*.

---

1 *Al-Qur'ān*, Chapter 4: 11.

2 Ibn al-'Arabi A B: *Fatḥ al-Qadīr - al-Jami' Baina Fannai al-Riwāyah wa al-Dirāyah Min 'Ilm al-Tafsīr*, Beirut: Dār al-Fikr, 1983, Vol 1 p. 432.
Tashīl al-Fara'id, pp. 43 - 44.
Al-Mawsū'ah al-Fiqhīyyah, Vol 3 pp. 30 - 31.
Aḥkām al-Tarikāt wa al-Mawārīth, pp. 127 - 128.
Ḥawāshī al-Shaikh, Vol 6 p. 403.

3 *Al-Qur'ān*, Chapter 4: 11.

4 Ibid.

Ibn ʿAbbās and those agreeing with him, rule that three and more is plural, while the majority state that dual is a plural[1] (probably because it is not singular). The Quranic rule in this share of the *umm* is "*If the deceased left brothers (or sisters), the mother has a sixth...*"[2] The *zaidiyyah* agree with the majority ruling of *ahl al-sunnah.*[3] The *jaʿfarīyyah* has a striking division system for the *umm* in this case. They rule that the *abb* and *umm* are first category heirs and she takes the place of the *abb* at times. Thus, if she is the only heiress of the deceased and there is no surviving *zawj* nor descendant heir, male or female, how lowsoever, nor any *ikhwah* (brothers and or sisters), she succeeds to the entire *tarikah* just like an *abb* would.[4]

She gets a third of the entire *tarikah* when the deceased leaves only parents and no other heirs. She gets one third of the residue of the *tarikah* after the surviving *zawj's* share had been deducted. This is the *mas'alah al-gharāwīn* which occurs when a deceased leaves a *zawj*, an *umm* and an *abb*. In this case, the surviving *zawj's* share is first deducted, then from the residue, the

---

1 *Al-Muḥallā*, Vol 9 p. 258.
Al-Tarikāt wa al-Wasayā, p. 295.
Tafsīr ibn Kathīr, Vol 2 p. 214.

2 *Al-Qur'ān*, Chapter 4: 11.

3 *Aḥkām al-Tarikāt wa al-Mawārīth*, pp. 130 - 132.
Al-Qawānīn al-Fiqhiyyah, pp. 256 - 257.
Al-Tarikāt wa al-Wasāyā, p. 294.

4 *Al-Tarikāt wa al-Wasāyā*, p. 299.

umm gets a third and the final residue goes to the *abb* as the nearest *ʿāṣib*. This is the ruling of the majority of the *fuqahāʾ* and that of ʿUmar, ʿUthmān and one of ʿAlī's rulings, ibn Masʿūd and Zaid bin Thābit. This ruling is based on the *mīrāth* principle that the *umm* receives half the *abb's* share as he is responsible for her full maintenance. Thus, in the case of a *zawjah* deceasing, leaving her *zawj* and both her parents as only heirs, the division is 1/2 of the entire *tarikah* for the *zawj* as there are no descendant children. The *umm* receives a 1/3 of the remaining half which is 1/6 and the remaining 2/6 goes to the *abb*. Ibn Sīrīn allows the *umm* a 1/3 of the entire *tarikah* when the *zawjah* survives and not when the *zawj* survives.[1]

Ibn ʿAbbās and the *ẓahiriyyah* rule that the *umm* receives a third of the entire *tarikah* in both cases in this problem due to the general meaning of her share in the *āyāt al-mīrāth* in the *Qurʾān*.[2] The *jaʿfariyyah* again, in the case of the *umm* surviving a deceased and one of the *azwaj* (spouses) then the surviving *zawj* (spouse) receives his or her share from the entire *tarikah* and the *umm* a 1/3 of the entire *tarikah* also. The *umm* also gets the residue.[3]

---

1 *Tafsīr ibn Kathīr*, Vol 2 pp. 214 - 215.
Kitāb al-Furūʿ, Vol 5 p. 8.
Tabyīn al-Haqāʾiq, Vol 6 p. 231.

2 *Tafsīr ibn Kathīr*, Vol 2 p. 214.
Al-Muhallā, Vol 9 p. 260.
Āyāt al-Ahkām, Vol 2 pp. 46 - 47.

3 *Al-Tarikāt wa al-Wasāyā*, p. 299.

(3) ***Mīrath al-Jadd* (Succession Of The Grandfather:**

When we speak of the *jadd* in *mīrath* we mean the *jadd ṣaḥīḥ - abb al-abb* (true grandfather i.e father's father) only, how highsoever. The term *jadd* will only be used hereafter. The *jadd* is like the *abb* in *fiqh.*[1] The *fuqahā'* derived this meaning from the *Qur'ān* and other *sharī'ah* texts. "*Oh children of Ādam! Wear your best apparel to every place of worship.*"[2] Ādam is, thus, the great ancestral grandfather of all mankind. "*I follow the way of my fathers - Abraham, Isaac and Jacob...*"[3] The Prophet (s.a.w) reportedly said: "*Teach your children archery, children of Isma'īl, for your fathers were archers.*"[4] In the general pattern of *mīrath* of the *jadd*, he succeeds just as the *abb* (the father, who is his son), when the latter is not found and thus, succeeds to a sixth *farḍan* when the deceased i.e. his grandchild, deceases and leave a descendant heir, whether male or female, or a sixth *farḍan* and the residue by *ta'sīb* when the deceased leave only a *bint ṣulbīyyah* and no other heir nor *'aṣabah* or only by *ta'sīb* when there is only him and the *umm* of the deceased as heirs[5].

---

1 Al-Sarakhsī S D: *Kitāb al-Mabsūṭ*, Beirut: Dār al-Ma'rifah, Vol 29 p. 179.
Bidāyah al-Mujtahid, Vol 2 p. 343.

2 *Al-Qur'ān*, Chapter 7: 31.

3 Ibid, Chapter 12: 38.

4 *Al-Tarikāt wa al-Wasāyā*, p. 259.

5 *Al-Qawānīn al-Fiqhiyyah*, p. 257.
Al-Tarikāt wa al-Wasāyā, pp. 258 - 259.
Aḥkām al-Tarikāt wa al-Mawārīth, pp. 134 - 135.

There are, however, exceptions, when the *jadd* differs from the *abb* in *mirath*. This occurs when the *jadd* is found with the *umm* and one of the surviving *azwaj*. The *umm* receives a 1/3 of the entire *tarikah* and not a 1/3 of the remainder as is the case when she is found with the *abb*, her *zawj*, and one of the surviving *azwāj* (spouses).[1] If the heir found with the *jadd* is a *ṣahib al-farḍ*, this fixed share is first deducted, thereafter the *jadd* gets whatever is the greater, either 1/3 of the residue after the *ṣahib farḍ's* share had been deducted, or 1/6 of the entire *tarikah*. If, after deductions, only 1/6 remains of the *tarikah*, the *jadd* succeeds to it and the *ikhwah* are all excluded from the *tarikah*, save in the *mas'alah al-akdarīyyah* (the *akdariyyah* problem), which will be presented later on.[2]

(a) **<u>*Mirath* (Succession) Of The *al-Jadd* (Grandfather) With The *Ikhwah* (Brothers And Sisters Of The Deceased:</u>**

There is no Quranic or *sunnah* text on this form of *mīrath*. Ruling hereon is by *ijtihad* of the *ṣahābah*. There is agreement by the *fuqahā'* that the *jadd* excludes the *ikhwah* and *akhawāt li umm* (uterine brothers and sisters) when found with him as heirs[3].

As for the *ikhwah ashiqqa'* and *akhawāt shaqiqat* as well as the *ikhwah li abb* and *akhawāt li abb*, the senior *fuqaha'*, Mālik,

---

1 *Ahkām al-Tarikat wa al-Mawārith*, p. 135.

2 *Tashil al-Fara'id*, p.45.
Al-Qawānīn al-Fiqhīyyah, p. 257.

3 *Al-Mawsu'ah al-Fiqhiyyah*, Vol 3 p. 34.
Al-Tarikāt wa al-Waṣāyā, p. 256.
Al-Qawānīn al-Fiqhīyyah, p. 257.

al-Shāfi'i, Aḥmad, Abū Yusuf and Muḥammad al-Shaibāni of the *ḥanafis*, rule that the mentioned *ikhwah* and *akhawāt* are not excluded from the *tarikah* when they are found with the *jadd*[1]. Abū Ḥanīfah and some *shafi'is* rule that the *jadd*, like the *abb* excludes these *ikhwah* and *akhawāt* of the deceased, because he stands in his place.[2] Sharing Abū Ḥanīfah's ruling are ibn Jarīr al-Tabari, al-Muzani and Abū Thawr. It is also reported to be the ruling of Abū Bakr[3], ibn 'Abbās, ibn'Umar and others[4]. Mālik and those agreeing with him, quote the *āyah "..if there are brothers and sisters (they share); the male having twice the share of the female"*,[5] in support of their ruling. The above mentioned *ikhwah* and *akhawāt*, thus, have, a share, and cannot be denied their share. They also share the degree of *qarābah* with the deceased as the *jadd* is his *abb* and the *ikhwah* and *akhawāt* are his brothers and sisters.[6] Abū Ḥanīfah and those agreeing with him submit the following in proof of their ruling. Firstly, the *jadd* is called

---

1 *Fatḥ al-Qadīr*, Vol 1 p. 432.
Al-Tarikāt wa al-Waṣāya, p. 267.
Al-Qawānīn al-Fiqhiyyah, p. 257.

2 *Hawāshī al-Shaikh*, Vol 6 p. 412.

3 Al-Shafi'i M I: *Al-Umm*, Beirut: Dar al-Ma'arif, undated, Vol 4 p. 81.

4 *Al-Ikhtiyār*, Vol 5 p. 101.
Al-Tarikāt wa al-Waṣāyā, p. 266
Al-Jāmi' li Aḥkām al-Qur'ān, Vol 5 p. 68.

5 *Al-Qur'ān*, Chapter 4: 176.

6 *Al-Mawsū'ah al-Fiqhiyyah*, Vol 3 p. 33.

abb both in the *Qur'ān* and *sunnah* as well as taking the *ḥukm* of an *abb* in many *sharī'ah* laws. He must, thus, have the same standing as the *abb* in *mīrāth* also and must thus exclude all the mentioned *ikhwah* and *akhawāt*. Also, the *jadd* is the highest level of the family tree and the *ibn al-ibn*, the lowest. They, thus have the same degree of *qarābah* to the deceased, the *jadd* being the grandfather and the *ibn al-ibn* the grandson. There is *ijmā'* by the *fuqahā'* that the *ibn al-ibn*, excludes the *ikhwah* and *akhawāt* of the deceased and thus the *jadd* must also exclude them.

Secondly, the Prophet (s.a.w) said: "*Give the fixed shares of the estate to those meriting it and give what remains to the 'aṣib*".[1] The *jadd* is an *'aṣib* and is nearer in relation to the deceased than the *akh* or *ukht* as he is his *abb* which is stronger than *ukhūwwah* (being a brother or sister). He also succeeds to the *wilāyah* of the minor children of his deceased son as well as to never being excluded from the *tarikah* save by his son, the *abb*. The *ikhwah* and *akhawāt* on the other hand, are excluded from the *tarikah* by three persons namely, the *abb*, *ibn* and *ibn al-ibn*, how lowsoever, of the deceased. The *jadd* also succeeds by way of *farḍ* and *ta'ṣīb*, while the *ikhwah* and *akhawāt* succeed by way of *ta'ṣīb* only.[2]

---

1 *Al-Tajrīd*, Vol 2 p. 150
Jāmi' al-Usūl, Vol 9 p. 624
Mukhtaṣar Ṣaḥīḥ Muslim, p 262.

2 *Al-Mawsū'ah al-Fiqhiyyah*, Vol 3 p. 33.
Aḥkām al-Tarikāt wa al-Mawārīth, p. 138.

(b) **_Nasīb_ (Share) Of The _Jadd_ (Grandfather) With The _Ikhwah_ (Brothers and Sisters):**

This system is somewhat complex. There is no direct *sharī'ah* text, neither *Qur'ān* nor *sunnah* which prescribes the share of a *jadd* when found with the *ikhwah*. His share, is founded on rulings of the *sahābah* as stated previously.[1] The *fuqahā'* differ on this arrangement.

The best and accepted ruling of 'Alī is that the *jadd* receives the residue after the *farḍ* of the *akhawāt* had been given when they are found alone with the *jadd* as heirs. This is conditional that the residue is not less than one sixth of the entire *tarikah*. If he will get less than a sixth of the entire *tarikah*, then *muqāsamah* (coinheritance) is resorted to on condition that his share is not less than one sixth of the *tarikah*. If the *akhawāt* reduces the *jadd's* share to less than a sixth of the

---

1 *Muwatta' Malik* Vol 2 p. 52.
Al-Tahqīqāt al-Mardīyyah, pp. 132 - 133.

tarikah[1] when there is a *bint ṣulbiyyah* or *bint al-ibn*, with the *jadd*, as heirs then he is given a sixth of the *tarikah.*[2] If the *jadd* is found with an *akh shaqiq* or *akh li abb*, he is treated as one of them and *muqasamah* is resorted to on condition that he does not get less than one sixth[3].

Zaid bin Thabit, the acknowledged expert on *mirath* amongst the *sahābah*, and other senior *fuqaha'* of the *sahābah* deal with the *mirath* of the *jadd* with the *ikhwah* as follows: Zaid rules that the share of the *jadd* must not be less than one third of the *tarikah* in *muqasamah* with the *ikhwah*. This is due to Zaid making the *jadd* an *'aṣib* with the *ikhwah* and *akhawat* of the deceased, whether, in this case, there are only *ikhwah* or only *akhawat* or a mixture of both. Zaid further rules that if the *jadd* is found with the *ikhwah ashiqqa'* (full brothers), he is taken as a *shaqiq* as far as distribution is concerned or if he is

---

1 this is the case when the deceased leaves a descendant female heir, like a *bint ṣulbiyyah* (own daughter) or *bint al-ibn* (daughter of the son), how lowsoever, and an *ukht shaqiqah* (full sister) or *ukht li abb* (consanguine sister) or more. In this case the *akhawat* (sisters) becomes *'aṣabah* (residuaries) with the *bint ṣulbiyyah* (own daughter) or *bint al-ibn* (daughter of the son), how lowsoever, and these *akhawāt* (sisters) merit the residue, which will exclude the *jadd* (grandfather) from the *tarikah* (estate), so he is given 1/6 of the entire *tarikah* (estate) *fardan* (fixed share). See *Al-Tarikāt wa al-Waṣāyā*, p. 269.

2 *Al-Mawsū'ah al-Fiqhiyyah*, Vol 3 p. 34.
Al-Tarikāt wa al-Waṣāyā, p. 269.

3 *Al-Tahqiqat al-Mardiyyah*, p. 136.
Hawāshī al-Shaikh, Vol 6 p. 413.
Al-Tarikāt wa al-Waṣāyā, p. 269.
Ahkām al-Tarikāt wa al-Mawārith, p. 138.

found with *ikhwah li abb*, he is taken as one of them in the distribution but on condition that his share is not less than one third.[1] This is also the ruling of Mālik, Aḥmad, Abū Yusuf, Muḥammad al-Shaibānī.

Al-Shāfi'ī makes a further rule that if a *ṣahib farḍ* (heir with a fixed share) is found along with the *jadd* and the *ikhwah*, then the *jadd* has three options. He can either accept *muqāsamah* with the *ikhwah* or take a third of the remainder of the *tarikah* or take a third of the entire *tarikah*.[2] Ibn Qudāmah of the *ḥanbalis*, gives an example of this, stating that, if the *jadd* is found with *akhawān* (two brothers) or four *akhawāt*, he is given one third of the entire *tarikah* because *muqāsamah* will give him the same amount and one third of the entire *tarikah* will be the same. If they are less than the mentioned numbers, then a third of the entire *tarikah* is better for the *jadd*. If they are more than the specified numbers, then he gets a third which is the better option for him, whether these *ikhwah* are *ashiqqā'* or *ikhwah li abb*.[3]

'Abd Allah ibn Mas'ud, another senior *faqīh* of the *ṣaḥābah* and an authority on *mīrāth*, rules that the *jadd*, if found with

---

1 *Muwatta' Malik*, Vol 2 p. 52.
Al-Umm, Vol 4 p. 81.
Aḥkām al-Tarikāt wa al-Mawārith, pp. 139 - 140.

2 *Bidāyah al-Mujtahid*, Vol 2 p. 345.

3 *Al-Mawsu'ah al-Fiqhiyyah*, Vol 3 p. 34.
Al-Qawānin al-Fiqhiyyah, p. 257.

the *akhawat* only or with a descendant heir, becomes an *'aṣib* with them and succeeds to the residue of the *tarikah* on condition that it is not less than one third of the entire *tarikah*. If this residue is less than a third of the entire *tarikah*, he is given one third of the entire *tarikah*.[1] Ibn Mas'ud's ruling is based on the application of *mirath* rules stating that if a *jadd* is found with *banat al-mayyit* (daughters of the deceased), he gets a third of the *tarikah*. The same should apply when the deceased leaves no *banat* but only *akhawat*, especially since the rule is that the nearest to the deceased are stronger in contention for *mirath* than those further removed. The *banat* are, of course, nearer to the deceased than his *akhawat*.[2]

Two occurrences are excluded by Abu Hanifah in the succession of the *jadd*. These are where he takes the place of the *abb* and the case where diminishing shares[3] occur. In the case of the heirs being the *zawj*, *umm* and *jadd* of the deceased, the *umm* gets one third of the entire *tarikah*.[4] But if the *jadd* falls in the place of the *abb*, the *umm* receives a third of the residue of the *tarikah* after the share of the *zawj* had been deducted. The *jadd* then succeeds to the entire final residue of the estate

---

1 *Al-Tahqiqat al-Mardiyyah*, pp. 136 - 137. *Ahkam al-Tarikat wa al-Mawarith*, p. 139.

2 *Al-Mawsu'ah al-Fiqhiyyah*, Vol 3 p. 34.

3 this is called *al-'awl* and will be dealt with later in this thesis.

4 *Al-Wajiz Fi al-Mirath*, p. 13.

being the only *ʿaṣib*. When the heirs are the *zawjah*, *umm* and *jadd* of the deceased, in this case, according to Abū Ḥanīfah, the *umm* receives a third of the entire *tarikah*. Abū Yusuf rule that the *umm*, in this example, receives a third of the remainder of the *tarikah* in both situations mentioned by Abū Ḥanīfah. This is according to the ruling of Abū Bakr. Ahl al-Kūfah also reported this from ibn Masʿūd. Ahl al-Baṣrah reported from ibn ʿAbbās that in the case of the heirs being the *zawj*, *umm* and *jadd* that the *zawj* get one half (as there are no children) and the rest is equally divided between the *umm* and *jadd*.[1]

(4) ***Mīrāth al-Jaddāt*** **(Succession Of The Grandmothers):**

Jaddāt (grandmothers) are of two kinds, namely, *jaddāt ṣaḥīḥah* (true grandmothers) and *jaddāt fāsidah* (untrue grandmothers). The *jaddat ṣaḥīḥah* are those grandmothers whose *nasab* to the deceased contains only females, or she is linked to a *ṣāhib al-farḍ* or an *ʿaṣib*, like the *umm al-umm* (mother of the mother) and the *umm al-abb* (mother of the father). The *jaddah fāsidah* is the grandmother that is linked in *nasab* to a person other than an *ʿaṣib* or *ṣahib al-farḍ*.[2] Hereafter, the *jaddah ṣaḥīḥah* will be termed *jaddah* only.

---

1 *Al-Mawsūʿah al-Fiqhiyyah*, Vol 3 pp. 34 - 35.

2 *Al-Wajīz Fī al-Mīrath*, p. 20.
Tashīl al-Farāʾid, p. 54.

4(a) **Nasib Jaddat al-Sahihah (Share Of The True Grandmothers):**

There is no text in the *Qur'an* on the share of the *jaddah*. Her share is established by *sunnah mashhurah* (known *sunnah*). Ibn Buraidah narrated that the Prophet (s.a.w) gave the *jaddah* a sixth (of the estate) when there was no mother (to the deceased).[1] Qubaisah bint Dhu'aib narrated that Abu Bakr was approached by a *jaddah* requesting her share of the *tarikah*. Abu Bakr informed her that there was nothing about her in the *Qur'an*, nor, to his knowledge, in the *sunnah*. On enquiry, Mughirah bin Shu'bah and Maslamah al-Ansari testified that the Prophet (s.a.w) awarded the *jaddah* a sixth.[2] There is *ijma'* by the *sahabah* as well as the *salaf* (early scholars of *shari'ah*) and the *khalaf* (later scholars of *shari'ah*) herein.[3] The *jaddah* is, thus, of the *ashab al-furud* while the *jaddah fasidah* is of the *arham*.

The *jaddah* has two cases of *mirath*. Firstly, when she succeeds by way of *fard*, in which case she inherits a sixth.[4] This is the share for a single *jaddah* or more,

---

1 *Sunan Abi Dawud*, Vol 1 p. 121.
Jami' al-Usul, Vol 9 p. 609.
Nail al-Awtar, Vol 6. p. 67.
Fiqh al-Mawarith, Vol 1 p. 49.

2 *Nail al-Awtar*, Vol 6 p. 67.
Jami' al-Usul, Vol 9 pp. 608 - 609.
Al-Mawsu'ah al-Fiqhiyyah, Vol 3 p. 35.
Muwatta' Malik, Vol 2 p. 54.

3 *Fath al-Qadir*, Vol 1 p. 433.
Al-Mawsu'ah al-Fiqhiyyah, Vol 3 p. 35.
Al-Tahqiqat al-Mardiyyah, Vol 1 pp. 95 - 96.

4 *Hawashi al-Shaikh*, Vol 6 p. 405.

if they all qualify, in the latter case, they will share equally in a sixth. The *jaddah* can be from the mother's side, like *umm al-umm* (mother's mother) or from your father's side, like *umm al-abb* (mother of your father) or a *jaddah* who is from both sides like the *jaddah* of both your parents, in which case, your *umm* and *abb* are cousins and granddaughter and grandson of one grandmother. The general rule is that if there is more than one *jaddah*, the nearest exclude the furtherest removed from the deceased.[1]

The *fuqahā'* differ on the issue of *qūwwah al-qarābah* (strength of relationship) of the *jaddah* and her share under such circumstances. Abū Yusuf of the *hanafis* rule that if there are *jaddatān* (two grandmothers) and one is related to both the mother's and father's side, and the other only related to one side, they share the sixth equally. This is also the more correct ruling of the *shāfi'īs*[2] and one ruling of Mālik. The reason being that a new category of *jaddah* is not created by relationship to two sides i.e. maternal and paternal sides.

Muḥammad, Zufar and al-Ḥasan bin Ziyād of the *hanafis* and the minority view of the *shāfi'īs* and the *ḥanbalis*, state that in the case mentioned, the *jaddah* with the double relationship receives twice the

---

1 *Tashīl al-Farā'id*, p. 45.
Al-Ikhtiyar, Vol 5 p. 104.
Fiqh al-Mawārīth, Vol 1 p. 375.

2 *Al-Tahqiqat al-Mardiyyah*, p. 104.
Fiqh al-Mawārīth, Vol 1 p. 384.

share than a *jaddah* with only one relationship to the deceased. The sixth is, thus, divided into three equal parts; two parts for the *jaddah* with double relationship to the deceased and one for the *jaddah* with one relationship to the deceased.[1] This is based on the rule that if a person has more than one cause for inheritance, he succeeds to both, like when a *zawjah* deceases leaving her *zawj* who is also her *ibn ʿamm shaqiq* (full paternal cousin). In this case the *zawj* receives half of the *tarikah* as there are no children and the residue as the only *ʿasib*. The *jaddah* with a double relationship resembles this case and the rule is applied to her.[2]

In the second case of the *jaddah*, the mother of the deceased excludes all the *jaddat* from the *tarikah* of any of her children, whether the *jaddah* is *abawiyyah* (paternal) or *umamiyyah* (maternal). This is due to no text existing where both they and the *umm* succeed together.[3] Also because they relate to the deceased through the mother and in the former i.e. *jaddah abawiyyah* because they are like the former. In reality, the *jaddāt abawiyyah* are weaker than the *jaddāt umamiyyah* as is apparent in *hadānat* where they come after the *jaddāt*

---

1 *Al-Taḥqiqat al-Mardiyyah*, p. 105.
Fiqh al-Mawārith, Vol 1 p. 383.
Al-Mughni, Vol 6 p. 210.

2 *Al-Mawsuʿah al-Fiqhiyyah*, Vol 3 p. 35.
Fiqh al-Mawārith, Vol 1 p. 385.

3 *Ahkām al-Tarikāt wa al-Mawārith*, p. 145.

umamiyyah who precede them. The *jaddat abawiyyah* are excluded from the *tarikah* by the *abb* of the deceased.[1] This is the ruling of 'Uthman, 'Ali, Zaid bin Thabit and others while 'Umar, ibn Mas'ud and Abu Mas'ud, ibn Sirin and al-Hasan allow the *jaddat abawiyyah* of the deceased to succeed along with the *abb*. They quote ibn Mas'ud narrating that the Prophet (s.a.w) gave the *umm al-abb* a sixth as an heir with the *abb* being present.[2] The rule is that the near *jaddat* in *qarabah* exclude the further removed ones irrespective of which side the near *jaddat* are.[3] This is one of the rulings of Zaid bin Thabit as well as the that of the *hanafis*. The other view of Zaid is that the near *jaddat abawiyyah* and the further removed *jaddat umamiyyah* are taken as succeeding *jaddat*. Both Zaid's views are quoted in *shafi'i* works, but the more correct *shafi'i* ruling is that the near *jaddat abawiyyah* do not exclude the far removed *jaddat umamiyyah*. The first quoted ruling of Zaid is the ruling of Malik, the more correct ruling of al-Shafi'i and its the ruling of Ahmad.[4]

---

1 *Al-Tarikat wa al-Wasaya*, p. 305.

2 *Al-Mawsu'ah al-Fiqhiyyah*, Vol 3 pp. 35 - 36.
Sunan al-Tirmidhi, Vol 3 p. 275.
Al-Mughni, Vol 6 p. 211.

3 *Al-Tarikat wa al-Wasaya*, p. 305.

4 *Ahkam al-Tarikat wa al-Mawarith*, pp. 145 - 147.
Al-Mawsu'ah al-Fiqhiyyah, Vol 3 p. 36.
Fiqh al-Mawarith, Vol 1 pp. 375 - 380.

There are views of the *fuqahā'* on how many *jaddāt* can succeed to the 1/6 allotted, like Malik limiting it to two (paternal and maternal grandmothers only), Ahmad to three etc.[1]

(5) **<u>*Mīrāth al-Zawjain* (Succession Of The Husband And Wife):</u>**

Their *mīrāth* is confirmed by *Qur'ān*. *"In what your wives leave, your share is a half if they leave no child; but if they leave a child, you get a fourth, after payment of (their) legacies and debts. In what you leave, their (wives') share is a fourth if you leave no child, but if you leave a child, they get an eighth, after payment of (your) legacies and debts."*[2] The two, thus, succeed to one another's *tarikah* by *farḍ*.

When the *zawjah* has no descendant heir, like an *ibn*, how lowsoever, or *bint* (daughter), irrespective if such a descendant heir is from the *nikāḥ* with the surviving *zawj* or from a previous *nikāḥ*, the surviving *zawj* receives one half of the entire *tarikah*.[3] He will also receive this amount if the *zawjah mutawaffā* (deceased wife) leaves a *bint al-bint* (daughter of the daughter) or an *ibn al-bint* (son of the daughter) as these are of the *arḥām* and not *aṣḥāb al-farḍ* nor are they *'aṣabah*. If the *zawjah mutawaffā* leaves a

---

1 *Al-Tahqīqāt al-Marḍiyyah*, Vol 1 p. 99.
Bidāyah al-Mujtahid, Vol 2 p. 347.
Al-Mughni, Vol 6 p. 207.

2 *Al-Qur'ān*, Chapter 4: 12.

3 *Muwaṭṭa' Mālik*, Vol 2 p. 48.
Tabyīn al-Haqā'iq, Vol 6 p. 233.
Minhāj al-Tālibīn, p. 85.

descendant child, whether one or more, the surviving *zawj* receives a quarter of the entire *tarikah*.[1] The surviving *zawjah* receives a quarter of the entire *tarikah* of the *zawj mutawaffā* (deceased husband) if he leaves no child. The same qualification of a child, as for the *zawjah mutawaffā* (deceased wife) applies here.[2] In his case the descendant heir must be a *walad shar'ī* (legitimate child) to him. The presence of a *bint al-bint* (daughter of the daughter) or *ibn al-bint* (son of the daughter) of the *zawj mutawaffā* does not affect the share of the surviving *zawjah*.

In the case where a child is left by the *zawj mutawaffā*, the surviving *zawjah* receives an eighth of the entire *tarikah*.[3] If there are more than one *zawjah*, they share in the mentioned quarter or eighth of the entire *tarikah* as the *Qur'ān* did not distinguish between one or more *zawjāt* in their shares as it did with the *banat* and *akhawāt*.[4] The *tawāruth* of the *zawjān* is affected by certain situations, at times, which will be dealt with now.

---

1 *Tafsīr ibn Kathīr*, Vol 2 p. 217.
Bidāyah al-Mujtahid, Vol 2 p. 240.
Al-Mawsū'ah al-Fiqhiyyah, Vol 3 p. 36.

2 *Muwaṭṭa' Mālik*, Vol 2 p. 48.
Tabyīn al-Haqā'iq, Vol 6 p. 233.

3 *Tafsīr ibn Kathīr*, Vol 2 p. 217.
Bidāyah al-Mujtahid, Vol 2 p. 240.
Al-Qawānīn al-Fiqhiyyah, p. 256.

4 *Tafsīr ibn Kathīr*, Vol 2 p. 217.
Al-Jāmi' li Aḥkām al-Qur'ān, Vol 5 p. 76.
Tafsīr al-Nasafī, Vol 1 p. 212.

(a) ***Shurut Mirath Bi al-Zawjiyyah*(Conditions Of Succession By Marriage):**

The first *shart* is that the *nikah* must be enacted correctly according to the *ahkam al-nikah* (laws of marriage).[1] Thus, if a *nikah* is ruled *batil* (void) or *fasid* (voidable) and one of the *zawjan* dies, then there is no *tawaruth* between them, even if they lived together for years. This is the ruling of Abu Hanifah, al-Shafi'i and Ahmad. Malik differs ruling that if the *fasad* (voidability) of the *nikah* is agreed upon, like a man marrying a fifth wife whilst being married to four or marrying his *ukht bi al-rada'ah* in ignorance, then there is no *tawaruth* between them, whether one of them dies before or after the division of the *tarikah* or before annulment of the *nikah*. In the case of *fasad* of the *nikah* being a point of disagreement between the *fuqaha'*, like a woman marrying without a *wali*, and she is *'aqilah* and *mukallafah* or the like cases, then, if one of the *zawjan* dies after the annulment of the *nikah*, there is no *tawaruth* between them. If death takes place before annulment of the *nikah*, *tawaruth* takes place due to a *nikah* existing in the eyes of those who see it that way. This ruling applies to the parties who were unaware that their *nikah* was *fasid* (voidable).

The second *shart* is that the *zawjiyyah* must still exist intact at death of one of the *zawjan*. This *zawjiyyah* can be existent

---

1 *Athar 'Aqd al-Zawaj*, p. 110.
Al-Tarikat wa al-Wasaya, p. 100.

haqiqatan (in reality an existing one) or existing *hukman* (existing in law) like a *zawj* divorcing his *zawjah talaq raj'i* (revocable divorce) and dies during her *'iddah al-talaq* (period of stay of divorce). In both these cases the *zawjah* succeeds to her share of the *tarikah* of her *zawj*. If he dies after her *'iddah al-talaq*, she does not succeed to his *tarikah* as *zawjiyyah* is non existent. If the *zawj* divorces her *talaq ba'in* (irrevocable divorce), irrespective of the grade, she does not succeed to his *tarikah* when he dies during her *'iddah al-talaq* (period of stay of divorce) or thereafter.[1]

(b) **Consequences Of *Talaq al-Far* (Divorce During Fatal Illness:**

Talaq al-far means divorce given by a *zawj* when he has *marad al-mawt* (fatal sickness from which he dies) intending thereby to prohibit his *zawjah* for succeeding to his *tarikah*.[2] *Hanafis* rule that if a *zawj* divorces his *zawjah talaq ba'in* during *marad al-mawt*, then she succeeds to her share of his *tarikah* when he dies during her *'iddah*. If he dies after the expiration of her *'iddah al-talaq*, she does no succeed to his *tarikah* as there is no *zawjiyyah* present.[3] Excluded from this kind of *talaq* is the *talaq* given by him

---

1 *Al-Mawsu'ah al-Fiqhiyyah*, p. 37.

2 Taj A R: *Ahkam al-Ahwal al-Shakhsiyyah Fi al-Shari'ah al-Islamiyyah*, Cairo, Dar al-Kitab al-'Arabi, 1955, p. 283.
Al-Shari'ah al-Islamiyyah, p. 298.

3 *Al-Mabsut*, Vol 30 p. 60.

before his illness but he dies during her *'iddah al-ṭalāq*.

However, the *zawj* in *maraḍ al-mawt* does not succeed to his divorced *zawjah's tarikah* should she die during her *'iddah al-ṭalāq*. The reason why *hanafis* allow the *zawjah muṭallaqah* (divorced wife) to succeed to the *tarikah* of her *zawj*, during her *'iddah* of *ṭalāq bā'in* is that *'iddah* is a consequence of the *nikāḥ* and to retaliate against his intended criminal act. If the *zawjah* divorces herself from her *zawj* (*ṭallaqa nafsahā*) and he approves of it (*ajāzahu*), while he is in his *maraḍ al-mawt* and he dies in that state, she does not succeed to any of his *tarikah* because she initiated *ṭalāq* (divorce) freely by herself and he approved it.[1]

Mālik again rules that if a *zawj* divorces his *zawjah ṭalāq ba'in* while in *maraḍ al-mawt*, she succeeds to his *tarikah* whether he dies during her *'iddah al-ṭalāq* or after its completion, or whether she remarries or does not remarry. This ruling is based on *sadd al-dhirā'ah* (closing the loophole rule in jurisprudence) and *raddan li maqāsidihi al-sai'* (in retaliation to his evil intention). This is also the ruling of al-Laith bin Sa'd, *shaikh* of the *fuqahā'* in Egypt during his time.[2]

---

1 *Al-Ṭalāq wa al-Wiṣāyah*, pp. 277 - 278.
Al-Sharī'ah al-Islāmīyyah, pp. 298 - 299,
Al-Tarikāt wa al-Wasāyā, pp. 102 - 103.

2 *Muwatta' Mālik*, Vol 2 p. 93
Fiqh al-Sunnah, Vol 2, p. 279.
Al-Tarikāt wa al-Wasāyā, p. 104.

The *shāfi'īs* have two rulings in this case. One ruling rule the *ṭalāq maraḍ al-mawt*, of the *ba'in* (irrevocable) category as valid and severs the cause of *tawaruth* between the *zawjān*. This kind of *ṭalāq*, thus, resembles *ṭalāq fi al-ṣiḥah* (divorce in a healthy state). Al-Shirāzī says this is the correct *shāfi'ī* ruling. The second *shafi'ī* ruling grants her the right of *tawāruth* if she is irrevocably divorced by the *zawj* during his *maraḍ al-mawt* on condition that he dies during her *'iddah al-ṭalāq* and subject to her not initiating the *ṭalāq* and that she is a Muslimah. The *ṭalāq maraḍ al-mawt* stands as executable when the *zawj* recovers from the sickness it was feared he would die from.[1]

The *ḥanbalis* rule that the *zawjah* divorced by her *zawj* during his *maraḍ al-mawt* succeeds to her share of his *tarikah* if he dies during her *'iddah al-ṭalāq* or after the expiry thereafter on condition that she does not remarry.[2] He does not succeed to her *tarikah* when she dies during her *'iddah al-ṭalāq* of his *maraḍ al-mawt*. Another *ḥanbalī* ruling states that she only succeeds if he dies during her *'iddah al-ṭalāq*.[3]

The *zaidiyyah* rule that *ṭalāq maraḍ al-mawt* as valid and the *zawjah* does not succeed to the *tarikah* of her *zawj* when he

---

1 *Al-Tarikāt wa al-Waṣāya*, p. 105.
Al-Wilāyah wa al-Wiṣāyah, p. 279.

2 *Al-Wilāyah wa al-Wiṣāyah*, p. 282.
Fiqh al-Sunnah, Vol 2 p. 279.

3 *Al-Mughnī*, Vol 6 pp. 329 - 330.

dies in her *'iddah*. Their reasoning is that their *tawaruth* is based on *nikah sahih* and when this is not found, they cannot succeed to one another's *tarikah*. The *ja'fariyyah* agree with the *hanbalis* that an irrevocably divorced woman so divorced by her *zawj* during his *marad al-mawt*, succeeds to his *tarikah* on condition that she does not remarry. This implies that she succeeds to his *tarikah*, whether he dies during her *'iddah al-talaq* or not.[1] The meaning of "her not remarrying", in this form of *talaq* (divorce) implies that she should be an unmarried widow when the *qismah* (division and distribution) takes place and not that she remain unmarried until she dies.

The *zahiriyyah* rule no *mirath* to the *zawjah* divorced by her *zawj* during his *marad al-mawt*, even if he states he is doing so to prevent her form succeeding to is *tarikah*. Their argument is based on the rule that a *nikah* is ended by *talaq ba'inah* and as such no *tawaruth* can take place between them. The *mutallaqah raj'iyyah* (woman divorced revocably), succeeds to the *tarikah* her *zawj* if he dies during her *'iddah al-talaq* and not after it.[2]

The issue of *talaq al-far* or *talaq marad al-mawt* is not mentioned in the *Qur'an*. The ruling is derived from the ruling of the *sahabah*. 'Abd al-Rahman al-'Araj narrated that the *khalifah* 'Uthman bin 'Affan gave the wives of ibn Mukmil their share of his

---

1 *Al-Tarikat wa al-Wasaya*, pp. 105 - 110.

2 *Al-Muhalla*, Vol 10 p. 218.
Al-Tarikat wa al-Wasaya, p. 112.

tarikah when he divorced them during his *maraḍ al-mawt*. Rabī'ah bin Abī 'Abd al-Rahmān narrated that the *zawjah* of 'Abd al-Rahman al-'Awf told him that she was divorced irrevocably (*al-batt*) by him during his *maraḍ al-mawt*. 'Uthmān gave her her share of his *tarikah*. 'Uthmān did the same with the *zawjah* of Ḥabban who divorced her irrevocably during his *maraḍ al-mawt*.[1] 'Ā'ishah narrated that the *mar'ah al-fārah* (woman divorced by her husband irrevocably during his fatal sickness), succeeds to her share of his *tarikah* as long as he dies during her *'iddah al-ṭalāq*.[2]

The issue of *ṭalāq bā'in* in *maraḍ al-mawt* of the *zawj* should, according to the principles of *fiqh*, preclude a *zawjah* from succeeding to his *tarikah*, for an *'ajnabiyyah* does not succeed to the *tarikah* of an *'ajnabi*. By *qiyās*, the irrevocably divorced woman is strange to her *zawj* and he to her as the *nikaḥ* had ended by *ṭalāq*. However, resort is made to finer *qiyās*, namely, *al-istiḥsān* to avoid the sinful situation *qiyās* would bring forth; a situation where a sinful act denies another person of a right ordained by *Allāh* in the *Qur'ān*. The *Qur'ān* states: "*...be just, that is next to piety...*"[3], and "*Allāh commands with justice, the doing of good and giving to kith and kin and He forbids*

---

1 *Muwatta' Mālik*, Vol 2 p. 93.
Jāmi' al-Uṣūl, Vol 9 p. 614 - 615.
Al-Mughni, Vol 6 p. 330.

2 *Al-Tarikāt wa al-Waṣāyā*, p. 102.

3 *Al-Qur'ān*, Chapter 5: 8.

all indecent deeds, evil and rebellion..."[1] Needless to say, *talaq al-far* flies in the face of these Quranic principles.

(6) *Mirath al-Banat* (Succession Of The Daughters):

The *mirath* of the *banat* is mentioned in the *Qur'an*. "*Allah (thus) directs you as regards your children's (inheritance): to the male a portion equal to that of two females; if only daughters, two or more, their share is two thirds of the inheritance. If only one (daughter), her share is a half...*"[2] This *ayah* shows that the *banat* have three cases in *mirath*.

Case 1:

In this case the *banat* are *'asabah* with the *abna'* (sons) of the deceased. They share the *tarikah* of the deceased in the ratio of two to one in the favour of the *abna'*, the latter of which are taxed with maintenance of the *banat*. Their shares, in this case, are distributed to them after the *ashab al-furud* had received their due shares. If there are no *ashab al-furud*, the *banat* and *abna'* of the deceased receive the entire *tarikah* in the portions mentioned.[3]

Case 2:

In this case, the deceased leaves *bintan sulbiyyatan* or *banat sulbiyyah* and there is no *ibn* or *abna'* of the deceased with them. In this case, the *banat* sulbiyyah share equally

---

1 *Al-Qur'an*, Chapter 16: 90.

2 Ibid, Chapter 4: 11.

3 *Al-Qur'an*, Chapter 4 : 11.
Muwatta' Malik, Vol 2 p. 47.
Bidayah al-Mujtahid, Vol 2 p. 338.
Tashil al-Fara'id, pp. 56 - 57.

in two thirds of the entire *tarikah*.[1] There is *sunnah* in this distribution in that Sa'd bin Rabi' was martyred in the Battle of *Uhud* and his brother took all his possessions giving nothing to Sa'd's *zawjah* nor his *banāt*. She complained to the Prophet (s.a.w) who sent her away as there was not yet revelation on the matter. When the revelation came, he (s.a.w) called them all in and ruled that the *banāt* share equally in two thirds of the *tarikah*, to the widow of Sa'd an eighth and the rest to Sa'd's brother.[2]

On this issue there is difference of opinion between the majority of the *fuqahā'* and ibn 'Abbās. All the *ṣaḥābah* and the majority of the *fuqahā'*, save ibn 'Abbās, rule that *bintān ṣulbiyyatān* or more, share equally in two thirds of the entire *tarikah* when there is no *ibn* or *abnā'* of the deceased with them. Ibn 'Abbās rules that a *bint ṣulbiyyah* or *bintān ṣulbiyyatān* share in a half of the entire *tarikah*. Ibn 'Abbās maintains that the *āyah* states "*..and if they are more than two - fawqa ithnatain - they share in two thirds of the (estate) and if there is (only) one, she receives a half..*"[3] Thus, according to ibn

---

1 *Al-Taḥqiqat al-Mardiyyah*, p. 78.
Minhāj al-Talibin, p. 85
Bidāyah al-Mujtahid, Vol 2 p. 338.
Al-Mughnī, Vol 6 p. 172.

2 *Sunan Abī Dāwūd*, Vol 2 p. 120.
Sunan al-Tirmidhī, Vol 3 p. 280.
Al-Jāmi' li Aḥkām al-Qur'ān, Vol 5 p. 57.

3 *Al-Qur'ān*, Chapter 4: 11.

'Abbās, the *bintān sulbiyyatān* share in a half of the *tarikah* of their parents.[1]

The majority say that the word *fawqa* (above) in the said *āyah* is *za'idah* (superfluous) as in another *ayah* (verse) "*...smite them above (fawqa) their necks..*"[2], which actually means,"smite their necks".[3] The majority further argue that since, in the case of an *ibn* and *bint*, the former gets two thirds and the latter a third, *bintān sulbiyyatān* must get two thirds.

Case 3:

If the deceased left only a *bint sulbiyyah*, and no *ibn* or *abnā'*, she receives a half of the entire *tarikah* due to the *āyah* "*...and if there is (only) one daughter, she gets a half...*"[4]

(7) *Mirath Banāt al-Ibn* (Succession Of The Daughters Of The Son:

The *bint al-ibn* is she who relates to the *abb* in a direct male line irrespective of distance from the deceased, which, in this case, is the *abb*. Thus, the *bint al-ibn* and the *bint ibn al-ibn* (daughter of the son of the son), all fall in this category of *banat al-ibn* (daughters of the son). The *bint al-ibn* has six cases in *mirath*. Cases one to three is

---

1 *Al-Mawsū'ah al-Fiqhiyyah*, Vol 3 p. 38.
Bidāyah al-Mujtahid, Vol 2 p. 338.
Al-Tarikāt wa al-Waṣāyā, p. 330.

2 *Al-Qur'an*, Chapter 8: 12.

3 *Al-Tarikāt wa al-Waṣāyā*, p. 331.

4 *Al-Qur'an*, Chapter 4: 11.
Kitāb al-Furū', Vol 5 p. 10.
Al-Mughni, vol 2 p. 172.
Nihāyah al-Muhtāj, Vol 6 p. 15.

when she stands in the place of the *bint ṣulbiyyah* when the latter is not found. Thus, in the absence of a *bint* or *banāt ṣulbiyyah* of the deceased, if there is a mixture of *ibn al-ibn* and *bint al-ibn*, they succeed by *ta'ṣib* and share in the ratio of a male receiving twice the share of a female in that part of the *tarikah* that remains, after the *aṣḥāb al-furuḍ* had their shares given to them. If there are no *aṣḥāb al-furuḍ*, then they succeed to the entire *tarikah* in the ratio mentioned. If there are two or more *banāt al-ibn*, they share equally in two thirds of the entire *tarikah* and when there is only a *bint al-ibn*, she receives a half of the entire *tarikah*. *Mirath* of the *bint al-ibn* is conditional that there is no heir, male or female, nearer to the deceased. In this case, the *bint al-ibn* does not fill the place of the *bint ṣulbiyyah*, like when an *ibn ṣulb* of the deceased is found with her.[1] The *bint al-ibn*, when found with the *bint ṣulbiyyah* has the following three cases.

<u>Case 1:</u>

The *bint al-ibn*, if found with a *bint ṣulbiyyah* receives a sixth of the *tarikah* to complete two thirds of the *tarikah* allotted for *banāt*, as the *bint ṣulbiyyah* will receive a half. This rule is conditional that there is no heir who will make the *bint al-ibn* an *'aṣabah* with her. If found, she, the *bint al-ibn*, shares with that heir by way of *ta'ṣib* only and not by *farḍ*.

---

1 *Bidayah al-Mujtahid*, Vol 2 p. 338.
Al-Mughnī, Vol 6 pp. 172 - 173.
Muwatta' Mālik, Vol 2 p. 47.

Case 2:

If a deceased leaves *bintān ṣulbiyyatan* and a *bint al-ibn* or *banāt al-ibn*, then the *bint al-ibn* or *banāt al-ibn* are excluded from the *tarikah* as the two thirds allotted for *bintān* (two daughters) have been exhausted. This is the ruling of the majority of the *fuqahā'*. Ibn ʿAbbās rule that if *bintān ṣulbiyyatān* are found long with a *bint al-ibn* or *banāt al-ibn*, then the latter will receive a sixth if there is one *bint al-ibn* or they will share equally in it, if they are more than one. The *bintān ṣulbiyyatān* share equally in a half of the entire *tarikah* and not two thirds, according to ibn ʿAbbās. Ibn Masʿūd again ruled that if there are *bintān ṣulbiyyatān* and a *bint al-ibn* or *banāt al-ibn*, and an *ibn al-ibn*, or their son or sons, then the *bint al-ibn* or *banāt al-ibn* receives nothing as the *ibn al-ibn* how lowsoever, will receive the residue of the tarikah as they are then *ʿaṣabah* entitled to the residue of the *tarikah*. His ruling is based on the fact that the *Qur'ān* had limited two thirds to the *banāt* and the *banāt ṣulbiyyah* had exhausted that.

Case 3:

In this case the *bint al-ibn* will receive nothing from the *tarikah*, whether there are *ʿaṣabah* with her or not. This occurs when there is found with her or with them, an *ibn ṣulb* or *ibn al-ibn* of the deceased who is higher in degree then the *bint al-ibn*.[1]

The *jaʿfariyyah* has a cardinally different rule here in that if a *bint ṣulbiyyah* and a

---

1 *Tabyīn al-Haqā'iq*, Vol 6 pp. 234 - 235.
Al-Taḥqīqāt al-Mardiyyah, pp. 92 - 94.
Al-Tarikāt wa al-Waṣāyā, pp. 341 - 348

bint al-ibn are found, then the former receives a half *fardan* and the other half *raddan* (by redistribution). The *bint al-ibn* receives nothing. This is due to *ja'fariyyah* rules that the first category of heirs succeed before the second.[1]

(8) ***Mirath al-Akhawat al-Shaqiqat* (Succession Of The Full Sisters:**

They have five cases of *mirath* and they are:

Cases 1 & 2:

In these two cases, if only an *ukht shaqiqah* is found and no heir which will either exclude her from the *tarikah* or reduce her share, or there is no other *ukht shaqiqah* with her, she receives half of the entire *tarikah*. If there are two or more of these *akhawat shaqiqat* and no *akh shaqiq* with them nor any other heir which will either exclude them or reduce their share, then these *akhawat shaqiqat* share equally in two thirds of the entire *tarikah*[2]. These rulings are based on the *Qur'an*. "*...Allah directs you (thus) about those who leave no descendants or ascendants as heirs. If it is a man that dies, leaving a sister but no child (of his), she shall have half of the inheritance. If (such a deceased was) a woman who left no child, her brothers takes her inheritance. If there are two sisters, they shall have two thirds of the inheritance (between the two of them)...*"[3] This pattern of

---

1 *Al-Tarikat wa al-Wasaya*, p. 349.

2 *Tafsir ibn Kathir*, Vol 2 p. 466.
Al-Jami' li Ahkam al-Qur'an, Vol 6 pp. 28 - 29.
Tafsir al-Nasafi, Vol 1 p. 267.

3 *Al-Qur'an*, Chapter 4: 176.

mīrāth is by *fard*.[1] The meaning of *ukht* in the quoted *āyah* refers to the *ukht shaqiqah* and *ukht li abb*.[2] It cannot refer to the *ukht li umm* as her and her sisters' share is by *fard* only, while the *mīrāth* of the *ukht shaqiqah* and the *ukht li abb* is by *farḍ* and sometimes by *ta'ṣib*.[3] When the *akhawat* are two or more, they share equally in the allotted share of the *tarikah*. This is due to the *āyah* "*....and if the daughters (nisa') are more than two, then they share in two thirds...*"[4] This principle is applicable to all cases resembling the daughters' *mirath*.

Case 3:

In this case, the *ukht shaqiqah* or *akhawat shaqiqat* are found with an *akh shaqiq* or *ikhwah ashiqqa'* (full brothers). The *tarikah* due to them is divided by *ta'sib*, the *akh shaqiq* receiving twice the share of the *ukht shaqiqah*.[5] The *Qur'an* states, in their case,"*....if they are brothers and sisters, (they share); the male having twice the share of the female...*"[6] This is the same pattern as with the *awlad al-mayyit* as in *Surah Nisa'*.[7]

---

1 *Hawashi al-Shaikh*, Vol 6 pp. 405.

2 *Tafsir ibn Kathir*, Vol 2 p. 465.
Tafsir al-Nasafi, Vol 1 p. 267.

3 *Al-Jami' li Ahkam al-Qur'an*, Vol 6 p. 28.
Tafsir Ayat al-Ahkam, Vol 2, p. 152.

4 *Al-Qur'an*, Chapter 4: 11.

5 *Al-Fiqh al-Islami wa Adillatuhu*, Vol 8 p. 320.
Ayat al-Ahkam, Vol 2 p. 153.

6 *Al-Qur'an*, Chapter 4: 176.

7 Ibid, Chapter 4: 11.

The *malikis* and *hanbalis* rule that the *ukht shaqiqah* or *ukht li abb* are made *'asabah* with the *jadd sahih* where there is no *akh* with them. In this case, the *jadd sahih* receives twice the share of the *ukht*.[1]

Case 4:

In this case the *ukht shaqiqah* or *akhawat shaqiqat* have no *akh shaqiq* with them, but the deceased left a descendant female heir. In this case, the descendant female heir takes her *fard* from the *tarikah* and the residue goes to the *ukht shaqiqah* or *akhawat shaqiqat* who became *'asabah* with the descendant female heir, all sisters sharing equally.[2] This is so done due to the ruling of the Prophet (s.a.w) who said: "*Make the sisters with the daughters residuaries .*" *Hadith* texts are reported by al-Aswad bin Yazid, Huzail and ibn Mas'ud on the *bint sulbiyyah* receive a half of the *tarikah* and the remaining half to the *ukht shaqiqah*[3]. This is also the ruling of ibn Mas'ud.[4]

Case 5:

The *ukht shaqiqah* or *akhawat shaqiqat*, in this case, is/are found with a *far' warith dhakr* (descendant male heir) like son of deceased or son of the son of the deceased, how lowsoever or male *warith 'asl* (ascendant heir) like an

---

1 *Al-Mawsu'ah al-Fiqhiyyah*, Vol 3 p. 40.
Bidayah al-Mujtahid, Vol 2 p. 345.
Muwatta' Malik, Vol 2 p. 53.

2 *Al-Fiqh al-Islami wa Adillatuhu*, Vol 8 p. 320.

3 *Sahih al-Bukhari*, Vol 8 pp. 189 - 190.
Jami' al-Usul, Vol 9. p. 610.
Subul al-Salam, Vol 3 p. 99.

4 *Al-Mawsu'ah al-Fiqhiyyah*, Vol 3 p. 40.

abb al-mayyit. The *ukht shaqiqah* or *akhawat shaqiqat* are totally excluded from the *tarikah*, in this case as the *'asib* takes the entire *tarikah*.[1]

(9) ***Mirath Akhawat Li Abb*** **(Succession Of The Consanguine Sisters:**

They have seven cases in *mirath*.

Case 1:

The *ukht li abb* succeeds to half of the *tarikah* of the deceased on condition that the deceased left no *far' warith mudhakkar* how lowsoever, nor *bint sulbiyyah*, nor *bint al-ibn*, nor *ukht shaqiqah* nor has she an *akh li abb* with her to make her an *'asib* with her.

Case 2:

If there are only *ukhtan li abb* (two consanguine sisters) or more, in place of the one as in Case 1, above, and with all the conditions mentioned, they succeed to two thirds of the entire *tarikah* which is equally divided between all of them.[2]

Case 3:

The *ukht li abb* succeeds to one sixth of the *tarikah* completing two thirds thereof, when she is found with an *ukht shaqiqah*, the latter succeeding to a half of the entire *tarikah*. This is subject to the conditions set in Case 1, above. If they are more than one, they share equally in the sixth. If the *ukht li abb* is found with her brother, the *akh li abb*, they share the sixth; the *akh li abb* receiving

---

1 *Al-Fiqh al-Islami wa Adillatuhu*, Vol 8 p. 321.
Al-Tarikat wa al-Wasaya, p. 367.
Al-Mawsu'ah al-Fiqhiyyah, Vol 3 p. 40.

2 *Al-Fiqh al-Islami wa Adillatuhu*, Vol 8 p. 323.
Minhaj al-Muslim, pp. 472 - 473.
Ahkam al-Tarikat wa al-Mawarith, p. 126.

twice the share of the *ukht li abb*. If they are more, they share in the ratio mentioned. The *akh li abb* and the *ukht li abb* are excluded from the *tarikah* when the *aṣḥāb al-furuḍ* exhausted the *tarikah*.[1] An example being when the deceased leaves *ukhtān shaqīqatān* for they take two thirds of the *tarikah* and thus exhausted the share of the *akhawāt*. The *Qur'ān*, limits their share to two thirds.[2]

Case 4:

The *ukht li abb*, if found with the *akh li abb*, succeeds to the *tarikah* by *ta'ṣīb*, the male receiving double the share of the female.[3]

Case 5:

An *ukht li abb* or *akhawāt li abb* is/are *'aṣabah* to the residue of a *tarikah* if found with a *bint* or *banāt ṣulbiyyah* or, in her/their absence, a *bint al-ibn* or *banāt al-ibn* of the deceased on condition that there is no *ukht shaqīqah* present. However, if there are *aṣḥāb al-furuḍ* and they exhausted the *tarikah*, then the *ukht* or *akhawāt li abb* are excluded from the *tarikah*.[4]

Case 6:

An *ukht li abb* or *akhawat li abb* is/are excluded from the *tarikah* by the presence of *ukhtān shaqīqatān* save when the *ukht li abb* or more are found with an *akh li abb* in which case the *ukht li abb* or *akhawat li abb* become

---

1 *Al-Fiqh al-Islāmī wa Adillatuhu*, Vol 8 p. 323.
Al-Mughnī, Vol 6 p. 174 - 175.

2 *Al-Qur'ān*, Chapter 4: 176.

3 *Al-Qur'ān*, Chapter 4: 176.
Al-Mughni, Vol 2 p. 175.
Al-Fiqh al-Islāmī wa Adillatuhu, Vol 8 p. 323.

4 *Al-Fiqh al-Islāmī wa Adillatuhu*, Vol 8 pp. 323 - 324.

ʿaṣabah with him (or more of them, if there are more *ikhwah li abb* - consanguine brothers). In this case, their *mirath* is by *taʿṣīb*, the male receiving twice the share of a female.[1]

Case 7:

The *ukht li abb* or *akhawāt li abb* will be excluded from the *tarikah* by the presence of an *abb*, or *ibn* or the *ibn al-ibn*, how lowsoever, or the *akh shaqīq* or an *ukht shaqīqah* being an *ʿaṣabah* with a *bint ṣulbiyyah* or *bint al-ibn* of the deceased, whether or not she or they have an *akh li abb* or *ikhwah li abb* (consanguine brothers) with them. The *ukht shaqīqah*, in this case, is as if she is an *akh shaqīq* as she is the nearest *ʿasabah* to the deceased.[2]

(10) ***Mīrāth Ikhwah Li Umm*** **(Succession Of The Uterine Brothers And Sisters):**

The *ikhwah li umm* are the brothers and sisters of the deceased from their mother. The *mīrāth* of the *ikhwah li umm* (both brothers and sisters) of the deceased is by *farḍ* only. They are, thus, never *ʿaṣabah*, even if they are *ikhwah* (brothers) and *akhawāt* (sisters). The *mīrāth* of the *akh* and *ukht li umm* is by equal shares, whether they succeed singly or as a group.[3] It is thus incorrect to claim that *sharīʿah* discriminates against women in *mīrāth*. Their *mīrāth* have three cases.

---

1 *Al-Fiqh al-Islāmī wa Adillatuhu*, Vol 8 p. 324.

2 *Al-Mawsūʿah al-Fiqhiyyah*, Vol 3 pp. 41.
Al-Tarikāt wa al-Waṣāyā, pp. 380.
Al-Fiqh al-Islāmī wa Adillatuhu, Vol 8 p. 324.

3 *Muwaṭṭa' Mālik*, Vol 2 p. 49.
Tafsīr ibn Kathīr, Vol 2 pp. 216 - 217.
Minhāj al-Ṭālibīn, p. 87.

Case 1:

A sixth of the *tarikah* is given for either an *akh li umm* or *ukht li umm* if each is found alone. This is subject to the deceased, who will be their brother or sister from the same mother but different fathers, leaving no descendant heir, whether male or female or an ascendant male heir, like an *abb* or in his absence, a *jadd ṣaḥīḥ*, how highsoever.

Case 2:

If the *ikhwah li umm* are more than one, whether only *ikhwah* or only *akhawāt* or a mixture of both, they succeed to one third of the entire *tarikah*, each receiving an equal share.[1] This is conditional that the deceased did not leave an ascendant male heir like an *abb* or *jadd ṣaḥīḥ* or descendant heir, male or female, how lowsoever.[2]

Case 3:

These *ikhwah li umm* are excluded from the *tarikah* of a deceased if such a deceased left an *ibn ṣulb* (own son) or more, or *ibn al-ibn*, how lowsoever or more, or a *bint ṣulbiyyah* or more or a *bint al-ibn*, or more, how lowsoever. In addition, the *abb* and *jadd ṣaḥīḥ*, how highsoever of the deceased, exclude the *ikhwah li umm* from the *tarikah*[3]. The proof hereof is from the *Qur'ān* and the *ijmā'*. "*If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but*

---

1 *Al-Qur'ān*, Chapter 4: 12.

2 *Bidāyah al-Mujtahid*, Vol 2 p. 341.
Al-Mughni, Vol 6 p. 167.

3 *Bidāyah al-Mujtahid*, Vol 2 p. 341.
Al-Mawsū'ah al-Fiqhiyyah, Vol 3 p. 41.
Al-Fiqh al-Islāmi wa Adillatuhu, Vol 8 p. 310.

left a brother or sister, each of the two gets a sixth, but if more than two, they share in a third after payment of legacies and debts..."[1] There is *ijmā'* that the above *āyah* refers to the *ikhwah li umm* of a deceased.[2] The following very interesting *mas'alah* (problem) arose in matter of these *ikhwah li umm*:

(a) ***Mas'alah al-Sharikah* (Problem Of The Partnership):**

This issue arises when a deceased *zawjah* left a *zawj*, an *umm* or *jaddah sahihah* and *akhawan li umm* (two uterine brothers or two sisters) and one or more *ikhwah ashiqqā'* (full brothers). The agreed rule in *mīrath* is that *aṣḥāb al-furuḍ* receive their shares first and the *'aṣabah* take the residue. In this case, all the heirs are *aṣḥāb al-furuḍ* save the *ikhwah ashiqqā'* who are *'aṣabah*. The division is thus, half of the entire *tarikah* goes to the *zawj* as there are no children, one sixth of the entire *tarikah* for the *umm* or the *jaddah ṣaḥīḥah* as the deceased left brothers and the *akhawān li umm* receive a third of the entire *tarikah*. The equation is from 6 - 3/6 for the *zawj* which is a half, 1/6 for the *umm* and 2/6 for the *akhawān li umm*, which is a third. The *tarikah* is exhausted and nothing is left for the *'aṣabah*, the *ikhwah ashiqqā'*.

The *fuqahā'* differed in this kind of distribution. 'Ali, the fourth of the *al-khulafā' al-rashidūn*, did not give anything

---

1 *Al-Qur'ān*, Chapter 4: 12.

2 *Al-Jami' li Aḥkām al-Qur'ān*, Vol 5 p. 76.
Al-Mawsū'ah al-Fiqhīyyah, Vol 3 pp. 41 - 42.
Fatḥ al-Qadīr, Vol 1 p. 435.

to the *ʿaṣabah*, the *ikhwah ashiqqāʾ* in this case, retaining the rule of *aṣḥāb al-furuḍ* preceding all other heirs. This is also the ruling of Ubai bin Kaʿb, Abu Mūsā al-Ashʿari of the *saḥābah* as well as being the more famous ruling of ibn ʿAbbās, another *saḥābi*. It is also the ruling of al-Shaʿbi, ibn Abi Laila, Abū Ḥanifah, Abū Yūsuf and other senior *ḥanafi fuqahāʾ* as well as that of Aḥmad and Dawūd al-Ẓāhirī. Initially, ʿUmar, the second caliph who preceded ʿAlī, also subscribed to this view, whereupon the *ikhwah ashiqqāʾ* told him: "show us that our father was an ass (*ḥimār)*! Are we not from one mother?" From here this *masʾalah* (problem) is also called the *masʾalah al-ḥimāriyyah* (problem of the ass). ʿUmar then ruled that the *ikhwah li umm* and the *ikhwah ashiqqāʾ* share equally in the one third and not only the *akhawān li umm* on grounds of having the same mother. This is also the ruling of ʿUthmān, the third caliph, who succeeded ʿUmar, ibn Masʿūd, the other ruling of ibn ʿAbbās, Zaid bin Thābit as well as that of Saʿid ibn al-Musaiyib, Shuraiḥ, Ṭawūs, al-Nakhaʾi, al-Thawri, Mālik, al-Shāfiʿī and Isḥāq al-Rāhawaih.[1]

If an *akh li abb*, or more, is/are found, instead of an *akh shaqiq*, the same ruling as for the *ikhwah ashiqqāʾ* applies/apply to him or them.[2] The ruling of ʿAlī and those agreeing with him, appears to be based on

---

1 *Tafsīr ibn Kathir*, Vol 2 p. 218.
Al-Jāmiʿ li Aḥkām al-Qurʾān, Vol 5 p. 79.
Muwattaʾ Mālik, Vol 2 p. 50.

2 *Al-Jāmiʿ li Aḥkām al-Qurʾān*, Vol 5 p. 79.

the normal rules of *mirath* as well as the fact that the *ikhwah li umm* are excluded at times from the *tarikah*, while that of 'Umar and those agreeing with him, on the common bond of relationship through the *umm*, the deceased wife in this *mas'alah al-sharikah*.

(11) ***Mīrāth al-'Asabah*** **(Succession Of The Residuaries):**

An *'āṣib* (pl *'aṣabah*) is a residuary[1] and is that heir who has no fixed *farḍ naṣīb* (fixed share), but who succeeds to the residue of the *tarikah* or is excluded from the *tarikah* when the *aṣḥāb al-furūḍ* had exhausted the *tarikah*.[2] As stated previously, the *'aṣabah* are of two kinds, namely, *al-'aṣabah al-nasabiyyah* and *al-'aṣabah al-sababiyyah*, the latter of which clientage is a part. As the latter is now no longer valid, by the majority ruling in *fiqh*,[3] only *al-'aṣabah al-nasabiyyah* will be dealt with.

(a) ***Al-'Aṣabah bi Nafasihi*** **(Independent Residuaries):**

There are four main categories in this form of *'asabah* and they are *al-bunuwwah* (deceased's children), called *juz al-mayyit* (part of the deceased), *al-ubuwwah* (fatherhood) or *asl al-mayyit* (origin of the deceased), *al-ukhuwwah* (brotherhood), or the brothers and sisters of the deceased and finally *al-juduwwah* (grand parentage)

---

1 *Qamus al-Muhit*, Vol 1 p. 109.

2 *Fiqh al-Mawarith*, Vol 2 p. 3.
Tashil al-Farā'id, p. 68.
Al-Mughni, Vol 6 p. 168.

3 *Al-Fiqh al-Islami wa Adillatuhu*, Vol 8 p. 332.
Al-Tarikāt wa al-Wasāyā, p. 246.

or *jadd* of the deceased.[1] The order in which these *'aṣabah* succeed, are:

- *banū al-mayyit* (children of the deceased) followed by the *abnā' banī al-mayyit* (children the deceased's children), how lowsoever.
- then the *aṣl al-mayyit* (origin of the deceased) who is the *abb* followed by his *abb* the *jadd ṣaḥīḥ*, how highsoever.
- then the *juz abihi* (part of his father) who are the *ikhwah* (brothers and sisters), followed by their *abna'* only.
- then *juz jaddihi* (part of his grandfather) who are the *'ummumah* (paternal uncles) followed by their *abnā'* only.[2]

There are some difference amongst the *fuqahā'* on these classifications. Abū Ḥanīfah ruled that the *jadd ṣaḥīḥ* precede the *ikhwah*, while Abū Yūsuf and Muḥammad of the *ḥanafis* hold the opposite view. The previously mentioned kinds of *'aṣabah* are called *'aṣabah binafsihi* as they do not require any one else to make them *'aṣabah*.

There is a difference amongst the *fuqahā'* as to the actual number of these *'aṣabah*. According to the *ḥanafis*, there are five, namely, *al-bunūwwah* (children), *al-ubūwwah* (fathers), *al-ukhūwwah* (brothers), *al-'ummūmah* (paternal uncles) and then *al-walā'* (clientage). *Mālikis* and *shāfi'is* have

---

1 *Al-Fiqh al-Islāmī wa Adillatuhu*, Vol 8 p. 335.

2 *Ahkam al-Tarikāt wa al-Mawārith*, p. 160.
Al-Fiqh al-Islāmī wa Adillatuhu, Vol 8 p. 335.

seven, and they are; *al-bunūwwah* (children), *al-ubūwwah* (fathers), *al-judūwwah* (grandfathers), *al-ikhwah* (brothers), *banū' al-ikhwah* (sons of the brothers), *al-'ummūmah* (paternal uncles) and the *bait al-māl* (Muslim public treasury). *Ḥanbalis* have six, namely, *al-bunūwwah* (children), *al-ubūwwah* (fathers), *al-judūwwah* (grandfathers), *al-ikhwah* (brothers), *banū' al-ikhwah* (sons of the brothers), the *al-'ummūmah* (paternal uncles) and finally *al-walā'* (clientage).[1]

(b) ***Al-'Aṣabah bi Ghairihi*** **(Female Residuaries):**

They are four in number, namely, the *bint ṣulbiyyah*, *bint al-ibn*, the latter in the absence of the *bint ṣulbiyyah*, *ukht shaqiqah* and the *ukht li abb*, the latter in the absence of the *ukht shaqiqah*. These female heirs become *'aṣabah* with their respective *ikhwah* of their *darajah* and *qurbah* to the deceased.[2] The *banāt al-ibn*, are also made *'aṣabah* with the *abnā' al-'amm* who are in their degree of relationship to the deceased. They (the *banāt al-ibn*) are also made *'aṣabah* with the *banū ikhwatihinn* (sons of their brothers) i.e the *ibn ibn al-ibn* as well as the *abnā' ibn 'amm*, should they require them to succeed to a *tarikah*.

Mālik and *ḥanbalis* allow the *ukht shaqiqah*, or, in her absence, the *ukht li abb* of becoming *'aṣabah* with the *jadd ṣaḥiḥ*

---

1 *Al-Mawsū'ah al-Fiqhiyyah*, Vol 3 pp. 42 - 43.

