ADMINISTRATION OF ISLAMIC LAW OF MARRIAGE AND DIVORCE IN SOUTH AFRICA

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DECEMBER 1993.
I dedicate this thesis to memory of my late parents whose dedication and patience in my upbringing have served me well in life.

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

The present day South African Muslim community has been in South Africa since about 1654 when they first arrived from the Indonesian archipelago and India.\(^1\) The Muslim community received a boost with the arrival of Shaikh Yūsuf, whose real name is 'Abīdīn Tādīa Tsoessoop, from Java in 1694.\(^2\) He was from Macassar, Bantam, in Java.

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

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

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

\(^1\) Davids A: The Mosques of Bo-Kaap, Cape Town, Institute of Arabic and Islamic Research, 1980, foreword p. xv.
\(^2\) Mosques of Bo-Kaap op. cit. foreword, p. xv.
\(^3\) The Early Muslims at the Cape, Cape Town, Muslim Assembly, 1977, p. 5.
\(^4\) Ibid, op. cit, p. 6.
\(^5\) Mosques of Bo-Kaap op. cit. foreword p. xvi.
Madrasahs (Islamic religious schools) where basic instructions in Islam were given to children and adults. This was not sufficient. Furthermore, the paucity of Muslim scholars and *Imāms* (*Imām*: one who leads the prayers) with good knowledge of Islamic sciences created difficulties for the community to maintain Islamic identity in all aspects.

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

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

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

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1 Mosques of Bo-Kaap, op. cit. p. 56.
3 Ibid. op. cit. pp. 70 - 71.
submission to the *Shari`ah* (Islamic law) and following that which the Prophet (S.A.W.S)\(^1\) came with.\(^2\)

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

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

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

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

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

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\(^1\) S.A.W.S is the abbreviation for - ‘sal-lahu `alaihi wa sallam’, the Peace and Blessings of God upon him.

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

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

South Africa lags far behind other countries in this field.

The Netherlands' courts apply the common national law to a divorce petition (of persons married in foreign countries) in accordance with Article 6 of The General Provisions Act of 1829.¹

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

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

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

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

Other Muslim minorities enjoy recognition of their Islamic Personal Law such as the Philippines where the Code of Muslim Personal Law was enacted in 1977, in Thailand where special concessions are allowed for the application of Muslim laws in family relations and inheritance since 1944, Sri Lanka where Islamic Personal Law was recognised from 1770 already and now administered in the comprehensive Muslim Marriage and Divorce Act of 1951 and Singapore where the entire spectrum of Muslim life including the Islamic Personal Law are recognised legally and administered by Muslims according to The Administration of Muslim Law Act, Act 27 of 1966. Prior to this, the Muslim Ordinance of 1957 regulated Muslim Personal Law.² Muslim Personal Law is protected and recognised by the Act of India of 1935 and the Shariah Application Act of 1937.³

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

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

b) to formulate basic Muslim laws of marriage and divorce on the basis of Islamic principles, and
c) to explore the best possible way to administer and implement the Islamic laws of marriage and divorce suitable for operation in South Africa.

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

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

Unfamiliar words have been translated at the top of each page to assist the reader.
Chapter 1

THE NATURE AND SOURCES OF ISLAMIC LAW

1. DEFINITION:

Islamic Law is termed as shari`ah in Arabic. The word shari`ah, in Arabic, literally means "the slopy leading to a drinking place or the drinking place itself where people drink and let their animals drink from."\(^1\)

In its legal meaning, shari`ah means "that which Allah (Almighty God), legislated for His servants." This law is called shari`ah because it resembles the watering place, for as water refreshes the being and is necessary for life, so the shari`ah refreshes and gives life to the soul and mind.\(^2\)

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

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

- freeing the human mind from the slavery of imitation and superstition which is achieved by way of belief in the One and only Almighty God through the *hidayah* (guidance) of a thinking process of knowledge, proof and clear thinking.

- reform of the individual, spiritually and morally and directing him to virtue and good so that his passions and greed cannot overrule his mind nor interfere with his commanded duties. This Islam does by way of lawful worship which reminds the being of his Creator and instils in him the principle of reward and punishment in the Hereafter so that he can strive for attaining good and virtue and abstain from evil and vice.

- reformation of the society in such a manner that general peace and societal justice between all people and protection of acceptable freedoms and respect for human honour can be attained and maintained.¹

In its general pattern, the *shari'ah* operates in two main spheres, namely:

- the sphere of *al ḥuqūq al khāssah* (special rights), in both the civil and criminal spheres, and

- the *al ḥuqūq al ʿammah* (public rights) which encompass both the internal and external spheres i.e. constitutional, administrative and monetary/fiscal spheres in the internal sphere and international affairs in the external sphere.

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

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

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

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

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

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

¹ Al MadKhal al Fiqhi al ʿAmm op. cit. Vol 1 p. 32.
As for the administrative side, the *shari‘ah* granted the *imam* or *khalifah* (Head of the Islamic State), unlimited executive and administrative powers. However, he is restricted to the sources of the *shari‘ah* and functioning of the *shari‘ah* to which all Muslims are bound in its execution. Thus, improper executive imposition or authoritarianism does not enter this scene, thus.

Muslims are expected to obey the *imam*, while the *imam* is required to rule justly and properly. The *Qur‘an* thus commands:

"Obey *Allah*, obey the Messenger\(^1\) and obey the righteous (Muslims) rulers amongst you....."\(^2\)

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

"There is no obedience required to any person if such obedience necessitates the disobedience of the Creator’s laws."\(^3\)

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

In the sphere of monetary matters, the *shari‘ah* placed the *imam* as chief *mutawalli* (trustee) of the *bait al mal* (public treasury) and to use its revenue for the benefit of the public and its welfare.

In the international sphere, the *shari‘ah* enunciated the following principles:

1. all nations are equal in human rights.

\(^1\) i.e. the Prophet Muhammad (S.A.W.S). Only the term "Prophet (S.A.W.S)" will be used hereafter.

\(^2\) *Al Qur‘an, Surah al Nisa’: 59.*

relations between the Islamic State and other States must be based on justice in both peace and wartime.

- the accepted honourable agreements and treaties between the Islamic State and other States are binding in the same manner as contractual obligations between individuals.

- no war is allowed without an announcement of it.

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

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

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

We have come to know that the shari'ah covers the entire spectrum of law in Islam.

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

¹ Al Madkhal al Fiqhi al 'Amm op. cit. Vol 1 pp. 33 - 51.

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

2. DEFINITION OF *FIQH*:

The word *fiqh* is derived from the Arabic verb *faqaha* which literally means "to have a deep understanding". The technical usage of the term *fiqh* restricted its meaning to "knowledge of the *shariʿah* and specifically knowledge of its branches i.e. applied law". Dr Zaidān defines *fiqh* in its literal sense as: "knowledge of something and understanding it" or "understanding the implication of the speech of a speaker." As for the meaning of *fiqh* in the law, it is defined as: "knowledge of the practical applied laws of the *shariʿah*, with its proofs." This is the standard definition with most authorities, although there are variations. For instance, Abū Ḥanīfah defined *fiqh* as "knowledge of what your rights are and what your obligations are."
Fiqh is thus those laws of the Shari‘ah promulgated through His Messenger
Muhammad (S.A.W.S) and all those laws derived from it and which has a practical or
applied value i.e it is practised by Muslims in their daily lives or have need for it in their
daily lives.

3. DIVISIONS OF THE LAWS OF FiqH:

There are seven divisions under this heading and they are:

- laws of `ibādat (worship), namely salah, (prayers), zakah (compulsory
  alms), ṣiyām (fasting and specifically fasting of Ramadān), ḥajj and `umrah
  (pilgrimage and lesser pilgrimage to Makkah).
- laws of the family and having bearing on the family, namely: nikāh
  (marriage), talaq (divorce), nasab (lineage), nafaqah (maintenance) etc.
  These are called al aḥwāl al shakhsiyyah.
- laws pertaining to the acts and inter-reaction of people in the fields of
  money, rights and obligations, settling of disputes etc. This is called al
  muʿāmalat (transactions with legal implications).
- laws pertaining to the ḥakim (ruler) in the Islamic State and those pertaining
  to the governed in matters of obligations and rights between the two
  parties. This is called al aḥkām al sultanīyyah or al siyāsah al sharī‘ah.
- laws pertaining to the criminals and control of internal security called al
  `uqūbat.
laws pertaining to the regulations between the Islamic State and other States during peace and times of war. This is called *al siyar*.

- laws pertaining to morals, good conduct virtue and fairness. This is called *al `adab*.

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

This issue is clearly illustrated in another important and interesting *fiqh* issue regarding judgment by *qada* (judicial process) and judgment by *ifta* (legal dispensation), both of which are valid in the *shari'a*.

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

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

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

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¹ Al Madkhal al Fiqhi al `Amm op. cit Vol 1 pp. 59 - 64.
4. THE MAIN SOURCES OF FIQH

These sources are divided into primary sources and secondary sources.

The primary sources are two in number, namely:

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

The secondary sources are founded on the ijtihād of the mujtahid (independent legist).

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

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

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

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

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

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

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

"Then I will exercise ijtihād...."

The Prophet then struck his chest and said:

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

2 `Abd al `Azīz A R: ʿAl Qaḍa Wa Niẓāmuhu Fi al Kitab Wa al Sunnah, Makkah, Umm Qura University, 1984, p. 321.
"Praise to be to Allah who blessed the messenger of the Messenger of Allah in that which pleases the Messenger of Allah."\textsuperscript{1}

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

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

He received the first Revelation of Quranic \textit{ayāt} in 610 C.E. This continued in Mecca till 622 C.E. when he migrated to Madīnah. This was on 16/7/622 C.E. This time marks the end of the Makki (Meccan) period of Revelation. This migration is called the \textit{Hijrah} from where the Muslim calendar dates.

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

The Prophet (S.A.W.S) died in 632 C.E. in Madīnah and is buried there.\textsuperscript{3}

4.1 THE PRIMARY SOURCES OF FIQH:

As stated previously, they are two in number.

We deal firstly with the Qur'ān.

\textsuperscript{1} Al Sajastānī Abū Dāwūd: Sunan Abī Dāwūd, Cairo, Matba'ah Muṣṭafā al Ḥalabi, 1983, 2nd ed., Vol 2: 297.

\textsuperscript{2} Al Qaḍā' Wa Niẓāmuḥu op. cit. p. 88.

\textsuperscript{3} `ayāt mean verses of the Qur'ān. The singular is āyah.

4.1.1 Definition:

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

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

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

The *Qurʾān* is defined as:

"The Divine Word, revealed to the Prophet Muḥammad (S.A.W.S) and recorded in the *mushaf* (the Qurʾān) and transmitted to us by *tawātūr*².

Dr S Sāliḥ asserts that this is the definition that the learned scholars of *fiqh*, jurisprudence principles and Arabic agree on.⁴ The learned *usūlī* (Muslim authority in the principles of jurisprudence) Shaikh al-ʿĀmīdī defines the *Qurʾān* as: "that Book which was revealed to us, through Jibrīl (the arch-angel Gabriel) from the Almighty and is between the covers of the *Qurʾān* and transmitted to us by *tawātūr*."⁵

From these definitions the *Qurʾān* is thus:

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

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² Al Qadā Wa Nizāmuḥu op. cit. p. 322.
³ continuous uninterrupted transmission.
⁵ Al ʿĀmīdī S D: Al Iḥkām Fī Usūl al Aḥkām, Cairo, Matbaʿah Muṣṭaʿfā al Ḥalabi, Vol 1 pp. 120 - 121.
which was transmitted to us by \textit{tawātur}. The meaning of the Quranic exegesis is included herein, as S Șalih says: "\textit{Tafsir} (Quranic exegesis) existed very early in Islām, in fact right from the era of the Prophet (S.A.W.S), who was the first exegetist of the Qur'ān."\textsuperscript{1}

This is amplified by the Qur'ān itself:

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

\section*{4.2 A SHORT ANALYSIS OF THE \textit{QUR'ĀN}:}

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

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

"We sent you down a Reminder\textsuperscript{3} so that you may explain to mankind what was sent down to them, so that they may meditate."\textsuperscript{4}

In this case, the \textit{ḥadīth/sunnah} is the key to the Qur'ān.\textsuperscript{5}

\begin{enumerate}
\item Al Mabāḥith Fi \textit{Ulūm al Qur'ān}, op. cit. p. 289.
\item Al Qur'ān, Sūrah al Shūrā: 52.
\item \textit{Al Dhikr} here (Reminder) is another word for the Qur'ān.
\item Al Qur'ān, Sūrah al Naḥl: 44.
\item Al Madkhal al Fiqhī al \textit{Amm} op. cit. Vol 1 pp. 60 - 68.
\end{enumerate}
In format, the Qur'an consists of 114 suwar (chapters - sing. surah), each having a name derived from somewhere in the text of the specific surah. These suwar are further divided into 30 ajzā (parts - sing. juz). The main division of the Qur'an is the Revelations of Makki (Meccan) and Madani (Medinite) eras. Makki suwar consist mainly of short āyāt, principles of Theology and beliefs, exhortation to truth and virtue, debates with the pagans and their wrong beliefs, narrations of previous Prophets and nations, speaks about Paradise and Hell and are usually not long. The Madani suwar are long, deal with actual law issues of persons and the State, jihad, debates with the hypocrites and Ahl al Kitāb (Jews and Christians) etc.¹ The following few selected suwar deal with the law subject matter mentioned:

**Surah al Baqarah:**

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

**Surah al Nisā':**

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

¹ Al Mabahith Fi 'Ulum al Qur'an op. cit. p. 183.
**Surah al Ma‘īdah:**

This surah deals with contractual obligations, pilgrimage restrictions, hudūd (prescribed punishments) punishments, final prohibition of liquor, gambling, jihad against the pagans etc.

**Surah al Anfal:**

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

**Surah al Nur:**

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

**Surah al Ahzab:**

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

**Surah Muhammad:**

Deals with procedure of jihad, compulsion of obedience to Allah and His Messenger (S.A.W.S) etc.
**Surah al Hujurat:**

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

**Surah al Mujadalah:**

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

**Surah al Mumtahanah:**

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

**Surah al Jumu`ah:**

Deals with the Friday service and the Jews.

**Surah al Talaq:**

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

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

- those dealing with theological principles and beliefs.
- those dealing with the purification of the soul and conduct.
- those dealing with all other acts besides the above two.
The latter one in "c" above is again divided into two parts, namely:

- all forms of 'ibadat (worship), and
- mu'amalat (transactions with legal implications) which consist of all the required spheres of human activity and matters pertaining thereto.¹

It appears that Dr Zaidān infers a loose usage of mu'amalat encompassing all acts under the shari'ah.

5. THE HADITH/SUNNAH:

This is the second primary source by consensus of all the 'ulamā' (sing. alim - the learned scholars of shari'ah), fuqaha' (sing. faqīh - expert jurists of jurisprudence), usuliyyun (sing. usuli - legists/authority in principles of jurisprudence) and other branch scholars of the shari'ah.

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

¹ Al Madkhal li Dirasah al Shari'ah op. cit. p. 186.
Al Qāḍā Wa Nizāmuhu op. cit. pp. 319 - 321.
5.1 Definition:

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

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

5.2 PECULIARITIES OF THE *HADĪTH*:

- *Hadīth* is the key to the *Qur'ān*, explaining the principles and generalities.

"He (S.A.W.S) explained to the people what was revealed to him.... He carried this responsibility alone, carrying out the obligations on him (herein).... until he died."

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In explaining the ayah referring to the birth of Mariam (Mary - later mother of `Isa (Jesus - A.S.), the Prophet (A.S) read:
"....and I seek refuge with You (Allah) for her and her offspring from the outcast Satan."¹

Thereafter he said as narrated by Abu Hurairah (R.A)
"No one is born save that Satan touches him when he is born which causes the infant to cry out, save Mariam and her son."²

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

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

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

`Imran bin Husain narrates that a man asked the Prophet (S.A.W.S) if there was any mirath⁵ due to him from his deceased grandson (son of his son), to which the Prophet (S.A.W.S) replied: “You get one sixth...."⁶ The first ruling on zakah al fitr is based on the Quranic welfare principle to people

¹ Al Qur’ān, Surah al `Imrān: 36.
² Al Bukhārī M I: Sahīh al Bukhārī, Cairo, Matba`ah Mustafā al Ḥalabī, undated, Vol 6: 42.
³ Fī al Tashrī al Nabawī, op. cit. p. 36.
⁶ inheritance.
⁷ Sunan Abī Dawūd op. cit. Vol 2 p. 121.
while the second one is based on the general Quranic concept of fatherhood and as understood in the line of wilāyah.

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

- it is a secondary source to the Qurʾān and as such does not depart from the texts of the Qurʾān nor the general principles of the shariʿah. In organising the civil code, the Prophet (S.A.W.S) ruled as narrated by Jabir (R.A) “that they are not to sell dates until the fruit is present and in good condition.” This is based on the Quranic principles of honesty and exchange of real goods.

- all matters of shariʿah, which the hadīth complement or explain, have to be obeyed compulsorily as it is a complement then of the Qurʾān, completing the law itself. No one is allowed to give another ruling in this case. This refers to issues like ḥajj and contracts.

The Qurʾān commands:

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

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1 Al Madkhal li Dirāsah al Shariʿah, op. cit. p. 194.
2 Mukhtasar Sahih Muslim, op. cit. p. 246.
3 Fi al Tashriʿ al Nabawi, op. cit. p. 36.
4 Al Qurʾān, Surah al Baqarah: 196.
entered into the *ihram* (state of starting pilgrimage rites) at the mosque of Dhū al Hulaifah.\(^1\)

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

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

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

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

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

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

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

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

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3 Al Qur`ān, Surah al `Imrān: 31.

4 Al Qur`ān, Surah al Najm: 2 - 5.

5 Al Qur`ān, Surah al Ḥāshr: 7.
The general sequence of the quoted ayat obligates following of both the Qur'an and hadith/sunnah.

6. THE SECONDARY SOURCES:

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

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

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

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

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

Al Qurtubi in his exegesis states:

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

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2 Al Qur’an, Surah al Nisa’: 83.
The verb - *yastanbitunahu* - means "extracting" indicating that those who are empowered to deliver judgment are to be consulted.  

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

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

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

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

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

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

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

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1 Al Ġami` li Ġhkam al Qur`ān, op. cit. Vol 5 p. 291.
   Wajiz Usūl al Fiqh, op. cit. p. 150.
   Al Madkhal al Fiqhi al `Āmm, op. cit. Vol 1 p. 71.
6.1.1 **Analysis of the Definition of Ijma**:

From the definition it is noted that:

- there must be full agreement on the judgment reached, thus if any of the mujtahidun (independent legists) differ or even one of them, then no *ijma* is founded, but a majority and a minority ruling will be founded.
- those deciding the issue must be mujtahidun.  
  Thus if the persons gathered are not mujtahidun no *ijma* is founded.  
  (It is important to know who a mujtahid is and such qualification they must have are listed hereunder.)
- the mujtahidun must be Muslims, thus non-Muslim persons whether they are jurists of their systems or not, cannot found *ijma*.
- their ruling must be founded after the death of the Prophet (S.A.W.S) as during his lifetime, he was the law entity on earth and gave the laws as revealed to him or as he was empowered to do so by Allah.
- they must decide on a *hukm shar*I, i.e. a shari`ah ruling on a matter which has no ruling yet and which is "new". Thus if there is already a ruling in the Qur’an or hadith/sunnah, such a ruling is taken and no *ijma* (juristic consensus of opinion) can take place. The *hadith* of Mu`adh bin Jabl on this issue quoted before is clear therein as well as other shari`ah texts.
- *ijma* must have a mustanad shar*I (a supporting shari`ah proof). Thus *ijma* based on other than mustanad shar*I is void.\(^1\)

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\(^1\) Wajiz Fi Usul al Fiqh, op. cit. pp. 150 - 152.  
Al Madhkhal al Fiqhi al `Amm, op. cit. Vol 1 p.71.
6.2 SHURUT OF THE MUJTAHID (INDEPENDENT LEGIST):

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

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

He must also know the causes for the hadīth to be found as well as its meaning, strength of texts, selection process of texts, cancellations that occurred in application of these texts, knowledge of hadīth dealing with law matters and the law extracted from it, to know the 'ulum of hadīth and the science of criticism of hadīth.
- knowledge of usul al fiqh (principles of jurisprudence) because every mujtahid must be a faqih. Thus he must know all the proofs in shari'ah and
its order of standing as well as the approved ways of law extraction, proofs derived from word usage and its procedure and the laws of selection in proofs.

- knowledge of *ijma* (juristic consensus of opinion). He must know all the issues in which there is *ijma* so that he does not breach the *ijma* of the *ummah*.

- knowledge of the *maqasid* (aims) of the *shari'ah*. He must thus know the reasons for the laws ("ilal al ḥukm) as well as the *masalih* (sanctioned benefits) of the Muslims within the ambit of the *shari'ah* so that he can extract laws for application to the people by way of *qiyaṣ* (analogical reasoning) or by *masalih* or by *`adat* (customs) of the people in their dealings with one another.

- to be naturally inclined to *ijtiḥād*. This means he must be in a position to exercise *ijtiḥād* for if he is not, the other *shurūṭ* will be useless.

### 6.3 Proof of the Validity of *IJMA* (Juristic Consensus of Opinion):

The validity of *ijma* is confirmed by *Allāh* Himself in the Qur'ān. *Allāh* says:

"And whoso opposes the Messenger after the Guidance (of *Allāh*) has been manifested unto him, and follow other than the believers' way, We appoint for him that unto which he himself has turned, and expose him unto Hell - a hapless journey's end -.

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

2 Al Qur'ān, Surah al Nisa': 115.
way of the Muslims. Thus, the way of the Muslims is the right and correct way and is incumbent to be followed and the ways or ways besides that specific way is forbidden to be followed.

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

6.3.1 The Kinds of Ijma‘ (Juristic Consensus of Opinion):

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

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

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

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

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

¹ Al Iḥkām, op. cit, Vol 1 p. 150.
The other two forms of *ijma* ` sarih are localised *ijma* ` forms. They are *ijma* ` *al iqlimi* and *ijma* ` *al mahalli*.

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

As for *ijma* ` *al sukūtī* (silent judicial consensus of opinion), there is a difference of opinion amongst the *fuqaha* ` as to its binding force. This form of *ijma* ` (juristic consensus of opinion) is formed when some *mujtahidun* or even one *mujtahid* expresses a juristic opinion on a *mas’alah* (juristic problem) which has no *shari‘ah* ruling yet and which needs a *shari‘ah* ruling. Theirs or his ruling reaches the other *mujtahidun* and the latter keep quiet thereon, not expressing reservations nor criticising it either.

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

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

¹ Wajiz Fi Usul al Fiqh, op. cit. p. 150.
² one of the senior Sunni Fiqh Schools of Thought, founded by Nu‘man bin Thabit al Kufi, commonly known as Abu Hanifah in the Fiqh works. His followers are called Hanafis.
³ another senior Sunni Fiqh School of Thought, the founder of whom was Abu Abd Allah Ahmad bin Hanbal bin Hilal bin Asad al Shaibani, commonly known as Ahmad in the Fiqh works.
that it is ordinary *ijtihad* (juristic opinion) and not even of the level of *hadith* and is thus ordinary juristic opinion. This is the view of *Malik*¹ and *al-Shafi'i*.²

- that it is not compulsory to be followed, but fall in the category of *hadith* strength. This is the view of some *Hanafis* and some *Shafi'is*.³

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

### 6.4 *AL QIYAS* (ANALOGICAL REASONING):

The word *qiyyas* is derived from the Arabic verb *qasa*, which means *taqdir* or *muqaranah*. Literally thus *qiyyas* means "to compare or measure or estimate similar things."⁴

In the *shari'ah*, *qiyyas* is defined as:

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

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

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¹ another senior founder of a Sunni Fiqh School of Thought. His real name is Malik bin Anas al-Asbahi. His followers are called Malikis. Malik was the Imam of Fiqh in Madinah during his time.

² another senior founder of a Sunni Fiqh School of Thought. His real name is Abu' Abd Allah Muhammad Idris Al Shafi'i. His followers are called Shafis.


⁵ Bulugh al Sul, op. cit. p. 88.

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

Due to the difficulty of the enactment of ijma' from the time of 'Uthman, the third of the al khulafa' al rashidun, qiyas became the most widely used source in fiqh. Examples of the qiyas rulings are the laws of waqf (endowment) taken from the law texts on wasaya (legacies) and applying the laws of the wasi (legal guardian) to the waqif (one who makes an Islamic endowment).

Also the application of the laws of bai' (sale) on ijarah (leasing) due to the similarity between the two as bai' is the transfer of ownership and ijarah the transfer of benefit without ownership.\(^4\)

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1 Al Qur'an, Surah al Ma'idah: 90.
2 Al Munjid, op. cit. p. 195.
4 Al Madkhal al Fiqhi al `Amm, op. cit. pp. 73 - 77.
6.5 **AL ISTIHSAN:**

*Istihsan* literally means "to think something to be good."¹

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

"the suspension of ruling by *qiya`s* (analogical reasoning) for a ruling better than it or which necessitates it."² This is the general definition for there are variations amongst the *fuqaha* herein due to their scope of usage of *istihsan*.

In this light, *al istihsan* is the opposite of *qiya`s*.

There are two kinds of *istihsan*, namely:

- *istihsan qiyasi* , and
- *istihsan darurah*.

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

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

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Al Munjid, op. cit. p. 134.
Adillah al Tashri`, op. cit. p. 155.

² Maṣādir al Tashri` al Islāmī, op. cit. p. 71.
Adillah al Tashri`, op. cit. pp. 157 - 158.
This is based on the rule that the second partner is not under obligation to demand his share from the party that received the advance.

*Istihsan darurah* is more of a *masalih* nature, than of a *qiyas* nature.

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

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

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

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1 Al Madkhal al Fiqhi al 'Amm, op. cit. Vol 1 pp. 84 - 89.
6.6 **AL ISTISLAH OR MASALIH AL MURSALAH:**

*Al Istislah* literally means "acquiring benefit".¹

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

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

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

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¹ Qāmūs al Muḥīṭ, op. cit. Vol 1 p. 243.  
Al Munjid, op. cit. p. 432.

² Maṣādir al Tashrī al Islāmī, op. cit. p. 85.  
Adillah al Tashrī, op. cit. p. 190.

³ Al Qaṣā Wa Niżāmuḥu, op. cit. pp. 374 - 375.  
Al Madkhal al Fiqh al `Āmm, op. cit. Vol 1 pp. 98 - 100.  
Adillah al Tashrī, op. cit. p. 190.
The principle of istislah is clearly reflected in the Qur'an itself:

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

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

_Dhara'i_ is the plural of _dhari'ah_. _Dhari'ah_ means literally "a way which is resorted to by a person in any matter."

In the _shari'ah_ it is attributed to "ways and means of preventing any evil or sin or the blocking of ways and avenues which may lead to evil and sin."

As the definition indicates, it is a wide field of operation for the _fuqaha' _ to operate in safeguarding the Muslim _Ummah_ and protecting its values in all spheres of human life.\(^2\)

Some _fuqaha' _ classify _dhara'i_ under _al istislah_ and not as a separate source in its own right.

Zaidan mentions some cases of the Prophet (S.A.W.S) and after him his _sahabah_ (R.A.H) employing this principle of _sadd al dhara'i_

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

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\(^1\) Al Qur'an, Surah al-`Araf: 33.

\(^2\) Wajiz Fi Usul al Fiqh, op. cit. p. 209.
the Prophet (S.A.W.S) prohibiting the loan debtor of giving his creditor a gift over and above the amount repaid to prevent *riba* (usury) entering the contract in another way.

- the *sahabah* (R.A.H) in their ruling inheritance to the *mutallaqah ba'inah* (irrevocably divorced woman) when her husband divorces her irrevocably on his sickbed from which he eventually dies, thus preventing him from excluding her from his estate on his deathbed wilfully and unlawfully.¹

**6.8 AL `URF:**

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

In the Qur'an, Allah uses the word `urf to mean "good and virtuous".

"Practice forgiveness, command what is good (`urf)...

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

In the shari`ah `urf is defined as:

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

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

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¹ Al Madkhal li Dirasah al Shari`ah al Islamiyyah, op. cit. p. 204.
² Qamus al Muht, op. cit Vol 4 p. 178.
³ Al Munjid, op. cit. p. 500.
⁴ Al Jami` li Ahkam al Qur’an, op. cit. Vol 7 p. 344.
⁵ Al Qaqa Wa Ni zamuhu, op. cit. p. 375.
Al Madkhal Li Dirasah al Shari`ah al Islamiyyah op. cit. p. 205.
There are two kinds of 'urf - 'urf sahih (proper and lawful 'urf) and 'urf fasid (invalid 'urf).