2 *Aḥkam al-Tarikāt wa al-Mawārith*, p. 160.

of the deceased so that they can succeed to a part of the *tarikah* of the deceased. This is so when these *akhawāt* have no *akh* who would make them *ʿaṣābah*.[1]

It must be noted here that any female who is not a *ṣāḥibah farḍ* (female with a fixed share) cannot become *ʿāṣibah* with another *ʿāṣib* as the *sharīʿah* only created *al-ʿaṣabah bi ghairihi* for the *bint ṣulbīyyah*, *bint al-ibn* and the *akhawāt* to become *ʿaṣabah* with their respective *ikhwah* in their degree and *qurbah* to the deceased. Thus, the *ʿammah* (paternal aunt) cannot become *ʿaṣabah* with the *ʿamm*, although the *ʿamm* is of the *ʿaṣabah*.[2] This pattern is clear from the *Qurʾān*: "*Allāh (thus) directs you regarding your children's inheritance; to the male a portion equal to that of two females...*"[3], and "*...if there are brothers and sisters, they (share); the male having twice the share of the female....*"[4] In these cases, the *akh* renders his *ukht* or the *ʿaṣabah* to succeed along with him in the *tarikah*.[5]

---

1 *Muwaṭṭaʾ Mālik*, Vol 2 p. 56.
Bidāyah al-Mujtahid, Vol 2 p. 345.
Al-Muqniʿ, pp. 181 - 182.

2 *Al-Fiqh al-Islāmī wa Adillatuhu*, Vol 8 pp. 337 - 338.
Al-Mawsūʿah al-Fiqhīyyah, Vol 3 pp. 44 - 45

3 *Al-Qurʾān*, Chapter 4: 11

4 Ibid, Chapter 4: 176.

5 *Al-Mawsūʿah al-Fiqhiyyah*, Vol 3 pp. 44 - 45.

(c) ***Al-ʿAṣabah Maʿa Ghairihi*** **(Assisted Residuaries):**

These are those female *ʿaṣabāt* who become *ʿaṣabah* with another female. They are the *ukht shaqiqah* or the *ukht li abb* with the *bint ṣulbiyyah* of the deceased or with the *bint al-ibn*, in the absence of a *bint ṣulbiyyah* of the deceased[1]. This is due to the Prophet's ruling: "*Make the sisters residuaries with the daughters..*"[2]

(12) ***Bait al-Mal*** **(Muslim Public Treasury):**

The *bait al-māl* is the depository where all the wealth and possessions which have no owner, is deposited for the benefit of the Muslims.[3] Hanafis and *ḥanbalis* rule that the *bait al-māl* is not an heir but a depository where ownerless property is deposited. This deposit is in the same meaning as *luqaṭah* (ownerless lost wealth) which is deposited in the *bait al-mal*. These deposits are used for the benefit of the Muslim public. Al-Muzani and ibn Suraij of the *shāfiʿis* concur herewith as well as it being a *shādh* (weak) ruling of Mālik. According to this view, any Muslim who has no heir can dispose of all his wealth and possessions by way of *waṣiyyah* or have it given to any one person or a number of persons on his or her death.

Mālik and al Shāfiʿi rule that the *bait al-māl* follows after *al-muʿtaq* (the freed slave

---

1 *Fiqh al-Mawārith*, Vol 2 p. 16.
Al-Mawsūʿah al-Fiqhiyyah, Vol 3 p. 44.
Al-Fiqh al-Islāmi wa Adillatuhu, Vol 8 p. 338.

2 *Nail al-Awṭar*, Vol 6 p. 66.
Al-Mawsūʿah al-Fiqhiyyah, Vol 3 p. 44.

3 Al-Farrā' A Y: *Al-Aḥkām al-Sulṭāniyyah*, Cairo, Matbaʿah Muṣṭafā al-Halabī, 1987, 3rd ed., p. 262.

category succession pattern), which, of course, is no longer in operation. Malik means by *bait al-mal* that treasury which is in his, i.e the deceased's domicile. If he has no domicile, then either the one he died in or where his wealth and possessions are found in and on condition that such a *bait al-mal* is *muntaziman* which means, properly constituted and administered. If the latter rule is not found, it does not qualify as a *bait al-mal*. Al-*Shafi'i* also ruled that *bait al-mal* can accept the *tarikah* of an heirless person or the residue of a *tarikah* when there is no heir to succeed to it. He did not lay down any regulation for the *bait al-mal* as Malik had done. However, the later *shafi'i fuqaha'* ruled that if the *bait al-mal* is *ghair muntaziman* (improperly constituted and administered), the residue of a *tarikah* is redistributed to the heirs in their allotted proportions till the *tarikah* is exhausted.[1]

Thus far, the normal circumstances under which *mirath* functions, had been mentioned. There are other rare circumstances in *mirath* which will be dealt with now, followed by the *mirath dhawi al-arham*.

(13) ***Mirath al-Mafqud* (Succession Of The Missing Person):**

The word *mafqud* is derived from the arabic verb *faqada* meaning "to be absent from or to be non-existent"[2] In the *shari'ah*, the *mafqud* is the one who is absent and from whom no news

---

1 *Al-Tahqiqat al-Mardiyyah*, pp. 249 - 250
Al-Mawsu'ah al-Fiqhiyyah, Vol 3 p. 45.

2 *Qamus al-Muhit*, Vol 1 p. 335.
Al-Munjid, p. 579.

is received of his whereabouts and it is not known whether he is alive or dead.[1] Such a person is assumed alive and only the *qāḍī* can declare him dead. By *al-istiṣḥāb* he is assumed to be alive.

There is virtual complete consensus by the *fuqahā'* on the *mīrāth* of the *mafqūd*. If a *mafqūd* is found dead, the *mafqūd* status lapses and the normal *mīrāth* pattern takes its course. If he is still a *mafqūd*, and feared dead, his heirs can succeed to the lowest share they are entitled to until the *mafqūd* is declared dead by the *qāḍī* or the *mafqūd* returns to his domicile. If he is pronounced dead by the *qāḍī* and an initial distribution was made to his heirs, they will receive the remainder due to each of them from the *mafqūd's tarikah*.[2] This case is found when a man dies leaving an *ibn mafqūd* (missing son) and *bintān* as only heirs. The *bintān* are given a half and one half is kept for the *ibn al mafqūd*. If he returns, he gets his half and distribution is then complete. If he is pronounced dead by the *qāḍī*, then his half goes to the *bintān*, each one receiving a half thereof and distribution is then complete.

In the case where the *mafqūd* is to succeed to someone else's *tarikah* and he had not yet been pronounced dead by the *qāḍī*, then, if he (the *mafqūd*) will influence the shares of the heirs by excluding them from the *tarikah*, then the *tarikah* is frozen and no one gets anything until the issue of the *mafqud* is finalised

---

1 *Tashīl al-Farā'iḍ*, p. 163.
Al-Taḥqiqāt al-Marḍiyyah, p. 227.

2 *Al-Wajīz fī al-Mīrāth*, p. 68.

i.e. he either returns alive or he is pronounced dead by the *qaḍi*. This is to prevent harm and hardship to both parties when the *mafqūd* returns. An example hereof being an *abb* deceasing and leaving an *ibn ṣulb mafqud* (missing own son) and an *akh shaqīq* as the only heirs. In this case, the *ibn ṣulb mafqūd* will exclude the *akh shaqīq* from the *tarikah* and thus it must be frozen until the position of the *ibn ṣulb mafqud* is finalised.

In the case were the *mafqūd* is an heir along with other heirs and his *muwarrith* deceases, then the shares of both cases must be worked out i.e. the case when the *mafqūd* will be alive and the case when he will be dead. The lowest share is then given. Should the *mafqūd* return alive, he gets his share and if he is pronounced dead by the *qaḍī*, the other heirs will receive redistribution so that their shares are in accordance with *mīrath* laws. An example hereof is when a man deceases leaving *abawān*, his *zawjah* and an *ibn mafqūd*. If it is assumed he is alive, then the distribution will be one sixth for each parent, as the deceased left a descendant heir and one eighth for the surviving *zawjah* for the same reason. The rest is for the *ibn mafqūd* as he is the *ʿaṣib*. The shares being from 24 will be 4/24 for the *abb* which is 1/6, 4/24 for the *umm* which is 1/6 and 3/24 for the *zawjah* which is 1/8 and 13/24 for the *ibn mafqūd*. If it is assumed that the *ibn mafqūd* is dead, then the division will be from 12, the *zawjah* receiving 1/4 which is 3/12 and the *umm* 1/3 of the residue of the *tarikah* which is 1/3 of 9/12 which comes to 3/12 and the rest 6/12 goes as a final residue to the *abb* as

'asib. Thus, in this problem, the *ibn mafqud* must be taken as alive and the shares given and the heirs either wait for the *ibn al-mafqud* to return or have the *qadi* declare him dead. In this case, redistribution is made to the heirs until their correct shares had been distributed in terms of *mirath*. The *zaidiyyah* and *ja'fariyyah* share these distribution patterns of *ahl al-sunnah*.[1]

(14) ***Mirath al-'Asir* (Succession Of The Prisoner):**

The word *'asir* is noun agent of the arabic *'asara*, meaning, amongst other things,"to take prisoner or capture".[2] The *'asir* is thus the prisoner. Such an *'asir* can either be imprisoned in the *Dar al-Islam* or *Dar al-Harb*. In the case of him being imprisoned in the *Dar al-Islam*, and his whereabouts are known, he is taken as alive and his position, thus, is the same as someone who is not imprisoned. His *tarikah* can only devolve upon his heirs at his known death. If his whereabouts is unknown, but his imprisonment is in the *Dar al-Islam*, he is taken as a *mafqud* and the laws of the *mafqud* are applicable to him. If he is an *'asir* in the *Dar al-Harb* and it is known that he is alive, (which is easily ascertainable nowadays), his position is the same as the living Muslim in the *Dar al-Islam*. This means he can be a *muwarrith* with his heirs succeeding to his *tarikah* on his death and he can be heir succeeding to his *muwarrith's tarikah*. The

---

1 *Al-Tarikat wa al-Wasaya*, pp. 197 - 205.

2 *Al-Munjid*, p. 10.
Elias A E: *Qamus Ilyas al-'Asri*, Cairo, Elias Modern Publishing House & Co., 1983, 14th ed., p. 30.

rule is, thus, that a Muslim is a Muslim irrespective of where he may find himself.

Only ibn Musaiyib opposes this rule, ruling that a Muslim *'asīr* of the *Dār al-Ḥarb* does not succeed as an heir to the *tarikah* of his *muwarrith* because he is like a captured slave in their hands. The other *fuqahā'* respond hereto stating that a free Muslim can never be a slave as nonmuslims cannot destroy the freedom of a free Muslim, even by slavery. The law of free persons, are, thus always applied to him. However, when a Muslim *'asir* becomes *murtadd* in the *Dār al-Ḥarb*, he ceases to be an *'asir* and the laws of *riddah* applies to him during his lifetime and at his death, if he dies as a *murtadd* (apostate).[1]

(15) ***Mīrath Walad al-Zinā*** **(Succession Of The Illegitimate Child:**

The word *zinā* is the noun from the arabic verb *zanā* meaning *fajara* which means "to commit an unlawful sex act".[2] *Zinā* covers both fornication, which is an unlawful sex act by an unmarried person and adultery which is an unlawful sex act by a married person. *Zinā* in married life may be followed by *li'ān* (mutual imprecation). *Li'ān* is the noun arrived from the arabic verb *la'ana* meaning "to curse".[3]

Mutual denials take place between the *zawjān* in this matter and if no one admits to lying, permanent separation takes place between the two and the child is attributed to

---

1 *Al-Tarikāt wa al-Waṣāyā*, pp. 206 - 207.

2 *Qāmus al-Muḥiṭ*, Vol 4 p. 341.
Al-Munjid, pp. 308 & 569.

3 *Lisān al-'Arab*, Vol 5 p. 4044.
Qāmūs al-Muḥīṭ, Vol 4 p. 259.

the woman only. *Li'ān* also takes place when a *zawj* denies paternity to the child his *zawjah* is pregnant with. This child is also considered illegitimate.[1]

A pregnancy without a valid *shari'ah* recognised *nikaḥ* is also ruled illegitimate. A *zawjah* can also claim that a child she carries is not her *zawj's*, in which case the child will also be illegitimate. In *ahl al-sunnah* law, an illegitimate child is only illegitimate to his biological father and not to his natural mother, while in *ja'fari* law, such a child is illegitimate to both these persons. An illegitimate child, in *sunni* law, irrespective of what kind of illegitimacy, succeeds to the *tarikah* of his *umm* as her motherhood to him is undisputed. He does not succeed to any of her relatives' *tarikah*. Such a child succeeds only to the *tarikat* of his *ikhwah* and *akhawāt* with whom he shares his mother and then only by *farḍ* as an *akh li umm* and never as an *'aṣib*. The illegitimate son's *umm* also succeeds by way of *farḍ* only to his *tarikah*. No other pattern is permitted. There is, thus, no *tawāruth* between an illegitimate's biological father and him as legitimacy is a necessary rule for *ubuwwah*. This is the ruling of the *ḥanafis*, *mālikis* and *shāfi'is* as well as the *ẓāhirīyyah*, whether it is an illegitimate child by fornication or *zinā* or *li'ān*.[2]

Ḥanbalis share the above ruling in one of their reported views from Aḥmad. If there are multiple births of an illegitimate pregnancy,

---

1 *Āthār 'Aqd al-Zawāj*. p 353.

2 *Al-Tarikāt wa al-Waṣāyā*, pp. 233 - 234.

each of these children succeed to one another's *tarikah* by *farḍ* only and that as *ikhwah li umm*. They can never succeed as *ʿaṣabah* to one another as they are not *ikhwah ashiqqāʾ* nor *ikhwah li abb*. There is no difference between the illegitimate child of *zinā* and that of *liʿān*. In the former cases, there is no *nikāḥ* while in the latter case of *liʿān*, a valid *nikāḥ* existed in which the child or children were conceived. A later, alleged new illegal situation arose which affected the legitimacy of the unborn child. Thus, if the *liʿān* is retracted, the child becomes legitimate with all the normal consequences that it entails. If the *liʿan* is not retracted, then the laws of *walad al-zinā* will apply.

Ḥanbalis have two rulings reported from Aḥmad. One is reported by al-Athram which states that the *umm* of the child of *liʿān* is his heir and *ʿaṣabah*, meaning he can succeed to her tarikah by *taʿṣīb*. Thus, if a *walad al-liʿān* dies, leaving his *umm* and a *khāl* (maternal uncle), the *umm* receives a third of the entire *tarikah* as the deceased left no descendant heir. She also receives the residue as an *ʿaṣibah* to the deceased. This is reported to be the view of ibn ʿAbbās, ibn ʿUmar, al-Ḥasan, ibn Sīrīn, al-Shaʿbī, al-Nakhaʿī, al-Thawrī and Ḥasan bin Ṣāliḥ.

The second *ḥanbali* ruling reported from Aḥmad is reported by Abū al-Ḥārith which states that the *umm walad al-liʿān* (mother of the child of mutual imprecation) is *ʿaṣabah* and if not found, then her *ʿaṣabah* become his *ʿaṣabah*. This is also reported to be the view of ʿAlī, ibn Masʿūd, Makḥūl and al-Shaʿbi.

Thus, if a *walad al-li'ān* dies leaving only his *umm* and a *khāl*, the *umm* receives a third *farḍan* as the deceased left no descendant heir and the remaining two thirds share goes to the *khāl* by *ta'ṣīb*. The *'aṣabah al-umm* of the *umm walad al-li'ān* is *'aṣabah* in the absence of such a child's legitimate father. The *ḥanbalī* proof on al-Athram's reported ruling is that the Prophet ruled in the case of ibn Zuraiq, that his mother is both father and mother in his *mīrath*. This is due to her *nasab* to ibn Zuraiq. The proof of Abū al-Ḥārith's reported ruling is the *ḥadīth* of the Prophet (s.a.w) that the *aṣḥāb al-furūḍ* be given their shares and the residue to the nearest *'aṣabah*, which is the *khāl* in the example quoted by Abū al-Ḥārith.[1]

In the case where there is a residue to the *tarikah* of a *walad al-li'ān*, such goes to the *bait al-māl* and this is the ruling of ibn 'Abbās, ibn Musaiyib, 'Urwah, ibn Yasār, ibn 'Abd al-'Azīz, al-Zuhrī, Mālik, ahl al-Madīnah and al-Shāfi'ī. Abu Ḥanīfah rule that the *dhawī al-arḥām* of the *walad al-li'ān* succeeds to the residue of his *tarikah* when there is a residue. This is due to his *umm*, in the absence of him having a descendant heir, being entitled to a third of his *tarikah* only. Al-Ḥasan bin Ṣāliḥ differ from all the above *fuqahā'* and rule that the *walad al-zinā* has no *'aṣabah* and the residue of his *tarikah* goes to the all the Muslims. This is due to his *umm* having been unmarried at his conception.

---

1 *Al-Tarikāt wa al-Waṣāya*, pp. 234 - 235.
Al-Mughnī, Vol 6 pp. 260 - 261.

A child conceived illegitimately cannot be legitimised, even by marriage to the biological father. The rule is that that which is found illegitimately remain so permanently as the natural circumstances surrounding that cannot be altered. This is the ruling of the majority of the *fuqahā'*. A minority of the *fuqahā'*, namely al-Ḥasan and ibn Sīrin rule that the *walad al-zinā* is attributed to the fornicator or adulterer when the *ḥadd* (fixed criminal punishment)[1] had been meted out to the biological father of that child.

Ibrāhim rules that if the fornicator received his prescribed punishment, or marries the woman he had illicit sexual relations with and impregnated, that that child will be attributed to him. Similar rulings are attributed to Ishāq, 'Urwah and Sulaiman bin Yasār. Ibn 'Āsim narrated from Abū Ḥanīfah that the latter said that if a man committed fornication or adultery with a woman and impregnated her and marries her while she is pregnant, then the chid born from her, is his child.

The *fuqahā'* have consensus that if a woman is married to a man and another man claims her child as his, the child is attributed to the *zawjān* as the Prophet (s.a.w) said "*al-walad li al-firāsh*" - children born from a *nikāḥ* is attributed to that *nikāḥ*. The dispute is only in the case where there is no existing *nikāḥ*.[2]

---

1 100 strokes and, by some *fuqahā'*, exile from the place of the crime for a lunar year for fornicators (unmarried adulterers) and death for the married adulterers.

2 *Al-Mughnī*, Vol 6 p. 266.

Both the *zaidiyyah* and *ja'fariyyah* rule that a *walad al-zinā*, whether from fornication or adultery, does not succeed to his mother's nor biological father's *tarikāt*, nor do they succeed to his. The *walad al-zinā's* wife and children of their correct *nikāḥ* succeed normally to the *tarikāt* in their family circle. Another ruling of the *ja'fariyyah* is that the *walad al-zinā* is like the *walad al-li'ān* in which case, there is *tawāruth* between the mentioned child and his *umm*. The *ja'fariyyah* rules retraction of *li'ān* by the former *zawj* of the *umm walad al-mulāna'ah* as rendering the child a legitimate child with all that it entails, while the *zaidiyyah* rule that in the case of the *walad al-li'ān*, there is *tawāruth* between his *umm* and her relatives.

Some *ḥanbalis* have a very different ruling from most of the *fuqahā'* in the case of the *walad al-zinā*. They rule that if a man impregnated a woman and that man accepts that he is the father of that unborn child and that woman was unmarried at the time and not in any form of *'iddah*, then that unborn child is taken as that man's child and take his *nasab*. However, if that same woman married another man, other than the known biological father of the child, that child is attributed to that couple due to children born in a marriage being attributed to that marriage.[1]

---

1 *Al-Tarikāt wa al-Waṣāya*, pp. 237 - 239.

(16) ***Mirath Muqir Lahu Bi al-Nasab* (Succession Of The Accepted Person In Lineage):**

The *muqir lahu bi al-nasab* means "the one whose lineage is accepted by someone". *Nasab* can only be attributed by three ways, *al-firash* (a marriage situation), *al-baiyinah* (proof) and *al-iqrar* (acceptance of lineage).[1] The other previously mentioned different patterns are minority exceptions. Acceptance of *nasab* are of two kinds:

Case 1:

This is called *al-iqrar bi asl al-nasab* or acceptance of *nasab* on yourself, which can be iqrar al-*bunuwwah* (claiming to be a son) or *iqrar al-ubuwwah* (claiming of lineage of fatherhood) and *iqrar al-umumah* (claiming lineage of motherhood). These kinds of *iqrarat bi al-nasab* (acceptances of lineage) are called *iqrarat mubashirah* (direct lineage claims) as no third party is involved. If all the required *shurut*, set by the *fuqaha'* are met, then such a person is taken as being approved of i.e. either the position of *ibn* or *abb* or *umm* is approved. *Mirath* then takes place normally between them at death.[2]

Case 2:

This deals with *al-iqrar bi al-nasab 'ala ghair al-muqir* or approval of lineage through other than the original descendant pattern, like a person claiming to be someone else's *akh* or *jadd* or *'amm*. This kind of *iqrar bi al-nasab* is retractable. The law is, however, that people are held to their acceptances of given situations and such rights as emanating

---

1 *Al-Ahwal al-Shakhsiyyah*, pp. 388, 393-394 & 402.

2 *Ahkam al-Tarikat wa al-Mawarith*, p. 75.

from that are executed. Thus, if the person accepting the *nasab* of another by his own *iqrār*, then the one *muqir lahu bi al-nasab* (the one accepted as of the lineage), will succeed to the *tarikah* of the *muqir* (one who claimed the lineage).[1] The reason being that there is no harm done to any party as the *muwarrith*, in this case, himself claimed the *nasab* of someone else and not *vice versa*. The difference shows in the example, when someone dies and leaves two sons and one of them accepts the *nasab* of another as their other brother.

Mālik, Abu Ḥanīfah and Aḥmad all rule that the third brother has a right over the brother who accepted his sonship to their father and thus share with that brother of him his share of the *tarikah*. The three *fuqahā'* differ on this share. Mālik and Aḥmad rule that he should give a third of his share to the third brother while Abū Ḥanīfah rule a half as he takes them as equal *ikhwah*. Al-Shāfi'ī rule that the matter be referred to the *qādī* for his decision on the *nasab* claim. If the matter is referred to the *muftī*, al-Shāfi'ī has two rulings attributed to him herein. One is that a ruling must be given by the *muftī* and the other ruling is that the third brother succeeds to his share of the *tarikah*. The same rule applies if a deceased leaves only an *ibn* as heir and he makes *iqrār al-nasab* to someone else as his brother i.e the *tarikah* is shared equally according to all *fuqahā'* save al-Shāfi'ī who again have two rulings attributed to him; one of *mīrāth* and one of prohibition

---

1 *Al-Mudawwnah al-Kubrā*, Vol 3 p. 89.

of *mīrath*. However, the *shafi'is*, as a *madhhab*, rule that if someone is the only heir and makes *iqrār al-nasab* to someone else, such will be a valid approval and *mīrath* is its logical conclusion.[1]

(17) ***Mīrath al-Khunthā* (Succession Of The Hermaphrodite):**

A *khunthā*, literally means, in arabic, "a person who has both male and female parts."[2] In *shari'ah* it is defined as "one who has sexual organs of both male and female or one who has no sexual organs at all".[3] This category of heir has numerous rulings due to the limited knowledge of medicine in the time of the early *mujtahidūn*.

Al-Sha'bi was asked about a person with no sexual organs but urinating from (near) the navel. He ruled the person a female. This is also the basic rule with a person possessing both male and female organs.[4] Ibn Mundhir states that this is the *ijmā'* of the *fuqahā'*. Ibn 'Abbās reported that the Prophet (s.a.w) ruled, in the case of a minor *khunthā*, that the share of that is determined from where urine passes from. Should a *khunthā* urinate from both sexual organs, and no record is found which preceded the other, the *fuqahā'* differ. Abū Ḥanīfah gave no ruling (*tawaqqafa*), al-Shāfi'i did not give it any consideration while al-Awza'i, Abū Yusuf,

---

1 *Al-Mawsū'ah al-Fiqhiyyah*, Vol 3 pp. 71 - 72.

2 *Qāmus al-Muḥīt*, Vol 1 p. 172.
Al-Munjid, p. 197.

3 *Al-Tahqiqāt al-Mardiyyah*, p. 205.

4 *Kitāb al-Furū'*, Vol 5 p. 40.

Muḥammad al-Shaibāni and Aḥmad rule that the part passing most urine is taken as the sex of that person. When both organs pass the same amount of urine, Abū Yūsuf and Muḥammad state that they do not know of this while the *hanbalis* state that this person is *mushkil* (sexually doubtful).[1]

Division of a *tarikah* in which a *khunthā* features is in the following example. Someone deceases leaving amongst his heirs a minor *khunthā*. The majority of the *fuqahā'* rule that the *tarikah* must be frozen and all the heirs must wait until the *khunthā* becomes *mukallaf*. The dominant physical signs will determine the sex and thus, the share of this person.[2]
If the heirs are in need of their shares, two assumptions must be made, firstly that the *khunthā* is a male and secondly a female and then give the lowest value to the heirs.[3] They can receive the remainder due to them when the *khunthā* reached *taklīf* (age of pubescence). If the *khunthā* dies before reaching age of *taklīf* or the *khunthā* reaches *taklīf*, but is *mushkil*, then such a person receive half the share of a male, which is less than that of a male and half of the share of a female, which, altogether is a position between the two sexes.[4] This is the ruling of ibn 'Abbās, al-Sha'bi, al-Thawrī, ibn Abī Laila, al-Lu'lu'i,

---

1 this matter can nowadays be dealt with accurately and swiftly due to the advances in modern medicine.

2 *Aḥkām al-Tarikāt wa al-Mawarith*, p. 225.

3 *Al-Taḥqiqat al-Marḍiyyah*, p. 210.
Aḥkām al-Tarikāt wa al-Mawārīth, p. 226.

4 *Al-Taḥqiqat al-Marḍiyyah*, p. 211.
Aḥkām al-Tarikāt wa al-Mawārīth, p. 227.

Shuraik, Ḥasan bin Ṣālih, *ahl al-Madīnah*, *ahl Makkah*, Abū Yūsuf, Na'īm bin Ḥammād and others. This rule is based on the uncertainty of the sex of the person concerned. Abū Ḥanīfah rule that a female's share is given to such a person, while Abū Thawr, al-Shāfi'ī, Dāwūd and ibn Jarīr rule that the residue be frozen until the sex becomes clear or the heirs agree to give this *khunthā* the share of a male or female. When a *khunthā* informs that an act normally occurring with a certain sex, like *iḥtilām (nocturna)*, this is taken and no evidence is called for. If anything occurs, which belie that, such as having *ḥaiḍ*, the situation is reversed i.e. the person is now ruled a female.[1]

18) ***Mīrāth al-Ḥaml*** **(Succession Procedure Of The Unborn Child):**

According to the *fuqahā'*, Shuraik, Abū Ḥanīfah, Mālik and al-Nakha'i, a share for four boys or four girls is to be reserved for the unborn, whichever is the bigger. The other heirs receive, then, the lowest share possible. Al-Shāfi'ī states that there is no rule for this situation. At birth, the shares are normalised. Muḥammad al-Shaibānī of the *ḥanafis* and al-Laith rule that the share of three boys or girls have to be reserved from the *tarikah*, whichever is more. Another view of Muḥammad says a share of two boys and two girls as twin births are not rare and rules are for common occurrences. Al-Khaṣṣāf reported from Abū Yūsuf, that only a single share of a male or female is reserved as single births are most common. The *fuqahā'* of

---

1 *Al-Mawsū'ah al-Fiqhiyyah*, Vol 3 pp. 63 - 65.

Samarkand ruled that if the *ḥaml* (pregnancy) is advanced, the *tarikah* should be frozen till after the birth, but if not, the distribution pattern of *ḥaml* is applied. Abū Yūsuf ruled that the *qāḍī* must take *kafālah* (security) from the heirs in case there is a multiple birth. Aḥmad shares, in one of his rulings, the ruling of Abū Yūsuf and the view of twin births of Muḥammad as far as distribution in this case is concerned.[1]

With pre-natal scanning nowadays, the above problems can be solved easily.

(19) ***Mīrath*** **Of Those Whose Time of Death Is Unknown):**

When related people and heirs of one another die together or simultaneously like drowning together or being burnt in a dwelling, they do not succeed to one another's *tarikah* as it is not known who died before whom.[2] This is the agreed ruling of Abū Bakr, 'Umar and Zaid bin Thābit. Their *tarikāt* devolve upon their other surviving heirs.[3] This was the ruling given to those murdered in Yamāmah. It was also the ruling of 'Alī for those killed in the battles of *al-Jamal* and *Siffīn*. This is also the ruling of 'Umar ibn 'Abd al-'Azīz as well as that of the majority of the *fuqahā'*.

Another ruling reported to be from 'Alī as well as the ruling of ibn Mas'ūd states that these deceased persons who died possibly

---

1 *Al-Mawsū'ah al-Fiqhiyyah*, Vol 3 pp. 65 - 67.
Al-Mughnī, Vol 6 p. 314.

2 *Al-Taḥqiqat al-Mardiyyah*, p. 236.
Al-Mabsūt, Vol 30 p. 27.

3 *Al-Mabsūt*, Vol 30 p. 27.

simultaneously and are heirs of one another, do succeed to one another's *tarikah*. The reason being that the cause of *mīrāth* is known, namely, having been alive previously which was known.[1] The exclusion from *mīrath* which is the time of death is doubtful and *al-qā'idah al-fiqhiyyah* states that "*al-yaqīn la yazūlu bi al-shaqq* - confirmed matters are not rendered void by doubt". The opposers of ibn Mas'ūd's ruling state that the cause of *mīrath* of each of these persons are doubtful and since *istiḥqāq al-mīrath* (meriting of succession) is based on cause and the cause in this case is doubtful, no *mīrath* can take place.[2]

(20) <u>*Al-Mūṣā Lahu* (A Legatee) In The Absence Of An Heir:</u>

Al-muṣā lahu means "the legatee" i.e. someone receiving a legacy.[3] If someone left a third of his *tarikah* to someone and the *mūṣi* (legator) has no heir of any kind, then according to the *ḥanafis* and *ḥanbalis*, such a person succeeds to the entire *tarikah* of that *mūṣi* and he precedes the *bait al-mal*. Their ruling is based on the rule that the *muṣa lahu* is to receive one third and the rest should go to the heirs. As there are no heirs, the *mūṣa lahu* receives all the *tarikah*.[4] *Mālikis* and *shafi'is* oppose this ruling that the *mūṣā lahu* cannot succeed to the residue of the *tarikah*

---

1 *Al-Taḥqīqat al-Mardiyyah*, p. 238 - 240.
Al-Mabsūt, Vol 30 p. 28.

2 *Al-Mawsū'ah al-Fiqhiyyah*. Vol 3 p. 70.

3 *Al Qamus al 'Asri*, p. 799.

4 *Al-Fiqh al-Islāmī wa Adillatuhu*, Vol 8 p. 286.
Al-Mawsū'ah al-Fiqhiyyah, Vol 3 p. 72.

as there is no one who can authorise that and as it is the *musi's* wealth, only his heirs can authorise a *wasiyyah* for more than a third of the *tarikah*.[1]

(21) ***Mirath Dhawi al-Arham*** **(Succession Of The Uterine Relatives):**

Arḥām is the plural of *raḥim* which literally, means, "the place where the foetus grows" and it also means *qarabah* (relatives), or its origin or causes."[2] In *shari'ah, raḥim* is every relative of a person. In *mirath*, it is every Muslim relative of you who has no *farḍ naṣib* (fixed share) granted him by *Allāh* or whom the Prophet (s.a.w) granted a share or *ijmā' al-ummah* granted it and such a person is not of the *'asabah* who merit the residue of a *tarikah*. The *dhawī al-arḥām* are thus the uterine relatives of a person.[3]

There is a difference amongst the *ṣaḥabah*, their students, the *tabi'un* and the *fuqahā'*, on the *mirath* of these persons. Those of the *ṣaḥabah* who allow the *arḥam* to succeed, are 'Alī, ibn Mas'ūd and ibn 'Abbās (which is his more known view), Mu'āḍ bin Jabl, Abu Dardā' and Abū 'Ubaidah bin Jarrah. Of the *tabi'un* who approve of this type of *mirath* are Shuraiḥ, al-Ḥaṣan, ibn Sirin, 'Aṭā'a and Mujahid and of the *fuqahā'* are the *ḥanafis*, *ḥanbalis*, the later *mālikis* and the later

---

1 *Al-Mawsū'ah al-Fiqhiyyah*, Vol 3 p. 72.

2 *Qamus al-Muḥiṭ*, Vol 1 p. 118.
Al-Munjid, p. 617.

3 Ibn Nujaim Z D: *Al-Baḥr al-Rā'iq - Sharḥ Kanz al-Daqa'iq*, Cairo, Dār al-Kitāb al-'Arabī, undated, 2nd ed., Vol 8 p. 577.
Al-Fiqh al-Islāmī wa Adillatuhu, Vol 8 p. 387.
Al-Taḥqīqāt al-Mardiyyah, p. 260.

shafi'is. Those who ruled that the *arham* do not succeed to a *tarikah* are, of the *sahabah*, Zaid bin Thabit, ibn 'Abbas (in his lesser known ruling) and of the *tabi'un*, ibn Musaiyib, ibn Jubair and the early *maliki* and early *shafi'i fuqaha'*.[1]

Those who support the *mirath* of the *arham* quote the *Qur'an*: *"But kindred of blood have prior rights against each other in the Book of Allah..."*[2] They also quote *hadith* herein. Ibn 'Umar narrated that the Prophet (s.a.w) said: "*...and the maternal uncle is an heir to him who has no heir...*" Similar texts are narrated by 'Abd al-Salam bin 'Atiq and al-Miqdad al-Kindi.[3] Al-Tirmidhi also transmitted similar texts.[4] Those who oppose *mirath al-arham* quote from the *Qur'an*: "*..and your Lord never forgets*"[5] stating that had the *arham* been heirs, *Allah* would have mentioned them along with the other heirs. This group also quote *hadith* stating that the *'ammah* and *khalah* does not succeed to the *tarikah* of their *arham*. This text is weak and unacceptable as proof.[6]

Some *malikis* rule that the *arham* succeed to a *tarikah* of their *arham* when no *ashab al-furud* or *'asabah* of the *muwarrith* are found and the *hakim* is unjust. The later *shafi'is*

---

1 *Al-Taqiqat al-Mardiyyah*, pp. 261.
Al-Mawsu'ah al-Fiqhiyyah, Vol 3 p. 53.

2 *Al-Qur'an*, Chapter 8: 75.

3 *Sunan Abi Dawud*, Vol 2 pp. 122 - 123.
Jami' al-Usul, Vol 9 pp. 617 - 618.

4 *Sunan al-Tirmidhi*, Vol 3 p. 285.

5 *Al-Qur'an*, Chapter 19: 53.

6 *Al-Mawsu'ah al-Fiqhiyyah*, Vol 3 p. 54.

ruled that the *arḥām* succeed to the *tarikah* of their *arḥām* if the *bait al-māl* is improperly administered (i.e. money in it is not used as prescribed in *sharī'ah*) and when there are no *aṣḥāb al-furūḍ* or *'aṣabah* to the deceased.[1] Thus, if there is a residue to a *tarikah*, redistribution takes place to the *aṣḥāb al-furūḍ* until the *tarikah* is exhausted and the *arḥām* do not feature.

The *fuqahā'* who allow *mīrath* to the *arḥām* rule that if there is only one *raḥim* of a deceased, male or female, and no other *qarīb* of any kind, then he or she succeed to the entire *tarikah*. When there are more than one of these *arḥām*, then the *fuqahā'* differ on the distribution of the *tarikah* to them.

These *fuqahā'* have three distinct systems herein, namely;

- *madhhab ahl al-qarābah* (principle of the nearest relative).
- madhhab al-raḥim (principle of uterine relationship).
- *madhhab al-tanzil* (principle of descending relationship).

1) <u>*Madhhab al-Qarābah* (System Of Relatives):</u>

This group bases *mīrath al-arḥām* (succession of uterine relatives) on *quwwah al-qarābah* (strength of relationship) in the same pattern as for the *'aṣabah*.[2] They have four divisions which are:

- *furū' al-mayyit* (uterine descendants of the deceased) such as the *awlād al-bint* (children of the daughter), uterine descendants of his parents and uterine

---

1 *Nihāyah al-Muḥtaj*, Vol 6 pp. 11 - 12.

2 *Al-Baḥr al-Rā'iq*, Vol 8 p. 577.

descendants of his grandparents. These heirs are the *awlād al-banāt* (children of the daughters) and *awlād bint al-ibn* (children of the daughter of the son), how lowsoever, *awlād al-akhawāt* (children of the sisters), whether male or female irrespective of their grade i.e. *awlād ashiqqā'* (the full category), *li abb* (the consanguine category) or *li umm* (uterine category), how lowsoever and the relatives of the *ajdād* (grandparents) and they are the *ajdad raḥimiyūn* (uterine grandparents). Also the *'ammāt* (paternal aunts), *akhwāl* (maternal uncles), *khālāt* (maternal aunts), the *'amām wa'ammāt al-umm* (paternal uncles and aunts of the mother) and their daughters, *banāt akhwāl* (daughters of the maternal uncles) and all those coming through these lines of uterine relationship.[1] This pattern is that of the *ḥanafis* and a narration claiming it is also Aḥmad's.[2]

There are two narrations from Abū Ḥanīfah through both Muḥammad and Abū Yūsuf on the *tawrīth* of the aforementioned *arḥām*. In Muhammad's narration the *ajdād raḥimiyūn* how highsoever, come first, then the *awlād al-banāt* and those in their category followed by the *awlād al-akhawāt*, then the *banāt al-ikhwah* (daughters of the

---

1 *Al-Baḥr al-Rā'iq*, Vol 8 p. 578.

2 *Al-Ikhtiyār*, Vol 5 p. 105.
Al-Mawsū'ah al-Fiqhiyyah, Vol 3 p. 53 - 55.

brothers) irrespective of grade (i.e full, consanguine or uterine), then all related to the deceased through his *ajdād* and these include his *ʿammāt*, *ʿamām al-umm* and the *awlād al-ʿamām wa al-akhwāl wa al-khālāt* (daughters of the paternal aunts, maternal uncles and maternal aunts) irrespective of distance from the deceased. Abū Yūsuf's narration list them as in the *ʿaṣabah* category, but the *raḥim* side, thus the *awlād al-banāt* and the *awlād banāt al-ibn* come first, followed by *ajdād raḥimiyūn*, followed by *awlād al-akhawāt* and *banāt al-ikhwah* irrespective of grade followed by the daughters of the *ʿamām*, *khāl* and *khālāt*. Abū Yūsuf and Muḥammad also let the *awlād al-akhāwāt* and the *banāt al-ikhwah* and *awlād al-ikhwah li umm* precede the mother's father.

(a) <u>Pattern Of *Tawrith* (Succession) Of These Persons:</u>

The nearest exclude the furthest removed,[1] thus, the *awlād al-bint* exclude the *awlād banāt al-ibn*. When their *darajah al-qarābah* (degree of relationship) is the same, then the children of an heir precede the *awlād raḥim*. Thus, the *bint bint al-ibn* (daughter of the daughter of the son) precedes the *ibn bint al-bint* (son of the daughter of the daughter) as the former's *jadd* is an heir of the *ʿaṣabah* category.

---

1 *Al-Mabsūt*, Vol 30 p. 3.

If the *darajah al-qarābah* is the same, and they are all males or all females, they share equally and if they are males and females, they share in the ratio two shares for the male and one for the female. There is no consideration for any category here according to Abū Yusuf and al-Ḥasan bin Ziyād but Muḥammad rule that origin is considered. This difference appears in the *mas'alah* of division between a *bint ibn al-bint* and the *ibn bint al-bint*. According to Abū Yusuf and al-Ḥasan bin Ziyād, two thirds go to the *ibn bint al-bint* as he is a male and the *bint ibn al-bint* receives a third because she is a female. Muḥammad insists that *usūl* (parentage) must be read in conjunction with the relationship and the shares are reversed. Thus the *bint ibn al-bint* will receive two thirds as that would be her father's share and the *ibn bint al-bint* a third as that would be his mother's share.[1]

(b) <u>Category Of The *Ajdad Raḥimiyun* (Uterine Grandparents):</u>

The nearest precede irrespective if the person is from the fathers's or mother's side. Thus the *abb al-umm* (father of the mother) precedes the *abb umm al-*

---

1 *Al-Mawsu'ah al-Fiqhiyyah*, Vol 3 pp. 55 - 56.

umm (father of the mother of the mother). When the *darajah al-qarābah* is the same, then the one who relates (*yudlī*) to the deceased precedes. Thus, the *abb umm al-umm* (father of the mother's mother) precedes the *abb abb al-umm* (father of the mother's father), as the former relates to the deceased i.e the *jaddah ṣaḥīḥah* who is the *umm al-umm*. When there is similarity in *qurb wa qūwwah al-qarābah* (nearness and strength of relationship) in that they relate to a *ṣāḥib al-farḍ* or a *raḥim* then *mīrāth sharikah* (shared succession) takes place. If they are either from the fathers's side or the mother's side, then they share in the ratio two to one in favour of males. If some are from the father's side and some from the mother's side, then two thirds go to the father's side and the remaining third to the mother's side. They take the shares of the origin which is of the father and mother which is two thirds and one third respectively as the deceased left no *aṣḥāb al-furūḍ* and *'aṣabah*.[1]

---

1 *Al-Tarikāt wa al-Waṣāya*, pp. 421 - 422.
Al-Ikhtiyār, Vol 5 p. 108.

(c) ***Awlād al-Ikhwah Wa al-Akhawāt:*** **(Children Of The Brothers And Sisters):**

These are the children of all the *ikhwah* and *akhawāt* regardless of category and their children, how lowsoever. Their *tawrīth* is the same that if only one is found of them, whether male or female he or she succeeds to the entire *tarikah* when there is no *aṣḥāb al-furūḍ* or *'aṣabah* of the deceased. This *raḥim* also takes the residue when a *zawj* (spouse) is found with him or her. If more than one *raḥim* is found, the nearest in *darajah* of relationship precedes and if they are equal in *darajah*, then those related to the *'aṣabah* precede those who are related to the *raḥim* only. If they are all equal in *darajah* and *qūwwah al-qarābah*, like all being *awlād al-'aṣabah* (children of residuaries), or of *aṣḥāb al-furūḍ* or they are a mixture of the two mentioned kinds of heirs, then the one strongest in *qarābah* succeeds. This means that the *awlād ashiqqa'* (children of full brothers and sisters) precede the *awlād ikhwah li abb* (children of the consanguine brothers and sisters) and the latter precede that of the *awlād ikhwah li umm* (children of the uterine brothers and sisters).

If they are all of one of these categories, and equal in *darajah* and *quwwah al-qarabah* to the deceased, they all share equally if they are only of one sex or in the ratio double the share to a male than a female if they are a mixture of sexes. This is Abu Yusuf's ruling.[1]

(d) **The *'Amam Al-Rahimiyun*, (Uterine Paternal Uncles), *'Ammat*, (Paternal Aunts), *Akhwal* (Maternal Uncles) And *Khalat* (Maternal Aunts):**

The *'amam al-rahimiyun* are the paternal uncles of the mother. If there is only one person of any of the mentioned categories present and the deceased left no *ashab al-furud* or *'asabah*, such a person succeeds to the entire *tarikah* whether the heir is a male or a female. This is irrespective whether it is an *akh shaqiq* or *ukht shaqiqah* or *li abb* (consanguine) or *li umm* (uterine).

If they are more than one, then the male line of the mother's side precede if they are of the same kind, like *ashiqqa'* (full brothers and sisters) etc and they take the entire *tarikah* and exclude all the others. If the *arham* are all equal in *quwwah al-qarabah* to the deceased, like all being the *'amam*

---

1 *Al-Tarikat wa al-Wasaya*, p. 422.

al-umm or all are *akhwāl* or *khalāt*, they all share the *tarikah* together. If they are only males, or only females, they share equally and if a mixture of both sexes, they share in the ratio males double the share of females.

If the categories differ, like *ʿamam li umm*, *ʿammat li umm*, *akhwāl* and *khālāt*, then the *tarikah* is distributed by giving two thirds to the mother's male line and one third to the her female line, the male receiving twice the share of the female.

Basically, the same rules apply to these *arḥām's* offspring. Thus, if a deceased left no *aṣḥāb al-furūḍ* nor *ʿaṣabah* but only a *bint khālah* (female maternal cousin), a *bint bint al-khālah* (daughter of the daughter of the maternal aunt) and an *ibn ibn al-khālah* (son of the son of the maternal aunt), then the *bint khālah* takes the entire *tarikah* because she is nearest in *qarābah* to the deceased.[1] If he leaves a *bint ʿammah* (female paternal cousin) from his mother's side and a *bint bint al-khalah* (daughter of the daughter of the maternal aunt), then the *bint ʿammah* succeeds to the entire *tarikah* as she is nearer in *darajah* to the

---

1 *Al-Mabsūṭ*, Vol 30 p. 20.

deceased. If these children are equal in *qarābah* and *darajah*, like a *bint ʿammah* and *bint khālah*, then the former gets two thirds and the latter one third of the *tarikah*. The sides of relationship differs but no distinction is made between *ʿaṣabah* descendants and *ghair ʿaṣabah* descendants. This is Abū Yūsuf's ruling. The *ẓāhir al-madhhab* (apparent view) of the *ḥanafis* is that preference is given to the nearer side of relationship. As the children of the residuaries are nearer to the deceased, they must receive preference.

Muḥammad recognises the *ʿuṣūbah* (residuary status) of the *arḥām* of the mother's side. Thus, if only a *bint khālah* and an *ibn khālah* is found, the former receives a third and the latter two thirds of the *tarikah* as their ascendants are the same. If the succeeding *arḥām* are a *bint khāl* and an *ibn khalah*, then, according to Abū Yūsuf, the *ibn khalah* gets two thirds of the *tarikah* and the *bint khāl* a third as the uterine heirs are a male and a female while in Muḥammad's ruling is the opposite due to the different fathers of the succeeding heirs.

Summarising, thus, it can be said that when persons of this category relate to an *ʿāṣib* and they are in the same category or

qarābah and *darajah* of relationship, then the *tarikah* is for the one strongest in *qarābah* and *darajah* to the deceased. If there is more than one of these uterine heirs, and they are equal in qarabah and *darajah* of relationship to the deceased and they are males and females, then the male gets twice the share of the female. If they are from the side of the father like descendants of the *'amm* or of the *'ammah* and from the side of the mother like the *khāl* and *khalah*, then the paternal male side gets two thirds and the maternal side one third.[1]

The remaining categories of *arḥām* are the *'amām abawai wa khu'ulatihimā li umm* (paternal uncles from the mother's side of both her parents and the maternal uncles and aunts of the mother of both parents) and their children. This category succeeds as the first category of *arḥām* mentioned earlier i.e. the *banāt bint al-mayyit* (daughters of the daughter of the deceased). Then the grand and great grand paternal uncles and aunts of the mother's side as well as the maternal uncles and maternal aunts of all categories and the *'amām umm al-umm* (paternal uncles of the maternal grandmother) as well as the maternal side of the deceased father's side i.e paternal grandmother's side. They also succeed as the first category of the *arḥām*. They are followed by the children of these categories, how lowsoever. All the children mentioned in these immediate afore

1 *Al-Tarikāt wa al-Wasāya*, pp. 424 - 427.

mentioned categories of *arḥām* succeed as the children of the brothers and sisters of the deceased.[1]

In finally summing up the *tawrīth* of the *arḥām* by *al-qarabah*, when they are more than one they resemble that of the *'aṣabah*. In the *'aṣabah* scale the *bunūwwah* comes first, followed by the *ubūwwah*, then the *ikhwah* and finally the *'umūmah*. The nearest in *darajah al-qarābah* (degree of relationship) precede when there is a difference in this quality without paying attention to relation to the deceased through an heir. This is called *taqdīm bi al-darajah* (preference by virtue of degree of relationship). If they are all of the same *qarābah* levels, then those who relate to the deceased through an heir, either a *ṣāḥib al-farḍ* or of the *'aṣabah* take preference over the one only related through *raḥim*. If they are all equal in one of these qualities of relationship, and they are all equal in *darajah al-qarābah* to the deceased, then *qūwwah al-qarabah* decides the issue. Thus the *ashiqqā'* (full category) comes first followed by the consanguine (*li abb*) and then the uterine (*li umm*) categories. If the sexes are mixed, then the rule of double share for males and single shares for females is applies.[2]

---

1 *Al-Tarikāt wa al-Waṣāyā*, pp. 427 - 428.

2 Ibid, pp. 428 - 429.

2) ***Madhhab Ahl al-Raḥim*** **(System Of Order Of Relationship):**

Those *fuqahā'* who subscribe to this system in *mīrāth al-arḥām* have no distinction between the different categories as to *qurb al-qarābah* or *darajah*. Thus, if a deceased leaves only a *bint al-bint* and a *bint al-ukht*, they share equally in the *tarikah*. The same applies when the deceased leaves an *ibn ukht* and a *bint ibn akh*. This is so as the cause of succession, here, is *raḥim* and thus equality in shares is the rule.[1] Those who took this line are Ḥasan bin Maisir and Nūḥ bin Dharah. It is conspicuous that none of the famous *madhāhib fiqhiyyah* took to this system.[2]

3) ***Madhhab ahl Tanzīl*** **(System Of Heir Substitution):**

This system is based on the rule that the *raḥim* who relates to the deceased through an heir takes such an heir's place in *mīrāth* when there are no heirs of the *aṣḥāb al-furūḍ* or *'aṣabah*. Thus, the *walad al-banāt*, *walad banāt al-ibn* and the *walad al-akhawāt* fall in the place of their mothers. On the other hand, the *banāt al-ikhwah*, and the *banāt al-'amām*, whether of the full or consanguine categories as well as the *banāt banihim* (daughters of their sons), *awlād ikhwah li umm* and the *awlād al-'amām li umm*, are like their fathers. Those *fuqahā'* who subscribe to this ruling

---

1 *Al-Mawsū'ah al-Fiqhiyyah*, Vol 3 p. 62.
Al-Fiqh al-Islāmi wa Adillatuhu, Vol 8 p. 386.

2 *Al-Mawsū'ah al-Fiqhiyyah*, Vol 3 p. 62.

are ʿAlqamah, al-Shaʿbī, Masrūq, Naʿīm bin Hammād, Abū Naʿīm and Abū ʿUbaidah al-Qāsim bin al-Salām. This is also the view of the later *mālikis, shāfiʿīs* and a view of Ahmad.[1]

Mas'alatān (two problems) are excluded from this ruling by *shāfiʿīs* and Aḥmad and they are:

- they reduced the *khāl* and *khālah* even of the father's side, to that of the mother's side according to the more accepted view. The same applies to the *jaddah li umm* (maternal grandmother) of the deceased.
- they did the same with the *ʿamām li umm* and the *ʿammah* placing them in the position of the *abb*. Their reason for accepting this system, is that they claim it is the *madhhab al-ṣaḥābah*. Thus, when a deceased leaves a *bint al-bint* and a *bint bint al-ibn* (daughter of the daughter of the son), then, according to those subscribing to *tanzīl* (substitution) in *mīrath al-arḥām*, the *tarikah* is for the two of them 3/4 for the *bint al-bint* and 1/4 for the *bint bint al-ibn*, by *fard* and *radd* (redistribution) of the residue. If there is only one *raḥim*, he or she takes the entire *tarikah*, as is the case with *madhhab al-qarābah* (system of nearness of relationship). The *madhhab al-tanzīl* - (system of substitution) differs from the latter system, in that they allowed

---

1 *Al-Taḥqiqat al-Mardiyyah*, pp. 266 - 267.
Al-Mughnī, Vol 6 p. 231.

substitution of the *arḥām* in the place of the heir through which they relate to the deceased, whether this is by *farḍ* or *ta'ṣīb*. Aḥmad rules that the *anṣibah* are equal for a male and a female if only one of them qualify as they are *arham*.[1]

Shafi'is (i.e later *shafi'is*) apportion the share of the representative relative i.e. either *ṣāḥib farḍ* or *'aṣib* to the *raḥim* heir.[2] This presupposes unequal shares.

(22) **<u>*Ja'fariyyah* Exception In *Tawrith Al-Arham* (Succession Of Uterine Relatives):</u>**

The *ja'fariyyah* is peculiar in one aspect of this kind of *mirath* ruling by consensus that the *ibn akh shaqiq* succeeds before the *'amm li abb*. They base this on a saying claimed to be of 'Ali who in turn claims it to be from the Prophet (s.a.w). It is only in this case that this occurs. Thus, the *ibn 'amm shaqiq* does not precede the *'amm shaqiq* nor the *'amm li umm*. However, the *bint 'amm shaqiq* (daughter of the full paternal uncle) does not precede the *'amm li abb*.[3] This is probably due to their concept of 'Ali succeeding to the *imamah* (leadership) of the *shi'ah* grouping as he was a full cousin to the Prophet (s.a.w) and, thus, preceded 'Abbas, the Prophet's (s.a.w) consanguine uncle.

---

1 *Al-Mughni*, Vol 6 pp. 231 - 232.
Al-Mawsu'ah al-Fiqhiyyah, Vol 3 pp. 61 - 62.
Al-Tahqiqat al-Mardiyyah, p. 268.

2 *Nihayah al-Muhtaj*, Vol 6 p.13.

3 *Al-Tarikat wa al-Wasaya*, p. 430.

(23) *Al-Waṣiyyah al-Wājibah* (Compulsory Legacy):

This is not actually found in any of the classical *fiqh* works, not even under the subject matter of *mirāth*. As is known, one of the *shurūṭ* of *mirāth* is that the heir must be alive when his *muwarrith* dies.[1] A problem arises when a child predeceases his parent or parents and leaves descendants behind, especially minor and needy descendants.[2]

According to the majority of *fuqahā'*, the grandparent(s) of such surviving grandchildren may, at their discretion, leave them a *waṣiyyah* of not more than one third of their individual estates as for them. This *waṣiyyah* is optional.[3] According to some *fuqahā'*, like Talḥa, al-Zubair, al-Zuhrī, Ṭāwūs, Abū 'Awānah, ibn Jarīr, al-Shāfi'ī (in his old view) and the *ẓāhiriyyah*, *waṣiyyah* is necessary for family not succeeding to your *tarikah*.[4] This they take from their interpretation of the *āyah al-waṣiyyah*[5] (verse of legacy) in the *Qur'ān*. It would thus not be a *bid'ah* (innovation) if a *waṣiyyah* was made obligatory on grandparents for their grandchildren whose parent (and who is their child) had predeceased them. Some Muslim

---

1 *Fiqh al-Mawārith*, Vol 1 pp. 88 - 89.
Tashil al-Farā'id, p. 21.

2 *Al-Wajiz Fi al-Mirath*, p. 80.
Aḥkām al-Tarikāt wa al-Mawārith, p. 244.

3 *Al-Hidayah*, Vol 4 p. 231.
Al-Ikhtiyār, Vol 2 p. 31.
Al-Mughni, Vol 6 p. 1.

4 *Nail al-Awṭār*, Vol 6 p. 39.
Al-Muḥallā, Vol 9 p 312.

5 *Al-Qur'ān*, Chapter 2: 180.

countries had already introduced this into their family law codes as will be shown in chapter six of this thesis. A recommendation for *waṣiyyah wājibah* will also be made in the mentioned chapter.

B) ***Al-Ḥajb* (Exclusion Or Diminished Shares)**

a) **Definition:**

Ḥajb, literally, means *man'* and *man'* means "prohibition or prevention" or it can mean *satr* meaning "to cover". Thus, one speaks of *ḥijāb* (derivative of *ḥajb*) which means "a cover which prevents people from seeing something or someone". The gatekeeper is called *ḥājib* (another derivative of *ḥajb*) as he prevents entry (to a place)."[1] In *sharī'ah*, *al-ḥajb* is defined as "prohibiting a specific person from a part or all of his share of a *tarikah* due to the presence of another person."[2]

There are two kinds of *al-ḥajb*, namely, *ḥajb al-nuqsān* (diminishing share system) and *ḥajb al-ḥirmān* (exclusion from the estate).

1) **Persons Meriting *Ḥajb Al-Nuqsān* (Diminished Shares):**

They are five heirs, namely, the spouses as the *zawj* has his share reduced from a half to a quarter when his deceased *zawjah* leaves a descendant heir, male or female while the *zawjah's* share is diminished from a quarter to one eighth when her deceased *zawj* leaves a descendant heir, male or

---

1 *Qamūs al-Muḥīṭ*, Vol 1 p. 54
Al-Munjid, p. 118.

2 *Fiqh al-Mawārith*, Vol 2 p. 82.
Al-Mawsū'ah al-Fiqhiyyah, Vol 3 p. 46.
Al-Taḥqiqāt al-Mardiyyah, p. 122.
Al-Tarikāt wa al-Waṣāyā, p. 443.

female. The mother's share is reduced from a third to a sixth when the deceased, who is the mother's child, leaves a descendant heir, male or female, or two or more *ikhwah* or *akhawāt*. The *bint al-ibn*, if found with the *bint ṣulbiyyah* of the deceased, is reduced from a half to a sixth which completes two thirds, which is the allotment for two or more *banāt*. The *ukht li abb* is reduced from a half to a sixth by the *ukht shaqiqah*.[1]

2) <u>Persons Meriting *Hajb Al-Hirmān* (Exclusion From The Estate):</u>

Six heirs never ever suffer this *ḥirmān* (exclusion) and they are; the *zawjān* (spouses), the *ibn*, the *bint*, the *umm* and the *abb*.[2] They, thus, always succeed to a *tarikah*.

Those heirs who suffer *ḥajb al-ḥirmān* from a *tarikah* may sometimes succeed or sometimes fall under the *ḥirmān* rule be they *aṣḥāb al-furūḍ* or *'aṣabah*.[3] Those suffering *ḥajb al-ḥirmān* are:

- the *banū al-'ayān* or *ikhwah ashiqqā'* and the *akhawāt shaqiqāt* who are excluded from the *tarikah* by the *ibn* or *ibn al-ibn*, how lowsoever of the deceased. These *ikhwah ashiqqā'* and *akhawāt* are

---

1 *Minhāj al-Muslim*, pp. 476 - 477.
Al-Tarikāt wa al-Waṣāyā, p. 444.
Nihāyah al-Muḥtāj, Vol 6 pp. 16 - 18.
Al-Mawsū'ah al-Fiqhiyyah, Vol 3 p. 46.

2 *Al-Ikhtiyār*, Vol 5 p. 94.
Al-Wajiz Fī al-Mirāth, p. 30.

3 *Tashīl al-Farā'iḍ*, p. 81.
Al-Tarikāt wa al-Waṣāyā, p. 444.
Al-Fiqh al-Islāmī wa Adillatuhu, Vol 8 p. 347.

also excluded by the *jadd ṣaḥīḥ* according to Abu Hanifah's ruling while Abū Yūsuf, Muḥammad and other *fuqahā'* rule *muqasamah* (coinheritance) for them on condition that the *jadd ṣaḥīḥ* does not succeed to less than a third of the *tarikah* when there are no *aṣḥāb al-furūḍ* or a sixth when there are *ashab al-furud*.

- the *banū 'allāt* or *ikhwah* and *akhawāt li abb* are also excluded by the *ibn* or *ibn al-ibn*, how lowsoever, of the deceased and by the *banū 'ayān* of the deceased.
- the *banū akhyāf* or *ikhwah* and *akhawāt li umm* are excluded by the child of the deceased, male or female and the child of the son of the deceased, whether male or female, how lowsoever. They are also excluded by the *abb* and the *jadd ṣaḥīḥ* of the deceased.
- the *umm* excludes the *jaddāt*, whether *abawiyāt* (from the father's side) or *ummiyāt* (from the mother's side) of the deceased. The *jaddāt abawiyāt* (grandmothers from the father's side) are excluded by the *abb* and by the *jadd ṣaḥīḥ*, save the *umm al-abb* (mother of the father), how highsoever because she is with the *jadd ṣaḥīḥ* as she is his *zawjah* and not of him. The near *jaddāt* irrespective of whether they are *abawiyāt* or *umamiyyāt* exclude the further removed *jaddāt* due to the *qurb* (nearness) rule in relationship.[1]

---

1 *Al-Taḥqīqat al-Marḍiyyah* , pp. 125 - 126.
Al-Tarikāt wa al-Waṣāyā, p. 447.
Al-Fiqh al-Islāmī wa Adillatuhu, Vol 8 p. 347.

b) *Al-Mahrum min Al-Mirath* (Person Prohibited From Succession):

These are persons who cannot succeed to a *tarikah* of their Muslim *muwarrith* due to a permanent prohibition hereto, like *kufr (disbelief)*.

The majority of the *fuqaha'*, including Abu Hanifah, Malik, al-Shafi'i and Ahmad, all rule that the *kuffar* (disbelievers) have no effect on *al-hajb* (exclusion or diminished share system) as they are considered *ma'dum* (non-existent). Ibn Mas'ud and Dawud al-Zahiri allow *hajb al-nuqsan* to the spouses and *umm* if found with a *walad kafir* (nonmuslim child) or more of the deceased as well as allowing the murderer to establish *hajb al-nuqsan* although he himself does not succeed to his *muwarrith's tarikah*. Al-Hasan al-Basri, al-Hasan bin Salih and al-Tabari allow *hajb al-nuqsan* when the murderer would have been an heir, although he himself will not inherit anything. Thus, by the majority ruling of the *fuqaha'*, if a *zawj* deceases and leaves a *zawjah Muslimah* (Muslim wife), a *walad kafir* and a Muslim *akh shaqiq*, the *zawjah Muslimah* receives a quarter of the *tarikah* as there are no children (the nonmuslim child being taken as non existent for diminished share purposes) and the rest goes to the *akh shaqiq Muslim* as the *'asib*, while in ibn Mas'ud's view, the *zawjah Muslimah* is reduced to an eighth, due to the presence of the *walad kafir* and the rest goes to the *akh shaqiq Muslim* as the nearest *'asib*.[1]

---

1 *Al-Tarikat wa al-Wasaya*, p. 446.
Al-Mawsu'ah al-Fiqhiyyah, Vol 3 p. 46.

Ḥajb al-ḥirmān is avoided in the case of the *banāt* or *ukhtān shaqiqatān* or more found with *bint al-ibn* or more and *ibn ibn al-ibn* (son of the son of the son). In this case the *bint al-ibn* or more, are made *ʿaṣabah* with the *ibn ibn al-ibn* sharing in the ratio double the share for a male than a female. This is done to let the *bint al-ibn* succeed to something as without this they will have nothing. They, thus, share in the remaining one third of the *tarikah*, the *banat* taking the other two thirds and this is shared equally between the latter. The rule of *qurbah* in relationship is disregarded in this case. The same will apply, if, instead of *banāt* and *bint al-ibn* and *ibn ibn al-ibn*, two or more *akhawāt shaqiqāt* are found and an *ukht li abb* or more with an *akh li abb* who can make them *ʿaṣabah* with him sharing in the ratio double share to the *akh li abb* than to the *ukht li abb*.[1]

The *zaidiyyah* and *jaʿfariyyah* do not differ from *ahl al-sunnah* in the matter of *al-ḥajb*.[2] The basic rules of al-*hajb*, are, thus:

- that those who relate to the deceased by way of an heir of that deceased, is excluded *ḥajb al-ḥirmān* from the *tarikah* of that deceased because of *buʿd al-qarābah* (distance of relationship). The *ibn* ,thus, excludes the *ibn al-ibn*. This rule is also applicable to all the *ʿaṣabah*, the nearest excluding the furtherest removed from the deceased.

---

1 *Al-Tarikāt wa al-Waṣāyā*, p. 448.
Al-Taḥqiqāt al-Mardiyyah, p. 125.

2 *Al-Tarikāt wa al-Waṣāyā*, p. 453.

- the strongest in *qarābah* excludes the weaker in *qarābah*, like the *akh shaqīq* excluding the *akh li abb* completely, while the *ukht shaqiqah* and *ukht li abb* share, half for the former and a sixth for the latter, which completes two thirds for the *akhawāt* when there are no other heirs to prevent this.[1]

C) ***Al-'Awl* (Share Devaluation):**

a) **Definition:**

'Awl, literally, means, amongst other things, *ziyādah* i.e "increase".[2] In *shari'ah*, it means the increase in the share number of the *ashāb al-furūḍ* from the original *mas'alah* and, consequently, a decrease in the value of the shares of the *tarikah*.[3] An example of this is when a *zawjah* deceases, leaving her *zawj* and *ukhtān shaqiqatān*. The *zawj* is to receive a half as there is no descendant heir of the deceased and the *ukhtān shaqiqatān* two thirds, which is the share for two sisters and more. This exceeds the whole which should be out of six, but increased to seven. The equation is, thus:

zawj 3/6 + *ukhtān shaqiqatān* 4/6 = 7/6.

This calls for a re-evaluation of the share value to even out the equation.

---

1 *Al-Taḥqiqat al-Marḍiyyah*, p. 124.
Al-Mawsū'ah al-Fiqhīyyah, Vol 3 pp. 46 - 47.
Bidāyah al-Mujtahid, Vol 2 p. 349.
Aḥkām al-Tarikāt wa al-Mawārith, pp. 169 - 170.

2 *Qamus al-Muḥiṭ*, Vol 4 p. 23.
Al-Munjid, p. 538.

3 *Al-Wajiz Fi al-Mirath*, p. 39.
Al-Tarikat wa al-Waṣāyā, p. 455.
Minhāj al-Muslim, p. 481.

b) Origin Of *'Al-Awl*:

There are different narrations as to how *'awl* came about. It is stated that during the reign of the *khalifah* 'Umar ibn Khaṭṭab, the *mas'alah* of the *zawj* and *ukhtan* was brought to him. The equation, of course, did not balance. 'Abbās ibn 'Abd al-Muttalib pointed out *'awl* in the example of someone leaving six *dirhams* (silver coins) but owing one person three *dirhams* and the other four *dirhams*. The solution will be to divide the six *dirhams* into seven parts. 'Umar accepted and ruled by it. There was no objection to this until during the reign of 'Uthmān, when ibn 'Abbās differed on the issue.[1]

The majority of the *ṣaḥābah*, the *tabi'ūn* as well as the *ḥanafis*, *mālikis*, *shafi'is*, *ḥanbalis*[2] and the *zaidiyyah* all accept the principle of *'awl*. A minority of the *ṣaḥābah*, like ibn 'Abbās, some of the *tabi'ūn*, like Muḥammad al-Hanafiyyah, 'Alī bin Ḥasan and Zain al-'Abidīn, the *ja'fariyyah* and the *zahiriyyah* reject *'awl*.[3]

c) Proofs Of The Opposers Of *Al-'Awl* (Devaluation in Shares):

Ibn 'Abbās states that there is no *'awl* in any *mas'alah* but that those placed lower in the scale of heirs are excluded when the *tarikah* cannot accommodate their shares. In his opinion, thus, the *aṣḥāb al-furūd*, whom

---

1 *Al-Mawsū'ah al-Fiqhiyyah*, Vol 3 p. 47.

2 *Al-Taḥqīqāt al-Marḍiyyah*, p. 162 - 163.
Al-Ikhtiyār, Vol 5 p. 96.
Minhāj al-Ṭālibīn, p. 88.

3 *Al-Muḥallā*, Vol 9 pp. 262 - 263.
Al-Tarikāt wa al-Waṣāya, pp 455 - 456.

Allāh had given fixed shares, precede and those who hover between *farḍ* and *ta'ṣīb* had been kept last. These, according to ibn 'Abbās, are the *banāt* and *akhawāt* and they must therefor accept less than their allotted share in the case where the *tarikah* cannot meet all the shares. He further contends that the *'aṣabah* take the residue of the *tarikah*. The *akhawāt* are more meriting for that residue as they actually share it and are, thus, more likely to accept a diminished share. He contends, further, that the *tarikah* is distributed in an order setting rights attached to it starting from the strongest to the weakest. Thus, *tajhiz* of the deceased comes first, followed by *qadā al-duyūn*, *tanfidh al-waṣaya* and lastly, distribution to the heirs of the deceased. Thus, in the distribution of the *tarikah*, the *ashab al-furūḍ* precede, the stronger preceding the weaker.[1]

d) <u>Proofs Of The Supporters Of *'Awl*:</u>

The majority of the *fuqahā'* prove their point by stating that there is no text in *shari'ah* stating that the stronger must precede the weaker heirs. In fact, there is no distinction made between heirs in *shari'ah* texts. They quote a *ḥadīth* of the Prophet (s.a.w) which says "give the share of the heirs as is due to them"[2]. Making a distinction between heirs is against this ruling of the Prophet (s.a.w). They also

---

1 *Al-Taḥqiqat al-Mardiyyah*, p. 162.
Al-Muḥallā, Vol 9 pp. 263 - 264.

2 *Sunan Abi Dawud*, Vol 2 p. 122.
Subul al-Salām, Vol 3 p. 98.

contend that there was *ijmā'* herein amongst the *sahābah* of the Prophet (s.a.w) during the reign of 'Umar ibn Khattāb and ibn 'Abbās only differed herein during he reign of 'Uthman. Finally, they state that *qiyās* necessitates that if the shares cannot be accommodated ordinarily, that the diminished value be applied evenly to all the heirs so that they all suffer the loss as in the case with a *tarikah mustaghraq bi al-duyūn* (insolvent estate). In the latter case, the creditors must accept loss each according to his percentage due to him from that *tarikah*.[1] The view of the majority is more fair and reasonable and in line with fairness.

e) **Problems In Which *'Al-Awl* (Devaluation Of Shares) Arise):**

'Awl arises in *masā'il* where the original share is out of six, or twelve or twenty four.

i ***'Awl* (Devaluation) In Six As Original Share Allotment:**

This allotment can go to seven, eight, nine or ten.[2]

- Six Rising to Seven:

In this case, a deceased left a *zawj* and *ukhtān shaqiqatān*. The *zawj* is to receive a half and the *ukhtān shaqiqatān* two thirds as there is no *ibn* nor *bint* or *banāt*. The equation is, thus: 3/6 (1/2) + 4/6 (2/3) = 7/6. This does not balance. The shares are now made into seven, instead of six parts and are, thus,

---

1 *Al-Tarikāt wa al-Wasāya*, pp. 457 - 459.
Al-Tahqīqāt al-Mardiyyah, p. 163.

2 *Ahkām al-Tarikāt wa al-Mawārith*, p. 154.

3/7 for the (*zawj*) and 4/7 for the *ukhtan* and the equation balances: 3/7 + 4/7 = 7/7. The value of the shares had diminished.

- Six Rising to Eight:

This happens in the following example: A deceased leaves a *zawj*, *ukhtān li abb*, and an *umm*. The shares are; half for the *zawj* as there is no descendant heir, two thirds for *ukhtān li abb* and the *umm* a sixth as the deceased left *akhawat*. The equation is: 1/2 + 2/3 + 1/6 = 3/6 + 4/6 + 1/6 This totals to: 8/6, which does not balance. The shares are made from eight instead of six and we have; 3/8 for the *zawj*, 4/8 for the *ukhtān li abb* and 1/8 for the *umm*. Thus, 3/8 + 4/8 + 1/8 = 8/8 which is a balanced equation.

- Six Rising to Nine:

This occurs when a deceased leaves a *zawj*, *ukhtān shaqiqatān* and *akhawān li umm*. The shares will be; 1/2 for the *zawj* as the deceased left no descendant heir, 2/3 for the *ukhtan shaqiqatān* 1/3 for the *akhawān li umm* as the deceased left no *abb* nor descendant heir. The equation is, thus 1/2 + 2/3 + 1/3 = 3/6 + 4/6 + 2/6 which totals: 9/6 which is an unbalanced equation. The shares are made from nine instead of six and we have: 3/9 + 4/9 + 2/9 = 9/9 which is a balanced equation.

- Six Rising to Ten:

This is reflected in the case where the deceased leaves a *zawj*, *ukht shaqīqah*, *ukht li abb* and *akhāwan li umm* and an *umm*. The *zawj* is to receive a half as there is no descendant heir, the *ukht shaqīqah* receives a half as there is no *bint* and the *ukht li abb* one sixth, completing two thirds allotted for *ukhtān* and more and one third for the *akhawān li umm* as the deceased left no *abb* nor a descendant heir and one sixth for the *umm* as the deceased left *akhawāt*. The equation will thus be as follows:

1/2 + 1/2 + 1/6 + 1/3 + 1/6 = 10/6 which is an unbalanced equation. The shares are now made out of ten instead of six. The *zawj* receives 3/10, the *ukht shaqīqah* 3/10, the *ukht li abb* 1/10, the *akhawān li umm* 2/10 and the *umm* 1/10 which is:

3/10 + 3/10+ 1/10 + 2/10 + 1/10 = 10/10 which is a balanced equation.[1]

ii **'*Awl* (Devaluation) In Twelve As Original Allotment:**

The original share allotment of twelve can rise to thirteen, fifteen or seventeen.

- Twelve Rising to Thirteen:

In this example, the deceased leaves a *zawjah*, *umm* and an *ukht li abb*. The shares are; a quarter for the *zawjah* as there is no descendant heir of the

---

1 *Hawāshī al-Shaikh*, Vol 6 p. 431.

deceased, one third for the *umm* as the deceased left no descendant heir and only one *ukht* and a half for the *ukht li abb* as there is no one to exclude her. The shares will, thus, be:

1/4 + 1/3 + 1/2 = 3/12 + 4/12 + 6/12.

This comes to 13/12 which is an unbalanced equation. The shares are made from thirteen instead of twelve, thus, the *zawjah* receives 3/13 instead of 3/12, the *umm* receives 4/13 instead of 4/12 and the *ukht li abb* receives 6/13 instead of 6/12. The equation will, thus, be as follows;

3/13 + 4/13 + 6/13 = 13/13 which is a balanced equation.

- Twelve Rising to Fifteen:

This occurs in the case when a deceased leaves a *zawj*, *bintān ṣulbiyyatān*, an *umm* and an *abb*. The shares will be; a quarter to the *zawj* as the deceased left descendant heirs, two thirds for the *bintān ṣulbiyyatān*, a sixth for the *umm* and a sixth for the *abb*, in both their cases, due to the deceased leaving descendant heirs. The equation will, thus, be:

1/4 + 2/3 + 1/6 + 1/6 which is:

3/12 + 8/12 + 2/12 + 2/12 = 15/12 and is an unbalanced equation. The shares are now made out of fifteen instead of twelve. The *zawj* receiving 3/15 instead of 3/12, the *bintān ṣulbiyyatān* receiving 8/15 instead of

8/12, the *umm* 2/15 instead of 2/12 and the same for the *abb*. The balanced equation, will, thus, be as follows:

3/15 + 8/15 + 2/15 + 2/15 = 15/15 which is a balanced equation.

- Twelve Rising to Seventeen:

Twelve rises to seventeen in the situation where a deceased leaves a *zawjah*, *umm*, *ukhtan li abb* and *akhawan li umm*. The shares will be a quarter for the *zawjah* as there is no descendant heir, one sixth for the *umm* as the deceased left *ukhtan* which reduces the *umm* from a third to a sixth, two thirds for the *ukhtan li abb* as there is no one to exclude them and one third for the *akhawan li umm*. The equation of these shares are:

1/4 + 1/6 + 2/3 + 1/3 which is actually 3/12 + 2/12 + 8/12 + 4/12 = 17/12 which is an unbalanced equation. The shares are made from seventeen instead of twelve and thus, the *zawjah* receives 3/17 instead of 3/12, the *umm* 2/17 instead of 2/12, the *ukhtan li abb* 8/17 instead of 8/12 and the *akhawan li umm* 4/17 instead of 4/12. The equation, is, thus:

3/17 + 2/17 + 8/17 + 4/17 = 17/17 which is a balanced equation.

iii *'Awl* (Devaluation) In Twenty Four:

The original allotment of twenty four rises to twenty seven and there is only one example hereof:

- This occurs when a deceased leaves a *zawjah*, *bintān ṣulbiyyatān*, an *umm*, and an *abb*. The shares will be; an eighth to the *zawjah* as the deceased left descendant heirs, two thirds for the *bintān ṣulbiyyatān*, one sixth for the *umm* as the deceased left descendant heirs, and a sixth for the *abb* for the same reason. The equation will thus, be:
  1/8 + 2/3 + 1/6 + 1/6 which is properly expressed as:
  3/24 + 16/24 + 4/24 + 4/24 = 27/24
  which is an unbalanced equation. The shares are now made from twenty seven, instead of twenty four. The shares will thus be; 3/27 for the *zawjah* instead of 3/24, 16/27 for the *bintān ṣulbiyyatān* instead of 16/24, 4/27 for the *umm* instead of 4/24 and 4/27 for the *abb* instead of 4/24. Thus, we have:
  3/27 + 16/27 + 4/27 + 4/27 = 27/27
  which is a balanced equation.

These are the only cases in which *'awl* occur. It does not occur in *masā'il* (problems) of 2 (where a half is shared by each heir) as in the case of the deceased leaving a *zawj* and an *akh shaqiq* as the only heirs. The *zawj* receives a half *farḍan* as there is no descendant heir and the *akh shaqiq* receives the remaining half by *ta'ṣib* as the nearest *'asib* to the deceased. Nor does it occur in 3 like a deceased leaving an *umm*

and an *akh shaqīq*. The *umm* receives a third as there is only one *akh* and the remaining two thirds go to the *akh shaqīq* by *taʿṣīb* as the nearest *ʿaṣīb* to the deceased.

There is no *ʿawl* in 4 as with a deceased leaving only a *zawj* and an *ibn*, where the *anṣibah* are a quarter for the *zawj* as the deceased left an *ibn* and the remaining three quarters going to the *ibn* as the nearest *ʿaṣīb* to the deceased. *ʿAwl* never occurs when there are *ʿaṣabah* and there is a residue such as when a deceased leaves a *zawj*, *bint ṣulbiyyah* and an *akh shaqīq*, where the *zawj* receives a quarter due to the presence of a *bint*, the latter a half, which is the share for a *bint* and the residue goes to the *akh shaqīq* of the deceased as the nearest *ʿaṣīb*.

There is, likewise, no *ʿawl* in 8 as when a deceased leaves a *zawjah* and an *ibn*, the former receiving an eighth due to the presence of an *ibn* and the latter receiving the residue as the nearest *ʿaṣīb* to the deceased. Nor does it occur when a deceased leaves a *zawjah*, a *bint ṣulbiyyah* and an *akh shaqīq*, the shares being an eighth for the *zawjah* due to the presence of the *bint*, a half for the latter which is the allotment for a *bint* and the residue going to the *akh shaqīq* as the nearest *ʿaṣīb* to the deceased.[1]

---

1 *Al-Mawsūʿah al-Fiqhiyyah*, Vol 3 pp. 51 - 53.
Al-Taḥqīqāt al-Marḍiyyah, pp. 164 - 167.
Al-Tarikāt wa al-Waṣāyā, pp. 460 - 461.
Al-Ikhtiyār, Vol 5 pp. 96 - 98.
Al-Mughni, Vol 6 pp. 189 - 193.
Hawāshī al-Shaikh, Vol 6 p. 432.

D) *Al-Radd* - Redistribution:

a) Definition:

Radd, literally, amongst other things, means *rafḍ* meaning "refusal" or *i'ādah* which means "to return to someone or something"[1]. In *shari'ah*, *radd* is defined as "the payment of the residue of a *tarikah* to the *aṣḥāb al-furūḍ* when there is one meriting the residue of that *tarikah*".[2]

b) *Mashrū'iyyah* (Validity) Of *al-Radd* (Redistribution):

The *fuqahā'* of the *ṣaḥābah* as well as those of the *tabi'un* differ on the validity, in *shari'ah*, of *radd*.

Zaid bin Thābit and ibn 'Abbās of the *fuqahā'* of the *ṣaḥābah* rule that the residue of a *tarikah* is deposited in the *bait al-māl*. This is also the view of Mālik, al-Awza'i, al-Shāfi'i and ibn Ḥazm of the *ẓāhiriyyah*. The principle of both Mālik and al-Shāfi'i is that, if there is a residue after the *aṣḥāb al-furūḍ* had been given their respective shares, the residue is deposited in the *bait al-māl*. *Shāfi'is* and *Mālikis*, especially, consider the *bait al-māl* an *'aṣib* when there is no heir[3]. This is the earlier *māliki* rule even if the *bait al-māl* is *ghair muntaẓim*. It is also the earlier *shāfi'i* ruling. The later *fuqahā'* of both the *mālikis* and *shāfi'is* ruled that *radd* must be resorted to when the authority is unjust in his administration of

---

1 *Qāmus al-Muḥit*, Vol 1 p. 304.
Al-Munjid, p. 254.

2 *Al-Taḥqiqāt al-Marḍiyyah*, p. 248.
Al-Tarikāt wa al-Waṣāyā, p. 467.

3 *Fiqh al-Mawārith*, Vol 2 p. 57.

the *bait al-mal*. The later *shafi'is*, specifically, do not allow *radd* for the spouses.[1]

Those who oppose *radd* of the residue of a *tarikah* quote the following proofs:

- firstly, *Allah*, had prescribed the share of each heir of the *ashab al-furud*. To allow *radd* will be to exceed the prescribed limits as set out in the *ayat al-mirath* in the *Qur'an* which reads "*but those who disobey Allah and His Messenger and transgress His limits will be admitted to a Fire to abide therein and they shall have a humiliating punishment*".[2] The opposers state that punishment is prescribed for transgression of the Law and as such *radd* must be *haram*:
- the opposers further contend that the residue is for the *'asib* and if not found, then it must go to the *bait al-mal* as is the case with a Muslim deceasing and having no heir whatsoever. They further contend that the *ashab al-furud* come first, followed by the *'asabah*. If none are found, then the *arham* succeed according to the rules of such *mirath*. If none are found, what is left of a *tarikah* goes to the *bait al-mal*.

Those who permit *radd* are 'Umar, 'Ali, 'Uthman, ibn Mas'ud, Jabir, ibn Zaid, al-Hasan, ibn Sirin, 'Ata'a, Mujahid, all of the *fuqaha'* of the *sahabah* and *tabi'un*, as well as al-Thawri, the *hanafis* and the *hanbalis*. These

---

1 *Al-Tarikat was al-Wasaya*, pp. 467 - 469.
Kifayah al-Akhyar, Vol 2 pp. 21 - 22.

2 *Al-Qur'an*, Chapter 4: 14

fuqahā' differ amongst themselves on how *radd* is to take place. Their rulings are:

- 'Alī allows *radd* to the *aṣḥāb al-furūḍ*, each according to the value of his share. However, the spouses are excluded from *radd* according to 'Alī.
- 'Uthmān, Jābir and ibn Zaid allow *radd* to all the *aṣḥāb al-furūḍ* including the spouses. Their reasoning is that the spouses must accept *'awl*, so they must merit *radd* for equality and justice sake.
- ibn Mas'ūd allows *radd* for the *aṣḥāb al-furūḍ* save the spouses, *bint al-ibn* when found with the *bint ṣulbiyyah*, the *ukht shaqiqah*, the *awlād al-umm* when found with their *umm* as well as the *jaddah* found with an heir who succeeds to a fixed share.
- ibn 'Abbās allows *radd* save to the spouses and the *jaddah*[1], the latter due to her share being confirmed by *sunnah* and being for her *tu'mah* (maintenance) due to the Prophet ruling feeding (at'imu) the grandmothers a sixth.[2] No *radd* is due to her save when no other *wārith nasabi* (heir of lineage relationship) is not found.[3]
- the *ḥanafis* took the ruling of 'Alī. They, further, allow *radd* to seven categories of heirs and these are; the *bint ṣulbiyyah*, the *bint al-ibn*, the *umm*, the *jaddah*, the *ukht shaqiqah*, the *akh li umm* and *ukht li umm*. *Radd*, according to them (*ḥanafis*) can

---

1 *Aḥkām al-Tarikāt wa al-Mawārith*, p. 172.

2 *Jāmi' al-Usūl*, Vol 9 p. 608.
Sunan al-Tirmidhī, Vol 3 p. 285.

3 *Al-Tarikāt wa al-Waṣāya*, pp. 470 - 471.
Aḥkām al-Tarikāt wa al-Mawārīth, pp. 171 - 72.

be to a single heir, like the *bint ṣulbiyyah* who can be the only heir of the deceased, taking a half of the *tarikah farḍan* and the remaining half *raddan*. Another case is the *umm* being the only heir of the deceased. She receives a third of the *tarikah farḍan* and the remaining two thirds *raddan*. Thus, at times, a female can receive the entire *tarikah* if she is a *wārithah bi al-farḍ* (heir with a fixed share). The later *ḥanafī fuqahā'* ruled *radd* valid for the spouses also due to the *fasad* in the administration of the *bait al-māl*.

- the *hanbalis* share the thrust of the *hanafi* arguments and rules, allowing *radd* to the *aṣḥāb al-furūḍ* save the spouses for they are not of the *arḥām* of the deceased i.e blood relations. They claim *radd* is founded on Quranic law,[1] which shows that kindred by blood must precede the *bait al-māl* as the latter represents all the Muslims who are not related to the deceased. As *radd* is for the *arḥām* of the deceased, they must precede all others. The Prophet (s.a.w) included this in his *ḥadīth* which reads: "*He whoso leaves a debt, I am responsible for (settling) it and he whoso leave wealth, it is for his heir.*"[2] This text is *'amm* (general) and as such includes all wealth.[3]

---

1 *Al-Qur'an*, Chapter 8: 75.

2 *Saḥiḥ al-Bukhāri*, Vol 8 p. 187.
Mukhtaṣar Ṣaḥīḥ Muslim, p. 263.
Nail al-Awṭār, Vol 6 p. 64.

3 *Al-Mughni*, Vol 6 pp. 201 - 202.
Al-Tarikāt wa al-Waṣāya, p. 476.
Al-Ikhtiyār, Vol 5 p. 99.

- the *zaidiyyah* and *ja'fariyyah* also allow *radd* to the *aṣḥāb al-furuḍ*, save the spouses and they both proffer the same arguments as *ahl al-sunnah*, including quoting the *āyah* of *arḥām* in the *Qur'ān*[1] as well as the ruling of 'Ali stating that he used to allow *radd* to all the heirs save the spouses.[2]

c) **Procedure Of *Radd* Distribution:**

There are categories in and divisions herein and they are as follows:

Category 1:

In this category one finds one category of heir, like *bintān*, or *ukhtān* who are in the same *darajah* with the deceased or *jaddatān*. When any one of these groups are found as the only heirs, only one division is made. The *tarikah* is halved and each heir receive a half.

Category 2:

There are three cases in this category and they are as follows:

Case 1:

In the case where the root of the *mas'alah* is 3, the *tarikah* is divided into three like when the *farḍ* are 1/3 and 1/6 as in the case when where the deceased leaves *akhawān li umm*, who merits 1/3 as they are more than one and an *umm* who merits 1/6 as the deceased left *ikhwah*. The *tarikah* is divided into three equal parts; two parts for the *akhawān li umm* and one part for the *umm*, *fardan* and *raddan*. The same will

---

1 *Al-Qur'an*, Chapter 8: 75

2 *Al-Tarikāt wa al-Waṣaya*, pp. 476 - 478.

apply, if, instead of *akhawān li umm*, *ukhtān li umm* are found).

Case 2:

If the distributive process involves shares of 1/2 and 1/6 and *radd* has to occur, like in the case of a *bint ṣulbiyyah* and a *bint al-ibn* or a *bint ṣulbiyyah* and an *umm*, then the *tarikah* is divided into 4 equal parts. In the case of the heirs being the *bint ṣulbiyyah* and *bint al-ibn*, the *bint ṣulbiyyah* receives 3 parts and the *bint al-ibn*, one part. In the case where the heirs are the *bint ṣulbiyyah* and *umm*, the *bint ṣulbiyyah* receives 3 parts and the *umm* one part. The actual shares are from 6; 3/6 for the *bint ṣulbiyyah*, which is a half, and 1/6 for either the *bint al-ibn* or *umm* with the *bint ṣulbiyyah*. The shares are made from 4, with 3/4 for the *bint ṣulbiyyah* and 1/4 for the *bint al-ibn* or the *umm*.

Case 3:

If the heirs who will benefit from *radd* are those who will inherit 2/3 and 1/6, like *bintān ṣulbiyyatān* and the *umm*, then shares are from 6; 4/6 (which is 2/3) for the *bintān ṣulbiyyatān* and 1/6 for the *umm*. The shares are taken from 5 instead, and, thus, the *bintān ṣulbiyyatān* receive 4/5 and the *umm* 1/5, *fardan* and *raddan*. The same process is followed when the heirs meriting *radd* are a *bint ṣulbiyyah*, *bint al-ibn* and an *umm* as the shares will be in the same fraction system (i.e. the *bint ṣulbiyyah* - and the *bint al-ibn* sharing 2/3 in the ratio 2:1 and the *umm* having 1/6).[1]

---

1 *Al-Tarikāt wa al-Waṣāya*, pp. 473 - 474.

Category 3:

In this situation, there are heirs who merit *radd* and those who do not. In this case, those who merit *farḍ* but not *radd* are given their shares. The remainder is then subject to the *farḍ* and *radd* processes. An explanatory case hereof is when the deceased leaves a *zawj* and three *banāt ṣulbiyyah*. The *zawj's* share is deducted, which is 1/4 as the deceased left descendant heirs. The remaining 3/4 is for the three *banāt ṣulbiyyah*, each receiving 1/4, *farḍan* and *raddan*. In the case where the residue does not fit the number of heirs, like in the case where the deceased left a *zawj* and six *banāt ṣulbiyyah*, the *zawj* merits a 1/4 as the deceased left descendant heirs, leaving a residue of 3/4, which does not agree with six. The *zawj* is not given his share, but the denominator of his share, which is 1/4, is multiplied by 2, giving 8. The *zawj* gets 2/8 hereof, which is 1/4 and the remaining 6/8 for the six *banat ṣulbiyyah*, each receiving 1/8. If the above cannot solve the division problem, *taṣḥiḥ* (rectification) of the equation is required, like when the deceased left a *zawj* and five *banāt ṣulbiyyah*. The original root here is 12 as 1/4 and 2/3 features in the equation. The *zawj* receives 1/4 which leaves 3/4 for the five *banāt ṣulbiyyah* which does not evenly divide by 5. One now takes the lower denominator, which is 4 (of the 1/4 of the *zawj*) and multiply this 4 by the number of persons meriting *radd*, which is 5. This comes to 20. From this, the *zawj* receives 5, which is 1/4 and the remaining

15/20 is for the five *banāt sulbiyyah*, each receiving 3/20.[1]

E) ***Al-Munāsakhah* (Share Transfer):**

a) **Definition:**

Munāsakhah is derived from the root word *nasakha* which, literally, means *izālah* which in turn means "removal". *Tanāsakha* also means *naql* or *taḥwīl* which means "transfer".[2] *Munāsakhah*, in *sharī'ah*, means "the transfer of the shares of the heirs or all of them to those who succeed them in meriting *mīrāth*".[3]

b) ***Al-Munāsakhah* (Share Transfer) In Practice:**

The issue of *munāsakhah* has one of two cases. Either the first set of heirs are the same as the second set or they are different.

Case 1:

In the case where the heirs of the first set are the same as the second set of heirs, like in the case where a deceased leaves his *zawjah* and *awlād*, both *abnā'* and *banāt*. If an *ibn* or *bint* dies before the division of the estate, then the *tarikah* devolves upon the *zawjah*, who receives an eighth as the deceased left descendant heirs and the residue is divided between the *abnā'* and *banat* in the ratio 2:1 in the favour of the males. This is when the *ibn* or *bint* deceasing and having no heir to succeed him or her.

---

1 *Al-Mawsū'ah al-Fiqhiyyah*, Vol 3 p. 52.

2 *Qāmūs al-Muḥīṭ*, Vol 1 p. 281.
Al-Munjid, p. 805.

3 *Al-Taḥqīqāt al-Marḍiyyah*, p. 177.
Minhāj al-Muslim, p. 490.

Case 2:

This is the case when the first set of heirs are different from the second set as in the case where the deceased leaves a *zawjah* and *awlād ashiqqā'*. Before the division of the estate, one of these *awlād* deceases. If that *walad* leaves no descendant heir, then Case 1, immediately above, is followed. If such a *walad* leaves heirs, who are not, in fact heirs of the first deceased, then the first division is made to the first heirs i.e. the *zawjah* and the *awlād ashiqqā'*. Thereafter the second division is made to the heirs of the second deceased. Thus, in the example quoted, the first division is made to the *zawjah* of the deceased who receives an eighth as the deceased left descendant heirs and the residue goes to the *awlād ashiqqā'*, each male receiving twice the share of a female. Thereafter the division is made to the heirs of the *walad shaqiq* who deceased prior to the first division of the first deceased. These cases of *munāsakhah* are the same for all *madhāhib fiqhiyyah al-sunniyyah* as well as the *ja'fariyyah*.[1]

F) *Al-Takhāruj* (Agreement Of Exit Of An Heir Or Heirs):

Takhāruj is the noun of *takhāraja* which means "the ending of a company by some partners taking the house and some the land."[2] The original root

---

1 *Al-Mughni*, Vol 6 pp. 197 - 198
Al-Tarikāt wa al-Waṣayā, pp. 512 - 518.
Al-Mawsū'ah al-Fiqhiyyah, Vol 3 p. 73.

2 *Qamus al-Muḥit*, Vol 1 p. 192.
Al-Munjid, p. 172.

is *kharaja* which means "to exit".[1] In *sharī'ah*, *takhāruj* means "the agreement of the heirs on the exit of some of them from the *tarikah* with a share other than their rightful share".[2] Ibn 'Ābidīn defines it as "the agreement of the heirs on the exit of some of them from the *tarikah* on condition that something is given to them from the *tarikah*, be it *'ain* (asset) or *dain* (debtor's dues)."[3]

a) ***Mashrū'iyyah* (Validity) Of *Takhāruj* (Exit From An Estate):**

The validity of *takhāruj* is founded on the *Qur'ān* and *sunnah*. *Takhāruj* is a form of *ṣulḥ* (settlement) and *sulh* is valid in *sharī'ah*. The *Qur'ān* states: "*...and settlement (ṣulḥ) is best ...*"[4] The *zawjah* of ibn 'Awf who suffered *talaq al-far* (divorce on deathbed of spouse), Tamāḍir bint al-Asbagh al-Kalbiyyah made *ṣulḥ* with the remaining three wives of ibn 'Awf and received 1/32 of his *tarikah*[5] which amounted to 83 000 *dinars*. This shows the validity of *ṣulḥ* in *mīrāth*.[6] Abū Hurairah narrated from the Prophet (s.a.w) that *ṣulḥ* between Muslims is valid as long as it does

---

1 *Qāmus al-Muḥīṭ*, Vol 1 p. 191.
Al-Munjid, p. 172.

2 *Al-Wajiz Fi al-Mirath*, p. 46.
Al-Tarikāt wa al-Waṣāyā, p. 518.
Aḥkām al-Tarikāt wa al-Mawārith, pp. 231 - 232.

3 *Al-Tarikāt wa al-Waṣāyā*, p. 518.

4 *Al-Qur'ān*, Chapter 4: 128.

5 the four wives shared equally in one eighth as ibn 'Awf must have had children.

6 *Al-Tarikāt wa al-Waṣāyā*, p. 518.

not legalise *ḥarām* nor prohibit the *ḥalāl*.[1] *Takhāruj* falls under *al-ʿuqūd al-muʿawadah* (contracts of compensation) and as such is an agreement between two parties, in this case, the exiting heir and the remaining heirs on an agreed compensation. When properly and correctly contracted, the consequences of this *ʿaqd* is that the heir exits from the *tarikah* by accepting the agreed compensation and the other heirs thus buys out the exiting heir's share. The *ʿaqd al-takhāruj* (contract of settlement in succession) can be ruled void if any of the principles or *shurūṭ* has not been met or improper enactment took place or other issues affecting distribution comes to light, like a debt attached to the *tarikah* or another heir becomes apparent or there is a *musā lahu*.[2]

b) **Cases Of Takhāruj:**

There are three main cases in this matter and they are:

Case 1:

This is *takhāruj wārith ilā wārith* - exit agreement between two heirs. This is the case of *takhāruj* between two heirs only in a given *tarikah*. Thus, when an heir reaches *ṣulḥ* with the other heir paying him, say, 5 thousand dollars to effect his exit from the *tarikah*, then the remaining heir succeeds to all the *tarikah*. He had, in effect, purchased the share of the other exiting heir.

---

1 *Subul al-Salām*, Vol 3 p. 59.
Fiqh al-Sunnah, Vol 2 p. 52.

2 *Al-Tarikāt wa al-Wasāya*, pp. 519 & 526.

Case 2:

Khurūj ʿalā taṣāluḥ ʿalā al-ʿain or exit on settlement of an asset. This is the most common form of *takhāruj*. An heir makes *ṣulḥ* with the other heirs on exiting from the *tarikah* in return for something from the *tarikah*. An example being a deceased leaving a *zawj* and five *abnā'* and a *tarikah* of a small house, five cars and five plots of land, all equal in size. The *zawj* of the deceased makes *ṣulḥ* with the five *abnā'* that he takes the house and exits from the *tarikah*, to which the other heirs agree. The five *abnā'* now share equally in the five cars and five plots of land.

Case 3:

Khurūj bi taṣāluḥ maʿā jamīʿ al-warathah (exit from the estate by settlement with all the heirs). This is the case when an heir agrees to exit from the *tarikah* on payment of a required sum of money which is paid from a source other than the *tarikah* itself. There are three situations in this matter. Either each heir contributed the same amount to the exiting heir or paid in accordance with the share value in the *tarikah* or some of the heirs paid more than the others to the exiting heir. In each of these cases, an example will explain the situation:

- in the case where a deceased leaves his *zawjah*, *umm* and an *akh shaqīq* and a *tarikah* of 36 plots of land, the *zawjah* is to receive 1/4 as there are no descendant heirs to the deceased, the *umm* 1/3 for the same reason and there being only one *akh shaqīq* to the

deceased so the residue goes to the *akh shaqīq* as the nearest *ʿaṣib*. The equation is from 12; 3/12 for the *zawjah*, 4/12 for the *umm* and the rest of 5/12 for the *akh shaqīq*. However, the *zawjah* makes *ṣulḥ* with the other two heirs to exit the *tarikah*, on payment of 900 dollars. Of this amount, the *umm* contributes 400 dollars and the *akh shaqīq* 500 dollars. The shares will be: 1/4 for the *zawjah* which is 3/12 X 36/1 which gives 9 plots. The *umm* get 1/3 which is 4/12 X 36/1 which gives 12 plots. The remainder of 5/12 is for the *akh shaqīq* which is 5/12 X 36/1 which gives 15 plots. The *zawjah* exited the *tarikah* by *takhāruj*. Her share must now be divided between the two remaining heirs in the ratio 5:4 in favour of the *akh shaqīq* and the *umm* due to the paying out of the *zawjah*. The latter's share of 9 plots is divided to suit the ratio. The *akh shaqīq* receiving 5 plots and the *umm* 4 plots. The *umm* will, thus, have: 12 + 4 plots = 16 plots for the *umm* and the *akh shaqiq* 15 + 5 plots = 20 plots. The final calculation is, thus, 16 + 20 plots = 36 plots which is the full complement of the *tarikah*.

- when both the *umm* and *akh shaqīq* paid equal amounts to the *zawjah* exiting from the *tarikah*, then the *zawjah's* share is equally divided between the two of them and thus we have;
  umm 12 + 4,5 = 16,5 plots.
  akh shaqiq 15 + 4,5 = 19,5 plots.

- in the cases where the heirs pay different amounts to the exiting heir, each is to be compensated for the amount they contributed. In the example quoted where the deceased leaves a *zawjah*, *umm* and an *akh shaqīq* and 36 plots of land, and the *zawjah* agreeing to exit on payment of 900 dollars, when the *umm* gives 600 dollars and the *akh shaqiq* 300 dollars, the ratio is here 6:3 in favour of the *umm*. The shares of land, for the heirs, are 9 plots for the *zawjah*, which is 1/4, 12 plots for the *umm* which is 1/3 and the residue for the *akh shaqīq* as *'aṣīb* which is 15 plots. The 9 plots of the *zawjah* is divided between the *umm* and *akh shaqīq* in the ratio 6:3. Thus, the *umm* will receive:
12 + 6 = 18 plots, and the *akh shaqīq* receives 15 + 3 = 18 plots. This equals the complement in the *tarikah*.
In the cases mentioned, the laws of *bai'* (sale) are applicable as the exiting heir is selling his or her share to the other heirs and the calculations are made in ratio form. Care must be taken where *ribā* (usury/interest) takes place, like a deceased leaving only cash assets. In this case, *takhāruj* in cash is forbidden as *ribā* will occur. If there is cash and *'ain* (moveable or immovable assets), then *takhāruj* can take place).[1] The basic rule with *riba* is that when the items of exchange are the same, then equal amounts must be

---

1 *Al-Tarikāt wa al-Wasāya*, pp. 523 - 525.

exchanged, like flour and flour or money and money, but when they differ, like money and flour, then exchange can take place in the manner the seller and buyer agree on. Principle law hereon is in the *Qur'ān*[1], and detailed law in the *sunnah*, the latter narrated from the Prophet (s.a.w) by Abū Sa'īd al-Khudrī, 'Ubādah bin Ṣāmit and Abū Hurairah.[2] Money, specifically, in *shari'ah*, is not a saleable commodity. It is an instrument of purchase only.

G) ***Masā'il Mulaqqabāt* (Titled Problems):**

Masā'il mulaqqabāt are those problems, in *mīrāth* that derived a name from a specific happening surrounding it. The famous ones are the following:

a) ***Mas'alah Al-Sharikah* (Problem Of Partnership):**

This is also called *al-ḥajariyyah* or *al-yamanīyyah* or *al-ḥimāriyyah* and had been dealt with previously under the *mīrāth ikhwah li umm*. This is a disputed *mas'alah*, in which both the *ikhwah li umm* and *ikhwah ashiqqā'* feature. The *ashiqqā'* being excluded from the *tarikah* of their *umm*, who is also the *umm* of their *ikhwah li umm*, by the *ikhwah li umm* and other heirs due to the *ikhwah ashiqqā'* being residuaries and there being no residue. Some *fuqahā'* like 'Alī, Abū Musā and 'Ubai bin Ka'b all rule exclusion of the *ashiqqā'* while 'Uthmān, Zaid bin Thābit, Shuraiḥ, al-Thawrī, Mālik and al-Shāfi'ī ruling *sharikah* (sharing)

---

1 *Al-Qur'ān*, Chapter 2: 275 - 278.
Ibid, Chapter 3: 130.

2 *Subul al-Salām*, Vol 3 pp. 39 - 40.

of the *ikhwah li umm* and *ikhwah ashiqqā'* in this case.[1]

b) ***Mas'alah Al-Gharimatain*** **(Problem Of The Strange Position Of Parents):**

This is also called *al-gharibatān* (due to the strange position of the parents in succession) or *al-gharawān* (as the parents are like creditors in an estate here) or *al-'umaryatān* (as 'Umar was the first to give this ruling in this problem). This *mas'alah* is founded in the case where a deceased leaves a *zawj*, an *umm* and an *abb* or the deceased leaves a *zawjah*, an *umm* and an *abb*. Most of the *fuqahā'*, including Abū Hanīfah, Mālik, al-Shāfi'i and Ahmad rule, in both cases, that the *umm* receives 1/3 of the residue after the surviving spouse's share has been deducted. This applies to both the *zawjān*. The *abb* receives the final residue as the nearest *'aṣib* to the deceased. The basic rule here is that every heir, male or female, who succeeds in shares of thirds (*ath-lā-than*), must take such, in the case of one of the surviving spouses being also an heir, from the residue after the *zawj's* share had been deducted. In the *mas'alah* under discussion, if this is not done, the *abb* will not get twice the share of the *umm*. Ibn 'Abbās opposes the above ruling, ruling that the *umm* receives 1/3 from the entire *tarikah* as the *Qur'ān*, gave her that share[2] and the Prophet's (s.a.w) ruling "*give*

---

1 *Al-Ikhtiyar*, Vol 5 p. 178 - 179.
Bidāyah al-Mujtahid, Vol 2 p. 343.
Al-Umm, Vol 4 p. 88.

2 *Al-Qur'ān*, Chapter 4: 11.

the heirs their due share..."[1] He further contends that the *abb*, in this *mas'alah*, is an *'aṣib* and as such must accept the residue after the *aṣḥāb al-furuḍ* had taken their respective shares. If the *abb* is not found and the *jadd ṣaḥīḥ* takes his place, the same rule shall apply, according to ibn 'Abbās. His ruling is also one of the reported views of Abu Bakr Siddiq. Abu Yusuf gives the *umm* 1/3 of the residue when she is found with the *jadd ṣaḥīḥ* in this *mas'alah*.[2]

c) ***Mas'alah al-Kharqā'*** **(Problem Of The Breaching the Consensus:**

This is so called due to 'Uthmān, breaching the *ijmā'* on certain issues (*kharq al-ijmā'*). It is also called 'Uthmāniyyah. This *mas'alah* centres around the case where a deceased leaves an *umm*, *jadd ṣaḥīḥ* and an *ukht*. The *ṣaḥābah* differed hereon. Abū Bakr ruled 1/3 for the *umm* and the entire residue to the *jadd ṣaḥīḥ* as *'aṣib*. Zaid ruled 1/3 for the *umm* and the residue to be shared by the *jadd ṣaḥīḥ* and the *ukht* in the ratio of 2/3 of that residue for the *jadd ṣaḥīḥ* and the remaining 1/3 of that residue for the *ukht*. 'Alī again ruled 1/3 for the *umm*, 1/2 for the *ukht* and the residue of which is 1/6 for the *jadd*. Ibn 'Abbās has two rulings attributed to him; one like the view of 'Alī just quoted and another one in which he gives the *ukht* half of the *tarikah* and the residue being shared equally between the *jadd ṣaḥīḥ* and the *umm*. 'Uthmān

---

1 *Mukhtaṣar Ṣaḥīḥ Muslim*, p. 262.

2 *Al-Taḥqiqat al-Marḍiyyah*, pp. 88 - 89.
Bidāyah al-Mujtahid, Vol 2 pp. 340 - 341.
Minhāj al-Muslim, pp. 473 - 474.

ruled 1/3 for the *umm*, and the residue shared equally between the *jadd ṣaḥīḥ* and the *ukht*.[1]

d) ***Mas'alah al-Marwāniyyah* (The Marwan Problem):**

This *mas'alah* gets its name from the *khalīfah* Marwān bin al-Hakam, in whose reign it occurred. It is also called *mas'alah al-gharā'a* due to it being famous and well known amongst the people of his reign. It is presented in the case where a deceased leaves her 6 *akhawāt mutafarriqāt* (sisters of different parentage) and her *zawj*. The *zawj* receives 1/2 as the deceased left no descendant heirs. The *ukhtān shaqiqatān*[2] receive 2/3, the *ukhtān li umm*[3] receive 1/3 and the *ukhtān li abb* are excluded as the *ukhtān shaqiqatān* excluded them taking the maximum allowed for *ukhtān* and more. *'Awl* occurs as the original root is 6, but increased to 9 i.e. 1/2 + 2/3 + 1/3 = 9/6. The shares are to be taken from 9 instead of 6 and are, thus, 3/9 (instead of 3/6) for the *zawj*, 4/9 (instead of 4/6) for the *ukhtān shaqiqatān* and 2/9 (instead of 2/6) for the *ukhtan li umm*. Thus, the final equation is: 3/9 + 4/9 + 2/9 = 9/9 which is a balanced equation.

e) ***Mas'alah al-Ḥamziyyah* (The Ḥamza Problem):**

This *mas'alah* gets its name from the person who asked the question, namely, Ḥamza al-Ziyāt. The *ṣaḥābah* differed on it. The case presents itself when a deceased leave 3 *jaddāt mutahaddiyāt* (grandmothers equal in lineage), 3 *akhawāt mutafarriqāt* (sisters of different

---

1 *Al-Ikhtiyar*, Vol 5 p. 128.
Al-Muḥallā, Vol 9 p. 289.

2 *Al-Qur'ān*, Chapter 4: 176.

3 Ibid, Chapter 4: 12.

parentage) and a *jadd ṣaḥīḥ*. It appears from the calculation that the 3 *akhawāt* are one *ukht shaqīqah* and the other *li abb*. Abū Bakr and ibn 'Abbās ruled 1/6 for the *jaddāt* (grandmothers) shared equally amongst them and the rest to the *jadd ṣaḥīḥ* as he is the nearest *'aṣib* excluding the *akhawāt* completely. He does the same as when an *abb* of the deceased was found with the *akhawāt*. The *mas'alah* is from 6; 1/6 for the *jaddat* and 5/6 for the *jadd ṣaḥīḥ*. The calculation is corrected by multiplying the number of *jaddāt* by the root, which is 6 and which gives 18. The *jaddāt* receive 3/18 i.e. 1/18 for each of them and the *jadd ṣaḥīḥ* receives 15/18. Thus 3/18 + 15/18 = 18/18 which is a balanced equation. 'Alī and ibn Mas'ūd rule that the *ukht shaqīqah* receives 1/2 and the *ukht li abb* 1/6 completing 2/3 for two and more *akhawāt*, the *jaddāt* share equally in 1/6 and the *jadd ṣaḥīḥ* receives 1/6 also. Their equation is, thus, as follows:

1/2 + 1/6 + 1/6 + 1/6 = 6/6. A *shādh* (irregular) ruling is attributed to ibn 'Abbās herein in that it is purported that he ruled 1/6 for the *umm al-umm* and the remaining 5/6 for the *jadd ṣaḥīḥ* as the *'aṣib*. This equation is simply:

1/6 + 5/6 = 6/6. Zaid bin Thābit, again, rule 1/6 for the *jaddāt* shared equally between them and the rest between the *jadd ṣaḥīḥ*, the *ukht shaqīqah* and *ukht li abb*. Correction is required in the equation which is out of 72, but is simplified to 36. The *jaddāt* receives 6/36 (which is one sixth), each, thus receiving 2/36. The residue is divided into *naṣīban* (two equal shares) of 15 each. The

jadd ṣaḥīḥ receive 15/36. The remaining 15/36 is divided between the *ukht shaqīqah* who will get 10/36 and the *ukht li abb* 5/36. The equation, is thus:

6/36 + 15/36 + 10/36 + 5/36 = 36/36.

f) ***Mas'alah al-Dinārīyyah* (Problem Of The *Dinars*:**

This is also called *mas'alah Dāwudiyyah* (the Dawūd problem) due to Dawūd al-Tai'i asking about it. The case revolves around the case of the deceased leaving a *zawjah*, a *jaddah*, *bintān ṣulbiyyatān*, 12 *ashiqqā'* and an *ukht shaqīqah*. The *tarikah* is 600 *dinars*. The *zawjah* receives 1/8 as the deceased left descendant heirs, which is 75 *dinars*. The *jaddah* receives 1/6 which comes to 100 *dinars*. The *bintān ṣulbiyyatān* receive 2/3 which comes to 400 *dinars*. A residue is found which is 25 *dinars*. The *ikhwah ashiqqā'* and their only *ukht shaqiqah* share, by *ta'ṣib*, this residue; 2 *dinars* for each *akh shaqīq* and one *dinar* for the *ukht shaqīqah*. The final equation is, thus:

4/24 + 3/24 + 16/24 + 1/24 = 24/24 and the *dinars* are distributed as:

75 + 100 + 400 + 25 = 600 *dinars*.

g) ***Mas'alah al-Imtihān* (The Testing Problem):**

In this case, the deceased leaves categories of heirs, each category being less than 10 and the equation does not balance save if it exceeds 30 000. The *mas'alah* is presented by the deceased leaving, 4 *zawjāt* (wives), 5 *jaddāt*, 7 *banāt* and 9 *akhawat li abb*. The equation is from 24 and the division is 3/24 (which is 1/8 as the deceased left succeeding descendants) for the *zawjāt*, 4/24 for the *jaddāt*, (which is 1/6) 16/24 for the *banāt* which is 2/3 and the residue is for the

akhawāt li abb which comes to 1/24. Correction is required in the equation to get even figured shares for all the heirs individually. This is done by multiplying the number of heirs by each other, category by category. Multiplying the *zawjāt* by the *jaddāt* we have: 4 X 5 = 20. We now multiply 20 by the number of *banāt* which is 20 X 7 = 140. Then 140 is multiplied by the number of *akhawāt li abb* which comes to: 140 X 9 = 1260. This 1260 is now multiplied by the root 24, thus, 1260 X 24 = 30 240. The complete final shares are, thus:
4 *zawjāt* 3/24 X 30 240/1 = 3780. Each *zawjah* receives 3780/4 = 945
4/24 shared by 5 *jaddāt* which is 4/24 X 30 240/1 = 5040. This is divided by 5 which equals 1008 for each *jaddah.*
16/24 for the 7 *banāt* is
16/24 X 30 240/1 = 20 160 divided by 7 = 2880 for each *bint.*
1/24 for the 9 *akhawāt li abb* is 1/24 X 30 240/1 = 1260 divided by 9 *akhawāt li abb* which comes to 140 for each *ukht li abb.* The full final equation is, thus, as follows:

zawjāt	4 X	945 =	3780
jaddāt (grdms[1])	5 X	1008 =	5040
banāt (daughs[2])	7 X	2880 =	20160
akhawāt(sists[3])	9 X	140 =	1260

Total: 30 240, which balances.

---

1 short for grandmothers.

2 short for daughters.

3 short for sisters.

h) ***Mas'alah Al-Ma'muniyyah*** **(The al-Ma'mūn Problem):**

This *mas'alah* arose when al-Ma'mūn wished to appoint a *qādi* for the city of al-Baṣrah in Irāq. Yahyā bin Akthar was brought before him whom al-Ma'mūn considered too young so he asked him the following *mas'alah*. Yahyā answered correctly. The *mas'alah* is presented in the case of both parents and *bintān* deceasing and leaving heirs behind and in another situation where one of these parties decease leaving behind heirs. Thus, in the first case, when the deceased leave behind *bintān* and both parents, 1/3 will go to each *bint* and 1/6 to each parent. The equation is: 1/3 + 1/3 + 1/6 + 1/6 = 6/6 which balances. This is the case when the deceased is a male. In the case of one of the *banāt* deceasing, the heirs will be a *jadd saḥīḥ*, a *jaddah saḥīḥah* or *umm al-abb* (mother of the father) and an *ukht*. According to Abū Bakr's ruling, the *jaddah* get 1/6 and the remaining 5/6 goes to the *jadd* and the *ukht* is excluded. With Zaid bin Thābit, again, the *jaddah* receives 1/6 and the rest is divided into three equal parts; two parts for the *jadd* and one part for the *ukht*. If the first deceased is a female, then she left an *ukht*, *jaddah saḥīḥah* and a *jadd fāsid*. In this case, the *jaddah* receives 1/6, the *ukht* 1/2 and the rest is redistributed to these two only as the *jadd fāsid* is excluded by *ijmā'* as the *aṣḥāb al-furūḍ* had exhausted the *tarikah*.[1]

---

1 *Al-Mawsū'ah al-Fiqhiyyah*, Vol 3 pp. 75 - 79.
Al-Ikhtiyār, Vol 5 pp. 128 - 130.

CHAPTER 4

AL-WASĀYĀ (LEGACIES)

1. ***Al-Wasāyā:***

Al-Wasāyā (sing *al-wasiyyah*) also has to do with succession to property after death. The cardinal difference between it and *al-mirath* is that much more freedom of testation is allowed.

1.1 **Definition:**

Wasāyā or *wasatu* is the plural of *wasiyyah* which means "a testament or legacy". The root derivative is the verb *'awsa*, meaning "to make someone responsible for the execution of a specific duty after your death". *Awsā*, thus, literally means "to impose upon someone or command with something."[1] *Wasiyyah* is so called due to *ittisāliha bi 'amr al-mayyit* (due to it having relation with the instructions of the deceased)[2]. As for the meaning of *wasiyyah* in *shari'ah*, *hanafis* define it as "authorising (*tamlik*) possession of your wealth or possessions to someone else after your death by way of charity (*tabarru'*)". There is a slight variation in this definition by *hanafis*.[3] This definition includes *'uqud* (contracts), like *bai'* (sale), *hibah* (gift) and the like. Limitation to "after death" excludes everything save the *wasiyyah* itself, while "charity" (*tabarru'*) excludes *iqrār bi al-dain* (acknowledgement of debt to a creditor). A *wasiyyah* can, thus, be *'ain* (a physical asset) or *manfa'ah* (beneficial usage or usufruct).[4] It

---

1 *Lisān al-'Arab*, Vol 6 p. 4853.
Qāmus al-Muhit, Vol 4 p. 403.
Al-Munjid, p. 904.

2 *Lisān al-'Arab*, Vol 6 p. 4854.

3 *Al-Tarikat wa al-Wasāyā*, p. 531.
Al-Ikhtiyār, Vol 5 p. 63.

4 *Fiqh 'alā al-Madhahib al-Arba'ah*, Vol 3 pp. 315 - 316.

is, actually, not necessary to mention "after death" as a *waṣiyyah* is only enacted after death by *shari'ah*.

Mālikis define *waṣiyyah* as "a right (*haqq*) due from one third of the possessions of the *'aqid al-waṣiyyah* or *mūṣī* (legator) due at the death of the *mūṣī* or it is a *haqq* due to someone by agency (*niyabah*) of the *mūṣī*."[1] This definition includes the *waṣiyyah* as well as *al-'iṣā'* (curatorship). *Ḥanbalis*[2] share this definition of the *mālikis*, while *shāfi'is*[3] limit it to the *waṣiyyah* only. The *ẓāhiriyyah* states *waṣiyyah* to be *farḍ* (binding) on every Muslim leaving *māl* (wealth) behind.[4] The *ja'fariyyah* share the *māliki* definition on *waṣiyyah*, while the *zaidiyyah* define it as "a special instruction (*'ahd*) chained down to take effect after death (of the legator) and which may be accompanied by *tabarru'*."[5] There is virtual *ijmā'* on the scope of *waṣiyyah* save that some *fuqahā'* have included *al-'iṣā'* in the definition.

1.2 ***Mashrū'iyyah al-Waṣiyyah* (Validity Of Legacy):**

The *fuqahā'* differ on the *ḥukm* of *waṣiyyah*. The majority of the *fuqahā'*[6] rule it to be *sunnah* while the *ẓāhiriyyah* rule it to be *farḍ* (compulsory)[7]. The *mashrū'iyyah* of *waṣiyyah* is proven from *Qur'ān*, *sunnah*

---

1 *Al-Tarikāt wa al-Waṣāyā*, p. 533

2 *Al-Mughni*, Vol 6 p. 1.
Al-Muqni', p. 169.

3 *Al-Iqnā'*, Vol 2 p. 56.
Fiqh 'alā al-Madhāhib al-Arba'ah, Vol 3 p. 316.
Al-Ikhtiyār, Vol 2 p. 31.

4 *Al-Muḥallā*, Vol 9 p. 312.

5 *Al-Majmu'*, Vol 15 p. 397.
Al-Tarikāt wa al-Waṣāyā, pp. 537 & 538.

6 *Al-Hidāyah*, Vol 4 p. 231.
Al-Ikhtiyār, Vol 2 p. 31.
Al-Mughni, Vol 6 p. 1.

7 *Al-Muḥallā*, Vol 9 p. 312.

and *ijmā'*.[1] The *Qur'ān* states: "*It is prescribed when death approaches any of you, if he leave any goods (wealth), that he make a bequest to parents and next of kin according to reasonable usage. This is due from the God-fearing.*"[2] Also in another *āyah* it is stated: "*...after a legacy (so made) or debt (which has to be paid).*"[3] Initially, prior to the revelation of *āyāt al-mīrāth*, *waṣiyyah* was necessary for wives at death of the husband and entailed lodgings and maintenance for a year (*ḥawl*).[4] In the *sunnah*, *waṣiyyah* is mentioned in *ḥadīth*, as narrated by ibn 'Umar that the Prophet (s.a.w) said: "*It is the duty of every Muslim who has something to dispose of as waṣiyyah, to have it written down as soon as possible.*"[5] The text speaks of "*thalātha la yālin*", literally meaning "three nights" which is interpreted to mean "swiftness".[6] *Ijmā'* of the Muslims is manifest as it was practised from the time of the *ṣaḥābah* till today. The *fuqahā'* differ on the status of *waṣiyyah*. Those who rule it *farḍ* (compulsory) are Talḥa, al-Zubair, al-Zuhri, Ṭawus, ibn Abi Awfa, Talḥa bin Mutarraf, Sulaiman Abū Mijlas, Dāwūd al-Ẓāhiri, Abū 'Awānah, al-Asfarainī, ibn Jarīr, Ishāq and the

---

1 *Al-Majmū'*, Vol 15 p. 397.

2 *Al-Qur'ān*, Chapter 2: 180.

3 Ibid, Chapter 4: 12.

4 Ibid, Chapter 2: 240.

5 *Mukhtaṣar Ṣaḥiḥ Muslim*, p. 259
Sunan Abi Dāwūd, Vol 2 p. 111.
Al-Lu'lu'u wa al-Marjān, Vol 2 p. 399.
Al-Muwatta', Vol 2 p. 228.

6 *Fiqh 'ala al-Madhāhib al-Arba'ah*, Vol 3 p. 315.

zāhiriyyah.[1] This is also al-Shāfi'i's old view as reported by al-Baihaqi.[2]

The difference of opinion of the *fuqahā'* centres around the standing of the *āyah al-waṣiyyah* (verse of legacy)[3] as to whether it is *mansūkhah* (abrogated) or not.[4] Those of the *fuqahā'* who rule *waṣiyyah farḍ*, state that the verse of legacy is *'āmm* (general) in its meaning as conveyed by the wording of the text and has special application to parents who do not inherit (like nonmuslim parents) of a convert to Islām, for example, as well as relatives who do not succeed to the *tarikah* of a deceased. Ibn 'Abbās, in one ruling attributed to him and Qatādah, rule that all those inheriting by way of *āyat al-mirāth* (verses of succession)[5] are excluded from *waṣiyyah* and all other persons have right to *waṣiyyah*[6] i.e they may receive from it. This is ibn 'Abbās's and Qatādah's understanding from the *hadīth* narrated by Abū 'Usāmah that the Prophet (s.a.w) said: *"Allāh had granted the right due to everyone so there is no wasiyyah for the warith (heir)."*[7] The above ruling is also the view of al-Shāfi'i, most *mālikis* and a group of the *ahl al-'ilm* (scholars in *sharī'ah*).[8] Ibn Hazm of

---

1 *Al-Muḥallā*, Vol 9 p. 312.
Nail al-Awtār, Vol 6 p. 39.

2 *Nail al-Awtār*, Vol 6 p. 39.

3 *Al-Qur'ān*, Chapter 2: 180.

4 a similar difference is found in the verse of the *waṣiyyah* for wives at the death of the husband (*Al-Qur'ān*, Chapter 2: 240). The vast majority of the *mufassirūn* rule that it was abrogated by the *āyāt al-mirāth*. (See *Al Jāmi' li Aḥkam al Qur'ān*, Vol 3 p. 226).

5 *Al-Qur'ān*, Chapter 4: 11 - 12 & 176.

6 *Sunan Abi Dawud*, Vol 2 p. 113.

7 *Sunan Abi Dawud*, Vol 2 p. 113.
Subul al-Salām, Vol 3 p. 106.

8 *Al-Jami' li Ahkām al-Qur'ān*, Vol 2 pp. 262 - 263.

the *zāhiriyyah* goes so far as to rule that any Muslim deceasing and leaving wealth behind and not having made *waṣiyyah*, a third of his *tarikah* must be taken for that purpose.[1]

The majority of the *fuqahā'* rule that the verse of legacy was abrogated fully by what ibn 'Abbās narrated that, initially, all the wealth left by a deceased was for his child or children and the *waṣiyyah* part for his parents. This was abrogated by what *Allāh* wished and He ruled that a male receives double the share of a female, to parents each a sixth, the wife a quarter or an eighth and the husband a half or a quarter.[2] Those who rule the verse of legacy as being *mansukhah* (abrogated) are, ibn 'Umar, Abu Mūsa, ibn Musaiyyib, al-Ḥasan, Mujāhid, 'Aṭa'a, ibn Sīrin, Qatādah al-Nakha'i, Shuraiḥ, al-Dhaḥḥāk, al-Zuhrī and others[3]. The verses of succession[4] supports this view.[5] Further, those *fuqahā'* who agree on the *fardiyyah* (compulsion) of *waṣiyyah* differ on its scope and its application. Most say it is of general application while Ṭawūs, Qatādah, Jābir bin Zaid and others state that it is compulsory for those relatives who do not inherit from the *tarikah* while Abū Thawr states the *wujūb* is manifest in the verse of legacy and it had been explained in *hadith* to whom it is to be given, failing which this right is lost.[6]

---

1 *Al-Muḥallā*, Vol 9 p. 313.

2 *Ṣaḥīḥ al-Bukhārī*, Vol 4 pp. 4 - 5.

3 *Tafsīr ibn Kathīr*, Vol 1 p. 372.

4 *Al-Qur'ān*, Chapter 4: 11 - 12 & 176.

5 *Tafsīr ibn Kathīr*, Vol 1 p. 372.

6 *Nail al-Awṭār*, Vol 6 p. 39.
Tafsīr ibn Kathīr, Vol 1 pp. 372 - 373.

1.3 **Permissible Amount For *Al-Waṣiyyah*:**

There are several *ḥadīth* texts on this matter. The *ḥadīth* of ibn 'Umar[1] quoted previously does not mention any amount. Ibn 'Abbās stated that "*if only the people would reduce their waṣiyyah from a third to a quarter, for the Prophet (s.a.w) said (in matter of waṣiyyah): "...a third and a third is much".*[2] Sa'd ibn Abī Waqqās narrated that the Prophet (s.a.w) visited him during his serious illness and the former asked him (s.a.w) if he could dispose of all his wealth as *waṣiyyah*. The Prophet (s.a.w) replied negatively. The Prophet (s.a.w) also refused a half as *waṣiyyah*, but consented to a third, saying "a third and a third is much; it is better leaving your heirs rich then poor begging for their living".[3] Abu Dardā' narrated that the Prophet (s.a.w) said: "*Allāh granted you a third of your wealth at the time of your demise to increase your good deeds.*"[4] The *isnād* (chain of reporters) is weak, but the rule of a third for *waṣiyyah* is supported in other stronger, proven and authentic *ḥadīth* texts. There is, thus, *ijmā'* that an unrestricted *waṣiyyah* must not exceed a third and, thus, logically, the amount distributed to the heirs must not be less than two thirds of the *tarikah*.

The question arising now is, is it permissible to have a *waṣiyyah* of more than one third of your *tarikah*. The *ḥadīth* texts quoted are clear that the *muwarrith* has a right of disposing of one third of his *tarikah* as a

---

1 *Mukhtaṣar Ṣaḥīḥ Muslim*, p. 259.

2 *Ṣaḥīḥ al-Bukhārī*, Vol 4 pp. 3 - 4.
Mukhtaṣar Ṣaḥīḥ Muslim, p. 259.
Sunan al-Nasā'ī, Vol 6 p. 244.
Jāmi' al-Usūl, Vol 11 p. 632.

3 *Mukhtaṣar Ṣaḥīḥ Muslim*, p. 259.
Nail al-Awṭār, Vol 6 p. 43.
Muwatta', Vol 2 p. 230.
Sunan al-Tirmidhī, Vol 3 p. 291.

4 *Nail al-Awṭar*, Vol 6 p. 43.

waṣiyyah and does not require the permission of anyone herein. The heirs, thus, have control over the remaining two thirds. Therefore, if a *muwarrith* makes *waṣiyyah* of more than a third of his *tarikah* and his heirs consent to that *waṣiyyah* being executed after the death of the *muwarrith*, it is so executed. If they refuse, the *waṣiyyah* is reduced to a third of the entire *tarikah*. This is due to the possession rights in *waṣiyyah* of the *muwarrith* and the rights of the heirs of the *muwarrith* to his *tarikah*.[1] An heir, normally, does not receive *waṣiyyah* from his *muwarrith* testator. If his *muwarrith* should grant a *waṣiyyah* to an heir of his, then such a *waṣiyyah* is only executed when all the remaining heirs consent thereto.[2] In 'Abbās and others narrated that the Prophet (s.a.w) said: "a legacy is not permitted for an heir save when the (other) heirs consented thereto."[3]

Some of the *ḥanbalī fuqahā'*, the *shafi'is*, al-Muzani and the *ẓāhiriyyah* oppose this due to the *ḥadīth* text.[4] The reason why the other heirs have to consent is that their right is attached to that *waṣiyyah* for their share of the *tarikah* will be reduced by that as well as to prevent hatred, enmity and strife between the heirs.[5] The Prophet also prohibited a Muslim parent from unequal gift distribution to his children during his lifetime. 'A'ishah narrated that the Prophet (s.a.w) said: "*Be*

---

1 *Al-Mughni*, Vol 6 p. 12 - 13.

2 *Al-Mughni*, Vol 6 p. 6.
Al-Tarikāt wa al-Waṣāyā, p. 551.
Al-Hidāyah, Vol 4 p. 232.

3 *Nail al-Awtār*, Vol 6 pp. 45 - 46.

4 *Al-Mughni*, Vol 6 p. 6.
Bidāyah al-Mujtahid, Vol 2 p. 332.
Al-Muḥallā, Vol 9 p. 316.

5 *Al-Hidāyah*, Vol 4 p. 233.

fair and just to your children in the giving of gifts."[1]

1.4 **Arkān al-Waṣiyyah (Principles Of Legacy):**

The *fuqahā'* differ on what constitute the *arkan* (principles) of *waṣiyyah*. Some, like Abū Ḥanifah, Abū Yūsuf and Muḥammad al-Shaibānī of the *ḥanafis* rule that only *ijāb* (proposal) and *qabūl* (acceptance) of *waṣiyyah* form a single *rukn* (principle) of the *'aqd al-waṣiyyah* (contract of legacy). The *mūṣī* must enact *waṣiyyah* legally and the *mūṣā lahu* (legatee) must accept it. *Qabd* (taking possession) is not a requirement with *waṣiyyah* as is the rule with *hibah* (gift).[2] Zufar of the *ḥanafis* opposes this ruling only *ijāb* (proposal) from the *mūṣī* as the required principle. His proof is that no *qabūl* is required from the heirs in succession to the *tarikah* of their *muwarrith* at the death of the latter, but is automatically ceded to the heirs. The same is applicable to the *mūṣī* in the case of *waṣiyyah*.[3] Abū Ḥanifah and fellow *fuqahā'* prove their argument by referring to the *āyah* in the *Qur'ān* "*..and that man can have nothing but what he strives for...*"[4] If the *mūṣā lahu* is possessed automatically of *waṣiyyah*, at the death of the *musi*, then he had made no effort for attaining the *waṣiyyah*, this effort being his *qabūl*. This automatic possession of the *mūṣā lahu* is in conflict with the *ayah* quoted. They further contend that by not ruling *qabūl* of *waṣiyyah* as a principle, one may harm the *mūṣā lahu* for the *waṣiyyah* may cause his death or some other

---

1 *Ṣaḥīḥ al-Bukhāri*, Vol 3 p. 195.
Subul al-Salām, Vol 3 p. 89.

2 *Badā'i al-Sanā'i*, Vol 7 pp. 331 - 332.
Fiqh 'alā al-Madhāhib al-Arba'ah, Vol 3 pp. 316 - 317.

3 *Badā'i al-Sanā'i*, Vol 7 p. 332.
Al-Hidāyah, Vol 4 pp. 233 - 234.
Al-Fiqh al-Islāmi wa Adillatuhu, Vol 8 p. 13.

4 *Al-Qur'ān*, Chapter 53: 39.

disadvantage, like *waṣiyyah* of some blind and crippled servants. To obligate acceptance of *waṣiyyah*, could, in certain cases, thus, be harmful to the *muṣā lahu* and, thus, he must be given the chance of accepting or refusing the *waṣiyyah*.[1]

Other *fuqahā'* like *mālikis*, *shafi'is* and others rule the *arkān* (principles) of *waṣiyyah* to be the *mūṣi*, *muṣā lahu*, *muṣā bihi* (the actual legacy) and the *sighah* (formula for enacting the contract of legacy).[2]

These principles have *shurūṭ* pertaining to them.

a) ***Shurūṭ Arkan al-Waṣiyyah* (Conditions Pertaining To The Principles Of Legacy):**

Ḥanafis rule that it is conditional that the *qabūl* of *waṣiyyah* must complement and agree its *ijāb*. If not, that principle is incomplete and thus no *'aqd al-waṣiyyah* is found.[3] *Qabūl* must take place after the death of the *mūṣi* as *waṣiyyah* is *tamlik* (transferred ownership) at death. *Qabūl* of *waṣiyyah* during the lifetime of the *mūṣi* is thus invalid.[4]

b) ***Shurūṭ al-Mūṣi* (Conditions Pertaining To The Legator):**

The *mūṣi* must fulfil the following *shurūṭ* before his *waṣiyyah* can be valid. These *shurūṭ* are as follows:

- he must be of *ahl al-tamlik* i.e someone who can possess someone else of his possessions. This requires him to be *'aqil* and *mukallaf*. The

---

1 *Bada'i al-Sanā'i*, Vol 7 p. 332.

2 Al-Dardir: *Aqrab al-Masālik li Madhhab al-Imām Mālik*, Cairo, Matba'ah Muṣṭafā al-Ḥalabī, 1954, 3rd ed., p. 184.
Bidāyah al-Mujtahid, Vol 2 p. 332.
Minhāj al-Ṭullāb, p. 73.
Al-Iqnā', Vol 2 p. 57.
Al-Tarikāt wa al-Waṣāya, pp. 542 - 543.

3 *Bada'i'i al-Sanā'i'i*, Vol 7 p. 334.

4 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 3 p. 317.

waṣiyyah, thus, of a *majnūn* or a *ma'tū* is invalid. *Waṣiyyah* of a *saghīr*, even a *murāhiq* (adolescent) if not *mukallaf* yet, is also invalid, even if his *walī* consents thereto. The only exception is his instruction for his *dafn* (burial) on condition that he is a *ṣabī mumaiyiz*. This is *ḥanafī* doctrine. All the other *fuqahā'* require *'aql* as a condition for the *mūṣī*. *Mālikis* rule validity of the *waṣiyyah* of a *ṣabī mumaiyiz*, but they differ as to purpose herein. Some *mālikis* ruling invalidity when such a *saghīr* makes *waṣiyyah* for the *sulṭān*, but valid if it is for *qurbah* (religious beneficence), while others do not lay down this condition.[1]

Shāfi'īs rule the *waṣiyyah* of a *ṣabī* as invalid as they rule *bulūgh* and *'aql* as necessary requirements for the *mūṣī*. The *ḥanbalis* require the *mūṣī* to be *'āqil*, thus, the *waṣiyyah* of the *majnūn mutbiq* (permanently insane) is invalid. As for those who oscillate between being insane and sanity, their *waṣiyyah* is valid in times of them being *'āqil*. The *waṣiyyah* of the inebriated is invalid. As for the weak minded (*ḍa'if al-'aql*), but who is *rāshid*, his *waṣiyyah* as well as his *'iṣā'* (appointment of curator for his minor children) is valid. *Tamyīz* is required, but not *bulūgh* and therefor the *waṣiyyah* of a *ṣabī mumaiyiz* is valid.[2]

- The *mūṣī* must also not be insolvent as debts are settled before the execution of a *waṣiyyah*.[3] Islām is not a condition, according to the

---

1 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 3 pp. 317 , 321.

2 Ibid, Vol 3 pp. 322 - 325.

3 *Al-Hidāyah*, Vol 4 p. 234.
Fiqh 'alā al-Madhāhib al-Arba'ah, Vol 3 p. 319.
Al-Tarikāt wa al-Wasāyā, p. 545.

ḥanafis, thus, the *waṣiyyah* of a nonmuslim to a Muslim and *vice versa* is valid.[1] They quote the Quranic *ayah* (verse) "*Allāh forbids you not, with regard to those who fight you not for (your) Faith nor drive you out of your homes, from dealing kindly and justly with them...*"[2]

c) ***Shurut al-Musā Lahū* (Conditions Of The Legatee):**

The *mūsā lahū* must fulfil the following conditions:

- he must be found at the time the *waṣiyyah* is made by the *mūṣi*. *Waṣiyyah* is *tamlīk* (transfer of ownership) and if the *mūsā lahū* is *ma'dūm* (non existent) at the time of the enactment of *waṣiyyah*, *tamlīk* had been effected to a non existent instance which is void in *shari'ah*. This point gives rise to *waṣiyyah* for a *ḥaml* (unborn child). There is a basic rule that the *waṣiyyah* to a unborn child is valid. There is no known difference herein amongst the *fuqahā'* and its the ruling of, amongst others, al-Thawrī, al-Shāfi'ī, Isḥaq, Abū Thawr and *ahl al-ra'i*.[3] *Ḥanafis* rule that if a *waṣiyyah* is made for an unborn child and such a child is born within six months of the enactment of the *waṣiyyah*, then such a child succeeds to that *waṣiyyah* as he was found when it was enacted. If that child is born before that period, the *waṣiyyah* is void as he was not found at the enactment of the *waṣiyyah*[4] *Shāfi'is* share

---

1 *Al-Hidāyah*, Vol 4 p. 233.

2 *Al-Qur'ān*, Chapter 60: 8.

3 *Al-Mughni*, Vol 6 p. 56.

4 *Fiqh 'alā al-Madhahib al-Arba'ah*, Vol 3 p. 319.

this view[1] as well as *ḥanbalis*.[2]

Mālikis rule that the unborn child succeeds to *waṣiyyah* when born alive according to their definition of a live birth or even if the foetus was not found at the time of the enactment of *waṣiyyah*. Thus, if someone says; "if a foetus is found of so and so, such a *waṣiyyah* will be for that child", such a *waṣiyyah* is valid and executed when found and the issue born alive, irrespective of duration between enactment of *waṣiyyah* and birth of that child, succeeds to the *waṣiyyah*.[3] Most of these rulings are based on the issue of when is an unborn child found in the mother's womb. Due to the difficulty of ascertaining this accurately at the time of these rulings, these different rulings were founded. Nowadays, pregnancy can be confirmed very early, which makes the issue of *waṣiyyah al-ḥaml* (legacy of the unborn) much easier.

- the *mūṣā lahū* must be known even if by description only, like the *fuqarā'* (poor) or *masākin* (needy). Mālik and al-Shāfi'i concur hereon, basically[4], but al-Shāfi'i rule that if the *mūṣā lahū* is a person he must be distinctly known. Thus, a *waṣiyyah* for Zaid is invalid.[5]
- the *mūṣā lahū* must not be the murderer of his *mūṣi*. If he is, the *waṣiyyah* is cancelled. This is so irrespective if it is *al-qatl al-'amd* or *al-qatl al-khata'a*. However, if the heirs of the

---

1 *Minhāj al-Ṭullāb*, p. 73.

2 *Al-Mughni*, Vol 6 pp. 56 - 57.

3 *Al-Tarikāt wa al-Waṣāyā*, p. 558.

4 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 3 pp. 319, 322 & 324.