'Urf sahih is that 'urf which the people practice and which does not clash with any of the shari'ah laws of halal and haram and neither opposes any of the compulsory orders of the shari'ah.

On the other hand 'urf fasid is that 'urf which people practice and which contradicts shari'ah law or legalises haram or prohibits halal.¹

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

- the 'urf must be practised in the land or place.
- the 'urf must not clash with any of the shari'ah laws already enacted in the shari'ah and must not undo any of the laws of halal and haram.

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

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

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

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¹ Al Qada Wa Nizamuhu, op. cit. p. 376.
That which the Muslims see as good, is good for them."

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

- Custom is law.
- Word usage is subject to customary meaning of such words.
- That which is accepted by custom is as that which had been legally set.
- Specification by custom is as specification by the shari'ah text.¹

6.9 QAWL OR MADHhab (SCHOOL OF LAW) OF A SAHABī:

By this is meant the fatwa' (legal dispensation) of a sahābī.

After the death of the Prophet (S.A.W.S), the learned in shari‘ah and fiqh of the sahābah gave fatawa and judgments in law to the people who needed them.

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

The issue is thus the individual fatwā' of a sahābī. Herein the fuqaha' differ.

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

¹ Al Madkhal al Fiqhi al 'Amm, op. cit. Vol 1 pp. 143 - 148.
Maṣādir al Tashrī' al Islāmī, op. cit. pp. 146 - 147.
Those who subscribe to this view are, according to ibn Taimiyyah, Abu Hanifah, Malik, Ahmad bin Hanbal and al Shafi‘i in one of the narrations from him.

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

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

6.10 AL ISTISHAB:

Al istișhab is the noun of istashaba which means "to have something or someone or ask someone to accompany you."

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."

There are three main principles emanating from al istișhab and they are:

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

1 Al Qa‘da Wa Niṣμuḥu, op. cit. pp. 370 - 382.

2 Qamūs al Muḥit, op. cit. Vol 1 p. 95.
Al Munjidi, op. cit. p. 416.
Adillah al Tashri‘, op. cit. p. 275.

earth. Also the \textit{ayah}: "...and had made of service unto you whatsoever is in the heavens and whatsoever is on the earth."\textsuperscript{2} Application of this rule is also found in the issue that all contracts are valid if no text or precedent of prohibition exists.

- that which is established is not cancelled by a doubt. Thus, someone whose marriage to someone else is certain is taken as married and doubt to the existence of the marriage does not interfere with the standing and thus consequences of that marriage.

- the original status of any person is innocence. This means that anyone accused of any misdemeanour is innocent until proven guilty by due process of the law as according to the shari`ah. Also, someone claiming a right from someone else is assumed not to have that right until it is proven as claimed.

\textit{Al istishab} is the weakest of all the \textit{ijtihad} proofs because, it only confirms a previous state or condition.

It is not allowed to implement it save after having searched for a proof pertaining to the given situation using the other proofs of shari`ah and only after finding none is resort made to \textit{al istishab}.

The Malikis, Hanbalis and most Shafi`is accept \textit{al istishab} as a shari`ah proof while most Hanafis reject it.\textsuperscript{3}

\textsuperscript{1} Al Qur`an, Surah al Baqarah: 29.
\textsuperscript{2} Al Qur`an, Surah al Jathiyah: 13.
\textsuperscript{3} Ma\textsuperscript{\textperiodcentered}adir al Tashri` al Islami, op. cit. pp. 151 - 153. Al Qad\textsuperscript{\textperiodcentered} Wa Niz\textsuperscript{\textperiodcentered}muhu, op. cit. pp. 376 - 378.
7. THE INDISPENSABILITY OF SHARI`AH TO MUSLIMS:

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

As Houtsma and others say:

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

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

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

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

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

Allah warns in the Qur’an against disobeying the Law:

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

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² Al Qur’an, Surah al Dhariyat: 56.
³ Al Jami` li Aḥkām al Qur’an, op. cit. Vol 17 p. 56.
⁴ Al Qur’an, Surah al Ma`idah: 44.
"...whoso does not judge by that which Allah revealed, such are the wrong-doers."\(^1\)

"...whoso does not judge by that which Allah has revealed, such are the evil-doers."\(^2\)

The command is much more direct in Surah al `Imran:

"Obey Allah and the Messenger."\(^3\)

The mechanism of solving disputes is also clearly stated:

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

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

The command then goes further:

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

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1 Al Qur'an, Surah al Ma'idah: 45.
2 Ibid, op. cit. 47
3 Al Qur'an, Surah Al `Imran: 32.
4 Al Qur'an, Surah al Nisa': 59.
5 Ibid, op. cit. 65.
Finally, *Allah* says:

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

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

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

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

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

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

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

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¹ Al Qur’an, Surah al Ahzab: 36.
Some of these States have marginally accepted some minor aspects of the Islamic Personal Law, mostly of a nature that will save their States maintenance payments, or such acts which they can construe to mean a legal act in terms of their secularist laws. There is an emphatic and manifest negative response to the recognition of the Islamic Personal Law for Muslim minorities in such States, a stance which is against fairness and justice.

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

The above matter of Muslims’ plight with their Islamic Personal Law will be dealt with in detail in chapter six of this thesis to give clarity on this matter.
Chapter 2

MARRIAGE AND ITS LEGAL POSITION IN ISLĀM.

1. DEFINITION:

Marriage is called zawaj or nikah. In this thesis the word nikah will be used.

The word nikah (marriage) comes from the Arabic verb naka'ah which means tazawwaja. Tazawwaja means "to marry". This is also the opinion of al 'Asha.\(^1\)

In the lingual origin, nikah means dam and jam ḍam, meaning "to bring together" and "to unite" respectively.\(^2\)

In the shari'ah, various definitions have been proffered. The Qur'an and ḥadīth use the term to mean tawwi'īj i.e "marriage". Most of the linguist accept this view. Al-Jawhari asserts that nikah literally means the "marital act" and metaphorical, the "aqd al nikah (marriage contract).\(^3\)

Through the above variation the fuqaha' have given their definitions. The Hanafis agree with al Jawhari's definition while the Shafi'īs assert that nikah is "aqd al nikah which includes the privilege of cohabitation. Malikīs state that it means "an 'aqd (contract) which allows the intimate enjoyment of husband and wife relationship."

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The Ḥanbalis have virtually the same definition as the Ḥanafis.¹

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

The Encyclopedia Britannica defines "marriage" as:

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

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

2. THE PRE-ISLAMIC ERA SYSTEM OF MARRIAGES:

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

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

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


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

3. THE PLACE OF \textit{NIKĀḤ} (MARRIAGE) IN ISLĀM:

As pointed out in the previous chapter, worship is an all-encompassing act in Islam. \textit{Nikāḥ} is one of these acts to which the Qurʾān alludes. Here are some:

- Marriage was the way of the Prophets.
  
  
  "And verily We have sent Messengers (to mankind) before you (Muḥammad) and We appointed for them wives and offspring...."\textsuperscript{1}

- Marriage is exhorted to:
  
  "And \textit{Allāh} has given you wives of your own kind and has given you, from your wives, children and grandchildren and has made provisions of good things for you...."\textsuperscript{2}

- Marriage is of the Signs of \textit{Allāh}:
  
  "And of His Signs is that He created mates from amongst yourselves that you might find repose in them, and He has put between you affection and mercy. Verily in that are Signs for men of knowledge."\textsuperscript{3}

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

\begin{itemize}
  \item \textsuperscript{1} Al Qurʾān, Surah al Ra`d: 38.
  \item \textsuperscript{2} Al Qurʾān, Surah al Nal: 72.
  \item \textsuperscript{3} Al Qurʾān, Surah Rum: 21.
\end{itemize}
The following is a hadith usually read in the marriage sermon:

Alqamah narrated that the Prophet (S.A.W.S,) said:

"Oh Youth! Whoever of you is able to marry, let him marry, for it is better for his sight and modesty: and whoso cannot (afford marriage), let him fast for it (fasting) will control the (sexual) desire."¹

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

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

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

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

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

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

¹ Sahih al Bukhari op. cit. Vol 4 p. 3.
² Mukhtasar Sahih Muslim op. cit. p. 208.
Nikah is thus cardinal to Islamic civilisation as such. Being such an important issue, it stands to reason that there has to be laws for its enactment, functioning, consequences and related issues and its dissolution. Thus the Personal Law Code is extensively dealt with in the shari‘ah to care for this very important facet of Muslim existence.¹

4. **NIKAH AND ITS LEGAL POSITION IN ISLAM**

The main issues concerning nikah in Islam are:

- **wilayah** (guardianship).
- **khitanah** (betrothal).
- **sadaq** (dowry).
- **arkan of nikah** (principal requirements of marriage).
- **ahkam of nika** (laws of marriage).

4.1 **WILAYAH:**

The word *wilayah* is the gerund of the Arabic verb *waliya*, which means *nasir* i.e. a helper.²

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

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

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

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

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

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

4.2 PURPOSE OF WILAYAH IN ISLAM:

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

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

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¹ Lisân al 'Arab, op. cit. Vol 6 p. 4920.
Al Ḥuṣārī A: Al Wilayah Wa al Wasaya Wa al Talaq Cairo, Maktabah al Kulliyat al Azhariyyah, undated, pp. 1 - 3.
knowledge of who is who, or can make enquiries without causing moral problems. They can thus then direct and guide their daughters or sisters or nieces better. It is rather a cooperative partnership in real practical terms - the wali guides and advises and the woman makes up her mind herself. Islam being strongly against the incorporation of evil elements into good families, has given the wali the right to object if a choice, which is against the shari'ah, is made, and insisted upon.

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

4.3 **AHKAM FOR THE WALI:**

The following ahkam is applicable to every wali:

- He must be a free Muslim, 'aqil (sane) and baligh (mature). The vast majority of fuqaha' require 'adalah (righteousness) as a necessary requirement, save the Ḥanafis. Ibn 'Abidin says that this means that he is not allowed to marry off the woman to someone lower in rank and status than her nor for less than sadaq mithl, if he does it will not be enforceable. If he does marry her off within her rank and sadaq mithl, it will still be valid and binding with legal consequences.

- The nearest 'asib (agnate) takes the wilayah. The taking over of the wilayah by the distant related wali when the near related wali is present is invalid by Shafi'is and Ḥanbalis, but valid by Ḥanafis and Malikis. However,

\footnote{this is a dowry equal to a dowry of woman of the same standing or of women of her family.}
the Shafi`is and Hanbalis approve of the distant wali taking over the
wilāyah when the near wali does not comply with the requirements of
ahliyyah\textsuperscript{1} or has a physical prohibition to executing his wilāyah like being
far away or being imprisoned or being missing. (Being far-away nowadays
is not an issue as the qādī (judge) can write to him to obtain instructions,
if the wali has a domicile.)

\begin{itemize}
\item When the wali unlawfully obstructs the woman under his wilāyah from nikah
(marriage), she has the option to petition the qādī herein. If she succeeds
in her application, the Sultan or qādī takes over the wilāyah. The Hanafis
differ in that and rule that the next in line of wilāyah of the `asabāt
(agnates) assumes the wilāyah and not the Sultan or qādī. Malikis differ
further on this issue by ruling that if the lawful wali of a woman has not got
the wilāyah mujbirah (wilāyah of the legitimate father or paternal
grandfather), then she can appoint any Muslim male with ahliyyah (having
legal capability) to act as her wali as Malik considers in such cases, each
and every Muslim male with ahliyyah as a wali. However, this is only for
women who are not wealthy, beautiful or of high rank according to some
Malikis.\textsuperscript{2}

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

\textsuperscript{1} having legal capability.
\textsuperscript{2} Fiqh Madhahib Arba'ah Vol op. cit. Vol 4 pp. 26 - 28
Al Qairawānī A A: The Risālah, translated by Joseph Kenny, Minna, Nigeria, Islamic Education
These *fuqaha'* took their ruling from their understanding of Qur'anic *ayat* (verses) on *nikah* in which the masculine form of the Arabic verb *naka*ḥa is used.

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

"And marry off such of you as are solitary..."\(^2\)

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

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

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

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

"...and do not forbid them from marrying their (former) husbands."\(^3\)

Ma‘qil consented to the remarriage and asked the Prophet to perform it. This is narrated by al Hasan.\(^4\)

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

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

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1 Al Qur‘an, Surah al Baqarah: 221.
2 Al Qur‘an, Surah al Nur: 32.
3 Al Qur‘an, Surah al Baqarah: 232.
4 Sahih al Bukhari, op. cit. Vol 7 p. 75.
consummated, her ṣadaq (dowry) is due to her, and if her wali refuses consent, then the Sultan is the wali for the one who has no wali. Abū Dawūd transmitted as well as Āḥmad, al Tirmidhī and Ibn Majah. Al Tirmidhī further transmits that: “there is no valid nikāḥ without a wali.” He further contends that this is accepted by the saḥābah and the ʿulama’.

Accepting this view of wilāyah in nikāḥ are, of the saḥābah: `Umar and `Ali and of the tabiʿun ibn Musaiyyib and al Hasan al Basri and of the fuqaha’ al Thawrī, Malik, al Shafīʿī, Āḥmad, ibn Hazm, al Tabarī et al.3

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

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1 Sunan Abī Dawūd, op. cit. Vol 1 p. 566.
If, however, the wali of the woman is the Sultan (Head of State) or the qadi or a qarib (relative) other than the legitimate father or legitimate paternal grandfather of the woman, they have none of the above powers of objection in wilayah according to the Hanafi madhhab. This is so as none of them can suffer from the `ar (disgrace) in this matter.

Hanafis advance the following proofs for their ruling:

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

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

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

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

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

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

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

¹ Al Qurʾān, Surah al Baqarah: 230.
² Al Qurʾān, Surah al Baqarah: 232.
there can only be interference by the *wali* when she may have made a bad decision and "defiles" the honour of her *wali* and his family. This right of interference has nothing to do with the enactment of the *'aqd al nikah* (marriage contract) enacted by the woman herself. This is specifically so when her legitimate father is her *wali*.

- all *ahadith* referring to *wilayah* in *nikah* are thus construed to mean *wilayah* on women who do not have full required *ahliyyah*.1

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

- Al Bukhari and Muslim transmit that Hansa bint Juth’am, a *thaiyyib*, was married off to a man she detested. She came to the Prophet (S.A.W.S) to complain and he annulled the *nikah*.

- its established in the *Sunan* (Prophetic practice), by narration of ibn ‘Abbas that a maiden came to the Prophet (S.A.W.S) complaining that her father married her off to a man and she was not consulted therein. The Prophet (S.A.W.S) gave her the option of choice to either continue the *nikah* or to have it annulled.2

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2 Ibn Qa`iyîm Al Jawzîyyah: Zâd al Ma`ad Fi Hadîy Khâr al ˝Ibad, Makkah, al Matba`ah al Miṣrîyyah, undated, Vol 4: 2
Hadith texts are quoted by some authorities pointing to the necessity of receiving the consent of women during the process of their nikah being enacted.

- Ibn `Abbas narrates that the Prophet (S.A.W.S) said: "The thaiyyib is not married off without her explicit consent and the never married bikr's permission is required and her consent is her silence. Text transmitted by the Jama`ah.

- Ibn `Abbas also narrates: "the thaiyyib is not married off without her explicit consent and the never married bikr is consulted by her father." Text transmitted by Ahmad, Muslim, Abu Dawud and al Nasa`i.

- `Abd Allah bin Buraidah narrates from his father: "A maiden came to the Messenger of Allah (S.A.W.S) and said: "my father married me off to my paternal cousin to vent his meanness on me." The Messenger of Allah then placed the matter in her hand (i.e. to choose to remain married or to have it annulled). The woman replied: "I consent (now) to what my father did, but I wish to teach the women that their fathers cannot do this unto them." ¹

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

4.4 THE WILAYAH OF THE ŞAGHÄ’IR (MINORS):

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

¹ Figh al Sunnah, op. cit. Vol 2 p. 119 - 120.
Zad al Ma`ad op. cit. Vol 4 p. 2.
Mukhtasar Sahih Muslim op. cit. p. 208 - 209.
attained the age of taklīf (pubescence). Also those who have reached puberty but are not sane (i.e. mad, retarded, simple and the like).

The laws of wilāyah in nikāh for them are as follows:

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

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

If these rules are not met, the nikāh will be invalid.¹

From the aforementioned, it is clear that the proper understanding of wilāyah is that the Qur’anic ayat and ahadith pertaining to wilāyah should be read together.

The atmosphere that should exist in a Muslim nikāh is mentioned in the Qur’ān:

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Al Mālīkī, Khalil bin Ishaq: Mukhtasar Khalil fi Fiqh al Imam Mālik, Cairo, Matba`ah Mustafa al Ḥalabi, 1922, p. 99 - 100.
Al Khāṭib, Shams al Din: Al Iqna` fi Ḥal Alfaz Abi Shuja`ah, Cairo, Matba`ah Mustafa al Ḥalabi, 1940, final ed., Vol 2: 78.
Al Maqdisī, Muwaffaq al Din: Al Muqni`, Cairo, Al Matba`ah al Salafiyyah, undated, p. 208.
"And of His Signs is this: He created for you partners from amongst yourselves that you might find rest in them, and He ordained between you love and mercy..."\textsuperscript{1}

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

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

It is thus impossible to achieve this if women have no say in the nikah and its contractual terms.\textsuperscript{2}

4.5 PERSONS MERITING WILAYAH OF NIKAH:

There is ikhtilaf (difference of opinion) amongst the fuqaha' herein. The Hanafis list them as the 'asabat (agnates) - (males directly linked to your legitimate father without the entering of a female in the lineage like you paternal grandfather, your brother etc.) followed by the Dhaw\textsuperscript{u} al Ar\textsuperscript{ham} (non 'asabat male relatives), followed by the Sultan and finally the qadi. There is a difference of opinion amongst the fuqaha' on the categories of these persons as well as the order they follow.

The line of wilayah is as follows:

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

\textsuperscript{1} Al Qur\textsuperscript{an}, Surah al R\textsuperscript{um}: 21.

\textsuperscript{2} Zad al Ma'\textsuperscript{ad}, op. cit. Vol 4 p. 2.
then the woman's legitimate father. If not found, then his legitimate father, how highsoever.

then her legitimate shaqiq (full) brother (i.e. from the same father and the same mother). If not found, then his son, how lowsoever.

then her paternal akh li abb (half brother) i.e. consanguine brother. If not found, then his son, how lowsoever.

then the legitimate `amm shaqiq (full paternal uncle). If not found, then his son how lowsoever.

then the legitimate `amm li abb (consanguine paternal uncle). If not found, then his son how lowsoever.

if none of the above are found, then the grand-uncle in the sequence of nearest of relation to the woman as for all the aforementioned categories. Thereafter the great-grand uncle, as for the grand-uncle.

hereafter the distant paternal cousin who is the weakest of the `asabat relatives. When there are no `asabat to be found, then the Dhawū al Arḥām takes on the wilāyah, the strongest and nearest in qarabah (relation to the woman) takes on the wilāyah.

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

Hanafis are distinct amongst all the fuqahā' in Islām in that they follow a part female pattern in the arḥām category who fall in the inheritance pattern according to them. They are (in relation to the woman): her mother, then her sister, then the latter's daughter, then her daughter, then the daughter of the grandson, then the daughter of the granddaughter, then the shaqiqah (full sister), then the ukht li abb (consanguine
sister), then the *ukt li umm* (uterine sister), thereafter the paternal aunts, then the maternal uncles followed by the maternal aunts, then the daughter of the legitimate paternal uncles, then the daughters of the paternal aunts.

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

Hereafter the *mawla muwala* (an adopted non-related person under your protection) which is now in disuse, follows. Then follows the *Sultan*, then the *qa‘di* or the one who deputises for him.

The *Malikis* and *Hanbalis* start with the legitimate father of the woman, followed by the *wasi* (guardian) appointed by the father before his death. Al Maqdisi, the *Hanbali Faqih*, states that the legitimate father comes first, then his legitimate father how highsoever, then the son and then his son how lowsoever in the usual pattern hereof. Hereafter the pattern is the same in the male line only as for the *aṣabat* category of the *Hanafis*.

When the *aṣabat* line has been exhausted, then the *Sultan* follows on condition that he is righteous and just, if not, then the *Malikis* rule that the general Muslim male public get the *wilayah* i.e. anyone of them, if the woman has no *wali*.

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

The *Shafi‘is* start with the legitimate father of the woman, followed by his legitimate father, how highsoever. Thereafter the pattern is the same as
for the Hanafis save that Shafi'is do not allow wilayah to sons of the woman to be married.¹

5. WIKALAH IN NIKAH:

Al wikalah (agency i.e someone acting on your behalf per your instructions) is mashru’ (lawful) in the shari’ah in any contractual matter. The general rule is that every person with full ahliyyah (having legal capability) can appoint a wakil to act for him in a given matter. The Prophet (S.A.W.S) himself acted as wakil in marrying off women under the wilayah of some of his sahabah. The requirements of ahliyyah also apply to the wakil.

The majority of the fuqaha’ rule that only men can be appointed wakil while the Hanafis insist that both men and women may accede to the position of wakil.

6. ARKAN OF NIKAH:

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

Bada’il, op. cit Vol 2 p. 250.
Al Maqdisi M D: Al Muqni’ - Fi Fiqh Imam al Sunnah, Ahmad ibn Hanbal, Cairo, Maktabah al Salafiyyah, undated, p. 208.
(principles) of nikāh. For some the issue is a rukn (necessary law or principle) while for others the same issue would be a shart (condition). The following are the views of the fuqaha’ herein:

The Hanafis:

They stipulate only one rukn, namely, the ijab and qabīl.¹

The Malikis:

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

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

The Shafi’is:

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

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The Hanbalis:

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

Shurūt (Conditions) of Nikāh:

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

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

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¹ Al Muqni‘, op. cit. p. 207.
"Nikah (in Islam) is contracted and enacted by what the people accept to be a nikah: be it in what language, or with what expression or with what act and likewise it is with any contract or shart between people."¹

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

His fatwa, is, of course, interpreted subject to the requirements of the shari'ah texts, but he nonetheless removed cumbersome and obstructive technicalities in the way of the enactment of nikah and brought the issue of 'urf in in a practical and logical manner.

There is also some difference of opinion amongst some of the fuqaha' on the legal requirement and standing of shahadah (witnessing) in nikah.

Al Qurtubi mentions that Abu Thawr and a group of the fuqaha' rule that shahadah is nor a shart (condition) of nikah - not a shart of sihah (correctness), nor shart for completing the enactment of nikah.

Their proof is the nikah of Hasan bin 'Ali, grandson of the Prophet (S.A.W.S), who married without shuhud and then made the nikah public. Al Qurtubi also quotes a hadith, transmitted by Abu Dawud in which the Prophet gave a similar instruction (in announcing a nikah already contracted).²

The second issue is in reference to the ijab and qabul. This is to be seen in the philosophy of the Arabic language and understanding that Arabic in the language of the shari'ah.


² Bidayah al Mujtahid op. cit. p. 18.
Many of the technicalities in this sphere can be obviated nowadays by administrative rules, without departing from the basic fundamentals of the *shari'ah*.

The third issue is the issue of *shahadah* in Islam which is regulated by the *Qur'an*, the constitution of Muslims.

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

"... And Allah never allowed the disbelievers a way over the (affairs of) the Muslims."\(^1\)

This is the nearest meaning to the *ayah* according to the classical and leading Muslim exegetists.\(^2\)

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

We have dealt with the *arkan* and the normal *shurūt* (conditions) of *nikāh*.

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

- *shurūt mashruʿah* (lawful *shurūt*) and *shurūt ghair mashruʿah* (unlawful *shurūt*).
- *shurūt nafadh al ʾaqd* (shurūt which cause the contract to be enacted).
- *shurūt luzūm al ʾaqd* (shurūt which makes the contract necessary to be executed).

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\(^1\) *Al Qur'an*, Surah al Nisa': 141.

\(^2\) *Al Jami` li Ahkām al Qurʾān*, op. cit. Vol 5 pp. 219 - 220.
7. SHURUT MASHRU`AH AND SHURUT GHair MASHRU`AH:

Shurut under this heading are of three kinds namely,

- `shurut al sahīḥah (valid shurut).
- `shurut al fasidah (improper shurut).
- `shurut al batīlah (void shurut).

The fuqaha' differ on the validity of certain shurut.

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

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

Hanafis, Malikis, Shafi`is and Zahiris subscribe to this.\(^1\)

Hanbalis allow shurut benefitting the zawjāh as valid and binding like agreeing to a monogamous nikāḥ with her or not removing her from her place of residence or necessitating her on travelling with him if his employment necessitates such or increasing her šadaq (dowry), stating that it is in the interest of `aqd al nikāḥ. They do not differ much in the `shurut batīlah and fasidah from the others.\(^2\)

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

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

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

"A woman must not set the shart of the divorce of her sister - (wife of her pending husband)."

It is also an abrogation of the rights of the husband and his other wife which are not tolerated in the shari'ah.¹

Those fuqaha' who oppose the validity of the shurūṭ (conditions) benefitting the zawjah of the madhāhib mentioned as well as other senior (kibār) fuqaha' like the a'immah (pl of imām) Qatadah, al Zuhri, al Laith and others state:

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

They further assert that a *shart* not found in the "Kitab of Allah" is *batil* (void) even if it is a hundred *shurut*. This is according to the *hadith* of the Prophet (S.A.W.S). The abovementioned *shurut* (conditions) are not found in the *shari'ah* and are thus *batil* (void) according to them.

They also assert that such *shurut* are not beneficial to the *nikah* nor the requirements of the 'aqd al *nikah* (marriage contract) and thus *batil*.¹

Those who sanction these *shurut* beneficial to the *zawjah* are, in addition to the *Hanbalis*: ibn 'Umar, Ibn Abū Waqqas and 'Amr ibn al 'Äs of the sahabah, Umar ibn 'Abd al 'Azīz, Jabir bin Zaid, Tawús and of the *fuqaha* of the Amsar, Imam al Awza'i and Ishāq.

They advance the following proofs:

- The Qur'ān commands: "Oh you who believe! Carry out your undertakings."²

Imam Ḥasan al Baṣrī states that this *ayah* specifically orders fulfilment of all obligations in Islam and this thus includes 'aqd al *nikah*.³

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

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

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² Al Qur'ān, Suṣrah al Ma'idah: 1.
They also quote the *hadith* narrated by 'Uqbah bin 'Amir as transmitted by al Bukhari and others that the Prophet (S.A.W.S) said: "the *shurut* which warrant the most to be fulfilled are those (*shurut*) set in *nikah*."\(^1\) This *hadith* obligates a Muslim to specifically fulfil the *shurut* (conditions) set in the *aqd al nikah* (marriage contract).

They also quote the ruling of the Khalifah 'Umar ibn al Khattab, as narrated by al Athram, that a man obligated himself in his *aqd al nikah* not to remove his *zawjah* from her domicile. Later he wanted to do this and he brought the matter to 'Umar who ruled that he is under obligation to fulfil that *shart* (condition).

Finally they contend that the *shurut* are benefitting the *zawjah* and do not nullify the *aqd al nikah* and as such are binding.\(^2\)

From the arguments advanced, it appears that:

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

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Sunan Abi Dawud Vol 1 p. 398.  


• The hadith texts legalising all shurūt save those which legalises ḥaram and vice versa, are quoted by the opposers as nullifying the said shurūt. Those who sanction those shurūt (conditions) state that the zawj will only have the right of faskh (annulment) of her ‘aqd al nikāh (marriage contract) if the zawj defaults on them or any of them. There is thus no validity in the argument of the opposers of these shurūt.

• The two other proofs quoted namely from Surah al Ma‘īdah and the hadith of the Prophet (S.A.W.S) obligating the shurūt set in nikāh and the ruling of ‘Umar herein as well as sanction of the most senior of the fuqaha’ from the šahābah down to the fuqaha’ of the Amsār, carry the argument for those sanctioning these shurūt.

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

8. THE KINDS OF ANKIHĪH:

There are three kinds of ankīhāh (pl of nikāh) all linked to the time of enactment of ‘aqd al nikāh (marriage contract). They are:

• ‘aqd al munjīz which is a contract enacted immediately in one session without any time restriction.

• ‘aqd al muḍaf which is a contract linked to a futuristic act or time factor and is thus enacted only when that act occurs.

• ‘aqd al mu‘allaq which is chained to a shart (condition) for its enactment.
The latter kind of 'aqd (contract) is invalid by the majority of fuqaha amongst them being the Malikis, Shafi'is and Hanbalis.¹

9. THE STATE OF THE 'AQD AS TO ITS EXECUTION:

In this sense, an 'aqd al nikah is either:

- nafidh, (executionable) or
- lazim, (binding) or
- ghair lazim (non-binding).