5 Ibid, Vol 3 p. 323.

slain *muwarrith* approves the *waṣiyyah* to the murderer of their *muwarrith*, it is executed if it was *al-qatl al-khata'a* and not if it is *al-qatl al-'amd* even if the heirs approve the *wasiyyah*. This is all *hanafi* doctrine. *Mālikis* rule that if someone strikes someone a blow from which he later dies and after that blow and before his death, he grants a *waṣiyyah* to the perpetrator of the crime, then such a *waṣiyyah* is valid on condition that the *mūṣi* knows that person struck him. If, however, he made a *waṣiyyah* to someone and thereafter that *mūsā lahū* strikes him a blow from which he dies, then that *waṣiyyah* is cancelled, whether the victim knows the perpetrator of the crime or not. *Hanbalis* exclude the murderer of the *mūṣi* from the *waṣiyyah* whether it is *al-qatl al-'amd* or *al-qatl al-khata'a*, whether the act was committed before or after *waṣiyyah* was enacted for the *mūṣā lahū*.[1]

- there is a difference amongst the *fuqahā'* about *waṣāyā* when the *mūṣā lahū* deceases before the *mūṣi*. Most *fuqahā'*, amongst them 'Alī, al-Zuhrī, Ḥammād bin Sulaimān, Rabī'ah, Mālik, al-Shāfi'ī and others rule that the *waṣiyyah* goes to the *walad mūṣā lahū* (child of the legatee), while 'Aṭā'a rules it to go to the heir of the *mūṣā lahū* as this heir stands in the place of the *mūṣā lahū*. This is subject to the *mūṣi* knowing about the demise of the *mūṣā lahū* and nothing happened which altered the *waṣiyyah*.
- a *waṣiyyah* for a deceased person is void. This is the ruling of Abū Ḥanīfah al-Shāfi'i, and the *ḥanbalis*. Mālik rule validity hereof and the *waṣiyyah* goes to his heirs. Mālik argues that *waṣiyyah* is for the benefit of the *mūṣā lahū* and

---

1 *Fiqh 'alā al-Madhahib al-Arba'ah*, Vol 3 p. 325.

this is procured here and this resembles the same situation as when the *mūṣā lahu* was alive.[1]

- *qabūl al-waṣiyyah* (acceptance of a legacy) by the *mūṣā lahu, if he is a person,* is required after the death of the *mūṣī*. If it is an instance, only death of the *mūṣī* is required.[2] If the *mūṣā lahu* rejects the *waṣiyyah*, it is abrogated and cancelled. This is so if done after the demise of the *mūṣī*. If done before the demise of the *mūṣī*, the *waṣiyyah* stays intact as *qabūl* must be after the demise of the *mūṣī*. *Waṣiyyah* is also cancelled when the *mūṣā lahu* rejects it after the demise of his *mūṣī* but before he (the *mūṣā lahu*) accepts it. When a *waṣiyyah* is cancelled, it reverts to the *tarikah* of the *mūṣī* and forms part of it for distribution to his heirs.[3] If the *mūṣā lahu* deceases after his *mūṣī* and before he (the *mūṣā lahu*) had accepted the *waṣiyyah*, then the heir of the *mūṣā lahu* takes his place.[4] *Ḥanbalis* differ on this question; a group of them ruling that the *wārith mūṣā lahu* (heir of the legatee) can accept or reject the *waṣiyyah* as he stands in the place of the *mūṣā lahu* who is his *muwarrith*. This group ruled as such due to a reported *ḥadīth* of the prophet (s.a.w) which says "*he whoso leaves a haqq* (right) (such) goes to his heirs". The other group of ḥanbalis, amongst them ibn Ḥammād rule the *waṣiyyah* as cancelled as *qabūl* by the *mūṣā lahu* is required and he is *ma'dūm*.[5]

---

1 *Al-Mughnī*, Vol 6 p. 21.

2 *Al-Majmū'*, Vol 15 p. 431.

3 *Al-Mughnī*, Vol 6 pp. 22 - 23.

4 *Al-Majmu'*, Vol 15 p. 434.

5 *Al-Mughnī*, Vol 6 p. 24.

d) ***Shurūṭ al-Musā Bihi*** **(Conditions Of The Actual Legacy):**

The *mūṣā bihi* is the actual *waṣiyyah* which has to be transferred from the ownership of the *musi* to that of the *mūṣā lahu*. The following rules are applicable hereto:

- *ḥanafis* rule that the *mūṣā bihi* must be found at the time of enactment of the *waṣiyyah* when the latter is *mu'aiyan* (specified) or *shā'i'an* (mixed with other possessions of his). If not so found, the *in'iqād al-waṣiyyah* (enactment of legacy) is void. However, when not specified, like leaving someone a third of his possessions, but at the time of the *waṣiyyah* the musi has nothing, but later on profits from a venture, such a *waṣiyyah* is valid by *ḥanafi* ruling. Al-Shafi'i does not require the presence of the *mūṣā bihi* at the time of *in'iqād al-waṣiyyah*.[1] *Ḥanbalis* share this *shafi'i* view. They also rule that it is not required that the *mūṣā bihi* be such as to be delivered to the *mūṣā lahu*, like birds in the sky or animals in the wild.[2]
- *shāfi'is* and *ḥanbalis* allow the *waṣiyyah* of a non *tāhir* (impure) nature provided it is used for the purposes prescribed, like *waṣiyyah* of *zait mutanajjis* (polluted oil)[3] which may be used for anything save for the *masjid* (mosque).[4]
- some *fuqahā'* like *ḥanafis*, *shāfi'is* and *ḥanbalis* allow the *waṣiyyah* of *manfa'ah* (usufruct) of an

---

1 *Al-Majmū'*, Vol 15 p. 425.

2 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 3 pp. 320 , 324 & 325 - 326.

3 *Al-Majmū'*, Vol 15 p. 426.

4 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 3 pp. 324 & 326.

asset for any period specified to a *musā lahu*.[1] Ibn Abi Laila, ibn Shubramah and the zāhiriyyah oppose this.[2]

e) ***Shurūt Sighah al-Wasiyyah*** **(Conditions Of The Formula For Legacy):**

Malikis require that the wording be such that enactment of *waṣiyyah* is understood by it. This applies to the verbal *waṣiyyah*. The same applies to the written *waṣiyyah* as well as for the one enacted by an *akhras* (dumb person), the latter's sign which must be clearly understood to mean the enactment of a *waṣiyyah*. *Shāfi'is* share, basically, these rules as well as hanbalis. *Hanafis* rule that the *ījab* and *qabūl* must fulfil the requirements of enactment of *waṣiyyah*.[3]

f) ***Hukm al-Waṣiyyah*** **(Ruling On Legacy):**

A *waṣiyyah* may sometimes be *wājib* (necessary), *mandūb* (preferred) and at times *muḥarramah* (forbidden). *Waṣiyyah wājibah* (necessary legacy) is for instances in which the rights and possessions of others, like items for safekeeping belonging to someone else, or debts that must be settled, features. *Waṣiyyah mustahabbah* (preferred legacy) is for settling the rights of *Allāh* like outstanding *zakah* and *fidyat al-siyām* (penalty incurred during fasting *Ramaḍān*) while *waṣiyyah muḥarramah* (prohibited legacy) is exhortation or instructing in sinful ways or acts. *Waṣiyyah mubāḥah* (permissible legacy) is that of the rich for their rich relatives and kin. This is all *ḥanafi* doctrine. There are

---

1 *Al-Muqni'*, p. 174.
Al-Ikhtiyār, Vol 5 p. 70.
Kifāyah al-Akhyār, Vol 2 p. 32.
Al-Majmū', Vol 15 p. 403.

2 *Bidāyah al-Mujtahid*, Vol 2 p. 332 - 333.

3 *Fiqh 'ala al-Madhāhib al-Arba'ah*, Vol 3 pp. 316 - 317, 322, 324 - 326.

other rules applicable to other forms of *waṣāyā* which have a religious nature[1]. These will be dealt with later on. *Shāfi'īs* agree with the *ḥanafī* definitions of *waṣiyyah wājibah* and *waṣiyyah muḥarramah*. They also have *waṣiyyah makrūhah* (detestable legacy) which is a *waṣiyyah* of more than a third, while they define *waṣiyyah mustahabbah* (preferred legacy) as the *waṣiyyah* for your relatives who are not heirs of you or for the poor. *Waṣiyyah mubāḥah* is that which is for the rich. *Mālikis* have the same kind of *waṣāyā* save that they give other names to it. *Ḥanbalis* have four kinds of *waṣāyā*. *Waṣiyyah wājibah* is like that for other *fuqahā'* save that they include the rights of *Allāh* under this heading, like outstanding *zakāh* and performance of outstanding *ḥajj*. *Waṣiyyah mustaḥabbah* is that for your poor relatives who are not heirs of you on condition that the *mūṣi* left much behind according to the understanding of his place of residence and that it does not exceed a fifth of the *tarikah* so that the heirs are not disadvantaged. *Waṣiyyah makrūhah* for them is the *waṣiyyah* of a *mūṣi* who is not well off and causes problems for his needy heir by this *waṣiyyah*. *Waṣiyyah muḥarramah* is that which is more than a third. They, thus, prohibit anyone who has heirs, from doing this. This is actually of the *wasāyā makrūhah*. Besides these categories, other *wasāyā* are *waṣāyā mubāḥah*.[2]

---

1 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 3 pp. 326 - 327.

2 Ibid, Vol 3 pp. 327 - 328.

g) **Instances Of *Wasāya* (Legacies):**

Case 1 - Performance Of *Hajj* (Major Pilgrimage):

There is a general consensus by the *fuqahā'* that every avenue which is good and beneficial to the Muslims and is not prohibited in *sharī'ah*, is a valid avenue for *waṣiyyah*.[1] The *fuqahā'* have views and rulings on these instances. One being the validity or otherwise of *waṣiyyah* for the performance of *ḥajj* and recitations of *Qur'ān* after your death. *Ḥanafis* rule that it is *mustaḥab* to have the *ḥajj* made for him who did not do so during his lifetime. Some *ḥanafis* rule it to be *wājib*. This is conditional that there is enough money for the deputy to perform that *ḥajj* for that deceased. *Mālikis* rule that it is necessary to execute the *waṣīyyah* for performance of *ḥajj* when the *mūṣī* so instructed[2]. The cost for this is taken from a third of the *tarikah* (estate). If the *mūṣī* did not instruct herein, it is not performed as *ḥajj* is also a bodily act and as such does not accept deputising. However, the *waṣiyyah* herein must be executed.[3]

Both *shāfi'is* and *ḥanbalis* rule validity of such a *waṣiyyah*[4]. This is also the view of ibn 'Abbās, Zaid bin Thābit and Abu Hurairah. *Shāfi'is* and those agreeing with them, rule that this is taken from his entire *tarikah*. These rulings are based on the *ḥadīth* narrated by ibn 'Abbās and transmitted by al-Bukhārī which states that a woman of the tribe of Jahm told the Prophet (s.a.w) that her mother vowed to perform *ḥajj* but died before she could perform it. She asked the prophet (s.a.w) if she could

---

1 *Al-Majmū'*, Vol 15 p. 403.

2 Ibid, Vol 3 p. 331.

3 *Fiqh al-Sunnah*, Vol 1 p. 637.

4 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 3 pp. 332 & 334.

perform it in her stead to which he (s.a.w) replied: "*If your mother had a debt, would you have settled it? Settle the debts of Allāh because He merits it more that you should settle His debt (you owe Him).*"[1] Due to Quranic law[2] there is *ijmā'* by the *fuqahā'* that *ḥajj* is compulsory on all those Muslims who are sane and pubescent and have the means to perform it, to do so once in their lifetime.[3]

Case 2 - Recitation From *Qur'ān*:

Ḥanafis rule that a *waṣiyyah* for recitations of *Qur'ān* for the deceased whether at his home or graveside, is void and must not be executed. A *ḥanafī* view is that the payment may be taken as *ṣadaqah* and not a fee for recitations.[4] They also rule *butlān* (non validity) for *waṣiyyah* for building or decorating graves save when it is necessary, like preventing wild animals from digging out a corpse or from the smell to pour forth from the grave. The latter rule is based on the *ijmā'* of the *fuqahā'*. *Shāfi'is* and *ḥanbalis* allow the execution of *waṣiyyah* for recitations of *Qur'ān* for a person after his death. *Mālikis* and *ḥanbalis* allow the *waṣiyyah* for a *masjid* although the latter is not normally a recipient of *waṣiyyah*. It is allowed due to being *birr*.[5] There is *ijmā'* that a *waṣiyyah* instructing in the performance of *ṣalāh* or *ṣiyām* and the like missed, to be performed by someone on behalf of the deceased legator is void as these are duties of body and person only and no deputising is allowed for it during your lifetime nor after your

---

1 *Fiqh al-Sunnah*, Vol 1 p. 636.

2 *Al-Qur'ān*, Chapter 3: 97.

3 *Fiqh al-Sunnah*, Vol 1 p. 431.

4 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 3 p. 329.

5 Ibid, Vol 3 pp. 329 - 334.

death. Any sinful act in a *waṣiyyah* is not executed either by *ijmā'* of the *fuqahā'*.

Case 3 - Non Specificatory *Waṣāya* (Legacies):

This has mostly to do with inaccurate speech or wording for *waṣāya*. Being of the *birr* and beneficial to the *mūṣā lahum* as well as the *mūṣi*, the *fuqahā'* allowed some leeway in this matter. Thus, the *waṣiyyah* for neighbours and relatives are valid, but the *fuqahā'* differ on its scope then. Abū Ḥanīfah rule that the *waṣiyyah* for neighbours is for all those whose houses which are inseparably attached (*mutalāziqūn*) to the *mūṣi's* house, irrespective who they are while Abū Yūsuf and Muḥammad al-Shaibānī rule it for all those who are in one area defined as people who use one *masjid* of one congregation and of one *dīn*.

These *fuqahā'* also differ on the *waṣiyyah* for relatives. Abū Ḥanīfah ruling it for the nearest *arḥām maḥārim* (blood relatives of the prohibited category in marriage) or their descendants on condition they are two or more and subject to the *mūṣā lahu* not being excluded from legacy in the same way as in *mīrāth* as well as not being an heir of the *mūṣi*. Thus, the parents and child of the *mūṣi* are excluded, but not the *ibn al-ibn* if found with the *ibn*, for example. Abū Yūsuf and Muḥammad go against all this and rule it to be for all the relatives, near or far removed from the *mūṣi*, whether it be one or more persons or whether they are Muslims or not.[1] *Mālikis* rule that *waṣiyyah* for neighbours are for all those "living around" the house of the *mūṣi* while *waṣiyyah* for relatives are for all those relatives who are not heirs of the *mūṣi*. There are lots of details in this matter which is actually

---

1 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 3 pp. 334 - 336.

derived from *'urf* and as such may not be relevant to a specific region or place under the laws of *'urf*.

Waṣiyyah for neighbours, according to al-Shāfi'i, is for 40 houses on each side of the *muṣi's* house, which comes to 160 households. *Ḥanbalis* share this view but add that the share for each household must be divided equally between all members of that household while *waṣiyyah* for relatives are for the nearest only. *Shāfi'is*, further, rule that *waṣiyyah* for relatives are for all the relatives in equal shares while *waṣiyyah* for the poor is for three and more persons as three is the least for *jamā'ah* (a congregation) in *shari'ah*. Similarly, *waṣiyyah* for the *'ulamā'* is for all save if a category is specified, like the *mufassirūn*, in which case, it will be only for them.[1]

h) ***Tazāhum al-Wasāyā* (Several Legacies From The Legator):**

A *muṣi* may leave more than one *waṣiyyah*. In this case, there are three possibilities:

- either all the *waṣāyā* are for people,
- or all are for settlements of the *huqūq Allāh* owed by the *muṣi*, or
- they are a mixture of the two mentioned kinds.

Case 1 - *Waṣāyā* (Legacies) For People Only:

In this case, the *waṣāyā* are, each, not more than a third or more than that. In the case where the *wasaya*, each of them, are less than a third, like 1/3, 1/4 and 1/6, then all are executed if the heirs of the *musi* approves. These *waṣāyā* will be 4/12 (which is 1/3), 3/12 (which is 1/4) and 2/12 (which is 1/6), all adding up to 9/12 or 3/4 of the *tarikah* of the *muṣi*, leaving 1/4 for the heirs as *tarikah*. If the heirs refuse to execute

---

1 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 3 pp 333 - 334 & 339 - 343.

the mentioned *wasaya* over 1/3 of the *tarikah*, then the *wasaya* is to be taken from only 1/3, each *musā lahu* taking what is his share proportionally to their share. This 1/3 for *wasāyā* is thus divided into 12 equal parts and the *musā lahu* meriting 1/3 get 4 parts (4/12), the one meriting 1/4 gets 3 parts (3/12) and one meriting 1/6 gets 2 parts (2/12).[1]

In the case where the *mūsi* made more than one *wasiyyah* and it is more than 1/3, like a *wasiyyah* of 1/2 for one and 1/3 for another, if the heirs of the *mūsi* accept this, the *wasāyā* are executed which means 3/6 and 2/6 goes for *wasāyā* and 1/6 remains for the heirs to be distributed as required in *mīrāth*. If the heirs refuse, the *wasāyā* are reduced to 1/3 of the *tarikah*. There is a difference between the *fuqahā'* as to the distribution of this 1/3 between Abū Ḥanīfah and the other *fuqaha'*. The former rule that each *mūsā lahuma* (two legatees) share equally in that 1/3 i.e. 1/6 each. Abū Yūsuf, Muḥammad al-Shaibāni, *mālikis, shāfi'is* and *ḥanbalis* rule that the *mūsi's* wishes must be obeyed and thus the 1/3 is divided into 5 parts; 3 parts for the *mūsā lahu* who is to have received 1/2 (which is 3/5) and two parts for the one who was to receive 1/3 (which is 2/5). The *zāhiriyyah* rule that one starts with the one first mentioned by the *mūsi* and execute his *wasiyyah* from that. If that exhausts the 1/3 of *wasāyā* the other *wasāyā* are automatically cancelled. The *zaidiyyah* agree with the majority view in this *mas'alah* as expressed by Abū Yūsuf and others.[2]

---

1 *Al-Tarikāt wa al-Wasāyā*, pp. 585 - 586.

2 Ibid, p. 594.

Case 2 - *Wasāyā li Allāh* - Legacies Of The Right Of God:

This has to do with the commanded acts of worship with which the *mūsī* defaulted during his lifetime. These missed acts cannot be substituted by anyone or anything, including *waṣāyā*. Acts which can be performed on your behalf, like payment of outstanding *zakāh* and *ḥajj* has to be executed, according to most of the *fuqahā'*, while acts like *ṣalāh* and *ṣiyām Ramaḍān* (fasting of Ramaḍān) cannot be repaid. Waṣiyyah given in these cases, is a *ṣadaqah* for enhancing the standing of the person in virtue as against the sin of default in these duties. There is no such thing as purchasing exemption for missed *ṣalāh* and *ṣiyām Ramaḍān* through *waṣīyyah*. If a *mūsī* makes *waṣīyyah* for a category of acts and they are all of the same kind, like only *farḍ* or only *sunnah* (optional) acts, and these can be executed from 1/3 of the *tarikah*, then these are executed. If the shares of the *waṣāyā* differ, like a *mūsī* decreeing 1/3 for *ḥajj*, 1/4 for unpaid *zakāh* and 1/4 for *kaffārah*, and the heirs refuse to give more than 1/3 for *waṣāyā*, then all these acts share in that 1/3 proportionally. The actual shares of the *waṣāyā* are; 4/12 for *ḥajj*, 3/12 each for *zakāh* and *kaffārah*. This make it 10 parts (adding the nominators). The 1/3 is divided into 10 equal parts; 4 for *ḥajj*, 3 for *zakāh* and 3 for *kaffārah*.

If the *mūsī* decreed 1/3 for his *ḥajj*, *zakāh* and *kaffārah* and it is too little to cover all these acts, then the *fuqahā'* differ, quite widely, in the settling of this issue. Their rulings range from settling what can be settled and cancelling those which cannot be settled to a

complicated system of precedence of forms of *'ibadat* which are found in *fiqh* works.[1]

Case 3 - *Wasaya li Huquq Allah* (Legacies For Rights/Duties Owed To God) And *Wasaya li al-'Ibad* (Legacies For Persons):

When a *musi* leaves *wasaya* for settling the *huquq Allah* and *wasaya* for people, but did not specify any share of his *tarikah* for it, 1/3 is given to cover them. Thus, is he leaves unspecified *wasaya* for *hajj*, *zakah*, *kaffarah* and for a person, then the 1/3 is equally divided between these four. Since all three *huquq Allah* are of a compulsory nature, each receives an equal share for execution. If the *huquq Allah* differ in degree, like some being *fard* and some *sunnah*, like *wasaya* for *hajj*, *zakah* and *sadaqah* and for a person, then 1/4 of the 1/3 of the *tarikah* goes for the person and the 3/4 thereof is made into one and the *huquq Allah* executed starting from the most major of these *huquq*. This is done till all the *huquq Allah* had been met or until the proceeds are exhausted and the remaining *wasaya* are cancelled due to insufficient means for its execution.[2]

i) ***Ruju' 'An al-Wasiyyah* - Retraction Of A Legacy:**

There is broad *ijma'* that the *musi* can withdraw any *wasiyyah* of his at any time before his death. This is the ruling of 'Umar, 'Ata'a, Jabir bin Zaid, al-Zuhri, Qatadah, Malik, al-Shafi'i, Ahmad, Ishaq and Abu Thawr. Al-Sha'bi, ibn Sirin, ibn Shubramah and al-Nakha'i also agree save that they rule the *wasiyyah 'itaq* (legacy of freeing a slave) as irretractable. *Ruju'* is effected by speech or an act

---

1 *Al-Tarikat wa al-Wasaya*, pp. 587 - 588.

2 Ibid, p. 589.

indicating *rujū'*, like giving away something or selling land you had made *waṣiyyah* of.[1]

j) *Al-Wiṣāyah* (Appointment Of A *Waṣī* - Curator):

The word *wiṣāyah* is another plural of *waṣiyyah* meaning, in this case, appointment of a *waṣī*. Thus, we speak of *awṣā ilā fulan* meaning "making him your *waṣī* over your possessions and minor children after your death."[2] A person can appoint someone to administer his possessions after his death and be guardian of his minor children. This person is called, in *shari'ah*, a *waṣī*. This kind of *waṣī* is called *al-waṣī al-mukhtār* (appointed curator). This *waṣī* is appointed by the *walī* and *qabūl* thereof is necessary, during the lifetime of the *walī* or after his death, unlike *waṣiyyah* which can only be accepted after the death of the *muṣī*. It is likewise imperative that the *walī* be informed of the refusal or retraction of acceptance of *waṣī* during his lifetime. Rejection of *wiṣāyah* after the death of the *walī* may be reversed, before the *qāḍī* confirms the retraction. *Qabūl* of a *waṣī* or *wiṣāyah* is by speech or an act, such as carrying out the duties of a *waṣī*.[3]

i) *Shurut al-Waṣī* (Conditions Of The Curator):

- All the *fuqahā'* agree that the *waṣī* must be *'āqil*, *mukallaf* and *rāshid*. The *waṣī* must also be a Muslim if the minor children are Muslims. All *fuqahā'* also agree that the *waṣī* must be *amīn* (trustworthy) and *'ādil* (righteous). Some *fuqahā'* rule *'adl ẓāhiran* (apparent righteousness) as being sufficient, while others, like *shāfi'is* require both *'adl*

---

1 *Al-Tarikāt wa al-Wasāyā*, pp. 590 - 591.

2 *Al Munjid*, p. 904.

3 *Al-Tarikāt wa al-Wasāyā*, pp. 90 - 92.

zāhiran and *'adl bātinan* (righteousness in private life). The *shahādah* of righteous Muslims being taken to establish this quality.

- there is a difference amongst the *fuqahā'* as to whether *qudrah* (physical strength) to see to the duties of the *waṣī* is required, some requiring it while others, like the *ḥanbalis* not requiring it, the latter ruling that a stronger person can be appointed to assist the weak *waṣī*. An *'amā* (blind person) and an *akhras* (dumb person) can be a *waṣī* on condition that the latter's sign is understood. *Dhukurah* (masculinity) is not a requirement for some, like the *ḥanbalis*, who allow a woman to be a *waṣī*.
- some *fuqahā'* like the *ḥanafis*, rule that if a *waṣī* cannot attend to his duties properly in certain matters in the way he did previously, the *qādi* appoints an assistant to assist him therein and does not relieve his of his position. If he still cannot see properly to his duties as *waṣī*, the *qādi* replaces him with another *waṣī*. If the *waṣī* had the required qualities for a *waṣī* and later exhibits a quality or qualities in conflict herewith, he is relieved of his duties as *waṣī*. An example being a Muslim curator apostatising from Islām or is guilty of theft. Al-Shāfi'i especially rules that the *waṣī* must not be an enemy of the those under his care in curatorship.
- it is the general rule that if two or more curators are appointed by the *walī*, then each can act independently from one another save if the instructions are such that prohibit such independent actions. Some *fuqahā'*, however, allow one of the curators to act individually in certain matters, like collecting the

possessions of the *wali*, burial of him, the return of items of safekeeping to its rightful owners and the sale of perishable items.[1] Abū Yusuf rules that authority of *wiṣāyah* is established in each of the multiple curators and each can, thus, act on his own.[2]

- if a *waṣi* appoints, before his death, another person to continue with the curatorship, it will be correct according to some *fuqahā'*, like *hanafis*. If the *wasi* did not do so, the *qādi* appoints a new *waṣi*.[3]

(ii) *'Ajr al-Waṣi* (Payment Of The Curator):

The *fuqahā'* differ on payment for the *waṣi*. Some rule that if he is poor, he is entitled to payment and if he is rich, no payment is due to him. Others rule that irrespective of the financial position or standing of a *waṣi* he is due for payment while others rule that no payment is due to any *waṣi*, rich or poor.[4] This ruling is based on the *fuqahā's* interpretation of the Quranic *āyah* on this matter. The *āyah* reads: *"...But consume it not wastefully, nor in haste against their growing up. If the guardian is well-off let him claim moderate remuneration and if he is poor let him have for himself what is just and reasonable."*[5]

---

1 *Fiqh 'alā al-Madhāhib al-Arba'ah*, Vol 3 pp. 350 - 352.

2 *Aḥkām al-Awlād*, pp. 93 - 94.

3 *Fiqh 'ala Madhāhib al Arba'ah*, Vol 3 p. 351.

4 *Aḥkām al-Awlād*, p. 96.

5 *Al-Qur'ān*, Chapter 4: 6.

CHAPTER 5

AL-WAQF (ENDOWMENT)

1 *Al-Waqf* (Endowment):

Waqf (pl. *awqāf* - endowments) are of the oldest Muslim institutions which has survived till this day and are being created continuously. It is one of the institutions that preceded the modern ministry of social welfare. In Muslim countries today, *waqf* alleviates considerably the work and responsibilities of the social programme of government. In South Africa, especially in the former Natal and Transvaal, numerous *awqāf* instances have been created by Muslim philanthropists which contribute considerably to Muslim welfare, education as well as aiding nonmuslims.

1.1 Definition:

Literally, *waqf* means "opposite of sitting". *Waqf al-ʿarḍ* means *ḥabs al-ʿarḍ* i.e "freezing it".[1] *"Freezing"* here refers to its ownership. In the *sharīʿah waqf* is "the freezing (*taḥbīs*) of an asset and retention of ownership of it by the owner or transfer of the ownership to *Allāh* and the benefits or proceeds from that asset being given away as charity."[2] This definition covers the various definitions of the *fuqahāʾ*. A *waqf* is never sold (*yubāʿ*), nor given in gift (*yūhab*) nor inherited (*yūrath*).[3] *Waqf* is sometimes called *ḥabs* by some *fuqahāʾ*, like the *ẓāhiriyyah*.[4]

---

1 *Lisān al-ʿArab*, Vol 6 p. 4898.
Al-Munjid, p. 914.

2 *Nail al-Awṭār*, Vol 6 p. 24.
Subul al-Salām, Vol 3 p. 87.
Minhāj al-Muslim, p. 423.
Al-Munjid, p. 914.

3 *Subul al-Salām*, Vol 3 p. 88.

4 *Al-Muḥallā*, Vol 9 p. 175.

1.2 ***Mashrū'iyyah al- Waqf* (Validity of Endowment):**

The validity of *waqf* is established in the *Qur'ān* and *sunnah* as well as the practice of the *ṣaḥābah*. As for the *Qur'ān*, the *fuqahā'* quote: "*..Do what is good to your closest friends..*"[1] and "*Oh you who believe! Bow down, prostrate yourself and adore your Lord, and do good that you may prosper.*"[2] Various *ḥadīth* texts have been reported dealing with *waqf*. Abu Hurairah narrated that the Prophet (s.a.w) said: "*When a person dies, all his deeds cease, save three things; sadaqāt al-jāriyah (continuous charity), knowledge he left behind from which people benefit and a pious child who prays for him.*"[3] The *fuqahā'* interpret *sadaqāt al-jāriyah* to mean *waqf* for it is enacted for perpetuity. The practice of *waqf* comes from two main acts of two senior *ṣaḥābah*, namely 'Umar and 'Uthmān. As for 'Umar, what he asked the Prophet (s.a.w) what to do with the land he acquired in Khaibar to which the Prophet (s.a.w) replied "*freeze the asset and distribute its produce as charity on condition that such is not sold, nor given in gift nor inherited.*" 'Umar gave such charity to the poor, kin, visitors and travellers.[4] There is no harm in the *mutawallī*[5] eating of it in moderation or feeding a

---

1 *Al-Qur'ān*, Chapter 33: 6

2 Ibid, Chapter 22: 77.

3 *Mukhtaṣar Ṣaḥīḥ Muslim*, p. 264.
Nail al-Awṭār, Vol 6 p. 24.
Al-Targhīb wa al-Tarhīb, Vol 1 p. 78.
Riyaḍ al-Ṣālihin, p. 530.

4 *Nail al-Awṭar*, Vol 6 p. 24.
Subul al-Salām, Vol 3 p. 88.
Mukhtaṣar Ṣaḥīḥ Muslim, p. 264.

5 the term *mutawallī* is usually translated as "trustee". However, in *waqf* matters, "trustee" is inappropriate as a trustee under Trust laws can own the trust property. A *mutawallī* of a *waqf* can never own a *waqf*. He is actually a manager of the *waqf*. Thus, *mutawallī* in this chapter will be translated as "manager".

friend therewith on condition that it is not done for profit, according to some *fuqahā'*. Ibn 'Umar continued his father's *waqf*.[1] This proves that *waqf* is for perpetuity. 'Uthmān bought the well of *Rumah*, the only well with sweet water in *al-Madīnah*, and made it *waqf* for the Muslims with him using it also.[2] Other instances of *waqf* by the senior *ṣaḥābah* have been reported. Abu Bakr gave his house as *waqf* to his son. 'Alī gave his lands in Yanbu as *waqf*, while Zubair gave his houses in Makkah and Miṣr (Egypt) to his son. Other *ṣaḥābah* did likewise.[3] *Waqf* is a very old Islamic institution and some of it had survived for more than a millennium.[4] Many *awqāf* institutions are found throughout the Islamic world and in minority Muslim situations, like in South Africa. *Waqf*, as an institution, is thus not only a religio-historical phenomenon.

In its operation, it is interesting to note that *awqāf*, throughout the ages, had provided different essential services such as health, education and municipal services for which the governing authority did not pay a cent. This aided government in reducing, massively, public expenditure and reducing public lending.[5] From this, in practice, *waqf* prevented

---

1 Nail al-Awṭār, Vol 6 p. 25.
Subul al-Salām, Vol 3 p. 88.
Sunan al-Nasā'ī, Vol 6 p. 230.

2 *Sunan al-Nasā'ī*, Vol 6 p. 235.
Nail al-Awṭār, Vol 6 p.25

3 Al-Mughnī, Vol 5 p. 599.
Nail al-Awṭār, Vol 6 p. 7

4 Murad Cizakca: *Towards a Comparative Economic History of the Waqf System* in *Al-Shajarah - Journal of the International Institute of Islamic Thought and Civilisation (ISTAC)*, Kuala Lumpur, 1997, Vol 2 No 1, p. 63.

5 *Al-Shajarah*, p. 64.

complete centralisation of services and thus acts as a brake on an authority which has ulterior aims in providing necessary services to the citizens.

1.3 ***Ahkām 'Ammah li al-Waqf*** **(General Laws of Endowment):**

- *waqf* is enacted immediately it is uttered or delivered to the beneficiary thereof. It is, then, forbidden to sell it, give it in gift or inherit it[1], and according to many *fuqahā'* the ownership of the asset is ceded to *Allāh*. This is the ruling of al-Shāfi'ī and the *hanafis*. Mālik and Aḥmad, in one of his rulings, rule that ownership is not lost.[2] According to Abū Ḥanīfah, ownership of *waqf* property is only lost when the *qadi* so rules it as *waqf*. Abū Yusuf rule that ownership ends immediately *waqf* is enacted while Muḥammad rule that it only lapses when the *mutawalli* of the *waqf* had been appointed and it then cedes to the ownership of *Allāh*.[3] Abū Yusuf shared Abū Ḥanīfah's ruling initially, but changed it when he heard, in Baghdād, the *ḥadīth* of the *waqf* of 'Umar and said: "If my colleague (*ṣāhibi*)[4] heard this, he would have changed his ruling".[5] Abū Ḥanīfah's ruling is, thus, not *ḥanafi* law.
- the *fuqahā'* differ as to whether *qabūl* is necessary from the *mawquf 'alaihi* (beneficiary of an endowment). Some *fuqahā'*, like some *ḥanbalis*, rule that if the beneficiary is the poor, acceptance is not required, but when it is a specific person, it is required. This is also the view of al-Khaṭṭāb of

---

1 *Kitāb al-Mabsūt*, Vol 12, p. 31.
Minhāj al Muslim, p. 434.

2 *Al-Mughnī*, Vol 5 p. 600.

3 *Al-Hidāyah*, Vol 3 p. 13.
Al-Ikhtiyār, Vol 3 p. 40.

4 he is referring here to his mentor, Imām Abū Ḥanīfah.

5 *Al-Ikhtiyār*, Vol 3 p. 41.

the *ḥanbalis*. Another senior *ḥanbalī*, al-Qaḍī, rule no such requirement is necessary.[1] *Shāfi'īs* share the view of al-Khaṭṭāb.[2]

- *waqf* is enacted by speech which indicates *waqf*, whether such speech is clear or metaphorical or an act indicating *waqf* like one building a *masjid* and allowing the Muslims to offer *ṣalāh* therein, or making land of yours a *maqbarah* (graveyard) and allowing people to be buried therein. There is some difference amongst *ḥanafis* on some of the rules in this case.[3]
- it is forbidden for the *wāqif* (one creating an endowment) of receiving anything from the *waqf* he created, save if this *shart* is set. This is the ruling of ibn Abī Laila, ibn Shubramah, Abū Yusuf, Zubair and ibn Shuraiḥ and the *ḥanbalis*. Mālik, al-Shāfi'i and Muḥammad al-Shaibānī rule this *shart* as invalid and the *waqf* as such as invalid. Ibn Abī Laila and others prove their argument on grounds of the *ḥadith* of 'Umar on his *waqf* where it is stated that the *walī* of the *waqf* and his friend may eat of the produce of the lands. A similar argument is taken from the *waqf* of 'Uthmān making the well of *Rūmah waqf* for the Muslims, but he himself using the well also. Should the *wāqif* make a *shart* that his family may also partake of the benefits of the *waqf* it will be valid according to ibn Abī Laila and others. It is reported that 'Umar made *waqf* for his daughter Ḥafṣah and thereafter for her family.[4]

---

1 *Al-Mughnī*, Vol 5 pp. 600 - 601.

2 *Kifayah al-Akhyār*, Vol 1 p. 321.

3 *Al-Mughni*, Vol 5 p. 603.
Al-Ikhtiyār, Vol 3 p. 45.

4 *Al-Mughnī*, Vol 5 p. 647.

However, a *sharṭ* for selling the *waqf* later on is invalid and no *waqf* comes into operation.[1]

- the *fuqahā'* differ on a *waqf* made for yourself and later for the poor. Some, like al-Shāfi'ī and the *ḥanbalis* rule this kind of *waqf* as invalid as it contradicts a principle of *waqf*. Others, like ibn Shubramah, Abū Yūsuf, ibn Shuraiḥ and ibn Abī Lailā rule it as valid.
- *waqf* for your children necessitate that they all share equally in the *waqf*, save if there is a provision to the contrary. This is so because *waqf* is in the meaning of *ṣadaqah* and *hibah* and in such cases one is not allowed to discriminate between your children.[2] This is due to the *ḥadīth* narrated by Nu'mān bin Bashīr on his father giving *ṣadaqah* to him alone and the Prophet (s.a.w) ordering him not to do so saying: "*Fear Allāh and be just in matters of your children*" (i.e give equal shares in charity).[3]
- *waqf* for a group and their subsequent descendants continue as long as such are alive. When no one of them is found, the *waqf* goes to the poor. In the case of *waqf* created by you for your family and relatives, such is due to them as long as they live. If they become extinct, it also goes to the poor as *waqf* is for perpetuity and for charitable causes.[4] *Waqf* is of the *birr* and the poor are the most meriting of such acts.
- *waqf* made in *maraḍ al-mawt* by the wāqif, is taken from a third of his *tarikah*. Anything more, requires

---

1 *Al-Mughnī*, Vol 5 p. 605.

2 Ibid, Vol 5 pp. 608 - 609.

3 *Mukhtaṣar Ṣaḥīḥ Muslim*, p. 261.

4 *Al-Mughnī*, Vol 5 pp. 619 & 625.

the consent of the heirs of that person as their right, i.e their inheritance share is now involved.[1]

- setting a *sharṭ* for the commencement of a *waqf* is valid according to some *fuqahā'*, like al-Kharqī, as reported by Abū al-Khaṭṭāb, while al-Qāḍī of the *ḥanbalis* rule it as invalid.[2]
- when a *waqf* is destroyed or derelicts to destruction, it may be sold on condition that the proceeds are used to purchase a new *waqf* for those meriting *waqf*, like a house, which is a *waqf* derelicting as to become unhabitable or which was destroyed by fire, for instance. The same applies to beasts of burden[3] which were made *waqf*. *Ḥanbalis* especially subscribe to this, basing such ruling on one of the principles of *waqf* being that it is not sold, nor given in gift nor inherited but is for perpetuity.[4]
- *waqf* of plants which yield food or fruit, when such reach the *niṣāb* (weight necessitating *zakāh*), then *zakāh* is levied on such produce. This is the rule of Mālik and al-Shāfi'ī. Ṭāwūs and Makḥūl rule no *zakāh* due on such produce as the person or persons benefitting from the *waqf* is/are not owners of the *waqf* land. *Ḥanbalis* agree with the ruling of Mālik and al-Shāfi'ī.[5]
- that from which one cannot benefit from save by its use and using it in such a way as to decrease or exhaust the asset, is invalid as a *waqf*. Examples hereof are gold, silver, eatables, fluids for drink as well as money. This is the general ruling of the

---

1 *Al-Mughnī*, Vol 5 p. 627.

2 Ibid, Vol 5 p. 631.

3 this can apply to vehicles made *waqf* nowadays.

4 *Al-Mughnī*, Vol 5 pp. 631 - 632.

5 Ibid, Vol 5 p. 639.

fuqahā' save what is reported from Mālik and al-Awza'ī that *waqf* of food is valid. By gold and silver is meant money coins of gold and silver and not jewellery, the latter of which is valid as *waqf*.[1] Some *fuqahā'* have different rulings on these issues. There is difference between the *fuqahā'* on the *waqf* of movables. *Ḥanafis* have consensus on movables of an immoveable *waqf* instance, like farm implements on a farm which is *waqf*. They differ when the moveable alone is the actual *waqf*. If there is usage (*ta'āmul*) of this, it is sanctioned by *'urf*[2] and if not, then not. If it is something that is needed by the people (*ma yahtāju ilaihi al-nās*), then it is also permissible, subject to it not being forbidden in *sharī'ah*. Abū Yusuf does not sanction the *waqf* of *maṣāhif* (*Qur'an* copies), *danā'ir* and *darāhim*[3] (old Arabian gold and silver coins) while Muḥammad allows it, as, when people have a certain usage[4], *qiyās* is not employed for arriving at a ruling. Muḥammad actually sanctions *waqf* of movables on grounds of *istiḥsān*.[5] The *waqf* of money, generally, is valid in *ḥanafī*, *mālikī*, and *shāfi'ī* rulings and invalid in *ḥanbalī* ruling.[6]

- the general rule is that that which is lawful for Muslims to trade with, benefit from and which remains in its original state, like land, weapons, armour, furniture and the like are suitable for

---

1 *Al-Mughnī*, Vol 5 p. 640.

2 *Badā'i'i al-Sanā'i'i*, Vol 6 p. 220.

3 *Buḥuth Wa Fatāwā*, Vol 2 p. 703 - 704.

4 *Al-Hidayah*, Vol 3 p. 16.
Al-Ikhtiyār, Vol 3 pp. 42 - 43.
Badā'i'u al-Sanā'i'i, Vol 6 p. 220.

5 *Al Hidāyah*, Vol 3 p. 16.

6 *Buḥuth wa Fatāwa*, Vol 2 p. 711.

waqf. The *ḥanbalī*, al-Athram, reports that Aḥmad allowed *waqf* of houses and lands which are the things the *ṣaḥābah* gave in *waqf*. Abū Yūsuf does not allow *waqf* of animals or armour. Mālik has two reported rulings attributed to him on *waqf* of armour. *Ḥanbalis* allow the *waqf* of armour due to *ḥadīth*[1] on Khālid making his armour *waqf*.[2]

1.4 ***Waqf Fī Al-Ma'ṣiyah* (Endowment On Sinful Instances):**

Waqf is only allowed for acts of *birr* (virtuous deeds) and for known persons to benefit from, such as your descendants or your kin, the poor or instances meriting *waqf* like *masājid* (mosques), *dūr aitām* (houses for orphans) and the like. Unlawful *waqf* is void apart from being sinful, like *waqf* for places of worship other than Islam or places of sin and iniquity[3], like gambling houses, liquor outlets and the like.

The basic rule is that every act which is sinful and prohibited in *sharī'ah* is prohibited to be made *waqf* of. *Waqf* is also not allowed for the *ḥaml* nor for the deceased due to *waqf* being *tamlik* (conferring ownership of benefit) and these two categories are *ma'dūm* (non existent). The same rule applies to the *murtadd* from Islām as he is considered *ma'dūm* as long as he remains a *murtadd*.

Ḥanbalis allow *waqf* for *ahl al-dhimmah* (nonmuslims living under Muslim rule). This ruling is based on the *waqf* of Safiyyah bint Ḥai, a converted Jewess and wife of the Prophet (s.a.w), who made *waqf* for her brother, a Jew.[4] *Waqf* is actually valid on all instances benefitting Muslims such a places of learning, resting houses for travellers, instances feeding the indigent

---

1 *Nail al-Awṭār*, Vol 6 p. 26.

2 *Al-Mughnī*, Vol 5 p. 642.

3 Ibid, Vol 5 p. 644 - 645.

4 Ibid, Vol 5 p. 646.

and needy, places of residence for the destitute and needy who cannot purchase a house or cannot afford to rent one and the like.

Most *awqāf* are for the foundlings, orphans, pensioners and retired persons, the weak and infirm, the blind and the like where they may live, receive food and drink, clothing, education and treatment. There is even a wider practical meaning to this form of *waqf* where those young men who cannot afford the *ṣadāq* are helped so that they may marry and uphold the high moral values and standing of the Islamic Faith.[1]

The general rule is, thus, that if the welfare of the Muslims is assured and the *waqf* is not invalid in terms of *sharī'ah*, it will be valid, is encouraged and exhorted to.

1.5 Matters Pertaining To The Administration Of A *Waqf*:

When a *waqf* had been correctly enacted, it has to be administered. There are rights and duties relating to both the *wāqif* and the *nāẓir* or *mutawallī* of a *waqf*. The term *mutawallī* will be used here to mean manager of a *waqf*.

a) Rights Of The *Wāqif*:

- he can make himself a beneficiary of his *waqf* for his lifetime.[2] He can appoint someone as *mutawallī* of the *waqf* and can do so by any means sanctioned in *sharī'ah*, like, for example, by appointment or instruction or the like. There is *'ijmā* on the means he may employ in creating a *waqf*.[3]
- the *shart* a *wāqif* lays down is observed save if it is against *sharī'ah* or is sinful. This is a

---

1 *Al-Mujtama' al-Mutakāfil fī al-Islām*, pp. 233 - 234.

2 *Al-Mabsūt*, Vol 12 p. 41.

3 *Al-Fiqh al-Islāmī wa Adillatuhu*, Vol 8 p. 231.

general rule of the *fuqahā'*.[1] This ruling is based on the *ḥadīth* transmitted by Aḥmad which says: "*that which the Muslims see as good is good in the sight of Allāh - (ma ra'āhu al-muslimūna ḥasanan fahuwa 'inda Allāh ḥasan)*"[2]. It is a *qā'idah fiqhiyyah* that the *shart* a *wāqif* sets is like the text of the *Shāri'* as far as necessity of execution thereof is concerned.[3] A valid *shart* is when the *wāqif* prohibits the *mutawallī* of appointing a *waṣī* for the *waqf* on the *mutawallī's* death.[4] There are exceptions in *ḥanafī* law in matter of *shurūṭ* the *wāqif* lays down. If the *wāqif* stipulates that the *qāḍī* cannot remove the *mutawallī* the *qāḍī* can remove him if he is untrustworthy, for example. If the *wāqif* made a *shart* in limiting the renting period of the *waqf* and there is benefit for the poor in extending it, the *qāḍī* can extend it if the *mutawallī* asks for it. If the *wāqif* sets a remuneration for the *mutawallī* the *qāḍī* can increase it if the former is righteous and trustworthy.[5]

- *ḥanafīs* rule that if the *wāqif* did not appoint a *mutawallī* for his *waqf*, he himself is then the *mutawallī*[6]. The *wāqif* can also appoint a *mutawallī* for his *waqf* and it may be of the beneficiaries of his *waqf*. Family of the *wāqif*,

---

1 *Al-Fiqh al-Islāmī wa Adillatuhu*, Vol 8 pp. 181 - 182. *Minhāj al-Muslim*, p. 424.

2 *Buḥūth Wa Fatāwā*, Vol 2 p. 704.

3 *Al-Fiqh al-Islāmī wa Adillatuhu*, Vol 8 pp 178 - 179. *Buḥūth wa Fatāwā*, Vol 2 p. 694.

4 Al-Hummām A: *Al-Fatāwā al-Hindiyyah Fī Madhhab al-Imām Abī Ḥanīfah al-Nu'man*, Beirut, Dār Ihyā al-Turāth al-'Arabī, 1986, Vol 3 p. 296.

5 *Al-Fiqh al-Islāmī wa Adillatuhu*, Vol 8 p. 181.

6 *Fatāwā Hindiyyah*, Vol 3 p. 295.

who qualify, must be appointed *mutawallī* when the *wāqif* did not appoint one and a non family member should only be appointed when family members do not qualify to be the *mutawallī*.[1] *Shāfi'is* and *ḥanbalis* differ hereon ruling that if the *wāqif* did not appoint a *mutawallī*, the *qāḍī* appoints one. If the *waqf* is for persons, a suitable person is appointed and if it is an instance, then *qāḍī* is the *mutawallī*.[2]

- the *wāqif* cannot remove his appointed *mutawallī* once he delivered the *waqf* to him as the *waqf* will then return to the owner according to Muḥammad of the *ḥanafis*.[3] Abū Yusuf allows the *wāqif* to remove the *mutawallī* as he is his *wakīl* (agent) and the *muwakkil* (principal) can remove his *wakīl*.[4] This is as long as the *qāḍī* did not rule the *waqf* as *lāzim* (binding). However, if the *wāqif* made a *shart* that he can dismiss the *mutawallī*, he can do so even after having delivered the *waqf* to the *mutawallī*. If he makes a *shart* prohibiting the *ḥākim* or *qāḍī* from removing his appointed *mutawallī*, the latter can disregard it if the *mutawallī* is untrustworthy.[5]
- if the *wāqif* prohibits the *mutawallī* to appoint a *waṣī* for his *waqf*, it will be valid. This is *ḥanafī* law.[6]

---

1 *Al-Mabsūt*, Vol 12 p. 44.

2 *Al-Fiqh al-Islāmī wa Adillatuhu*, Vol 8 p. 231

3 *Fatāwa Hindiyyah*, Vol 3 p. 295.

4 *Al-Mabsūt*, Vol 12 p. 44.

5 *Fatāwa Hindiyyah*, Vol 3 p. 295.

6 Ibid, Vol 3 p. 296.

- *hanbalis* rule that a *wāqif* cannot create a *waqf* for himself as ownership of the asset has to cease before a *waqf* comes into operation.[1]

b) ***Shurūt* (Conditions) For A *Mutawallī* (Manager):**

- the majority of the *fuqahā'* rule *'adālah zāhirah* as a requirement for the *mutawallī*. By this is meant that the *mutawallī* must carry out the compulsory religious duties as well as refraining from vice and sin. *Ḥanbalis* do not require *'adalah* for the *mutawallī*.
- he must be *mukallaf* and *'aqil* as well as physically healthy to carry out his duties as *mutawallī*. *Dhukūrah* is not a requirement as 'Umar appointed his daughter Ḥafṣah *wasiyyah* (manager) over his *waqf*.
- he must be a Muslim if the beneficiary is a Muslim or if the instance is an Islamic instance like a *masjid*, for example.[2] This is due to the position of *mutawallī* being a form of *wilāyah* and *Allāh* has precluded the nonmuslims from having a say over the affairs of Muslims.[3] If the *waqf* is for the disbelievers, a nonmuslim can be the *mutawallī* of such a *waqf*. This is specifically *hanbali* law. *Ḥanafis* do not require Islām as a *shart* for the *mutawallī*.[4]

---

1 *Al-Mughni*, Vol 5, p. 607.
Al-Fiqh al-Islāmi wa Adillatuhu, Vol 8, p. 193.

2 *Al-Fiqh al-Islāmi a Adillatuhu*, Vol 8 p. 232.

3 *Al-Qur'an*, Chapter 4: 141.

4 *Al-Fiqh al-Islami wa Adillatuhu*, Vol 8 p. 233.

b(i) **Duties And Rights Of The *Mutawallī* (Manager) Of A *Waqf*:**

- he must protect and look after the *waqf* and collect the income or benefits accruing to the *waqf* and distribute it to the beneficiaries.
- he must exert sincere effort in the growth of the *waqf* income if it is of an accruing nature or repairing any immovable *waqf* property.
- if there are restrictions on his duties according to the *wāqif's* instructions, he is to observe such restrictions.
- if he hires out the *waqf* property, then he can hire out the buildings for one year only and land for three years. This applies when there is no need to extend the period of hire. He must hire out at a price normally charged for such buildings (*ajr mithl*). If he hires any *waqf* property under the normal price, the lessee has to make up the difference.

  The above are all *ḥanafi* rules.[1]
- *Mālikis* rule that the *mutawallī can hire out* agricultural *waqf* lands for one or two years for ordinary people and four years for the poor and the *'ulamā'*.
- that he cannot distribute benefits to the beneficiaries until the period of accrual of benefits had lapsed. This applies even when the income was paid in advance.

---

1 *Al-Fiqh al-Islamī wa Adillatuhu*, Vol 8 pp. 233 - 235.

- in the case of the beneficiaries being poor or *'ulamā*, the *mutawallī* uses his judgement in distribution to them.
- the *mutawallī* can change of the fixtures of the *waqf* property and transfer it to another *waqf* property of the same *wāqif* if so required.
- he can receive something from the *waqf* for remuneration for his services and duties by order of the *qāḍī* if the *wāqif* granted him nothing. *Hanbalis* rule the same save that they do not state that the *qāḍī* has to consent hereto but state that the *mutawallī* may use of the *waqf bi al-ma'rūf* (in moderation). They also place liability on the *mutawallī* if the hires our the *waqf* property for less than *ajr mithl*.[1]

b(ii) **Dismissal Of The *Mutawallī*:**

The *mutawallī* can be removed from his position under the following circumstances:

- the *wāqif* dismisses the *mutawallī* if he appointed him and if the *qāḍī* appointed the *mutawallī*, then the *wāqif* cannot remove him. Some *ḥanafis* differ hereon as indicated earlier in this chapter. *Shafi'is* rule that if the *wāqif* dismisses the *mutawallī*, the former appoints a new one.
- the *qāḍī* removes the *mutawallī* if he is *ghair ma'mūn* (untrustworthy) whether the *wāqif* or the *qāḍī* appointed the *mutawallī*.[2] The latter is also dismissed if he becomes incapable of carrying out

---

1 *Al-Fiqh al-Islāmi wa Adillatuhu*, Vol 8 pp. 235 - 237.

2 *Fatāwā Hindiyyah*, Vol 3, p. 295.

his duties or becomes a *fāsiq*. This applies even if the *wāqif* made a *shart* that his appointed *mutawallī* cannot be removed by the *ḥākim* or *qāḍī*. *Mālik* rules that if the *mutawallī* is dismissed by the *qāḍī*, the latter appoints a new one. If a *qāḍī* dismisses a *mutawallī*, a second *qāḍī* cannot reinstate him. Some *fuqahā'*, like *shāfi'īs*, for example, allow the *mutawallī* to dismiss himself. *Ḥanbalis* allow the *wāqif, the* ḥākim or even the beneficiaries, if they are specified persons, like Zaid and 'Umar, for example, to dismiss the *mutawallī*. The latter can dismiss himself also. If he does so, it must be done in front of the *qāḍī*. He cannot be considered dismissed until the *qāḍī* had been informed hereof. *Mālikis* and *shāfi'īs* rule that if a *mutawallī* dismisses himself, he can appoint someone else in his place.

- the *mutawallī* is also dismissed if he leaves off his duties.[1]

---

1 *Al-Fiqh al-Islāmī wa Adillatuhu*, Vol 8 pp. 238 - 239.

CHAPTER 6

ADMINISTRATION AND IMPLEMENTATION OF ISLAMIC LAWS OF SUCCESSION, ADOPTION, GUARDIANSHIP AND ENDOWMENT IN SOUTH AFRICA.

It can be justifiably said that South Africa had to enter a fundamentally new era in all spheres after the unbanning of the African National Congress (ANC) and other political organisations in February 1990 and the later setting free of Nelson Mandela and other fellow political prisoners. The events which had to follow were unstoppable. The negotiation process, starting with the agreement on the Groote Schuur Minute[1] on 4 May 1990 in Cape Town[2], through to the Pretoria Minute[3] of 6 August 1990[4], the National Peace Accord[5] of 14 September 1991[6], the Declaration of

---

1 This Minute deals with the issues of political offences, immunity from prosecution for political offences including temporary immunity, channels of communication between the then government and ANC *et al.*

2 Hough M & Du Plessis A: *Selected Documents & Commentaries on Negotiations & Constitutional Development in the RSA 1989 - 1994*, Pretoria, Institute for Strategic Studies, University of Pretoria, 1994, pp. 51 - 52.

3 These Minutes deal with political offences, release of political prisoners, indemnity matters, repealing of legislation relating to the Security Act having relevance to the talks.

4 *Selected Documents & Commentaries on Negotiations & Constitutional Development in the RSA*, pp. 53 - 54.

5 This Accord established a Peace Committee and deals with the required conduct of all parties and security matters etc.

6 *Selected Documents & Commentaries on Negotiations & Constitutional Development in the RSA*, p. 58.

Intent[1] of the Convention for a Democratic South Africa (Codesa I) of 20 December 1991[2], then the Record of Understanding[3] of 26 September 1992 between Messrs De Klerk and Mandela[4] and later the Resolution on the Need for the Resumption / Commencement of Multi Party Negotiations[5] of 5 - 6 March 1993[6], and, finally the enactment of the Transitional Executive Council Act[7], which, regulating the transitional process, was to facilitate and promote, in conjunction with all legislative and executive structures at all levels of government in South Africa, the preparation for a transition to a democratic order in South Africa[8]. This culminated in the Codesa talks at Kempton Park delivering the interim constitution[9], the latter of which

---

1 In this declaration all parties committed themselves to bringing about real democratic reform in "an undivided South Africa with one nation sharing a common citizenship, patriotism, and loyalty, pursuing amidst our diversity, freedom, equality and security for all irrespective of race, colour, sex, or creed; a country free from *apartheid* or any other form of discrimination or domination..."

2 *Selected Documents & Commentaries on Negotiations & Constitutional Development in the RSA*, pp. 101 - 103.

3 The Resolution was aimed at resolving misunderstandings as well as recognising the need for a democratic Constituent Assembly / Constitution making body.

4 *Selected Documents & Commentaries on negotiations & Constitutional Development in the RSA*, pp. 104 - 105.

5 In terms of this Resolution parties had to commit themselves to drafting and adopting the new South African Constitution.

6 *Selected Documents & Commentaries on Negotiations & Constitutional Development in the RSA*, p. 109.

7 *Transitional Executive Council Act, Act 151, 1993.*

8 *Transitional Executive Council Act, Act 151*, 1993, Article 3.

9 *Constitution of the Republic of South Africa* No. 200 of 1993, assented to on 25th January 1994 and which commenced taking effect, overall, on 27th April 1994.

subsequently engendered the working draft of the new constitution[1]. This latter draft gave rise, eventually, to the controversial version of the first non racial democratic constitution of South Africa[2], firstly by the constitutional committee of the Constitutional Assembly in Cape Town and thereafter by both Houses of Parliament sitting as the Constitutional Assembly of parliament in Cape Town which brought the irrevocable reality of a pluralistic heterogenous South African society to reality. This was effected by parliamentary Bill No: B34A-96 of 8 May 1996[3]. The drama of the Constitutional Court, which in terms of the interim South African constitution, had to certify the new constitution as fulfilling the constitutional requirements set forth in the said interim constitution[4], sending back the constitution for amendments to the Constitutional Assembly as it did not fulfil certain required constitutional requirements was breathtaking compared with the former final political decision making process as the final arbitrator of any law. In this *melee* and excitement, the position of South African Muslims and their legitimate struggle over three centuries for the legal recognition of their Muslim way of life had largely been dimmed and apparently relegated to travel on the oxwagon of political bureaucracy to await its turn on the agenda of importance.

This chapter will deal with the issues of *wilāyah* (guardianship), *al-tabannā* (adoption), *al-mīrāth* (succession), *al-waṣāya* (legacies) and *al-wiṣāyah* (curatorship) and *waqf* (religious endowment) as it affects Muslims in South Africa and what should be done to justly, fairly, equitably, honestly and

---

1 Constitutional Assembly: *Working Draft of the New Constitution, Cape Town, 22nd November 1995.*

2 Constitutional Assembly, Republic of South Africa: *Constitution of the Republic of South Africa 1996*, Cape Town, South Africa.

3 Constitutional Assembly: *Statement of P A Lilienfeld, Secretary of the Constitutional Assembly*, 29 October 1996.

4 *Schedule 4, Act 200 of 1993.*

sincerely remove the discrimination, hardship and imbalance in the addressing of Muslim anxieties and grievances in their lives. Prior to this, it is deemed expedient to sketch, first, a very brief scenario of the history of South African law followed by a critical review of the new South African constitutional order and other orders relevant to this thesis.

1. **Brief Sketch the of History of South African Law:**

Roman Dutch law, which is actually the uncodified law of Holland at the Cape's secession in 1806[1], is South Africa's common law[2] having been brought here by Jan Van Riebeeck when a colony was established at *Kaap De Goede Hoop* (The Cape of Good Hope)[3] and which eventually reached the other South African areas during British rule[4]. Roman Dutch law is made up of Roman and Dutch law with infused French and Spanish ideas. English law is also part of its present day ingredients[5]. When the British took over the Cape from the Dutch, they retained Roman Dutch law as the common law[6], but government, administration and judicial instances were changed to suit British practices. There was a substantial introduction of English civil and criminal procedure as well as English mercantile and company law and the English Law of

---

1 *Africa South of the Sahara*, England, New Zealand & Japan, Europa Publications Ltd, 1997, Staples Printers, 26th ed., p. 914.

2 Walker E A (ge. editor): *The Cambridge History of the British Empire*, Cambridge, University Press, 1963, 2nd edition, Vol. 8, Chapter 31, p. 859.
Africa South of the Sahara, p. 914.

3 Hahlo H R & Kahn E: *The South African Legal System and Its Background*, Cape Town, Juta & Co. Ltd., 2nd ed., 1973, p. 571.

4 *The South African Legal System*, p. 576.
The Cambridge History of the British Empire, Vol 8, Chapter 31, p. 858.

5 *The South African Legal System*, p. 584.

6 *Cambridge History of the British Empire*, Vol 8, p. 858.

Evidence being adopted.[1] Criminal procedure followed the same pattern.[2] Significant changes were effected by the *Charters of Justice* such as the *Raad van Justitie* being replaced by the Cape Supreme Court, *landrosten* and *heemraden* were replaced by resident magistrates while a Master of the Supreme Court took over the functions of the *Weeskamer* and *Desolate Boedelkamer*[3]. A Registrar of Deeds was created in 1828[4] and municipal self-government which functioned on modern lines, was introduced in 1836[5]. By influence and other factors, English rules and concepts were superimposed upon the laws of Grotius and Voet, which anglicised Roman Dutch Law. This was British practice in countries conquered by her and them having to face competition from English law and institutions[6].

South African courts mainly rely on the elucidation of Roman Dutch law by institutional writers. These collections of law opinions have little for us use as the views of writers of Holland have preference. The prevailing judicial opinion is that the courts must apply Justinian's law as interpreted by 18th century Dutch lawyers and not modern Romanist expounding of classical Roman law.[7] Roman Dutch law is an important part of South African law nowadays but had been refashioned in many spheres, on English lines, by legislation and other

---

1 *The South African Legal System*, p. 576.
The Cambridge History of the British Empire, Vol 8, p. 865.
Africa South of the Sahara, p. 914.

2 *The South African Legal System*, p. 576.
The Cambridge History of the British Empire, Vol 8, p. 865.

3 *The Cambridge History of the British Empire*, Vol 8, p. 864.

4 *Ordinance 39 of 1828.*

5 *Ordinance 9 of 1936.*

6 *The South African Legal System*, pp. 576 & 578.

7 Ibid, p. 581.

instruments, such as constitutional, administrative, mercantile law and other forms of law.[1]

2 The South African Constitution Processes And Its Effects On *Shari'ah* And Muslims:

Discrimination against persons other than Europeans, is as old as South African itself. When Britain took over the Cape, the restrictive Hottentot laws of 1809 - 1819 were repealed allowing Hottentots, Bushmen and free Coloureds to be granted full civil rights as well as right to buy and own land[2] in the same way as Europeans. The Slavery Abolition Act was passed by the British in 1833.[3] Muslims were initially prohibited from publicly practising their religion and to convert people to Islam by *Placaat* 1642.[4] The spirit of this religious discrimination is still present in South Africa in certain spheres of life - both private and public till this day, as well as in religious circles even across ethnic lines.

As is known, South Africa consisted of various States prior to Union. The Cape of Good Hope and Natal were under British rule while both the *Oranjefrijstaat* (Orange Free State) and Transvaal were *Boer* republics ruled by *Afrikaners*. Laws of the Cape were usually applicable to Natal after the latter's annexation. Thus, by proclamation, Sir George Napier, governor at the Cape of Good Hope declared: "...there shall not be, in the eye of the law, any distinction and disqualification, whether founded on mere distinction of colour, origins, language or creed..."[5] Sharply contrasting to this were the constitutional laws of both the *Oranjefrijstaat* (Orange Free State) and Transvaal. The Transvaal Republic prohibited and

---

1 *The South African Legal System*, p. 585.

2 *Ordinance 50 of 1828 (Cape)*.

3 *The South African Legal System*, p. 577.

4 *Mosques of Bo-Kaap*, Foreword p. xv.

5 *Ordinances and Proclamations Relating to the Cape Colony and Natal: 1836 - 1847*, published by Saul Solomon & Co., Cape Town, 1848. Proclamation dated 12/05/1843, Clause 6(1).

denied "*Coolies*[1], Arabs, Malays and Mohamedan subjects of the Turkish Dominion" both *burgher rechte* (citizenship) and ownership of property, according to Law 3 of 1885 signed by president Paul Kruger on 10/06/1885.[2] Laws requiring separate registration for Indians doing business was passed by the Transvaal *Volksraad*[3] (parliament) as well as laws prohibiting Indians from being on the streets after 9 pm.[4] Many of these persons were Muslims.

The *Oranjefrijstaat* (Orange Free State) did no better. Only White persons could be citizens, the birth of White children, legitimate or illegitimate was to be registered[5]. No mention is made of other communities' children. No Arab, Chinese, Indian[6], or "other Asiatic Coloured" was allowed to reside in the *Oranjevrijstaat* (Orange Free state) or stay longer than two months without the prior permission of the State President[7] and no Coloured could own property for trading or farming purposes, direct or indirect.[8] Land and property could only be legally owned by persons of colour who had one European parent and one coloured parent and who were legally married in terms of law.[9] In these circumstances, there was no place in law for either Muslims or *sharī'ah*.

---

1 a derogatory name for Indians, whether Muslim or Hindu.

2 Barker H S et al: *Statute Law of Transvaal, Cape Town*, 1901, p. 250.

3 Ibid, p. 342. Transvaal *Volksraad* Resolution of 16/05/1890 passed an amendment to Law 3 of 1885.

4 Ibid, p. 327. Transvaal *Volksraad* Resolution of 08/06/1888.

5 *Wetboek Van Den Oranjevrijstaat*, Bloemfontein, Stoomdrukkerij van de Oranjevrijstaatse Nieuwsblad Maatschappij, 1892, Chapter 1 (a - d) and Chapter 32 (1).

6 the text uses the word *coolie*.

7 *Wetboek Van Den Oranjefrijstaat*, Chapter 33 (1).

8 Ibid, Chapter 33 (7).

9 *Wetboek Van Den Oranjefrijstaat*, Chapter 34 (1).

The attaining of Union in South Africa in 1910 did not see a departure from the former *Boer* Republics' fascist attitude. Thus, to qualify for being a member of the House of Assembly and the Senate of the Union Parliament, one had to be, "a British subject of European descent"[1]. A proviso for the retention of coloured voters on the voters' role was granted and required a two thirds majority of both Houses of Parliament sitting together to remove them.[2] Muslims thus suffered firm discrimination in the two *Boer* republics as well as Union. The *Afrikaner* political vision as well as staunch Calvinist religious fervour strongly influenced subsequent governments and policies, eventually giving rise to the colossus of *apartheid* (ethnic and racial discrimination) in a form hitherto unknown in South Africa. This indecent abberation in governance, especially white privilege and eventually, greed, had to give rise to the collapse of privileged White minority government and its following.

In the Union of South Africa, *shari'ah* had no official recognition or place either. This gave rise to serious problems for Muslims in all spheres of their lives and especially, their family laws.

Later the "Tricameral" constitution[3] was to concretise parliament into three ethnically based chambers, namely, the House of Assembly for Whites, the House of Representatives for Coloureds and the House of Delegates for Indians[4] with "own" and "general" affairs being the foundation of law and administration. Still, even in this pattern, there was no place for *shari'ah*, not even Muslim family law. Its preamble, surprisingly, in part, reads "...To uphold Christian values

---

1 *Statutes of the Union of South Africa 1910 - 1911*, Government printer, Pretoria, 1911 - South Africa Act of 1909, Clauses 26(d) and 44(c).

2 Ibid, Clause 35(1).

3 *Republic of South Africa Constitution Act, Act 110, 1983.*

4 Ibid, Part 6, Article 37 (1).

and civilised norms, with recognition and protection of freedom of faith and worship...."[1] In essence, South Africa's political and related problems centres on justice and rights from the earliest of times.

3. <u>The South African Constitutional Position In The Nineties:</u>

While the previous white minority administration was guilty of denying rights and practising injustices, the new government claims to be the champion of justice and rights of people.

South Africa is a plural society with a kaleidoscope of cultures, religions, languages, customs and traditions resembling its physical geography. If religion, culture and language, constitute the most important components of human beings and their lives, then practical recognition of these factors must be accorded and upheld. Fairness, justice, equity and sincerity demands that.

As is known, South Africa's first participatory constitution was produced at the Codesa constitutional talks in Kempton Park, outside Johannesburg, in what is now called Gauteng province. These talks were participatory in that parties and interest groups considered the most important were represented, although not all delegates were elected representatives of their people or respective constituencies. In this sense, these talks were not truly democratic.

Furthermore, this interim constitution was not formally presented to the nation for its consent and approval. Instead, the outgoing white dominated parliament had to pass that constitution[2] and its outgoing president, F W De Klerk signed it into law on 25 January 1994. This constitution was to be operable as from 27 April 1994, save for some clauses which became operable on 28 January 1994 and others on 9 March

---

1 *Preamble, South Africa Constitution Act, Act 110, 1983.*

2 *Constitution of the Republic of South Africa, Act 200 of 1993.*

1994,[1] and was to be functional until 1996 when the Constitutional Assembly had to enact the final new constitution.[2]

3.1 Analysis of the Interim Constitution of South Africa with Regards to Muslims and Muslim Life:

In a public address to residents of the *Bo-Kaap* on 19 March 1991, the South African president, Dr Mandela, and leader of the ANC, the dominant political party in the country, said, as reported by *Muslim Views*,:
"*We (ANC) regards it highly insensible and arrogant that the culture of other groups can be disregarded. The ANC had pledged itself to recognising Muslim Personal Law.*"[3] He did not expound on the relationship between religion and State and the place of religion in the new in South Africa and how Muslim Personal Law will be recognised. Muslim euphoria of the recognition of their personal law virtually obliterated the requirement of properly qualified Muslims necessary for that statement to have proper Islamic application in a *shari'ah* context.

The interim constitution[4] makes South Africa a "*sovereign and democratic constitutional state...in which there is equality between men and women and people of all races...*"[5] Since South Africa is a constitutional state the interim constitution declares: "*This constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary application in this constitution, be of no*

---

1 *Constitution of the Republic of South Africa Act*, Act 200 of 1993.

2 Ibid, Act No 200 of 1993, clause 73.

3 *Muslim Views*, Cape Town, March 1991, Vol 5 No. 2 p. 3.

4 *Act No 200 of 1993.*

5 *Preamble to Act 200 of 1993.*

force and effect to the extent of the inconsistency. The constitution shall bind the legislative, executive and judicial organs of state at all levels of government."[1] The working draft of the new South African constitution[2] does not significantly alter these clauses.

These clauses must be borne in mind when reading the chapter on Fundamental Rights[3] in the interim constitution. The BOR binds all legislative and executive organs of state at all levels of government as well as "*...all law in force and all administrative decisions taken and acts performed..*"[4] and entitles aggrieved persons to seek judicial relief if their right had been infringed.[5] Of great importance to Muslims is clause 14 of the interim constitution which reads: "*Every person shall have the right to freedom of conscience, religion, thought, belief and opinion,...*[6] This is unchanged in the working draft of the new constitution[7]. The interim constitution also states that "*Nothing in this chapter shall preclude legislation recognising a system of personal and family law adhered to by persons professing a particular religion; and the validity of marriages concluded under a system of*

---

1 *Constitution of the Republic of South Africa Act, Act 200 of 1993*, Chapter 1, clauses 4(1)(2).

2 Constitutional Assembly: *Working Draft of the New Constitution*, Cape Town, 22 November 1995, Chapter 1 (Founding Provisions).

3 hereinafter called the Bill of Rights or BOR in short.

4 *Constitution of the Republic of South Africa Act, Act 200 of 1993*, Chapter 3, clause 7(1)(2).

5 Ibid, Chapter 3 clauses 7(4).

6 Ibid, Chapter 3, clause 14(1).

7 *Working Draft of the New Constitution*, Bill of Rights, clause 14(1).

religious law subject to specified procedures."[1] This clause had been fundamentally changed in that it includes "other recognised traditions" as valid personal law systems as well as restricting all religious and customary personal law systems to be "consistent with the Bill of Rights".[2] While there was never a doubt that the interim constitution applied vertically between State and citizen, it was not clear whether it would apply horizontally between individuals as well. However, the working draft of the new constitution recommended imposing secular western liberal law on all regardless.

Another issue in the constitution which may give rise to problems for Muslims is the clause on language and culture. In the interim constitution it reads: "*Every person shall have the right to use the language and to participate in the cultural life of his and her choice.*"[3]

In the working draft of the new constitution it reads: "*Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may violate the rights of anyone else.*"[4] Another possible problem area for Muslims, pending interpretation of the clause, is the equality clause in the interim constitution which reads: "*Every person shall have the right to equality before the law and to equal protection of the law. No persons shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following*

---

1 *Constitution of the Republic of South Africa Act, Act 200 of 1993*, Chapter 3, clause 3(a)(b).

2 *Working Draft of the New Constitution*, Chapter 2, clause 3.

3 *Act 200 of 1993*, Chapter 3, clause 31.

4 *Working Draft of the New Constitution*, chapter 2, clause 30.

grounds in particular; race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language."[1] The working draft of the new constitution did not radically depart from this position, but added another clause reading: "*Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*"[2]

Customary international law forms part of the law of South Africa save if it inconsistent with the constitution or an Act of parliament.[3] The same provision exists in the interim constitution.[4] This form of law refers to the unwritten law which is universally recognised despite the fact that it is not specifically legislated into law. There must be widespread acceptance of such a law before it is given recognition; an example being the UN Charter. Customary international law, however, does not include domestic customary law.

We thus again have possible forms of discrimination against Muslims in their lives. The former discriminating *Boer* republics did not consult Muslims in their law processes and legislated against them on ethnic lines. The same situation, in principle, if not in practice, may exists with the present constitutional process. The error lies in the fact that no wide, open, full and transparent consultations with Muslims was held at the *Codesa* constitutional talks, which, in practice, seriously disadvantages Muslims and perpetuates certain

---

1 *Constitution of the Republic of South Africa Act, Act 200 of 1993*, Chapter 3, clause 8(1)(2).

2 *Working Draft of the New Constitution*, Chapter 2, clause 8 (1)(3)(4).

3 Ibid, Chapter 15, clause 202.

4 *Constitution of the Republic of South Africa Act, Act 200 of 1993*, clause 231(4).

angles of Muslim problems - problems they have been experiencing for over 300 years. In my view, the first interim (*Codesa*) constitutional process, which was of great magnitude and importance, was too speedily conducted.

3.1.1 <u>Analysis Of The Final Constitution Of South Africa With Regards To Muslims:</u>

No modern constitutional process is easy and the South African one is no exception. The Constitutional Assembly's Constitutional Committee, under Mr Cyril Ramaphosa, at a meeting in Cape Town, adopted the new constitution on 8 May 1996 by majority vote. The full Constitutional Assembly, comprising both Houses of Parliament sitting in one session[1], passed the new constitution on, 8 May 1996 as Bill B34A-96 by a huge majority[2] and it was forwarded to the Constitutional Court for certification in terms of the requirements of the interim constitution[3].

The Constitutional Court, after hearing evidence and due study and consideration, on 6 September 1996[4], delivered judgment and sent the constitution back to the Constitutional Assembly for amendments as the said constitution did not fully comply with the constitutional principles[5] set out in the interim constitution. The required amendments (only

---

1 *Constitution of the Republic of South Africa Act, Act 200 of 1993*, Chapter 5, clause 68(1).

2 Constitutional Assembly: *Minutes of Proceedings of Constitutional Assembly*, No. 6 - 1996, Cape Town, 8 May 1996, p. 1 - 2.

3 *Constitution of the Republic of South Africa Act, Act 200 of 1993*, Chapter 5, Clause 71(2).

4 Constitutional Assembly: *Constitution Talk*, Number 4, 17 September 1996, p. 2.

5 *Constitution of the Republic of South Africa Act, Act 200 of 1993*, Schedule 4, Clauses I - XXXIV.

eight)[1] are not serious flaws which will upset the constitutional process[2]. The core constitution was not rejected - not even self determination and traditional councils clauses. The Constitutional Court called the efforts for writing a new constitution "a monumental achievement."[3] The Constitutional Assembly passed the required amendments[4] on 11 October 1996.[5] On the Constitutional Court certifying it, president Mandela will sign it into law.[6] He had done subsequently done that.[7]

The Preamble to the new constitution mentions that "*We, the people of South Africa....believe that South Africa belongs to all who live in it, united in our diversity.*"[8] This should be the limiting

---

1 *Constitution Talk*, p. 3.

2 These issues are Collective Bargaining, Immunisation of the Labour Relations and the Truth Reconciliation Acts, the Public Service Commission, the Public Prosecutor and Auditor General, Amending the Constitution, Provincial Powers, Local government and certain provision of a State of Emergency.

3 *Certification of the Constitution of the Republic of South Africa,* Judgment of the Constitutional Court, 6 September 1996, Explanatory Note, 1996 - CCT 23/1996, p. 3.

4 *Constitution of the Republic of South Africa Third Amendment Bill*, Bill B34B-96.

5 Constitutional Assembly: *Minutes of Proceedings of Constitutional Assembly*, No 8 - 1996, Cape Town, 11 October, 1996.

6 *Statement of Secretary P A Lilienfeld*, Secretary of the Constitutional Assembly, dated 29 October 1996.
Statement of Executive Director Hassen Ebrahim of the Constitutional Assembly, Cape Town, Ref B.1.1 dated 13 November 1996.

7 *Government Gazette, Vol 378, No. 17678* , Cape Town, Government Printer dated 18 December 1996.

8 Constitutional Assembly: *Constitution of the Republic of South Africa 1996*, adopted 8 May 1996.

interpretation of the catchy phrase on the cover of the draft Bill "One law for one nation." National diversity appears to be accommodated in a certain manner in the constitution, like recognition of indigenous law, its application and administration[1], participation in a cultural life of one's choice[2], the new clause not found in the previous versions of post *apartheid* constitutions allowing cultural, religious and linguistic communities, "*with members of their community to enjoy their culture, practise their religion and use their language and form, join and maintain cultural, religious and linguistic associations and other organs of civil society...*"[3] as well as recognition of other than civil marriages and systems of family and personal law other than the common and civil South African law.[4]
These are all subject to such being consistent with the BOR.

The Limitation of Rights clause in the new constitution makes interesting reading allowing limitation of the rights in the BOR by a law of general application on condition that such is "*reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and, less restrictive*

---

1 *Constitution of the Republic of South Africa*, May 1996, Chapter 12, Articles 211 & 212.

2 Ibid, Chapter 2, Article 30.

3 Ibid, Chapter 2, Article 31 (1)(a)(b).

4 Ibid, Chapter 2, Article 15 (3) (a)(i)(ii), (b).

means to achieve the purpose."[1] Except for the immediate afore mentioned rule, and any other provision, no law may limit any entrenched right in the BOR[2].

Apart from the BOR having a central influence in the new constitution and its application, the constitutional principles[3], embodied in the interim constitution regulated the constitution writing process and as such, the later functioning and interpretation of the new constitution. South Africa is also constitutionally bound by international agreements which the Republic acceded to before the new constitution came into operation[4]. This is important for Muslim Family Law application here.

Finally, the new constitution "*does not preclude the recognition of the notion of the right to self determination of any community sharing a common cultural and language heritage, within the territorial entity of the Republic or in any other way, determined by national legislation*".[5] This could possibly be a useful clause for accommodating diverse community matters.

---

1 *Constitution of the Republic of South Africa*, May 1996, Chapter 2, Article 36 (1)(a)(b)(c)(d)(e).

2 Ibid, Chapter 2, Article 36 (2).

3 *Constitution of the Republic of South Africa Act, Act 200 of 1993*, Schedule 4, Articles I - XXXIV.

4 *Constitution of the Republic of South Africa*, May 1996, Chapter 14, Article 231 (5).

5 Ibid, Chapter 14, Article 235.

4 Religious / Cultural Rights In The Constitutions Of Selected Countries:

4.1 Accommodation of Religious and / or Cultural Rights in Constitutions of NonMuslim Countries:

Since we are dealing with Islamic Law, which is a religious based law, it is deemed valuable to see how the concept of religion and culture feature the constitutions of countries where Muslims form a minority.

In Europe, Belgium allows freedom of public worship and manifestation of personal views.[1] No specific mention of religion is found. Byelorus[2] allows freedom of religion and its practice while Germany considers freedom of faith, conscience and religion as inviolate[3] but denies any favour or disadvantage to any religion.[4] Greece allows freedom of religious worship and conscience but prohibits proselytism.[5]

In Asia, Japan allows freedom of religion but denies it any privilege. No recognition of any personal religious law is allowed.[6] India prohibits discrimination, including religious discrimination.[7] There are no special rules for personal social religious laws.

In Africa, Botswana protects freedom of conscience which includes religion as well as its practice and

---

1 *Belgium Constitution*, 1994, Article 19.

2 *Constitution of Byelorus*, 1994, Article 31.

3 *Constitution of the Federal Republic of Germany*, 1949, Chapter 1, Article 2(3).

4 Ibid, Chapter 1, Article 4(1).

5 *Constitution of Greece*, 1975, Section 2, Part 2, Article 13(1)(2).

6 *Constitution of Japan*, 1947, Chapter 3, Articles 20 & 24.

7 *Constitution of India*, 1950, Part 3, Article 15.

observance, individually or in community with others.[1] Ghana prohibits discrimination which includes religious discrimination.[2] However, there is an exclusion clause which reads: "*Nothing in this Article (i.e. art. 17) shall prevent parliament from enacting laws that are reasonably necessary to provide for matters relating to adoption, marriage, divorce, burial, devolution of property at death or other matters of personal law*", as well as "*for making different provisions for different communities having regard to their special circumstances...*"[3] The constitution of Sierra Leone[4] and Zambia[5], in relation to religious freedom and practice, resembles that of Botswana. The Zambian constitution has an apparent exclusion clause which rules that any law inconsistent with the non discriminatory clause in the constitution, shall not be a contravention of Article 19 when "*it is shown that the law in question makes provision which is reasonably required...for the purpose of rights and freedoms of other persons, including the right to observe and practice religion without the unsolicited intervention of members of any other religion...*" if it is shown not to be reasonably justifiable in a democratic society.[6] Zimbabwe rules as valid law that which "*protects the rights and freedoms of other persons, including the right to observe and practice any religion or belief...*"[7]

---

1 *Constitution of Botswana*, 1966, Article 11(i).

2 *Constitution of Ghana*, 1992, Chapter 5, Article 17(2).

3 Ibid, Chapter 5, Article 17 (4)(b)(d).

4 *Constitution of Sierra Leone*, 1991, Chapter 3, Article 18(1).

5 *Constitution of Zambia*, 1991, Article 19(1).

6 Ibid, Article 19 (5)(6).

7 *Constitution of Zimbabwe*, 1987, Chapter 3, Article 19 (5)(b).

The Singaporean constitution is unique in Asia and the world in its provisions for rights of minorities. While that constitution outlaws discrimination and grants freedom to all, it does not prohibit or invalidate a provision for regulating personal law or any provision or practice restricting office or employment to a specific religious group in running their affairs.[1] The constitution goes much further by creating a 20 member Council of Minority Rights[2]. The particular functions of the Council is to draw attention to any Bill or any subsidiary legislation which is, in the opinion of the Council, a differentiating measure. A mechanism of procedures, including the right to refer Bills back to the Speaker for amendments is constitutionally guaranteed. Any Bill affecting a minority community must bear the certificate of the Council President before assent is granted to a Bill.[3] By any standards of democracy, this is certainly one of the most profound in protecting, in a practical sense, minority rights, especially minority family laws and thus minority fears and anxieties and thus easying and relaxing inter-community relations and cooperation which are so important in plural societies.

Surprisingly, even Israel recognises a religious marriage and divorce of the parties' choice as well as consequences of such a marriage and subsequent divorce of a specific religion.[4] In addition, religious courts exist for specific religious communities such a rabbinical courts for Jews, Muslim religious courts for

---

1 *Constitution of Singapore*, 1992, Part 4 Article 12 (1) (2) (3)(a)(b).

2 Ibid, Article 69.

3 Ibid, Part 7, Articles 77 & 78.

4 *Constitution of Israel*, 1958 - 1988, Section on Human Rights, Article 22 (d).

Muslims, Christian religious courts for Christians and Druze courts for the Druze community.[1]

4.2 **Religion And Cultural Freedom In The Constitutions Of Muslim Countries:**

Constitutional provisions for freedom of religion and culture differs from country to country - from short expressions to some form of detail. Brunei Darrusalam declares Islam its religion, but allows freedom of religion to other groups[2] Tunisia also declares Islam its religion but grants equality before the law for all.[3] Morocco has the same provision as Tunisia but also guarantees freedom of worship for all.[4] Indonesia uniquely declares that "The State shall be based on belief in one Supreme God" and grants freedom for all "*to profess and exercise their religion*".[5] Egypt's State religion is Islam and Islamic jurisprudence its principal source of legislation[6] but grants freedom of belief and freedom of practice of religious rites.[7] Jordan declares Islam as its State religion, grants freedom to all forms of worship and prohibits discrimination, including on religious grounds.[8] Malaysia rules equality before the law for all, despite

---

1 *The Middle East and North Africa*, England, Europa Publications Ltd, Staples Printers, 1996, 42nd ed p. 571.

2 *Constitution of Brunei Darrusalam*, 1984, Part 2, Article 3(1).

3 *Constitution of Tunisia*, 1959, Chapter 1, Articles 1 & 6.

4 *Constitution of Morocco*, 1992, Title 1, Articles 5 & 6.

5 *Constitution of Indonesia*, 1959, Chapter 11, Article 29 (1)(2).

6 *Constitution of Egypt*, 1980, Part 1, Article 2.

7 Ibid, Part 3, Article 46.

8 *Constitution of Jordan*, 1984, Chapter 1, Article 2 & Chapter 2 Article 6(i) and 14.

Islam being its State religion. In addition, it allows provisions for regulating personal law.[1] Sudan declares *shari'ah* as its main source of legislation but rules that personal matters of nonmuslims are governed by their own personal law. Freedom of religion to all is granted and discrimination of various forms prohibited.[2] Pakistan allows freedom to profess, practice and propagate religion, rules Islam as system of life for Muslims with the State safeguarding legitimate rights and interests of minorities, including their due representation in the federal and provincial services.[3]

Iran declares Islam as its official religion and *ja'fari* (*shi'ah*) school of law as its eternally immutable source of law[4]. *Sunni* schools have the right to decide religious matters in terms of their own jurisprudence. Personal status (marriage, divorce, inheritance and will) and related matters of litigation in courts of law are allowed and where a specific school of jurisprudence is prevalent, it will have to be followed by local councils without infringing on the rights of followers of other schools of jurisprudence.[5] Zoroastrians, Jews and Christians are recognised religious minorities within limits of law and have freedom to perform religious rites and ceremonies and

---

1 *Constitution of Malaysia*, 1963, Part 1, Article 5(a) and Article 8(1)(2).

2 *Constitution of Sudan*, 1985, Part 1, Article 4, Part 3, Article 7 (1)(2) & Article 8.

3 *Constitution of Pakistan*, 1990, Part 2, Articles 20, 35 & 36.

4 This makes Iran a sectarian State in law in stark contrast with some other muslim countries where Islam is the State religion and Islamic jurisprudence its source of law, which, in practice, includes, at times, recourse to some aspects of *ja'fari (shi'ah)* jurisprudence.

5 *Constitution of Iran*, 1989, Chapter 1, Article 12.

act according to their canon in matters of personal affairs and religious education.[1] They have no hope of gaining a seat in parliament due to their small numbers, hence the constitutional guarantee for representation so that their affairs can be brought to parliament's attention directly.[2]

It will be noted that at least some Muslim countries have gone far in recognising the canons of personal law of nonmuslims virtually without limitation of any kind, something which nonmuslim countries, democratic and otherwise, save Singapore and a few other States, did not reciprocate to this day. The Western World had not reciprocated properly either, to this day. Some Muslim countries legally recognise nonmuslim personal law such as Jordan where ecclesiastical courts exists for Christians, even for different sects[3] who use canon law in their judicial processes.[4] Syria has a similar arrangement as Jordan[5], while Somalia has district courts dealing with civil and customary matters[6], the latter pertaining to nonmuslim customary law. Nigeria has a similar position.[7]

In Kenya, where traditional African religion prevails and where Muslims constitute 16.6% of the population, *kadi* courts exists which deal with questions of Islamic law[8], while in Sierra Leone where Muslims constitute

---

1 *Constitution of Iran*, 1989, Article 13.

2 Ibid, Article 64.

3 they are for Eastern Orthodox, Greek Melekite and Roman Catholics Christians.

4 *The Middle East & North Africa*, pp. 625 - 626.

5 Ibid, p. 904.

6 *Africa South of the Sahara*, p. 882.

7 Ibid, p. 753.

8 Ibid, p. 521.

30% of the population, local courts have jurisdiction over native and customary law which fall outside the jurisdiction of other courts.[1] Mauritius does not accommodate differing family law systems.[2]

The main Islamic constitutional rule on which the freedom of nonmuslim religions' canon law is to apply to them and not Muslim law is the Quranic verse: "*Let there be no compulsion in religion; the Truth stands out clear from Error..*"[3] Islam forbids forced conversions as it is against human nature. Conversion is by free conviction.[4] "Compulsion in religion" here, includes compulsion of nonmuslims in following *shari'ah* based family law for it is forbidden to force people into Islam.[5]

5 Roman Law Relating to the Law of Persons:

Since South Africa has Roman Dutch law as its common law, it is deemed relevant to deal with aspects of that law which has a bearing on this thesis, *albeit*, as briefly, as possible.

5.1 The Roman Family:

This was the most important unit of the Roman law of Persons and was merely a collective under the authority of a man, the *paterfamilias* (family head). Every male, whether pubescent or not, was his own *potestas* and had power or was in power. *Potestas* means "authority or

---

1 *Africa South of the Sahara*, p. 860.

2 Statement of First Secretary, Mauritius High Commission, Pretoria, South Africa, Ref. No: Gen/Corr/003 V4, dated 11 June 1997.

3 *Al-Qur'ān*, Chapter 2: 256.

4 Al-Bahī M: *Al-Imān*, Cairo, Majma'ah al-Buhūth al-Islāmī, 1995, Book 4, p. 25.

5 *Al-Jāmi' li Aḥkām al-Qur'ān*, Vol 3 p. 279.
Fi Ẓilāl al-Qur'ān, Vol 3, p. 29

power".[1] Women had no standing in this regard. While marriage and blood ties is central to modern family life, a Roman marriage had little relevance to family for its essential value lay in the fact that it gave the husband or his *paterfamilias potestas* over any issue. No distinction was made between natural and adopted children; thus, if a father emancipated his natural son, he became a stranger to that family while the adoptee remained a family member. This proves that *potestas* and not procreation was the basis of the Roman family.

Family relationship was traced through the male line and there was no relationship with the mother's family save if she was married *in manu*. The civil law relationship was *agnatio* (agnate based) existing between those born under the *potestas* of a family head or who would have been under the *potestas* of a single male ancestor in the male line. On the death of the *paterfamilias*, his subordinates were subjected to the *potestas* of the newly emancipated persons of the family of that *paterfamilias*. In early Roman law, the family head's power was absolute and virtually unregulated. He could, for instance, with a family council, condemn to death and execute sons or daughters and descendants as well as sell his children. He could decide on their legitimacy, marry them off or forbade their marriage as well as regulate their divorce, give them away in adoption or emancipate them at will. This despotic system later changed and the child's consent was required. The family head's power in proprietary capacity of his family members developed later. Augustus and Constantine I brought substantial changes in this field. The latter, especially, ruled that the mother's inheritance to her beneficiary child shall be such a child's *dominium* (possession), although still

---

1 Hiemstra V G & Gonin H L: *Trilingual Legal Dictionary*, Cape Town, Wetton & Johannesburg, Juta & Co, 1992, 3rd ed., p. 257.

forming part of the *pater's* (family head) estate. He was not allowed to alienate or appropriate the capital of such a possession, but he could use the returns from it. The beneficiary child succeeded to this property at the family head's death.[1]

5.2 **Legitimacy Of Children:**

Children born from a valid and lawful marriage came under the *potestas* of the father if the parents had *connubium* (capacity to contract a valid marriage). If the marriage was unlawful at law, like between a *civis* (free person) and a foreigner, the child related by blood to both parents but took the mother's status and was denied any agnatic link or relationship with his father. This kind of marriage was thus valid but not recognised in Roman law.[2] Legitimation (i.e acquisition of family control over children born out of wedlock) was unknown in classical times. This developed in the later Christian empire and presupposes a system of concubinage. Men were allowed both a wife and concubine or concubines. Children born from concubinage were illegitimate at law but were not despised nor did they have intestate succession rights to the estate of their natural father. However, the latter could give them gifts or provide them with a legacy in his Will and he could appoint a guardian for such children which the magistrate had to confirm.[3] Illegitimate children belonged to the mother.[4]

---

1 Thomas J A C: *Textbook of Roman Law*, Oxford, North Holland Publishing Company, 1979, 2nd ed., pp. 411 - 417.
Muirhead J: *Historical Introduction to the Private Law of Rome*, London, Adam & Charles Black, 1899, 2nd ed., Part 1, pp. 25 - 33.
Sohm R: *Institutes of Roman Law*, Oxford, Clarendon Press, 1907, 3rd ed., pp. 449, 451 - 452 & 458.

2 *Textbook of Roman Law*, p 419.

3 Ibid, p. 433.

4 *Institutes of Roman Law*, p. 451.

Constantine legitimated these children, but not subsequent issues of concubinage. Justinian carried the matter further but did not allow legitimation of children of adulterous unions. Natural fathers of illegitimate children could petition the emperor for legitimation or their natural father could make them heirs in his Will by rescript of legitimation of children by concubinage. The legitimation of children from concubinage was also politically encouraged through inducement of serving as *decurio* (municipal councillor), a dying profession, or by marrying your daughter to a *decurio* (municipal councillor).[1]

5.3 Adoption:

Two adoption systems existed in Roman society. One was the *androgatio* which marked the extinction of one family in order to perpetuate another[2] and continue observing its *sacra* (house gods worship). *Androgatio* was actually a precursor of testation which allowed for the artificial creation of an heir by the *paterfamilias* during his lifetime. A pontifical assembly, the *comitia curiata*, under the *Pontifex Maximus*, together with the *androgator* (one making the *androgatio*) and the *androgatus* (one entering *androgatio*) had to agree to the *androgatio*. Women had no part in this ceremony and was, initially, excluded from *androgatio*, but Antonius Pius opened their way by allowing *androgatio* by rescript. The *androgatus* and all his family came under the control of his new *paterfamilias*[3].

Adoption came later. The Roman adoption process entailed the transfer of a person from an alien family from one *potestas* to another. This process had to be

---

1 *Textbook of Roman Law*, pp. 434 - 435.

2 *Historical Introduction to the Private Law of Rome*, p. 30.

3 *Textbook of Roman Law*, pp. 437 - 438.
Institutes of Roman Law, p. 479 & 481.

confirmed by the magistrate and recorded in the court's archives as well as requiring the emperor's permission. Initially, women could not adopt,[1] but Diocletian changed that "so as to be a solace for them in their bereavement." Justinian retained this. Adoption only affected the adoptee. If the adoptee had children, such will remained under the *potestas* of their *pater*. In Roman law, the adoptee had no claim on his former *pater* nor succession right to his estate save as a cognate where the praetorian succession scheme was applied. Justinian altered the consequences of adoption. Classical law consequences only applied where the adopter was a natural ascendant like a maternal grandfather. In all other cases, the adoptee retained succession rights to his former family and did not pass into the *potestas* of his adopter even if he acquired intestacy succession rights to his adopter.[2] In the case of a woman adopting a child, the consequences thereof was to create mutual intestate succession rights between the adoptive mother and adopted child and his descendants.[3]

5.4 Tutelage (*Tutela*) And Curatorship (*Cura*):

Tutelage and curatorship were, initially, for the protection of the guardian rather than for the protection of those who were under tutelage or curatorship. Tutelage is the assistance a tutor gives to a non pubescent minor and women in transactions which these persons conducted themselves[4] while in curatorship, the curator substituted for the insane and

---

1 *Institutes of Roman Law*, p. 481.

2 *Textbook of Roman Law*, pp. 437 - 441.

3 *Institutes of Roman Law*, p. 482.

4 Ibid, pp. 488 - 489.

prodigal (spendthrift).[1] Tutelage for males ended at puberty for they could beget children then, while women remained permanently under it due to only bearing children. Tutelage of non pubescent children came either under testamentary tutelage (*tutela testamentaria*) i.e by Will, or legal tutelage (*tutela legitima*). When there was no appointment for a tutor by testament, the latter, if he is the one who succeeds to the estate of the non pubescent person, became his tutor. If emancipation was performed by a collaborator of the *pater*, he became the *tutor fiduciarus* in fiduciary tutelage. Roman women, due to not having power of testation, was under a form of perpetual tutelage (*tutelea perpetua milierum*), and as a consequence did not have power of testation. Hadrian changed this. A number of births liberated them from this tutelage. Curatorship of the insane went to the nearest agnate and in his absence, one was appointed. A disqualification system operated for both tutors and curators.[2]

5.5 Roman Succession Law:

Roman succession law, unlike modern succession law, had more to do with appointing a successor than transferring or disposing of property at death. The Roman praetor interfered with succession and modified it considerably in both testate and intestate forms and did so especially with agnatic privileges. Living succession was already found in *androga* where the *androgatus* and his family passed into the *potestas* of the *androgator*, the latter who acquired the former's assets and became liable for his delicts.[3] An heir succeeded to the

---

1 *Textbook of Roman Law*, p. 453.
Institutes of Roman Law, p. 489.

2 *Textbook of Roman Law*, pp. 454 - 467.

3 Ibid, p. 479.

estate completely i.e. proprietary rights as well as liabilities of the deceased.[1]

Roman law required, in testate succession, that heirs be named in a Will and succession had to be complete. The Will system evolved over a long period of time from the requirement of an ecclesiastic session for succession pronouncements to a document witnessed by the testator and seven witnesses through to a holograph Will without witnesses. A soldier's Will existed which had exceptions from other Wills.[2] Certain persons were entitled to make a Will but others, like those born deaf or blind were denied testation rights. Women could not make a Will, initially, until Hadrian came to their aid.

Conditions to being a testator included, amongst others, a fitness to be an heir or becoming a beneficiary or to be appointed a *tutor*. Women could not be an heir under the *Lex Voconia* to an estate worth 100 000 *sesteres* nor receive legacies exceeding that of the heirs. Justinian allowed natural children and their mother to succeed to no more than 1/12 of the inheritance of their natural father, but if the deceased left no legitimate children, they could succeed to everything.[3] The *Lex Julia de Muritandis Ordinibus* of 17 BC and the *Lex Papia Pappaea* of 9 AD, aimed at cajoling and bullying people into marriage and procreation to offset the falling birth rate of the upper classes. Unmarried and childless couples suffered succession deprivation of varying degrees and such forfeited shares went to heirs with children.[4]

A Roman Will had to name heirs at the beginning, initially, but this was relaxed later on. Impossible,

---

1 *Institutes of Roman Law*, p. 504.

2 *Textbook of Roman Law*, 485 - 486.

3 Ibid, p. 488.

4 Ibid, pp. 488 - 489.

illegal and immoral provisions in a Will were struck out. A testator could institute as many heirs as he wished and vary their shares. If no specification of shares were made, equal shares were allotted.[1] Wills were rendered void if they failed to observe required rules. Special arrangements of substitution were allowed for non pubescent minors who became heirs but died as minor pubescents and thus had no power of testation. Ascendants could petition the emperor naming substitutes for insane descendants. Justinian removed this requirement.

Testation was free[2] so disinherison was legal[3] although morally and socially unfair and improper. Disinherison had to be clear. A somewhat elaborate system operated in degrees of relationship and their shares. A testator could even disinherit his family validly, save for minor modifications hereto. During Justinian's time the view that a family had a lawful right to succession of a deceased's estate developed. He also laid down the shares the heirs had to receive.[4] Heirs were of three classes, namely, freed slaves who became automatic heirs and could not refuse the inheritance, necessary heirs such as sons, daughters and grandchildren or remote ascendants who, also, could not refuse the inheritance while extraneous heirs could accept or refuse it.[5]

As far as intestate succession was concerned, Romans viewed this with horror due to the importance of an heir in continuing the worship of the *sacra*. The Twelve

---

1 *Textbook of Roman Law*, pp. 490 - 491.

2 Schultz F: *Principles of Roman Law*, Oxford, Clarendon Press, p. 156.

3 *Historical Introduction to the Private Law of Rome*, p. 46.

4 *Textbook of Roman Law*, pp. 492 - 495.

5 Ibid, pp. 496 - 498.

Tables of Law gave the order of intestate succession as *sui heredes* i.e. sons, daughters, grandchildren and wives *in manu*, followed by the *proximus agnatus* (near agnate) and then gentiles i.e. those with a common *nomen* with the deceased.[1] In later Roman republican days, the praetor established a new succession order, granting *bonorum possessio* (possession of inheritance) in an order of his own, which differed from civil law and in which he preferred blood relations to civil relations. The praetorian order of succession in possession of inheritance was; the immediate family such as sons and the like with diminished distribution of those further removed like grandsons of the deceased, then the nearest agnate, then the nearest cognate, then the surviving spouse if the deceased's marriage ended by the death. Ascendants and descendants had a year to claim possession and all others 100 working days.[2]

The *senatus consulta* ameliorated the position of mother and child of which Roman civil law said nothing. It gave children, legitimate or not, first claim to succeed their mother. Justinian brought in a new system completely breaking the agnatic principles and removing discrimination between the sexes. This system, through canon law, found its way to modern systems of legislation. He placed descendants first, how lowsoever, the nearest excluding the futherest removed, then ascendants on the same principle, but if both paternal and maternal lines existed, each took half of the estate. If none of these are found, the treasury took it as *bona vacantia*, subject to third party claims. Succession of freedmen was easier as they could only have issue as relatives.[3] Free men were those born free (*ingenui*) and those made free (*libertini* or *liberti*).

---

1 *Textbook of Roman Law*, pp. 517 - 518.

2 Ibid, pp. 519 & 522 - 523.

3 Ibid, pp. 523 - 525.

Free born citizens were Latins, either original or colonary and foreigners[1]. Junian Latins had no succession right as they reverted to slavery at death and their patron succeeded to all his property. A later ruling changed this somewhat. The property of the *dediticii* was for his patron as they had no testation powers. There were, thus, succession rights to persons born free or made free, in Roman law.[2]

In matter of legacies, Roman practice is expressed that "a legacy is a particular disposition in a Will - or in a codicil confirmed by a Will - whereby the testator made a devise, whether corporeal or incorporeal, or money to the designated beneficiary at the expense of the heir or heirs or a specified heir among them."[3] Four kinds of legacies existed in developed law, which, in essence, were the ceding of a thing to a legatee. These had to be written in Latin until 439 AD. Legacies had various forms, various laws and applicable rules and some having been changed by certain rulers. A bequest was upheld even if it had impossible, immoral or illegal conditions in them, these conditions simply being ruled as invalid.

In the Republican era, legacy size was reduced to curtail freedom of devise of ancient times. This was to ensure that the heir had some material advantage of the estate he succeeded to. This was a gradual evolvement and, generally, with the *Lex Falcidia* of 40 BC which ruled that a maximum of three quarters of the nett value of the estate could go to legacies, thus the heir had to receive at least a quarter of the state.[4] Inoperative legacies were those of which the legatee predeceased the

---

1 *Textbook of Roman Law*, p. 403.

2 Ibid, pp. 525 - 526.

3 Ibid, p. 501.

4 *Principles of Roman Law*, pp. 156 - 157.
Textbook of Roman Law, pp. 501 - 506.

legator and ademption. If a legacy was conditional and the prescribed condition did not occur or materialise yet, the legatee could require the heir to give security that he would honour the legacy if and when the condition occurred or arrived.[1]

5.6 ***Fideicommissa* (Trusts):**

To evade the Roman law restrictions on heir institution and legacies, Romans resorted to the process of *trusts*, by way of imposition or by codicil, like, for example instructing one's brother to transfer what he had received under a Will, to an ultimate beneficiary. It was used to give women more than what they were allowed under the *Lex Voconia,* like in the case of daughters who were quite disadvantaged in succession to their father's estate. Married daughters, for instance, could not succeed to their father's estate as they ceased, on marriage, to be a member of his family. Unmarried daughters inherited in name only as their guardian had effective control of their inheritance.[2]

A *trust*, as a legal institution, is actually a "Roman juristic innovation on imperial instigation". In early Roman days, *consuls* (executive magistrates) administered *trusts* and later the special *trust* magistrates, the *praetor fideicommissarius*, performed this function. A *trust* could comprise an entire estate or part of it and was subject to an heir accepting the inheritance. This gave rise to heirs being reluctant to accept inheritance which caused *trusts* to fail. Romans could settle their property in perpetuity as the modern day *trust* institution does.[3]

---

1 *Textbook of Roman Law*, pp. 506 - 507 & 509.

2 *Historical Introduction to the Private Law of Rome*, p. 44.

3 *Textbook of Roman Law*, pp. 511 - 514.

5.7 Codicils:

This forms part of modern day Wills. However, in classical Roman law, it existed independently, though originally dependent on a Will. Confirmed codicils dealt with anything which could be effected in the Will, such as the creation of legacies. When legacies and *trusts* assimilated under Justinian law, little practical difference existed between a Will and a codicil, save that only a valid Will could institute an heir.[1]

6 Aspects Of Indigenous Law Having Bearing On This Thesis:

Before dealing with South African law in such issues as this thesis deals with, it is necessary to deal briefly with some aspects of the African customary law, also known as indigenous law, operating in South Africa as there is confusion as to its relation with Islamic law and practice. The term indigenous law will be used instead of African customary law.

6.1 Property And Persons in Indigenous Law:

Indigenous law is tribally based and follows, at times, a complex system of personal laws. Tribes comprise families, each family comprising a family head, his wife or wives and children. In indigenous law, only family heads are emancipated persons.[2] At the death of the family head, the eldest son of each house becomes the family head of that house. There is an uninterrupted and unchanged pattern of rights and liabilities passing from father to son.[3] There are usually two kinds of property owned by a family head, namely, the general estate also called family property[4] and house property.

According to indigenous law, generally, all property

---

1 *Textbook of Roman Law*, pp. 514 - 515.

2 Bekker J C: *Seymour's Customary Law of Southern Africa*, Cape Town: Juta & Co. Ltd., 1989, 5th ed., p. 69.

3 Ibid, p. 70.

4 this is property not allotted to any house nor automatically accruing to it.

which a family head or which any of the unemancipated members of his house acquired is his and is administered by the family head and no one else has a right to own anything.[1] The family head acquires property by various means such as by his own labour, that which his wife or wives and unemancipated members of his family acquires, fines for personal law issues, like damages from the adulterer for adultery with his wife, produce of his lands and inheritance. The family head is responsible for contracts, as in any normal procedure of law, but an unemancipated family member may enter a contract benefitting him as that would go to the family head. Incurring a debt by such a person is not clearly provided for in indigenous law. The family head or his heir must maintain the entire family.[2]

6.2 Indigenous Succession:

Indigenous succession is based on familial status and tribal law and relates to indigenous marriages. It is, thus, necessary to understand the family pattern in these forms of unions. All indigenous tribes, of which there are four main ones, namely, the *Nguni* (to which both the *Xhosa* and *Zulu* tribes belong), the *Sotho-Tswana* or *Tswana* of which the North *Sotho* or *Bapedi* and the Southern *Sotho* or *Basuto* are branches, the *Tsonga, Tonga, Tsonga-Shangaan* or *Shangaan* and the *Vhanenda, Bavenada* or simply *Venda* with three main branches[3]. Unlimited polygamy is allowed by all tribes subject to paying *lobola* (bride price) and "having a physical need" for more than one wife.[4] Wives and their offspring are graded in a system; either the simple or the complex system of polygamy.

---

1 *Customary law*, p. 72.

2 Ibid, pp. 72, 81 & 126.

3 Ibid, pp. xxxv - xxxvi.

4 Ibid, p. 126.

In the simple polygamy system, one great or main wife is found, who is the first woman the family head married and all other wives are subordinate to her, each of these other wives is, in turn, subordinate to the one married previous to her.[1] In this system, ownership of property is in the hand of the family head, and at his death, in the hand of the heir who is the eldest son of the great wife. The other wives and their sons have no right in the estate, but have right of maintenance and the *lobola* of their first wives. Wives, here are regarded as assets coming under the guardianship of the heir. This system is practised by the *Tsonga* who were not influenced by *Zulu* law.

In the complex polygamy system, Cape *Nguni* have two main wives, sometimes three and the others are subordinate wives. Each family wife creates a house and all wives and houses are under the guardianship and control of the family head. The first house is the great house and highest in rank. The second wife is the right hand wife and her house is distinct from the great house. The third wife is the *qadi* (support) wife and is subordinate to the great house while the fourth wife is the *qadi* (support) to the right hand house and subordinate to it and so the upturn continues in this order for other wives.[2] There are various variations in this complex polygamous system amongst the various tribal branches which increases the complexity of the system. When a family head has no heir, due to his great wife, for example, dying without leaving a male child or his wife is barren or he divorced her and she has no male child from him, he may marry a *seed raiser* whose task it is to produce children and especially a male heir to succeed the family head. This *seed raiser* does not form another house but continues the great wife's

---

1 *Customary Law*, p. 126.

2 Ibid, pp. 126 - 127.

house, while in *Thembu* law, she actually becomes the great wife.[1]

Generally, a male belongs to the family of his mother at the time of his birth while a family relates to a group of families who are traced through a male line. Every male member may potentially succeed the family head and through him to any other family head in the group. A family head's descendants precede his ascendants and collaterals. A woman does not inherit under any circumstances as an heir. The family home consisting of many houses has as many inheritances, but only one heir succeeds to the inheritance of a house and no one shares in this right. Indigenous succession law is based on perpetuating the family head's name as well as a form of communalism of collective right and responsibility within the family and family grouping.[2]

There are different systems of succession in indigenous succession. When a family head deceases and he had only one wife and his children were legitimate, the eldest son will succeed as only heir; if the latter predeceased the family head, the second eldest son succeeds. This pattern continuous until this male line is exhausted. If a son, who predeceased the family head, had a son, then he succeeds. When no descendant is found, the family head's father succeeds and if the latter predeceased the family head, the latter's eldest brother or one of his descendants succeeds in the same manner as with descendant sons. If not found, then the next eldest brother of the family head and if this male line is exhausted, the family head's grandfather succeeds. If not found, then the most senior paternal uncle succeeds and if not found, then his senior descendant following the pattern as for sons. If none are found, then the great grandfather of the family head

---

1 *Customary Law*, p. 279.

2 Ibid, p. 273.

succeeds, followed by his sons and their descendants in the mentioned pattern of descendants. When there are no male relatives who can succeed, the paramount chief of the family head's tribe succeeds in his capacity as guardian of female wards of the deceased family head. However, in KwaZulu-Natal, the paramount chief does not succeed in this case, but the inheritance devolves upon the family head's heirs as in intestate division according to civil law consequences of a civil law marriage.

In the *Sotho* and *Pedi* tribes, the widow, in a one wife marriage, or the great widow in a polygamous marriage, succeeds to the position as family head until a male issue can be raised to succeed.[1]

In the case of a polygamous union, the succession is either simple or complex. In simple polygamous succession, like that of the *Tsonga* where no *Zulu* influence is found, the eldest son of the first wife succeeds the family head and in his absence or disqualification, the eldest of his descendants. If no male descendants are found with the first wife, then the sons of the family head by the second wife. If she has no sons, then the successive wives' male children and descendants are taken into consideration in the order of their marriage to the family head.[2]

In a complex polygamous system, like with the Cape *Nguni* tribes, the family head's property is distributed amongst the houses of his wives. Each such house has its own estate and only the eldest son thereof succeeds, whether he is minor or major. If only two houses are found, the great and right hand houses, and no heir in one of them, the eldest son succeeds to both. In the case of *qadi* (supporting) houses, the son of one section of the *qadi* house system is preferred over that of the

---

1 *Customary Law*, pp. 274 - 275.

2 Ibid, p. 275.

other. A complex system of succession is involved here.

In *Pondo* law, if no sons are found in the two main houses (great and right hand houses), the highest ranking son of the *qadi* (supporting house) is the heir of the main house of his section. *Zulu* succession resembles, more or less, that of the Cape *Nguni* tribes.[1]

7 The Current South African Family & Succession Laws & Matters Relating Thereto:

This thesis deals, primarily, with succession (*mīrath*) and its immediate related subject matter, such as legacies (*waṣāya*) and endowment (*waqf*) and also with guardianship, custody and custodial care, status and adoption. These matters will now be dealt with as in South African law and practice.

7.1 Guardianship:

There are similarities as well as differences, sometimes cardinal, between *sharī'ah* and South African law in this matter. Guardianship is defined as "the control over and administration of the estate of a minor (his money, property, investments) and assistance in the performance of juristic acts (for example, the conclusion of contracts)."[2] A minor, irrespective of sex, is someone who is, as far as age is concerned, under 21 years of age.[3]

a) **Prenatal Guardianship:**

South African law protects and takes notice of the interest of a foetus[4], such as postponing the

---

1 *Customary Law*, pp. 275 - 276.

2 Barnard *et al*: *The South African Law of Persons and Family Law*, Durban, Butterworths, 1986, p. 262.
Visser P J, Potgieter J M: *Introduction to Family Law*, Cape Town, Juta & Co. Ltd., 1994, 1st ed., p. 187.

3 *Age of Majority Act*, Act 57 of 1972, Section 1.

4 Cronje D S P: *The South African Law of Person and Family Law*, Durban, Butterworths Publishers (Pty) Ltd., 1994, 1st ed., p. 24.

death sentence on a pregnant woman[1] and the court issuing an order for custody of an unborn child in divorce proceedings after its birth.[2] However, it appears that a foetus is not taken as a being in law and has, thus, no rights as a being especially now with the enactment of a new abortion Act[3], save if it is injured, for example, during his mother's pregnancy with him. A claim for damages can be instituted after his birth.[4] This principle was confirmed in a court case[5] although the plaintiff lost her case on grounds of not proving beyond reasonable doubt that the actual accident caused the foetus' defect.

b) **Postnatal Guardianship & Curatorship Of Minors:**

In South African law, each of the parents married legally to one another, has guardianship rights over their minor children.[6] In fact, each parent can exercise this guardianship independently and without the consent of the other parent.[7] Both parents' consent is required for certain matters, such as marriage of the minor, adoption of the child or his removal from the Republic, his application or a passport and the alienation or encumbrance of his immovable property or right thereto.[8]

---

1 *Criminal Procedure Act*, Act 51 of 1977, Section 278.

2 Boberg P Q R: *The Law of Persons and the Family*, Cape Town, Juta & Co. Ltd., 1977, p. 17.

3 *Choice of Termination of Pregnancy Act*, Act 92 of 1996.

4 *The Law of Persons and Family Law*, p. 12.

5 Pinchin vs Santam Insurance Co. Ltd. 1963 2 SA 254 (W).

6 *Guardianship Act*, Act 192 of 1993, Section 1(1).

7 Ibid, Section 2.

8 Ibid, Section 2(a)(b)(c)(d)(e).

c) Majority (*Taklif*):

A minor attains majority on reaching the age of 21 years.[1] A minor of 18 years can be emancipated by applying therefor to a South African court and complying with the necessary documentation and procedures required under the Act.[2] If so granted, he attains majority.[3] A minor can be tacitly emancipated in terms of tacit emancipation which is a controversial form of emancipation in modern law.[4] Some maintain that tacit emancipation "liberates the minor from parental power for all intents and purposes," while others maintain that it is only "an enlargement of the minor's capacity to act without parental consent."[5] An *infans* (someone aged below 7 years) has no power to conclude any contract even with parental assistance[6], while persons aged 7 to 20 have limited contractual power save when such will improve their state like receiving while the other contracting party gives. They must, however, be assisted by their guardians herein.[7]

The prodigal (*safīh*) is restricted in his capacity to act in managing his own affairs when he is incapable of it and squanders his assets. He or someone else can apply to the court for the appointment of a curator to manage his affairs. This system existed in both Roman and Roman-Dutch law and

---

1 *Age of Majority Act,* Act 57 or 1972, Section 1.

2 *Age of Majority Act, Act 57 of 1972,* Section 2.

3 Ibid, Section 7.

4 *The Law of Persons and the Family,* pp. 383 - 384.

5 Ibid, p. 384.

6 *South African Law of Persons and Family Law,* p. 78.

7 Ibid, p. 80.

is also South African law.[1] The insane person's acts are invalid as he has no capacity to act.[2] The court appoints a curator to act for them and look after their assets.[3]

d) Custody Of Minors:

Parents are eligible for the custody of their children save if they are unfit for it. Custody is that part of parental power which deals with the child's personal life.[4] In marriage, custody is shared by both parents unless they are not proper parents and no one of them can prevent the other from custody of the children.[5] If a marriage subsists, but parents live apart, the court will give a decision which parent will get custody of the children and herein the court will be guided by the interest of the children.[6] When one parent dies, the surviving parent has then sole custody and guardianship of the children. After divorce, the court must make a ruling as to what parent gets custody, but both parents have a right to the physical presence and company of their children.[7]

---

1 *South African Law of Persons and Family Law*, p. 119. Bekker J C: *Family Law - An Introduction*, Cape Town, Juta & Co. Ltd., 1990, p. 12

2 *South African Law of Persons and Family Law*, p. 103. *Family Law - An Introduction*, p. 12.

3 *South African Law of Persons* and Family Law, p. 111.

4 *Introduction to Family Law* ,p. 186. *The Law of Persons and the Family*, pp. 549 - 550.

5 *The Law of Persons and the Family*, p. 460. *South African Law of Persons and Family* Law, p. 311.

6 *South African Law of Persons and Family Law*, p. 311. *Introduction to Family Law*, p. 186.

7 *South African Law of Persons and Family* Law, p. 311.

The mother of an illegitimate child had exclusive custody over her extra- marital child.[1] In a court case[2] the Witwatersrand division of the Supreme Court[3], held that the natural father of an illegitimate child has an inherent right of reasonable access to the child while the Transvaal Division held that such a father must approach the court for such access.[4] This is set to change dramatically as a Bill has been introduced in parliament where the natural father of children born out of wedlock may be granted access rights, custody or guardianship of his illegitimate child[5] on application to the court subject to certain considerations.[6]

Joint custody may be awarded, although this is rare, as happened in the Kastarn case[7] where the parents agreed, in their divorce action, to exercise joint custody over their children. A similar ruling was given in another case[8]. In another case,[9] joint custody was refused.

e) <u>The Court As Upper Guardian:</u>

The High Court[10] is upper guardian of all minor children which, in practice, means that its powers

---

1 *Children's Status Act*, Act 82 of 1987, Section 3.

2 <u>Van Erk vs Holmer 1992 (2) SA 636 (W)</u>.

3 now the High Court.

4 *Introduction to Family Law*, p. 187.

5 *Natural Fathers of Children Born Out of Wedlock Bill*, 1997, Section 2(1).

6 Ibid, Section 5 (a)(b)(c)(d)(e)(f) & Section 6.

7 <u>Kastarn vs Kastarn 1985 (3) SA 325 (C)</u>.

8 <u>Venton vs Venton 1993 (1) SA 763 (D)</u>.

9 <u>Schlebusch vs Schlebusch 1988 (4) SA 548 (EC)</u>

10 previously Supreme Court.

overrides the authority of both parents and guardians. The court may thus interfere with parental authority in the child's interest. Both common and statutory law grant these powers to the court. At common law the court interferes with the guardianship of a child, when the child's life, health, morals or property is endangered by the conduct of the child's parents. Court intervention in the interest of minor children in divorce cases is also founded on common law.[1] The court's statutory powers have been conferred by Acts of Parliament. The Child Care Act makes provision for the welfare and protection of children.[2] A magistrate's court sits as a children's court.[3] Children in need of care and those without parents or guardians are provided for as far as their safety is concerned.[4] Children in the care of unsuitable parents or guardians may be placed in foster care or sent to a children's home or school of industries.[5]

The High court can consent to the marriage of a minor if his parents or guardian or commissioner of child welfare refuse consent without adequate reason or act contrary to the interest of the child in this matter.[6] Guardianship, custody and access to children of divorced parents can be entertained by the court in the best interest of such children[7], while a minor's property is protected in that

---

1 *Introduction to Family Law*, p. 193 - 194.

2 *Child Care Act, Act 74 of 1983*, Chapter 3.

3 Ibid, Chapter 2, Clause 5.

4 Ibid, Chapter 3, Clause 11(1)(2) & Clause 12.

5 Ibid, Chapter 3, Clause 15(b)(c)(d).

6 *Marriage Act, Act 25 of 1961*, Section 25(4).

7 *Matrimonial Affairs Act, Act 37 of 1953, Section 5(1).*

parents or guardians cannot alienate immovable property of minors without the court's consent when its value exceeds R10 000.00.[1]

f) Other Forms Of Guardianship:

Other forms of guardianship exist in South African law such as testamentary guardians who are appointed by a guardian in his testament and who can commence his duties after appointment by the Master of the High Court. A sole guardian nominates a guardian exclusively to control the minor child's estate.[2] An assumed guardian is nominated by a testamentary guardian to act with him or in his place. There are specific regulations herein regulated by an Act.[3] A putative guardian is a person who acts erroneously as guardian under the mistaken assumption that he has that right. The court can ratify the conduct of such a guardian if it is in the interest of the child.[4]

7.2 Adoption In South African Law:

Adoption was valid in Roman law[5], and was widely practised[6], though Roman-Dutch law did not recognise it, it existed in Friesland[7]. Adoption was legalised in South Africa in 1923 by an Act[8]. This was followed by

---

1 *The Administration of Estates Act, Act 66 of 1965, Section 80.*

2 *Introduction to Family Law*, p. 196.

3 *Administration of Estates Act*, Act 66 of 1965, Section 72(2).

4 *Introduction to Family Law*, p. 197.

5 *Textbook of Roman Law*, p. 437.

6 *The Law of Persons and the Family*, p. 350.

7 Ibid, p. 350.

8 *Children's Act*, Act 25 of 1923.

the Children's Act of 1937[1], which was followed by the Children's Act of 1960[2] and finally the Child Care Act.[3] A magistrate's court, sitting as a children's court deals with adoptions in the area of its jurisdiction.[4] Private adoptions are invalid in law as confirmed in a court case[5] where biological parents gave their child to a married couple but never completed adoption papers. The child was returned to his biological mother as there was "no threat to his life, health or morals" with her "..nor would the court deprive a parent of the custody of his child.."[6]

South African law has procedures which has to be followed for adoption to be valid which are set out in the Child Care Act.[7] Of these are the ability of the adoptive parent(s) to be of good repute, fit and proper to be entrusted with the custody of a child and have adequate means to maintain and educate the child and see to his interest and welfare[8]. There were stringent age restrictions between adoptive parent and adopted child in the Children's Act[9] but these are not found in the present Child Care Act.[10] Consent is necessary for a

---

1 *Children's Act, Act 31 of 1937.*

2 *Children's Act*, Act 33 of 1960.

3 *Child Care Act*, Act 74 of 1983.

4 Ibid, Chapter 2, Section 5.

5 Van der Westhuizen vs Van Wyk & Mother 1952 (2) SA 119 (GW).

6 Ibid.

7 Section 18.

8 *Child Care Act*, Section 18(a)(b).

9 *Children's Act*, Act 33, Section 2(a)(b)(c)(d) & 3(a)(b)(c).

10 *Act 74 of 1983.*

valid adoption and both parents must consent or the mother of the illegitimate child must consent.[1]

Married persons adopt jointly, while a divorce or divorcee, widowed or unmarried person adopts singly.[2] This had now been amended[3] to allow a natural parent to adopt his illegitimate child. A child of 10 years or older must also consent to his adoption.[4]

There must be regard for the child's religion and cultural background in adoption.[5] This is called "matching". The law states that "regard" be had in this case and not that the court must be "satisfied" in this matter. The High Court did not uphold the background rule. In fact, it had, at times, overruled the commissioner of child welfare in a court case[6] where a Jewish couple was granted adoption of an Afrikaans speaking child who was also a member of the Dutch Reformed Church. Matching of religion and culture diminishes with the advance of age of the prospective adoptee.[7]

a) Legal Effect Of Adoption:

An adoption order confers the surname of the adoptive parent on the adoptive child and he becomes the legitimate child of the adoptive parents[8] as well as terminates all rights and legal responsibilities existing between the adopted child

---

1 *Child Care Act*, Section 18(d).

2 Ibid, Section 17(a)

3 *Child Care Amendment Act*, Act 86 of 1991.

4 *Child Care Act*, Section 18(e).

5 Ibid, Section 40.

6 C & Another vs Commissioner of Child Welfare, Wynberg 1970 (2) SA 76 (C).

7 *The Law of Persons and the Family*, p. 359.

8 *Child Care Act*, Section 2(2)(3).

and his natural parents and their relatives. An adoption order does not legalise marriage or sexual intimacy which would otherwise be unlawful, nor does it prohibit a marriage or sexual intimacy which would otherwise be permitted. However, the adopted child cannot marry his adoptive parent nor can there be sexual relations between them as that would tantamount to incest.[1] There is, thus, no prohibition of marriage between the adopted child and a natural child of the adoptive parent nor between other adopted children of an adoptive parents, provided there is no barrier to marriage such as prohibited degrees in marriage. This again highlights the artificial nature of adoptions. It is interesting to note that prior to 1960, there was no prohibition of marriage between the adopted child and his adoptive parent on condition that the child was not less than 21 years of age.[2] This is another example of the artificiality of adoptions.

It is an offence to give or receive any consideration for adoption save with the Minister's consent.[3] An adopted child may be adopted by another adopter parent. If so, all previous legal consequences of his previous adoption are cancelled save property acquired by virtue of his previous adoption.[4] The artificiality of adoption is again manifest herein also.

---

1 *Child Care Act*, Section 20(4).

2 *The Law of Persons and the Family*, p. 366.

3 *Child Care Act*, Section 24(1).

4 Ibid, Section 23(1).

7.3. SUCCESSION:

This differs fundamentally and cardinally with *mirath*.

In common law, making a Will requires the attaining of puberty which is 14 years for males and 12 years for females.[1] Statutory laws in the pre-Union colonies and territory of South West Africa changed this and the English form of a Will was introduced.[2] Natal colony explicitly departed from common law requiring a testator to be 21 years or older or be emancipated from parental power and having legal capability of making a Will.[3] These laws had been changed statutorily by an Act[4] which created uniformity. The administration and execution of Wills thus had two phases, one dating before 1st January 1954[5] and those after that date.

a) General Rules Of A Will:

A "Will" is defined as "a unilateral, voluntary expression of the wishes of the testator in legally prescribing ways which determine what must happen to his property after his death."[6] In English law, a Will is defined as "...the declaration in a prescribed form of the intention of the person

---

1 *The Law of Persons and the Family*, p. 642.

2 *Ordinance 15 of 1845 of the Cape Colony.*
Law 2 of 168 of Natal Colony.
Ordinance 14 of 1903 of Transvaal Colony.
Ordinance 11 of 1904 of Orange Free State Colony.
Proclamation 23 of 1920 (South West Africa).

3 *Law 2 of 1868 of Natal Colony*, Section 6.

4 *Wills Act, Act 70 of 1953.*

5 date of the *Wills Act, Act 70 of 1953.*

6 De Waal M J *et al*: *Law of Succession - Student's Handbook*, Cape Town, Juta & Co. Ltd., 2nd ed., p. 42.

making it with regard to matters which he wishes to take effect upon or after his death."[1]

A Will must be in writing, signed or marked by the testator[2] and signed by witnesses[3]. When a testator uses a mark, a magistrate, commissioner of oaths or justice of the peace must certify that he/she is satisfied with the testator's identity and that the Will is his Will.[4] If there is more than one page, each page must be signed by the testator and witnesses.[5] These rules are obvious for the avoiding of fraud in Wills.

In order to make a valid Will, a testator must be 16 years of age and mentally capable to make a Will. The witnesses, must be 14 years of age or older.[6] Minors under 16 years in statutory law (and those under 14 years, at common law) have no capacity to make a Will and their Wills are invalid at law.[7] Later Roman law as well as Roman-Dutch law validated a prodigal's Will if prodigality did not show in the Will. There appears to be acceptance hereof in South African law as in *Ex Parte F 1914 WLD 27 at 30.*

---

1 Lord Hailsham: *Halsbury's Law of England,* London, Butterworths, 1984, 4th ed., Vol 50, p. 91 (Section on Wills).

2 testator will, hereinafter, also include the testatrix, unless otherwise indicated.

3 Erasmus A J & De Waal M J: *The South African Law of Succession*, Durban, Butterworths Publishing Co., 1989, pp. 36 - 37.

4 *Wills Act, Act 70 of 1953*, Section 2(i)(ii)(iii)(v).

5 *Law of Succession Amendment Act, Act 43 of 1992*, Section 2(b)(ii).
The South African Law of Succession, p. 47.

6 *Wills Act, Act 70 of 1953*, Section 1.

7 Corbett M M *et al*: *The Law of Succession in South Africa*, Cape Town, Juta & Co. Ltd., 1980, p. 64.

Persons born as deafmutes had no capacity to make a Will in Roman law nor does Roman-Dutch law view this positively and South African courts have not dealt with this. Corbett *et al* is of the opinion that the real test in these persons' cases will be if they had the required capacity to execute a Will.

Sound mental capacity is a requirement for the execution of a valid Will.[1] These were all applicable before 1st January 1954. Wills executed after this date, are dealt with in terms of the Wills Act.[2] This Act apparently does not preclude a prodigal of being incapable of executing a valid Will by reason of interdict alone whether prodigality is observed or not from his Will due to prodigality not being a mental incapacity. If there is no mental deficiency in a deafmute, he is likewise not precluded form making a valid Will.[3]

Joint Wills are valid in South African law, whether the persons are married in or out of community of property or even if they are not married at all.[4]

b) <u>Administrative Requirements Of A Will:</u>

These have no corresponding statutory rules in *shari'ah.*

Opening of Wills in front of witnesses featured in both Roman and Roman-Dutch law.[5] In South African law both production and registration of a Will is governed by statute.[6] A Will, prior to death is either kept by the testator or entrusted to another

---

1 *The Law of Succession in South Africa*, pp. 64 - 65.

2 *Wills Act, Act 70 of 1953.*

3 *The Law of Succession in South Africa*, pp. 68 - 69.

4 Ibid, p. 48.

5 Ibid, p. 101.

6 *Administration of Estates Act, Act 66 of 1965.*

person.[1] The Act[2] requires that a deceased's Will be delivered to the Master[3] when the testator dies.[4] This includes a revoked Will.[5] The original minute of a notarial Will must also be delivered to the Master by the notary in whose presence it was passed and he must file a certified copy of such a notarial Will in his protocol and endorse such a copy to the effect that the original had been delivered to the Master.[6] This account is for the estate in question.[7] Defaulting herein is an offence in law[8] punishable by a fine of R100.00 or imprisonment not exceeding 6 months or both.[9]

The Master is under obligation to register Wills delivered to him in a register of estates.[10] He must also register a certified copy of an original foreign Will if such was certified by a competent authority. When an original will is lost, application must be made to the Court in declaring the copy to be the Will of the deceased. In normal practice an outright order is usually not immediately granted but a *rule nisi* calling on those

---

1 *The Law of Succession in South Africa*, p. 101.

2 *Administration of Estate Act, Act 66 of 1965.*

3 meaning here, and hereinafter, the Master of the High Court (previously Supreme Court).

4 *Administration of Estates Act, Act 66 of 1965*, section 8(1).

5 *The Law of Succession in South Africa*, p. 102.

6 Ibid, pp. 102 - 103.

7 *Administration of Estates Act, Act 66 of 1965*, Section 8(2).

8 Ibid, Section 102(h).

9 Ibid, 1965, Section 102(i)(iv).

10 Ibid, Section 8(3).

having an interest in the matter to show cause why the order should not be granted is issued. It may grant an order if circumstances so warrant.

Registration of a Will is not recognition thereof. Any aggrieved party can apply to the court to set aside a Will registered with the Master.[1] The Master himself, with valid reason(s), may refuse to accept a Will, even if he registered it and refuse to grant letters of executorship.[2] It is the duty of the surviving spouse or nearest relative of the deceased or associate of the deceased residing in the latter's district, to supply an inventory of deceased's estate to the Master.[3] An interim curator can be appointed by the Master to take custody of the deceased estate until letters of executorship have been granted, signed and sealed or someone had been instructed to liquidate and distribute the estate.[4] The Master must grant letters of executorship to an executor mentioned in a Will when there are no legal objections to his executorship.[5]

c) <u>Revocation Of Wills:</u>

Since freedom of testation applies in South Africa, it is logical that the revocation of Wills will also be valid. A testator can revoke a Will at any time before his death, but an agreement by him to revoke his Will is invalid. By making another Will, he revokes the previous Will. He also revokes his Will by making a codicil to that effect or destroying the Will in question. A testator's

---

1 *The Law of Succession in South Africa*, pp. 104 - 105.

2 *Administration of Estates Act, Act 66 of 1965*, Section 8(4).

3 Ibid, Section 9(1).

4 Ibid, Section 12(1).

5 Ibid, Section 14(a)(b).

marriage does not revoke his Will nor is a mutual Will revoked by remarriage of the surviving spouse.[1]

d) Contents Of Wills:

South African law applies the principle of freedom of testation which is wider than in any other western system of law. A high regard is placed on the testator's wishes in disposing of his assets provided it is lawful. Immoral, vague, impracticable or impossible provisions are not executed nor provisions prohibited by law[2]. Thus, The Immovable Property Act[3] empowers the court to alter or amend immovable property restrictions imposed by a testator in his Will[4], likewise is the subdivision of agricultural land also limited by provisions of an Act[5].

The court can also, on application of a trustee or other suitable person, authorise the amending of a trust deed.[6]

A surviving spouse may claim maintenance from the deceased estate of the deceased spouse until his/her death or remarriage, if unable to provide for him/herself.[7] This claim must be reasonable and rules had been laid down for determining this.[8] The maintenance of minor children as well as costs of

---

1 *The South African Law of Succession*, pp. 58 & 62.

2 *The Law of Succession in South Africa*, pp. 33 - 34. *The South African Law of Succession*, p. 64.

3 *Act 94 of 1965.*

4 *Law of Succession*, pp. 2 - 3.

5 *Agricultural Land Act, Act 70 of 1970.*

6 *Trust Property Control Act, Act 57 of 1988*, Sections (13) & (14).

7 *Maintenance of Surviving Spouse Act, Act 27 of 1990*, Section 2.

8 Ibid, Section 3.

their education are claimed from their parent's estate, but is subordinate to creditor claims but precede claims of legatees and heirs.[1] Apart from this, the testator can appoint any heirs and name any legatees and any form of benefit. There can, thus, be only one heir.[2]

The minor children must be provided for from their mother's estate when the surviving father cannot provide sufficiently for them.[3] Provisions of an ante nuptial contract on the devolution of property at death of one of the spouses are valid and can only be revoked by a mutual Will.[4]

The South African succession system is the English executorship system brought in by a Cape Ordinance[5] which supplanted the Roman universal succession system.[6]

As far as conditions in a Will is concerned, bequests may be conditional or unconditional or resolutive, which cancels the bequest if a certain act is done. If the condition is impossible, the heir succeeds unconditionally. A condition may be mixed when an heir can only fulfil it partially, or casual of it is beyond his power to fulfil or potestative if he can fulfil it. Illegal conditions or those against public policy are void and the beneficiary succeeds to his benefit if the Will makes sense without the void conditions. Illegal

---

1 *Law of Succession*, p. 88.
The South African Law of Succession,, p. 65.

2 *Law of Succession*, p. 89.
The South African Law of Succession, p. 64 - 65.

3 *The South African Law of Succession*, p. 65.

4 Ibid, p. 114.

5 *Cape Ordinance No. 104 of 1883.*

6 *The Law of Succession in South Africa*, p. 5.

conditions are those that destroy an existing marriage or forbidding the beneficiary to marry, but partial restraint is valid such as prohibiting the beneficiary from marrying someone of a particular religion, race or nationality.[1] Excluding court jurisdiction is against public policy and is void.[2]

A testator may make either a suspensive or resolutive *dies*[3].In a suspensive *dies* a time limit is set before succession to benefit is allowed while a resolutive *dies* ensures that a right given will disappear.[4] Another valid testamentary imposition is a *modus* which is an obligation imposed on the beneficiary without making his rights conditional, like the testator ruling "my property P is left to Q subject to him building school S". A condition postpones but does not oblige while a *modus* obliges but does not postpone. Benefit subjected to a *modus* vests immediately in the beneficiary subject to complying with what the *modus* instructs in.[5]

e) **Vesting:**

When a beneficiary's right to an inheritance or bequest becomes unconditionally fixed and established, such a beneficiary is vested with the specific benefit.[6] There is a difference between vesting of an interest in a deceased estate and the accrual of the right to enjoy or exercise that interest. In intestate succession, vesting takes

---

1 This may be void now in terms of the new South African constitution's Bill of Rights, Chapter 2, Section 9(2)(4), Section 10, Section 15(1) & Section 18.

2 Law of Succession, pp. 91 - 93.

3 a *dies* is a time factor imposed by the testator before a beneficiary succeeds to his benefit.

4 *Law of Succession*, pp. 93 - 94.

5 *The Law of Succession in South Africa*, pp. 130 - 131.

6 *The South African Law of Succession*, p. 77.

place immediately at death of the deceased but in testamentary succession, the testator's intention, as in his Will, determines that. This is usually at death of the testator or when he stipulates it in his Will. Where an interest is vested in a beneficiary but its enjoyment postponed and the beneficiary dies before he can enjoy the benefit, it passes to his heirs. Vesting plays an important role where there is excess income from property in cases where beneficiaries receive an annuity (usually from trusts). When an inheritance or bequest had been made conditional, the right of the beneficiary therein will be vested, usually, when the condition had been met.[1]

f) Collation:

This applies to both testate and intestate succession. Collation is the required duty of heirs of an estate of an ascendant, whether testate or intestate, to declare what they owe his estate or what they received from him in advances or gifts during the latter's lifetime.[2] Such an heir is only obliged to do so when no indication to the contrary is found. This process is required for calculating the shares of the heirs. Only descendants collate and only when they would have succeeded to the deceased's estate *ab intestato* (by way of intestacy) if there had been no Will of their testator. Thus, if a testator wills his estate to his grandchildren and his son is still alive at his death, the grandchildren do no collate as they would not be the grandfather's heirs *ab intestato*.[3] Descendants who have to collate themselves are entitled to

---

1 *The Law of Succession in South Africa*, pp. 133 - 136 & 143 - 145.

2 *The South African Law of Succession*, p. 17.

3 *The Law of Succession in South Africa*, pp. 17 - 18.

collation. Grandchildren must collate to their brothers and sisters, uncles and aunts.

There is no collation due to ascendants nor strangers nor descendants who do not succeed to a deceased's estate *ab intestato*, nor do legatees or creditors. There is no agreement as to whether the deceased's surviving spouse can claim collation. Benefits that must be collated are an advance by the testator for his heir as part of his inheritance, property, money, or an advance made to him for aiding him in his profession or business or as a marriage settlement or such gifts which are substantial when compared with the donor's financial position and which, if left out of the deceased estate, will result in an unfair and diminished share value to the heirs. No collation is due for gifts of a simple and unconditional nature, nor for maintenance and education nor donations for recognition or in recompense of services or benefits.[1]

The following issues may be validly reflected in Wills and since of these have relevance to Muslim Wills, they are discussed hereunder.

g) <u>Substitution In Wills</u>:

Substitution is resorted to to prevent failure of a bequest such as a beneficiary replacing one that deceases. In this case, if the first is found, the second one falls away.[2]

Substitution are of two kinds, namely, direct substitution which occurs when the appointed beneficiary takes the benefit to the exclusion of the substitute, and fideicommissary substitution when "an instituted heir has to allow benefit to pass to a subsequent beneficiary after a lapse of

---

1 *The Law of Succession in South Africa*, pp. 20 - 23.

2 *The South African Law of Succession*, pp. 78, 79.

time or the death of the heir." Direct substitution provides for alternative succession, in this case the first heir, the *institutus*, succeeds followed by the substitute or *substitutus*. There may be one *institutus* and many *institutii* or *vice versa*.[1] There can also be direct substitution by law. The General Law Amendment Act[2] provides implied substitution in certain cases.[3] A testator's grandchildren will succeed to the benefit of the testator's predeceased son, if the testator's Will does not prohibit that.