9.1 'AQD AL NIKAH AL NAFIDH:

An 'aqd is nafidh if shartan (two conditions) are met:

- That both parties contracting the nikah have full ahliyyah (having legal capability). Thus if one of the contracting parties has not got full ahliyyah, such as not being mukallaf yet, then the 'aqd (contract) cannot be enacted save with the consent of the wali.
- That both parties enact the 'aqd directly. Thus if a wakil is involved, the 'aqd is mawqif (dependent) on the approval of the muwakkil (principal).

¹ Al Nikah, op. cit. pp. 120 - 123.
9.2 AL-'AQD AL-LAZIM:

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

9.3 AL-'AQD GHAIR AL-LAZIM:

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

¹ Fiqh al Sunnah op. cit. Vol 2 p. 60.
10. THE KHITBAH (ENGAGEMENT):

*Khitbah* is derived from the Arabic verb *khataba*, and in the *shari‘ah* means asking a woman’s hand in *nikah*.  
*Khitbah* is thus a prelude to *nikah* and is *mashru‘* in the *shari‘ah* and is optional. *Khitbah* is a promise to marry and nothing else as far as the *shari‘ah* is concerned.

10.1 KHITBAH OF THE SINGLE WOMAN:

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

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

10.2 PROHIBITIONS OF KHITBAH:

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

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

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1 Qamus al Muhit op. cit. Vol 1 p. 65.  
Al Munjid, op. cit. p. 186.
The fuqaha‘ differ on whether it will be valid to send a proposal to these women.

The mu‘taddah of wafat may receive an offer of khiṭbah due to her zawj being deceased and her nikah having permanently and irrevocably ended. But a mu‘taddah of ‘iddah of talaq raj‘i may not receive such an offer as in this case the nikah may resume if reconciliation is effected before the expiry of the ‘iddah. Nikah did not end fully yet in this case.

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

The Qur‘an ruled herein:

“There is no sin for you if you make a hint of your betrothal or conceal it in your hearts. Allah Knows that you will remember them. But plight not your troth with women except uttering a recognised form of words.”

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

Imam Malik, al Laith and al Awza‘i rule that they may not remarry one another, while the majority of the fuqaha‘ rule that they may remarry if the woman stays out her ‘iddah.

10.3 KHITBAH (ENGAGEMENT) OF A MAKHTUBAH (FIANCEÉ):

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

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1 Al Qur‘an, Surah al Baqarah: 235.
This is forbidden by the hadith text. 'Uqbah bin 'Amir narrates as transmitted by Muslim and Ahmad that the Prophet (S.A.W.S) said:

"The Muslim is the brother of the other Muslim: so it is prohibited for him to enter the completed sale contract of his brother or to make khitbah to his (brother’s) makhtubah (fiancée)."

This prohibition applies to those whose khitbah is known.

10.4 LAWS OF KHITBAH:

- khitbah is not a nikah nor a necessary shart (condition) for nikah.
- Both the khatib (fiancé) and the makhtubah (fiancée) are strangers to one another and none of the marital privileges are allowed, including being alone in one another’s company.
- It is permissible for the parties to see one another, preferably when the other one is not knowing and then only when both are properly attired as by shari’ah requirement.
- The khitbah is not a permanently binding ‘aqd and both parties have the right to end it should they so wish before they enact an ‘aqd al nikah. This is because khitbah is only a promise to marry. Breaking it off without valid reason is considered bad manners.
- If sadaq (dowry) had been paid or part of it at khitbah (engagement) and the khitbah is ended before enactment of the ‘aqd al nikah (marriage contract), then it has to be returned in full to the khatib (fiancé).
• All gifts given or exchanged take the law of *hibat* (gifts). This means basically that you own a gift and it is not returnable nor should it be demanded back. Ibn Abbas narrates as transmitted by Ashab al Sunan (Abu Dawud, al Tirmidhi, al Nasa'î and ibn Majah). "It is not permitted for a man who gave something to someone or gave him a gift to demand it back, save the father if he gives a gift to his son he may take it back."1

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

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

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

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

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

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

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

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

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

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

Al Bukhari and Muslim transmit the following in this regard:

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

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³ Mukhtasar Sahih Muslim op. cit. p. 19. *Aḍwā al Shari'ah*, Riyaːd, Imam Muhammad bin Sa'ud Islamic University, 1400 AH, No 14, Article: "Al Tīfī Fī Naṣṭar al Shari'ah al Islamiyyah" by Dr M A Al Salīh, p. 34.

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

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

- The father must be a person who can father a child.
- That the zawj and zawjah be of such a state that it is possible to have their nikah consummated. A child is attributed to his parents by ruling of the Prophet: "Al walad li al firash - a child is attributed to the married partners."
  
Most of the fuqaha' state that firash in the hadith means "the mother" while Abu Ḥanīfah says it means "the father."\(^2\)

- That no less than six months have passed since the nikah i.e. consummation of it. This is deducted from the Quranic āyah: "...and his weaning is two years..."\(^3\) and another āyah: "He was carried and weaned for thirty months."\(^4\) This means that he is conceived and born after six months. Thus anyone conceived before a valid and correct nikah and born within six months of the of the nikah is illegitimate to the natural father.

- That the father does not negate the nasab (lineage) of the child. If he does, he must make mula`ānah (denial of parentage). In this case he is actually accusing his wife of adultery.

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\(^1\) Adwa' al Sharī'ah op. cit. p. 34.


\(^3\) Al Qur`ān, Surah Luqman: 14.

\(^4\) Al Qur`ān, Sūrah al Qāf: 15.
• By proof of parentage which will not then depend on the other forms of proofs of nasab. This is usually by way of shahadah (evidence) of shuhud which passes the test by shari’ah standards.

• Parentage is also attributed when a birth had taken place in a time which is not above the maximum time allowed in the shari’ah for a pregnancy.1

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

The learned Shaikh Mustafa al Maraghi states in his book Buhuth Fi al Tashri‘ al Islami: “that women were confused in their calculations of time of their pregnancies, hence the discrepancies in time in the examples quoted. Sometimes they may miss their menstruation or it may be absent for a time, sometimes due to breastfeeding or something else and they believe that they are pregnant.

Thus they would not know accurately when they fell pregnant.

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

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

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1 Adwa‘ al Shari‘ah p. 35 - 37. 
Athar Aqd al Zawaj p. 365 - 367. 
Ahmad A: Mohammedan Law p. 113 - 114.

This can eliminate the issue of the time factor completely.

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

12. **AL MU’ASHARAH AL ZAWJIYYAH**

By *al mu‘asharah al zawjiyyah* is meant "sound marriage coexistence." A man may have a *zawjah* or *zawjat* (wives). In all cases the basic rules of *mu‘asharah* have to be upheld. Thus fairness, justice and noble conduct towards your *zawjah* or *zawjat* is a compulsory duty. The *Qur’an* states:

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

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

¹ *Al Qur’an*, *Surah al Nisa’*: 19.
Should he continue to do so and refuse to mend his ways and he has no valid shari‘ah sanctioned reason for his action, then his wife has the right to seek annulment of the nikah from the qadi - who cannot refuse her request to end it.¹

13. TA`ADDUT AL ZAWAJ

By ta`addud al zawjat is meant “polygamy”, which is the act of having more than one zawjah. Polygamy is lawful in the Islamic order, under certain strict conditions. Polygamy is a social institution from times immemorial. The Jewish and Christian Scriptures testify that polygamy was an acceptable practice. The Talmudic Prophets were polygamous with the exception of Jesus. Many of the Prophets mentioned in the Old Testament and the Qur’an were polygamous. Abraham had Sarah and Hagar, the bondwoman.² Samuel’s father Elka’nah has two wives,³ David took Abigail and Ahin’o-am of Jezeel as wives,⁴ and later took Bathsheba.⁵ Solomon had seven hundred wives and princesses and three hundred concubines.⁶

³ Ibid, op. cit. 1 Samuel: 1
⁴ Ibid, op. cit. 1 Samuel 25: 42 - 43.
⁶ Ibid, op. cit. 1 Kings 11: 3.
There is no restriction on the number of women a Jewish male can marry according to the Bible and the Talmud. The Takanah (decree) against polygamy was taken by the Jewish Synod of Worms by Rabbi Gershom Ben Juda in the 11th century C.E. That ruling is in conflict with both the Bible and Talmud. Initially only German Jews were affected by the decree, but later all of Europe. However the Sephardim refused to accept or adhere to that decree.¹

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

Polygamy and concubinage were also practised by the German tribes in the Early Germanic Period.³

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Shaṛīʿah - The Islamic Law, op. cit. p. 144.

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

Polygamy was found in the pre-Islamic Arabian era where a man could marry any number of zawjāt and divorce at will or keep zawjāt on a "stay - not divorced nor married state". Ghailan had ten zawjāt when he accepted Islam.² He had to divorce six and have only a maximum of four.

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

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

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

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

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³ Al Qur'an, Surah al Nisa': 3.

⁴ Al Qur'an, Surah al Nisa': 129.
Thus, if justice cannot be done to more than one zawjah in the way of nafaqah (maintenance), sukna (lodging), kiswah (clothing) and other requirements of nafaqah (maintenance), then only one zawjah is allowed. Polygamy is allowed when there is a scarcity of men due to wars, specifically. This is in preference to brothels, mistresses and other immoral social evils.

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

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

14. AL KAFA‘AH

Al kafa‘ah literally means "equality". In nikah it means "equality of standing" of the marrying partners.² It is a fact that people of the same standing have a better chance of making a success of their union

² Rawā‘ī Al Bayān op. cit. Vol 1 p. 428.
⁵ Qāmūs al Muhīt, op. cit. Vol 1 p. 27.
due to less divergent qualities being present. This is the primary reason for kafa'ah by
the fuqaha', although some went too far in its necessity for nikah.

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

- Ibn Ḥazm rules that kafa'ah is not recognised in nikah. This is what the
brotherhood of Islam means. The Qur'an specifically points this out: "The
believers are nothing else but brothers."¹ It further states: "...marry of the
women of your choice..."² Further the Prophet (S.A.W.S) married al
Miqdad to the daughter of Zubair ibn `Abd al Muttalib and they were not
of equal standing. Had this been forbidden, he would not have done so.³

- Some fuqaha' rule kafa'ah as valid in nikah, but restrict it to good and
sound conduct and soundness from `uyub (defects). Thus, a pious Muslim
man without any known nasab (lineage) may marry a woman of standing
and rank. The Qur'an points to this:

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

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¹ Al Qur'an, Surah al Ḥujurat: 10.
² Al Qur'an, Surah al Nisa': 3.
⁴ Al Qur'an, Surah al Ḥujurat: 13.
Shawqani states that 'Umar ibn Khattab, ibn Mas`ud, ibn Sirin, and 'Umar ibn 'Abd al-'Aziz all conform to this view also.¹

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

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

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

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

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

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

"If someone comes to you requesting *nikah* and you are satisfied with their Islam and conduct, then marry them off, for if you do not, evil and sin will triumph in the land."

This is transmitted by al Tirmidhi. This text is also narrated by Abu Ḥātim al Muzani. Al Bukhari transmits as narrated by Abu Hurairah that the Prophet (S.A.W.S) said:

"A woman is married for four reasons: her wealth, her rank, her beauty and her *Dīn*. Choose the quality of *Dīn* and you will be successful."2

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

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

15.1 IMMEDIATE CONSEQUENCES OF AN `AQD AL NIKĀH:

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

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

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15.1 IMMEDIATE CONSEQUENCES OF AN 'AQD AL NIKAH:

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

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

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\(^1\) Athar 'Aqd al Zawaj, op. cit. p. 75 - 76.  
These rights are referred to in general in the Qur'an:

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

16. THE SADAQ (MAHR).

16.1 DEFINITION:

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

The sadaq or sadqah or ṣidaq (pl ṣaḍiqah) or ṣaduqah (pl. ṣaduqat), which is sometimes called the mahr, means ḥibah or atiyah which in turn means "a gift" and is the dowry a man gives to his bride on marrying her.² It is a free gift which becomes her property.

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

¹ Al Qur'an, Sūrah al Baqarah: 228.

² Liṣan al `Arab, op. cit. Vol 4 p. 2420.
custom of dowry where the latter, given to a daughter upon marriage, became the property of her zawj as if it was an inducement for him to marry her. Likewise within the Islamic system, the sadaq is not the same as the dowry of some Christian and Hindu practice in Kerala and elsewhere in India, where fathers have to pay heavy dowries to get suitable azwaj (husbands) for their daughters.¹

16.2 MASHRU’IYYAH (LEGALITY) OF SADAQ (DOWRY):

The mashru‘iyyah (legality) of sadaq is from the Qur’an:

“And give unto the women (whom you marry), their free gift of their marriage portions...”²

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

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

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² Al Qur’an, Surah al Nisa’: 4.
consummation of *nikah shubhah* (*nikah* in error). These situations will not cause waiving of the *sadaq*.¹

16.3 PURPOSE OF SADAQ:

*Sadaq* is primarily a social security for the *zawjah* which the *Qur'ān* obligates.²

The *sadaq*, which must be of value, is given to the wife for forgoing her opportunity of financial enrichment of herself and she retains it most of the time at *talaq* (divorce) and definitely at *wafat* (death) of her spouse. There is thus security for her in *sadaq* if such *sadaq* (dowry) is proper and fitting.

The *Qur'ān* refers to sadaq as being a *qintar*, which is a great amount³, while the *sunnah* states that the *sadaq* of the Prophet's wives was *nisf 'uqiyah*, which is five hundred silver *dirhams*.⁴

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

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16.4 SHURUT (CONDITIONS) OF SADAQ:

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

16.5 APPLICATION OF THE SHURUT OF SADAQ:

16.5.1 Wealth of Value:

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

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\(^1\) Al Muhalla, op. cit. Vol 9 p. 494.

\(^2\) Al Qur'an, Surah al Nisa': 25.
The Prophet (S.A.W.S.) blessed them in their *nikah*.\(^1\) That was equal to 3 *dirhams*. These parties also quote: "...and lawful unto you are all beyond those mentioned that you seek them with your wealth in honest wedlock and not in debauchery."\(^2\) They state that the text only says that wealth should be given for *sadaq* (dowry) and there is no limits set. Thus, wealth can be two *dirhams* and much more than that.\(^3\)

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

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

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

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\(^1\) *Sahih al Bukhari*, op. cit. Vol 7 p. 25.
\(^2\) *Athar 'Aqd al Zawaj*, op. cit. p. 129.
\(^3\) *Mukhtasar Sahih Muslim*, op. cit. p. 212.
\(^4\) *Nail_al_Awтар*, op. cit. Vol 6 pp. 187 - 188.
There is a difference on the interpretation of the Prophet (S.A.W.S) marrying off a woman to a sahabi "with what he had memorised of the Qur’an." Some, notably the Hanafis, rule that this is not a sadaq and if a nikah is so enacted it is proper but sadaq mithl will be necessary. Abu ‘Umar states that there is consensus amongst the fuqaha’ that there can be no nikah without sadaq. Nikah performed by the Prophet with “what was memorised of the Qur’an”, is for according great stature to the Qur’an and those who uphold its standing in Islam and not that it was in itself sadaq.¹

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

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

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


² Al Qur’an, Surah al Qasas: 27.
It would thus appear that a manfa’ah can be a sadaq (dowry).  

16.6 GENERAL LAWS OF SADAQ:

- When a nikah is properly and correctly enacted, the mentioned and agreed upon sadaq is due on terms so set out by the zawjah and accepted by the zawj. Hereon there is consensus by all the fuqaha’.

- It is makruh (detestable) to set an expensive sadaq.

- It is possible for the sadaq to be mu’aqjal (payable immediately on contract) or mu’aqjal (deferred), which will then, usually, be paid in instalments. This applies if it is the custom of a specific place. Ibn ‘Abbas reports that the Prophet (S.A.W.S) ordered ‘Ali to give Fatimah, the Prophet’s daughter, something of the sadaq before he set up house with her.

- sadaq is compulsory when a nikah had been consummated. This is due to the Qur’an ruling: "...and how can you take it back (sadaq) after you have given in unto the other and they have taken a strong pledge from you."  

  Sadaq is still compulsory when the zawj dies before paying the full sadaq. His estate must pay it for it is then a debt.

  He took his ruling from what ibn ‘Awfā narrates: "The khulafa’ rashidun ruled that "if the door is locked and the curtains drawn, then sadaq is due to the zawjah." Wāqi'  

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1 Athar Aqd al Zawāj, op. cit. pp. 133 - 136.  
Al Muqni’ op. cit. p. 218.  
Bada‘i, op. cit. Vol 2 p. 278.  

2 Al Qur‘ān, Surah al Nisa’: 21.
narrates a similar text from Nafi’ ibn Jubair. ‘Umar ruled likewise as well as ibn Musaiyyib.¹

16.7 SADAQ MUFAWWAD (UNSPECIFIED DOWRY):

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

16.8 SADAQ MITHL:

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

¹ Al Suyuti J D: Muwatta’ Malik, Cairo, Matba’ah Mashhad al Husaini, 1353 AH., Vol 2 p. 65.
² Al Qur’an, Surah al Baqarah: 236.
Factors to be taken into consideration for șadaq mithl calculation are: sanity, intelligence, fertility, virginity at nikah time, wealth, beauty, age and country.¹

16.9 FORFEITURE OF THE ŞADAQ (DOWRY):

The entire şadaq is forfeited if:

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

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


16.10 **SADAQ CONTRACTED IN PRIVATE:**

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

16.11 **ACCEPTANCE OF THE SADAQ:**

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

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


17. **AL NAFAQAH (MAINTENANCE):**

The word *nafaqah* is derived from *anfaqa* which literally means "losing of your possessions or spending of your wealth."\(^1\)

In the *shari'ah* it means "adequate provision in food (and drink), residence, clothing and medical care for your *zawjah* even if she is rich."\(^2\)

*Nafaqah* is compulsory by rulings from the *Qur'an*, *sunnah* and the *ijma*.

As for the *Qur'an*:

- "...and the father is responsible for the maintenance and clothing of his wives in fair measure. No one is taxed beyond his means."\(^3\)

- "Lodge them where you dwell, according to your wealth, and do not harass them so as to make their lives difficult. And if they are pregnant, then spend for them till they bring forth their burden..."\(^4\)

- "Let him who has abundance spend of his abundance, and he whose provision is measured, let him spend that which *Allah* has given him."\(^5\)

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

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

2 Athar `Aqd al Zawaj, op. cit. p. 169.

3 Al Qur'an, Surah al Baqarah: 233.

4 Al Qur'an, Surah al Talaq: 6.

5 Al Qur'an, Surah al Talaq: 7.
to take for her and her child's provisions from her husband's wealth (when the latter was miserly in nafaqah for them) without his permission.¹

17.1 **SHURUT (CONDITIONS) OF NAFQAQH:**

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

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

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17.2 THE AMOUNT OF NAFAQAH (MAINTENANCE):

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

17.3 DEGREE OF COMPULSION OF PROVIDING SERVANTS:

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

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

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1 Al Qur‘an, Surah al Ma‘îdah: 89.
2 Al Qur‘an, Surah al Baqarah: 233.
3 *Athar `Aqd al Zawaj*, op. cit. pp. 162 - 165.
• Some fuqaha’ like al Shafi‘i and Muhammad al Shaibani of the Ḥanafis rule that if she is someone who is served by servants, she must be given a servant as this is then a part of the nafaqah (maintenance).¹

• Others like Abu Hanifah, Malik and Ahmad rule that if the zawjah comes from a family where she was waited upon and her zawj is rich or of means, he must give her a servant to wait on her. They say this is due to the āyah: "....and live with them harmoniously..."² Abū Yūsuf of the Ḥanafīs, Abū Thawr and a view of Malik say two servants. If the zawj is poor, then he is not under obligation to supply a servant as he will only be able to manage the ordinary nafaqah and a servant will be an increase over that. This, they say, agrees with the āyah: "Allāh burdens not a soul beyond its scope (means)."³

17.4 SUKNĀ (LODGINGS) FOR THE ZAWJAH:

Suqna means “lodgings”. There is consensus by all the fuqaha’ that the zawjah must compulsorily be housed. This is based on the āyah: “Lodge them where you dwell...”⁴ This āyah is for the mutallaqāt (pl of mutallaqaqh) in ‘iddah. The argument is that if suqna is required during ‘iddah of talaq, then it is more so during the

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¹ Al Khatib S D: Al Iqna` Fi Hal Alfaz Abi Shuja` ah, Cairo, Matba` ah Muṣṭafa al Halabi, 1940, final ed. Vol 2 p. 146.
⁴ Al Qur`ān, Sūrah al Nisa`: 19.
⁵ Al Qur`ān, Sūrah al Baqarah: 286.
subsistence of the *nikah*. The *sukna* is to be such as to be affordable for the *zawj* and sufficient for privacy.

17.5 REFUSAL OF THE ZAWJ OF NAFAQAH (MAINTENANCE) FOR THE ZAWJAH:

If the *zawj* refuses to give due *nafaqah* to his *zawjah*, she may take from his wealth which suffices for her, if she can do so. This is taken from the Prophet's (S.A.W.S) ruling to Hind bint 'Utbah as mentioned previously. If she cannot, then she should refer her case to the *qadi* who, on investigating the matter, will order the *zawj* to give the required *nafaqah*. If he disobeys him, the *qadi* should send him to prison.¹

17.6 NAFAQAH (MAINTENANCE) OF THE MUTAWAFFA `ANHA:

The *mutawaffa `anha* is the *armalah* (widow) of a man. The basic rule in *nafaqah* is that *nikah* obligates *nafaqah* while *wafat* (death) ends it. The *fuqaha* differ herein some ruling no *nafaqah* for her at like the *Hanafis* while some obligate *nafaqah* only when she is pregnant like *Hanbalis* due to *ayah* 6 of *Surah Al Talaq*.²

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² *Athar 'Aqd al Zawaj*, op. cit. p. 205.  
Al Khasṣ̱āf A B A: Kitāb al Nafaqāt, Bombay, Dar Al Salafiyyah, undated, p. 42.  
Al Mughni, op. cit. Vol 7 pp. 570 - 571.  
17.7 SÜKNA (LODGINGS) OF THE MUTAWAFFA ‘ANHA:

The fuqaha’ have the following rulings in this case:

- The Hanafis, al Shafi’i, in one of his rulings and ibn Hazm rule that she has no sükna during the ‘iddah of wafat whether she is ḥamil (pregnant) or not. These fuqaha’ thus see that at death of the zawj, according to the shari‘ah, the warathah (heirs) become the owners of his possessions in such measure as the shari‘ah prescribes. The armalah must take her nafaqah (maintenance) from her share of the mirath.

- Ahmad rules that if the armalah is not pregnant, she has no sükna. If she is ḥamil, then Ahmad has two rulings: one ruling is on the necessity of sükna and the other is an opposite ruling. This is based on ayah 6 of Surah al Talaq.

- Malik and al Shafi’i, in his other more accepted ruling, ruled that the armalah receives sükna from the mirath of her deceased zawj, whether she is ḥamil or not. They assert that the ruling on the nafaqah and kiswah had been cancelled in the Qur‘an but that sükna remained for the entire period of the ‘iddah after wafat.

The Maliki ruling is closer to the spirit of the shari‘ah texts.

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1 Al Qur‘ān, Surah al Baqarah: 240.
17.8 NAFAQAH OF THE HAMIL (PREGNANT WOMAN):

The ḥamil woman and still married to her zawj, receives all the required nafaqah, kiswa, sukna and the required medical attention and matters related to it. If she is divorced from her zawj and is ḥamil, then her former zawj is to provide for her all nafaqah (maintenance) in its full meaning until she delivers the baby. Thereafter, if she breastfeeds, she can levy a fee for the service and for looking after the baby. She is still to receive nafaqah of food and drink and medication, if so required, to enable her to provide a nourishing and beneficial breastfeeding service. The majority of the fuqaha' ruled nafaqah necessary for the ḥamil mutallaqah due to the ayah: "Lodge them (divorced women) where you dwell according to your wealth, and treat them not in a bad manner so as to force them to leave: and if they are pregnant. then spend for them till they deliver. Then if they suckle your children, give them their due payment...."¹

The ruling of the vast majority of the fuqaha' is nearer to the shari'ah text in this issue.²

17.9 CONTRIBUTIONS OF THE ZAWJAH TO THE HOUSEHOLD:

The payments the zawjah makes to the household when the income of the zawj is insufficient, is taken as a debt on the zawj owing to the zawjah and is due when he has the means to settle the debt or when he divorces her or at his wafat. In the latter

¹ Al Qur'an, Surah al Ṭalaq: 6.
² Athar 'Aqd al Zawij, op. cit. pp. 193 - 204.
two cases, it is due in full immediately. If she explicitly gives it as a gift, then the zawj has no liability. If she agrees to go into a partnership with him in the purchase of fixed assets, she is a partner on such terms as they agree upon provided that it is a ḥalāl and valid undertaking as per the shari'ah. At talaq or at wafat of the zawjah, her share is due to her in full - to her directly in the case of talaq and to her tarikah (estate) on her wafat. This ruling is based on the ruling of the Prophet as transmitted by Dar al Qutni: "The wealth of a Muslim is forbidden for another Muslim save if it is given as a gift."¹ The Qur'an amplifies this fact: "Oh you who believe! Devour not your wealth among yourselves unjustly, except it be a trade amongst you by mutual consent."²

17.10 NAFAQAH (MAINTENANCE) OF THE CHILDREN:

The basic rule is that the legitimate father is responsible for the nafaqah of all his legitimate children born from his Muslim nikah. A father is legitimate to his children when such children are conceived after he married their mother in sahīh (valid) or fāsid (invalid) nikah, but not a bātil nikah (void marriage).³ There is thus no legitimisation of illegitimate offspring in Islam.

¹ 'All Jad Al Haqq; Shaikh Al Azhar: Fatwā S/551 Cairo, Al Azhar University,dated 8/1/1413 AH corresponding to 9/7/1992, page 30.
² Al Qur'an, Surah al Nisa': 29.
³ Mohammedan Law, op. cit. p. 108.
Chapter 3

MARRIAGE WITH NON-MUSLIMS.

In this chapter, marriages contracted with the *Ahl al Kitab* (People of the Book, i.e. the Jews and Christians) as well as non-*Ahl al Kitab* like the *mushrikun* (polytheists) and the prohibited forms of *ankihah* (marriages) will be discussed.

1. PROHIBITED *ANKIHAH* (MARRIAGES):

These are the forbidden marriages in the *shari'ah*.

They are basically the following:

- *Nikah* to *Ahl al Kitab* (in which there is dispute).
- *Nikah al Mut'ah* (forbidden by *Sunni* schools of law).
- *al Nikah al Mu`aqqatah* (temporary marriage).
- *Nikah al Tahlili* (illegally validating a forbidden form of marriage).
- *Nikah al Shighar* (a pre-Islamic form of marriage).
- *Nikah* to a *Mushrik* (polytheist - m-) or *Mushrikah* (polytheist - f-).
- *Nikah* to the *Zunat* (adulterers an fornicators).
- *Nikah Batil* and *Nikah Fasid* (void and invalid marriages).
1.1 **NIKAH TO THE AHL AL KITAB:**

The *Ahl al Kitab* are those people who received a heavenly Scripture before the advent of Islam and they are thus the Jews and the Christians. The *Qur'an* says:

"...lest you say: 'The Book was sent down to only two factions before us'...."¹

The "two factions" mentioned in the above ayah are the Yahud (Jews) and Nasara (Christians)². The *Qur'an* and the Prophet (S.A.W.S) called the followers of Jesus Nasara (lit. helpers) while the present day term for them is Masihiyun (followers of the Messiah) possibly due to the Trinity doctrine of most Christians and divinity attributed to Jesus by them.

Islam views both the Jewish and Christian Scriptures as incomplete and Islam came to fulfil and complete the entire process of Revelation in which both the spiritual and worldly matters were dealt with by the Creator in finality.

The *Qur'an* says:

"This day I (Allah) have perfected your religion for you, completed My favour upon you and have chosen Islam as your religion."³ This is emphasised by:

"Truly, the religion (accepted) in the Sight of Allah is Islam."⁴

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¹ *Al Qur'an*, Surah al An'am: 156.
³ *Al Qur'an*, Surah al Ma`idah: 3.
⁴ *Al Qur'an*, Surah al `Imran: 19.
The status of the Jews and Christians are confirmed by the Qur'an as people who received a message before.\(^1\) These have been tampered with and changed over the years.

"But those among them who did wrong, changed the Word that had been told (to) them."\(^2\) The higher criticism of the Jewish and Christians Scriptures as well as history bear testimony to that.

The Bible itself speaks of its limitations as to the scope of its application.