The South African Law Commission (SALC) had recommended that section 24 of the General Law Amendment Act[4] be amended and its provision be extended to cover all descendants of the testator and that "lawful descendants" in the mentioned section be amended to read "descendants" and that children born after the testator's death (who are not his children) shall not be included in sharing any benefit save if the testator so expressed such in his Will.[5]

h) <u>Fideicommissary Substitution:</u>

A *fideicommissum* is a legal institution which is established by the *fideicommittens* and transfers property to a particular beneficiary, the *fiducianus* on condition that if a certain condition had been fulfilled, the further beneficiary, the *fideicommissarius* or fideicommissary, receives the

---

1 *Law of Succession*, pp. 96 - 97.

2 *Act 32 of 1952.*

3 *General Law Amendment Act, Act 32 of 1952,* Section 24.

4 *Act 32 of 1952.*

5 South African Law Commission: *Review of the Law of Succession*, Pretoria, 1991, pp. 111 - 112, paragraph 5:24.

property.[1] The substitution in this case is thus that it is successive and cumulative. The difference between a fideicommissary and direct substitution is that in the latter provision is made for alternative beneficiaries while in fideicommissary substitution, the beneficiaries benefit successively.

For a *fideicommissum* to be valid, certain necessary requirements have to be met and these are that the testator clearly intends to create a *fideicommissum*, that there is effective ceding of benefit in favour of the fideicommissary when he fulfils the requirement(s) of the fideicommissary condition, that the testator clearly indicate the fideicommissary assets, which may be any kind of assets (but is usually land) and that the fideicommissary be valid. For it to be valid it must not be vague, nor prohibit the fideicommissary from coming into operation, nor must it be illegal or contrary to public morals. It is, however, valid to make a fideicommission conditional on the death, marriage or remarriage of a fiduciary.[2]

1) <u>Operation Of A *Fideicommissum*</u>:

It can be explicitly created, like in a Will, for example. In this case, it is usually stated that "I leave my land L to C and on his death to D, who is C's son." It can be tacitly created (the *fideicommissum tacitum*), like in the example, "I leave my land L to Y and if Y dies, childless, then Z will take the land." Thus, if Y dies childless, Z succeeds to the land, but not if Y dies before the testator and leaves children. The *fideicommissum*, in this case, goes to Y's children according to the latest Appeal Court ruling. A *fideicommissum* may, through the

---

1 *The South African Law of Succession*, p. 86.

2 *Law of Succession*, pp. 101 - 103.

instrument of a Will, prohibit alienation or limit its duration.[1]

2) Legal Position Of The Fiduciary:

There must be proper and adequate identification of the fiduciary before the *fideicommissum* can be valid.[2]

When the fideicommissary assets are transferred to him, the fiduciary is vested with the right therein and becomes the owner thereof on being delivered to him, in the case of movables, or on registration, in the case of immoveables. However, his proprietary rights are limited and he can, generally, not alienate the property but enjoy its fruits subject to not changing the essential state and qualities of the property as it must be in that state when transferred to the fideicommissary. The fiduciary can be compensated for improvements made to the fideicommissary assets, but not for luxury or even ordinary improvements and the scope of his claim is limited to the improvement in the fideicommissary assets and expenses incurred by him. Whichever is smaller, is paid to him, usually into his estate as benefit of fideicommissary assets is usually for life.[3]

The fiduciary is required to provide an inventory of the fideicommissary assets and furnish security thereof unless the testator gave contrary instruction. The fideicommissary assets must be retained in its original state when delivered to the fiduciary. On fulfilment of the

---

1 *Law of Succession*, pp. 104 - 105.

2 *The South African Law of Succession*, p. 91.

3 *Law of Succession*, pp. 107 - 108.
The South African Law of Succession, p. 100.

fideicommissary condition, the assets are transferred to the fideicommissary.

There is a ranging disagreement on the legal position of the fideicommissary before the fulfilling of the fideicommissary condition. Some maintain that it is only a hope or expectation (and this is the traditional view) to those who confer a real right to him in the fideicommissary.[1]

3) **Alienation Of Fideicommissary Assets:**

The fiduciary can only alienate the fideicommissary assets when the testator had so explicitly stated that in his Will. If not, only the court can alienate it but can only act in terms of the common law or legislation. In terms of common law, if all the fideicommissaries agree and they are majors, the court can order alienation.

The court can also act in alienating fideicommissary assets on behalf of unborn fideicommissaries, conceived or not yet conceived, but cannot remove the fideicommission.[2] The court can also consent to an exchange of fideicommissary assets or the sale thereof and substitute assets bought with the returns and it will do so if it is in the interest of the fideicommissaries. Alienation will be resorted to by the court in fideicommissary assets when there is dire need for it like paying the testator' debts, making provision for legacies made, to discharge statutory required obligations such as taxes, for maintenance of the testator's children as well as

---

1 *Law of Succession*, pp. 110 - 111.

2 *General Law Amendment Act, Act 62 of 1955*, Section 33(1).

covering for recurring expenses for the maintenance and protection of the fideicommissary assets.[1]

4) Termination Of A Fideicommission:

A *fideicommissum* ends when the fideicommissary condition had been met and there is no fideicommissary substitute or when the *fideicommissum* duration, as mentioned in the Will, ended. It will also end as a result of the application of Act 94 of 1964[2], or when the fideicommissary assets are destroyed due to no fault of the fiduciary as well as being ended by interested parties who are majors or the testator's nomination of a fiduciary to fideicommissary fails or when the fideicommissary condition is invalid.[3]

If a *fideicommissum* is multiplex, the testator must indicate for how many generations it will continue. If he does not, the court will limit it to 4 generations according to common law.[4]

i) Usufruct:

This is a legal institution which can be granted *inter vivos* (during your lifetime) or *mortis cause* (in a valid Will).[5] This personal servitude can be granted in a Will and can be created by movable, immovable or incorporeal things, but not consumables. The usufructuary has limited real right to use another's property and take and enjoy the fruits thereof after which, it returns to the real

---

1 *Law of Succession*, pp. 108 - 109.

2 *Immovable Property Act (Removal or Modification or Restrictions).*

3 *Law of Succession*, p. 115.
The South African Law of Succession, p. 113.

4 *The South African Law of Succession*, p. 98.

5 *Law of Succession*, p. 115.

owner. The difference between a usufruct and a *fideicommissum* has been set by the court case of *Estate Watkins-Pitchford v CIR 1955 2 5A 437 (A) 447* which states that the "fiduciary has a vested right in the *corpus* of the fideicommissary property and may, on failure of the fideicommissaries, acquire full *dominium* in respect of the property which he holds as a fiduciary interest while in a usufructing interest, the usufructuary has no vested interest in the *corpus* of the property.... and can never acquire the full *dominium* of that property."[1]

A testator may also grant other limited benefits to a beneficiary like *usus* (right of use) or *habitatio* (right of living in a property) with certain limitations.[2] Joint usufruct is valid and the usufruct property is divided between them to the extent of their life interest except when it is forbidden to do so by the Will in question.[3]

j) <u>The Trust</u>:

This exists in the context of the law of testate succession. A beneficiary benefits from this legal institution, but a trustee is vested with ownership and or control of the trust assets. A trust can also be created for impersonal purposes like a charitable trust. An Act[4] regulates the law of trusts. This Act defines a "trust" as "the arrangements through which the ownership in property of one person is, by virtue of a trust instrument, made over or bequeathed to:

---

1 *Law of Succession*, pp. 116 - 117.
The South African Law of Succession, p. 87.

2 *Law of Succession*, p. 118.
The South African Law of Succession, p. 114.

3 *The South African Law of Succession*, p. 114.

4 *Trust Property Control Act, Act 57 of 1988.*

(a) another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument or,

(b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument for the achievement of the object stated in the trust instrument,

but does not include the case where the property of another is to be administered by any person's executor, tutor or curator in terms of the provisions of the *Administration of Estates Act, Act 66 of 1965*".[1] In "a" of the above definition, the trustee becomes the owner of the trust assets which is to benefit the trust beneficiary or other trust objective. Here the trustee is not the owner in his own right, but in the interest of the trust beneficiary.[2] But in "b" of the Act's[3] definition, the trust beneficiary actually owns the trust assets and the trustee only undertakes control and administration of such assets.[4]

---

1 *Trust Property Control Act, Act 57 of 1988*, Section 1(a)(b).

2 *Law of Succession*, p. 119.

3 *Trust Property Control Act (1988).*

4 *Law of Succession*, p. 120.

1) **Requirements For A Valid Trust:**

A testamentary trust created by a Will must comply with certain required formalities. These are the clear intention by the testator to create a trust, indicating the beneficiary, the trust assets and what the trust objectives are, the latter of which must be lawful. These objectives apply to charitable trusts.

Trust assets can be moveable, immovable or incorporeal things. Trust objectives having consideration for religion, nationality and population group have been regarded as lawful by the courts.[1]

2) **The Legal Position Of The Trustee In Law:**

A trustee appointed after commencement of the Act[2] either by nomination in a trust instrument, by court order or by appointment by the Master can only act as a trustee when the Master had authorised him herein.[3] The trustee must furnish an address for service of notices as well as furnishing any change of address.[4] He is required to lodge the original or certified copy of the trust deed with the Master and pay the prescribed fee. He must do the same when the trust document is varied.[5]

A trustee must account to the Master satisfactorily in the administration and disposal of assets and answer any queries about the administration and records of the trust honestly

---

1 *Law of Succession*, pp. 120 - 121.

2 *Trust Property Control Act, Act 57 of 1988.*

3 Ibid, Section 6.

4 Ibid, Section 5.

5 Ibid, Section 4.

and truthfully.[1] An auditor of the trust must report any material irregularity to the trustee[2] and if such is not rectified one month after being reported, the investigating officer must report such in writing to the Master. Further requirements are that the documents of proof of the operation of the trust must be kept by the trustee,[3] that he provide security save if he is exempted from it by the trust document, the Master or a court order. The Master has wide discretionary powers in this matter save in the case of a court order.[4]

A trustee is further required to execute his duties with care, diligence and skill and is not absolved by a trust instrument provision herein. Monies received by a trustee in that capacity must be banked in a banking institution or building society[5], while he many receive remuneration specified in the trust document or reasonable remuneration if such had not been specified. A dispute as to what is reasonable herein, will be decided by the Master.[6]

As far as the tenure of the trustee as such is concerned, he can be directed to comply with the request to perform his duty as required under the trust deed or by law. He can be removed from office by a court order at any time on application from the Master or any person having interest in the trust assets if the court feels

---

1 *Trust Property Control Act, Act 57 of 1988*, Section 16.

2 Ibid, Section 15.

3 Ibid, Section 15 & 17.

4 Ibid, Sections 6 (2) & 6(3).

5 Ibid, Sections 9(1), 9(2) & 10.

6 Ibid, Section 22.

this is in the interest of the trust beneficiaries and the trust.[1] He can be similarly removed from office if he is convicted in the Republic or elsewhere of an offence of which dishonesty is an element or for any offence for which he was sentenced without the option of a fine, fails to give security or additional security to the Master within 2 months of being requested to do so by the Master and the latter granted no extension herein.

Also, when the trustee's estate is sequestrated or placed under judicial management or he is declared mentally ill or incapable of managing his own affairs or he is detained in terms of the Mental Health Act or declared a patient in such an institution or as a President's patient or he fails to perform his duties so required under the Act, satisfactorily. A trustee can, further, resign his position in written notice to the Master[2] and the Master can appoint a trustee if such is required (such as the post being vacant or cannot be filled) but he must consult interested parties herein as he deems necessary. He may also appoint a co-trustee, if he deems it fit.[3]

3) <u>The Legal Position Of The Trust Beneficiary:</u>

He has a right to receive income or capital from the trust as prescribed. If the trustee mismanages or fails to comply with the trust directives, the trust beneficiary can obtain a prohibitionary interdict against the trustee who wish to alienate trust assets in an unauthorised

---

1 *Trust Property Control Act, act 57 of 1988*, Section 20(1).

2 Ibid, Sections 20(1), (2)(a)(b)(c)(d)(e) & 21.

3 Ibid, Section 7(1)(2).

manner or if the trustee fails to carry out his duties in payment to the beneficiary or transfer of capital or income to such a trust beneficiary. In the latter case the trust beneficiary can sue the trustee.[1] Similarly, the trust beneficiary can sue for damages consequential to the trustee's deliberate or negligent maladministration of the trust, non compliance with trust provisions or misapplication of trust assets.[2]

If the trust beneficiary is aggrieved by the authorization, appointment or removal of a trustee, by the Master, or any decision made by the latter in terms of the Act, he can seek relief through the court.[3]

4) Insolvency Of The Trustee:

A trust beneficiary may be harmed if the trustee is declared insolvent in the case where the trustee is the owner of the trust assets. It is accepted that immovable trust property registered in the name of the insolvent trustee shall not fall into the insolvent estate of such a trustee.[4] The trust beneficiary enjoys complete protection from the insolvency of the insolvent trustee.[5]

5) The Charitable Trust:

This is created for social benefit and not only for religious orientated benefit. Thus, trusts providing bursaries, maintaining old age homes or provide for the needs of the destitute

---

1 *Trust Property Control Act, Act 57 of 1988*, Section 19.

2 *Law of Succession*, p. 128.

3 *Trust Property Control Act, Act 57 of 1988*, Section 23.

4 *Law of Succession*, p. 129.

5 *Trust Property Control Act, Act 57 of 1988*, Section 12.

and under privileged are all charitable trusts. Courts are more accommodating and lenient to these forms of trusts.[1]

6) **Changing And Termination Of A Trust:**

Courts have wider powers to alter trust provisions. The Act[2] allows the court to alter trust instrument provisions, which, in the opinion of the court, the founder of the trust "did not contemplate or foresee and which will hamper the achievement of the objects of the trust's founder or prejudices the interest of beneficiaries or is in conflict with public interest". An application is to be lodged herefor by the trustee or any person having sufficient interest in the trust property. This altering of trust provisions includes substituting trust property for other property or an order terminating the trust.[3]

A trust is terminated when its objectives had been accomplished, or trust assets are destroyed, or the trust fails, or the trustee and trust beneficiary agree to end the trust or when an income beneficiary renounces his rights and there is no other intention mentioned in the trust document.[4]

k) **The Foundation:**

This may be created during your lifetime or in one's Will. A foundation is a juristic person without members and has legal capacity bearing rights and duties. It resembles a charitable trust in that it is usually created for an impersonal

---

1 *Law of Succession*, p. 130.

2 *Trust Property Control Act, act 57 of 1988.*

3 Ibid, Section 13.

4 *Law of Succession*, p. 132.

objective. The specific beneficiaries have no membership of the foundation nor do the representatives, controller, administrator or manager of it have any claim to its assets. A foundation is established by legislation such as the Land Bank founded in terms of an Act[1] etc., or it may be set up by private persons such as the Urban Foundation and Rural Foundation were established.

The Foundation's charter must be in writing but no government permission or registration is required. The nature of a foundation is disputed amongst the authorities, some claiming it to be the transfer of ownership from the founder to a charitable institution while others maintain that it is founded on an ambivalent act.

A foundation is terminated, amongst other reasons, upon its liquidation due to insolvency or when the purpose of its founding had been met or such becomes impossible to meet.[2]

1) <u>Systems Of Succession In South Africa:</u>

There are only two systems of succession, namely, testate and intestate succession.

1) <u>Testate Succession:</u>

Testate succession is by a valid and accepted Will, while intestate succession is without it.[3] Both these forms of succession in South African law clash fundamentally with *mirath* (Islamic succession law). In essence, testate succession allows for freedom of testation subject to certain statutory requirements as mentioned previously. This entire system is cardinally and fundamentally opposed to *mirath* as compared with the chapter on *mirath* in this thesis.

---

1 *Act 18 of 1912.* (Later replaced by Act 13 of 1944).

2 *Law of Succession*, pp. 133 - 136.

3 Ibid, pp. 1 - 2.

2) Intestate Succession:

A person dies intestate when he leaves no Will or left a Will, but it is invalid or he left a revoked Will or he failed to dispose of his entire estate in his Will or his beneficiary predeceased him or there is a residue to the estate.[1]

South African law intervened in intestate succession to define prescribed conditions, rules and shares for heirs. This form of succession is governed by an Act[2]. The basic provisions of this Act are:

- if a deceased leaves a spouse, but not a descendant, the surviving spouse succeeds to the entire intestate estate.[3]
- if the deceased leaves a descendant and not a spouse, then the surviving descendant succeeds to the entire intestate estate.[4]
  Collaterals (i.e those relatives who are not descendant or ascendants of the deceased) do not feature in intestate succession in the above two cases.
- if the deceased is survived by both a spouse and a descendant(s), the spouse inherits a child's share of the intestate estate or such an amount as the Minister of Justice determines from time to time by way of a official notice in the Government Gazette. The South African Law Commission recommended the

---

1 *The South African Law of Succession*, p. 21.

2 *Intestate Succession Act, Act 81 of 1987.*

3 Ibid, Section 1(a).

4 Ibid, Section 1(b).

latter procedure.[1] These two amounts are compared and the surviving spouse gets whatever is the greater.[2] The present amount is R125 000.00 as stated in Government Gazette No. 11188 of 18 March 1988.[3] The equation is worked out by dividing the monetary value of the deceased intestate estate by the number of *stirpes* (children) of the deceased plus one. Whatever remains of residue are for the descendant(s).[4]

- if the deceased is survived by both his parents and no spouse or descendant, then each surviving parent receives half of the entire deceased intestate estate.[5]
- if the deceased is survived by one parent only, such a parent receives half of the entire deceased intestate estate and the other half goes to the descendant(s) of the deceased parent. If no descendants of such a deceased parent survived him, the surviving parent succeeds to the entire intestate estate.[6]
- if the deceased is survived by descendants of both predeceased parents only (and thus no spouse or parents or descendants of his own), then the deceased estate is halved; one half goes to the descendants of the deceased's

---

1 South African Law Commission: *Review of the Law of Succession - Project 22*, Pretoria, April 1985, p. 12, para. 4.2.4.

2 *Intestate Succession Act, Act 81 of 1987*, Section 1(c)(i).

3 *Law of Succession*, p. 14.

4 *Intestate Succession Act, Act 81 of 1987*, Section 1 (c)(ii).

5 Ibid, Section 1 (d)(i).

6 Ibid, Section 1 (d)(ii).

predeceased mother and the other half to the deceased's predeceased father's descendants. The full descendants (full blood collaterals) will inherit from both parents' descendants' share and thus get a double share while those relating to one parent only receive only one share.[1] If the deceased is survived by descendants of a predeceased parent only, then the mentioned descendants only will succeed to the deceased intestate estate.[2]

- if the deceased is survived by blood relations in the third degree or further and leaves no spouse, nor descendants, nor parents, nor descendants of parents, then these blood relations succeed to the entire deceased intestate estate in equal shares. They must be nearest to the deceased in degree of relationship.[3]

  The degree of relationship for the direct line is determined by the number of generations between the ancestor and the deceased or descendants. However, in the collateral line, the degree of relationship is the number of generations between the deceased, the blood relatives and the common ancestor and this includes the generations between the mentioned common ancestor and the deceased.[4]
- at common law, an illegitimate child could be intestate heir to his mother and his maternal blood relations and *vice versa*, but not his

---

1 *Intestate Succession Act, Act 81 of 1987,* Section 1 (e)(i)(aa)(bb)(cc).

2 Ibid, Section (e)(ii).

3 Ibid, Section 1 (f).

4 *Law of Succession*, p. 18.
The South African Law of Succession, p. 31.

biological father nor the latter's blood relations.[1] The Intestate Succession Act (1987), has changed that and illegitimacy has no effect on the capacity of blood relations to inherit under intestacy from another blood relation.[2]

- an adopted child can be an intestate heir of his adoptive parents and their blood relations and *vice versa*, but not to his natural parents nor the later's blood relations and *vice versa*.[3] Certain sections of the Child Care Act (Act 74 of 1983) have "related" the adopted child to other persons and have "derelated" him to others.[4] This arrangement is confirmed by the Intestate Succession Act.[5]

3) <u>Other Matters Pertaining To Intestacy:</u>

- when no intestate heirs are found, the deceased intestate estate forfeits to the State as *bona vacantia*. The law requires the executor of an estate to forward to the Master, two months after an estate becomes distributable, all monies unable to be distributed for any reason for depositing in the Guardians' Fund.[6] Monies deposited in the

---

1 *The Law of Persons and the Family*, pp. 342 - 343. *The South African Law of Succession*, p. 24.

2 *Intestate Succession Act, Act 82 of 1987*, Section 1(2). *The South African Law of Succession*, p. 24.

3 *Intestate Succession Act, Act 82 of 1987*, Section 1(5). *The South African law of Succession*, p. 24.

4 *Child Care Act, Act 74 of 1983*, Sections 17(c) & 20(1)(2).

5 *Intestate Succession Act, Act 81 of 1987*, Section 1 (4)(e)(i)(ii).

6 *Administration of Estates Act, Act 66 of 1965*, Section 35 (13).

Guardians' Fund and unclaimed for 30 years, forfeit to the State.[1]

- an heir to a testate deceased estate can renounce his right to succession or he may be disqualified from succeeding to his benefit in which case the deceased is taken as deceasing intestate.[2] A disqualified heir, for example, is one who murdered the deceased.[3]

8. <u>The Position Of Muslim Family Law In Some Muslim Countries:</u>

Generally *al-ahwāl al-shakhsiyyah* (Muslim Personal Law) in Muslim countries includes family law and countries may use any one of these two terms for this. The law of persons is the foundation of Muslim society and is family based. This family law is a "collection of natural and family values which distinguishes a being from another and to which legislation gives social consequences for (effective) personal life", or it is the law "that has to do with personal matters of members of a family in issues such as marriage, divorce, custodial care (*hadānat*), maintenance (*nafaqah*), linage (*nasab*), death and succession (*mīrāth*)".[4] These two definitions form the foundation on which Muslim countries' family laws are based. Most, if not the overwhelming majority of Muslim countries, practice *al-ahwāl al-shakhsiyyah* as in *sharī'ah*. Those who excepted certain *sharī'ah* provisions herein, did so on their own and did not obtain the required Islamic juristic sanction (*fatwā*) for it. It will be a serious mistake and miscalculation to assume that these deviations are "modern" Muslim directions in law seeking accommodation with "a new world order". There is also a mistaken tendency amongst

---

1 *Administration of Estates Act, Act 66 of 1965,* Section 92.
The South African Law of Succession, p. 32.

2 *Intestate Succession Act, Act 81 of 1987,* Section 1 (7).

3 *Law of Succession,* p. 24.

4 *Majallah al-Hiwār*, Beirut: 1987, Vol 2 No 8, Article: *Family Law in Law as one of the Factors of Change in Egypt* by A Y Wahdān, p. 54.

certain people to equate switching Islamic juristic rulings or opinions of *al-madhāhib al-fiqhiyyah* (juridical schools) as "modernising" *sharī'ah*. This is also incorrect as *al-madhāhib al-fiqhiyyah* are all founded on the same fundamental and primary sources of *sharī'ah*, differing only in *masā'il ijtihādiyyah* (issues based on juristic inference). The law content of some Muslim countries in subject matter relevant to this thesis, is now presented.

8.1 ***Al-Wilāyah:***

Moroccan personal law deals with *al-wilāyah* (guardianship) and *al-niyābat al-shar'iyyah* (legal deputation). Guardianship is vested either in the *wali* (guardian) or *waṣi* (tutor) declaring that he is, according to *sharī'ah*, the father of a *saghir* (minor) or the *qādi* (Muslim judge). The father is declared to have legal control over the person of the minor and his possessions and is bound by his duty until the *saghir* (minor) reaches *ahliyyah* (legal capacity). The father can appoint a *waṣi* for his minor child or unborn child and can withdraw this appointment, but if he deceases without appointing a *waṣi*, the *qādi* appoints a *muqaddam* (curator).[1]

Kuwaiti law grants the father *wilāyah*, followed by his father and then the *'aṣabah* (residuary agnates) as in *mīrāth*. When more than one of the latter, of equal standing, are found, the court appoints a suitable sound person from them and if not found, the court can appoint any suitable sound (*ṣāliḥ*) person for this position.[2] The *wali* must be *amin* (trustworthy) in relation to the person of the minor and have the physical ability to be a guardian as well as being of the same religion as the minor. Failure to comply herewith causes *wilāyah* to

---

1 *Mudawwanah al-Aḥwāl al-Shakhṣiyyah*, Moroccan Law No 1.57.343 of 1957, Book 4, Chapter 2, Sections 147 - 151.

2 *Qanun al-Aḥwāl al-Shakhṣiyyah*, Kuwait, Law 51 of 1984, Book 3, Chapter 7, Section 209 (1)(2)(3).

lapse for that *walī*. When no one merits *wilāyah*, then, in this case, when no appointment had been made for a *waṣi* by the *walī* of the *saghīr*, the court will place the latter with a trustworthy person or a welfare institution.[1] The same *'aṣabah* as in *mīrath*, has the *wilāyat al-tazwīj* (guardianship of marriage), but, in the case of a *bikr* (never married woman), both she and her guardian must consent to the marriage, while a *thaiyib* (previously married woman) or a woman 25 years and more marries on her own, but in both cases their *walī* manages or conducts (*bāshara*) the actual *'aqd al-nikāh* on their behalf (and presumably on their instructions). When there is no *walī*, the *qāḍī* assumes this position.[2]

The never married woman between puberty and 25 years petitions the court when her *walī* refuses consent and the court has discretion in granting her application.[3]

Jordanian family law obligates the *qāḍī* to marry off a woman whose *walī* refuses consent for marriage.[4] No condition is set by this law. Iraqi law prescribes 18 years as minimum for marriage for both males and females and allows 15 year olds to petition the *qāḍī* for marriage. If the *walī* unfairly withholds consent, the *qāḍī* consents to the marriage.[5] Malaysian family law, like Kuwaiti law, insists on the agreement of both the marrying woman and her *walī*.[6] Singapore has the same

---

1 *Qanūn al-Aḥwāl al-Shakhṣīyyah*, Kuwait, Book 3, Chapter 7, Sections 211 - 212.

2 *Qanūn al-Aḥwāl al-Shakhṣīyyah*, Kuwait, Book 1, Sections 29 - 30.

3 Ibid, Section 31.

4 Jordanian Family Law, Law 61 of 1976, Clause 6(b).

5 *Qanūn al-Aḥwāl al-Shakhṣīyyah*, Iraq, Law 188 or 1959, Chapter 3, Sections 7 - 8.

6 *Islamic Family Law Act*, Malaysia, Act 303, 1984, Part 2, Section 13(a)(b).

principle as Jordanian law, save that the aggrieved woman petitions the Appeal Board for permission for a Muslim marriage and the Board will instruct the *qadi* to marry off the woman.[1] Indonesian law requires both marrying parties to consent to the marriage[2] as well as according the *wali* of the woman, deputising rights as in *shari'ah*.[3]

8.2 ***Al-Hadānat:***

Hadānat is defined by certain Muslim law codes as "the protection of a child from that which may harm him in a manner (humanly) possible and seeing to his upbringing and training as well as his interest," while Tunisian law defines it as "protecting the minor in providing him safe residence and seeing to his upbringing".[4]

Moroccan law rules custodial care and custody as a duty to both parents during the subsistence of the marriage.[5] Tunisian law makes it a right (*haqq*) to both parents during the subsistence of their marriage.[6] Singaporean law is not explicit on the issue, save that in a divorce case the court can "make such orders as it thinks fit with respects to the custody, maintenance and education of the minor children of the (divorcing)

---

1 *Muslim Marriage and Divorce Rules*, Singapore, 1968, Clause 9.

2 *Indonesian Marriage Law*, Law 1 of 1974, Book 1, Chapter IV, Part 2, Article 16.

3 Ibid, Part 3, Articles 19 - 23.

4 *Mudawwanah al-Aḥwāl al-Shakhsiyyah*, Morocco, Book 3, Chapter 3, Section 97.
Majallah al-Aḥwāl al-Shakhsiyyah, Tunisia, 1988, Chapter 5, Section 54.

5 *Mudawwanah al-Aḥwāl al-Shakhsiyyah*, Morocco, Book 3, Chapter 3, Section 99(1).

6 *Majallah al-Aḥwāl al-Shakhsiyyah*, Tunisia, Chapter 5, Section 57.

parties..."[1], while Iraqi law is unique in that custodial care and custody, including education of the minor in that stage, is the right of the mother, save if such will harm the minor.[2]

Egyptian law grants the right to custody and custodial care of minors to, predominantly, the female line of the minor's mother. This last for males until they reach 10 years and females until age 12 with the *qadi* being granted discretion to prolong these periods for males until age 15 and females until they marry.[3] This clause was retained in the amended law.[4] Kuwaiti law also give custody and custodial care right to females of the mother's side, starting with the latter and allowing males to remain with her until puberty and females until they marry and set up house with their spouse.[5] Moroccan law concurs with this Kuwaiti law ruling.[6] Indonesian law apparently merged minority (*sughr)* and *rushd* (full emancipation) and ruled 21 years age of maturity.[7] It departed significantly from expressed *shari'ah* herein.

---

1 *Administration of Muslim Law Act, Singapore*, 1985, Chapter 3, Clause 52(3)(c).

2 *Qanun al-Ahwal al-Shakhsiyyah*, Iraq, 1959, Chapter 6, Section 2, Clause 57(1).

3 *Egyptian Law 25 of 1925 Relating to Some Matters of Personal Status*, Section 7(1).

4 *Egyptian Law 100 of 1985*, Section 20.

5 *Qanun al-Ahwal al-Shakhsiyyah*, Kuwait, 1984, Chapter 5, Section 194.

6 *Mudawwanah al-Ahwal al-Shakhsiyyah*, Chapter 3, Section 102.

7 *Indonesian Marriage Law*, Chapter XIV, Article 98 (1).

a) Persons Meriting *Hadānat*:

Kuwaiti law rule these persons[1] to be the minor's mother followed by her mother, how highsoever, then the maternal aunt[2], then the mother's maternal aunt[3], then the mother's paternal aunt, then the paternal grandmother, then the father, then the sister, then the paternal aunt, then the father's paternal aunt, then the father's maternal aunt, then the daughter of the son, then the daughter of the sister taken in the order of first the full (*ashiqqā'*), followed by the uterine (*li umm*) and then consanguine (*li abb*). If none are found, then the appointed tutor, then the brother, then the paternal grandfather, then the uterine grandfather, then the son of the brother, then the paternal uncle, then his son, in the latter case following the rule of first the full followed by the uterine and then the consanguine. It is conditional that the custodian be *maḥram* (one you may never marry) to the minor.[4] When there is equality between persons meriting *hadānat*, the *qādi* selects the best one of them.[5]

Egyptian law mentions these persons as being the mother, followed by the mother's mother how highsoever, followed by the paternal grandmother,

---

1 these persons who follow are taken in the mentioned relationship to the minor in question.

2 first the *khālah shaqiqah* (full maternal aunt), followed by the *khālah li umm* (uterine maternal aunt) and then the *khālah li abb* (consanguine maternal aunt). This is the standard pattern when categories of relatives are in line for rights.

3 the same rule as for the maternal aunts.

4 a cousin to a minor can thus have custody only of a minor of his own sex as cousins can marry in *shari'ah*.

5 *Qanun al-Aḥwāl al-Shakhsiyyah*, Kuwait, Law 51 of 1984, Book 3, Chapter 5, Sections 189 (a)(b)(c) & 190 (b).

then the full sisters (*shaqiqāt*) followed by the uterine sisters (*akhawāt li umm*), then the consanguine sisters (*akhawāt li abb*). These are followed by the daughter of the full sister (*bint ukht al-shaqiqah*) followed by the daughter of the uterine sister (*bint ukht li umm*). Then the maternal aunts (first the full, then uterine then consanguine), then the daughter of the consanguine sister (*bint ukht li abb*), then the daughter of the brother, first of the full brother (*bint akh shaqiq*), then the uterine (*bint akh li umm*), then the consanguine (*bint akh li abb*), then the paternal aunts first the full (*'ammah shaqiqah*), followed by the consanguine (*'ammah li abb*). Hereafter the mother's maternal aunts, first the full maternal aunt (*khālah al-umm al-shaqiqah*), then the mother's uterine maternal aunt (*khālah al-umm li umm*), then the mother's consanguine maternal aunt (*khālah al-umm li abb*). Then the father's maternal aunts in the same pattern as the mother's maternal aunts mentioned afore, then the mother's paternal aunts in the same pattern, then the father's paternal aunts in the same pattern.

If none of these are found or are found but fail to qualify for *hadānat*, or the period of *hadānat* had ended, then such is transferred to the males in the agnate line of succession in *mirath* with the paternal grandfather (*abb al-abb*) preceding the brothers (*ikhwah*). If none of these persons are found then custody goes to the non agnate category of male relatives (*dhukūr rahimiyūn*) starting with the maternal grandfather, then the uterine brother, then his son, then the mother's paternal uncle (*'amm li umm*) followed by the maternal uncles (*akhwāl*), starting from the full (*khāl shaqiq*), then the

uterine (*khāl li umm*) and then the consanguine (*khāl li abb*).[1]

The two differing systems (Kuwaiti and Egyptian) is due to different *al-madhāhib al-fiqhiyyah* they used in their laws. The South Yemeni[2] law allowed the mother custody of her minor male child till age 10 and female child till 15 years.[3] Malaysian law also grants custody to minor children to their mother or her substitute allowing males to be with her till 7 and females till 9 but grant the *sharī'ah* court discretion to extend these periods on application by the custodian (mother or substitute). The maximum age for males, then, will be 9 and for females 11 after which custody goes to the father. However, a discerning child (*ṣabī mumaiyiz*), whether male or female, can choose with which parent to reside unless the court decides otherwise.[4] Indonesian law rules that a normal child of 12 years and over is *mumaiyiz* and may decide with which parent he wishes to reside (if parents are divorced, of course).[5]

b) <u>Conditions Pertaining To The *Hadinat* Or *Hadin* (Custodial Parent Or Substitute):</u>

According to Tunisian law, the *ḥāḍin* and *ḥāḍinat* must be trustworthy, physically capable to the task of rearing a minor, healthy and to be *maḥram* (not

---

1 *Egyptian Law 100 of 1985*, Section 20.

2 Yemen is now a united country.

3 *Family Laws of South Yemen*, Law 1 of 1974, Article 46.

4 *Islamic Family Law (Federal Territory) Act*, Act 304 of 1984, Section 84 (1)(2).

5 *Indonesian Marriage Law*, Chapter XIV, Article 105 (a)(b).

within marriageable range) to the child.[1] Kuwaiti law require them to be *bāligh* (pubescent), *'āqil* (sane), *amīn* (trustworthy), *qādir* (capable of the task of custody and rearing), of sound physical health and of sound morals. Kuwaiti law, further rules that the *ḥādinat* married to a non *maḥram* male, loses *ḥaḍānat* and that the *ḥāḍin* must be *maḥram* to the *maḥḍūnah* (female minor under custodial care).[2] Access for the non custodian parent or his substitute is guaranteed.[3] Morocco also allows this save that it prescribes weekly visitations,[4] while Tunisian law allows the father to discipline his minor or send him to a place of learning. However, the minor stays with his mother, if not having completed his custody years with her.[5]

c) **Attaining Majority In Managing One's Property:**

Majority in *sharī'ah* entails two stages, namely, majority for marriage which is puberty (*bulūgh)* and majority for taking possessions of your property and dealing therewith (*rushd*). The latter issue is important for this thesis as issues of *mirath* will be affected by it. Some Muslim countries' laws ruled the attaining of *rushd* as 21 years such as Morocco

---

1 *Majallah al-Aḥwāl al-Shakhṣiyyah*, Tunisia, Chapter 5, Section 58.

2 *Qanūn Aḥwāl al-Shakhṣiyyah*, Kuwait, Chapter 5, Section 190 (1) & 191 (a)(b).

3 *Egyptian Law 100 of 1985*, Section 20.
Qanūn al-Aḥwāl al-Shakhṣiyyah, Kuwait, Chapter 5, Section 196 (1).

4 *Mudawwanah al-Aḥwāl al-Shakhṣiyyah*, Morocco, Chapter 3, Section 111.

5 *Majallah al-Aḥwāl al-Shakhṣiyyah*, Tunisia, Chapter 5, Section 60.

and Indonesia[1] and Tunisia 20 years[2]. Those Muslim countries which do not mention an age will usually depend on the *madhhab's* prevalent in that country[3] or if so ruled, left to the discretion of the *qāḍī* to rule hereon.

8.3 ***Al-Tabanna:***

There is no recognition for adoption in *shari'ah* as shown in chapter 2 of this thesis. This is the position in all Muslim countries save two, namely, Somalia[4] and Tunisia[5] who have both departed from *shari'ah* rulings herein. There rulings are thus secular based and not *shari'ah* based. Surprisingly, Tunisian law allows for the fostering of minors[6], which agrees with *shari'ah*.

Somali adoption law is a virtual photocopy of western secular adoption law, creating artificial parentage and making it "natural parentage" with all that goes with that as well as creating filial relationships between the adoptee and adoptive parents and equal rights between and adoptee and the natural children of the adoptive parents.[7]

Tunisian law is another photocopy of western secular adoption law in that it has the same formalities,

---

1 *Mudawwanah al-Aḥwāl-al Shakhṣiyyah*, Morocco, Book 4, Chapter 1, Section 137.
Indonesian Marriage Law, Chapter XIV, Articled 98 (1).

2 *Majallah al-Aḥwāl al-Shakhṣiyyah*, Tunisia, Book 10, Chapter 1, Section 153.

3 such as, for example, those following the *ḥanafi madhhab* (*ḥanafi* jurisprudence school) might probably take Abū Ḥanifah's ruling which says *rushd* (majority for property possession) is 25 years.

4 *Law 23 of 1975*, Somalia, Sections 110 & 114.

5 *Law 27 of 1958 - Guardianship & Adoption*, Tunisia, Section 8 - 16.

6 *Law 27 of 1958, Guardianship & Adoption*, Sections 3 - 7.

7 *Law 23 of 1975*, Somalia, Sections 110 & 114.

imposed rights, obligations and duties which flow from adoption in a western secular law sense such as application to a court, changing of surname of adoptee to that of adoptive parents, but retaining the marriage prohibitions of blood relations etc.[1]

Reasons for these two States' drastic departure from *sharī'ah* requirements in this issue, are that Somalia, after the socialist revolution, of 1969, the ruling party in Somalia, leaned towards communism and adopted a policy of restricting the sphere of religion and religious laws. It was under ideological communist influence of the communist world that the new Somali government started a massive law reform process. The 1975 Family law which was enacted in terms of the First and Second Charters of Justice was required "in order to create a healthy society." Somali adoptions are restricted to cases where the parents are unknown.[2]

Tunisian adoption laws are found due to the fact that while its constitution[3] regards Islām as the State religion, it does not declare that *sharī'ah* is a binding source of law.[4] However, *sharī'ah* was reintroduced in Somalia in September 1993[5] so a general overhaul of the legal system can be expected.

8.4 ***Al-Mirath:***

Tunisian law did not depart from the basic principles of *sharī'ah* in *mīrath* and the shares of males and females had been retained.[6] Other Muslim countries

---

1 *Law 27 of 1958*, Tunisia, Sections 8 - 17.

2 Pearl D: *A Textbook on Muslim Law*, London, published by Croom Helm, 1979, p. 82.

3 *Tunisian Constitution, 1959*, Chapter 1, Article 1 & 6.

4 Muḥammad T: *Personal Law in Islamic Countries*, New Delhi, Academy of Law and Religion, 1987, p. 254.

5 *Africa South of the Sahara*, p. 882.

6 *Majallah al-Aḥwāl al-Shakhṣiyyah*, Tunisia, 1988, Chapter 7, Part 2, Sections 89 - 90.

follow the same line, like, for example, Egypt[1], Iraq[2], Morocco[3] and Kuwait[4]. Indonesia retained all *mīrāth* laws, save that in the case of a child deceasing without leaving descendants, both father and mother received one third of his estate. This is against Quranic law as well as a contradiction as all other *sharī'ah* decreed shares had been retained.[5]

In Libya females' share in inheritance, according to *sharī'ah*, is especially guaranteed[6], while the Decree of 8 *Ramaḍān* 1391 AH / 28 October 1971 ruled that all legislation had to conform to basic principles of Islamic Law.[7] Pakistani law obligates *sharī'ah* to be used in matters of succession[8], but retained sectarian interpretation of the *Qur'ān* and *sunnah*.[9] The Muslim minority of Singapore is obliged by law to execute their Wills according to succession law as in *sharī'ah*.[10]

Muslim countries have maintained the *sharī'ah* prescribed shares. Thus, where males are obligated in *sharī'ah* to maintain females, the male share is double

---

1 *Law 77 of Egypt of 1943.*

2 *Qanūn al-Aḥwāl al-Shakhṣiyyah, Law 188 of 1959*, Iraq, Chapter 9, Section 89.

3 *Mudawwanah al-Aḥwāl al-Shakhṣiyyah*, Morocco, 1957, Chapter 6, Part 3.

4 *Qanūn al-Aḥwāl al-Shakhṣiyyah*, Kuwait, 1984, Part 3, Section 2, Chapter 1, Article 296.

5 *Indonesian Marriage Law, Book 2 - Inheritance Law*, Chapter 3, Articles 176 - 191.

6 *Law 6 of 1959*, Libya, Part 1.

7 *Personal Law in Islamic Countries*, p. 108.

8 *Act 5 of 1962*, Pakistan (as amended by Ordinance 39 of 1963 and Act 28 of 1964).

9 *Constitution of Pakistan*, 1980, Article 227 (1).

10 *Administration of Muslim Law Act*, 1985, Part 7, Sections 110 - 111.

the share of a female, but where it is not so, as in the case of uterine succession[1] such as uterine brothers and sisters of a deceased, the shares are equal. Where there are males and females of the same strength (*quwwah al-qarābah*) and degree of relationship (*darajah al-qarābah*) such as the *'aṣabah* category, the sharing is again a share for a male and a half share for a female for the maintenance of females applies again in their case.[2]

a) **Basic Principles Of Eligibility To Succeed To A *Muwarrith's* Estate:**

Muslim countries have upheld *sharī'ah* laws in this regard. Thus, succession between a Muslim and nonmuslim and *vice versa* is prohibited but succession between nonmuslims is allowed, difference of domicile does not prevent succession between Muslims nor does it prevent succession between nonmuslims.[3]

---

1 this refers to the uterine brothers and sisters of a deceased who are listed in the *Qur'an* as heirs with a fixed share. These must not be confused with the other uterine relatives who, in certain sectarian rulings, succeed when there are no heirs with a fixed share or agnate residuaries of the deceased.

2 *Qanūn al-Aḥwāl al-Shakhṣiyyah*, Kuwait, Part 3, Chapter 2, Book 1, Sections 296 - 310.
Qanūn al-Mīrāth, Law 77 of 1943, Egypt, Chapter 2, Parts 1 & 2.
Majallah al-Aḥwāl al-Shakhṣiyyah, Tunisia, 1988, Book 4, Chapters 3 - 6.
Qanūn al-Aḥwāl al-Shakhṣiyyah, Irāq, 1959, Chapter 9.
Mudawwanah al-Aḥwāl al-Shakhṣiyyah, Morocco, Book 6, Chapters 3 & 4.
Qanūn al-Aḥwāl al-Shakhṣiyyah, Law 59 of 1953, Syria, (as amended by law 34 of 1975, Article 263).

3 *Qanūn al-Aḥwāl al-Shakhṣiyyah*, Kuwait, 1984, Part 3, Book 1, Section 293.
Qanūn al-Mīrāth, Law 77 of 1943, Egypt, Chapter 1, Sections 5 - 6.
Mudawwanah al-Aḥwāl al-Shakhṣiyyah, Morocco, Book 6, Chapter 1, Sections 228 - 229.

b) Causes Of *Mirath*:

These have been retained as in *shari'ah*, namely that *zawjiyyah* (marriage), *qarabah* (filial relationship) and *'usubah* (residual status) are causes for *mirath*. The laws of Egypt[1], Kuwait[2], Iraq[3], Morocco[4] and Indonesia[5], amongst others, express this.

c) The Order Of Distribution Of A *Tarikah*:

The order is given as in *shari'ah*, starting with *tajhiz* (burial expenses), followed by settling of debts, then *wasaya* (legacies) of the *mayyit* (deceased) and finally distribution to those persons so meriting it in *shari'ah*.[6]

Since *mirath* is so wide and peculiar, especially to some specific and interesting problems that may arise, as pointed out in the chapter 3 on the subject matter, it is interesting to see how some Muslim countries reacted to *fiqh* in this matter.

---

1 *Qanun al-Mirath, Law 77 of 1943*, Egypt, Chapter 2, Section 7.

2 *Qanun al-Ahwal al-Shakhsiyyah*, Kuwait, Part 3, Book 2, Section 295.

3 *Qanun al-Ahwal al-Shakhsiyyah*, 1959, Iraq, Chapter 9, Section 88 (1).

4 *Mudawwanah al-Ahwal al-Shakhsiyyah*, Morocco, Book 6, Chapter 1, Section 225.

5 *Indonesian Inheritance Law*, Chapter II, Article 174 (1) (a)(b).

6 *Qanun al-Ahwal al-Shakhsiyyah*, Iraq, 1959, Chapter 7, Section 87 (1 - 4).
Qanun al-Mirath, Law 77 of 1943, Egypt, Chapter 1, Section 3 (1 - 3).
Mudawwanah al-Ahwal al-Shakhsiyyah, Morocco, Book 6, Section 218 (1 - 5).
Majallah al-Ahwal al-Shakhsiyyah, Tunisia, Book 9, Chapter 1, Section 87 (1 - 5).
Qanun al-Ahwal al-Shakhsiyyah, Kuwait, Part 3, Section 291 (1 - 5).

d) ***Al-'Awl:***

As pointed out in the chapter of *mīrāth*, that it sometimes happens that the shares exceed a whole such as there being 6 heirs for 7 shares as in the case of a deceased leaving a *zawj* and *shaqiqatān* (two full sisters) as the only heirs. The shares are 1/2 for the *zawj* and 2/3 for the two sisters (all by Quranic text), which comes to 7/6. The *ṣaḥābah* differed on this, some accepting it while other rejected it. The shares are now made out of 7 parts instead of 6 in order to balance the equation, resulting in a diminished share for all heirs.

Several Muslim countries such as Tunisia[1], Egypt[2], Kuwait[3] and Indonesia[4], accept the application of this principle.

e) ***Al-Radd:***

The *fuqahā'* also differed on this issue. In this issue, there is a residue of the *tarikah* after distribution to the heirs. There is a difference as to who is entitled to this residue. Tunisian law rules the division of the residue to the *ashab al-furuḍ* (heirs with fixed shares) according to their share value when there are no *'aṣabah* to take the residue.[5] Egyptian law is the same as Tunisian law save that if there are no *'aṣabah*, or *aṣḥāb al-furūḍ*, the residue goes to one of the uterine

---

1 *Majallah al-Aḥwāl al-Shakhṣiyyah*, Tunisia, Book 9, Chapter 4, Section 112.

2 *Qanūn al-Mirath*, Egypt, 1943, Section 15.

3 *Qanun al-Aḥwāl al-Shakhṣiyyah*, Kuwait, 1984, Chapter 2, Section 303.

4 *Indonesian Inheritance Law*, Chapter 4, Article 192.

5 *Majallah al-Aḥwāl al-Shakhṣiyyah*, Tunisia, Book 9, Chapter 6, Section 143.

relatives (*dhawī al-arḥām*) and if not found then it goes to the *zawjān* (spouses).[1]

Moroccan law implies that the residue, if any, of a given *tarikah* goes to the State as the personal law code rules that anything not mentioned in the law is dealt with according to the practice of *māliki fiqh*.[2] Iraqi law does not mention *al-radd*, but in its "general laws" in its personal law code stipulates that if no text is found on a given situation, the most suitable *sharī'ah* ruling suitable to the text of the said code should be used.[3] Tunisian law rules that redistribution to the daughter or daughters of the deceased must take place when there is a residue to the *tarikah* of their *muwarrith* even if there are *'aṣabah* present.[4]

f) ***Al-Ḥajb:***

Some Muslim Personal Law codes of some Muslim countries have kept the *fiqh* laws in this matter such as *ḥajb al-ḥirmān* (exclusion) and *ḥajb al-nuqṣān* (diminished shares).[5] Egyptian and Kuwaiti law specifically rule that the *maḥrūm min al-mīrath* (person prohibited from succeeding to his testator's

---

1 *Qanūn al-Mīrath*, 1943, Egypt, Chapter 4, Section 30.

2 *Mudawwanah al-Aḥwāl al-Shakhṣiyyah*, Morocco, Book 6, Chapter 10, Section 297.

3 *Qanūn al-Aḥwāl al-Shakhṣiyyah*, Iraq, 1959, Article 2.

4 *Majallah al-Aḥwāl al-Shakhṣiyyah*, Tunisia, Chapter 6, Section 143.

5 *Qanūn al-Mīrath*, Law 77 of 1943, Egypt, Chapter 3, Sections 25 - 29.
Mudawwanah al-Aḥwāl al-Shakhṣiyyah, Morocco, Book 6, Chapter 5, Sections 253 - 256.
Qanūn al-Aḥwāl al-Shakhṣiyyah, Kuwait, 1984, Law 51, Book 3, Sections 311 - 317.

estate)[1] does not diminish the shares of the other heirs of that specific *muwarrith*.[2]

g) **Special *Masā'il Mīrāth* (Problems of Islamic Succession Law):**

As is known by now, the *fuqahā'* differed in their *ijtihādāt* (juristic inferences) on certain problematic divisions in *mīrāth*. Certain Muslim personal law codes have mentioned these and the solutions to be applied. Tunisian law mentions three cases only[3], while Moroccan law has vast detail on these cases (9 in all).[4]

h) ***Mīrāth* Of The *Dhawī al-Arhām* (Uterine Relatives):**

This is a disputed issue in *mīrāth*, with some *fuqahā'* permitting it while others rule that the *tarikah*, in the absence of *ashāb al-furūd* and or the *'asabah*, goes to the *bait al-māl* (public treasury). Those that permit the succession of the *dhawī al-arhām* differ amongst themselves as to how this is done. There is no *Quranic* text on this distribution system nor clear authentic *hadīth* either. The differences between the *fuqahā'* in the distribution pattern here is thus based on *ijtihad* (juristic inference).

Muslim countries' laws differ in this issue.

---

1 due to committing a prohibited act such as murdering his *muwarrith*.

2 *Qanūn al-Mīrath*, Law 77 of 1943, Egypt, Chapter 3, Section 24.
Qanūn al-Ahwāl al-Shakhsiyyah, Law 51 of 1984, Kuwait, Book 3, Section 312.

3 *Majallah al-Ahwal al-Shakhsiyyah*, Tunisia, Chapter 7, Sections 144 - 146.

4 *Mudawwanah al-Ahwal al-Shakhsiyyah*, Morocco, Book 6, Chapter 7, Sections 257 - 265.

Tunisian law[1] and Moroccan law[2] do not mention anything in their succession law under the sections dealing with heirs anything on succession of *dhawī al-arḥām*. Since Morocco and Tunisia are both *mālikī* in *madhhab*, it is understandable as *mālikī* law rule that the *bait al-mal* succeeds as heir when there are no heirs to a Muslim. Moroccan law recognises only three kinds of heirs, namely, *aṣḥāb al-furūḍ*, *ʿaṣabah* and those who are both *aṣḥāb al-furūḍ* and *ʿaṣabah* and succeeding as such.[3]

Those that do accept and mention this form of succession, deal with it quite extensively. Egyptian succession law, for example, mentions these heirs to be, the first category who are the children of the daughter how lowsoever, the children of the daughter of the son how lowsoever, the second category being the untrue grandparents how highsoever, the third category being the sons of the uterine brothers and sisters how lowsoever, the children of the daughters (first the full, then consanguine and then the uterine), daughters of the brothers (the full followed by the consanguine and then the uterine) and their children, how lowsoever and the daughters of the sons of the brothers (the full, followed by the consanguine and then the uterine). The fourth category is an involved category consisting of six categories such as the paternal aunts, paternal uncles of the mother's side, the maternal uncles and aunts and children of these categories.[4]

---

1 *Majallah al-Aḥwal al-Shakhṣiyyah*, Tunisia.

2 *Mudawwanah al-Aḥwal al-Shakhṣiyyah*, Morocco.

3 *Mudawwanah al-Aḥwal al-Shakhṣiyyah*, Morocco, Book 6, Chapter 2, Section 230.
Majallah al-Aḥwal al-Shakhṣiyyah, Tunisia, Book 9, Chapter 1, Section 89.

4 *Qanūn al-Mirath, Law 77 of 1943*, Egypt, Chapter 5, Section 31.

Iraqi law mentioned the *dhawi al-arḥām* as of the heirs[1] while Kuwaiti law categorises these relatives in the same manner as Egyptian law.[2] In the manner of succession, Egyptian law gives precedence to a child descendant from a *ṣahib al-farḍ* (heir with a fixed share) or an ascendant related to the deceased as in the case of uterine grandparents. The *darajah* (degree) of relationship decides who precede in succession of all categories. If they are all equal in relationship to the deceased, they all share in the *tarikah*. In the case of descendants, the nearest to the deceased in relationship (*qarabah*) precede, with the full relatives first succeeding and in their absence the consanguine and in their absence the uterine. In the case of the uterine level uncles (both paternal and maternal), the strongest in relationship (*aqrab qarābatan*) to the deceased precede with the full coming first and if not found, the consanguine, and if not found, the uterine. If both sides of parenthood of the uterine category are involved, two thirds go the side related to the father and one third to the side of the mother.[3]

Kuwaiti law is virtually the same as Egyptian law in this matter.[4] Egyptian law rules equal shares for the heirs in the grade *dhawi al-arḥām*[5] while Kuwaiti law rule as for *'aṣabah* which is two shares for a

---

1 *Qanūn al-Aḥwāl al-Shakhṣiyyah*, Iraq, 1959, Chapter 9, Section 89 (3).

2 *Qanun al-Aḥwāl al-Shakhṣiyyah*, Kuwait, 1984, Book 5, Chapter 1, Section 320.

3 *Qanūn al-Mīrath, Lw 77 of 1943*, Egypt, Chapter 5, Sections 32 - 35.

4 *Qanun al-Aḥwāl al-Shakhṣiyyah*, 1984, Kuwait, Book 5, Chapter 2, Sections 321 - 325.

5 *Qanūn al-Mīrath, Law 77 of 1943*, Egypt, Chapter 5, Section 38.

male and one share for a female.[1] Iraqi law does not mention any laws pertaining to the succession of the *dhawi al-arham* save mentioning them as heirs. It thus follows that this matter is dealt with in terms of *shari'ah*.[2] Indonesian law implies that the old *shafi'i* law applies in that, if no heirs are found or they are unknown, the *tarikah* goes to the *bait al-mal* by order of the Islamic court.[3] *Dhawi al-arham* are not mentioned as heirs in the law.[4] Indonesia follows the *shafi'i madhhab* in *fiqh*.[5]

8.5 **Laws Relating To *Al-Wasaya*:**

These laws have maintained *shari'ah* standards in general. The definition of *wasaya* is standard.[6] There is a general requirement that the *musi* be *ahlan li al-tabarr'u* (i.e legally entitled in *shari'ah* to make a *wasiyyah*)[7]. Moroccan law requires only *tamyiz*

---

1 *Qanun al-Ahwal al-Shakhsiyyah*, Kuwait, 1984, Book 5, Chapter 2, Section 327.

2 *Qanun al-Ahwal al-Shakhsiyyah*, Iraq, 1959, Chapter 9, Section 90.

3 *Indonesian Inheritance Law*, Chapter 3, Article 191.

4 Ibid, Chapter 2, Article 174.

5 Doi A R I: *Shari'ah - The Islamic Law*, London, Taha Publishers, 1984, p. 107.

6 *Majallah al-Ahwal al-Shakhsiyyah*, Tunisia, Book 11, Chapter 1, Section 171.
Qanun al-Ahwal al-Shakhsiyyah, Iraq, 1959, Chapter 8, Part 1, Section 64.
Qanun al-Ahwal al-Shakhsiyyah, Kuwait, 1984, Part 2, Chapter 1, 213.
Qanun al-Wasiyyah, Law 71 of 1946, Egypt, Chapter 1, Section 1.

7 *Mudawwanah al-Ahwal al-Shakhsiyyah*, Morocco, Book 5, Chapter 2, Section 177.
Qanun al-Wasiyyah, Law 71 of 1946, Egypt, Chapter 1, Section 5.
Qanun al-Ahwal al-Shakhsiyyah, Iraq, Chapter 8, Section 65 (2).
Qanun al-Ahwal al-Shakhsiyyah, Kuwait, Part 2, Chapter 1, Section 217.

(discerning age) for validity of enacting *waṣiyyah* and rule validity of *waṣiyyah* of persons in and out of sanity in times of their sanity.[1] The *mūsā lahu* need not be found at the time of enacting *waṣiyyah*. If, however, it is defined, it must be found and known.[2] *Waṣāya lillāh* (legacies for God's sake) or *waṣāya 'amāl al-khair* (charities), are valid even without specification in which case it is given to charity. Futuristic charities not founded at time of the *mūṣi's* death are valid and enacted when the requirement is met. If not found, the *waṣiyyah* is for a charity near to it in kind and purpose.[3] *Waṣāya* between Muslims and nonmuslims, even those of different States, are valid as long as it is no forbidden in *shari'ah*.[4] *Waṣiyyah* to an heir of a *mūṣi* is invalid in Moroccan law, save if the other heirs consent but a *waṣiyyah* to a non heir of a *mūṣi* of 1/3 or less of his estate is executed without recourse to his heirs.[5] Tunisian law concurs.[6] Egyptian

---

1 *Mudawwanah al-Aḥwāl al-Shakhṣiyyah*, Morocco, Book 5, Chapter 1, Section 175.

2 *Qanūn Aḥwāl-al Shakhṣiyyah*, Kuwait, Part 2, Chapter 1, Section 218 (1)(2).
Qanūn al-Waṣiyyah, Law 71 of 1946, Egypt, Chapter 1, Section 6 (1)(2).
Qanūn Aḥwāl al-Shakhṣiyyah, Iraq, Chapter 8, Section 68 (1).

3 *Mudawwanah al-Aḥwāl al-Shakhṣiyyah*, Morocco, Book 5, Chapter 6, Section 207.
Qanūn al-Aḥwāl al-Shakhṣiyyah, Kuwait, Part 2, Sections 219 - 220.
Qanun al-Waṣiyyah, Law 71 of 1946, Egypt, Chapter 1, Section 6 (1)(2) & 7.

4 *Qanūn al-Aḥwāl al-Shakhṣiyyah*, Kuwait, Part 2, Section 221.
Qanun al-Waṣiyyah, Law 71 of 1946, Egypt, Chapter 1, Section 9.

5 *Mudawwanah al-Aḥwāl al-Shakhṣiyyah*, Morocco, Book 5, Chapter 2, Section 179 (1) & Section 200.

6 *Majallah al-Aḥwāl al-Shakhṣiyyah*, Tunisia, Book 11, Chapter 2, Section 179.

law allows *waṣiyyah* to an heir of the *muṣi* even without their consent if it is 1/3 or less of the estate, but requires it if it is more than 1/3 of the estate.[1] *Waṣiyyah* in excess of 1/3 of an estate requires the consent of the heirs in some law codes.[2] *Waṣiyyah* of a *murtadd* is executed on condition that he reverts to Islam before his death.[3]

Waṣiyyah al-ʿain (a physical asset) and *manfaʿah* (usufructuary benefit) are valid.[4]

a) **Acceptance Of *Waṣiyyah*:**

A *muṣa lahu* may accept or reject a *waṣiyyah* or part of it after the death of the *muṣi* provided he has *ahliyyah*.[5] This acceptance may be direct (*ṣarāḥatan*), or by an act (*dalālatan*). Those without *ahliyyah*, like a foetus, for example, has his *wali* acting for him and if the *muṣa lahu* is an instance, like an organisation, a representative of it does

---

1 *Qanūn al-Waṣiyyah, Law 71 of 1946,* Egypt, Chapter 1, Section 37.

2 *Majallah al-Aḥwāl al-Shakhṣiyyah*, Tunisia, Chapter 2, Section 179.
Qanūn al-Aḥwāl al-Shakhṣiyyah, Iraq, Chapter 8, Section 70.

3 *Qanūn al-Aḥwāl al-Shakhṣiyyah*, Kuwait, Part 2, Chapter 1, Section 217 (3).

4 *Mudawwanah al-Aḥwāl al-Shakhṣiyyah*, Morocco, Book 5, Chapter 4, Section 190.
Majallah al-Aḥwāl al-Shakhṣiyyah, Tunisia, Book 11. Chapter 4, Section 189.
Qanūn al-Waṣiyyah, Law 71 of 1946, Egypt, Chapter 3, Section 50.
Qanūn al-Aḥwāl al-Shakhṣiyyah, Kuwait, Part 2, Chapter 1, Section 223.

5 *Mudawwanah al-Aḥwāl al-Shakhṣiyyah*, Morocco, Book 5, Chapter 3, Section 186 - 187.
Qanūn al-Aḥwāl al-Shakhṣiyyah, Kuwait, Part 2, Chapter 3, Section 234 (1)(2).
Qanūn al-Waṣiyyah, Law 71 of 1946, Egypt, Chapter 2, Section 18.
Majallah al-Aḥwāl al-Shakhṣiyyah, Tunisia, Book 11, Chapter 6, Sections 193 & 195.

this.[1] If the *musā lahu* dies before the *musi*, his heirs succeeds to the right of rejection or acceptance of the *waṣiyyah*[2], while some Muslim countries rule that if the *musā lahu* predecease the *musi*, the *waṣiyyah* lapses.[3] A *waṣiyyah* is cancelled when it is destroyed before the *musā lahu* can accept it or when the latter kills his *mūṣi al-qatl al-'amd* or when the *musi* retracts it by speech or act.[4]

Egyptian law rules cancellation of *waṣiyyah* when the *musi* becomes insane and dies in that state.[5] A cancelled *waṣiyyah* is returned to the estate of the *musi* subject to there not being other *wasāyā* which could not be accommodated due to there being too many for the 1/3 allowed for *waṣāya*. If there are other *waṣāya*, in this case, it must be executed then.[6]

---

1 *Qanūn al-Aḥwāl al-Shakhṣiyyah*, Kuwait, Part 2, Chapter 3, Section 230.

2 *Qanūn al-Aḥwāl al-Shakhṣiyyah*, Kuwait, Part 2, Chapter 3, Section 231.

3 *Mudawwanah al-Aḥwāl al-Shakhṣiyyah*, Morocco, Book 5, Chapter 6, Section 211.

4 *Majallah al-Aḥwāl al-Shakhṣiyyah*, Tunisia, Book 11, Chapter 7, Section 197.
Mudawwanah al-Aḥwāl al-Shakhṣiyyah, Morocco, Book 5, Chapter 6, Section 211.
Qanun al-Aḥwāl al-Shakhṣiyyah, Kuwait, Part 2, Chapter 2, Sections 227 - 228.

5 *Qanūn al-Waṣiyyah, Law 71 of 1946*, Egypt, Chapter 1, Section 14.

6 Ibid, Chapter 1, Section 34.

b) *Waṣiyyah* For A *Ḥaml* (Unborn Child):

This is valid in *sharī'ah*. Muslim countries' law allows this[1]. Kuwaiti and Egyptian law give some detail herein such as limiting the time span of making of *waṣiyyah* for an acknowledged (*muqarr*) *ḥaml* to 365 days from date of *waṣiyyah* and live birth of the child. If the *muṣi* does not acknowledge the presence of a *ḥaml*[2] (*lam yuqir bi wujūdihi*) and a live child is born 270 days or less after making the *waṣiyyah* for him then the *waṣiyyah* is valid. This is conditional that the pregnant woman is not a widow in *'iddah al-wafāt* (period of waiting due to death of her spouse) or in *'iddah ṭalāq bā'inah* (period of waiting due to irrevocable divorce). If she is, and a live child is born 365 days or less after the *muṣi* making a *waṣiyyah* for that *ḥaml*, such a *waṣiyyah* will be correct.

If the woman is his widow or *zawjah mutallaqah* (divorced wife), the *waṣiyyah* for such a child is valid if he is born within 365 days or less of date of death of the *muṣi* or ending of his marriage to the woman concerned.[3] These countries have stuck to old *fiqh* rulings of the *fuqahā'* and did not take the present day medical knowledge of pregnancy and related matters into consideration.

---

1 *Qanūn al-Aḥwāl al-Shakhṣiyyah*, Iraq, Chapter 8, Section 67 (1).
Mudawwanah al-Aḥwāl al-Shakhṣiyyah, Morocco, Book 5, Chapter 2, Section 177.
Qanun al-Aḥwāl al-Shakhṣiyyah, Kuwait, Part 2, Section 245.
Majallah al-Aḥwāl al-Shakhṣiyyah, Tunisia, Book 11, Chapter 3, Section 184.

2 probably due to there being either no confirmation of the pregnancy or no visible sign or other sign of it.

3 *Qanūn al-Waṣiyyah, Law 71 of 1946*, Egypt, Chapter 1, Sections 35 - 36.
Qanūn al-Aḥwāl al-Shakhṣiyyah, Kuwait, Part 2, Sections 244 - 245.

Should, in this case, multiple births occur, all share equally in the *waṣiyyah*, save if the *mūṣī* gave contrary instructions. If twins are born, one dead and one alive, the live one succeeds to the entire *waṣiyyah*, but if both are born alive and one dies afterwards, his share goes to his heirs.[1]

c) ***Waṣiyyah Wajibah* (Necessary Legacy):**

This is a *waṣiyyah* which some Muslim countries obligated on the grandparents in the case of one of their children predeceasing them and leaving children behind. In terms of the practical effect of this law, the deceased child is taken as "present" for inheritance purposes and his heirs receive his share provided it is not more than 1/3 of the entire estate. This share is distributed as a *waṣiyyah* to these children.[2]

Tunisian and Egyptian law also allow this but disallows it if the heirs, in this case, are also the heirs of the grandparents or if the latter had already made a *waṣiyyah* for them or he or she gave them something during their lifetime which is equal or more than the required *waṣiyyah wajibah*. If the latter was less, the remainder must be given as *waṣiyyah wajibah*.[3] Tunisian law limits this process to the first level of grandchildren only, males and females and the distribution is made as for inheritance, namely, males twice the share of

---

1 *Qanun al-Aḥwal al-Shakhṣiyyah*, Kuwait, Part 2, Section 246.

2 *Qanun al-Aḥwal al-Shakhṣiyyah*, Iraq, Chapter 8, Part 1, Section 74.

3 *Majallah al-Aḥwal al-Shakhṣiyyah*, Tunisia, Book 11, Chapter 5, Section 191.
Qanūn al-Waṣiyyah, Law 71 of 1946, Egypt, Chapter 6, Section 76.

females.[1] Egyptian law agrees with this pattern of distribution but extends the heirs to be the children of the daughters and children of the sons how lowsoever with the laws of *al-ḥajb* applying.[2]

The *waṣīyyah wājibah* must be executed before the other legacies, the latter of which are called *waṣāyā ikhtiyārīyyah* (optional legacies). The *waṣīyyah wājibah* must be taken from the 1/3 allowed for *waṣāya*.[3]

d) *Taẓāhum al Waṣāyā* (Exhausting Amount Allocated For Legacies):

This means that there are too many *waṣāyā* and 1/3 of the estate is not enough for the execution of all of it. If such *waṣāyā* are for *qurubāt* (religious purposes), they are executed in the order of *farḍ* (compulsory), *wājib* (necessary) and *sunnah* (optional) purposes.[4] When there are too many *waṣāyā* for the allotted 1/3 of the estate and the heirs refuse to allow more than 1/3 for *waṣāyā* and the allotted 1/3 is still too little to accommodate all the *waṣāyā*, then each *muṣā lahu* gets a proportional share proportional to the *waṣīyyah* allotted to it.[5]

---

1 *Majallah al-Aḥwāl al-Shakhṣīyyah*, Tunisia, Book 11, Chapter 5, Sections 192.

2 *Qanūn al-Waṣīyyah, Law 71 of 1946*, Egypt, Chapter 6, Section 76.

3 Ibid, Chapter 6, Section 78.

4 *Qanun al-Aḥwāl al-Shakhṣīyyah*, Kuwait, Part 2, Chapter 6, Section 286 (b).
Qanūn al-Waṣīyyah, Law 71 of 1946, Egypt, Chapter 6, Section 81.

5 *Qanun al-Aḥwāl al-Shakhṣīyyah*, Kuwait, Part 2, Chapter 6, Section 285.

9 **Recommendations For The Application Of *Al-Wilayah, Al-Tabanna, Al-Mirath, Al-Wasaya* And *Al-Waqf*:**

It is evident from the foregoing deliberations that *shari'ah* and liberal secular law are incompatible and irreconcilable. Incorporation or assimilation of *shari'ah* into secular law must give rise to abrogation of very basic and fundamental principles and laws in *shari'ah* which will amount to discrimination on religious grounds and will, thus, be in conflict with the South African constitution.[1] The Republic is bound by international agreements which, amongst other issues, recognises freedom of religion and its practice.[2] There is a need for founding a suitable system which can accommodate the sensitivities and peculiarities of Muslim family law.

It is recommended that:

- firstly, a Permanent Muslim Board of Muslim Personal Law be established which will deal with all matters relating to the Muslim family and personal law such as marriage and related and consequential matters, lineage, divorce in all its forms, succession, legacies, endowments etc. The South African constitution does not preclude this as it can function as an autonomous body under the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.[3]
- secondly a Muslim Family Court or *Shari'ah* Court be founded which will deal judicially with all matters of a Muslim family or personal law nature which is not repugnant to law.[4] The said court must have both its normal as well as review division. Both these recommendations are reasonable and practicable for the following reasons:

---

1 *South African Constitution Act, Act 108 of 1996*, Chapter 2, Section 15 (1) & Section 31 (1)(a).

2 Ibid, Chapter 14 (5).

3 *South African Constitution Act*, Act 108 of 1996, Chapter 9, Section 185 (a)(c).

4 Ibid, Chapter 8 Section 166 (e).

- firstly, the *apartheid* era completely ignored Muslim family and personal law. It will be another form of discrimination when the new South Africa prescribes and imposes its own concept of what other systems and religions aught to be, how they should act and how they implement their family laws. The present constitution prohibits discrimination.[1] A proper concept in *shari'ah* will show that what is perceived to be discrimination is not really discrimination and that proper *shari'ah* practice does not conflict with the mentioned section of the South African constitution. At the very most, "fair discrimination" may exist and will not be prohibited in the South African constitution.[2] The constitutional right exists for religious communities to organise their affairs, in terms of their religious requirements, in community with members of their faith, culture and practice of religion is explicitly mentioned.[3]

  Indigenous law and traditional leaders are given constitutional recognition in clear terms in the constitution[4] and the right to self-determination of a community sharing common cultural and language heritage in a territory in South Africa is not prohibited in the constitution or "in any other way determined by national legislation".[5] The latter allowance was given to Afrikaners, specifically, but in all fairness and justice, has to apply to other communities too. Self-determination in lifestyle and the manner of its application is central to any community and must be taken as a constitutional right.

---

1 *South African Constitution Act, Act 108 of 1996*, Chapter 2, Section 9 (3).

2 Ibid, Chapter 2, Section 9 (5).

3 *South African Constitution Act, Act 108 of 1996*, Chapter 2, Section 31 (1)(a).

4 Ibid, Chapter 12, Section 21 (1)(2)(3).

5 Ibid, Chapter 14, Section 235.

South Africa is also bound by international conventions and instruments it signed.[1] Various United Nations (UN) Resolutions on various aspects of human life are applicable here and amongst these are the following:

- "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]
  Another UN Resolution states in one of its Articles that:
  "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 social, cultural, and religious groupings.
  In one of its Declarations, the UN states that: "No one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or belief." [4] Furthermore it states that "Discrimination between human beings on grounds of religion or belief constitutes an affront to

---

1 *South African Constitution Act, Act 108 of 1996*, Chapter 14, Section 231 (1)(2)(3)(4)(5).

2 The United Nations: *Universal Declaration of Human Rights*, New York, Article 18. [This Declaration was enacted by the General Assembly of the UN on 10/12/1948 per Resolution 217 (A)(III)].

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.

4 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.

human dignity and a disavowal of the principles of the Charter of the United Nations..."[1]

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 in mind the moral education in which they believe the child should be brought up."[2]

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.

- secondly, *sharī'ah* is different from secular law in origin, philosophy, fundamentals, and practice as this thesis had clearly shown. *Sharī'ah* must, thus, be accommodated in a way which will not be repugnant to it nor cause it to pass permanently from Muslim hands. A National Commission of Inquiry (COI) into MPL was constituted in Cape Town in June 1995 by the Islamic Unity Convention (IUC) and has as its two main binding conditions of operation that MPL must function in such a manner as not to be repugnant to *sharī'ah* and that Muslims have effective control over the writing up, implementation, application and administration of MPL and its apparatus.[3] This is in conformity with *sharī'ah*.

Two senior *fuqahā'* of *al-Aḥkām al-Sulṭāniyyah* (Islamic constitutional law), al-Māwardī and al-Farrā' gave ruling on persons who are fit to deal in *sharī'ah*

---

1 *Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on* Religion and Belief, Article 3.

2 Ibid, Article 5.

3 Workshop on the COI, Athlone, 16/10/1994, IUC Report dated 24/11/1994.

and issue judicial decisions herein. The necessary requirements according to al-Mawardi are: to be a Muslim, having *ahliyyah* (legal standing in *shari'ah*), to be male, having a sound and thorough knowledge of *shari'ah* and being endowed with virtuous and noble conduct. He quotes from the *Qur'an*: "...*And Allah did not grant to the unbelievers any way over the Muslims.*"[1] Abu Hanifah only allowed the nonmuslim judge to rule on nonmuslim people's affairs according to their Faith and customs and not over Muslims.[2]

The late Grand *Shaikh* of the celebrated al-Azhar University in Cairo in his *fatwa* (legal dispensation) ruled:

"...Thus is it forbidden for Muslims to submit to the judicial authority of a nonmuslim judge, save under *darurah*[3] (absolute necessity). It is necessary for a Muslim minority (community), in this case, to rid themselves of such a situation through independence (from such judicial power), migration or the qualified *'ulama'* of the Muslims in which the disputing parties (litigants) have trust, judge Muslim matters, especially in *halal* (the permissible) and *haram* (the forbidden) of which the Muslim Personal Law of *nikah* (marriage), *talaq* (divorce), *nasab* (lineage) and *mirath* (succession) form a part. This will be best for the Muslims in the affairs of a worldly and religious nature than to submit to a nonmuslim judicial authority (in matters pertaining to *shari'ah*).[4]

---

1 *Al-Qur'an*, Chapter 4: 141.

2 Al-Mawardi A H: *Al-Ahkam al-Sultaniyyah*, Cairo, Matba'ah Mustafa al-Halabi, 1973, 3rd ed., p. 65. *Al-Ahkam al-Sultaniyyah*, (Al-Farra'), p. 22.

3 *darurah*, here, implies an authority which puts death or seriously harms persons who oppose its rulings or a policy of physical oppression.

4 *Shaikh al-Azhar*: *Fatwa number 611*, Cairo, al-Azhar university, dated 26/11/1990.

This position is supported by the fact that the Prophet (s.a.w) never ever appointed a nonmuslim judge to judge Muslims law matters of Muslims. This is so because there is no *wilāyah* (authority) of nonmuslims over Muslims in matter of the latter's law practices. The *Qur'ān* confirms this: " *The believers, men and women are awliyā (guardians / protectors) or one another; they enjoin what is just and forbid what is evil..*"[1] The converse is also true where unbelievers are guardians to one another.[2]

It had previously been pointed out that Muslim countries recognise, legally, nonmuslim personal law and have created special courts for this.

In addition, some nonmuslim countries in Africa and Asia had done the converse by legally establishing *shari'ah* courts for Muslims. There is, thus, a precedent set herein.

10 <u>Basic Structure Of Muslim Personal And Family Law In South Africa:</u>

Having set out the basic requirements, the actual recommendations for enactment and application follows:
A Muslim Personal Law code should cover all aspects of MPL and Muslim family law for marriage and related laws, divorce in all its forms, custody of minors, guardianship, curatorship, succession and legacies and endowment. Only the basic law should be codified and the numerous other sections should be left to the *qadā* (Muslim judiciary) to develop a system fit for the community and befitting the cases coming before it.

Since this thesis deals only with *al-wilāyah*, *al-tabannā*, *al-mīrāth*, *al-waṣāyā* and *al-waqf*, only recommendations for these will be dealt with here. Before proceeding proper with the recommendations, the following pertinent points should be made and these are:

---

1 *Al-Qur'ān*, Chapter 9: 71.

2 Ibid, Chapter 8: 73.

- the major part of this thesis, namely, *al-mīrāth*[1], cannot be accommodated at all in South African law as it is completely and fundamentally opposed to it. In *sharī'ah*, as is clear from this thesis, there is no such thing as testate and intestate succession, nor freedom of testation either. Once a Muslim deceases, whether there is a Will or not, the estate devolves upon the heirs in such shares as prescribed in *sharī'ah* after the pre-distribution formalities had been attended to. There are also no administrative rules and restrictions herein as there are in secular law, such as signature rules, for example. The issue of *waṣāyā* has some leeway as the testator has substantial freedom herein save if it is more than 1/3 of the estate, in which case the heirs will have to consent.

As or *al-tabannā*, it has no place in *sharī'ah* nor the overwhelming majority of Muslim countries, save Tunisia and Somalia, both of which breached *sharī'ah* law and the present practice of Muslim countries. *Kafālah* (fostering) and care for the *laqīṭ* (foundling) are substitutes for *al-tabannā* and both have the same lofty moral aims and practice of caring, providing shelter, education and upbringing of parentless minors who will fall by the wayside and so become a social nuisance if not a danger.

In matters of *wilāyah*, *sharī'ah* has allocated roles for parents to which they are best suited and so serves the interest of the children, their growth, upbringing and care.

Two types of *wilāyah* are found, namely, that over minors and that over property. The first type is subdivided into two; that over person called *wilāyat 'alā al-nafs* and that over marriage called *wilāyat al-tazwīj* and the *fuqahā'* differ about the latter.

---

1 in this case we are dealing with the minimum of two thirds of one's estate which a muslim testator should leave for his/her heirs without the latter opposing the division of shares and legacies.

The *ḥanafis*, disallow *wilāyat al-tazwīj* on any sane and *mukallaf* woman, but ruling it for all other minors. The majority of the *fuqahā'* agree with the last part, but differ with *ḥanafis* in the *wilāyat al-tazwīj* (guardianship in marriage). There is virtual consensus on the issue of *rushd* but difference on age when this takes place.

10.1 **Basic Recommendations For *Wilāyah* (Guardianship):**

Wilāyat al-ḥaḍānat is the responsibility of both parents during the subsistence of a Muslim marriage. However, the *nafaqah* of the *zawjah* and of all the children are the sole responsibility of the *zawj*, whether he is part of the *wilāyat al-ḥaḍānat* process or not. Actual *wilāyat 'alā al-nafs* is the responsibility of the father subject to him doing so according to *sharī'ah* in that the best interest of the child is served. If not, the *qāḍī* intervenes and applies *shari'ah* in the interest of the child. In the absence of the father, the next *'aṣib* succeeds. If the father died and appointed a *waṣī*, such will succeed prior to anyone else. If no one had been appointed and no *walī* is found of those meriting it in *shari'ah*, the *qāḍī* appoints a suitable and trustworthy Muslim person for this duty. All *awliyā* (guardians) or *awṣiyā* (curators) must act in the interest of the minor child and the *qāḍī* has the right to intervene if the person, health, safety, life or moral life of the child is threatened on application from any source. The *walī* must be suitable for his position as required in *sharī'ah*. This applies to the *waṣī* also.

Emancipation from *wilāyat 'alā al-nafs* ends at *taklīf*, with sanity, for males. If such a youth is self sufficient, the father's *nafaqah* duty lapses also. However, such a youth cannot control his property until he is *rāshid*. The age of *nikāḥ* shall not be less than 18 years save with permission from the *qāḍī*. The age of *rushd* shall be 18 years for both males and females, but the *qāḍī* must have discretion herein, but he should not allow anyone who has not obtained *rushd* to dispose of his assets. Females are emancipated from *wilāyat 'alā al-nafs* on marriage. This

means that her father's responsibility to care, maintain and protect her person ends then.

Wilāyat al-tazwīj over the never married daughter or ward, shall be one of agency in practice. Such females choose their future husbands and set the terms of their *ʿaqd al-nikāḥ* and their *walī* acts for them in contracting with their future husbands. Both the woman and her *walī* must sign the *ʿaqd al-nikāḥ*. Widows and divorcees choose their own husbands and contract their own *ankiḥah* (marriages), save that it is better that their *walī* (guardian) acts for them on their instructions.

As for *wilāyat al-ḥaḍānat* after the ending of marriage by divorce or by death, the custody of all minors, males under the age of 10 and females until they marry, shall be the right of the minor's mother. If she does not qualify for *ḥaḍānat*, her mother will succeed to this right. Failing her, then the father's mother, then the *shaqīqāt* followed by the *akhawāt li umm*, then the *akhawāt li abb*. These are followed by the *bint ukht al-shaqīqah* followed by the *bint ukht li umm*. Then the maternal aunts (first the full, then uterine then consanguine), then the daughter of the *bint ukht li abb*, then the daughter of the brother, first of the full brother (*bint akh shaqīq*), then the uterine (*bint akh li umm*), then the consanguine (*bint akh li abb*), then the paternal aunts first the full (*ʿammah shaqīqah*), followed by the consanguine (*ʿammah li abb*). Hereafter the mother's maternal aunts, first the full maternal aunt (*khālah al-umm al-shaqīqah*), then the mother's uterine maternal aunt (*khālah al-umm li umm*), then the mothers consanguine maternal aunt (*khālah al-umm li abb*). Then the father's maternal aunts in the same pattern as the mother's maternal aunts mentioned afore, then the mother's paternal aunts in the same pattern, then the father's paternal aunts in the same pattern.

If none of these are found or are found but fail to qualify for *ḥaḍānat*, or the period of *ḥaḍānat* had ended, then such is transferred to the males in the agnate line of

succession in *mīrath* with the paternal grandfather (*abb al-abb*) preceding the brothers. If none of these persons are found, then custody goes to the non agnate category of male relatives (*dhukūr raḥimiyūn*) starting with the maternal grandfather, then the uterine brother, then his son, then the mother's paternal uncle (*'amm li umm*) followed by the *akhwāl* (maternal uncles), starting from the full (*khāl shaqīq*), then the uterine (*khāl li umm*) and then the consanguine (*khāl li abb*). If none of these are found, then the *qāḍī* shall place such a minor with any suitable Muslim person who shall be a *wasi*.

These are the patterns the *fuqahā'* have set and many of these are based on *ijtihād* and based on the rule of "the nearest relatives are closer to the minor and his genuine interest". The family had changed considerably these days and preoccupation with necessary duties is time consuming. Many young people have to work nowadays out of necessity. Besides this, Muslims in nonmuslim countries usually marry comparatively late and as such many of the older generation meriting *ḥaḍānat* will fail to satisfy its requirements. In the light hereof, the *qāḍī* should be allowed to exercise his discretion and in the process see that the interest of the child is paramount. The latter rule is a *sharī'ah* rule and *ḥaḍānat* as such is based on it.

Qualifications for *ḥaḍānat* (custodial care) shall be:

- to be a practising Muslim.
- to be of sound and moral conduct.
- to be physically able to take on the duties and responsibilities of *ḥaḍānat*.
- to be *maḥram* (permanently prohibited in marriage) to the minor.
- to have *ahliyyah* (i.e. to be sane and pubescent).
- that the minor be safe in the care and custody of the custodian.
- that the custodian mother be unmarried or married to a man who is a *maḥram* (permanently prohibited in marriage) to the minor daughter in her care. If this

condition is not met and the interest of the minor is served by being with the mother, the *qadi* shall allow her to have custody of her minor child.

- that the custodian parent does not live with anyone, even a relative of the minor, who upsets or angers the minor.
- that the custodian parent must not be a *murtadd* or *murtaddah* (an apostate).

10.2 Regulations And Conditions For *Al-Kafālah* And For The *Laqīt*:

- The *kāfil* (foster parent) must have the same religion as the foster child and be of sound and good moral conduct as well as have the nature to care for children. Failure to comply herewith at any time causes forfeiture of *kafālah*.
- to maintain, care and educate the child and be his custodian save that if the *makfūl* (fostered child) or *laqīṭ* (foundling) has been emancipated, the foster parent cannot claim for services rendered. If such a child has his own possessions and/or property, such is used for his maintenance and upbringing and if not, the foster parent is responsible for this.
- the foster child's surname and names, if known, must not be changed at any time. The child should be informed at *taklīf* of his natural parents, if known. If at any time, the natural parents wish to have their child back, the foster parent, nor any other instance may hinder them therein provided they are capable to care for the child. If such a wish is expressed by the foster child, the child will not be hindered by any person or instance, official or otherwise from attaining such a wish.
- any interested party may petition the *qāḍī* if there is a breach in the care and upbringing of the foster child or foundling.

10.3 Regulations For Legitimacy And *Al-Iqrar Bi Al-Nasab* (Acknowledgment Of Lineage) of Muslim Children:

- any child not born from any person shall not be a child of that person and all such laws of *sharī'ah* consequential hereto shall apply.
- any child born out of a valid and correct *nikāḥ* in *sharī'ah* of husband and wife shall be legitimate and anyone born outside of a properly contracted and valid *nikāḥ* shall be illegitimate and there shall be no legitimisation process.
- a child conceived, after the marriage of a Muslim couple and while still being married, and such a child is conceived extra-vitro (outside the womb due to some necessary physical form of manipulation) and then implanted in his own mother's womb, shall be a legitimate child to that specific Muslim married couple.
- surrogacy is forbidden and gives rise to illegitimate status as far as the biological father is concerned.
- any child conceived with the sperm of a man and the eggcell of a woman other than his wife by *sharī'ah* shall be illegitimate to that man and shall belong to woman whose eggcell was used.
- any woman who provenly carries the child of another Muslim woman through surrogacy, shall not be the mother of that child, but the mother whose eggcell was used shall be the mother of that child and such a child shall be illegitimate to his biological father.
- any woman who has herself impregnated with the sperm of a man through any means, other than the sperm of her husband by *sharī'ah*, shall be the mother of that child and such a child shall be illegitimate to the biological father of that child. This is a forbidden process in *sharī'ah* as it has circumstances and

consequences of *zinā* (illicit sexual actions) inherent in it.

The above rulings are such as the basic law in *sharī'ah* is that a valid and correctly contracted *nikaḥ* gives rise to lawful and valid sexual relations and, thus, legitimate offspring are those who relate to parents and where the mutual responsibilities and obligations as well as rights and privileges are automatically found and enforced.

- any child, known to be without *nasab* and is claimed by a man to be his child and there is no reason why this cannot be so in *sharī'ah*, such a child will be attributed to such a person and will be his child with all such rights as there are for a child in *sharī'ah*. Children from incestuous or adulterous unions, the latter of which is a sexual relationship between a married man and a woman, married or unmarried, cannot be acknowledged by their biological father.
- any child born from a correct and proper *nikaḥ* or of a widow born after the death of her spouse or of a divorcee born after any kind of divorce within a period accepted by *shari'ah*, or of a *nikaḥ fāsid* (voidable marriage) shall be attributed to the father of such a child but children from a *nikah bāṭil* (void marriage), whether such a marriage was known to be so by the parties or not at the time of the *nikaḥ*, shall be illegitimate to their biological father.

10.4 <u>Regulations For *Al-Mirath*:</u>

The basic recommendation in relation to *mīrath* is that every person married according to *sharī'ah* shall have his estate, upon his death, devolve upon his heirs and in such shares as expressed and determined in *sharī'ah*, whether he has left a written Will behind or not. This is due to *mīrath* being a natural consequence of *nikaḥ*. Such shall also be the case when that Will

conflicts with *sharī'ah* requirements. *Mīrāth* is thus part of the unwritten ante-nuptial contract of a *nikāḥ*.

Mīrāth functions in accordance with *sharī'ah*. Consequently, all relevant circumstances as are required to be in operation in terms of *sharī'ah*, must be in operation otherwise a clear injustice will prevail. The following must, thus, be found before *mīrāth* operates:

- the laws of *nafaqah* as in *sharī'ah* must be enforced. All females receive *nafaqah*. *Nafaqah* means, nourishment, clothing, lodgings, medical care and education and the like. There is no exemption from this for Muslim males. The *walī* of the woman or his substitute in *sharī'ah*, in his absence, is responsible for this. If he is incapable, then the *qaḍī* obligates this on such male relatives of the woman, starting with those males who receive *wilāyah* of such a woman and who will succeed to her estate as an *'aṣīb*. *Nafaqah* is determined by *kifāyah* (sufficiency) and according to usage.
- all women receive *nafaqah* even if they are self-sufficient. This includes the religious tax imposed in Islam, but excludes *zakāh*, *ṣadaqah* and *kaffārāt* (religious penances) which *sharī'ah* requires from the perpetrator of a religious wrong.
- all women should not work to provide for a home and its requirements. Should they do so, all income shall be theirs only. If they so choose, and help in purchasing any fixed asset(s), they own such a share therein equal to their contribution at market value. If the asset is something decreasing in value, such as furniture etc., the actual contribution at date of purchase shall be taken as a debt. *Ribā* (usury or interest) shall not be due on such amounts. Any amount she contributes to a household, is a debt on the male head of that household. All these contributions mentioned above, fall under *duyūn* (debts) of the deceased and is due to such a woman,

over and above what is due to her in inheritance from him, if the condition of *mīrāth* is found in her in relation to her spouse.

- all women, on marrying, per terms of *sharī'ah*, must be paid a *ṣadāq*.[1] This is, amongst others, due to her becoming a *zawjah* and in most cases an *umm* which restricts her capacity to be fruitfully and profitably employed. The *ṣadāq* offsets this. This necessitates that the *ṣadāq* be of value, if not of substantial value, relatively speaking, in relation to the economic standing of the couple. The *Qur'ān* alludes to *ṣadāq* of substantial value.[2] It is recommended that the *ṣadāq* be at least 10% of two years' gross earnings in the case of employees while in the case of self employed men, the *ṣadāq* be 10% of the turnover of a single year, provided a reasonable profit had been made by the business concerned, and on condition it is not less than a *ṣadāq* a woman of her standing will receive. This *ṣadāq* is hers only and she sets the terms of payment or delivery of it. If it is paid off, she can demand security for the outstanding amount.
- any woman can carry on her own business concern without the consent of her husband on condition that it is lawful in *sharī'ah*. The same applies to the husband, of course. Income from a concern run by the woman will be her's only.
- all property and possessions a woman possesses at her *nikāḥ* to a Muslim man, are and remain hers and hers only. She is free to do therewith what she feels to do without her husband's consent subject to it being permissible in *sharī'ah*.
- on divorce, she receives such a settlement as set out in her *'aqd al-nikāḥ* and will then, not succeed

---

1 *Al-Qur'ān*, Chapter 4: 4.

2 Ibid, Chapter 4: 20.

to her spouse's estate by way of inheritance, save if such is allowed in *sharī'ah* (such as her being divorced *ṭalāq raj'ī* - revocable divorce - by her husband and he dies while she is still in *'iddah al-ṭalāq* - period of waiting of divorce) or the like.

- there are some *fuqahā'* who rule that *nikāḥ* gives rise to wifehood and motherhood and as such, housework is not part of the *'aqd al-nikāḥ*. Should such a provision be made in such a marriage contract, and domestic assistance was not provided by the husband as agreed upon, a claim, as a debt against the estate of her husband, is valid for such a widow.
- women contributing to the purchase of the fixed family property or other fixed property of their father, shall have such contributions calculated at market value at death of their father and such will be due to them at his death over and above what they inherit from their father's estate.

From this scenario, it is obvious that Muslim women are not disadvantaged in *mīrath* if the system is made to function properly. The following system in *mīrath* should be enacted in South Africa:

- all the shares allotted to heirs must be executed as in *sharī'ah*. This is confirmed in the *sharī'ah* texts as well as laws of personal codes in Muslim countries as shown in this thesis.
- an heir must take his share allotted by *sharī'ah*, and after having being possessed of it, may do with it what he so wish, including ceding it to another heir or have some or all of the heirs share in it according to his directives.
- the shares of female heirs shall be their sole and full property and shall never form any part of any form of community of property between her and her spouse nor shall he have any form of control or say

over such property save with her explicit written consent.

- unmarried male children who lived with their father or mother in the family home which was bought by the house bond system and who contributed to paying off the bond shall have such contributions calculated as percentage of investment in the property and such shall be taken at market value at the death of the owner of the property and shall be considered a debt of the estate to such a child or children and this will be over and above other debts the estate may owe him or them and over and above what he is to inherit from the estate as his or their share according to *mirath*. This is so as a business transaction of a form of partnership is found in the above case.

In addition, the following special provisions must be provided for:

- *al-wasiyyah al-wajibah* shall be obligatory on every estate. If it had not been provided for by the *muwarrith*, it shall be taken from the estate. This *wasiyyah* shall equal the amount the predeceased parent or children should have received from the *tarikah* of their parents, but shall not exceed 1/3 of the entire estate. It will be divided between the children of the predeceased parent in the ratio of two shares for a male and one for a female child. This will not apply when the testator grandparent made *wasiyyah* for the mentioned grandchildren which equals or exceeds the amount required for *al-wasiyyah al-wajibah* or provenly gave that to them during his lifetime or made a proven settlement with them which equals or exceeds their required *al-wasiyyah al-wajibah*.
- if the estate cannot accommodate the shares from one whole, then the shares are reduced proportionately and not one of the *ashab al-furud* will be excluded

from the estate. For example, in the case where the deceased leaves a *zawj* and *ukhtān shaqiqatān* as the only heirs, the shares will be 3/6 and 4/6 respectively, which comes to 7/6. The shares must be taken from 7 instead of 6 and thus will be 3/7 for the *zawj* and 4/7 for the *ukhtān shaqiqatān*.

- where there is a residue of the estate and one of the *azwāj* (spouses) are of the heirs, they shall also be included in the process of *radd* (redistribution) as they have to accept diminished shares in the case of *'awl*.
- where there is a residue of a *tarikah* and there are only minor or unmarried daughters to the deceased, such daughters shall receive the residue, in equal shares, after the *aṣḥāb al-furuḍ* had received their shares. This is in terms of *ja'fari* jurisprudence.[1] Few *sunni* Muslim countries apply this law such as Tunisia[2] and Irāq[3], the latter of which makes no qualification of the degree of daughters. In South Africa, this application will offset the hardship that will be encountered when the *'aṣabah* insist on their cash share and a family home has to be sold leaving women destitute as far as lodgings is concerned. There is also a propensity of some *'aṣabah* not to care and look after these females as is required in *shari'ah*. This rule must only apply to the *banāt ṣulbiyyah* of the deceased.
- when a husband deceases and leaves only one house and his sons are in such a condition as not to be able to house their surviving mother, living in the father's house, in such a manner as *shari'ah*

---

1 *Al-Tarikāt wa al-Waṣāya*, p. 477.

2 *Majallah al-Aḥwāl al-Shakhṣiyyah*, Tunisia, Chapter 6, Section 143.

3 *Qanun al-Aḥwāl al-Shakhṣiyyah*, Iraq, Chapter 9, Section 91 (2).

prescribe, such a house shall not be sold, but the heirs shall all be made joint owners thereof and the said mother shall have right of *habitatio* and usufruct of the property until she remarries or dies. If she remarries, she must vacate the house as her new husband must provide for her and the heirs may then sell the property and take their shares, should they so wish. Should the *wali* of the mother or her son(s) be liable for her *nafaqah* too, the amount due for lodgings shall fall away in this case under discussion.

- anyone who has no heirs, as in *sharī'ah*, shall have his estate distributed as a *waṣiyyah*. If he left written instructions herein, it shall be executed subject to it being in conformity with *sharī'ah*. If not, such *waṣāya* which are repugnant to *sharī'ah* shall not be distributed to the instances mentioned in the written *waṣiyyah*. If no written *waṣiyyah* exists, the estate shall be given to such Muslim charitable instances as the *qāḍī* deems fit. Alternatively, a special fund is to be established under the Muslim or *Sharī'ah* Court to receive such estates and use it for such Muslim persons as are in need such as destitute widows, divorcees and minor children.

These recommendations have bases in *sharī'ah* and law practised in Muslim countries and suit problems encountered by South African Muslims in respect of *mīrath*.

- if a Muslim deceased does not have any *aṣḥāb al-furūḍ* or *'aṣabah*, but he has relatives of the *dhawi al-arḥām* category, they shall succeed to the estate, the nearest in degree succeeding, followed by the nearest in familial relationship (*qarābah*). If they are all equal herein, they will all be heirs. The shares, in this case, shall be equal for males and females as the relationship of these heirs and their

testator is not within the degree of *wilāyah* and *ʿuṣūbah* (agnate status). These kinds of heirs also have no claim of maintenance from the testator due to the absence of *wilāyah* and *ʿuṣūbah* status and relationship between them and the deceased. The *fuqahāʾ* have varying methods in dealing with this distribution pattern, most preferring the *mīrath* system of the *ʿaṣabah* (residuaries, i.e. males twice the share of females).

Mīrāth al-arḥām is a disputed issue in *fiqh*, with some *fuqahāʾ* allowing it and others not. The *Qurʾān* is not clear on the issue nor is the *sunnah* emphatically clear on it either. Some Muslim countries, like Egypt and Kuwait allow *mīrath al-arḥām* according to the *mīrath* pattern.[1]

The categories in this kind of distribution will be, firstly, the children of the daughters of the deceased how lowsoever, the children of the daughters of the son of the deceased, how lowsoever. Secondly the uterine grandfather, how highsoever and the grandmother who is not a *ṣāḥibah al-farḍ* (heir with a fixed share). The third group are the sons of the uterine brothers and sisters of the deceased, how lowsoever, the daughters of the full brothers of the deceased, the daughters of the consanguine brothers of the deceased and their children, how lowsoever, then the daughters of the sons of the mentioned full and consanguine brothers, how lowsoever. The fourth group are the mother's paternal uncles, the paternal aunts, the maternal uncles and maternal aunts, first the full and then the consanguine, followed by their children, how lowsoever. The daughters of the paternal uncles of

---

1 *Qanūn al-Mīrath, Law 77 of 1943*, Egypt, Chapter 5, Section 38.
Qanūn al-Aḥwāl al-Shakhṣiyyah, Kuwait, Part 3, Book 5, Section 326.

the deceased, first the full followed by the consanguine and their sons, how lowsoever. There are other degrees of this fourth category, but it will be a rare occurrence to find them in a South African context due to the overwhelming majority of Muslims marrying late compared with most Muslim countries. Should that occur, the *qāḍī* must refer to *sharī'ah* herein.

- the *mafqūd's* share of his testator's estate shall be kept for him until his death is proven by his body being found or the *qāḍī* ruled him dead. If he appears alive, before the ruling of the *qāḍī* he is entitled to his share. If he appears after the judgment of the *qāḍī* on his death, he gets what remains in the hands of the heirs who took his share due to presumption of death ruling of the *qāḍī*. Nothing more is exacted from the said heirs.
- a person born with both systems of sexual organs and whose sex cannot be clearly discerned and no surgical method had been used to make one sex dominant, shall receive the share of a female. In the case of persons who had a sex change, the rules of *mīrāth* will be applied in terms of the sex they were born with.

10.5 <u>Recommendations For *Wasāya*:</u>

A sane Muslim, man or woman has been allowed the right to dispose of a maximum of 1/3 of his or her estate for *wasaya* which will accrue to him or her as good deeds. The following should be enacted for *waṣāya*:

- *waṣiyyah* can be a physical asset (like a car or wardrobe) or money or a valuable or *manfa'ah* (something of a usufruct nature) like use of a property for a fixed period or indefinitely. This is subject to the *waṣiyyah* not being repugnant to *sharī'ah*.
- one third (1/3) of the estate is allowed for a *waṣiyyah* or *wasāya* without the heirs' consent.

Anything in excess thereof must have their consent. If some of the heirs are *mukallaf* (pubescent) and others not, the former must consent. If only some of the heirs consent to the increase in *waṣiyyah* of more than a third for one of them, the calculated percentage constituting the consenting heirs' agreed amount, will be added to that specific *waṣiyyah* for that heir. The *walī* of the minors consent on their behalf and this consent is subject to the *qāḍī's* approval.

- a *waṣiyyah* must be in writing, duly dated and signed and the place of signature recorded. The signature must be at the bottom of the page, if the document has only one page, or at the end of the document if it has more than one page. The other requirements may be anywhere in the document. No verbal *waṣāyā* will be valid.
- a *waṣiyyah* from a Muslim *mūṣī* to a nonmuslim *mūṣā lahu* and *vice versa* shall be valid provided it is not repugnant nor prohibited in *sharī'ah*.
- a *waṣiyyah* for a foster child or children or foundling(s) who lived or lives with the *mūṣī* shall be valid provided it is not more than 1/3 of the estate.
- a *waṣiyyah* is a voluntary act, save *al-waṣiyyah al-wajibah*, and can be withdrawn or amended in any way, by the *mūṣī* during his lifetime.
- a *waṣiyyah* for an unborn child so specified shall be valid and if such a child is born alive, the child succeeds to the *waṣiyyah*. If more than one is born, they share it equally irrespective of sex, save if the *mūṣī* gave instructions to the contrary. If there is a multiple birth and one or more die soon after birth, the surviving one or surviving ones succeed to the entire *waṣiyyah*. *Waṣiyyah* to an unspecified unborn child (like someone leaving a legacy for the first born of his second youngest daughter) shall be

valid and executed when the child is born alive. In all these cases, if the child is not born alive, the *waṣiyyah* reverts to the estate of the *muṣī*. If there are other *waṣāyā* which could not be executed due there great number, then they are executed in the order the *muṣī* put them in his document of *waṣiyyah*. If he only made a *waṣiyyah* to the unborn and the child is miscarried or stillborn, the *waṣiyyah* reverts to the *muṣī's* estate for distribution to the heirs according to their shares in the estate.

- a *waṣiyyah* for a charitable instance not repugnant to *sharī'ah* shall be valid and a representative shall receive it on behalf of the instance.

a) **Requirements For The *Muṣī*:**

- the *muṣī*, if he is a Muslim, must be one who is *ahlan li al-tabarru'* (has *sharī'ah* sanctioned legal capacity to be of those who can execute a charitable act).
- anyone who is 18 years of age, save the insane or mentally deficient, can be a *muṣī*. A *safih* can be a *muṣī* subject to the *qāḍī* sanctioning it and the latter must rely on *sharī'ah* for his ruling. However, when a *safih* made a *waṣiyyah* before *al-ḥajr* (being placed under curatorship), such is executed when the time of its execution comes.
- the *waṣiyyah* of a *murtadd* (fem. *murtaddah*) is executed when he returns to the fold of Islām, otherwise, it will be void.

b) **Regulations And Conditions For The *Muṣā Lahu*:**

- anyone or instance who can be possessed of property will be fit to be a *muṣā lahu*. If the *muṣā lahu* is a minor, his *walī* or *waṣī* accepts the *waṣiyyah* on his behalf. If there is no *walī* or *waṣī* to the minor then, and it is imperative or in the interest of the minor that the *waṣiyyah* be possessed by the *muṣā lahu*, then his mother or any of her male relatives may do so on his

behalf. On the appointment of a *waṣī*, the latter will take charge in terms of and subject to the requirements of *sharī'ah*.

- the physical presence of the *mūṣā lahu* is not required at the time of death of the *mūṣī* save if this requirement had been laid down by the *mūṣī* himself.
- if the *mūṣā lahu* dies before the *mūṣī*, the *waṣiyyah* is cancelled, save if the *mūṣī* instructed that the heir or heirs of the *mūṣā lahu* is to succeed.
- if the *mūṣā lahu* dies after the *mūṣī* had died, but before he could take possession of the *waṣiyyah*, the heir(s) of the *mūṣā lahu* succeed/s to this right.
- if the *mūṣā lahu*, loses *ahliyyah* (legal standing, like, for example, becoming insane) after a *musi* allotted him a *waṣiyyah*, and remains so, then his *walī* or *waṣī* accepts the *waṣiyyah* on his behalf, but if they wish to reject it or part of it, the permission of the *qādī* must be obtained and the latter shall be guided by the interest of the *mūṣā lahu*.

c) <u>Regulations And Conditions For The *Musa Bihi* (Actual Legacy):</u>

- the *waṣiyyah* must be such that it can be possessed.
- the *waṣiyyah* itself must not be *haram* in *sharī'ah* even if it is not *haram* for the *mūṣā lahu*. An example being a Muslim leaving *waṣiyyah* of wine for a nonmuslim.
- the *waṣiyyah* can be *'ain* (a physical asset) or *manfa'ah* (usufruct) or that which is in its meaning, like right of *habitatio*, for example, and this can be for any limited period or permanently i.e duration of life.

- *waṣiyyah lillāh* (legacy for the sake of God) is valid and will be distributed to poor Muslims and or to Muslim institutions of a charitable nature. The *qāḍī* shall decide on this and its scope.
- a *waṣīyyah* for any acceptable charitable cause will be valid on condition that it is not forbidden or repugnant to *sharī'ah* and its *maqāṣid* (aims and objectives).
- a *waṣīyyah* is cancelled if the *muṣī* withdraws it, either in writing or by an act which clearly points to withdrawal or which is reasonably construed as such. It also lapses when the *waṣiyyah* is destroyed.
- a *waṣiyyah* need not be found at the time of its enactment, but should be found after the death of the *muṣī*.
- *al-waṣiyyah al-muḥarramah* (forbidden legacy) is automatically invalid and cancelled. Such will also be the case of an impossible *waṣiyyah*, like "leaving all the money in the world to X."
- any *waṣīyyah* which cannot be executed reverts to the estate of the *muṣī*. If other *waṣāyā* could not be executed due to there being too many for the allotted amount for *waṣāyā*, then these legacies shall be executed. The order as it stands in the *waṣīyyah* document shall be followed, provided there is no *sharī'ah* objection hereto. If there is a remainder of any *waṣīyyah*, such reverts to the estate of the *muṣī* and is distributed to his heirs according to their shares save if the *muṣī* gave instructions to the contrary and such are not forbidden or repugnant in terms of *sharī'ah*.
- *waṣīyyah* for duties owed to the *Shāri'* (Supreme Legislator i.e God), such as *zakāh* arrears or outstanding *ḥajj* shall be executed first, before any other *waṣīyyah* is executed, even before *al-*

waṣiyyah al-wājibah to grandchildren, where this is required.

10.6 **Recommendations For Creating *Awqaf*:**

Waqf (pl. *awqāf*) is an institution the *sharī'ah* allowed to encourage virtuous deeds of a social and social communal nature as a physical and practical expression of the inner conceptions of the brotherhood of Islam. In this sphere it had preceded all socialist systems by centuries and fostered social obligations and responsibilities on the basis of inner convictions, and not the power or coercion of the legislature or military as has happened in so many social experiments the world over. Of the basic *maqāṣid* of the *sharī'ah* is *targhīb li al-birr* (exhortation and encouragement to good deeds) and *tarhīb li al-wa'īd* (inculcation of fear of retribution for wrong doing). *Waqf* is usually created through a *waṣiyyah* document. It may also be created during your lifetime and enacted during your lifetime. Due to its aims, *sharī'ah* allowed more leeway in the creation of *waqf* than for other forms of contracts.

The following recommendations should be carefully considered:

- *waqf* must be created by a written document in which the *wāqif* (one making the endowment) clearly and unambiguously creates the *waqf* and indicates for which purpose and for what duration this is for. If this is not clear, the *qāḍī* will rule in this matter and must be guided by *sharī'ah*. He should allow leeway usually allowed for this kind of charitable act as the *wāqif* desired therewith *jazā' al-ākhirah* (reward in the Hereafter).
- *waqf* can be created for any charitable issue which is valid and acceptable in *sharī'ah*. Anything *ḥaram* in *sharī'ah* or repugnant to it, will render the *waqf* void.

- a *waqf* made for building a mosque or for the purchase of ground for building a mosque is valid and must be executed. This kind of *waqf* is permanent and cannot be revoked and the property, be it ground or building or both, cedes to the ownership of *Allāh* permanently with the laws of *awqāf al-masjid* applicable to it. The *wāqif* cannot retract this kind of *waqf* when made.
The same rules shall apply to a *wāqif* making *waqf* of ground for Muslim public burial or institutions of public Islamic learning or public homes for orphans or widows or the destitute or the like. Islamic learning, here, refers to *sharī'ah* learning. These *awqāf* may only be ruled by *sharī'ah* injunctions. Thus, any clauses in the *waqf* document in conflict with *sharī'ah*, in these cases, will be invalid.

When there is a conflict amongst the *fuqahā'* on any issue, the majority decision must prevail provided it is not repugnant in *sharī'ah*. The *wāqif* may appoint himself or of his Muslim family or relatives as *mutawallis* (managers) of this kind of *waqf* and such appointments may be hereditary, subject to the *mutawallis* executing their tasks and duties and seeing to their responsibilities in a manner acceptable to *sharī'ah*. The conduct of the *mutawallī* must be in conformity with *sharī'ah* and if not, he cannot be a *mutawallī*. The *wāqif*, cannot, in the case of the building or contributing to the building of a mosque, make of his own family members or relatives the *Imām* (prayer leader) of that mosque, save if they qualify to be so, in terms of *sharī'ah* and no one better is to be found. No heredity appointments of *'a'immah* (prayer leaders) by the said *wāqif* will be permissible whether from his family or relatives or from

outside their ranks if such appointments conflict with *sharī'ah*.

- any other form of *waqf* will be valid and shall last for such duration as the *wāqif* specifies.
- the beneficiary of the *waqf* can be a person or an institution. If the person has no *ahlīyyah*, like being a minor or insane, for example, his *walī* or *waṣī* acts for him. In the case of an instance, the representative thereof acts for it herein.
- a *waqf* can be made for your dependants such as your wife, children, grandchildren and other relatives as well as for non related persons.
- a *wāqif* must create the *waqf* during his lifetime and cede whatever he gives in *waqf* to whoever is the beneficiary. Any *waqf* made during the lifetime of the *wāqif* and not ceded properly during his lifetime or is ceded only at death will take the laws of *waṣiyyah* as applicable to it.
- a *waqf* created without a time limit being specified will be construed to being permanent.
- a *waqf* created *lillāh* (for the sake of God) without further specification, shall be for Islamic charitable purposes and the *qāḍī* shall rule herein.
- a *waqf* for *manfa'ah* allows usage of the asset only on terms specified by the *wāqif*. If it is a physical endowment, like a property, the beneficiary is responsible for its upkeep save if the *wāqif* ruled otherwise. If the beneficiary wilfully, or through neglect causes the property to be destroyed or to become dilapidated, he shall make good at his own expense.
- a *waqf* made by the *wāqif* for his children and their offspring without any restriction or definitive definition, will perpetuate until no

more such persons are found. Thereafter it shall be for the benefit of the Muslim poor and needy.

- if a *wāqif* did not leave administrative specifications and rules for his *waqf* or left insufficient administrative rules or specifications, or made invalid specifications and rules, the *qāḍī* shall make such rulings as will be fitting under the circumstances for the *waqf* and such must be in conformity with *sharī'ah* and the perceived aims and objectives of the *wāqif*.
- no charitable issue shall be created by a Muslim save through such a process as is valid in *shari'ah*.

CONCLUSION

This thesis deals primarily with *al-mīrath* and *al-waṣāyā* as well as with *al-wilāyah* which is linked to *al-mīrath* and *al-waqf* which is linked to *al-waṣāyā*.

What must be understood is that *al-mīrath* is a result of *nikāḥ* and is, in actual fact, an unwritten condition of the *'aqd al-nikāḥ* in *sharī'ah*. Any condition excluding *al-mīrath* as a consequence to the *nikāḥ* will be invalid as it conflicts with the *muqtaḍayāt 'aqd al-nikāḥ* (requirements of the marriage contract). Thus, reading or understanding *al-mīrath* on its own as a separate and independent subject matter in *sharī'ah*, as some scholars have done, is completely erroneous.

From this thesis, it is clear that *sharī'ah* is incompatible with secular law and as such with South African law.
Both the religious and administrative forms of law are inextricably intertwined and linked to belief. This makes the assimilation or incorporation of Muslim Personal Law into South African law impossible. The fact that *sharī'ah* is incompatible with secular law and as such with South African law is a reality which must be accepted by government and its institutions as well as South Africans in general. Incorporation or assimilation of *sharī'ah* into South African law will destroy it; there is no way the two can be merged into one and still retain their respective identities and effects.

As shown earlier in this thesis, Muslims are under religious obligation to conduct their affairs according to *sharī'ah*. This duty is linked to their belief system as the sources of *sharī'ah* clearly indicate. The *Qur'an* states: "*Obey Allāh and obey the Messenger (Muhammad) and those (Muslims) charged with authority among you...*"[1] This fundamental principle is one of the constitutional laws of Islam and is clear in the scope and application of the command. This is amplified further by: "*Oh*

---

[1] *Al-Qur'an*, Chapter 4: 59.

you who believe! believe in Allāh and His Messenger.."[1] Muslims are further commanded to heed the Prophet: *"Oh you who believe! Respond to Allāh and His Messenger when He calls to that what will give you life..."*[2] The *Qur'ān* describes Muslims in their beliefs and obedience, in the following words: "*The answer of the believers, when summoned to Allāh and His Messenger, in order that he may judge between them is no other than 'we hear and we obey'.*"[3] Muslims are warned not to follow ways other than that of *Allāh* and His Messenger.: "*Allāh is the protecting friend of those who believe. He brings them out of the darkness into the light, but those who disbelieve, their friends are the false deities and false leaders; they bring them out from light to darkness. Those are the companions of the Fire and they will abide therein.*"[4] *Allāh* Himself declares those who do not follow what He revealed as unbelievers, sinners and rebels.[5] The command of the Prophet, emphasising the above is clear from his saying: "By Him in whose Hand my life is! No one of you will be a believer until I am dearer to him than his child or his parents and all mankind."[6] There is thus no way a Muslim can follow a system other than one *Allāh* ordained. Those who do so have broken the *sharī'ah* law.

Matters dealt with in this thesis all form part of *sharī'ah* and as such fall under the requirements set out above. Muslim Personal Law has been practised by Muslim nations throughout the ages right up to this present time. Special personal and family law codes in Muslim countries exist as elucidated in this thesis. Muslim Personal Law is thus not a historical event fit for

---

1 *Al-Qur'ān*, Chapter 4: 136.

2 Ibid, Chapter 8: 24.

3 Ibid, Chapter 24: 51.

4 Ibid, Chapter 2: 257.

5 Ibid, Chapter 5: 44, 45 & 47.

6 *Mukhtaṣar Ṣaḥīḥ Muslim*, p. 14.
Minhāj al-Muslim, p. 38.

academic study or the library archives only but a living issue practised twenty fours a day all over the world.

South Africa now has a new constitution. As with any secular constitution, it is not the end of constitutional mechanics, but it will have to be amended and streamlined as time goes on. One of the first issues to be addressed is to bring it in line with satisfying Muslim aspirations, unambiguously, in their personal law matters. Some potential ambiguity remains in the constitution with regards to the free and unfettered practise of *sharī'ah* based Muslim Personal Law. Muslim Personal Law practise must thus be excluded from at least certain provisions of the BOR[1], to remove this potential ambiguity[2]. Reference had been made earlier of political promises to recognise Muslim Personal Law issues. The Muslim public had understood this to mean the Muslim Personal Law as they understand it. The above mentioned section of the constitution and those related to it goes against this promise and would suggest that Muslims had been misled as to what was really meant by that promise.

The entire Muslim Personal Law code must be so recognised as to have an integral whole comprising all the divisions of the code, all inter-related and linked to one another, with an apparatus that guarantees the free and unfettered operation thereof, as well as allowing Muslims effective control of the Muslim Personal Law process as far as its substance, implementation, application and administration is concerned. For this, as previously stated, a Permanent Muslim Personal Law Board as well as a *Sharī'ah* Court or Muslim Family Court must be established. This is the only practical way conflict of the two systems of law can be avoided and a peaceful, just, fair and practical solution for this conflict found and to correct, effectively, the wrongs, injustices and discrimination of the

---

1 Bill of Rights of the South African Constitution, Act 108 of 1996.

2 Section 3 of Chapter 2 of Act 108 of 1996, especially, must be rewritten to give effect to this. Section 3 (b), especially, must exclude muslims from its provision. Other provisions in the constitution which relate hereto must also be suitably amended.

past 300 years, effect national reconciliation and avoid endless, expensive, bitter and emotional litigations which may give rise to inter-communal conflict, the results of which will negate all the efforts being made for one nation with many cultures coexisting in peace and mutual tolerance.

The State and other parties should also not interpret Muslims' sensitivities to Muslim Personal Law as fundamentalism or separatism. If fundamentalism means living the life of a Muslim as required by beliefs and its practices, which, in actual fact, Islam had been for fourteen centuries, then the Muslim world as a whole had been and still is fundamentalist for all those centuries up to now. If the argument of separatism is used, one must be very careful not to label anything that does not conform to local and present day patterns of political thinking and models as relics from the past *apartheid* era. This may give rise to another form of *apartheid* by the process of imposition regardless of others. That will not be freedom of choice.

It is generally accepted that religion, culture and language constitute the most important elements of being human. This in itself necessitates a differentiation between communities and nations; this had been, still is and will continue to be so as long as there is human life on planet earth. The *Qur'ān* bears testimony to this undisputed truth and fact when it says: " *Oh mankind! We have created you from a single (pair) of a male and a female and made you into nations and tribes that you may know each other (not that you despise one another)...*"[1]

Situations exist in different parts of the world where constitutional and legal exceptions are made to accommodate divergent cultural and religious lifestyles. Such accommodation, is, thus, not innovative.

If freedom of religion and its practise, guaranteed by International Conventions, is to be a practical reality in South Africa, then imposed prescription, constitutional or otherwise, to any religious grouping, amongst others, must be avoided.

---

1 *Al-Qur'ān*, Chapter 49: 13.

There exists, amongst certain people, the perception that like other religious and cultural or customary laws, *sharī'ah* laws are discriminatory laws. This is erroneous as proven in this thesis. *Sharī'ah* cannot be compared to indigenous law as far as males and females are concerned. The position of females in Islam is virtually opposite to that of women in indigenous societies and groupings. Muslim men have not and never had the authority indigenous males have in family life and control over their womenfolk, their persons and property nor do Muslim parents have such control over the person and property of their children as some indigenous systems grant.

Another issue is the call by some scholars and academics that *sharī'ah* must be "changed" or "adapted" to suit "modern life", meaning modern western secular liberal life. They disregard the meaning, aims and objectives of *sharī'ah* as well as the purpose of *waḥy* throughout the ages.

Some people confuse community cultural and customary practices with *sharī'ah*, while others confuse a particular *madhhab* with *sharī'ah*. These are usually persons who did not study the *sharī'ah* from its original sources in its full form, including sectarian interpretations.

One cannot be a Muslim unless you accept that *Allāh* is infallible and that His Messenger Muhammad (s.a.w) is infallible in matters of *sharī'ah*. The confession of the *shahādah*[1] is very clear herein. What stands in the *Qur'ān* of law remains so permanently from the death of the Prophet (s.a.w). The *Qur'an* declares: "*This day have I perfected your religion for you, completed My favour upon you and have chosen for you Islām as your religion.*"[2] During the era of prophethood, some abrogations of verses took place in which *Allāh* Himself changed the laws. The *Qur'ān* is clear about this process: "*None of Our revelations do We abrogate or cause to be forgotten, save We substitute*

---

[1] a Muslim must believe in *Allāh* and thus all that stands in the *Qur'ān* and which His Messenger brought in the authentic *aḥādith* and must do so unconditionally before he can be a Muslim.

[2] *Al-Qur'ān*, Chapter 5: 3.

something better or similar (to it)..[1]" This is a reference to what is called *tadarruj fī al-tashrī'*, (gradualism in revelation in matters of law practices, specifically), to accommodate the learning process of people. Since it is a cardinal rule in Islām that prophethood ceased at the death of the Prophet (s.a.w), it is logical that the *Qur'ān*, as it stood at his death, is the record of the last revelation and must so remain till the last Hour. No change can be effected by it, for the author thereof is none other than *Allāh* Himself. No Muslim can deny this and still be a Muslim.

If shortcomings had existed in the unofficial application of Muslim Personal Law in South Africa over the years, this must be attributed to the State which did not want to recognise the system and so deny administrative enforceability to it. To complain now that that system is unsuitable is to proportion blame to the wrong source and that will be very unfair and highly improper.

---

1 *Al-Qur'ān*, Chapter 2: 106.

APPENDICES

APPENDIX 1

This appendix sets out the recommended system that should be followed in implementation of Muslim Personal Law (which includes family law) in South Africa.

APPENDIX 2

Deals with the application of *al-mirath* (succession), *al-wasaya* (legacies) and *al-waqf* (Islamic endowment).

APPENDIX 3

This is an explanatory appendix dealing with *madhahib* (juridical sects) of the *sunni* school.

APPENDIX 1

Reference had been made in chapter 6 of this thesis in the establishing of a Permanent Muslim Personal Law Board and a Muslim or *Sharī'ah* Court.

In this appendix recommendations for its founding and functioning are made. Reference had been made that it would be imperative that certain amendments to the South African constitution be made to ensure that MPL can effectively be implemented and applied. The following recommendations are made subject to the constitution being amended to accommodate what is being recommended:

1 <u>Permanent Muslim Personal Law Board:</u>

The Permanent Muslim Personal Law Board, hereinafter referred to as the "Board", shall:

1.1 consist of suitable Muslims as far as its decision making and implementation processes are concerned. This is to safeguard Muslim control of the system and its application. This is in accordance with *sharī'ah* that the affairs of Muslims in their law matters[1] are not subject to control of nonmuslims.

1.2 The Board should consist of a suitable number of persons, say five, who should be qualified in *sharī'ah*. The required qualification must be the first university qualification and must have been done in the Arabic medium at a Muslim Arabic medium university at university college level. This is necessary as the mentioned members will have to be competent to refer to original *sharī'ah* sources as well as being able to interpret and understand the sources. Postgraduate tertiary qualifications must be in the field of *sharī'ah* as such to come into consideration for appointments to the Board. There may not be problems in this matter as the Human Sciences Research Council (HSRC) in Pretoria

---

1 *Al-Qur'an*, Chapter 9: 71
Shaikh al-Azhar: Fatwa No: 611, Cairo, Al-Azhar University, dated 26/11/1990.

has an equivalence system for foreign degrees. A sixth person, preferably a Muslim lawyer with knowledge and experience in Muslim Family Law, will be the secretary of the Board. He shall be a non voting and purely administrative member of the Board.

1.3 the most senior person in qualifications and experience in the field of *sharī'ah* should head the Board.

1.4 the Board must have a Code of Conduct for members which must agree with *sharī'ah* requirements.

1.5 the Board must have the complete power to formulate and pass all necessary and suitable laws and regulations to implement MPL and must apply it on a non sectarian basis, but in such a manner as not to compromise *sharī'ah* in this matter. This calls for a unique legislative process which the present constitution does not sanction clearly and unambiguously. It is recommended that a system be so worked out that the Board, after passing a given Bill, forwards it to a specific Minister of the National parliament who lays it before the President for signature. Since Muslims must have effective control of the MPL system, it is useless to send such Bills back and forth to the National Parliament and continuously engage in litigations with judicial instances herein. Mention had been made in chapter 6 of this thesis of Muslim countries giving complete freedom and legal recognition to nonmuslim minorities in matters of their family and religious laws. Mention had also been made of the novel Singapore model in practically accommodating Muslim sensitivities in this regard. It is very strongly recommended that that model be seriously considered for implementation in South Africa.

1.6 the Board must have national powers in its operation and application of its decisions. Regional offices of the Board may exist as extension of its administration only.

1.7 the Board shall appoint, on proven merit, qualifications and in accordance with acceptable conditions and

regulations, Muslim persons who will act as *qudat* (Muslim judges) of the *Sharī'ah* Courts. It shall also appoint the Chief *Qāḍī*. *Quḍāt* must be appointed on a permanent basis and their independence in their judicial functions must be guaranteed in law. Their dismissal shall be based only on:

1.7.1 apostatising from Islām.

1.7.2 committing a proven offence, considered as such in *sharī'ah*.

1.7.3 proven mental or physical incapability to execute the required duties satisfactorily.

1.8 the Board shall, in conjunction with and practical participation of Muslim *sharī'ah* experts, including *quḍāt* of the Court, draft a code of MPL in basic form. Matters of detail and discretion in sectarian issues, should be left to the Court for its decision.

2 Establishing of a *Sharī'ah* Court:

As shown in this thesis, *sharī'ah* is incompatible with the South African legal system. This means that the present court structure cannot be used for MPL application. It has also been recommended that the Board establish *Sharī'ah* Courts (hereafter called the "Court") throughout the country to apply MPL.

The following shall apply:

2.1 the Chief *Qāḍī* shall head the Court structure and administer it and will be assisted by a deputy *Qāḍī*.

2.2 all *Quḍāt* must be Muslims and duly, properly and suitably qualified for their positions.

2.3 the Court shall hear, adjudicate, deliver judgment, including imposing sentences as well as attend, as required in *sharī'ah*, to all matters it is empowered to attend to and in a way so prescribed.

2.4 the Chief *Qāḍī* shall appoint a suitable Muslim to the position of Chief *Mutawallī* of a *Bait al-Māl* (Muslim treasury) who shall administer the mentioned treasury. The *Bait al-Māl* shall receive all unclaimed or invalid Muslim deceased estates as well as various donations,

including *zakāh*, made to it by Muslims as well as fines paid by offenders. The Chief *Mutawallī* shall, under regulations set out by the Court, use funds in the *Bait al-Māl* for destitute Muslim widows, divorcees, orphans, minor children or such other Muslim persons or instances as the Court may direct.

APPENDIX 2

Most of this thesis had been devoted to *mīrāth*. It is one of the most complex subject matters in *fiqh*. To help understand the subject matter better, some examples will be presented here:

- EXAMPLE 1:

  A never married Muslim man dies leaving only his father and mother as heirs. The mother receives 1/3 of entire estate and the father the rest. The same happens when a never married Muslim lady dies.[1]

- EXAMPLE 2:

  A Muslim widow dies leaving both her parents and a son. The surviving parents each receive 1/6 as there is a descendant child[2] and the son as *ʿaṣīb* the residue which is 5/6.[3] The same division, as in this example, occurs when a widower dies.

- EXAMPLE 3:

  A Muslim divorcee dies leaving both her parents and a minor daughter as heirs. Each parent receives 1/6[4] and the daughter 1/2[5] leaving 1/3 as residue which goes to the father by *taʿsīb* (residual status) by the majority ruling. Some countries, like Tunisia and Iraq, will award the 1/3 residue to the daughter also being a 1/2 *fardan* (fixed share) and 1/3 *raddan* (by residue ruling).

- EXAMPLE 4:

  A Muslim man (or woman) dies leaving only his (her) mother and 3 brothers and 2 sisters. The mother receives 1/6[6] and the rest goes to the brothers and sisters, on condition that they are of the same degree (i.e either full or consanguine) the

---

1 *Al-Qurʾān, Chapter 4*: 11.

2 Ibid.

3 Ibid.

4 Ibid.

5 Ibid.

6 Ibid.

brothers receiving twice the share of the sisters[1], as the *nafaqah* (maintenance) of the mother and sisters is *farḍ* on the brothers. A sister or a brother does not reduce the mother's share from 1/3 to 1/6. Two of them (any mixture) does that by the vast majority ruling of the *fuqahā'*. Ibn 'Abbas and ibn Hazm rule three and more of them (any mixture) reduces the mother from 1/3 to 1/6.[2]

- EXAMPLE 5:

A Muslim woman (or man) dies leaving her (his) mother and a *shaqīq* (full brother) as only heirs. The mother get 1/3 and the rest goes the brother. A mother get 1/6 when there are two or more brothers and or sisters (of any grade i.e full or consanguine or uterine) as the *Qur'ān* speaks of *ikhwah* in this case[3] and two and more are *ikhwah* in arabic.

- EXAMPLE 6:

A Muslim man dies leaving his Muslim wife and both his parents as the only heirs. The wife gets 1/4 (as there are no children) and the mother 1/3 of the remainder which is 3/4, she, thus, receiving 1/4 and the remaining 1/2 goes to the father of the deceased. In the reverse case, when the wife deceases, leaving her husband and both her parents, the surviving husband receives 1/2 (as there are no children), the remaining 1/2 is divided into 3 equal parts; one for the mother and 2 for the father. This is the ruling of the vast majority of the *fuqahā'*[4] as the father will receive twice the share of the mother, as is the common case in the *mirath* pattern, the father being taxed with *nafaqah* of dependants including the mother. Ibn 'Abbās and ibn Ḥazm[5] rule that she

---

1 *Al-Qur'ān*, Chapter 4: 176.

2 *Al-Tarikāt wa al-Waṣāyā*, pp. 293 & 295.

3 *Al-Qur'ān*, Chapter 4: 11.

4 taken from the ruling of the caliph 'Umar ibn Khaṭṭāb in these two cases, thus these two problems are called the *'Umratain.*

5 *Al-Tarikāt wa al-Waṣāyā*, p. 297.

receives, in both cases, 1/3 of the entire estate as the *Qur'ān* did not speak of 1/3 of the remainder for her.

- EXAMPLE 7:

A Muslim widow dies leaving a son and a consanguine brother. Her husband predeceased her. The son succeeds to the entire estate as nearest *'aṣib* and excludes the further removed *'aṣib*. In the same example, if the widow left a daughter, she will receive 1/2 and the other 1/2 will go to her consanguine brother as *'aṣib* according to the majority's ruling. According to Irāqi and Tunisian law, she would succeed to the entire estate.

- EXAMPLE 8:

A Muslim father leaves three sons and one daughter as heirs. The *mirath* is by *ta'sib* as there are no *aṣḥab al-furuḍ* (heirs with a fixed share). The estate is divided into 7 equal parts; two parts for each son and one part for the daughter, the sons having to provide *nafaqah* for their sister.

- EXAMPLE 9:

A Muslim mother leaves a daughter, a daughter of her predeceased son and her paternal uncle. The daughter receives 1/2 and the daughter of her predeceased son 1/6 which completes 2/3 for two daughters, leaving 1/3 residue which, by the majority ruling, goes to the paternal uncle as *'aṣib*. In the Irāqi and Tunisian law, it will go to the daughter only.

- EXAMPLE 10:

A Muslim deceased leaves his mother, his maternal grandmother (his mother's mother), two daughters, one full sister, one consanguine sister and a *waṣiyyah* of 1/6 for charity. The 1/6 for charity is first deducted[1] leaving 5/6, of which 1/6 is for the mother as the deceased left daughters and 4/6 (2/3) for the two daughters.[2] The estate is exhausted and there is nothing for the sisters (who are, anyway, excluded by the daughters as 2/3 allotted for females had been exhausted). The mother excludes her own mother by the rule, the nearest

---

1 *Al-Qur'ān*, Chapter 4: 11.

2 Ibid.

exclude the furthest removed, if they link up to the deceased in the blood line. She also excludes the father's mother, if found with her.

- EXAMPLE 11:

A deceased leaves a full sister, two consanguine sisters and two uterine brothers as heirs. The full sister, in the absence of the daughter, takes her share which is 1/2, the two consanguine sisters share equally in 1/6 completing 2/3 for females and uterine brothers share equally in 1/3[1] as the deceased left no parents no *furū'* (descendants). If, in the same example, two full sisters are heirs and the other heirs being the same, the two full sisters share equally in 2/3 and the uterine brothers share equally in 1/3 and the consanguine sisters are excluded.

- EXAMPLE 12:

A Muslim deceased leaves two daughters of her predeceased son, a son of their grandson (*ibn ibn al-ibn*), a uterine brother and a uterine sister, a paternal aunt, a full maternal uncle and a paternal cousin. The two granddaughters receive 2/3 in the absence of two daughters and the son of the grandson (*ibn ibn al-ibn*) gets the residue of 1/3 as the *'aṣib*. The uterine brother and sister is excluded by them. They also exclude all the others as the latter are all *dhawī al-arḥām* (uterine relatives), save the paternal cousin who is also an *'asib*. However, *bunūwwah* (sonship) comes before *'ummūmah* (paternal uncle's line) and thus the paternal cousin is excluded.

- EXAMPLE 13:

A Muslim deceased leaves his paternal grandfather, four full brothers and two full sisters as the only heirs. In this case the grandfather should receive 1/3 or take *muqāsamah* with the others heirs in this case whichever is better for him. If there are two or more brothers or sisters, *muqāsamah* is bad for the grandfather. In this case he gets 1/3 of the estate and the 2/3 are divided between the brothers and sisters in the ratio 2 shares for a brother and one for a sister.

---

1 *Al-Qur'ān*, Chapter 4: 12.

- EXAMPLE 14:

A Muslim deceased leaves her mother, husband, paternal grandfather and one full brother. The mother receives 1/3 as only one brother is found and no children, the husband receives 1/2 as there are no children which equals 5/6, leaving only 1/6 which goes to the paternal grandfather and he cannot get less than 1/6 under any circumstances. The full brother is excluded from the estate. The rule here is that when the paternal grandfather is found with *ashāb al-furūḍ* (heirs with a fixed share) and brothers and or sisters of the deceased, he must get 1/6, at least, even if that means excluding the brothers and or sisters.

- EXAMPLE 15:

A Muslim deceased leaves a paternal grandfather, a full brother and a consanguine brother as only heirs. As only brothers are found, the paternal grandfather is taken as one of them for distribution purposes and thus, all will have 1/3. Here the full brother takes over the share of the consanguine brother according to the *al-ḥajb* (exclusion) rule and prevents the paternal grandfather from taking a bigger share. This is called the *mas'alah mu'adah.*[1]

- EXAMPLE 16:

A very peculiar situation is found in the *mas'alah al-akdarīyyah* where the deceased leaves a husband, her mother, and a full sister or a consanguine sister and paternal grandfather. The shares are 1/2 for the husband as there are no children, 1/3 for the mother for the same reason, 1/2 for the full sister or consanguine sister as there is no daughter of the deceased and 1/6 for the grandfather. The problem is from 9 instead of 6. Thus they will be, as in the order above, 3/9 (husband), 2/9 (mother), 3/9 (sister) 1/9 (grandfather). The grandfather's share is now combined with the sister's share of 3/9 and divided 2:1 in favour of the grandfather. To have it properly worked out, the shares are taken from 27. The husband receives 9, the mother 6, the sister 9 and the

---

[1] *Mudawwanah al-Aḥwāl al-Shakhṣiyyah*, Book 6, Chapter 7, Section 257.

grandfather 3. The grandfather's share is added to the sister's which gives 4/9 and taken from 27 is 12 which is divided by 2:1 in favour of the grandfather. The grandfather, thus, receives 8 and the sister 4. If should have been a simple case of *'awl* (increase in share number). There is no father in this distribution, thus his father, the grandfather features. The sister is his daughter and he (grandfather) is responsible for her *nafaqah*, hence the ratio 2:1 in favour of the grandfather.

- EXAMPLE 17:

A Muslim deceased leaves her husband, her mother, her full brother and full sister and uterine brothers and sisters of her mother. The husband receives 1/2 as there are no children, the mother receives 1/6 as there are brothers and sisters to the deceased. The uterine brothers and sister share in 1/3 as they are more than one. This exhausts the estate and the *ashiqqā'* (full brother and sister) being *'aṣabah* are excluded as there is no residue. The majority of the *fuqahā'* allow the joining up of the sets of brothers and sisters and let them share equally (both brothers and sisters) in the 1/3 allowed for the uterine brothers and sisters as they are all from one mother. They, thus, inherit from a uterine position.

- EXAMPLE 18:

A Muslim deceased dies leaving a mother, a consanguine brother and paternal grandfather. The shares are 1/3 for the mother as there is only one brother and the grandfather does not reduce her share and the rest is equally divided between the grandfather and consanguine brother (each taking 1/3) as the former is taken as a brother when there are only brothers in the given situation. Their succession here is by *ta'ṣīb*.

- EXAMPLE 19:

A Muslim deceased leaves two sons, three full brothers, one full sister, two consanguine brothers and one consanguine sister and a son of his predeceased son. Two sons succeed to the entire estate in equal shares and exclude all the others and they are nearest to the *mayyit* and *bunūwwah* (sonship) preceding all other residual relationships.

- EXAMPLE 20:

  A Muslim deceased, who converted to Islām, leaves his entire estate to his nonmuslim parents and nonmuslim brother. This is not executed and the *qāḍī* will rule it invalid. At most, he can award 1/3 as a *waṣiyyah* to the three to be shared equally between them or in any ratio of his choice. The rest is to be for the benefit of the Muslims.

- EXAMPLE 21:

  A Muslim deceased, who converted to Islām, leaves all her estate to charities. She has Muslim relatives eligible for succession in terms of *sharī'ah*. The heirs receive what is due to them and the rest is for the charities proportional to their allotted share. One cannot dispose by way of *waṣiyyah* of all your possessions when you have legitimate and lawful heirs in terms of *sharī'ah*.

- EXAMPLE 22:

  A Muslim deceased leaves his estate to his heirs in *sharī'ah*, save one who is engaged in unlawful and sinful actions in terms of *sharī'ah*, such as consuming liquor, associating with women of ill-repute etc. All the heirs must succeed to their rightful shares. The other heirs may petition the *qāḍī* in the share of the sinful heir requesting that his share be frozen for his heirs to succeed to at his death. The *qāḍī* should rule in favour of the heirs' applicants as not doing so will cause the sinful heir to continue, if not in worse form, with his wrongful lifestyle and may further harm his dependants. This ruling will be for *sadd al-dharā'i* (blocking the avenues of sin).

- EXAMPLE 23:

  A *murtadd* (or *murtaddah*), dies in *riddah* (apostasy) and leaves Muslim heirs who qualify to succeed under normal *sharī'ah* required circumstances. No one succeeds to his estate as there is no succession between Muslims and nonmuslims.

- EXAMPLE 24:

  A *murtadd* or *murtaddah* reverts to Islām before his or her death and leaves an estate and Muslim heirs who would normally succeed to his estate. They succeed as the succession will be between Muslims.

- EXAMPLE 25:

  A Muslim heir kills his *muwarrith*. There are only two other Muslim heirs, a wife and a son to the deceased. Only the latter two succeed; the wife receiving 1/8 as there is a child and the son receives the rest by *ta'sīb*. The murderer heir is excluded by *sharī'ah* ruling.

- EXAMPLE 26:

  A Muslim deceased leaves Muslim heirs and a *waṣiyyah* for his nonmuslim relative. The latter murders him. The *wasiyyah* lapses and reverts to the estate for distribution to the heirs as no provision had been made for other *waṣāyā*.

- EXAMPLE 27:

  A Muslim creates a *waqf* during his lifetime for his minor children but does not depossess himself from the ownership of the *waqf* property nor allow them benefit from it and declares in his Will that the *waqf* is to continue indefinitely for the mentioned persons after his death. He has other lawful heirs in *sharī'ah*. The *waqf* can only be founded as a *waṣiyyah* and as such must not exceed 1/3 of the estate and must be consented to by other heirs as it is a *waṣiyyah* for heirs of the deceased.

- EXAMPLE 28:

  A Muslim creates a *waqf* during his lifetime for homeless people and for this purpose buys a property and creates a proper *waqf* in perpetuity. At his death, one of the heirs sets a claim against the estate for the *waqf* to be part of the estate for distribution to the heirs. The claim is refused as the *waqf* had been properly instituted and is for perpetuity.