"Come, I will send you to Pharaoh that you may bring forth my people, the sons of Israel, out of Egypt."\(^3\)

"Go and gather the elders of Israel together and say unto them - `the Lord, the God of your fathers...` "\(^4\)

Jesus according to the Gospels instructed: "Go nowhere among the Gentiles, and enter no town of the Samaritans, but go rather to the lost sheep of the house of Israel."\(^5\) Jesus stated that he was sent to the "lost sheep of Israel."\(^6\) Similar expressions are found elsewhere in the New Testament.\(^7\)

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\(^1\) Al Qur'an, Surah al-Baqarah: 53.  

\(^2\) Al Qur'an, Surah al-A'raf: 162.

\(^3\) The Holy Bible, op. cit. Exodus 3: 10.


Differences of opinion exist amongst the fuqaha' on the question of whom are to be categorised as Ahl al Kitab and whether nikah contracted with them is proper or legal within the shari'ah.

It is common knowledge that the very first principle of Islam, is the absolute and uncompromising Oneness of the Almighty with no likeness to any created being. This is seriously compromised by the Trinity dogma of the vast majority of Christians, where Jesus is part of the Godhead or God Himself in human form. The Qur'an strongly condemns this as disbelief.¹

From this angle some of the sahabah and fuqaha' ruled that these people are not Ahl al Kitab but mushrikun and thus rule that they cannot be married to Muslims in or outside of Dar al Islam (Islamic State).

To this view went ibn 'Umar of the sahabah who said:

"Allah forbade marriage between the mushrikun and the Muslims and I do not know of anything worse in shirk (polytheism) than a woman saying that her God is 'Isa (Jesus)."²

Ibn `Abbas, in a ruling from him, ruled the ayah of the prohibition of nikah to the mushrikun as generally applicable to all persons other than Muslims while al Harbi narrates that a group of the fuqaha' rule the ayah (Quranic verse) of nikah (marriage) to the kitabiyat (women of the People of the Book) as cancelled by the ayah of prohibition of nikah to all the mushrikun (polytheists).³

¹ Al Qur'an, Surah al Ma'idah: 17 & 73. Al Qur'an, Surah al Tawbah: 30.
Ibn 'Umar's father the khalifah 'Umar, ordered one of his governors, Hudhaifah, who married a woman from Ahl al Kitab, to divorce her, claiming "concern that the Muslims will leave their Muslim women and marry kitabiyat (women of Ahl al Kitab - the People of the Book)".¹

This ruling of 'Umar is taken as karahah (detestableness) of such a nikah. Those who take Ahl al Kitab (People of the Book) as they are, quote:

".....(Lawful to you in marriage) are chaste women from the believers and chaste women from those who were given Scripture before you..."²

They further claim that the mushrikun (polytheists') rule is not applicable to them. Amongst these are 'Uthman and ibn Jubair. It is conditional that these Ahl al Kitab women must be believing Ahl al Kitab women. Thus disbelieving or immoral kitabiyat are forbidden in nikah by these 'ulama'.

Those who allow it restrict its practice by rule that it is detestable (makruh) to marry women of Ahl al Kitab, due to the danger of diluting your Islam or losing it. There is thus not a clear unfettered permissibility by those who allow such a nikah.

The actual purpose of this kind of nikah is to bring the women of Ahl al Kitab into the fold of Islam.

This concession is only applicable to Muslim men and those living in the Dar al Islam (Islamic State) where the shari'ah operates and where, thus, the affairs of nikah and related matters are enforced in the Islamic system.

This is particularly the ruling of ibn 'Abbas.

¹ Tafsir al Qur'an al 'Azm, op. cit. Vol 1 p. 456.
   Al Jami' li Ahkam al Qur'an, op. cit. Vol 3 p. 68.

² Al Qur'an, Surah al Ma'idah: 5.
There is consensus that a Muslim woman may not marry a kitabī (a man of the Ahl al Kitab category), due to the authority a zawj has in family life.

Some fuqahā, like some Shafi‘is, rule that only the Ahl al Kitab whose ancestors entered the religion of Prophet Musa (Moses) or Prophet ‘Isa (Jesus) before their respective cancellations i.e Jews before the advent of ‘Isa and Christians before the advent of Islam and before their Scriptures were corrupted by deletions or additions, are Ahl al Kitab.¹

The Hanbalis share this view.

According to this interpretation, there is virtually no Ahl al Kitab (People of the Book) to be found nowadays.

Hanafis do not allow marriage to Jewesses and Christian women in Dar al Harb (non-Muslim country) due to the absence of the application of shari‘ah. Shafi‘is and Hanbalis require both parents to be Ahl al Kitab before the rule of kitabīyyah marriages (marriages to a Jewess or Christian woman) can apply.²

The Shi‘ah Imamiyyah and some of the Zaidiyyah prohibit marriage to Ahl al Kitab claiming that the permissibility of nikah to Ahl al Kitab women was cancelled by the revelation prohibiting marriage to the mushrikun and mushrikat.³

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   Al Nikāḥ, ōp. cit., pp. 440 - 441.

2 Shari‘ah - The Islamic Law, op. cit. p. 136.

3 Sayis A and Shaltut M: Ayāt al Aḥkām, Cairo,
This issue has to be further clarified. Trinity is a very clear breach of the *Tawhid* law (law of Oneness of *Allah*) as it is clearly that of joining partners to the Almighty.

The quoted *Shafiʿi* rule in definition, is thus logical and clear while the ruling of the *Shiʿah* is more logical and in conformity to history and content of the Scriptures of most of the *Ahl al Kitab*.

All forms of atheists are excluded by all *fuqaha* from the *Ahl al Kitab* category due to their *ilḥad* (atheism).

There is a further problem in the *Ahl al Kitab ankiḥah* (marriages to the People of the Book) in that there is a concept, amongst certain persons, that the *Ahl al Kitab* issue could be extended to non-Muslim lands. This is a serious mistake. Ibn `Abbas, one of the senior *sahabah* has already precluded that, as well as some of the senior *fuqaha*.

Some *fatawa* (legal opinions) issued herein clearly do not reflect understanding of the functioning and application of Family laws in non-Muslims countries where Muslims live as minorities.

Firstly, the Islamic Personal Law is not recognised in the overwhelming majority of these countries and where it is recognised, with few exceptions, it is usually such a recognition where the non-Muslim authority makes the laws and takes what it feels it wishes to enact, save in Singapore perhaps.

If there is a fear that the children might lose their Islam in such a setup, then such *ankihah* are not allowed. There is no way that the *shariʿah* will sanction any order which will destroy its own system.

"Those who fulfil the covenant of *Allah* and break not the covenant."\(^1\)

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\(^1\) *Al Qur’an*, Surah al Raʿd: 20
"And fulfil (every) covenant..."¹

Common logic also supports this point.

A kitābiyah married to a Muslim must take the required baths after menstruation, lochia (after birth) and after sexual relations. She is also to refrain from eating and drinking all such substances as are forbidden in Islam.

None of the secularist countries would condone the above stipulations since that would be considered to be in violation of personal rights.

Further, a Muslim zawj and father is obligated by the shari‘ah to see to the Islamic upbringing of the family at all times, even after divorce.

In the secularist non-Muslim countries, mothers invariably are given the custody of their minors. Thus, it would be impossible to implement the shari‘ah stipulation to the contrary.

It is thus clear that the aims of nikah, as set out in the shari‘ah, cannot be met under such circumstances and as such the prohibition in Non-Muslim countries should be applied. The Qur’an does also proclaim all those who do not “follow the Religion of Truth (i.e. Islam)² as enemies of the Muslims who must be subdued so that they do not obstruct or hinder the Faith or its spreading. There is thus no nusrah (spirit of mutual help) between obstructionist Non-Muslims and practising Muslims.

The position of Muslims in the world and especially most of the Muslim minorities, testifies in practical terms to this position. Besides, the real Ahl al Kitāb who follow the true, correct and unadulterated Tawrah (Old Testament) and the true, correct and unadulterated Injil (Gospel) are not to be found nowadays.

¹ Al Qur’an, Surah al Isra: 34
² Al Qur’an, Surah al Tawbah: 29.
1.2 NIKAH AL MUT`AH:

The Arabians were, prior to the advent of Islam, sunk in iniquity of which sexual iniquity was prominent. When Islam came, there was a genuine need for a practical approach to solve this unsavoury position.

*Nikah* was thus made the cornerstone institution of society's social fabric. However, problems occurred on expeditions and especially during warfare, when the men would be far away from their wives for long periods and some of them were new in the Faith.

Thus we read in some *hadith* texts of the issue of *mut`ah* unions being allowed for a fixed period in a certain place and finally prohibited permanently by the Prophet (S.A.W.S).

*Mut`ah* is a system whereby a man marries a woman, gives her a *sadaq* and live with her as her *zawj* for a period of time\(^1\), usually for the period of encampment in a place in the war zone.

When the agreed time expired, the *mut`ah* marriage is automatically dissolved. It is conditional that no inheritance takes place between the parties of a *mut`ah* marriage, nor for the offspring coming from that union nor is paternity established.

The initial *mashru`iyah* (legality) of this kind of union was established by *hadith* texts.\(^2\)

- Ibn Mas`ud narrates that "we used to be in the war party with the Prophet (S.A.W.S) and we did not have our wives with ourselves and we asked

\(^1\) Lisan al `Arab, op. cit. Vol 6 p. 4127.

\(^2\) Ta’rikh al `Arab, op. cit. pp. 146 - 147.
Shari`ah - The Islamic Law, op. cit. pp. 155 - 156.
permission from the Prophet (S.A.W.S) to castrate ourselves, which he refused, but he allowed us to marry a woman for a certain period."¹

Muhammad bin Ka`b narrates from ibn `Abbas that he said: "mut`ah was valid in early Islam. A man would come to a place where he knew no one and he would marry a woman for the length of that period as he would remain there and she would look after him and his belongings as a zawjah. Thereafter the Qur'an ayah was revealed: "Successful indeed will be the believers who are humble in their prayers and who shun vain conversation and who pay the poor-due and who guard their sexual purity save from their wives...."² Ibn `Abbas then said: "besides this all forms of sexual behaviour is forbidden."³

• Imam al Zuhri narrates prohibition of mut`ah during the farewell pilgrimage. He also narrates it from ibn `Abbas as from the time of Khaibar.⁴

• Imam `Ali, the fourth khalifah, narrates that the Prophet (S.A.W.S) prohibited mut`ah in the time of Khaybar (i.e. expedition of Khaybar).⁵

¹ Zad al Ma`ad, op. cit. Vol 4 p. 6.
² Al Qur'an, Surah al Mu`minun: 1 - 6.
⁴ Sunan Abi Dawud, op. cit. Vol 1 p. 520.
⁵ Sahih al Bukhari, op. cit. Vol 7 p. 16.
The vast overwhelming majority of the fuqaha' of the saḥābah (companions of the Prophet), tabi`ūn (students of the Prophet's companions) and the Ameṣār (cities) all agree that mut`ah was permitted in the initial period of Islam, mostly to the troops fighting a long way from home and not having their wives with them. Later the Prophet (S.A.W.S) himself permanently prohibited this.

The 'ulama' (learned scholars) and fuqaha' who rule that mut`ah is forbidden rule that, irrespective of the duration of this artificial nikah, the parties are living in sin and all the sexual activity thereby is tantamount to zina (adultery).\(^1\)

This is the view of Ahl al Sunnah who forms the overwhelming majority of Muslims in the world.

The Shi`ah grouping, notably the Imamiyyah, the largest of the Shi`ah groupings, still rule it as valid and they do not accept the aḥadith (prophetic precepts) indicating prohibition. They assert that ibn Mas`ud and ibn `Abbas specifically ruled it as valid. Ibn `Abbas later retracted in the latter part of his life while `Ali the actual first Imam (leader) of the Shi`ah grouping, himself narrates the prohibition as indicated above. Mut`ah was thus banned by the Prophet (S.A.W.S.) during his lifetime.\(^2\)

Siddiqi quotes Ja`far bin Muhammad, also called Ja`far al Ṣadiq, the sixth Shi`ah Imamiyyah Imam, equated mut`ah to zina (adultery) and fornication.\(^3\)

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\(^1\) Ibn Taimiyyah: Fatawa ibn Taimiyyah, Vol 4: 69.  

Sunan Abī Dawūd, op. cit. Vol 1 p. 520.  

\(^3\) The Family Laws of Islam, op. cit. p. 203.
1.4 **NIKAH AL TAHILIL:**

*Tahilil* means "making lawful" and is derived from the Arabic verb *hallala* which means "to make lawful". In the *shari'ah* it is the "unlawful legalising process of a woman who had been divorced irrevocably by her zawij*.\(^1\)

When a Muslim man marries a woman for the first time he possesses three *talaqat* (divorces) over her. After executing the third *talqah* (divorce), he cannot remarry her save if she naturally and by normal events married another man, was by natural and normal events divorced or widowed by him and stays out her required *`iddah*.\(^2\)

Should anyone make an arrangement herein for another man to marry his irrevocably divorced *zawjah* in order to circumvent the requirements, then that is called *tahlil*.

The second party who undertakes the *nikah* is the *muhallil* and the one for whom it is done is called the *muhallalahu*.

Both of these persons were cursed by the Prophet (S.A.W.S) himself.

Imam `Ali narrates that the Prophet (S.A.W.S) said:

"Cursed is the *muhallil* and the *muhallalahu*."\(^3\)

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   *Sunān Abī Dāwūd*, op. cit. Vol 1 p. 520.

1.4 **NIKAH AL SHIGHAR**:

This is the *nikah* in which there is agreement that no *sadaq* be paid to the woman.

This was a pre-Islamic form of pagan marriage and was explicitly forbidden by the Prophet (S.A.W.S.) in the *ahadith*.

Ibn 'Umar narrates that the Prophet (S.A.W.S) said:

"There is no *shighar* in Islam." Ibn Sa'îd and ibn Ḥusain also narrate it.¹

Abū Hurairah narrates that the Prophet prohibited *shighar*. Jabir bin 'Abd Allah also narrate it.²

There are two cases of *shighar*: one mentioned in the *hadith* texts above and the second one is where *waliyan* (two Walis i.e guardians)) of two women agree to marry a woman under each one's *wilayah* and no *sadaq* is payable to the women they marry.

In the first case, where no *sadaq* is paid to the woman, there is consensus that that is *batil* (invalid).

In the second case of the two *walis* marrying without *sadaq*, the *fuqaha'* differ on the validity of the *nikah*.

¹ *Ṣaḥīḥ Al Bukhari*, op. cit. Vol 7 p. 15.
*Ṣunan Abi Daŵūd*, op. cit. Vol 1 p. 520.
*Al Zabidi Z D: Al Tajrîd al Sarih li Ḥadîth al Jâmi` al Sahih*, Cairo, Matba`âh Mustafa al Halabi, undated, Vol 2 p. 120.

1.5 **NIKAH TO THE MUSHRIKUN (POLYTHEISTS):**

The *mushrikun* (sing. *mushrik*) are the idolaters and polytheists. *Tawḥīd* (absolute unitarianism) is the first and most cardinal principle of belief in *Islam*. No compromise in that is permissible under any circumstances. The *Qurʾān* is very strong on this point:

"Worship *Allāh* alone and join none with Him."\(^1\)

"Verily whosoever sets up rivals in worship with *Allāh* then *Allāh* has forbidden Paradise for him..."\(^2\)

Prohibition of *nikāh* to these people is by clear text of the *Qurʾān*:

"Wed not the idolatresses till they believe (in *Allāh*): for a slave woman who believes is better that an idolatress though she allures you. And give not your daughters in marriage to idolaters till they believe (in *Allāh*) for a believing slave is better than an idolater though he allures you. Those (idolaters) invite to the Hell and *Allāh* Calls to Paradise and unto forgiveness by His Grace...."\(^3\)

This āyah was revealed prohibiting Marthad al Ghanawi from marrying an idolatrous prostitute resident in Mecca still after the *Hijrah*.\(^4\)

There is consensus by all the 'ulamāʾ and *fuqahaʾ* in *Islam* that this kind of *nikāh*, i.e *nikāh* to the *mushrikun* (idolaters), is batil\(^5\).

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1. Al Qurʾān, Sūrah al Nisāʾ: 36.
3. Al Qurʾān, Sūrah al Baqarah: 221.
1.6 **NIKAH TO THE ZUNAT (ADULTERERS):**

The *zunat* are the adulterers and fornicators, males and females. *Nikah* to them by righteous Muslims, while they are still *zunat*, is forbidden. *Allah* states in the *Qur’ān*:

"The man who agrees to marry a prostitute, then surely he is either an adulterer or a pagan. And the woman who agrees to marry an adulterer, then she is either a prostitute or a pagan. Such a thing is forbidden for the believers."¹

This is general for all categories of people. It is even the rule when you married a slave girl.

"...and give them (slave girls you marry) their dower (and they) should be chaste, not adulterous nor taking lovers."²

The Prophet said, as narrated by ‘Amr bin Shu‘aib:

"the fornicator marries none save one like him (or her)."³ *Imam* Ahmad also transmitted it.

Al Shawqani says that this is applicable to one who’s *zina* (adultery or illicit sex activities) are known. There is also agreement amongst the *fuqaha’* that someone who fornicates with a woman may marry her as they are of the same category.⁴

The *zunat* (adulterers) become acceptable Muslims again when they repent with *tawbah nasuţah* (full proper repentance in which one admits the wrongdoing, regrets it sincerely, and repents never to return to it). The *Qur’ān* alludes hereto.

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¹ *Al Qur’ān*, Surah al Nur: 3.
³ *Sunan Abi Dawud*, op. cit. Vol 1 p. 514.
"...nor commit illegal sexual intercourse: and whoever does this shall receive punishment. Their torment will be doubled on the Day of Resurrection and he will abide in there in disgrace. Except those who repent, believe and do good deeds, for those, Allah will change their sins into good deeds..."\(^1\)

2. **NIKĀH BAṬIL (VOID MARRIAGE) AND NIKĀH FASID (INVALID MARRIAGE):**

Nikāh batil is a void nikah while nikāh fasid is an imperfect or invalid nikah.

2.1 **NIKĀH BAṬIL:**

This is a nikāh in which there is non-compliance with the arkan (principles) and shurūt al in’iqad (conditions of enactment) of the ‘aqd al nikāh. An example being that a nikāh is contracted directly with a ṣaghir (male minor) or ṣaghira (female minor) who is not mukallaf (mature) nor even of the mumayyiz (discerning) category or marrying one who is of those who are permanently prohibited to you, like your uncle, brother or foster brother or their corresponding female categories.

If this kind of nikāh is enacted and that marriage is consummated, then no nasab is effected nor familial consequences of a normal correct nikāh. If consummation had taken place, then no tahrīm (prohibition of marriage) is effected between the relatives.

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1 Al Qur’an, Sūrah al Furqān: 68 - 70.
of both the parties and there is no `iddah on the woman either as nasab is not an issue here.

2.2 NIKAH FASID (INVALID MARRIAGE):

This is an imperfect nikah in which the arkan (principles) and shurut in\(^{i\text{qad}}\) (conditions of enactment) of the `aqd al nikah have been met, but not the shurut al sihhah (conditions of correctness) of nikah like the nikah without the shuhud (witnesses), according to the majority of the fuqaha.

If this kind of nikah was not consummated and separation of the parties took place, then nothing is done to the parties including the non-application of the provisions of the Islamic criminal law.

If separation took place after consummation, then still criminal punishment is not effected (of the hadd category - i.e. the prescribed punishment). This is due to the shubhah (doubtful form) of this kind of `aqd al nikah. This is due to the Prophet's (S.A.W.S) ruling:

"Do not execute the hadd if there is reason of doubt."

However, the Hakim (Muslim ruler) is obligated to mete out some form of deterrent punishment for such sinful behaviour.

If there had been consummation of a nikah fasid, then:

- payment of the full sadaq (dowry) agreed on, or if there had not been an agreement of sadaq, then sadaq mithl is necessary.

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1 Nail al Awtar, op. cit. Vol 7 p. 117.
• *nasab* (lineage) is attributed to the man if the woman became pregnant from him.

• *`iddah* of *talaq* (period of waiting of divorce) is compulsory on the woman.

• The *hurmah* (prohibition) of the categories of persons on both side comes into operation.

_Hanalis* have the above divisions for the *`aqd al nikah*, (marriage contract) including also the *uqud sahihah* (valid contracts).

_Malik, and_ Āḥmad speak of the *uqud sahihah* (valid contracts), *mawqufah* (on which no ruling of validity or otherwise exists) and *batilah* (void) contracts while al Shafī′ speaks of only *uqud sahihah* (valid contracts) and *batilah*.

Thus the consequences for each will be what kind of definition is given to what kind of *`aqd* (contract) contracted.\(^1\)

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3. **THE MUHARRAMAT (PROHIBITED PERSONS FOR MARRIAGE).**

These are persons Muslims are not allowed to marry. These are corresponding categories of Muslim men and Muslim women. Some *muharramat* are permanently prohibited and some are temporarily forbidden.

These *muharramat* of the women are of categories, namely:

• The *muharramat mu`abbadah* (permanently prohibited).

• The *muharramat mu`aqqatah* (temporarily prohibited).

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\(^{1}\) Al Zawaj Wa al Ṭalaq, op. cit. pp. 28 - 29.

Āṭhār ʿAqd al Zawaj, op. cit. pp. 75 - 77.
3.1 **THE MUḤARRAMĀT MUʿABBADAH:**

These are the women you are permanently not allowed to marry ever. They are of three main categories:

- **Muḥarramat by nasab.** (lineage).
- **Muḥarramat by muṣaharah.** (affinity).
- **Muharramat by rada`ah.** (fosterage).

The Qur’ān refers to all the prohibited persons:

"Forbidden unto you are your mothers, and your daughters, and your sisters, and your father’s sisters, and your mother’s sisters, and your brother’s daughters, and your sister’s daughters, and your foster mothers and your foster sisters, and your mothers-in-law, and your step-daughters who are under your protection (born) from your women whose marriage you consummated, but if you did not consummate their marriage, then it is no sin for you (to marry their daughters), and (forbidden) are the wives of your sons who (are born) from you. And it is forbidden (unto you) that you shall have two sisters together (in marriage) except what has already happened (of that nature) in the past.

Lo! Allah is Ever Forgiving, Merciful. And all (still) married women (are forbidden unto you)......"

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1 Al Nikaḥ, op. cit. p. 206.
Al Zawāj Wa al Talāq, op. cit. p. 30.

3.2 THE MUHARRAMAT OF NASAB:

These are those women who are permanently forbidden due to lineage how highsoever or how lowsoever i.e you are directly descendant from them and those directly descendant from you.

They are:

3.2.1 The Mothers:

These include your own mother as well as her mothers how highsoever and includes your father’s mothers how highsoever and all the women he married. The latter is confirmed in another ayah: "And marry not those women your fathers married, except that which had already happened in the past. Lo! it was ever lewdness and abomination and an evil way."

3.2.2 The Daughters:

This denotes every female person born from you be it of what grade or level. Thus your own daughter and all your granddaughters how lowsoever are all your daughters by shari’ah definition and understanding.

3.2.3 Sisters, Aunts And Nieces:

- Your sister is a female who shares both parents as you or one of your parents, either a father or a mother.

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1 Al Qur’an, Surah al Nisa': 22.
• Your paternal aunt is a woman with the same parents as your father or who shares one of the parents of your father or grandmothers how highsoever.

• Your maternal aunts are the sisters of your mother who share the same parents as her or one of her parents or the same grandmothers how highsoever.

• Your niece is the daughter of your brother or your sister, a brother and a sister who shares the same parents as you or one of your parents.

All the above are permanently forbidden unto you.¹

The Prophet (S.A.W.S) prohibited the nikah of a woman along with the nikah of her aunt, maternal or paternal. Abū Hurairah narrates that the Prophet (S.A.W.S) said: "It is not lawful for a man to be joined in nikah to a woman and her 'ammah (paternal aunt) or her khālah (maternal aunt)." Only a group of the Khawārij and Shi`ah oppose this ruling.²

3.3 THE MUIHARRAMAT DUE TO MUṢAHARAH (AFFINITY):

Under this heading comes your mother-in-law and her mothers how highsoever. They are permanently forbidden unto you. All the fuqaha' rule that the mothers of your

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Al Ḥalāl Wa al Ḥaram, op. cit. p. 173.

mother-in-law, both from her father and mother's side how highsoever are all permanently forbidden unto you.

This prohibition comes into operation after you married the woman and consummation is not a requirement.

Your daughters-in-law are also permanently prohibited to you.

The daughters of your mother-in-law fall in another category.

The following cases have some kind of relation to this category or persons. They are:

- The rabibah (step-daughter, i.e. daughter of your wife from a previous marriage) and
- The walad (child) of zina (adultery or fornication).

3.3.1 The Rabibah:

She is the daughter of a woman you married from her previous marriage, which means she has a father other than you. The law is that if you consummate the nikah of her mother, she will be prohibited to you permanently.

There is a difference of opinion whether it is a shart that this rabibah has to be resident with her mother and you in the same house.

3.3.2 The Bint (daughter) of Zina:

This is a female born from fornication or zina: i.e. you are the biological father. The juristic question revolves around whether she is your daughter by shari‘ah. The majority of the fuqaha’ rule that she falls in the permanently prohibited category because she is physically from your seed and you are her biological father. The
Shari'ah has only denied her legitimacy of the male parentage due to the rules of legitimacy having been breached by an illicit sexual relationship.

This is the view of the Hanafis, one view of Malik and some Malikis, the Hanbalis, al Thawri and al Awza'i. The Shafi'is dissent with this stating that the bint zina (illegitimate daughter) is not his daughter as the shari'ah had denied such an illegitimate issue such rights and privileges as a legitimate daughter. This is also one of the views of Malik.

They state that the Prophet (S.A.W.S) said:

"Al Wa'ad li al Firash..."1 - children are legitimate from a lawful marriage. The bint zina (illegitimate daughter) is thus not of this category.

They thus rule that the biological father may marry his bint of zina but they rule it as makruh (detestable).2

3.4 THE MUHARRAMAT OF RADA `AH (FOSTERAGE):

These are the persons who become prohibited permanently due to fostering i.e. suckling. Rada `ah prohibits in the same way and in the same pattern as nasab. The aayah on the prohibitive categories, quoted earlier, is clear in this regard. Thus the foster mother who suckled you becomes like your mother with all the prohibitions of

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1 Mukhtasar Sabih Muslim, op. cit. p. 229.
Athar `Aq'd al Zawaj, op. cit. p. 365.
Al Qada' Wa Nizamuhu, op. cit. p. 705.
Al Iqna`, op. cit. Vol 2 p. 79.
nikah announcing as well as all females of her side of the same category of the nasab line like her daughter, sister etc.

The above is confirmed by hadith text also.

`Amratah bint `Abd al Rahman and A'isha narrate that the Prophet (S.A.W.S) said:

"Rada`ah prohibits what birth prohibits."¹

`Ali narrates that the Prophet (S.A.W.S) said:

"Allah forbade by fostering that which is forbidden by nasab."²

4. PROCEDURE IN DETERMINING TAHRIM (PROHIBITION) BY RADA`AH:

There is a difference of opinion amongst the fuqaha as to how much milk of the foster mother brings forth this tahrim. The differences are due to the interpretations of different texts in this matter.

- Some fuqaha rule that irrespective of amount of milk consumed, tahrim (prohibition) is effected due to the Prophet (S.A.W.S) not asking the slave woman who suckled `Uqbah and Umm Ya`hya as to amount of milk consumed when he separated the two permanently.³

¹ Umdah al Qad, op. cit. Vol 16 p. 282
Mukhtasar Sahih Muslim, op. cit. p. 230.


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Subscribing to this view are: 'Ali, ibn `Abbas, ibn Musa`yyib, al Hasan al Basri, Abu Hanifah, Malik and it is one of the views of A`mad.¹

- Some rule that five *rada`at mutafarriqah* (five separate feeding sessions) necessitate *tahrim*. This is according to the text of `A’isha transmitted by Muslim² and others. Subscribing to this view are: ibn Mas`ud, ibn Hazm, al Shafi`i and its the more famous view of A`mad and of most of the Ahl al Hadith.³

- Some again rule that three sucking movements with three swallowings give rise to *tahrim*, due to the *hadith* text: "a single suck or two sucks do not give rise to *tahrim*."⁴ This *hadith* is narrated by `A’isha and others. Those subscribing to this view are: Abu `Ubaid, Abu Thawr, Dawud al Zahiri, ibn Mundhir and is a view of A`mad.⁵

- The fuqaha also differ as to the *shahadah* accepted for *tahrim* by *rada`ah*. Some take one *shahidah* (female witness) as sufficient due to the *hadith* of `Uqbah bin al Harithah mentioned afore. This is the view of Tawus, al Zuhri,

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¹ Fiqh al Sunnah, op. cit. Vol 2 p. 76
Bidayah al Mujtahid, op. cit. Vol 2 p. 35.

² Mukhtaṣar Ṣahih Muslim, op. cit. p. 231.
Sunan Abi Dāwūd, op. cit. Vol 1 p. 517

³ Bidayah al Mujtahid, op. cit. Vol 2 p. 35.

⁴ Sunan Abi Dawud, op. cit. Vol 1 p. 517.
Mukhtaṣar Ṣahih Muslim, op. cit. p. 231.

Al Halal Wa al Ḥaram, op. cit. p. 175.
Awza'i, Ahmad and others. The majority of fuqaha' do not accept this as it is the evidence of one person on his own action. Ibn 'Abbas, 'Ali and others take this view. The Hanafis rule two Muslim males or one Muslim male and two Muslim women are required as shuhud. Al Shafi'i has the same requirement as the Hanafis, but also allow the shahadah (evidence) of four Muslim women herein. His reason for this ruling is "that women usually witness this kind of act."  

4.1 THE MÚHARRÁMAT MU'AQQÁTAH:

These are women who are prohibited to a man to marry due to prevailing circumstances. If the prohibitive circumstances are relieved, then nikāh will be lawful to such a woman.

These women are:

- A woman still married to another man. She is still haram unto you if she is in 'iddah of talaq rai (revocable divorce) due to the fact that the zawj may retract the talaq (divorce pronouncement) and resume the marriage. This prohibition is expressed in the āyah of the muharramat quoted before (Surah al Nisa': 23 - 24).

- A woman in 'iddah of talaq ba'in (period of waiting of irrevocable divorce) or in 'iddah of wafat (period of waiting of a widow) is haram (forbidden) to a man until her 'iddah is completed. If a nikāh (marriage) is contracted

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during this period, it will be invalid and if consummated and a child is born, no *nasab* is attributed to the biological father.

- The *mutallaqah thalathan* (a woman who was given three *talaqat* - three divorce pronouncements) is *haram* for her *zawj* who gave her the *talaqat*. Her remarriage to him has been explained under *nikah al tahill*.

- Any woman who has no Divinely Revealed religion and there is consensus on this.

- Your sisters-in-law are *haram* (forbidden unto you) as long as you are married to their sister. Even when you divorce her, you cannot marry any of her sisters until the `iddah of your *zawjah* had been completed in full. "Sister-in-law" here means all sisters-in-law whether *shaqiqat, ukht li abb* or *ukht li umm* (full sister, consanguine sister and uterine sister respectively).¹

- It is *haram* (forbidden) to be married to a woman and her aunt at the same time. Abu Hurairah, Jabir and others narrate that the Prophet (S.A.W.S) said: "Do not marry a woman and her `ammah (paternal aunt) nor a woman and her *khalah* (maternal aunt)."² This means that you are not to be married to them both at the same time.³

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1. DEFINITION:

The word تلاق (talaq) is derived from the Arabic word إطلاق (itlaq) which literally means "leaving off" or "releasing". تلاق (talaq) of a woman means "termination of marriage to her husband."¹ In the شريعة (shari'ah), talaq means "the breaking of the نكاح (nikah) bond and ending of the نكاح (nikah) relationship."²

 nikah is meant to be a permanent bond, but Islam, unlike certain other religions or religious systems, accepts that, due to factors beyond human control, that bond may have to be severed for the sake of justice, at times.

Although تلاق (talaq) is lawful, it is not encouraged and is detested. It is thus a lawful act which is detested by the شريعة (Shari'ah) Himself. It is sinful if it is misused and thus punishable in the Hereafter.³

Ibn 'Umar and Muharib narrate that the Prophet (S.A.W.S) said:

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"The most detestable of the lawful acts, in the sight of Allah, is *talaq*."¹ This is construed to mean the unlawful form of *talaq*.

2. **ARKAN OF TALAQ (PRINCIPLES OF DIVORCE):**

According to some of the *fuqaha*, they are four in number.

- The *zawj* (husband): thus the *talaq* of a man other than the actual *zawj* cannot divorce a *zawjah*.
- The *zawjah* (wife): with the same rule as for the *zawj* as indicated above.
- The *ṣighah* (divorce formula) which must end the *nikah* relationship. This may either be in *sarih* (clear) terms or *kināyah* (indirect intent) terms.
- The *niwah* (intention).

Some *fuqaha*, like those of the *Hanafis* and *Hanbali* schools of Islamic Jurisprudence, rule that the *ṣighah* (divorce formula) is the only *rukn* (principle) of *talaq* as it is the only means of knowing the *zawj*’s intention herein.

Some others like `Ali, the *Hanafis* and *Malikis* again rule that if a man states “that if I marry so and so, she will be *taliq* (divorced), then when he does so, she is immediately divorced.

¹ Sunan Abi DMIN, op. cit. Vol 1 p. 546.  
This is in conflict with the *hadith* text: "... there is no *talaq* for one not possessing the right of *talaq.*"\(^1\)

This latter ruling is also that of `Ali, ibn `Abbas, ibn Zaid, al Shafi`i and others.\(^2\)

### 3. **SHURUT (CONDITIONS) OF TALAQ:**

There are specific *shurut* for the *mutalliq* (divorce) and the *talaq sighah* (divorce formula) which are:

- that the *mutalliq* (divorced) must have *ahliyyah* (legal ability) and as such sanity is a requirement. There is vast difference of opinion on inebriation whether done voluntarily or not.

Some *fuqaha'* ruling validity of *talaq* like al Shafi`i and not, like ibn Hazm. Some even differentiate between *khamr* (wine from grapes) and other wines, like *Hanafis*.

From some of the *fuqaha*’, like the *Hanbalis*, we have three different rulings in this matter, namely, some ruling validity, others non-validity and *tawqif* (non ruling).\(^3\)

There is consensus that unknowingly consuming anything which causes inebriation, does not validate *talaq* issued, be it food or drink or medication.

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\(^1\) Ṣaḥīḥ al Bukhārī, op. cit. Vol 7: p. 57.


\(^3\) *Fiqh Madhahib Arba’a* ah, op. cit. Vol 4 pp. 281 - 183.
Their proof is the hadith text of the Prophet (S.A.W.S): "No act is recorded against three (persons): the one who sleeps till he awakes, the immature child till he matures and the mad person until he regains his senses."  

It should be noted that voluntary intoxication is a sin in Islam and is a punishable offence.

Bulugh (maturity) and freedom of choice are requirements. Ahmad is the only one validating talaq of a saghir (minor) if he knows what he is saying. The vast majority of fuqaha' rule free choice of talaq by the mutalliqa as necessary. Thus a coerced act will be invalid. Hanafis differ in ruling talaq of the coerced as valid if spoken but not if written.

3.1 SHURUT OF THE SIGHAH OF TALAQ:

These are that the sighah must point clearly to the act of talaq by speech or writing or sign for the akhras (dumb person). There are varying rulings for each of these kinds like some of the fuqaha' permitting equal usage of speech or writing but limiting the sign to an akhras only like al Shafi'i and Ahmad, while Malik allows both sign and writing to an akhras, while Hanafis rule an akhras's sign invalid if he can write. The issue here is what is clearer in the issue of talaq for a specific kind of person. It is

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conditional that the zawjah understands the sign of the akhras zawj (dumb husband).1

3.2 THE GRADES OF TALĀQ:

The talāq of the hazil (one who fools), mukht'ī (one whose tongue slipped), madhūsh (one suddenly surprised) and ghādbān (one in extreme anger), has not been covered fully in the above rules. These are dealt in short as follows:

- The majority of the fuqaha' rule that the talāq of the hazil i.e one who jokes with the pronouncement of talāq, is regarded to be enacted. They quote hadīth text by Abū Hurairah who said: "Three acts' consequences are the same, whether you are serious with it or not - nikāh, talāq and raj`ah (retraction of revocable talāq)". Al Tirmidhī says this is an exceptional hadīth, although sahih2. Malik, in one of his rulings and Aḥmad rule that this talāq is invalid as no intention is present and the Qur'ān states: "And if they decide on talāq, then Allāh is all-hearing and all-knowing."3 The Prophet (S.A.W.S) also said: "All actions will be judged according to intentions."4

- talāq of the mukht'ī is the talāq of one who alleges his tongue slipped and pronounced the word talāq in error, like wanting to call someone called

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3 Al Qur'ān, Sūrah al Baqarah: 227.
4 Šaḥīh al Bukhari, op. cit. Vol 1 p. 4.
"Tariq" and he says instead, in the presence of his zawjah, "taliq" (which means "you are divorced"). Hanafis rule validity of his talaq by qada' (judicial process) and not by diyānah (dispensationary process) after swearing an oath to the effect of a slip of the tongue. The same applies to the ghāfil (ignorant person). The talaq of the hāzil, however is valid both by qada' and diyānah.

- talaq of the madhūsh is the talaq of the one who is surprised by someone or something and in that state pronounce the word talaq. His talaq is invalid as it is of the category of talaq of the unconscious person.

- talaq of the ghadīban is talaq of he who is so enraged that he does not know he said the word talaq. His talaq is assessed by the following rules:

  - complete blanking of the mind due to the extreme anger which makes his talaq invalid.
  - anger but knows what one said makes his talaq valid.
  - in the case between the above two cases it would be better to rule talaq as valid.¹

3.3 TAQSIM OF TALAQ

"Taqsim of talaq" means the divisions into which talaq is divided. This taqsim (division), basically, is according to time and sigah (formula).

3.3.1 **Talaq Related to Time:**

Talaq is either talaq sunni or talaq bid'i.

- **Talaq Sunni:** Talaq sunni is talaq executed in accordance with the requirements of the shari'ah. Talaq sunni is divided into two sections, namely:
  - talaq sunni aḥsan (the best sunni talaq), and
  - talaq sunni ḥasan (good sunni talaq).

- **Talaq Sunni Aḥsan:** This is the giving of one talaq (divorce pronouncement) to the zawjah by the zawj when she is in tuhr (non menstrual period) and he had no sexual relations of any kind with her in that tuhr state since the immediate previous ḥaid. After the issue of this one talaq, he lets her complete her 'iddah. This is the Ḥanafi view and Malik, al Shafi`ī and Aḥmad concur.

  Al Shafi`ī further contends that no ruling exists for the ḥamil (pregnant), sağıhirah (minor) or menopausal zawjat i.e their talaq in neither sunni or bid`i. Aḥmad generally agrees with al Shafi`ī.

- **Talaq sunni ḥasan** by Hanafis is the giving of three separate talaqat (divorces) in three consecutive pure states of the zawjah.

  Their differences of rulings are due to their understanding of the shari`ah texts herein.

  The Qur`ān states:

  "Oh Prophet! When you (menfolk) divorce women, divorce them at their prescribed periods."  

  1 Al Qur`ān, Surah al Talaq: 1.
This is explained further in ḥadīth by ibn 'Abbas:

"talaq are of two kinds: two lawful ones and two unlawful ones. The lawful ones are the ṭalaq of a zawjah in her tuhr in which no sexual relations took place and the ṭalaq of the visibly ḥāmil zawjah.

The unlawful ones are the ṭalaq of a zawjah in a state of haid and in a state of tuhr in which he had sexual relations with her and thus does not know if she is pregnant or not."¹

Hanafis further interpret "divorce them at their prescribed periods" as meaning one ṭalqah after every haidah and this for them is ṭalaq sunni ḥasan as indicated above.

Another ḥadīth narration herein is that of ibn 'Umar who divorced his zawjah in haid and the Prophet (S.A.W.S) ordering him to make muraja'ah (retraction) with his zawjah.²

• Talaq Bid'ī: This is talaq contrary to the procedure of the ṭalaq sunni. The fuqaha' differ in its status.

Generally speaking, ṭalaq bid'ī is defined as a ṭalaq in which the zawj give three ṭalaqat to his zawjah in one expression or three ṭalaqat separately, but in one session or ṭalqatan (two divorce pronouncements) in one session or one talaqah in the haid of the zawjah or in her tuhr in which he had sexual relations with her or during her haid following her tuhr in which he had no sexual relations with her.

² Ibid. op. cit. Vol 6 pp. 249.
The *fuqaha'* have detailed differences on the rulings of *talaq bid'i*, some pertaining to numbers which cause the enactment of divorce like the view of the *Hanafis* while others order retraction by order of the *Hâkim* if the *nikâh* was consummated and even ordering imprisonment to force retraction like the view of Malik. This applies to *talâq* in menstruation or *tuhr* in which consummation took place.

Generally *Shafi'is* and *Hanbalis* agree with Malik save that they do not allow imprisonment to force retraction.

Ibn *Hazm* rule *talaq bid'i* as invalid save if three *talaqat* is given in one session or the *zawj* gives the third *talqah* after having given two previously.¹

### 3.4 THE NUMBER OF *TALAQAT* AND RULINGS THEREON:

There is substantial differences between the *fuqaha'* on the effect of three *talaqat* given, either in one expression or in three separate expressions, but in one session.

It is agreed that when a man married a woman for the first time, he possesses three *talaqat* over her. There is also agreement that he may give three *talaqat* in one session in the manner explained above, but that would be sinful.

They explain that the *zawj* has this right by the *'aqd al nikâh* and if he used it, he has closed the door of retraction or reconciliation and continuation of the *nikâh* and he acted contrary to the *shari'ah* which has given instruction of separate *talaqat* on separate occasions as a safety measure against over-hastiness and miscalculation by

Al Wilâyah Wa al Wasâyâ Wa al Talâq, op. cit. pp. 229 - 247.
the *zawj* in this matter. This issue already happened in the Prophet's (S.A.W.S) time as al Nasa'i records that Mahmūd bin Labīb said:

"The Prophet (S.A.W.S) was informed of a man who gave three *talaqāt* together. The Prophet (S.A.W.S) got up in anger and said: "Do they play with the Book of *Allāh* and I am still present amongst you?""¹

The *fuqaha* differ on how many *talaqāt* take effect when three *talaqāt* are given as indicated above. The vast majority of the *fuqaha* rule validity of the three *talaqāt*, others rule only one *talqah* takes effect, while a small minority rule that it has no effect at all.

The *fuqaha* substantiate their view points as follows:

- The vast majority of the *fuqaha* quote a number of *āyāt* in support of their ruling e.g.: "Then if he divorces her (for a third time) then she is not lawful to him thereafter until she has married another husband."² "There is no blame on you if you divorce women while you have not touched them..."³ "And if you divorce them before you touched them and you have not appointed them a dowry (*sadaq)*..."⁴ There is no difference here in the *ayat* on the *talaqāt* whether one, two or three. "Divorce is only permissible twice, after that the parties should either hold together on reasonable terms or separate in kindness."⁵ This *āyah* is clear in the permissibility of *talqatān* or

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¹ Sunan al Nasā‘ī, op. cit Vol 6 p. 147.
³ Ibid, op. cit 236.
⁴ Ibid, op. cit. 237.
⁵ Ibid, op. cit. 229.
three *talaqat*, at once or separately. In the *sunnah* practice, the *hadith* of Sahl ibn Sa`d who reported the *mula `anah* of `Uwaimir of his *zawjah* and divorced her with three *talaqat* in the presence of the Prophet (S.A.W.S) and he did not say anything.\(^1\) This is the ruling of most of the *sahabah*, the *tabi`un* as well as Abu Hanifah, Malik, al Shafi`i and Ahmad.

The group of *fuqaha’* who rule only one *talqah* is effected by the giving of three *talaqat* in one session, quote the following proof: `Ikramah narrates from ibn `Abbas in the divorce of the wife of Rakanah, the latter who divorced her with three *talaqat*. After querying it with the Prophet (S.A.W.S) the latter asked: "In one session?" to which Rakanah replied in the affirmative. The Prophet then said: "That will be only one."\(^2\) The latter text is questioned as to authenticity according to al Shawqānī. This ruling (of one *talqah* taking effect when three are pronounced in one session) is the view of `Ali, ibn `Abbas, Jabir, Zaid bin `Ali, ibn Taimiyyah and ibn Qaiyyim as well as that of the *Shaikhs* of Qurtubah (Cordova in Andalusia of Muslim Spain).

Those who rule this *talqah* as *bid`i* rule it has no effect. This is the view of some of the *tabi`un*, ibn `Aliyyah, Abu `Ubaidah, some of the Zahirīyyah and some others.

There is a further view that if three *talaqat* is given to a *zawjah* whose *nikah* had been consummated, then three will take effect while only one will take

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\(^1\) Sahīf al Bukhari, *op. cit.* Vol 7 p. 69

\(^2\) Sunan Abī Dawūd, *op. cit.* Vol 1 pp. 551 - 552.
effect if the *nikah* had not been consummated. This is the view of some of the companions of ibn `Abbas and of Isḥaq al Rahawai.

3.4.1 **Talaq al Battah:**

*Talaq al battah* is a final *ba'in* (irrevocable) form of *talaq* like a *zawj* saying to his *zawjah*: "anti *taliq al battah* - you are divorced in finality." The *saḥabah* of the Prophet (S.A.W.S) differed on its ruling. Some like `Umar ruled it as one *talqah* (one divorce) while `Ali ruled it as three *talaqat* (three divorces) and some *fuqaha’* ruled that the intention to is to be taken into consideration as that was intended as does al Thawrī and the *fuqaha’* of Kufah, while Malik rule three *talaqat* if the *nikah* was consummated.¹

3.4.2 **Talaq Sarih and Talaq Kinayah:**

*Talaq sarih* (clear divorce) is a clearly indicated *talaq* in which there is no ambiguity as to intention of the *mutalliq* (divorce) while *talaq kinayah* (indirect intent divorce) is an unclear form of *talaq* which needs clarity from the *mutalliq* as to what he meant by his expression.

- **Talaq Sarih:** Hanafis, Malikis, Shafi`is and Hanbalis all agree that the word *talaq* and its derivatives in Arabic have to be used to enact *talaq sarih*. If the *mutalliq* does so, his intention is not asked for. Thus, according to these *fuqaha’*, if a *zawj* says to his *zawjah*: "anti *taliq*" (you are divorced), or "*talaqtuki*" (I have divorced you), he cannot claim fooling with it. Their proof is from the Qur’an’s usage of the term *talaq* for this matter and

nothing else. Allah says: "...fa taliqahunna li `iddati-hinna - "...divorce them at their prescribed times...". There is a lot of discussions amongst the fuqaha' as to the usage of a foreign language in issuing talaq. Most of it are irrelevant to non-arabic speaking Muslims.

- **Talaq Kinayah (Indirect Intent Divorce):** The fuqaha' divide the kinayah (pl of kinayah) into categories. The basic division is between kinayah zahirah (indirect but clearly expressed intent) and kinayah khafiyyah (indirect declaration of intent not clearly expressed). These are the main divisions of the majority of the fuqaha' amongst of them the Maliki, Shafi and Hanbali schools.

The Hanafis have three categories, namely:

A zawj's reply to a request from his zawjah for talaq, or that which can be a reply to a request for talaq, or that which may be a reply to a request for talaq by the zawjah. These fuqaha' further go into and give many kinds of examples and usage of Arabic terms which are not relevant in Non-Arabic speaking societies and they will not be dealt with here.

Fundamental to the kinayah being taken for talaq is the intention of the zawj herein so much so that even if he utters kinayah talaq like saying: "anti wahidah" (literally "you are alone") and he intended a number of talaqat, then that number of talaqat is effected.

He must swear an oath if he did not intend talaq and his word will be taken.

The Zahiriyyah rule that no talaq takes effect with a kinayah utterance whether intended for talaq or not. This is the rule for both diyanah (dispensationary cases) and

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1 Al Qur'an, Surah al Talaq: 1.
qada’ (judicial cases) due to such form of ṭalaq not being mentioned in the Qur’an nor the sunnah, according to them.

The Shi’ah Imamiyyah has the same view as the Zahiriyyah herein.¹

3.4.3 Ṭalaq Munjiz, Ṭalaq Mu’allaq and Ṭalaq Muḍaf:

Ṭalaq munjiz is a ṭalaq that comes into operation immediately due to clarity of intent by the muṭalliq.

Ṭalaq mu’allaq is ṭalaq chained down to a certain happening while ṭalaq muḍaf is chained down to a time factor or place.

All the fuqaha’ agree that ṭalaq mu’allaq made on your zawjah is immediately enacted when the condition set is met but differ when it is made to a woman with whom one is not married yet. Discussions on these issues by the fuqaha’ exist but are not relevant to the South African Muslim scene and practice and are thus omitted here.

Those of the fuqaha’ who rule validity of ṭalaq mu’allaq, assert that it actually happened in the days of the saḥabah who gave fatwa on its enactment. The same applies to the tabi‘un of Ahl al Ijtihad (legists).

Nafi’ narrates that a man divorced his zawjah by saying:

"you will be ṭaliq al batt if you leave." Ibn ‘Umar said: "If she leaves, ṭalaq ba’in will take effect immediately and if not, nothing will happen."²


A similar ruling is reported from Ibn Mas'ud while Ibn Abü al Zunăd transmits it from the fuqaha' of al Madinah.

3.4.4 Talaq Mudaţ:

This is talaq chained down to a time factor or a place.

As soon as the time factor prescribed in the talaq is found, talaq is enacted. Some fuqaha' rule that this form of talaq may be chained down to a time factor, past, present or future like the view of the Ḥanafis.

Others like Malik, the Shafi'is and Ahmād rule that any impossible or far fetched time factor like "you are divorced when you touch the sky" enacts talaq munjiz (divorce with immediate effect). The same occurs when this kind of talaq is chained down to the "Will of Allah".

Ibn Ḥazm rules this kind of talaq i.e talaq mudaţ, as invalid as the Qur'an and sunnah did not entertain it.

3.4.5 Tawfiq (Ceding) and Tawkil (Agency) of Talaq:

Since talaq is a ḥaqq (right) of the zawj, normally, due to his obligations in the nikāh, he has the right to appoint a representative in the process of talaq who will act on his behalf.

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1 Al Zawaj Wa al Talaq, op. cit. pp. 109 -110.
Al Wilayah Wa al Wasayā Wa al Talaq, op. cit. pp. 458 - 462.
Fatawa ibn Taimiyyah, op. cit. Vol 4 p. 156.

Al Mughnī, op. cit. Vol 7 pp. 199 - 204.
Al Zawaj Wa al Talaq, op. cit. p. 108.
The fuqaha’ differ in that:

Ibn Hazm rules that it is not valid to cede such a haqq (right) to one’s zawjah, while the majority of the fuqaha’ rule validity of ceding it to both the zawjah and the wakil.

Tafwīd is specifically the ceding of ṭalaq to the zawjah and the result will depend on her reaction to it.

Tawkil is the appointing of a wakil to carry out the ṭalaq process of the muṭalliq, either verbally or in writing.

All the fuqaha’ agree that the muṭalliq can relieve the wakil of the instructions.

There is a difference amongst the fuqaha’ whether the muṭawwīd (one making tafwīd) can retract his tafwīd or whether the zawjah possesses that tafwīd of ṭalaq until she responds to it.

The fuqaha’ also differ as to whether the matter has to be settled in one session or not.

Some, like the Ḥanbalis, rule that the offer is still the zawjah’s, even after the session in which the offer was made to her. This is reported from `Ali, Abū Thawr and others. While others like Malik and al Shafi`i and the Ḥanafis restrict it to one session. Thus if she does not respond in the session in which the offer is made, and her zawj leaves her presence, the offer lapses. She has thus to respond immediately to the offer, according to the above fuqaha’.

A claim is made of consensus herein by some Ḥanbalis as no difference was found amongst the saḥabah herein.

The fuqaha’ also differ whether the zawj may retract this offer of ṭalaq tafwīd, after having made it.
`Aṭa‘a, Mujahid, al Awzā‘i and others rule that he can as he is the possessor of that *haqq* (right) while al Zuhri, al Thawri, Malik and the Ḥanafis rule that he cannot as he ceded a *haqq* and cannot retract it.¹

### 3.4.6  Ṭalaq Marid Marad al Mawt Or Ṭalaq al Far:

This is *ṭalaq* of a *zawj* who is on his sickbed from which he does not recover and finally dies from. There is no clear and unambiguous text on this in the *shari‘ah*. There is only the practice of the *ṣaḥabah* herein as in the case of `Abd al Raḥman ibn `Awf who gave *ṭalaq* to his *zawjah* while ill and from which illness he eventually died.

The khilifah 'Uthman ruled her right to her share of his estate. Some of the *fuqaha* claim *ijma* of the *ṣaḥabah* herein, but this is incorrect as ibn Zubair differs herein. The *fuqaha* differ on this form of *ṭalaq*.

Some *fuqaha* like the Ḥanafis rule that if a *zawj* gives *ṭalaq* to his *zawjah* while in *marad al mawt* (illness from which he dies), she inherits from him as long as he dies during her *`iddah of ṭalaq* (period of waiting in divorce). This is to refuse the *zawj* the luxury of disinheriting his *zawjah* at *wafat* (death) to deny her her rightful share of his estate.

Malik rules that she receives inheritance from his estate, whether the *zawj* dies during or after the completion of her *`iddah of ṭalaq*, whether she marries another man after it or not. This is a clear ruling so as to prevent the *zawj* from getting away with his improper action.

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Al Zawāj Wa al Ṭalaq, op. cit. pp. 111 - 112.
Ahmad and ibn Abū Laila rule that the zawjah in the ṭalaq of marad al mawt (illness from which he dies) receives her inheritance from the estate of her former zawj on condition that she does not remarry before she receives her allotted share. This period is unspecified.

Al Shafi‘ī and ibn Hazm rule no inheritance due to her as the nikāḥ bond was severed and thus no consequences of nikāḥ, like inheritance, is applicable.

It should be noted that the zawj must have full ahliyyah (legal capacity) in his marad al mawt (illness from which he dies) before his talaq can be valid and correct. Sanity is especially required.

Those of the fuqaha‘ who rule inheritance for the mutallaqah of marad al mawt, based it on qiyās with the mutallaqah (divorcee) of talaq raj‘i where consequences of the nikāḥ is still to be found. Those who rule that she inherits subject to her not remarrying, do so to avoid breaking the ijma‘ that a woman does not inherit from two husbands simultaneously. This is based on the supposition that her second zawj dies before she receives her inheritance from her first former zawj’s estate.¹

3.4.7 Ishhad (Witnessing) of Talaq:

The fuqaha‘ differ on the necessity of ishhad (witnessing) of talaq.

The Zahirīyyah rule ishhad of talaq as a shart (condition) for the validity of talaq while the Shi‘ah Imamiyyah rule it a necessary rukn (principle) of talaq.

They quote as proof for their argument the ‘ayah:

"And when they are about to fulfil their `iddah, either take them back in a good manner or part with them in a good manner and take for witnesses, two just persons from amongst you (i.e Muslims)."\(^1\)

They state that Allah here joins between *muraja`ah* (reconciliation) and *talaq* and witnessing and thus separation of the two issues are not permissible.

Thus *talaq* without *ishhad* is invalid by them and has thus no consequences.

The majority of the *fuqaha*, amongst them, the *Hanafis, Malikis, Shafi`is* and *Hanbalis*, rule that *ishhad* is not a requirement for the correctness of *talaq* as there is no contract in Islam which requires *ishhad* for its correctness save *`aqd al nikah* due to its serious consequences.

The Prophet (S.A.W.S) has stated that "the most detestable *halal* act in the sight of Allah is *talaq*".

Thus this act does not have the serious moral and social consequences which *nikah* has and thus *ishhad* is not necessary for it.

The relevant *ayah* quoted on *ishhad* of *talaq* is for *istihbab* (preference) but not for *wujub* (necessity).\(^2\)

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\(^1\) Al Qur'an, Surah al Talaq: 2.

Al Wilayah Wa al Wasayâ Wa al Talaq, op. cit. pp. 732 - 734.
4. **TALAQ RAJ'I** (REVOCABLE DIVORCE) AND **TALAQ BA'IN** (IRREVOCABLE DIVORCE).

4.1 **DEFINITIONS:**

*Talaq raj'I* is the *talaq* after which the *zawj* may make *muraja'ah* (reconciliation) with his *zawjah* and continue the *nikah* without remarriage and a new *'aqd al nikah*, provided such *muraja'ah* takes place before the *'iddah* of her *talaq* had been completed.

*Talaq ba'in* is a *talaq* in which the *zawj* may only live again with his *mutallaqah* after he had contracted a new *'aqd al nikah* and *nikah* with her subject to such conditions as the *shari'ah* prescribe.

*Talaq ba'in* are of two kinds: *talaq ba'in sughra* (irrevocable divorce - minor degree) and *talaq ba'in kubra* (irrevocable divorce - major degree).

As for *talaq ba'in sughra*, it is the *talaq* in which the *mutalliq* (divorced) and the *mutallaqah* (divorcee) may resume married life only after they have contracted an entirely new *nikah* and *'aqd al nikah*.