- EXAMPLE 29:

  A Muslim purchases ground and builds thereon a mosque for which he pays fully in his lifetime, but had everything registered in his name as owner. At his death, the heirs wish

to claim the mosque as part of the estate. The estate is dispossessed of the mosque and its ground as well as everything which the deceased might have given to it for its use. This is so due to the fact that as soon as one builds a mosque, it becomes to a permanent *waqf*, cedes to the ownership of *Allāh* permanently and is for the use of the Muslims as a mosque in terms of *sharī'ah*. The *qādī* must oversee the appointment of a *mutawallī* for the mosque. The same rule will apply if ground is bought for burial and public burials are allowed in it without any objection of any kind from the owner of the ground.

APPENDIX 3

AL-MADHĀHHIB AL-FIQHĪYYAH (ISLAMIC JURISPRUDENCE SCHOOLS)

Mention had been made several times, in this thesis, of the above term and its derivative. It is considered necessary to explain in more detail what *al-madhāhib al-fiqhiyyah* are all about.

1 Major Islamic Movements In Islām:

Three major religious movements had arisen in Islām since its inception. These are the *Sunnī*, *Shī'ah* and *Khārijī* movements the latter of which is non-existent now. *Sunnīs* form the overwhelming majority of Muslims in the world and is a system both of theology and *fiqh* while *Shī'as*[1] form a small minority and is also both a theological as well as *fiqh* system.

1.1 The *Sunnī* System:

As we are dealing with *fiqh* systems, we shall exclude the theological part of the *sunnī* school. A striking peculiarity of the *sunnī fiqh* is the large number of *mujtahidūn* it produced, some with excellent *madhāhib* while the work of many never reached us due to many of them not having their works recorded. However, some of their rulings are with us in the surviving works of the major *sunnī fuqahā'*.

The major *sunnī fiqh madhāhhib* are:

1.1.1 the *hanafī madhhab* founded by Nu'mān bin Thābit, commonly known as Abū Hanīfah who was born in 80 AH in al-Kūfah in southern Irāq.

1.1.2 the *mālikī madhhab* founded by Mālik bin Anas who was born in Madīnah in present day Saudi Arabia in the year 93 AH.

---

[1] there are many sects amongst the *shī'ah*. Some, like the *ghulāt* (extremists who breached fundamental Islamic theological rules), are not Muslims while there are some *shī'ah* sects which are acceptable to *ahl al-sunnah*.

1.1.3 the *shāfi'ī madhhab* founded by Muḥammad Idrīs al-Shāfi'ī who was born in Ghazzah in Palestine in 150 AH.

1.1.4 the *ḥanbalī madhhab* founded by Aḥmad ibn Ḥanbal who was born in Baghdād, Irāq, in 164 AH.

1.1.5 the *ẓāhirī madhhab* founded by Dāwūd al-Ẓāhirī, who was, initially, a *shāfi'ī* follower. This *madhhab* is not well known amongst ordinary people. The most famous *faqīh* of this *madhhab* is ibn Ḥazm who left a voluminous work called *Al-Muḥallā* which contains the rulings of the *ẓāhirī madhhab*. *Ẓāhirī* rulings are quoted in most *sunnī fiqh* works as well as *fatāwā* (dispensations) of *muftūn* (pl of *muftī* - Islamic law dispensation specialist).

a) <u>The *Ḥanafī Madhhab*:</u>

This *madhhab's* founder, Abū Ḥanīfah, studied under famous teachers, amongst them being Ḥammād ibn Sulaimān, who in turn studied under the famous *ṣaḥābī*, ibn Mas'ūd.

Abu Ḥanīfa's *fiqh* is based on *ijtihād* in all problems he found no *sharī'ah* text, whether *Qur'ān* or *sunnah* or *ijmā' al-ṣaḥābah*. His system is founded on certain *usūl* (principles) which he himself stated:

"I take from the *Qur'ān* if I found the ruling in it and if not, then I take from the *sunnah* of the Messenger of *Allāh*. If I do not find anything there, then look at the *fatāwā* of the *ṣaḥābah* which I feel to take. When a matter comes to Ibrāhīm al-Nakha'ī and al-Ḥasan, (of the *tabi'ūn*), then I use *ijtihād* as they used it.[1]

His *usūl*, comprises:

The *Qur'ān, ḥadīth/sunnah, ijmā' al-ṣaḥābah, fatāwā al-ṣaḥābah* (dispensations of the legist companions of the Prophet), *al-qiyās, al-istiḥsān*

---

1 *Ta'rikh al-Tashrī' al-Islāmi*, p. 170.

and *al-'urf*. His two most famous students, Abū Yūsuf and Muḥammad al-Shaibānī recorded his works for posterity. Another two famous students and *fuqahā'* of the *ḥanafis* are Zufar bin Hudhail and al-Ḥasan bin Ziyad. *Ḥanafis* are found mostly in Asia and the Middle East.[1]

b) <u>The *Mālikī Madhhab*:</u>

The *mālikī madhhab* derives its name from its founder Mālik bin Anas, a Medinite. Of his famous teachers were ibn Hurmuz, Rabī'ah al-Ra'i and Ja'far al-Ṣadiq.[2] Mālik was both a *faqīh* and a *muḥaddith* (authority in *ḥadīth*) and it is, thus, not surprising that his *madhhab* is *riwāyah* (text) based. His outstanding contribution to *fiqh* is his legacy of *fiqh al-Madīnah*, derived from *Qur'ān* and *sunnah*. His monumental work *al-Muwatta'* is still with us and is extensively used by Muslims the world over. The *usūl* of his *madhhab* are, as explained by the *mālikī* jurist al-Qarrafī are:

"The *usūl* of our *madhhab* is; the *Qur'ān*, followed by the *sunnah*, then *ijmā' al-ṣaḥābah* followed by the *ijmā' ahl al-Madīnah* (consensus of the *fuqaha'* of Madinah). Hereafter follows, *al-qiyās*, *qawl al-ṣaḥābi*, *al-istiṣlāḥ*, *al-'urf*, *sadd al-dharā'i*, *al-istiḥsān* and finally *al-istiṣḥāb*".[3] *Mālikis* are found mostly in Egypt, Sudan, the Arabian Peninsula and North Africa.[4]

---

1 Abū Zahrah M: *Ta'rikh al-Madhāhib al-Islāmiyyah Fi Ta'rīkh al-Madhāhib al-Fiqhiyyah*, Cairo, Dār al-Fikr al-'Arabi, undated, p. 162.

2 *Ta'rīkh al-Tashrī' al-Islāmi*, p. 175.
Ta'rikh al-Madhāhib al-Islāmiyyah, p. 178.

3 *Madkhal li Dirāsah al-Sharī'ah al-Islāmiyyah*, p. 164.

4 *Ta'rīkh al-Madhāhib al-Islāmiyyah*, pp. 223 - 224.

c) The *Shafi'i Madhhab*:

Muḥammad Idrīs al-Shāfi'i, founder of this *madhhab* was a Qurashite and memorised the *Qur'ān* at seven and the *Muwatta'* of Imām Mālik by fifteen. His teachers were Muslim bin Khālid al-Zunjī who was the *mufti* of Makkah, Sufyān al-'Uyīnah and later Muḥammad al-Shaibānī, the famous *ḥanafī faqīh*, from who he studied *ḥanafī fiqh* in depth. His *madhhab* has the distinguishing feature that it has two divisions, one called the "old" and the other "new" *madhhab*. The old one being his rulings in Baghdād and the new one being his rulings in Egypt. These are based on different *'arāf* (customs) of Baghdād and Egypt. He has two famous compilations, namely, *Kitāb al-Umm* and *al-Risālah*, the latter which deals with jurisprudence principles. The *shāfi'ī madhhab* is midway between *ḥanafī* and *mālikī fiqh*. His usūl *is:*

The Qur'ān, followed by the *ḥadīth or sunnah*, even the *āḥad* category which are authentic. Hereafter follows the *ijmā'*, the *fatawā al-khulafā' al-rāshidīn* (dispensations of Abū Bakr, 'Umar, 'Uthmān and 'Alī) and their rulings takes precedence over *al-qiyās*, which is the last format of proof.[1] Amongst his famous students rank, Aḥmad ibn Ḥanbal, al-Ṭabarī, al-Muzanī, Dawūd and who later became Dawūd al-Ẓāhirī.[2] *Shāfi'īs* are found mostly in Yemen, Egypt, Iraq, Syria, Pakistan, Indonesia, Malaysia, Philippines, East and South Africa.[3]

---

1 *Madkhal li Dirāsah al-Shari'ah al-Islāmiyyah*, p. 169. *Ta'rīkh al-Tashrī' al-Islāmī*, p. 186.

2 *Ta'rīkh al-Tashrī' al-Islāmī*, p. 189.

3 *Shari'ah - The Islamic Law*, p. 107. *Madkhal li Dirāsah al-Shari'ah al-Islāmiyyah*, pp. 170.

d) The *Ḥanbalī Madhhhab*:

Its founder is Aḥmad ibn Ḥanbal. He was a student of al-Shafi'i, but developed his own form of *ijtihād* later on. Of his famous students are al-Athram, ibn Ḥajjaj and al-Marūzi.[1] The *Ḥanbalī madhhab* is distinguished in its strong *shari'ah* text based system. *Ḥanbalis* aligned themselves as fully as possible to the Prophetic system . Their *usūl are:*

The *Qur'ān* followed by the *ḥadith* and *sunnah*, even the weak, but *ṣaḥiḥ* (authentic) categories of ḥadith and not the rejected texts. Hereafter follows the *fatāwā al-ṣaḥābah* and Aḥmad would take the one nearest to the *Qur'ān* and *sunnah*. Then comes *marāsil al-ḥadīth* (a category of *hadith* that is technically weak, but not rejected) and then the *al-qiyās* patterns.[2] According to al-Tūsi, the *Ḥanbalis* also accept *al-istiḥsān*, while, ibn Qudāmah, the famous *ḥanbalī faqīh*, states that both *al-istiṣlāḥ* and *al-istiṣḥāb* are also part of their *usūl*.[3] *Sadd al-dharā'i* is also an accepted *ḥanbalī usūl* principle.[4]

---

1 *Ta'rīkh al-Tashri' al-Islāmi*, p. 190.

2 *Madkhal li Dirāsah al-Shari'ah al-Islāmiyyah*, pp. 171 - 172.

3 *Maṣādir al-Tashri' al-Islāmi*, pp. 70, 89 & 152.

4 *Ta'rīkh al-Madhāhib al-Islāmiyyah*, p. 335.

GLOSSARY

ARABIC WORDS

Abb (pl *Aba*)	father.
Abb al-abb	father's father.
Abb al-umm	mother's father.
Abna sulb	own children/sons.
Adah (pl. *Adat*)	tradition/custom.
'Adil	righteous in conduct/ just/fair/equitable.
'Adl batinan	righteous conduct in private life.
'Adl zahiran	apparent justice.
Adwar fiqhiyyah	stages of development of *fiqh*.
Ahad	single.
Ahd al-nubuwwah	prophetic era.
Ahd ma ba'da al-nubuwwah	post Prophetic era.
Ahkam (sing *hukm*)	laws/injunctions.
Ahl al-dhimmah	nonmuslims living under Muslim rule.
Ahl al-hadith	followers of *hadith* school of thought.
Ahl al-ra'i	followers of juristic opinions/rulings.
Ahl al-Kitab	people of the Book.
Ahliyyah	legal status and standing.
Al-ahwal al-shakhsiyyah	personal law.
Ajir khass	permanent employee.
Ajir mushtarak	casual employee.
Ajnabi (pl *Ajanib*)	non-related/foreign.
Akh shaqiq (pl *ikhwah ashiqqa'*)	full brother.
Akhras	a dumb person.
'Alim (*'ulama'*)	scholar.
Allah	God Almighty.

Amānah	trust.
Amīn	trustworthy person.
ʿAmm (pl *ʿAmām*)	paternal uncle.
ʿAmm li abb	consanguine uncle.
ʿAmm li umm	uterine paternal uncle.
ʿAmm shaqīq	full paternal uncle.
ʿAmmah (pl *ʿAmmāt*)	paternal aunt.
ʿAmmāt abī al-saghīr	father's paternal aunts.
Anbiyā (read as *ambiyā*)	prophets.
Anṣārī (pl *anṣār*)	settled Muslims of Medina.
Aqarra	acknowledge/affirm.
ʿAqd (pl *ʿUqūd*)	contract.
ʿAqd al-baiʿ	contract of sale.
ʿAqd al-hibah	contract of gift.
ʿAqīdah	beliefs.
ʿĀqil	sane.
ʿĀqilah	a sane female.
ʿAql	sanity.
Arḥām (sing *raḥim*)	relatives.
Arḥām maḥārim	relatives of the prohibited category (for marriage).
ʿAṣabah	residuaries.
Asbāb makhṣūṣah	special causes.
Asbāb al-nuzūl	reasons for revelation.
ʿĀṣib (fem *ʿāṣibah*)	residuary.
Aṣl al-mayyit	ascendants of the deceased.
ʿAwl	diminished shares.
Awqaf al-masjid	endowment for a mosque.
Āyah (pl *āyāt*)	verses.
ʿAyan al-tarikah	physical assets of the estate.
Āyāt kulliyah	general Quranic verses.
Āyāt Madaniyyah	verses revealed in Medina.

Ayāt Makkiyah	verses revealed in Mecca.
Ayāt tafṣīliyyah	detailed Quranic verses.
Azwaj	spouses.
Bait al-mal	State treasury.
Baiyinah	proof.
Balāghah	rhetoric.
Banāt al-ibn	daughters of the son.
Banāt shaqiqah	full daughters.
Banāt ṣulbiyyah	own daughters.
Banu Isra'il	the Jews/Israelites.
Bid'ah	Innovation.
Bint (pl *banāt*)	daughter.
Bint akh li abb	daughter of the consanguine brother.
Bint akh li umm	daughter of the uterine brother.
Bint akh shaqiq	daughter of the full brother.
Bint al-ibn	daughter of the son.
Bint 'amm (*bint 'ammah*)	female paternal cousin.
Bint ibn al-bint	daughter of the son of the daughter.
Bint khal (*bint khalah*)	female maternal cousin.
Bint ṣulbiyyah	own daughter.
Bintān ṣulbiyyatān	two own daughters.
Birr	virtuous deeds.
Bulūgh	pubescence.
Bunuwwah	being a son.
Buṭlān	void or invalid.
Dā'in	creditor.
Al-dā'in al-gha'ib	absent creditor.
Dain (pl *duyūn*)	debt.
Dawām	permanency.
Dhawi al-arḥām	uterine relatives.
Dhimmi	nonmuslims living under Muslim rule.

Dhukūrah	masculinity.
Dīn	religion.
Dīnār (pl *danānīr*)	old Arabian gold coin.
Dirham (pl *darāhim*)	old Arabian silver coin.
Diyah (pl *diyāt*)	blood money.
Fard	compulsory.
Fatwā (pl *fatāwā*)	legal opinion or dispensation.
Fidyat al-siyām	penalty for infringement of fasting laws.
Al-fiqh	Islamic jurisprudence.
Fiqhī	juridical.
Ghulāt	*shī'ah* extremists who breached fundamental Islamic theological rules.
Al-ḥaḍānat	custodial guardianship.
Ḥāḍin	male custodian of a minor.
Ḥaḍinat	female custodian of a minor.
Ḥajr	curatorship over persons or their possessions.
Al-Ḥajb	exclusion or diminished shares in an estate.
Ḥajb al-ḥirmān	exclusion from an estate.
Ḥajb al-nuqṣān	diminished share.
Ḥākim	lawful Muslim ruling authority.
Ḥaml	pregnancy or foetus.
Hawā	unqualified opinion not based on *shari'ah*.
Al-ḥuqūq al-'ammah	public rights.
Al-ḥuqūq al-khassah	personal rights.
Ibn (pl *abnā'*)	son.
Ibn al-'amm (pl *abnā' al-'amm*)	paternal male cousin.

Ibn al-ibn	son of the son.
Ibn bint al-bint	son of the daughter of the daughter.
Ibn ibn al-ibn	son of the grandson.
ʿIddah	period of waiting.
ʿIddat al-talāq	period of waiting of a divorcee.
ʿIddat al-wafāt	period of waiting of a widow.
Al-iflās	insolvency.
Al-ijārah	leasing or hiring.
Al-ijmāʿ	consensus.
Al-ijmāʿ al-sarīḥ	clear consensus.
Al-ijmāʿ al-sukūtī	silent consensus.
Al-ijtihād	juristic inference.
Imām	leader of Muslims.
Imām (pl *aʾimmah*)	mosque prayer leader.
Al-imām al-akbar	Head of State.
Inʿiqād al-wasiyyah	enacting of a legacy.
Inkāḥ	marrying of (someone).
Iqrār (pl *iqrārāt*)	affirmation/admission acknowledgment.
Iqrār bi al-nasab	acknowledgment of lineage.
Irth	inheritance.
Al-istiḥsān	in the best interest of or refined analogy.
Al-istiṣḥāb	confirming an existing situation.
Jadd (pl *ajdād*)	grandfather.
Al-jadd al-fāsid	untrue grandfather.
Al-jadd al-saḥīḥ	true grandfather.
Jaddah (pl *jaddāt*)	grandmother.
Al-jaddah al-fāsidah	untrue grandmother.
Al-jaddah al-ṣaḥīḥah	true grandmother.
Al-jaddāt al-abawiyyāt	paternal grandmothers.
Al-jaddāt al-umamiyyāt	maternal grandmothers.

Ja'fari	a branch of the *shi'ah* school of thought.
Jahannam	Hell.
Jalb al-manfa'ah	requisition of benefit.
Jama'ah	a congregation or a group.
Jannah	Paradise.
Jihad	struggling in the utmost in the path of *Allah* including fighting in the path of *Allah*.
Jiran (sing *jar*)	neighbours.
Juduwwah	being a grandparent.
Al-junun	insanity.
Al-junun al-mutbiq	permanent insanity.
Juz (pl *ajza'*)	a part.
Juz jaddihi	descendant from a grandparent.
Kaffarah (pl *kaffarat*)	penance/fine for a religious infringement.
Kafil	legal guardian (of a parentless minor)
Kafil al-laqit	legal guardian of a foundling.
Kalami	theological.
Khal (pl *akhwal*)	maternal uncle.
Khalaf	early scholars of *shari'ah*.
Khal li abb	consanguine maternal uncle.
Khal li umm	uterine maternal uncle.
Khal shaqiq	full maternal uncle.
Khalah (pl *khalat*)	uncle. maternal aunt.
Khalah abi al-saghir	maternal aunt of the minor's father.
Khalah al-shaqiqah	full maternal aunt.

Khālah li abb	consanguine maternal aunt.
Khālah li al-umm	uterine maternal aunt.
Khalīfah (pl *khulafā'*)	caliph/successor/ruler.
Al-khilāfah al-rāshidiyyah	rule of the first four caliphs after the death of the Prophet (s.a.w).
Al-khulafā' al-rāshidūn	the four righteous caliphs.
Al-khuntha	hermaphrodite.
Kutub fatāwā	books of legal opinions/dispensations.
Laqīṭ (pl *luqaṭā'*)	foundling (male).
Laqīṭah	foundling (female).
Al-li'ān	mutual imprecation.
Ma'tūh	autistic.
Mabādi' (sing mabda')	principles.
Madanī	belonging to the city of Medina in Arabia.
Al-madāris al-fiqhiyyah	juridical schools.
Al-madhāhib al-fiqhiyyah	juridical schools.
Madhhab (pl *madhāhib*)	a juridical school.
Madīn	debtor.
Mafqūd	a missing person.
Mafsūkh	cancelled.
Maḥjūr 'alaihi	placed under curatorship.
Maḥkūm	the governed.
Maḥram (pl *maḥārim*)	a person you are prohibited from marrying.
Majnūn (fem *majnūnah*)	an insane person.
Makkī	belonging to the city of Mecca in Arabia.
Al-māl (pl *al-amwal*)	wealth or possessions.
Mālikī	a follower of the *mālikī* school of law.
Mandūb	approved/recommended.
Manfa'ah	usufruct/benefit.

Mansūkhah	cancelled.
Muqāsamah	coinheritance.
Maqāsid (sing *qasd*)	aims.
Marji' al-hukm	final authority in legal matters.
Al-maṣādir al-aṣliyyah	original sources.
Al-maṣādir al-taba'iyyah	secondary sources.
Masā'il ijtihādiyyah	issues based on juristic inference.
Masākin (sing *miskīn*)	the needy.
Maṣālih (sing *maṣlaḥah*)	public interest.
Al-maṣālih al-mursalah	public interest in law.
Mashhūr	famous.
Masjid (pl *masājid*)	mosque.
Maslaḥat al-saghīr	interest of the minor.
Mawaddah	love/affection.
Mawlā	freed slave.
Mawāqīt (sing *miqat*)	boundaries for pilgrimage.
Mawqūf 'alaihi	beneficiary of an endowment.
Mawqūf 'alaihim	beneficiaries of an endowment.
Al-mīrath	succession.
Mu'aiyan	specified/fixed/designated.
Mu'allimūn (sing *mu'allim*)	teachers.
Mu'āmalat	daily social transactions which have legal bearings.
Mufassirūn (sing *mufassir*)	exegetists.
Muftūn (pl *muftī*)	experts entitled to give legal opinion.
Muḥaddith (pl *muḥaddithūn*)	scholar/authority in *hadith*.
Muhajir (pl *muhājirūn*)	emigrant Muslim from Mecca.

Muḥarram	forbidden.
Mujtahidūn (sing *mujtahid*)	legal experts who infer laws.
Mukallafah (masc *mukallaf*)	a woman who reached puberty and is then responsible for her actions.
Mulaʿanah	mutual imprecation.
Multaqiṭ	finder of a foundling.
Mumaiyiz	a discerning youth (male).
Munasakhah	replacement.
Muntaẓiman	properly administered.
Muqtaḍayāt ʿaqd al-nikaḥ	requirements of a marriage contract.
Murḍiʿ	a wet nurse.
Murtadd (fem *murtaddah*)	an apostate.
Mūṣā bihi	actual legacy.
Mūṣā lahu	legatee.
Mūṣā lahum	legatees.
Muṣḥaf	the *Qur'ān*.
Mūṣī	legator.
Muslim (fem *Muslimah*)	a Muslim person.
Mustaghraq bi al-dain	insolvent.
Mustaḥab	preferred/desirable encouraged.
Muʿtaddah ṭalāq al-rajʿi	woman in the period of waiting in a revocable divorce.
Al-mutallaqah al-baʾinah	irrevocable divorcee.
Mutalāziqan	inseparable.
Muʿtaq	freed slave.
Mutawalli	administrator/trustee.
Mutawātir	numerously reported.
Muṭlaqan	absolutely.
Mutūn (sing *matn*)	texts.
Muwakkil	principal.

Muwarrith	testator.
Muwarrithah	testatrix.
Nafaqah	maintenance.
Al-nafs	self/person.
Nahw	grammar.
Nasab	lineage.
Nasara	Christians.
Nasikhah	still valid in law.
Nasir	helper.
Naskh	process of cancellation and substitution of new laws.
Al-nasl	offspring.
Nazir	manager or administrator of an endowment.
Nikah (pl *ankihah*)	marriage.
Nikah batil	void marriage.
Nikah fasid	voidable marriage.
Nikah sahih	valid marriage.
Nubuwwah	prophethood.
Nusrah	help or assistance.
Qabul	acceptance.
Qada	judicial process.
Qada al-duyun	settling of debts.
Qadhf	slander.
Qadi (pl *qudat*)	Muslim judge.
Qadir	capable.
Al-qa'idah al-fiqhiyyah	a fundamental legal principle.
Qaiyim	a righteous Muslim.
Al-qarabah al-nasabiyyah	related by lineage.
Qarabah bi al-rada'ah	related by fostering.
Al-qatl al-'amd	intentional homicide or killing.
Al-qatl al-jari majra al-khata'a	homicide resembling accidental homicide.
Al-qatl al-khata'a	homicide in error or

	killing in error.
Al-qatl bi al-tasabbub	homicide by cause.
Al-qatl shibh al-ʿamd	probable intentional homicide/resembling intention to kill.
Al-qawāʿid al-fiqhiyyah	fundamental legal principles.
Qawad	death penalty or retaliation.
Qawl al-sahābi	ruling of a companion of the Prophet (s.a.w).
Qimah	value.
Qismat al-tarikah	division to an estate.
Qiyās	analogy.
Qiyās zahir	apparent analogy.
Qudrah	physical strength.
Qurbah (pl *qurubāt*)	nearness (to God).
Quwwah	strength.
Radāʿah	fostering.
Radd	redistribution of the residue of an estate
Ramadan	9th month of the Islamic calender.
Rashid	mature of mind (for administering one's possessions.
Riʿayah	supervision.
Ribā	interest (monetary) which includes usury.
Ruḥ	soul.
Rushd	maturity of mind.
Ṣabi mumaiyiz	a discerning boy.
Ṣabiyyah mumaiyizah	a discerning girl.
Ṣabr	patience/endurance.
Ṣadāq	dowry.
Ṣadāq mithl	customary dowry in a family.

Sadaqah (pl *sadaqāt*)	charity.
Sadd al-mafsadah	blocking evil.
Safah	prodigality.
Safīh	prodigal.
Saghīr (pl *saghā'ir*)	a minor male.
Saghīrah	a minor female.
Sahābah (sing *sahābī*)	companions of the Prophet (s.a.w).
Salaf	later scholars of *sharī'ah*.
Salāh (pl *salawāt*)	prayer.
Sarf	etymology.
Shafaqah	compassion/tenderness.
Shāfi'is	followers of the *shafi'i school of law*.
Shahādah	evidence.
Shā'i'an	non-separated articles or possessions.
Shaqīq (pl *ashiqqā'*)	full brother.
Shaqīqah (pl *shaqīqat*)	full sister.
Shar'an	according to *sharī'ah*.
Sharh	explanation.
Sharī'ah	Islamic law of Islamic injunction.
Shart (pl *shurūt*)	condition.
Shī'ah	that branch of Muslims who recognise 'Alī, the Prophet's (s.a.w) son-in-law as his rightful successor.
Shūra	mutual consultation.
Sifah	lewdness.
Silah	blood relationship or link.
Siyām	fasting.
Al-sughr	minority.
Sukna	lodgings.

Sultān	Muslim ruling authority.
Sunnah (pl *sunan*)	practice of the Prophet (s.a.w).
Sunnī	Muslims who accept Abū Bakr as the first of the four successors of the Prophet (s.a.w).
Sūrah (pl *suwar*)	a chapter of the *Qur'ān*.
Sūrat al-Fātihah	opening chapter of the *Qur'ān*.
Sūrat al-Nās	final chapter of the *Qur'ān*.
Ta'amul	usage.
Al-ta'aqud	contracting (a contract).
Ta'āwun	cooperation.
Al-tabannā	adoption.
Tabdhīr	squandering.
Tabi'ūn (sing *tabi'i*)	followers of the companions of the Prophet (s.a.w).
Tadarruj	gradualism.
Tafsīr (pl *tafāsīr*)	exegesis.
Ṭahir	pure.
Tajhiz al-mayyit	preparation for the burial of a deceased.
Takharuj	exit of an heir from an estate on an agreed amount of property.
Taklīf	accountability due to maturity.
Talaq	divorce.
Talāq marad al-mawt	divorce in death sickness.
Tamyiz	discernment.
Tanfidh al-wasāya	execution of legacies.
Taqlīd	imitation.
Taqnīn	codification.

Taqwā	piety.
Tarbiyah	education or training.
Tarikah (pl *tarikāt*)	a deceased estate.
Taṣarruf al-amwāl	disposal of property and possessions.
Taṣarrufāt	right of disposal.
Taṣhīh	correction.
Tashrī'	legislation.
Tawāruth	mutual succession or succession rights.
Tazāhum al-tarikah	deprivation in a deceased estate.
Ṭifl (fem *ṭiflah*)	an infant.
Ubūwwah	being a father or parentage.
Ukht (pl *akhawāt*)	a sister.
Ukht al-raḍā'ah	foster sister.
Ukht li abb	consanguine sister.
Ukht li umm	uterine sister.
Ukhūwwah	brotherhood or being a brother.
Umm (pl *ummahāt*)	mother.
Umm al-abb	mother of the father.
Umm al-saghīr	mother of the minor.
Umm al-umm	mother of the mother.
Umm ḥādinat	custodial mother.
Umm umm li abb	maternal grandmother of the father.
Ummahāt al-umm	mothers of the mother.
Umūmah	being a mother.
Umm walad al-li'ān	mother of the child of mutual imprecation.
Al-'uqūbah (pl *'uqūbāt*)	punishment/penalty or punitive measures.
Uṣūl al-fiqh	principles of jurisprudence.
Uṣūlī (pl *uṣūliyūn*)	authority in the

	principles of jurisprudence.
Wadi‘	depositee.
Wafat	death.
Wahm	unqualified opinion.
Wahy	revelation.
Wājib	necessary.
Wakīl	agent.
Walad (pl *awlād*)	child.
Walad al-li‘ān	child of mutual imprecation.
Walad al-shar‘ī	legitimate child.
Walad al-zinā	illegitimate child or extra-marital child.
Walad mūṣā lahu	legatee's child.
Walī (pl *awliyā*)	guardian.
Waqf (pl *awqāf*)	endowment.
Wāqif	one creating an endowment.
Waṣī (pl *awsiya*)	tutor or curator.
Wasīyyah (pl *wasaya*)	legacy.
Wasīyyat al-ḥaml	legacy of the unborn.
Al-wasīyyat al-mubāḥah	permissible legacy.
Al-wasīyyat al-makrūhah	detested legacy.
Al-waṣīyyat al-wājibah	compulsory or necessary legacy.
Wikālah	representation or agency.
Al-wilāyat (pl *wilāyāt*)	guardianship.
Al-wilāyat ‘alā al-nafs	guardianship over person.
Al-wilāyat al-‘ammah	public guardianship.
Al-wilāyat al-dhātiyyah	natural guardianship.
Wilāyat al-ḥadānat	guardianship of custodial care.
Wilāyat al-ḥifẓ wa al-tarbiyah	custodial guardianship.
Al-wilāyat al-ijbārīyyah	compulsory guardianship.
Al-wilāyat ‘al-mukhtasibah	acquired guardianship.
Wilāyat al-tarbiyah	guardianship of

	upbringing.
Al-wilayat al-tazwij	guardianship of marriage.
Wisayah	curatorship.
Wujub	necessity.
Yubā'	to be sold.
Yuhab	to be given in gift.
Yurath	to be inherited.
Za'idah	increase.
Zahiriyyah	a follower of a minor *sunni* school of law who believe in literal interpretations.
Zaidiyyah	followers of the *zaidi* school of law belonging the *shi'ah* branch and who are nearer to the *hanafi* school of law.
Zakah	annual compulsory alms.
Zakat al-fitr	alms payable at the end of *Ramadan*.
Zawj	husband.
Zawj mutawaffa	deceased husband.
Zawjah (pl *zawjat*)	wife.
Zawjah mutawaffa	deceased wife.
Zawjan	the two spouses.
Zawjiyyah	state of marriage.
Zina	adultery.

LATIN WORDS

Ab intestato	by way of intestacy.
Androga	same meaning as above.
Androgatio	a from adoption in early Rome.
Androgator	one making *androgatio*.
Androgatus	one entering *androgatio*.
Civis	a free person.
Connubium	capacity to contract a valid marriage.
Cura	curatorship.
Decurio	municipal counsellor.
Dominium	possession.
Fideicommisa	Trusts.
Infans	a child under 7 years of age.
Ingenuii	born free persons.
Libertini	made free persons.
Manus	a kind of family subjection in which a woman became a member of her spouse's agnatic family.
Pater	family head.
Paterfamilias	family head.
Potestas	authority or power.
Praetor fideicommissarius	Trusts magistrate.
Proximus agnatus	near agnate.
Tutela legitima	legal tutelage.
Tutela testamentaria	testamentary tutelage.
Tutela	tutelage.
Tutor fiduciarus	fiduciary tutor.

BIBLIOGRAPHY

ARABIC REFERENCES

1 Abadi M D: *Al-Qamus al-Muhit*, Cairo: Dar al-Ma'arif, undated. 4 Vols.

2 'Abd al-Aziz A R: *Al-Qada wa Nizamuhu Fi al-Kitab wa al-Sunnah*, Makkah: Umm al-Qura University, 1984.
Short Title: *Al-Qada wa Nizamuhu.*

3 'Abd al-Baqi M F: *Al-Lu'lu'u wa al-Marjan Fima Ittifaqa 'Alaihi al-Shaikhan*, Kuwait: Ministry of Islamic Affairs, 1992, 2nd ed. 2 Vols.
Short Title: *Al-Lu'lu'u wa al-Marjan.*

4 Abu Zahrah M: *Al-Ahwal al-Shakhsiyyah Fi al-Islam*, Cairo: Dar al-Fikr al-'Arabi, 1950.
Short Title: *Al-Ahwal al-Shakhsiyyah (Abu Zahrah).*[1]
Ahkam al-Tarikat wa al-Mawarith, Cairo: Dar al-Fikr al-'Arabi, 1963.
Ta'rikh al-Madhahib al-Islamiyyah Fi Ta'rikh al-Madhahib al-Fiqhiyyah, Cairo: Dar al-Fikr al-'Arabi, undated.
Short Title: *Ta'rikh al-Madhahib al-Fiqhiyyah.*

5 'Abud M U: *Al-Wajiz Fi al-Mirath*, Cairo: Al-Azhar University, 1995.

6 'Afifi M S: *Al-Mujtama'ah al-Islami wa Huquq al-Insan*, Makkah: Idarah al-Sahafah wa al-Nashr, 1406 AH.

7 Al-'Ali S A: *Muhadarat Fi Ta'rikh al-'Arab*, Baghdad: Matba'ah al-Irshad, 1968. 2 Vols.

8 Amidi S D: *Al Ihkam Fi Usul al-Ahkam*, Cairo: Matba'ah Muhammad 'Ali Subaih, 1968. 3 Vols.
Short Title: *Al-Ihkam.*

9 Ansari A Y: *Ghayah al-Usul - Sharh Lubb al-Usul*, Cairo: Matba'ah Mustafa al-Halabi, 1941, final ed.
Short Title: *Ghayah al-Usul.*

---

[1] There is a title in this bibliography which is virtually similar to this title, hence the inclusion of the author's name here to avoid confusion.

10 Ansāri Z: *Minhaj al-Tullab*, Cairo: Maktabah Mustafā al-Halabi, undated.

11 ʿAwdah A Q: *Al-Tashriʿ al-Janāʾi al-Islāmi Muqāran Bi al-Qanūn al-Waḍʿi*, Beirut: Dār al-Kitāb al-ʿArabi, undated. 2 Vols.
Short Title: *Al-Tashriʿ al-Janāʾi.*

12 Azdi I A H: *Jamʿ al-Nihāyah Fi al-Bādi al-Khair wa al-Ghāyah*, Beirut: Muʿassasah al-Thaqafiyyah, 1986, 1st ed.

13 Al-Bahi M: *Al-Imān*, Cairo: Matbaʿah al-Buḥūth al-Islāmi, 1995.

14 Ba Billi M : *Fi al-Tashriʿ al-Nabawi*, Beirut: Dār al-Irshad, 1969, 1st ed.

15 Baqāʾi I U B: *Faid al-ʿUlah - al-Mālik Fi Ḥal Alfaẓ ʿUmdah al-Salik wa ʿAddah al-Manasik*, Cairo: Matbaʿah al-Istiqāmah, 1955. 2 Vols.
Short Title: *Faid ʿUla al-Mālik.*

16 Bāz A A: *Al-Fawāʾid al-Jaliyyah*, Riyaḍ: Dār al-Iftā, undated.

17 Birri Z A: *Aḥkām al-Awlad*, Cairo: Dar al-Qamariyyah Li al-Tibaʿah, 1964.

18 Al-Bukhāri A A: *Saḥiḥ al-Bukhāri*, Cairo: Maktabah al-Jumhūriyyah, undated. 9 Vols.

19 Al-Dardīr: *Aqrab al-Masālik li Madhhab al-Imām Mālik*, Cairo: Matbaʿah Mustafā al-Halabi, 1954, 3rd ed.

20 Dhahabi H: *Al-Sharīʿah al-Islāmiyyah - Dirāsah Muqāranah Baina Madhahib Ahl al-Sunnah wa al-Shiʿah*, Cairo: Maktabah Wahbah, 1991, 3rd ed.
Short Title: *Al-Sharīʿah al-Islamiyyah.*

21 Al-Farraʾ A Y: *Al-Aḥkām al-Sultāniyyah*, Cairo: Matbaʿah Mustafā al-Halabi, 1987, 3rd ed.

22 Fawzān S F: *Al-Taḥqiqāt al Marḍiyyah Fi al-Mabaḥith al-Farḍiyyah*, Riyaḍ: Maktabah al-Maʿārif, 1986, 3rd ed.
Short Title: *Al-Taḥqiqāt al-Marḍiyyah.*

23 Al-Haithami S D: *Ḥawāshi Li al-Shaikh ʿAbd al-Ḥamid al-Sharawāni & al-Shaikh al-ʿAbādi ʿAla Tuḥfat al-Muḥtaj - Sharḥ al-Minhāj*, Cairo: Dār al-Fikr, undated. 8 Vols.
Short Title: *Ḥawāshi al-Shaikh.*

24 Al-Hummam A: *Al-Fatawa al-Hindiyyah Fi Madhhab al-Imam Abi Hanifah al-Nu'man*, Beirut: Dar Ihya al-Turath al-'Arabi, 1986. 6 Vols.
Short Title: *Al-Fatawa al-Hindiyyah.*

25 Al-Husaini T D: *Kifayah al-Akhyar Fi Hal Ghayah al-Ikhtisar*, Cairo: Dar Ihya al-Kutub al-'Arabiyyah, undated. 2 Vols.
Short Title: *Kifayah al-Akhyar.*

26 Al-Husari A: *Al-Tarikat wa al-Wasaya Fi al-Fiqh al-Islami*, Amman: Maktabah al-Aqsa, 1972.
Short Title: *Al-Tarikat wa al-Wasaya.*
Al-Wilayah wa al-Wisayah wa al-Talaq, Cairo: Maktabah al-Kulliyat al-Azhariyyah, 1969.
Short Title: *Al-Wilayah wa al-Wisayah.*

27 Ibn 'Abidin: *Al-Durr al-Mukhtar 'ala Tanwir al-Absar.*

28 Ibn al-'Arabi A B: *Fath al-Qadir - al-Jami' Baina Fannai al-Riwayah wa al-Dirayah Min 'Ilm al-Tafsir*, Beirut: Dar al-Fikr, 1983. 4 Vols.
Short Title: *Fath al-Qadir.*

29 Ibn al-Athir M D: *Jami' al-Usul Fi Ahadith al-Rasul*, Damascus: Maktabah al-Halwani, 1970, 1st ed. 11 Vols.

30 Ibn Hazm A M: *Al-Muhalla*, Cairo: Dar al-Turath, undated. 11 Vols.

31 Ibn Juzai M: *Al-Qawanin al-Fiqhiyyah*, Beirut: Al-Maktabah al-Thaqafiyyah, undated.

32 Ibn Kathir I D: *Tafsir al-Qur'an al-'Azim*, Beirut: Dar al-Andalus, 1966. 7 Vols.
Short Title: *Tafsir ibn Kathir.*

33 Ibn Manzur al-Ifriqi: *Lisan al-'Arab*, Cairo: Dar al-Ma'arif, undated. 6 Vols.

34 Ibn Muflih S D: *Kitab al-Furu'*, Beirut: 'Alam al-Kutub, 1985, 4th ed. 6 Vols.

35 Ibn Nujaim Z D: *Al-Bahr al-Ra'iq - Sharh Kanz al-Daqa'iq*, Cairo: Dar al-Kitab al-'Arabi, undated, 2nd ed. 8 Vols.
Short Title: *Al-Bahr al-Ra'iq.*

36 Ibn Qudamah A M: *Al-Mughni*, Riyad: Maktabah al-Riyad al-Hadithah, undated. 9 Vols.

37 Ibn Qudāmah M D: *'Umdah al-Fiqh*, Makkah al-Mukarramah: Maktabah al-Nahḍah, undated.

38 Ibn Taiyib A A: *Al-Mu'tamad Fī Usūl al-Fiqh*, Beirut: Dār al-Kutub al-'Ilmiyyah, 1983, 1st ed. 2 Vols.
Short Title: *Al-Mu'tamad.*

39 Imām M K D: *Usūl al-Fiqhī al-Islāmī*, Beirut: Mu'assasah al Jam'iyyah, 1996. 1st ed.

40 Jādd al-Ḥaqq A J H: *Buḥūth wa Fatāwā Islāmiyyah Fī Qadāyā Mu'āṣarah*, Cairo: General Secretariat of the Higher Council of Islamic Missionary Work, al-Azhar University, 1994. 3 Vols.
Short Title: *Buḥūth wa Fatawa.*

41 Al-Jawziyyah I Q: *'Alām al-Muwaqqi'īn 'An Saiyid al-'Ālamīn*, Cairo: Matba'ah al-Kulliyāt al-Azhariyyah, 1968. 4 Vols.
Short Title: *'Alām al-Muwaqqi'īn.*
Zād al-Ma'ād Fī Hadyi Khair al-'Ibād, Makkah: al-Matba'ah al-Miṣriyyah, 1379 AH. 4 Vols.
Short Title: *Zād al-Ma'ād.*

42 Jazā'irī A B: *Minhāj al-Muslim*, al-Madīnah, 1969. 2nd ed.

43 Juzairī A R: *Kitāb al-Fiqh 'alā al-Madhāhib al-Arba'ah*, Cairo: al-Maktabah al-Tijāriyyah al-Kubrā, undated. 4 Vols.
Short Title: *Fiqh 'ala al-Madhāhib al-Arba'ah.*

44 Kānūn A A: *Buḥūth Fī al-Qur'ān al-Karīm*, Cairo: Majma'ah 'Ulyā li Ikhtifāl Bi al-'Id al-Alfi Li al-Azhar, 1983.

45 Al-Kāsānī A D: *Kitāb al-Bada'i'i al-Ṣanā'i'i Fī Tartīb al-Sharā'i'i*, Beirut: Dar Maktabah al-'Ilmiyyah, 1986, 2nd ed. 8 Vols.
Short Title: *Bada'i'i al-Ṣanā-'i'i.*

46 Al-Khudari M: *Ta'rīkh al-Tashri' al-Islāmī*, Cairo: al-Maktabah al-Tijāriyyah al-Kubrā, 1970, 9th ed.
Short Title: *Ta'rikh al-Tashri'.*
'Usūl al-Fiqh, Cairo: al-Maktabah al-Tijāriyyah al-Kubrā, 1969, 6th ed.

47 Khallāf A W: *Maṣādir al-Tashri' Fima la Naṣṣa Fiha*, Kuwait: Dar al-Qalam, 1970, 2nd ed.
Short Title: *Maṣādir al-Tashri'*

48 Al-Khandahlawi M A: *Hayah al-Sahabah*, Damascus, Dar al-Qalam, 1983. 3 Vols.

49 Al-Khatib S D: *Al-Iqna' Fi Hal Alfaz Abi Shuja'ah*, Cairo: Al-Maktabah al-'Arabiyyah, 1967, 3rd ed. 2 Vols.
Short Title: *Al-Iqna'*.

50 Al-Khayyat A A: *Al-Mujtama'ah al-Mutakafil Fi al-Islam*, Amman: Maktabah al-Aqsa, 1972.

51 Al-Lahim A K M: *Fiqh al-Mawarith - Dirasah Muqaranah*, Riyad: al-Maktabah al-Ta'awuni Li al-Da'wah wa al-Irshad, 1413 AH, 1st ed.
Short Title: *Fiqh al-Mawarith*.

52 Al-Mahmasani S: *Al-Awda' al-Tashri'iyyah Fi al-Duwal al-'Arabiyyah*, Beirut: Dar al-'Ilm Li al-Malayin, 1981, 4th ed.
Short Title: *Al-Awda' al-Tashri'iyyah*.

53 Makhluf M H: *Bulugh al-Sul Fi Madkhal 'Ilm al-Usul*, Cairo: Matba'ah Mustafa al-Halabi, 1966, 2nd ed.
Short Title: *Bulugh al-Sul*.

54 Malik K I: *Mukhtasar Khalil Fi Fiqh al-Imam Malik*, Cairo: Matba'ah Mustafa al-Halabi, 1922.
Short Title: *Mukhtasar Khalil*.

55 Al-Maqdisi M D: *Al-Muqni' Fi Fiqh Imam al-Sunnah Ahmad ibn Hanbal al-Shaibani*, Cairo: al-Matba'ah al-Salafiyyah, undated.
Short Title: *Al-Muqni'*.

56 Al-Marghinani A H: *Al-Hidayah - Sharh al-Bidayah al-Mubtadi'*, Cairo: Matba'ah Mustafa al-Halabi, undated. 4 Vols.
Short Title: *Al-Hidayah*.

57 Al-Mawardi A H: *Al-Ahkam al-Sultaniyyah*, Cairo: Matba'ah Mustafa al-Halabi, 1973, 3rd ed.

58 *Al-Mawsu'ah al-Fiqhiyyah*, Kuwait: Ministry of *Awqaf* and Islamic Affairs, 1995. 35 Vols (incomplete).

59 Al-Mawsuli A: *Al-Ikhtiyar li Ta'lil al-Mukhtar*, Cairo: Matba'ah Mustafa al-Halabi, 1951, 2nd ed. 5 Vols.
Short Title: *Al-Ikhtiyar*.

60 Al-Mughniyyah M J: *Al-Fiqh 'ala al-Madhahib al-Khamsah*, Beirut: Dar al-'Ilm li al-Malayin, 1979, 6th ed. 2 Vols.

61 Al-Mundhiri A M: *Al-Targhib wa al-Tarhib Min Ahadith al-Sharif*, Cairo: Matba'ah al-Sa'adah, 1960. 6 Vols.
Short Title: *Al-Targhib wa al-Tarhib.*

62 *Mukhtasar Sahih Muslim*, Damascus, al-Maktab al-Islami, 1977, 3rd ed.

63 *Al-Munjid Fi al-Lughah wa al-'Ilam*, Beirut: al-Maktabah al-Sharqiyyah, 1975, 23rd ed.
Short Title: *al-Munjid.*

64 Al-Nasafi A A: *Tafsir al-Nasafi*, Cairo: Dar Ihya al-Kutub al-'Arabiyyah, undated. 2 Vols.

65 Al-Nawawi A Z: *Riyad al-Salihin Min Kalam Saiyid al-Mursalin*, Cairo: Matba'ah Mustafa al-Halabi, 1979, 2nd ed.
Short Title: *Riyad al-Salihin.*
Minhaj al-Talibin wa 'Umdah al Muftin, Cairo: Matba'ah Mustafa al-Halabi, undated.
Short Title: *Minhaj al-Talibin.*
Al-Majmu' - Sharh al-Muhadh-dhab, Beirut: Dar al-Fikr, undated.
Short Title: *Al-Majmu'.*

66 Al-Nawawi Z: *Rawdah al-Talibin*, Beirut: Dar al-Kutub al-'Ilmiyyah, undated. 8 Vols.

67 *Al-Qararat wa al-Tawsiyyat*, Jeddah, Amman & Kuwait: Majma'ah al-Fiqhi al-Islami, 1985 - 1988.
Al-Qararat wa al-Tawsiyyat, Abu Dhabi: Majma'ah al-Fiqhi al-Islami, 1415 AH / 1995.

68 Al-Qardawi Y: *Al-Halal wa al-Haram Fi al-Islam*, Beirut: al-Maktab al-Islami, undated.
Short Title: *Al-Halal wa al-Haram.*

69 Al-Qurtubi A A: *Al-Jami' li Ahkam al-Qur'an*, Cairo: Al-Maktabah al-'Arabiyyah, 1967, 3rd ed. 10 Vols.

70 Al-Qurtubi M: *Bidayah al-Mujtahid wa Nihayah al-Muqtasid*, Cairo: Maktabah al-Kulliyat al-Azhariyyah, 1966. 2 Vols.
Short Title: *Bidayah al-Mujtahid.*

71 Qutub S: *Fi Zilal al-Qur'an*, Makkah: 1972, 15th ed. 8 Vols. (No publisher mentioned).

72 Al-Rabi'ah A Z: *Adillah al-Tashri' al-Mukhtalif Fi al-Ihtijaj Biha*, Beirut: Mu'assasah al-Risalah, 1979, 1st ed.

Short Title: *Adillah al-Tashri'*.

73 Al-Ramli S D: *Nihayah al-Muhtaj Ila Sharh al-Minhaj Fi al-Fiqh 'ala al-Madhhab al-Imam al-Shafi'i*, Cairo: Matba'ah Mustafa al-Halabi, 1967, finale ed. 8 Vols.
Short Title: *Nihayah al-Muhtaj*.

74 Al-Rida S R: *Majmu'ah al-Hadith al-Nadjiyyah*, Cairo: al-Maktabah al-Salafiyyah, 1383 AH, 3rd ed.

75 Sabiq S: *Fiqh al-Sunnah*, Beirut: Dar al-Kitab al-'Arabi, 1969, 1st ed. 2 Vols.

76 Al-Sabuni M A: *Rawa'i'u al-Bayan - Tafsir al-Ahkam al-Qur'an*, Makkah & Damascus: Matba'ah al-Ghazali, 1980, 1st ed. 2 Vols.
Short Title: *Rawa'i'u al-Bayan*.

77 Al-Salih S: *'Ulum al-Hadith*, Beirut: Dar al-'Ilm li al-Malayin, 1969, 5th ed.
Mabahith Fi 'Ulum al-Qur'an, Beirut: Dar al-'Ilm li al-Malayin, 1984, 3rd ed.
Short Title: *'Ulum al-Qur'an*.

78 Al-San'ani M: *Subul al-Salam - Sharh Bulugh al-Maram Min Adillah al-Ahkam*, Cairo: Matba'ah Mustafa al-Halabi, 1960, 4th ed. 4 Vols.
Short Title: *Subul al-Salam*.

79 Al-Sarakhsi S D: *Kitab al-Mabsut*, Beirut: Dar al-Ma'arif, undated. 30 Vols.

80 Al-Shafi'i M I: *Al-Umm*, Beirut: Dar al-Ma'arif, undated. 8 Vols.

81 Shaltut M & Al-Sayis M A: *Ayat al-Ahkam*, Cairo: Matba'ah 'Ali Subhi, 1953, 4 Vols.

82 Al-Shawqani M A: *Nail al-Awtar - Sharh Muntaqa al-Akhbar Min Hadith Saiyid al-Akhyar*, Cairo: Matba'ah Mustafa al-Halabi, undated, final ed. 8 Vols.
Short Title: *Nail al-Awtar*.

83 Al-Sijistani A B: *Sunan Abi Dawud*, Cairo: Matba'ah Mustafa al-Halabi, 1983, 2nd ed. 2 Vols.

84 Al-Suyuti J D: *Tanwir al-Hawalik - Sharh Muwatta' Malik*, Cairo: Maktabah al-Mashhad al-Husaini, undated. 3 Vols.
Short Title: *Muwatta' Malik*.

Sunan al-Nasa'i, Beirut: Dar al-Fikr, 1930, 1st ed. 6 Vols.
Ta'rikh al-Khulafa', Cairo: Matba'ah al-Madani, 1964, 3rd ed.

85 Taj A R: *Ahkam al-Ahwal al-Shakhsiyyah Fi al-Shari'ah al-Islamiyyah*, Cairo: Dar al-Kitab al-'Arabi, 1955.
Short Title: *Ahkam al-Ahwal al Shakhsiyyah.*

86 Al-Tanukhi: *Al-Mudawwanah al-Kubra Li al-Imam Malik*, Beirut: Dar al-Fikr, undated. 2 Vols.
Short Title: *Al-Mudawwanah al-Kubra.*

87 Al-Tirmidhi A: *Sunan al-Tirmidhi*, al-Madinah: al-Maktabah al-Salafiyyah, undated. 6 Vols.

88 Al-Tufi N D: *Sharh Mukhtasar al-Rawdah*, Beirut: Mu'assasah al-Risalah, 1989. 3 Vols.

89 'Uthaimin M S: *Tashil al-Fara'id*, Cairo: Maktabah ibn Taimiyyah, 1993, 1st ed.

90 'Uthman A: *Athar 'Aqd al-Zawaj Fi al-Shari'ah al-Islamiyyah*, Riyad: Islamic University of Imam Muhammad ibn Sa'ud - Committee For Research, Compilations, Translations and Distribution, 1981.
Short Title: *Athar 'Aqd al-Zawaj.*

91 Al-Zabidi A A: *Al-Tajrid wa al-Sahih Li Ahadith al-Jami' al-Sahih*, Cairo: Matba'ah Mustafa al-Halabi, undated. 2 Vols.
Short Title: *Al-Tajrid.*

92 Al-Zaidan A K: *Ahkam al-Laqit Fi al-Shari'ah al-Islamiyyah*, Baghdad: Matba'ah Salman al-'Azami, 1968.
Short Title: *Ahkam al-Laqit.*
Al-Madkhal Li Dirasah al-Shari'ah al-Islamiyyah, Baghdad: al-Maktabah al-'Ani, 1969, 4th ed.
Al-Wajiz Fi Usul al-Fiqh, Baghdad: Matba'ah Salman al-'Azami, 1967, 3rd ed.

93 Al-Zaila'i F D: *Tabyin al-Haqa'iq - Sharh Kanz al-Daqa'iq*, Cairo: Dar al-Kitab al-Islami, 1313 AH, 1st ed. 4 Vols.
Short Title: *Tabyin al-Haqa'iq.*

94 Al-Zakhili W: *Al-Fiqh al-Islami wa Adillatuhu*, Cairo: Dar al-Fikr, undated. 8 Vols.

Al-Ijtihād Fī al-Sharī'ah al-Islāmiyyah, Riyad: Islamic University of Imām Muḥammad al-Sa'ūd.

95 Al-Zarqā M A: *Al-Madkhal al-Fiqhī al-'Āmm*, Damascus: Matba'ah al-Hayāh, 1964, 8th ed. 2 Vols.

ENGLISH REFERENCES

96 *Africa South of the Sahara*, England, New Zealand & Japan: Europa Publications Ltd., Staples Printers, 1997, 20th ed.

97 Ameer A S: *A Short History of the Saracens*, Delhi: Kitab Bhavan, 1981.

98 Ahmed A: *Textbook of Mohammedan Law*, Allāhabad: Central Law Agency, 1977, 8th ed.

99 Ahmed S M: *Economics in Islam*, Lahore: Sh Muhammad Ashraf, 1977.

100 Aḥsan S A: *The Last Prophet*, Karachi: Siddiqi Trust, Publication No: 40, undated.

101 Arnold T W: *The Preaching of Islām*, Lahore: M S Ashraf Publishers, 1979.

102 'Aẓamī M M: *Studies in Ḥadīth Methodology and Literature*, Indianapolis: American Trust Publications, 1992.
Short Title: *Studies in Ḥadīth.*

103 'Aziz A: *Abū Bakr - The Caliph*, Karachi: Ghanzafar Academy, 1978, 1st ed.

104 Babu Saheb M H: *Al-Farā'iḍ - The Law of Inheritance in Islām*, Singapore: Islamic Publications, 1979.

105 Barker H S *et al*: *Statute Law of Transvaal*, Cape Town: 1901.

106 Barnard *et al*: *The South African Law of Persons and Family* Law, Durban: Butterworths Publishers, 1986.
Short Title: *The South African Law of Persons.*

107 Bekker J C: *Seymour's Customary Law of Southern Africa*, Cape Town: Juta & Co. Ltd., 1989, 5th ed.
Short Title: *Customary Law.*
Family Law - An Introduction, Cape Town: Juta & Co. Ltd., 1990.

108 Bible Society of South Africa: *The Holy Bible - Revised Standard Version*, London: Collins Clear Type Press, 1984.

109 Boberg P Q R: *The Law of Persons and the Family*, Cape Town, Juta & Co. Ltd., 1977. 1st ed.

110 Brom L (editor): *The New Shorter Oxford English Dictionary*, Oxford: Clarendon, 1994, 3rd ed.

111 Corbett M M *et al*: *The Law of Succession in South Africa*, Cape Town: Juta & Co. Ltd., 1980.

112 Cronje D S P: *The South African Law of Persons and Family Law*, Durban: Butterworths Publishers, 1994, 1st ed.

113 Davids A: *Mosques of Bo-Kaap*, Cape Town: Institute of Arabic and Islamic Research, 1980.
The Early Muslims at the Cape, Cape Town: Muslim Assembly, 1977.

114 De Waal *et al*: *Law of Succession - Student's Handbook*, Cape Town: Juta & Co. Ltd., 1996, 2nd ed.
Short Title: *Law of Succession*.

115 Dicania M: *The Encyclopaedia of Marriage, Divorce & Family*, New York: 1989.

116 Doi A R: *Shari'ah - The Islamic Law*, London: Taha Publishers, 1984.

117 Douglas J D: *Illustrated Bible Dictionary*, Sydney: Hodder & Stoughton, 1980. 2 Vols.

118 Elias A E: Elias' - *Modern Dictionary: Arabic - English*, Cairo: Elias Modern Publishing House & Co. 1983, 14th ed.

119 *Encyclopaedia Americana International*, Connecticut: Grolier Inc. 1988. 15 Vols.

120 *Encyclopaedia Brittanica*, London: Encyclopaedia Inc., 1987. 29 Vols.

121 *Encyclopaedia Canadiana*, Toronto: Grolier of Canada, 1972. 10 Vols.

122 *Encyclopaedia Judaica*, Jerusalem: Keter Publishing House, 1972. 14 Vols.

123 Erasmus H J & De Waal M J: *The South African Law of Succession*, Durban: Butterworths Publishing Co., 1989.

124 Esposito J L: *Oxford Encyclopaedia of the Modern Islamic World*, Oxford: Oxford University Press, 1995. 4 Vols.

125 Galwash A A: *The Religion of Islām*, Cairo & al-Doha: al-Doha Modern Printing Press, 1963. 2 Vols.

126 Glasse C: *The Concise Encyclopaedia of Islām*, London: Stacey Int., 1989.

127 Gottlieb N: *A Jewish Child is Born*, New York: Bloch Publishing Co., 1960.

128 *Government Gazette*, Vol 378 No: 17678, Cape Town: Government Printer, 18 December 1996.

129 Grove P B: *Webster's Third International Dictionary of the English Language - Unabridged*, London: G Bell & Sons Ltd., 1959.

130 Hahlo H R & Kahn E: *The South African Legal System and its Background*, Cape Town: Juta & Co. Ltd., 1973, 2nd ed.
Short Title: *The South African Legal System.*

131 Hailsham Lord: *Halsbury Laws of England*, Butterworths, 1984 4th ed. 50 Vols.

132 Hastings J: *Dictionary of the Bible*, New York: T & T Clark, 1899. 4 Vols.

133 Hiemstra V G & Gonin H L: *Trilingual Legal Dictionary*, Cape Town, Wetton & Johannesburg: Juta & Co., 1992, 3rd ed.

134 Hough M & Du Plessis A: *Selected Documents & Commentaries on Negotiations & Constitutional Development in the RSA 1989 - 1994*, Pretoria: Institute for Strategic Studies, University of Pretoria, 1994.

135 Houtsma M T *et al*: *The Encyclopaedia of Islam*, Leyden: J Brill Ltd, 1934. 4 Vols.

136 *Islamic Development Bank:* Lectures in Islamic Economics, Jeddah: Islamic Research & Training Institute, 1992.

137 Kenny J: *The Risālah - Treatise on Mālikī Law of 'Abd Allāh ibn Abī Zaid al-Qairawānī*, Minna (Nigeria): Islamic Education Trust, 1992, 1st ed.
Short Title: *The Risālah.*

138 Khan A M: *Muḥammad, The Final Messenger*, Lahore: Sh M Ashraf, 1983.

139 Mahida E M: *History of Muslims in South Africa - A Chronology*, Durban: Arabic Circle, 1993.
Short Title: *History of Muslims in South Africa.*

140 Mahmood T: *Personal Law in Islamic Countries*, New Delhi: Academy of Law and Religion, 1987.

141 Manan M A: *Islamic Economic Theory & Practice*, Delhi: Mohammed Ahmed Publishing Co., 1980.

142 Muirhead J: *Historical Introduction to the Private Law of Rome*, London: Adam & Charles Block, 1899, 2nd ed.

143 Nanji A A: *The Muslim Almanac*, New York: Gale Research Inc. 1996.

144 *New Catholic Encyclopaedia*, New York: McGraw-Hill Book Co., 1966. 15 Vols.

145 Pearl D: *A Textbook on Muslim Law*, London: Croom Helm, 1979.

146 Procter P (editor): *Longman's New Universal Dictionary*, Essex: Longman, 1982.

147 Rahman H: *Chronology of Islamic History*, London: 1989.

148 Roth C & Wigoder G: *The New Standard Jewish Encyclopaedia*, London: W H Allen, 1970.

149 Schultz F: *Principles of Roman Law,* Oxford: Clarendon Press, 1936.

150 Sills D L (editor): *The Encyclopaedia of the Social Sciences*, MacMillan & Co., USA: 1968. 18 Vols.

151 Smith T *et al*: *The Laws of Scotland - Stair Memorial Encyclopaedia*, Edinburgh: Law Society of Scotland, Butterworths Publishers, 1989. Vols.

152 Sohm R: *Institutes of Roman Law,* Oxford: Clarendon Press, 1907, 3rd ed.

153 *The Middle East and North Africa*, England *et al*, Europa Publications, Staples Printers, 1996, 42nd ed.

154 Thomas J A C: *Textbook of Roman Law*, Oxford: North Holland Publishing Company, 1979, 2nd ed.

155 Tizard B: *Adoption - A Second Chance*, London: Open Books, 1977.

156 Visser P J & Potgieter J M: *Introduction to Family Law,* Cape Town: Juta & Co. Ltd., 1994, 1st ed.

157 Walker E A (editor): *The Cambridge History of the British Empire*, Cambridge: University Press, 1963. 7 Vols.

158 *Wetboek Van Den Oranjefrijstaat* Bloemfontein: Stoomdrukkerij van den Oranjefrijstaat Nieuwsblad Maatschappij, 1892.

ARTICLES, REPORTS AND STATEMENTS

159 *Al-'Ilm*, Vol 14, 1994, published by the Department of Islamic Studies, University of Durban-Westville, Durban: Article: *The Muslims in South Africa - Problems and Concerns of a Minority* by S E Dangor.

160 Arnold T & Guillaume A: *The Legacy of Islām*, Oxford: Oxford University Press, 1931, 1st ed. Article: *Law and Society*, by D De Santillana, p. 288.

161 *Al-Shajarah - Journal of the International Institute of Islamic Thought (ISTAC)*, Kuala Lumpur: 1997, Vol 2, No. 1: Article: *Towards a Comparative Economic History of the Waqf System* by Murad Cizakca p 63.

162 *Islamic Unity Convention News*, Rylands Estate, Athlone: published by the IUC Public Relations Dept., Johannesburg, *Shawwal* 1415 AH / 1995 CE.

163 *IUC Report on Workshop on the Commission of Inquiry (COI)*, Athlone: dated 16/10/194.

164 *Muslim Views*, Athlone: March 1991, Vol 5 No: 2.

165 South African Law Commission: *Review of the Law of Succession*, Pretoria: 1991.

166 *Statement of P A Lilienfeld*, Secretary of the Constitutional Assembly, Cape Town: dated 29 October 1996.

167 The South African Law Commission: *Nineteenth Annual Report*, Pretoria, Government Printer, 1991.

168 *Majallah al-Ḥiwār*, Beirut: 1987, Vol 2, No: 8: Article: *Family Law* in *Family Law as One of the Factors of Change in Egypt* by A Y Wahdān.

SOUTH AFRICAN LAWS

169 Age of Majority Act, Act 57 of 1972.

170 Agricultural Land Act, Act 70 of 1970.

171 Children's Act, Act 25 of 1925.

172 Children's Act, Act 31 of 1937.

173 Children's Act, Act 33 of 1960.

174 Child Care Act, Act 74 of 1983.

175 Children's Status Act, Act 82 of 1987.

176 Choice of Termination of Pregnancy Act, Act 92 of 1996.

177 Constitution of the Republic of South Africa, Act 200, 1993, Government printer, Pretoria.

178 Criminal Procedure Act, Act 51 of 1977.

179 General Law Amendment Act, Act 62 of 1955.

180 Guardianship Act, Act 192 of 1993.

181 Immovable Property Act (Removal or Modification or Restriction), Act 94 of 1964.

182 Intestate Succession Act, Act 81 of 1987.

183 Law of Succession Amendment Act, Act 43 of 1992.

184 Law 2 of 1868 of Natal Colony.

185 Maintenance of Surviving Spouse Act, Act 27 of 1990.

186 Marriage Act, Act 25 of 1961.

187 Matrimonial Affairs Act, Act 37 of 1953.

188 Ordinance No 50 of 1828.

189 Ordinance 104 of 1883.

190 Ordinance 11 of 1904 of Orange Free State Colony.

191 Ordinance 15 of 1845, Cape Colony.

192 Ordinance 14 of 1903 of Transvaal Colony.

193 Ordinances and Proclamations Relating to the Cape Colony and Natal, 1836 - 1847, published by Saul & Solomon & Co., Cape Town, 1848.

194 Proclamation 23 of 1920 - South West Africa.[1]

195 Republic of South Africa Constitution Act, Act 110 of 1983.

196 South African Constitution Act, Act 108 of 1996.

---

[1] now Namibia.

197 Statutes of the Union of South Africa, 1910 - 1911, Government Printer, Pretoria, 1911.

198 The Administration of Estates Act, Act 66 of 1965.

199 The South Africa Act of 1909.

200 Transitional Executive Council Act, Act 151 of 1993.

201 Trust Property Control Act, Act 57 of 1988.

202 Wills Act, Act 70 of 1953.

203 Working Draft of the New Constitution for South Africa, Cape Town, Constitutional Assembly, 22 November 1995.

SOUTH AFRICAN COURT CASES

204 C & Another vs Commissioner of Child Welfare, Wynberg, (2) SA 76 (C).

205 Kastarn vs Kastarn 1985 (3) SA 325 (C).

206 Pinchin vs Santam Insurance Co. Ltd. 1963 2 SA 254 (W).

207 Schlebusch vs Schlebusch 1988 (4) SA 548 (EC).

208 Van Erk vs Holmer 1992 (2) SA 636 (W).

209 Van der Westhuizen vs van Wyk & Mother 1952 (2) SA 119 (GW).

210 Van Erk vs Holmer 1992 (2) SA 636 (W).

211 Venton vs Venton 1993 (1) SA 763 (D).

FOREIGN LAWS

Constitutions:

212 Belgium - Constitution of Belgium, 1994.

213 Botswana - Constitution of Botswana, 1966.

214 Brunei - Constitution of Brunei Darrusalam, 1984.

215 Byelorus - Constitution of Byelorus, 1994

216 Egypt - Constitution of Egypt, 1980.

217 Germany - Constitution of the Federal Republic of Germany, 1949.

218 Ghana - Constitution of Ghana, 1992.

219 Greece - Constitution of Greece, 1975.

220 India - Constitution of India, 1950.

221 Indonesia - Constitution of Indonesia, 1959.

222 Iran - Constitution of Iran, 1989.

223 Israel - Constitution of Israel, 1958 - 1988.[1]

224 Japan - Constitution of Japan, 1947.

225 Jordan - Constitution of Jordan, 1984.

226 Malaysia - Constitution of Malaysia, 1963.

227 Morocco - Constitution of Morocco, 1992.

228 Pakistan - Constitution of Pakistan, 1990.

229 Sierra Leone - Constitution of Sierra Leone, 1991.

230 Singapore - Constitution of Singapore, 1992.

231 Sudan - Constitution of Sudan, 1985.

232 Tunisia - Constitution of Tunisia, 1959.

233 Zambia - Constitution of Zambia, 1991.

234 Zimbabwe - Constitution of Zimbabwe, 1987.

Personal Law Codes Of Muslim Countries And Of Singapore:

235 Administration of Muslim Law Act, 1985, Singapore.

236 Egyptian Family Law, Law No 100 of 1985, Egypt.

237 Egyptian Law No 25 of 1925 relating to some Matters of Personal Status, Egypt.

238 Family Law of South Yemen, Law 1 of 1974, South Yemen.

---

[1] No formal constitution exists in Israel. Nine basic laws, which had been enacted between 1958 - 1988, have constitutional status.

239 Indonesian Marriage Law, Act 1 of 1974.

240 Islamic Family Act, Act 303 of 1984, Malaysia.

241 Jordanian Family Law, Law 61 of 1976.

242 Law No 5 of 1962, Pakistan.

243 Law No 6 of 1959, Libya.

244 Law No 27 of 1958, Tunisia.

245 *Majallah al-Aḥwāl al-Shakhṣiyyah*, Tunisia, 1988.

246 *Mudawwanah al-Aḥwāl al-Shakhṣiyyah*, Morocco, Law No: 1.5.7.343 of 1957.

247 Muslim Marriage and Divorce Rules, Singapore, 1968.

248 *Qānūn al-Waṣiyyah*, Law 71 of 1946, Egypt.

249 *Qānūn al-Aḥwāl al-Shakhṣiyyah*, Law 188 of 1959, Iraq.

250 *Qānūn al-Aḥwāl al-Shakhṣiyyah*, Law 51 of 1984, Kuwait.

251 *Qānūn al-Mīrāth*, Law 77 of 1943, Egypt.

252 Somali Law No 23 of 1975, Somalia.

253 Tunisian Law No 27 of 1958, Tunisia.

UNITED NATIONS RESOLUTIONS / CONVENTIONS

254 The Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, New York, dated 25 November 1981.

255 *The International Covenant on Economic, Social and Cultural Rights, New York, dated 16 December 1966.*

256 The Universal Declaration of Human Rights, New York, dated 10 December 1948.