*Talaq ba'in kubra* is the *talaq* where the *nikah* is fully and completely ended and the *mutalliq* and the *mutallaqah* may not remarry save if the *mutallaqah* has, by free choice and natural events, married another man, lived with him naturally and normally as his *zawjah* and by normal and natural events be divorced by him or widowed by him and stays out her required *'iddah* fully and completely.
4.2 CASES OF THE STATUS OF TALAQ:

Some of the fuqaha' like the Hanafis rule the following cases as talaq raj‘i (revocable divorce):

*Talaq raj‘i* is a talaq of a zawjah, whose nikah was consummated, by usage of the talaq wording and which is not conditioned by `iwd (compensation), nor number (of talaqat) nor qualified by a strong adjective of separation nor chained down to any form of monetary compensation nor compelling three talaqat. All forms of kinayah talaq will also be talaq raj‘i on condition that it is not qualified by a strong adjective indicating bainunah (irrevocability).

For others it is the issue of less than three talaqat or divorce chained own to `iwd as for the Hanbalis. Malikis and Shafi‘is have more or less the same rulings as Hanafis herein.

*Talaq ba‘in* for the fuqaha’ are as follows:

- **Talaq** after nikah and before consummation of it as that nikah does not accept raj‘ah (retraction or reconciliation). These zawjat do not observe an `iddah of talaq.
- **Talaq** with a strong qualifying adjective indicating bainunah (irrevocable) status.
- **Talaq** where the zawjah offers `iwd (compensation) for ridding herself of her zawj.
- A talaq which completes three talaqat or three talaqat given separately in one session or in one sentence indicating three talaqat, whether by words or sign.
Kināyah talaq which points to bainūnah status like saying: anti ba’in - "you are separated from me" save for Malikis who rule it raj’ī. (revocable). Khul’ save for Shafi’i’s who rule it raj’ī always. The Zahirīyyah rule that talaq is only effected by the three words of talaq and its derivatives as mentioned before. Kināyah has no consequence for them. Thus talaq ba’in for them is three talaqat or completing three talaqat to a zawjah whose nikāh had been consummated or one talaq to the zawjah whose nikāh had not been consummated. Besides this, all other forms of talaq permissible in their view, are enacted as talaq raj’ī (revocable divorce). They further opine that there is no other kind of talaq mentioned in the Qur’an and sunnah, save these categories.

Talaq given by the qadi (judge) is ba’in even if it is the first talaq given to the zawjah. This is the ruling of most of the fuqaha’. It is especially so when there is a reason necessitating such action.¹

This latter issue, called tatliq (judicial divorce), or talaq by qada’ and sanctioned by some of the fuqaha’, will be dealt with fully later on.

### 4.3 POSITION OF TALAQ RAJ’I (REVOCABLE DIVORCE):

Raj’ah (retraction in revocable divorces) is lawful by rule of the Qur’an and the sunnah Prophet (S.A.W.S). As for the Qur’an:

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¹ Al Wilayah Wa al Wasāya Wa al Ṭalaq, op. cit. pp. 396 - 406.
Al Zawāj Wa al Ṭalaq, op. cit. pp. 102 - 104.
"And divorced women should wait for three menstrual periods and it is not allowed for them to hide what Allah had created in their wombs, if they believe in Allah and the Last Day. And their husbands have more right (than others) to take them back in that period should they feel they can effect reconciliation."\(^1\)

The Prophet (S.A.W.S) divorced Hafsah and then reconciled with her. He also ordered ibn `Umar to make muraja`ah (reconciliation) with his zawjah whom he divorced while she was in ha`id (menstruation).\(^2\)

There is consensus by the fuqaha that during the `iddah of talaq raj`i, the zawj has the right of muraja`ah with the zawjah with or without her agreement. This is specifically so if the zawj had been overhasty with talaq and erred in the process. However, the Qur'an makes it clear that the intention of the muraja`ah must be reconciliation and not for causing any harm to the zawjah in any way. If he intends that, then he is not entitled to muraja`ah (reconciliation).

4.4 CONSEQUENCES OF TALAQ RAJ`I:

Some fuqaha like the Hanafis rule that the only difference occurring in the the nikah relationship in this form of talaq is the diminishing of the number of talaqat the zawj still possesses over his zawjah. Thus she is his zawjah in all respects during the `iddah. They rule that he has the following huqeq (rights) during he `iddah of this form of talaq:

- The full right of muraja`ah during the `iddah.

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1 Al Qur'an, Surah al Baqarah: 228.
• The remaining balance of the *sadaq* (dowry) is not due during the `iddah.

• The *zawjah* inherits from the *zawj* and vice versa during the `iddah irrespective what the circumstances of *talaq* were on condition that it is *talaq ra`i*, with or without her consent.

• The *zawj* has the right to add to the number of *talaqat* during the `iddah.

• Conjugal rights are valid.

• The *zawjah* is entitled to all forms of *nafaqah* (maintenance) during the `iddah of this form of talaq.

All these above rules are basic to all the major *madhahib* (schools of Islamic Jurisprudence).

*Hanbalis* share the *Hanafis’* view that sexual relations during the `iddah of *talaq ra`i* is valid.

Malik prohibits this before *raj`ah* (reconciliation) had been made.

His ruling is due to the *ayah* speaking of *bu`ul* (former spouses) and as such, they have to make *raj`ah* so that the former marriage status is restored.

Al Shafi`i rules that *raj`ah* has to be expressed by words as in the case of the enactment of *nikah* or that which is in its meaning for categories of persons who cannot speak.

This is because he sees this form of *talaq* as a break in the *nikah*.

The other *fuqaha’* rule that any act which can be construed to be indicative of *raj`ah*, is taken as such.

If the `iddah* lapses and no valid *muraja`ah* had been made, the *nikah* ends, even if only one and the first *talqah* has been given. If they wish to resume their
married life, they will have to enact a new *nikah* with a new *`aqd al nikah* and a new *sadaq*.\(^1\)

Hereafter the *fuqaha‘* differ when a *mutallaqah raj iyyah* (revocably divorced woman) was not informed by her *zawj* of her *talaq* from him.

Some of the *fuqaha‘*, like Malik and ibn Hazm, validate the second *nikah* and base their ruling on *fatwa* of *`Umar* while some rule the right of the first *zawj* over the woman on condition that the *nikah* was not consummated as does *`Aṭa‘a* in his ruling as well as being one of the rulings of *Aḥmad* while al Shafi‘ī and others rule the right of the first *zawj* over her whether the *nikah* was consummated or not. This is the *fatwa* of *`Ali*.\(^2\)

### 4.5 Talaq ba‘in AND ITS CONSEQUENCES:

*Talaq ba‘in* (irrevocable divorce) is either *sughra* (minor degree) or *kubra* (major degree).

*Talaq ba‘in sughra* is a *talaq* which is not enacted with more than *talqat Anat* (two divorce pronouncements) nor a *talqah* (divorce pronouncement) completing three *talqat* (divorce pronouncements).

The following are of the *talaq ba‘in sughra* category:

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• a *talqah* after *nikah*, but before consummation of it. Also included herein is a *talqah* after *nikah* and *khulwah sahīhah* (being alone with one another), but before consummation of the *nikah*.

• *talaq `ala-al māl* (divorce by compensation) which is *talaq* against `īwād, (compensation) usually the *sadaq* or part of it. This is the *talaq* a *zawjah* requests to rid herself of her *zawj* when there is no reason warranting her to be granted a *talaq*.

• *talaq* issued by the *qādi* (Muslim judge) on request of the *zawjah* due to the *zawj*’s default in *nikah* obligation in *nafaqah*, `uyūb (defects) of the *zawj*, *ḍarar* (harm) from him and the like.

In these cases *murāja`ah* (reconciliation) is not allowed to the *zawj* as the *nikah* broke down and one of the parties have clear intent of getting rid of the marriage bond.¹

*Talaq ba’in sughra* (irrevocable divorce - minor degree) has the following consequences:

• the *nikah* is immediately ended and the parties are total strangers to one another.

• the parties do not inherit from one another when one of them dies, during or after the `iddah (period of waiting) of the *zawjah*.

• the outstanding *sadaq* (dowry) becomes due immediately and in full to the *zawjah*.

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¹ Bidayāh al Muṭahid, op. cit. Vol 2 p. 60. Al Wilayah Wa al Wasaya Wa al Talaq pp. 103 - 104.
• the parties may remarry during or after the 'iddah if they so agree. This means an entirely new 'aqd al nikah, sadaq and nikah. The wali enters the scene again by such madhāhib (schools of Islamic Jurisprudence) requiring it for validity of nikah.

• the mutallaqah (divorcee) must receive sukna (lodgings) during her 'iddah of this kind of talq. No nafaqah (maintenance) and kiswah (clothing) are required as there is no muraja 'ah (reconciliation) to the zawj. This is based on the ayah (Quranic verse): "Lodge them (the mutallaqat) where you dwell and obliged them not to leave, and if they are pregnant, then spend on them until they deliver (their child)."¹

• nasab of the child or children are attributed to the zawj if attributable to him or proven to be his.

4.6 TALAQ BA'IN KUBRA (IRREVOCABLE DIVORCE - MAJOR DEGREE) AND ITS CONSEQUENCES:

There is consensus that a third talqah breaks the nikah irrevocably and both the partners immediately become strangers to one another. However, they may not remarry directly again during or after the 'iddah but only after the woman, by natural and normal events married another man, lived with him and had her nikah consummated and then, by natural and normal events, either be divorced by him or widowed by him and stays out her required 'iddah.

¹ Al Qur'an, Surah al Talaq: 6.
Only then may she remarry her former spouse, if they so both agree, with a new 
nikāh, `aqd al nikāh (marriage contract) and sadaq (dowry).

This procedure is prescribed in the Qurʾān:

"And if he divorced her for a third time (by a third talqah), then she is not lawful for 
him thereafter until she married another husband." ¹

It is thus obvious that an "organised" marriage to legalise the situation for the first zawj 
to remarry his former zawjah is not permissible.²

This matter had been dealt with in marriages to Non-Muslims.

4.7 THE ISSUE OF HADM (DESTRUCTION) OF TALAQAT:

Hadm literally means "to destroy, pull down or demolish"³. In the Fiqh of talaq it means the "destroying of previously issued talqat."

These talqat are those issued to her by her former zawj.

There is consensus by all the fuqahā that if a woman is divorced talq ba‘in kubra by her zawj and goes through the process of marriage to another man, not by tahillī (unlawful legalisation) method, by the more correct ruling, and remarries thereafter her former zawj, she returns to him with him possessing three talqat over her.

Hereafter the fuqahā differ on talqat (divorce pronouncements) issued which are less than three and the zawjah marries someone else after her `iddah of talq of

¹ Al Qurʾān, Surah al Baqarah: 230.
² Bidayah al Mujtahid, op. cit. Vol 2: 86.
   Al Wilayah Wa al Waṣayā Wa al Talqāq, op. cit. pp. 409 - 416.
³ Al Munjīd, op. cit. p. 859.
the first zawj had been completed. Are those talaqat destroyed by the second marriage or not.

Abū Hanīfah and Abū Yusuf rule that in the case of talaq bainūnah sughra (irrevocable divorce - minor degree)), if the woman marries another man after completion of her 'iddah of talaq of her former zawj, and later, when permitted in shari‘ah, she remarries her first zawj, then the latter will possess three talaqat over her as the second zawj "destroyed" the talqah or talqatan of the first one.

Muḥammad al Shaibānī and Zufar of the Ḥanafis oppose this ruling, saying, as the rest of the fuqaha, that on remarriage to her first zawj, she returns to him with only the remaining talaqat on her.

Thus if the first zawj gave only one talqah or talqatan and did not make muraja‘ah during the 'iddah of her talaq and she remarries him (the first zawj), when so permissible in shari‘ah, he will only possess talqatan or one talqah over her respectively.¹

4.8 OTHER FORMS OF TALAQ AND TALAQ BY QADA‘

There are other forms of talaq like talaq zihar, talaq li‘ān (mutual imprecation) and talaq qada‘ (judicial divorce). Some fuqaha‘ classify talaq qada‘ or (tatiq) as faskh.

4.8.1 *Talaq Zihar:*

*Zihar* comes from the word *zahr*, meaning a person's back. In the Jahiliyyah (pre-Islamic) era, saying to your *zawjah*: "*anti alaiya kazahri ummi* - you are to me like the back of my mother" meant *talaq*.1

The implication is that a child is carried on the back of his mother and a mother is of the *muharramat mu`abbadah* (permanently prohibited persons for marriage).

Islam forbade this practice and instituted laws to deal with it. Thus the Qur'an states:

"Those amongst you who make their wives unlawful to them by saying: 'you are like my mother': they cannot be their mothers. None can be their mothers except those who gave birth to them. And verily they utter an ill word and a lie...."2

This *ayah* was revealed due to Khawlah bint Tha`labah complaining to the Prophet (S.A.W.S) about this act from her husband, Aws bin al `Samit. The Prophet (S.A.W.S) sent her away as there was then no Revelation on it yet. Later the above *ayah* was revealed.3

4.8.2 *Rules of Zihar:*

The utterer must have *ahliyyah* and use only the word "mother".

When *zihar* is enacted, cohabitation is forbidden as well as any sexual or other intimate act like kissing. *Kaffarah* (penalty) becomes compulsory when the *zawj* retracts. There is difference of opinion amongst the *fuqaha* as to what constitutes retraction. Some rule any act indicating that as is the view of Qatdah and Abu

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2 Al Qur`an, Surah al Mujadalah: 2.

Hanifah while actual verbal retraction is required by Dawud al Zahiri. Al Shafi‘i rules if he keeps her with him that is taken as retraction. Malik and Ahmad require actual intention of retraction.

The Qur’an has specified the kaffarah of zihar as being freeing a slave or if incapable, then fasting two months consecutively and if unable, feeding sixty poor people for a full day.¹

All the fuqaha’ rule that the above are the only penalties for zihar and that the order must be kept. If he cannot do any of these, then he is exempted according most of the fuqaha’ save al Shafi‘i.

There is a difference of view when a zawj is busy paying the penalty and he “touches” his zawjah in the forbidden manner. Some fuqaha’, amongst them Abu Hanifah, al Shafi‘i, rule that only one kaffarah is necessary. While ibn Shihab and others rule kaffarat-an (two penalties) become due.²

4.9 AL LI’AN (DIVORCE BY MUTUAL IMPRECATION):

The word li’an comes from the Arabic word l’an which literally means "curse".³

Li’an is so called due to the cursing process the parties have to complete when mula’anah (process of li’an) is made. This is explained further on.

¹ Al Qur’an, Surah al Mújadalah: 3 - 4.
Li`an is actually the accusation of a zawj to his zawjah that he saw her committing adultery with another man or he denies the hamil (pregnancy) of her as being his i.e. his child.¹

The process of li`an consists of four consecutive statements by the zawj that his zawjah committed zina (adultery) and the fifth statement he invokes the curse of Allah on him if he is lying.

The zawjah is then required to respond by admitting to the act, in which case the punishment of zina will be obligatory.

If not, she is to make four statements consecutively denying her zawj’s accusation and the fifth statement she invokes the anger of Allah on her if she is lying.

They are then permanently separated and may never ever marry one another again.

The ayah of mula`anah came for Hilai bin Umaiyyah who found his wife committing zina with another man and he being the only witness.²

Hereafter the ayah of the law of li`an or mula`nah as it is also called, was revealed: "As for those who accuse their wives (of adultery) but have no witnesses except themselves, let the testimony of one of them be four testimonies (i.e. testify four times) by Allah that he is of those who speak the truth. And the fifth testimony is the invoking of the curse of Allah on him if he is of the liars.

And she shall avert the punishment if she bears witness four times by Allah that he is telling a lie. And the fifth one is that she invokes the anger of Allah upon her if her husband is speaking the truth."³

The *sunnah* practice of the Prophet (S.A.W.S) doing so is clear herein as the above texts indicate and also to the separating by *mula`ânah* between certain parties as reported by *hadîth* texts by ibn `Umar, Sa`d ibn Jubair and Sahl bin Sa`d.¹

4.9.1 **General Laws of Li`ân:**

Both parties must have *ahliyyah* and the *zawj* is under obligation to make *mula`ânah* when accusing her of *zina*. Abû Hanîfah even rule denial of the unborn child as *li`ân*.

The case must be brought to the *qâdi* (judge) and if the *zawj* refuses to make *mula`ânah*, he receives *hadd* of *qadhf* (slander) and if the *zawjah* refuses to do the *mula`ânah*, the charge of *zina* is confirmed and *hadd* carried out on her save by Abû Hanîfah who rule imprisonment for her until she makes *mula`ânah* or confesses to *zina*.

When both make *mula`ânah* they are permanently separated due to the Prophet (S.A.W.S) as narrated by `Umar:

"When two parties make *mula anah*, they are separated."¹ Similar texts are narrated by Sahl.² If *mula anah* is complete and the *zawjah* is *hamil*, no *nasab* of that child is attributed to the *zawj* of the *zawjah*.³

4.10 *AL IILA’*:

*Ila’* literally means *half* which is swearing an oath.

In the *shari’ah* it specifically means the swearing of a *zawj* by oath that he will not cohabit with his *zawjah* for a period longer than four months.

*Ila’* in the pre-Islamic era was indefinite and could thus go on for years on end according to ibn ‘Abbas.

Islam changed the pattern and ruled stringent and restrictive rules for this.⁴ The issue of *Ila’* is dealt with in the *Qur’an*:

"Those of you who take an oath not to cohabit with their wives, must wait four months: then if they retract, verily *Allah* is oft forgiving, most merciful. And if they decide on divorce, *Allah* is all-hearing and all-knowing."⁵

¹ Sahih al Bukhari op. cit. Vol 7 p. 71
² Mukhtasar Sahih Muslim op. cit. p. 228.
³ Sunan Abi Dawud op. cit. Vol 1 p. 565.
⁵ Rawai’ al Bayan, op. cit. Vol 1 p. 312.
4.10.1 General Laws of *ila*:

There is consensus that shunning the *zawjah* is not *ila* and that swearing by oath with abstention from cohabitation is required. Some *fuqaha* like ibn `Abbas and Abu Hanifah rule that if the four months of *ila* passed, one *talqah* takes effect while others like Malik, al Shafi`i and Ahmady obligate retraction or *talaq* failing which the *Hakim* intervenes and issues *talaq*.

There is a difference as to what constitutes retraction of *ila*. Some *fuqaha* rule that it constitutes the actual cohabitation while others qualify it stating that it takes place while there is no prohibition to cohabitation by *shari`ah* like her fasting while others rule retraction by mouth as sufficient.¹

5. *AL KHUL* (DIVORCE BY COMPENSATION METHOD)

5.1 DEFINITION:

The word *khul* is taken from the expression *khala`a al thawb* which means "removing the garment". This is the literal meaning.

In the *shari`ah* it is ‘the release from the *nikah* bond of the *zawjah* by the *zawjah* by `iwa` (compensation).”²

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¹ Raw`i al Bayan, Vol 1 pp. 312 - 314.
   Al Jam` li Aḥkām al Qur`ān, Vol 3 p. 103.

In *nikah*, a *zawj* is like a garment to a *zawjah* and she to him in that both protect the chastity of one another. This intimate relationship is based on love, mutual respect, fairness and a just co-existence.

When these requirements can no longer be upheld, and the *zawj* dislikes his *zawjah*, he can divorce her and she keeps the *sadaq* in this case.

If she dislikes him or no longer loves him and wishes to have her freedom, she is to return his *sadaq*, generally, and is set free.

The process whereby a *zawjah* gets her freedom by her own request is called *khul*.

The validity of *khul* is confirmed in both the Qur'an and the *sunnah* practice of the Prophet (S.A.W.S).

"And it is not lawful for you (men) to take back any of your gifts (*sadaq*) (from your wives) which you have given them, except when both parties fear that they would be unable to keep the limits ordained by Allah. Then if you know that they would not be able to keep the limits ordained by Allah, then there is no blame on either of them if she gives back (the *sadaq*) for her freedom."

In the *sunnah* practice the Prophet (S.A.W.S) gave judgment in the case of Thabit bin Qais and his *zawjah*, as narrated by ibn `Abbas. She complained to the Prophet (S.A.W.S) that she could not stand Thabit any more, but had no complaint about his conduct or religious practice. The Prophet (S.A.W.S) ordered her to return the plantation he gave her as *sadaq* and ordered Thabit to "let her go", which is construed to mean, "divorce her."

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1 Al Qur'ān, Surah al Baqarah: 229.
The majority of the fuqaha' rule validity of khul` and the zawj taking back the sadaq (dowry) in exchange for the zawjah's freedom from the nikah bond. They take their proof from the ayah:

"And give to the women (whom you marry) their dower (sadaq) as a gift, but if they, of their own good pleasure remit any part of it to you, take it and enjoy it without any fear of any harm (as Allah has made it lawful)."¹

Abu Bakr ibn `Abd Allah al Muzani opposes the taking back of the sadaq stating that the above ayah was cancelled by:

"But if you want to take a wife in place of another wife, even if you gave the latter a qinta² for dower (sadaq), take not the least bit of it back...."³

The majority of the fuqaha' rule the latter applies when it is done against her will and it is not so in khul` and as per the procedure in the ayah 4 of Surah al Nisa'.⁴

5.2 THE AHKAM (LAWS) OF KHUL`:

The fuqaha' have the following general laws of khul`:

- The fuqaha' rule that the word khul` or its derivatives must be used or words with that meaning. If not, khul` is not enacted, but talaq by 'iwaq mali (talaq by monetary compensation) comes into force. Ibn Taimiyyah and ibn Qaiyyim al Jawziyyah rule that even if the word talaq is used and

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¹ Al Qur’an, Surah al Nisa': 4.
² A Qintar is a great amount of gold.
³ Al Qur’an, Surah al Nisa': 20.
Khul' was intended, khul' will be enacted as, according to them, the principles of the shari'ah accept facts as well as intentions in 'uqud (contracts). The Prophet (S.A.W.S) even used the word fāriq hā - "separate from her" - in his instruction to Thābit bin Qais in khul' of his zawjah and this kind of expression is explicitly used for talaq sāriḥ.

- The 'āyah (Quranic verse) permitting khul' specifically restricts the 'iwaḍ to the šadaq and nothing more. This is the ruling of al Sha'bi, al Zuhri and al Hasan al Basri. Most of the fuqaha' rule that it is permissible to take more than the šadaq because, according to them, khul' is an 'aqd of 'iwaḍ and thus its scope is not limited. The difference of ruling of the fuqaha' is based on the difference of view on whether a Quranic 'āyah is restricted by certain hadīth texts as to its application or not.

- A group of the fuqaha' rule and classify khul' as being faskh, for if it is talaq, then it would mean that a zawj has four talaqāt over his zawjah which is repugnant in the shari'ah. Those who claim it is to be faskh state that the zawjah of Thābit bin Qais had to observe 'iddah of one ḥaidah (menstruation) only. This shows that it was not talaq for in the latter case three hiyad (menstruations) are required. The majority of the fuqaha' rule khul' as being talaq and not faskh, for in the latter case, nothing other than the šadaq can be taken. Their ruling is based on the wording used by the Prophet (S.A.W.S) in the case of khul' of Thābit bin Qais and his zawjah.

- Most fuqaha' rule that the zawj is not under obligation to accept the khul'. Ibn Rushd opines that he has to as the khul' has been instituted to give relief to a zawjah due to valid shari'ah approved reason. Since the zawj
has the right of talaq in his hand and thus the zawjah must equally have the right of khul. Some fuqaha' rule that the qadi (judge) obligates the zawj to accept khul as the Prophet (S.A.W.S) obligated Thabit bin Qais herein.

- The `iwad (compensation) can be anything according to al Shafi'i as long as it is lawful and need even not be the actual sadaq. Malik even allows a foetus in the womb of a pregnant animal as `iwad in khul. If the `iwad is of a forbidden nature, then talaq and not khul takes effect.

- It is haram for a zawj to harm his zawjah in any way so as to force her into khul and then resort to taking back his sadaq. If he does that, khul will be invalid even if it is already executed by the order of the qadi. This is clear from the aayah: "...and you should not treat them (wives) with harshness, that you may take away part of the dower (sadaq) you gave them..." Malik rules the return of the sadaq to the zawjah and enactment of talaq, in this case.

- Khul is valid in both the states of tuhr (non menstrual period) and ha'id (menstrual period) of the zawjah as neither the Qur'an nor the hadith restricted the period of its validity.

- The majority of the fuqaha' rule that retraction of khul state after the zawj accepted it, is invalid and there is no raj'ah for it either. This is so even if he returns the `iwad given by the zawjah and even if he does so during her `iddah of khul. However, if the two parties agree voluntarily, they may remarry with a new nikah, a new `aqd al nikah, a new sadaq and fulfill all such requirements as may be so required in shari'ah.

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1 Al Qur'an, Surah al Nisa': 19.
• The *khul* of a * zawjah maridah* (sick wife) who dies from her *maraq* (sickness) is valid. The *fuqaha*, however, differ on the *`iwaq*’s value in this case. Some, like Malik and Ahmad rule it equal to his share of her estate, while al Shafi‘i insists it may be equal to *sadaq mithl* and the *Hanafis* insist that it may not be more than one third of the estate.

• In the ruling of the Prophet (S.A.W.S) of *khul* between Thabit bin Qais and his *zawjah*, the Prophet (S.A.W.S) ordered her to keep *`iddah* of one *haidah*. This is also the ruling of all the senior *sahabah* such as *`Uthman* and ibn `Abbás and it is one of the rulings of Ahm as well as the ruling of ibn Taimiyyah. Their explanation hereof is that in *talq*, three *hiyaq* is required as there is *rajah* in *talq*. In *khul* there is no *rajah* and one *haidah* is required to ascertain *haml* (pregnancy) or not and nothing else. The majority of the *fuqaha*’ rule three *hiyaq* for the *mukhtalah* ( zawjah in *khul*) as is the case with the *mutallaqah*.

• The *fuqaha* allow the *khul* between a *zawj* and an *ajnabi* (outsider). This is when an *ajnabi* agrees to pay the *`iwaq* on condition that the *zawj* lets her free. Malik makes this conditional that there should be *maslahah* (benefit) therein or prevention of *mafsadah* (harm). Thus, if this is resorted to as a trick to allow the *zawj* to escape his responsibility of *nafaqah* (maintenance) of the *zawjah*, it should be forbidden. Abu Thawr rule this kind of *khul* as invalid.1

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6. **AL TATLIQ (JUDICIAL DIVORCE)**

By tatliq here is meant "talaq by qada". This means judicial talaq or talaq issued by the qadi.

The word tatliq is from the word tallaqa which means "to relieve somebody from the bond of nikah."¹

There are several kinds of separations of nikah which has to be done by the qadi on application by the zawjah. Some fuqaha' call this tatliq i.e talaq given by the qadi while others rule that the qadi can only grant faskh and not talaq.

Since nikah is based on continued sound, fair, just, honourable, friendly and loving foundation, the shari'ah has ruled that it should continue as long as the law of the shari'ah is upheld in that relationship.

Thus, if a zawjah breaks that covenant, the zawj has, after trying reconciliation, if such is possible and, under the circumstances prevailing, permissible, recourse to talaq.

Likewise when the zawj is unjust, unfair, harsh, cruel, bad mannered, miserly or the like the zawjah has recourse to a process of relief. Such a zawj misuses his position of trustee in nikah in seeing that justice is done in the nikah and observing mu'asharah zawjiyyah (just married life).

In this case, the shari'ah intervenes through the qada' (judicial) system and gives the zawjah the right to ask the qadi for relief, including an end to such a nikah which the shari'ah never intended to bring forth nor legislated for.

The cases in which the qadi has the right of tatliq are:

¹ Lisan al 'Arab, op. cit Vol 4 p. 2693.
Al Munjid, op. cit p. 470.
• **tatliq** due to non-*nafaqah* or insufficient *nafaqah* by the zawj.

• **tatliq** due to *darar* of the zawjah by the zawj.

• **tatliq** due to the *ghiyab* (absence) of the zawj without an acceptable reason.

• **tatliq** due to the imprisonment of the zawj.

### 6.1 **TATLIQ DUE TO NON-NAFAQAH**:

Some *fuqaha* like the Hanafis rule that the *qadi* cannot grant **tatliq** to the zawjah in this case for he can order him to give it and imprison him till he gives it if he has the means but refuse *nafaqah*. They base their ruling on the *ayah*:

"Let the rich spend according to his means and the man whose resources are restricted, let him spend according to what *Allah* had given him."\(^1\)

The Malikis, al Shafi'i and Aḥmad grant her that right.

Al Shafi'i cites the *nikah* rule of "retaining the bond with justice or setting free with kindness" if the marriage bond cannot be held,\(^2\) as well as claiming that non-*nafaqah* is harmful to the zawjah and retaining *nikah* to harm a zawjah is explicitly forbidden in the Qur'an.\(^3\)

There are other details pertaining like no **tatliq** granted if the zawjah knew of the zawj's position before the *nikah* and accepted it and the *qadi* selling of

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3. Ibid, op. cit. 231.
the assets of the zawj to pay for the zawjah’s nafaqah. There is difference of views amongst fuqaha' herein.1

6.2 TATLIQ DUE TO DARAR:

This is tatliq due to darar (harm) caused to the zawjah by her zawj or by his conduct or that he is such a person that she fears for her life living with him.

The basis of tatliq due to darar is from the Qur'an:
"If you fear a breech between the two (husband and wife) appoint ḥakamān (two arbitrators): one from his family and one from her family. If they both wish for peace, Allah will cause their reconciliation."2

The āyah speaks of ḥakam from both sides. Some fuqaha’ rule that if there are no persons from one or either sides of the disputing parties, other righteous and just ḥakamān (two arbitrators) may be selected.3

The Malikis allow tatliq by the qadi on application of the zawjah and such is granted for a condition that she cannot tolerate or withstand like him physically assaulting her or insulting her or force her to do detestable acts or swearing at her. Some even rule his turning his back on her in bed as darar. When darar (harm) is proven the qadi

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2 Al Qur'an, Surah al Nisa’ p. 35.
gives one *talqah ba’inah* (irrevocable divorce). If she cannot prove her case and the *zawj* does not confess, the application is dismissed.\(^1\)

The other *fuqaha’* like the *Hanafis, Shafi‘i* and *Zahiris* rule that the *zawjah* does not have the right to petition the *qadi* (judge) for *tatliq*. They say the *qadi* can order the *zawj* to desist from the meting out the *darar* (harm) or he can punish him if he refuses. If all this fails, he is to send *hakaman* (two arbitrators) to try and effect reconciliation between the two. According to al Shafi‘i, if this procedure fails, the *hakaman*, as *wakil* (two agents) for the two, effect *talq* from the *zawj* or *khul‘*.\(^2\)

Ahmad has the same above view as al Shafi‘i, but in another ruling he empowers the *hakaman* to effect reconciliation or separation with or without *iwaqf* (compensation). This is also the ruling of ‘Ali, Awza‘i and others.\(^3\)

### 6.3 *TALQ* DUE TO *GAIBAH* (ABSENCE) OF THE *ZAWJ*:

Malik allows *talq* by the *qadi* due to the physical absence of the *zawj* and the *zawjah* suffering *darar* (harm) from it. This applies even though he left her *nafaqah* or not or whether the absence is valid by *shari‘ah* or not.

If he is abroad and he can be contacted, the *qadi* is to write to him and give him three options: either to return to live with her or fetch her and live with her abroad or grant *talq* to her. If he refuses, the *qadi* resorts to *talq*.\(^4\)

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\(^2\) *Al Iqna‘*, op. cit. Vol 2 p. 92.

\(^3\) *Al Mughni*, op. cit. Vol 7 pp. 48 - 49.

\(^4\) *Al Wilayah Wa al Wasaya Wa al Talq*, op. cit. pp. 729 - 730.
Hanbalis share Malik's view but rule separation by faskh and that the zawjah can complain only after six month's absence of the zawj and if she fears committing a sin of a sexual nature.¹

Other fuqaha' like the Shafi'is refuse permission for the qadi to resort to tatliq herein insisting that the zawjah can effect faskh if he did not leave her nafaqah.²

If the zawj is imprisoned, Malik and Ahmad allow the zawjah to petition the qadi for tatliq if she is harmed by his physical absence. They make it conditional that absence must be three years or more and that one year had elapsed before she petitions the qadi. The separation by Malik will be tatliq by talaq ba'in (irrevocable divorce) and by Ahmad, faskh.³

6.4 TALAQ OF THE MAFQUD (MISSING PERSON):

The mafqud is derived from the Arabic verb faqada which means "to be absent from or to be non-existent."⁴

In the shari'ah, the mafqud is the one who goes absent and from whom no news is received and thus his whereabouts are not known nor whether he is dead or alive.

There are two cases pertaining to the mafqud.

Either he is assumed alive, in which case his zawjah is his zawjah and all the consequences of the nikah remain and it is forbidden to distribute his estate, or he is

² Athar 'Aqd al Zawaj, op. cit. p. 189.
⁴ Qamus al Muhit, op. cit. Vol 1 p. 335.
assumed dead, in which case his zawjah becomes an arma/ah (a widow) and his estate is distributed as per the requirement of the shari'ah.

The fuqaha' have the following rulings in these cases:

The Ḥanafis and Shafi‘is rule that irrespective of how the mafqūd is lost, he is assumed alive until proven to be deceased. Thus his zawjah remains his zawjah and his wealth remains his property.

If his death is not proven, his death is assumed when persons of his age group in his place of residence usually die.

Various age limits had been set by these fuqaha’: some ruling seventy years, others eighty years and some even one hundred and twenty years.

One of the Ḥanafis’ views is that the matter is left to the ījtihād (juristic decision) of the qādi and this is claimed to be the accepted view of the Shafi‘i madhhab (school of law).

The ruling of these fuqaha’ is based on the fact that a nikāh can only be ended by ṭalaq or wafat (death): the former is usually known factually, while the latter, if not factually known, has to be made definite, hence the age group death application.

The Ḥanbalis see the ghai bah (absence) of the mafqūd (missing) in two perspectives, namely:

- A zawj who travels away from his domicile for trade or studies or tourism and does not return. The ruling herein is the same as for the Ḥanafis.

Some Ḥanbali fuqaha’ set the age limit for assumption of death as ninety years since birth while others rule it is to be left to the ījtihād (juristic opinion) of the qādi to decide on the period.
The second case is where a zawj "disappears within reach of his family". This means near his place of residence like going to the mosque for prayer or to the shop and does not return.

A period of four years waiting is required with resultant ruling of assumption of wafat, after which his armalah (widow) is to observe her 'iddah of wafat (period of waiting of death) and his estate distributed to his warathah (heirs) as per the requirements of the shari'ah.

Some Hanbalis rule that only after the completion of both the four year waiting period and the 'iddah of wafat can his estate be distributed.

The Malikis have the same division as the Hanbalis in regard to categories of the mafqūd (missing person). The first is like the Hanbali ruling for the mafqūd who disappears from his domicile. The second category of the one who is lost "in the presence of his family", is like the Hanbali ruling for this case but they have a different ruling when the zawj disappears in the Dar al Islām (Muslim ruled territory). They rule that if he does not return after the war she observes 'iddah of wafat. If he does not return during that period, wafat (death) is confirmed and his estate is distributed to the warathah (heirs). This is also the ruling of ibn Zubair, 'Ali, 'Uthman and others.

The Shaikhs Shaltut and al Sayis state that with today's greatly improved communications systems, it will be much easier to find a mafqūd. Thus it will be better to leave the matter to the ijtiḥād of the qādī for the rulings and views of the earlier fuqaha were pertinent expressions of their times and the communications limitations of that era.¹

7. AL MUT'AH OF TAFRIQ (GIFTS ON SEPARATION):

7.1 DEFINITION:

The word mut'ah literally means tamattu' which means "enjoyment". In the shari'ah it means:

"that which is given by the zawj to the zawjah at talaq or firaq (separation) on condition that she is not responsible for the talaq or firaq (separation) like her riddah (apostasy) nor that it be given at the death of the zawj."¹

Mut'ah of talaq is derived from the ayah (Quranic verse):

"There is no blame on you if you divorce women before you touched them, nor appointed for them their dower (sadaq). But bestow on them a suitable gift: the rich according to his means and the poor according to his means, a gift of a reasonable amount is a duty on the doers of good."²

The ayah has the word matti'u (bestow!), which compels the act of giving a gift.

This mut'ah is thus a gift and is not to be confused with a mut'ah nikah which is one of the forbidden forms of ankiyah (marriages).

The mut'ah (gift) is given to the zawjah when they separate and end their nikah before or after consummation according to the various rulings of the fuqaha'. There are three cases where mut'ah is received and they are as set out hereunder:

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¹ Lisan al Arab Vol, op. cit. 6 p. 4128.
² Athar Aqd al Zawaj, op. cit. p. 213.
• A zawjah that is divorced before consummation and allocation of her šadaq (dowry).

• A zawjah divorced after consummation of her nikah and she received her šadaq.

• A zawjah divorced before consummation of her nikah but after the allocation of her šadaq.

7.2 MUTʿAH OF A WOMAN WHOSE NIKAH IS ANNULLED:

In the case of a zawjah who cancels her nikah to a man (i.e. faskh), the fuqaha' differ on her mutʿah (gift):

Some of the fuqaha', like ibn Hazm, rule no mutʿah whatever to her while others like the Hanafis, Shafiʿis and Hanbalis rule mutʿah due to her if her nikah was ended by faskh (annulment) due an `aib (defect) in the zawj but no mutʿah if she is the cause of the faskh like her apostasy from Islām.¹

The latter ruling is best as it is just and in agreement with the shariʿah principles as when faskh is due to the zawj's fault or shortcoming, the rules of talaq are applicable.

It is unfair to rule against the zawjah when her zawj has a shortcoming.

¹ Athar 'Aqd al Zawaj op. cit. pp. 220 - 221.
7.3 THE VALUE OF THE MUT'AH:

The majority of the fuqaha' rule that mut`ah should comprise a fixed amount of clothing and money, basing their ruling on the practice of the sahābah (companions of the Prophet) and tabi`un (students of the Prophet's companions).

The minority ruling of the fuqaha', namely, that of Malik, Āḥmad and one of the rulings of al Shafi`i, rule that the allocation is left to the qādi as the allocation of former times is not the same as the allocation of later times.¹

8. AL `IDDAH (PERIOD OF WAITING)

8.1 DEFINITION:

Literally the word `iddah comes from the Arabic word `add which means iḥṣa' which means "counting something". It also means "what a woman counts of the days in her haid (menstruation) and pure cycles."²

¹ Athar `Aqd al Zawaj, op. cit. p. 222.
² Lisan al `Arab op. cit. Vol 4 p. 2832.
Qāmūs al Muhīt op. cit. Vol 1 p. 324.
In the *shari'ah* it means "the necessary waiting of a woman whose *nikah* had been consummated for a fixed number of days when the *nikah* ends whether by *talaq* or *wafat* (death i.e. of her spouse)."\(^1\)

The senior *fuqaha* more or less agree with this definition.\(^2\)

`Iddah` is required by all major sources of the *shari'ah*.

The Qur'an states:

"Divorced women shall wait (as regards their remarriage) for three menstrual cycles..."\(^3\)

"And for those of your women as has passed the age of monthly courses, for them the prescribed period, if you have doubt (about their courses), is three months and for those who have no courses, is three months likewise, except in the case of the death of the husband."\(^4\)

"And those of you who die and leave wives behind, they (the wives) shall wait (as regards their remarriage) for four months and ten days...."\(^5\)

In the *sunnah*, the Prophet (S.A.W.S) ordered Fatimah bint Qais: "keep `iddah in the house of ibn Umm Maktum."\(^6\) As for *ijma*, the Muslim nation, through their

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5. Al Qur'an, Surah al Baqarah: 228.
mujtahidun (legists), have consensus, since the death of the Prophet (S.A.W.S), on the necessity of 'iddah for the mutallaqat (divorcees) and armalat (widows).¹

8.2 REASON FOR 'IDDAH:

- to ensure that the mutallaqah or armalah is not pregnant so as not to disadvantage the unborn child or children and prejudice their rights.
- to give a period of grace for the parties to reconcile during the 'iddah of talaq raj'i (revocable divorce) and thus save undesirable consequences and also to render nikah its place of honour in the social sphere of the Islamic order.
- to give the armalah (widow) time to mourn her loss and overcome her trauma before a remarriage.²

8.3 CASES OF 'IDDAH:

There are five cases of 'iddah, four of which are agreed upon by all the fuqaha' and one they dissent in.

Those agreed upon are the 'iddah of wafat whether the nikah was consummated or not but provided that it was properly enacted. The 'iddah of talaq due to faskh (annulment) or talaq after a nikah which had been consummated on condition that it

was properly enacted, 'iddah of a woman who contracted a fasid nikah (invalid marriage) on condition that it was consummatted and the 'iddah of a woman of nikah shubhah - a doubtful marriage - (like a nikah in which a shart (condition) of the shurut sihhah (conditions of correctness) is not met, like nikah without witnesses.¹

They differ on the 'iddah of talaq or faskh of a nikah sahih (valid marriage) ended before consummation but after khulwah sahihah, some like al Shafiʿi, Ahmad and ibn Hazm ruling no 'iddah on her due to the āyah "...when you marry believing women and then divorce them before you touched them, no 'iddah have you to count in respect of them."² Ibn 'Abbās' fatwa rules likewise.³

Other fuqaha' like the Hanafis and the Malikis obligate an 'iddah as there could have occurred consummation when they were alone. The khulafa' rashidun ruled, as narrated by Zararah bin Abi 'Awfā, that "when the curtains are drawn and the door locked, sadaq (dowry) and 'iddah become necessary."⁴

As for the starting time of the 'iddah, most fuqaha' rule that the 'iddah starts when either wafat or talaq occurs. If not known or if she was not informed of it and the

¹ Athar 'Aqd al Zawa:j, op. cit. p. 271.
² Al Qur'ān, Surah al Ahzāb: 49.
     Minhāj al Šalībīn, op. cit. p. 115.
     Al Muḫallāh, op. cit Vol 10 p. 256.
     Badā'i, op. cit. Vol 3 p. 192.
`iddah time expired, no `iddah is required. Ibn Ḥāzm differs, obligating `iddah when she hears about his wafat or her talaq from him irrespective of time lapse. Their differences are due to interpretation of Quranic verses and fatawa (legal dispensations) of the sahabah.

8.4 KINDS OF MU`TADDAT (WOMEN IN `IDDAH):

They are the mu`taddat of talaq, faskh and wafat (divorce, annulment and death, respectively).

The mu`taddat of talaq or faskh may be either women who still menstruate, the mustahādah (a woman with irregular menstruations), the menopausal women, non-menopausal women whose menstrual cycle stopped and the mukhtala`ah (woman divorced by khul` - annulment - procedure).

The basic rule is that they have three aqra‘ (cycles) to observe. The fuqaha‘ differ what this qur‘ (sing. of aqra‘) is. Some like Hanafis and a ruling of Aḥmad rule it to be the actual ḥaid (menstruation) while others like Malik al Shafi`i and others rule it to be the tuhr (non-menstrual) state. Their differences are due to interpretation of Qur’an text, hadīth and fatawa.

There is further difference on the `iddah of the mukhtala`ah.

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1 Athar `Aqd al Zawāj, op. cit. pp. 276 - 277.
3 Al Qur’an, Surah al Ṭalaq: 1.
   Al Iqna`, op. cit. Vol 2 p. 128.
Some fuqaha' like ibn 'Abbas, Abu Thawr, ibn Taimiyyah and others rule one ha'ida' (menstrual cycle) due to the Prophet (S.A.W.S) ruling so for the wife of Thabit bin Qais\(^1\) while the others like Abu Ḥanīfah, Malik, the Zahiriyah and others rule three hiyaḍ (menstrual cycles) as for the ordinary mutallaqah (divorcee), quoting rulings of ibn ‘Umar.\(^2\)

Since these text mention no number, the ordinary ruling is applicable.\(^3\)

There are wide divergent views of the fuqaha' on the remaining kinds of mutallaqat mentioned which are very complicated and involved but all are agreed that the menopausal women have an 'iddah of three months.\(^4\)

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1 Sunan Abi Dawud, op. cit. Vol 1 p. 74.


4 Athar `Aqd al Zawaj, op. cit. p. 297.
8.4 ‘IDDAH OF THE HAMIL (PREGNANT WOMAN):

The hāmil is the pregnant woman. There is consensus that she ends her ‘iddah at birth due to the āyah:
"...and those who are pregnant, their ‘iddah is until they deliver."¹ This is for the woman who is visibly pregnant.²

There are divergent views on aborting of an embryo or a foetus, some obligating ‘iddah while others do not and some go according to what is a discernible human form.³ There is also a difference when the child carried by the mutallaqah (divorcee) is illegitimate. Some fuqaha’ like Abu Ḥanīfah and ibn Ḥazm consider her liable for the ordinary ‘iddah of the hāmil⁴ while al Shafī‘i and the Hanbalis rule no ‘iddah for her due to the illegitimacy and thus no nasab (lineage) issue arises and a view of Malik rule ‘iddah of one haidah (one menstrual cycle).⁵

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¹ Al Qur‘ān, Surah al Tala‘q: 4.
² Nihayah al Muhtaj, op. cit Vol 7 p.134.
³ Al Muqni‘, op. cit p. 258.
⁴ Risalāḥ al Qairawānī, op. cit. p. 72.
⁵ Al Hidayah, op. cit. Vol 2 p. 28.
⁷ Al Muḥni‘, op. cit Vol 7 p. 476.
¹³ Al Muḫallā, op. cit. Vol 10 p. 263.
8.5 THE MU'TADDAH OF WAFAT:

This is the woman in the period of waiting due to the death of her spouse. Such women might either be ḥa'il (non-pregnant) or ḥāmil (pregnant).

There is consensus that the ḥa'il category observes an 'iddah of four months and ten days\(^1\) according to the āyah of Qur'ān\(^2\) and ḥadīth text.\(^3\) There is further consensus that if a zawj divorces his zawjah talaq raj'i and dies in that 'iddah, she must stay out the 'iddah of wafat of four and ten days, but only 'iddah of talaq if it was talaq ba'in (irrevocable divorce).\(^4\)

As for the ḥāmil (pregnant woman) of this category, the fuqaha' differ as to what time span her 'iddah is to take - 'iddah of the mutallaqat (divorcee) or the armalah (widow).

One group of the fuqaha' like `Ali, ibn `Abbas and Saḥnūn of the Mālikis rule she takes the one that is longest\(^5\) of the two basing their ruling on joining the āyatan (two verses) on 'iddah of talaq and wafat.\(^6\)

\(1\) Al Hidayah, op. cit. Vol 2 p. 30.  
Aqrab al Masālik, op. cit. p. 97.  
Al Iqna', op. cit Vol 2 p. 126.  

\(2\) Al Qur'ān, Sūrah al Baqarah: 234.

\(3\) Sahih al Bukhārī, op. cit. Vol 7 p. 94.  
Mukhtasar Sahih Muslim, op. cit. p. 225.


\(5\) Rawā'i al Bayān, op. cit. Vol 2 p. 615.  

\(6\) Al Qur'ān, Sūrah al Talaq: 4.  
Al Qur'ān, Sūrah al Baqarah: 234.
The second group of the *fuqaha*, amongst them Abu Ḥanīfah, Malik, al Shāfi‘ī and Aḥmad rule ending of the ‘*iddah* at birth of the child irrespective of duration after the zawj’s death.

They take the *ayah* of ‘*iddah* of the ḥāmil (pregnant woman) as general to all women who are ḥāmil and in ‘*iddah*.

They also take the *hadith* of Umm Salamah who informed that Subai‘ah al Aslamiyyah was delivered half a month after the death of her zawj and the Prophet (S.A.W.S) consented that she marry again then.\(^1\) Ibn ‘Umar gave a similar ruling in a similar case.

Al Bukhāri, Muslim and al Nasā‘ī all transmit *hadith* texts with a similar meaning.\(^2\)

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\(^1\) Muwatta’ Malik op. cit. Vol 2: 105.  
Jami‘ al Usūl op. cit Vol 8: 117.

Nihāyah al Muḥtāj op. cit. Vol 7: 146.  
Chapter 5

THE LAWS OF AL FASKH (ANNULMENT) OF MARRIAGE IN ISLĀM.

1. DEFINITION:

Faskh literally means "cancellation".¹ Faskh al `aqd means "abrogation or cancellation or annulment of an `aqd al nikāh (marriage contract)". This faskh (annulment), in nikāh, is due to a defect or defects in the `aqd al nikāh (marriage contract) or an emergency which occurred in the nikāh situation which renders the continuity of nikāh impossible. Thus faskh ends the bond of nikāh between parties.²

Faskh has basically the same final result as ṭalāq (divorce) in that the marriage bond is ended by it.

It is different from ṭalāq in that it is invariably done judicially through the qādi (judge) and the applicant is usually the zawjah while ṭalāq is instituted by the zawj only.

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¹ Qāmus al Muḥīṭ, op. cit. Vol 1 p. 276.
2. THE LAWS OF FASKH

- The fuqaha' have the differing rulings as to what constitutes the right of faskh of the 'aqd al nikāh if an 'aib (defect) or 'uyūb (defects) are found in the zawj or zawjah after the contracting of the said 'aqd.

- All the fuqaha' agree that insanity, leprosy, mutilations, absence of genitalia or part of it, notably testicles or vaginal passage, malformed or fused excretory and genitalia passages warrants faskh.

- Malikis rule bad body odours and secretions as an 'uyūb while some fuqaha' rule impotency but not sterility, bad breadth or lesions from pustules as an 'aib as does the Shafi'i.

- The Ḥanbalis differ amongst themselves in 'uyūb, but agree that changing of skin pigmentation is reason for faskh, while Abū Bakr and Abū Ḥafs rule that even haemorrhoids, fistulas, tumours, pus ulcers and secretions from the genitalia warrant faskh as these repel people ordinarily.

- Sterility is reason for faskh by them due to 'Umar's ruling to a sterile man, ibn Sandar, who married a woman without informing her that he inform her of his condition and to give her a choice of faskh.

- The Ḥakim (Muslim ruler) is the one who will give ruling in a matter of faskh by reason of 'aib.¹

Kifayah al Akhbār, op. cit. Vol 2 pp. 59 - 60
Nihayah al Muḥtaj, op. cit. Vol 6 pp. 314 - 315
The Zahiriyah is singularly distinguished in that they do not allow an `aib found after nikah as reason for faskh stating that the parties had to make sure of that before the nikah.1

It appears that for the sake of justice and fairness, `uyub has to be a cause for right of faskh.

How far one is to go is to be measured by what is just, fair and correct. Thus the ruling of some of the fuqaha' refusing the right to faskh for `uyub, by varying degrees, is not in line with the spirit of the shari`ah.

There are other fuqaha', sometimes of their own madhhab, who hold views opposite than their fellow colleagues which shows the difference in application.

There are other cases wherein the fuqaha' allow faskh.

The Hanafis and Malikis allow faskh of nikah for the following cases:

- Fasad (invalidity) of the `aqd al nikah (i.e the marriage contract lacks a condition or correctness) like enacting nikah without shuhud (witnesses) or nikah for a fixed period or nikah with a mu`taddah (a woman in a period of waiting either of divorce or death of her husband).

- When the zawj or zawjah brings forth an act which brings forth ‛urmah of musaharah (prohibition by affinity), like kissing the daughter of his zawjah (a daughter from another man), with sexual desire or the zawjah doing the same to the same grade of a son of his zawjah. This act creates the state of musaharah (affinity) between such zawj and zawjah and thus faskh (annulment) of the nikah is necessary. The Shafi`is differ and rule no faskh necessary as no ‛urmah of musaharah had occurred according to them.

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1 Bidayah al Mujtahid, op. cit. Vol 2 pp. 50.
When one of the married disbelievers convert to Islam and the other one not. If it is the zawjah who converts, she will be completely divorced from him after three hiyad, if she menstruates, or three months if she does not menstruate.

If a man marries any of his foster family of the mu'ṣarramat mu'abbadah (permanently prohibited) category, like his foster mother, foster sister etc. the nikāh is immediately ended due to the taḥrim (prohibited) degree created by fostering. The same applies to a woman in the male line of the foster relationship as that for a man.

Riddah (apostasy) of one of the spouses necessitates faskh (annulment) of the nikāh.

The Shafi'īs also allow faskh for inability of the zawj to provide nafaqah (maintenance) or sufficient nafaqah and rule the separation by li'an (separation by mutual imprecation) as faskh also. Besides this, they share all the other views of the Ḥanafīs and Malikīs. Ḥanbalīs rule faskh or tatlīq (judicial divorce) necessary when four months had passed of ila' and no retraction was made by the zawj. The Ḥakīm (Muslim ruler) then enact either faskh (annulment) or tatlīq (judicial divorce).

They have, otherwise, the same views as the Ḥanafīs and Malikīs.¹

Chapter 6

ADMINISTRATION AND IMPLEMENTATION OF THE ISLAMIC LAW OF MARRIAGE AND DIVORCE.

In this chapter we will deal with:

- A short history of the position of Muslim marriages and divorces in South Africa, and,
- An analysis of the present position of these issues in South Africa.
- Recommendations for the implementation and administration of Muslim marriages and divorces.

The basic difference between the shari‘ah and South African law is that the former is a divine law, both religious and temporal. Violating divine law is tantamount to committing both crime and sin, while in the case of the latter, only a crime or an offence, in a worldly sense, is committed.

Thus in the shari‘ah the consequences of a wrong act are both sinful and criminal - sinful in that the Supreme Sovereign, Allah, had been disobeyed and criminal in that the society’s code had been broken.

In this light thus, the shari‘ah is eternal in its value system and law content and does not accept change while secularists systems have varying degrees of separation between State and Church, due to historical happenings. No such separation ever occurred in Islam and thus there is to be no separation between State and Religion.

The lack of understanding and appreciation of this salient fact is the major cause why Muslims all over the world and their Islamic system are not properly understood.
To understand the position of Muslims and their law in South Africa, it is necessary that we understand, very briefly, the background of law here.

6.1 BRIEF HISTORY OF ROMAN DUTCH LAW:

South Africa is one of the few countries in the world that has the Roman Dutch system of law. Roman Dutch law came to South Africa via the Cape and through Van Riebeeck.\(^1\) From the Cape, Roman Dutch law found its way to the Transvaal, Orange Free State and Natal. When the British took over there were some changes as the British changed the government, administration and judicial machinery to conform to British practice.

The English law of Evidence was adopted in its entirety.\(^2\)

The Charters of Justice replaced the old Raad van Justitie with the Supreme Court. A Master of the Supreme Court was enacted to replace the Weeskamer and the Desolate Boedelkamer. Important changes were made to Private law like reducing the age of majority from 25 years to 21 years.\(^3\)

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\(^1\) The South African Legal System And Its Background op. cit. p. 571.


\(^3\) Ibid op. cit p. 577.
6.2 ROMAN DUTCH LAW APPLICATION IN SOUTH AFRICA TODAY:

South African courts rely mostly on institutional writers in elucidating Roman Dutch law while little use is made of the collection of law opinions that came down.\(^1\) Views of the writers of Holland are preferred.\(^2\)

Prevailing opinion holds that the courts must apply Justinian's law as understood and interpreted by Roman Dutch lawyers of the 18th century.\(^3\)

The Supreme Courts appear to be less inclined than the Appeal Division to alter the ambit of an established rule.\(^4\)

Hahlo and Kahn give this view of the situation:

"...it still remains true that effectively a reasonable adaptation to the ever-changing needs of a society in constant movement is a task the courts cannot shirk.... With the greatest humility, one cannot help feeling that in their endeavour to avoid pitfalls of policy-making, our courts have occasionally erred on the other side by dealing with cases that came before them as if they were abstract exercises in history, logic or semantics."\(^5\)

Although the two authors possibly quoted the above for the Roman Dutch law as such, it should ring true for the Muslim community whose personal law cases were, at times, decided by the Court in South Africa.

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\(^1\) The South African Legal System And Its Background op. cit. p. 579.

\(^2\) Ibid op. cit p. 580.

\(^3\) Ibid op. cit p. 581.

\(^4\) Ibid op. cit. p. 584.

\(^5\) Ibid op. cit. pp. 595 - 596.
The courts feared becoming a "law-making body", leaving that to the legislature. The latter had been less than understanding and generous in this regard either as far as the Muslims' personal law is concerned as will be shown later on.

One may wonder whether the legal training and perhaps the religious inclinations of the officers of the courts did not compound their fear for becoming "lawmakers" and hence their abstract and academic approach to especially Muslim personal law matters and its validity, showing no due regard for any form of adaptation nor even, it would appear, mercy.

In short, the courts found it to be part of its duty to enforce the laws. It was not innovative herein by its own choice.

This will become clear when some cases dealing with and having relevance to Islamic Personal Law is dealt with later.

6.3 SOUTH AFRICAN LAW RELATING TO CUSTOMARY UNIONS:

The basic rule is that a marriage, not conforming to the requirements of the South Africa law, is void and has no legal standing nor consequences. This has been shown by both legislative as well as judiciary instances and decisions.

These two issues will now be dealt with to see how they affected Muslims in their personal law matters.
6.3.1 THE LEGISLATIVE POSITION:

A classical case of the standing of a Muslim marriage, contracted according to shari'ah, is set out in the case Seedat vs The Master (Natal): In this case¹ the presiding judge said:

"... and even if such a union was entered into abroad and is recognised as a valid marriage in terms of the lex loci celebrationis or the lex domicilii, it will not be recognised as valid in South Africa."

This means that the children born from such a union are illegitimate, the laws of intestate succession would not apply and the mutual duty of support flowing from a marriage and other consequences would not apply. A marriage thus solemnised only in terms of the shari'ah is void in terms of South African law.

This is not applicable in toto for there are certain statutory exceptions, namely:

- a part of the Insolvency Act of 1936 reads:²

  "in this section the word "spouse" means not only a wife or husband in a legal sense, but also a wife or husband by virtue of a marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another." This clause even recognises an immoral union, which is against strict Christian principles, for purposes of the mentioned Act.

- a part of the Income Tax Act of 1962 reads:³

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¹ Seedat's Executors vs The Master (Natal) 1917 AD.
² Section 21 (13) of the Insolvency Act (Act 24) of 1936.
³ Section 1 of Act 58 (The Income Tax Act) of 1962.
"..."married" includes joined together in union recognised as a marriage in accordance with any law or custom and "husband" and "wife" shall be construed accordingly."

This Act, of course, deals with monetary matters.

- One should also note that the South African law has equated a black customary union with a legal marriage for certain specific purposes in a number of general statutes. This was not the case with other customary unions or "potential polygamous" customary unions of other ethnic or religious groups.

Perhaps herein is the adamant refusal to accord any proper and meaningful recognition to marriages contracted according to the shari'ah.

- Act 76 of 1963: gives the right of a partner to a customary union to claim damages from a person unlawfully causing death of the other partner. This is recognition of consequences of a customary union in claiming compensation.

- Part of Act 45 of 1988 reads:

  "...Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles."

This clause gives the court the right to take judicial notice of customary law, provided that the particular rule of customary law is not to be applied where it is opposed to the principles of public policy or natural justice.

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1 Section 31 of Act 76 (The Black laws Amendment Act) of 1973.
2 Clause 1 of Act 45 (Evidence Amendment Act) of 1988.
Nevertheless, the custom of *lobola* or *bogadi* or other similar customs are not to be regarded as repugnant to these principles.

- The Child Care Act of 1983, at clause 27 reads:

"In the application of the provision of this Chapter in respect of a person who is Black, any "customary union", as defined in section 35 of the Black Administration Act, 1927, (Act 38 of 1927), shall be deemed to be a marriage between the persons concerned, and any reference to a husband, wife, widower, widow, divorced person, married person or spouse shall be construed accordingly."\(^1\)

This clause recognises the customary union of black persons for purposes of adoption.

- Further, recognition is granted for the widow of a customary black union in The Workmen’s Compensation Act where clause 4 (f)(3) reads:

"For purposes of this Act "widow" includes a woman who was a participant in a customary union according to the indigenous law and custom, where neither the man nor the woman was a party to a subsisting marriage."\(^2\)

Here a widow of a customary black union is considered a dependant in terms of Act 30 of 1941.

There is thus comprehensive recognition, in certain instances, of customary black unions and it is obvious that the South African Legislature did not apply this principle ethically, morally and uniformly to its subjects.

It chose to be discriminatory herein.

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1 Clause 27 of Chapter 4 of the Child Care Act (Act 74) of 1983.

2 Clause 4 (f)(3) of The Workmen’s Compensation Act (Act 30) of 1941.
As pointed out in earlier in this thesis, Islam had a difficult beginning in South Africa. It was prohibited by law (Placaat 1642) to practice Islam publicly, like having a mosque as well its missionary activities being prohibited. The strong Christian leanings of the rulers and successive Colonial Powers ensured a difficult position for Islam and its adherents. Amongst these was the non-recognition of the Islamic Personal Law, which is still the case to this day. Muslim marriages were thus only solemnised in terms of the shari‘ah and was, thus, and is still invalid at common law. It is also invalid due to the fact that even if it is a monogamous Muslim marriage, monogamy being one of the tenets of the South African law of marriage, such a Muslim marriage has “the potential of becoming polygamous” according to the interpreters of the law here. This very unfair and unjust principle has been upheld in numerous court cases in South Africa, due to the explicit absence of South African statutory law in that sphere even till today. Statutorily, a Muslim marriage, solemnised as per the shari‘ah requirements, is void in terms of the South African Marriage Act. One may thus deduce that both the Legislature as well as the Judiciary are partners in this field and none has to this day shown any worthwhile practical innovative action herein.

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1 Mosques of Bo-Kaap op. cit. Foreword p. xv.
6.3.3 THE CASE LAW POSITION OF MUSLIM MARRIAGES:

The celebrated Seedat case, mentioned earlier, was decided in the Appeal Division of the South African Supreme Court and was the proverbial landmark decision in Muslim marriages in that it set down the basic fundamental principle that due to the "potential polygamy" of a Muslim marriage, all unions entered into in terms of the *shari'ah* were to be regarded as invalid even if they were *de facto* monogamous. One may even regard the court's decision as an entrenched principle as later cases proved.

6.3.3.1 Case 1:

In the case *Ismail vs Ismail*¹, in the Appeal Division of the Supreme Court, the issues of a Muslim marriage had been dealt with extensively.

The question the Court had to answer in the above mentioned case was whether the customary proprietary consequences of a Muslim marriage and its termination were enforceable by law.

The decision reached by the Court was that the solemnisation, payment of dowry (*sadaq*), the giving of engagement and wedding gifts, the duty to pay maintenance, the manner of termination and annulment of a Muslim marriage, the proprietary consequences of the marriage and the adjudication by the Muslim religious leader of proprietary disputes, were all governed by custom.

The *Imam* or person marrying the couple need not be a marriage officer as per terms of the Marriage Act (Act 25) of 1961.

¹ *Ismail vs Ismail 1983 (1) SA 1006 (AD).*
There is also no participation of the State in this kind of marriage.

The case, broadly speaking, was as follows:

A man and a woman were married as per the Islamic law (shari'ah) only by a Mawła (title of a Muslim who studied Islam in India or Pakistan).

The wife gave the gift of jewellery her husband gave her on marriage, to the latter for safekeeping.

Dowry (ṣadāq) was deferred until death of the husband or at the termination or annulment of the marriage.

About 4 years after the marriage, the husband divorced his wife irrevocably. The husband failed to maintain his wife during the days of the 'iddah of ṭalāq (period of waiting of divorce).

The Mawła then ruled for the payment of maintenance, the return of the gold jewellery and payment of the deferred ṣadāq (dowry).

The divorced wife, not receiving satisfactory treatment from her erstwhile spouse, took the matter to the Supreme Court and asked the Court to find that the proprietary consequences of her marriage to the defendant, her erstwhile spouse, ought to be recognised by South African law.

The basic finding of the Appeal Court was that "to entertain the plaintiff's claim would tantamount to recognising the illegal union entered into by the parties and that would be to fly in the face of all the authority in this country..."

In its (the Appeal Court’s) assessment of the South African law herein, the said Court found:

• Potential polygamy is tantamount to polygamy. Any agreement (tacit or otherwise) between the parties cannot alter this.
The said marriage was not solemnised as per the requirements of Section 2, 3 and 11 of the Marriage Act, Act 25 of 1961, nor was there compliance with Section 29 (2) of the said Act requiring the presence of both parties.

The customs and contracts between the parties are closely and intimately connected with the conjugal union entered into in terms of the Islamic law (the shari'ah).

Polygamous unions have never been recognised in South African courts.

It is interesting to note the arguments that the Counsel for the plaintiff advanced in favour of recognising the proprietary consequences of a Muslim union.

These were as follows:

- Counsel argued that it is possible in law for an Imām to be a marriage officer in terms of the Marriage Act (Act 25) of 1961. This section reads: "The Minister and any officer in the public service authorised thereto by him may designate any minister of religion...... as a marriage officer for the purpose of solemnising a marriage according to the Christian, Jewish and Mohammedan rites."  

However, the Court ruled that in this case the marriage must be monogamous and shall have to comply with all the formalities as in Act 25 of 1961.

In other words, the consequences of such a marriage is South African law and not Islamic law.

- Plaintiff's Counsel then also relied on another section of the Marriage Act of 1961 which states:

1 Section 3 (1) of the Marriage Act, Act 25 of 1961.
"Nothing in sub-section (2) contained shall apply to any marriage ceremony solemnised in accordance with the rites or formalities of any religion, if such ceremony does not purport to effect a valid marriage."\(^1\)

The said Counsel claimed that this section recognises polygamous unions and the proprietary consequences thereof.

The Court rejected this argument and interpretation of the said clause by stating that just because such a marriage (not purporting to be a valid marriage) can be solemnised by a marriage officer and then such solemnisation would not be an offence in terms of Section 11 (2) of the Marriage Act of 1961, does not mean that polygamous unions will be recognised in South African law.

- Counsel then argued that English law recognises polygamous unions solemnised abroad and that this is a relevant factor in this case.

The Court again rejected this line of argument on the grounds that the case under discussion deals with a polygamous marriage solemnised in South Africa.

- Counsel referred to Rhodesian cases namely:
  
  *Mehta vs Acting Master, High Court\(^2\) and Kader vs Kader\(^3\).*

  In both these cases, the Court was asked whether a foreign polygamous marriage should be recognised as valid for a particular purpose. The Court, in Mehta's case found that the principle laid down in the Seedat case,

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\(^1\) Section 11 (3) of the Marriage Act (Act 25) of 1961.

\(^2\) *Mehta vs Acting Master, High Court*, 1958 (4) SA 252 FC.

\(^3\) *Kader vs Kader*, 1972 (3) SA 203 (RA).
namely, that the Court will under no circumstances recognise a polygamous marriage, should no longer be followed. Justice C J Tredgold at 253 D-G said:

"There are good and sufficient reasons for not recognising such marriages when the consequences of recognition would be to disturb the incidents of our own monogamous system. But where it is merely a question of recognising the marriage for the purpose of succession to property, no such complication arises."

This decision was also applied in the case Kader vs Kader. The Court side-stepped this whole issue by claiming that it is not necessary to decide this point as the case of Ismail vs Ismail was of a marriage solemnised in South Africa and not abroad which distinguishes it from the mentioned Rhodesian cases.

Counsel for the plaintiff now moved to the extension of the recognition of polygamous unions by the Legislature of South Africa. In the said case (i.e Ismail vs Ismail), the Court found that save for "Black" customary unions, there is no indication in any statutory provisions where the Legislature either expressively or by implication approves of polygamous unions. It further stated that the existence of statutes in which polygamous unions are recognised is no indication of the tolerance of polygamy as part of the general South African legal system.
The Court, in the end, gave its landmark judgment:

- Muslim marriages solemnised only in terms of Islamic law (shari'ah) are void on grounds of public policy.
- The Court would refuse to give effect to the consequences of polygamous unions contracted in South Africa, statutory exceptions part.
- The Court also viewed that due to the trend in favour of the recognition of complete equality between marriage partners, the recognition of polygamous unions solemnised under the tenets of the Muslims Faith may be regarded as a retrogressive step particularly in respect of customs relating to the termination of such unions.
- The Court also found that such polygamous unions are not contrary to public policy in the sense that they are "immoral", but rather that they are contrary to "expected customs and usages" which are regarded as morally binding upon all members of our society.
- The Court thus rejected the claims of the plaintiff for dowry (sadaq) and maintenance, but ruled that contract of deposit was enacted when the plaintiff gave the jewellery to the defendant for safekeeping.

The Court thus refused to accept that it will rule in the jewellery matter from an Islamic law point of view.

Besides this case, other cases with certain aspects of Islamic Personal Law were pronounced upon.
These are:

- **Bam vs Bhabha:**
  This case decided in the Appeal Court, concerned the custody of minor children and the decision reached was based on the principle that a Muslim marriage is invalid in law.
  The Court, thus, basically, ruled that there is no legally binding consequences to a Muslim marriage.
  It should be noted that the majority of the Court found it unnecessary to decide whether there had been a putative marriage between the parties, for, had there been such a putative marriage, the children born from that union would have been legitimate.

- **Davids vs The Master & Others:**
  In this case the Court was asked whether the word "spouse" in Section 49 (1) of Act 66 of 1965, includes a woman married in terms of the Islamic law. The Court followed the decision of Seedat's case.

- **The State vs Johardien:**
  In this case in the Cape Supreme Court had to pronounce whether a woman married by Muslim rites could enforce privilege as in section 198 of

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1. *Bam vs Bhabha* 1947 (4) 798 (AD).
2. *Davids vs The Master & Others* 1963 (1) 458 (C).
the Act 51 of 1977. This section deals with the privilege of spouses in respect of marital communications in criminal proceedings.

The wife of the accused, so married to him only as per Muslim rites, wished to avail herself to the privilege as in the mentioned Act.

The Court found that although a de facto monogamous marriage was found, the priest who married them was not a marriage officer in terms of the Marriage Act.

Presiding judge AJ Farlam in the Cape Provincial Division of the Supreme Court ruled:

"that if a wife is not de jure, the wife or husband of the accused cannot claim privilege under section 198 (1) of the mentioned Act."

From the two main legislative institutions in South Africa which had their hands in and on Muslim marriages and its consequences, it is clear that their attitude is, at the least, an unpalatable indifference, with the case of the Judiciary, a marked opposition to anything that the Roman Dutch law could not tolerate nor accept.

The legacy of this country's legal system and its origin, philosophy and civilizational milieu, at most times, clash head-on with the Islamic system.

There is also an apparent discrimination in the law in that it recognised "Black" customary unions, at certain times, as valid marriages, but refused this privilege to others, like Muslims, whose marriages are monogamous, in most cases.

The Judiciary exhibited, at times, a marked ignorance of the real shari'ah.

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1 The Criminal Procedure Act, Act 51 of 1977.

The rule that, even if a Muslim marriage is monogamous, it is "potentially polygamous" and as such is equated to a "polygamous union" is not only an absurd kind of reasoning, but also unjust and unfair.

The Courts also stated that recognising "polygamous" unions would be retrogressive. It made this statement as to its view on the ending of Muslim marriages by divorce. This statement of the Court is breathtaking for it obviously did not make the effort to ascertain factually from duly and properly qualified Muslim jurists and other sources as to what the real position in this matter was.

It would appear that the Court did not know that wives can initiate the end of the marriage with procedures of various forms and for reasons which the most advanced Western countries to this day do not accept.

Furthermore, for the Court to assert that "polygamous" unions are against public policy is ludicrous.

The level of immorality in society, the infidelity of persons in marriage, which are commonly reported in the media from time to time, are known facts.

Public policy might be rather "what is expected" and not "what it really is" at a given time.

One can nearly read some of the Frankish era's philosophy of marriage in some reasoning of the Courts.

The Courts here have failed to understand its function in a plural multi-cultural and multi-religious society and in the end have ended up ruling uncompromisingly and semantically in its judgments.

It had, by its own choice, failed to be innovative and above all, it failed to be the protector of a minority and its human rights.
That is a serious judicial failure.

This matter was so necessary in an era when the Legislature was not in the mood to do anything in this regard.

The Courts failed to hear the voice of the despairing and the only message it could give was a strict judicial palliative that the law cannot condone Islamic Personal Law consequences.

That is a very sad indictment indeed.

To further rule that even any agreement, tacit or otherwise, cannot alter the position of the standing of a Muslim marriage, is calculatedly improper.

If the vast majority of Muslim marriages are polygamous, that label might have stuck.

But that is not the case and this is common knowledge.

6.3.4 REPRESENTATIONS FOR RECOGNITION OF ISLAMIC PERSONAL LAW IN SOUTH AFRICA:

Efforts had been made to have the Legislature recognise Islamic Personal Law, as the Courts were persistent in refusing any form of recognition.

Law in South Africa is either by statute through the Legislature or by case law through Court precedent. Besides these two instances, no avenue of legal enforcement can be effected no matter how it is done or executed.

This was and still is the reality of the situation, which some Muslims do not seem to understand.

There had been several petitions to the South African Government on the recognition of Islamic Personal Law applicable to all Muslims in South Africa, amongst these were the attempts of The Institute of Islamic Shariah Studies in Cape Town whose stand is
that it is a human right and Mr P. Poovalingham, Member of Parliament. Likewise several religious organisations as well as individual Muslims approached the South African Law Commission (SALC) in this regard like The Institute of Islamic Shariah Studies, Waterval Islamic Institute, Sayed & Lockhat (attorneys) and Professors S S Nadvi, S H Haq Nadvi the Jami`yat al `Ulama` of both Natal and Transvaal and others.¹

6.3.5 THE PRESENT SYSTEM OF ISLAMIC PERSONAL LAW OPERATION IN SOUTH AFRICA:

Muslim women experience a serious difficulty when they marry according to the shari`ah (Islamic law) as well as entering into a civil marriage.

As soon as a civil marriage is entered into, the consequences of that marriage is automatically South African law as has been clearly set out by the Appeal Court in South Africa in the case Ismail vs Ismail. Many Muslims do not know this.

She cannot avail herself to Islamic law privileges and rights in this case.

A serious conflict occurs when the husband institutes a talaq (Muslim divorce), which the courts will not accept. Should he enter into a subsequent Muslim marriage, he can be accused of sexual misconduct in marriage as his first marriage is still valid in law.

On the other hand, if the wife institutes and obtains a civil divorce, such a divorce may not be recognised in the shari`ah as valid and should such a woman remarry, serious moral problems arise from a shari`ah point of view.

The issue is further compounded when a court grants a civil divorce and the spouse refuse to give the required *talaq* (divorce).

In an Islamic State, the State administers the Islamic Personal Law, but in Non-Muslim States like South Africa, the Islamic Personal Law should be recognised legally and apparatus created for its functioning which is not repugnant to the *shari'Ah*.

In the *shari'ah* there is no restriction as to who may engage in matters of *shari'ah*, whether *fatwa* (giving legal opinion) or application of the *shari'ah* save that they should be Muslims persons who are duly qualified in it. This applies also to Islamic Personal Law matters.

Universal registration of Muslim marriages, divorces and related matters are unheard of. There is, presently, no record book either of a provincial or national scale.

It was in the mid 1940's when some form of mosque *Imams* in the Western Cape, or rather the Cape Peninsula, grouped themselves together into some form of a body.

Thus the Muslim Judicial Council was formed in Cape Town, primarily to solve doctrinal disputes between *Hanafi* and *Shafi'i* viewpoints.¹

The other provinces established their *'Ulama'* Councils namely the *Jami'Yāt al Ulama'* of Transvaal and of Natal in 1923 and 1950 respectively.²

All three mentioned Councils deal with Islamic Personal Law matters.

Organisations which are also dealing with Islamic Personal Law matters are, amongst others, The Institute of Islamic Shariah Studies, The Majlis al Ashūra al Islāmi and the Islamic Council of South Africa (ICSA).

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¹ Mosques of Bo-Kaap, op. cit. p. 56.

² History of Muslims in South Africa, op. cit. pp. 56 & 70.
Some private individuals, who are not mosque *a’immah* (pl. of *Imām*), or who were mosque *a’immah* before, also deal with Islamic Personal Law matters, but they are in a small minority. There are also ‘*ulama*’ who do not belong to any organisation or are not *a’immah* of mosques who also marry off Muslims and see to Islamic Personal Law consequences.

None of all the bodies mentioned has any formal recognition or is considered to represent lawfully any section of the Muslim community by law.

Certain Muslim social organisations also deal with Islamic Personal Law consequences, like the social consequences of divorce etc. Amongst them being The Muslim Assembly and The Islamic Social and Welfare Association (ISWA), both in Cape Town.

The issuing of Muslim marriage certificates were unknown in South Africa till the 1950’s. Prior to this the presentees at the marriage ceremony were the witnesses. Divorce certificates were also unknown until recently.

From the above system of administration, theoretically speaking, a man may marry an unspecified number of wives at any time and no one will know. This shows the most untenable present position of this matter.

Further, marriage and related matters are dealt with by most of those working with it, in most cases, on a sectarian basis and rarely is departure made from this practice. This is in stark and glaring contradiction to the practice in most Muslim majority countries and sanctioned by their senior ‘*ulama*’ nowadays and the practice of the *fuqaha*’ of the salaf (early Muslim jurists) in former days, when rigidly and sectarianism were unknown.
6.3.6 PROBLEMS EXPERIENCED BY MUSLIMS AS A RESULT OF NON RECOGNITION OF ISLAMIC PERSONAL LAW:

The basic problem of Muslim marriages and resultant consequences is that it is not legal in the eyes of South African law and thus have no lawful consequences. The married Muslim man and woman, so married only according to the shari‘ah, are just "living together" and thus all their children from that marriage are illegitimate in the eyes of South African law. Their legitimate father, by the shari‘ah, is not their lawful father either in terms of South African law.

This is utterly repugnant to Muslims.

There are further problems, which may be summarised as follows:

- Muslim religious experts, in general, are not marriage officers in terms of the Marriage Act of 1961 and thus, in terms of current South African law, cannot enact a lawful marriage. Those who can do so, conduct a Muslim marriage ceremony only as the consequences of such a marriage is South African law. Some Muslim marriage officers might not even be aware of this. They cannot thus effect a polygamous union.

- The issue of wilayah (guardianship) of Muslim fathers, married only in terms of shari‘ah, over their minor children, generally, is denied by South African law and enforced by the shari‘ah thus causing a serious conflict of conscience.

The issue of wilayah in nikah (marriage) is also radically affected by South African law.
This is anathema to a Muslim destroying fatherly rights and privilege in the Islamic setup.

In the *shari'ah*, the *zawj* (husband) is head of the family and must take ultimate responsibility for all its members and their maintenance.

All those under his care are to obey him in matters which are right and in accordance with the *shari'ah*.¹ He is answerable for it on the Last Day.

- Muslim women married only according to *shari'ah* cannot resort to claim maintenance and support from their husbands by such *shari'ah ankilah* (marriages) as lawfully wedded wives. This is a denial of their rights and privileges.

- Divorced *zawjat* (wives) have to stay out an *`iddah* and some of them receive *nafaqah* (maintenance) of various forms according to the kind of *talaq* (divorce) executed.

  They may also not marry during their *`iddah*, while a man who divorced his wife and wants to marry her sister cannot do so until his first wife's *`iddah* is complete. The duration of this for of *`iddah* had been dealt with in detail in chapter 4.

  *`Iddah* of *wafat* (death) is necessary for all *armafat* (widows), during which a different pattern of *nafaqah* is applied and during which they may also not contract a *nikah* with another man.

  There is no way this can be administered properly in the light of non-recognition of the Islamic Personal Law.

¹ *Shari'ah* - The Islamic Law, op. cit. p. 129.
• At death, if the parties are still married, they inherit from one another in fixed proportions, along with their other warathah (heirs). If no Will is found, then the spouses cannot inherit from one another in terms of current South African law, nor can the children inherit from their Muslim father. This is denying the right of inheritance. It further complicates the issue in that, in terms of South African law, persons who are not to inherit in terms of shari'ah are made heirs and if such heirs do not wish to make a voluntary redistribution to comply with the shari'ah's requirements, innocent persons suffer, quite possibly become destitute, which is the antithesis of the shari'ah's aims in this matter.

• There is no administrative authority and power to effect consequences of nikah (marriage), like forcing an unwilling zawj whose nikah had been annulled, to leave the common home. There are endless problems in that field.

• The nasab (lineage) of children and thus the sphere of nikah is seriously compromised by the non-recognition of their legitimate Muslim fathers according to the shari'ah.

• There is no way of enforcing who may and who may not work or partake in application and functioning of the Islamic Personal Law. This allows for unscrupulous and unqualified persons to carry out unscrupulous and perhaps even unlawful acts forbidden according to the regulations of the shari'ah.
• Uniformity of any kind in the application of the Islamic Personal Law is impossible due to the present position of Islamic Personal Law in South Africa.

• There is no uniform and reliable registration of all the aspects of the Islamic Personal Law. Thus no one in the other provinces will know who is married and who is not.

There are no known births registers of any kind for Muslims anywhere in South Africa.

This is highly improper as the rights of children are not properly looked after as required in the shari'ah.

• The pattern of nafaqah (maintenance) is fundamentally different from the South African concept of it. These concepts cannot be enforced causing great harm to zawjat (wives), dependant children and other dependants.

• Divorce granted by the South African courts are not recognised by the other spouse and or the ‘ulama’.

All these constitute the major problems confronting Muslims in their private lives.

6.3.7 INTERNATIONAL OBLIGATIONS IN THE PROTECTION OF MINORITIES:

The United Nations (UN) enacted various Resolutions on various aspects of human life.
Of these, pertinent to this thesis are:

- The Universal Declaration of Human Rights\(^1\) states:
  "Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief, and freedom either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."\(^2\)
  This obviously allows for, amongst others, the necessity of the recognition of the Islamic Personal Law.

- The above is amplified by another UN Resolution, The International Covenant on Economic, Social and Cultural Rights which states in one of its Articles:
  "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society."\(^3\)
  This ruling must include the families of all cultural, social and religious groupings which must include the Islamic Personal Law, which is, in essence, a family law.

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1 Enacted by the General Assembly of the UN, New York, on 10/12/1948, per Resolution 217 (A)(III).


The Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief,\(^1\) also pronounces on this subject:

"No one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or belief."\(^2\)

This Article prohibits discrimination of non-recognition, amongst other issues, of Islamic Personal Law, which is an expression of the religious beliefs and subsequent practice of such beliefs.

It further states:

"Discrimination between human beings on grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations..."\(^3\)

The non-recognition of Islamic Personal Law is in conflict with the above Article.

Another Article gives the right to parents or legal guardians for the organisation of family life, stating:

"The parents...or the legal guardians of the child have the right to organise the life within the family in accordance with their respective religion or belief, bearing

\(^1\) The United Nations: The Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, New York, General Assembly Resolution 36/55 of 25/11/1981.

\(^2\) Ibid, op. cit. Article 2 (1).

\(^3\) Ibid, op. cit. Article 3.
in mind the moral education in which they believe the child should be brought up.\footnote{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. \textit{op. cit. Article 5.}}

The non-recognition of the Islamic Personal Law is against this Article also, as no proper legal consequences is given to such rights, as mentioned in the above Article, in South Africa.

It is thus clear that the non-recognition of the Islamic Personal Law code in South Africa, and elsewhere, is contrary to International Covenants and Resolutions. The dichotomy and double standards approach by some members of the UN, including the superpowers, in these matters, is a sad indictment on their moral commitment to justice and fairness, so often aired in public.

\section*{6.4 RECOMMENDATIONS FOR THE IMPLEMENTATION OF ISLAMIC PERSONAL LAW}

The basic recommendation is that Islamic Personal Law must be legally recognised and administered officially in such a way that the \textit{shari'ah} is not compromised in such a system of administration and by those Muslims who are so qualified to do so in terms of the \textit{shari'ah}.

We have seen how the Legislature of this country and the Courts have dealt with Muslim matters in an unfair and rather, at times, an undignified and improper way. There had never been a willingness by either, since Muslims arrived here in the late
17th century till nearly the end of the 20th century, to do something about it, even in a limited way. There is thus no way that a system as different in philosophy, content, approach, aims and objectives, procedure and application can ever be assimilated into the Roman Dutch law and current South African law patterns. It is not a maverick attitude to be "different" that an entire separate system is called for, but rather the experience of history in the position of Islamic Personal Law here and elsewhere and to prevent any occurrence of the same issue painted in different colours against a different background in the new South Africa.

If ever this assimilation is to be resorted to, only those aspects which can be assimilated or which are not "repugnant" to the system of law will be acceptable to the authorities.

In short, a partial or a watered down version of the Islamic Personal Law of marriage and divorce and consequences can possibly be acceded to as well as other aspects of the Islamic Personal Law by the secularist new South African government.

This approach appears to be clear from the SALC’s (South African Law Commission) statement and method of approach in this subject, namely: "Project 59: Islamic marriages and related matters." In the summary of the said project, the SALC states: "The object of this investigation is to determine the extent to which provision can be made in South African law for recognition of rules of Islamic law relating to marriage, matrimonial property, succession, guardianship and related aspects of family law."°

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This indicates a tampering with the law in accommodating and assimilating what the Legislature feels or thinks may or can be accommodated in law, whether that is in accordance with or repugnant to the shari`ah.

It can be reasonably accepted that the entire Islamic Personal Law, in the context of the SALC’s statement of approach, will not be accommodated.

This must be and is unacceptable to the vast majority of Muslims in South Africa, especially with the notion of a "new South Africa" floating all over and all around us.

6.4.1 CURRENT ATTITUDES OF POLITICAL PARTIES AND ORGANISATIONS TO RECOGNITION OF THE ISLAMIC PERSONAL LAW:

The policy of some of these are dealt with hereunder in alphabetical order.

6.4.1.1 The African National Congress:

Its stance is, at this stage is not clear. An enquiry sent to the Head of its constitutional committee was forwarded to the Department of Applied law at Wits University, from where a Mr Cachalia sent a booklet on Islamic Personal Law stating in a covering letter that “the ANC....has not yet formulated a policy on this matter (i.e. recognition of Islamic Personal Law).”

However, Dr Mandela, President of the ANC, as reported in the "Muslim Views", has made a clear statement in this matter. He is reported to have said at a meeting in the Bo-Kaap, Cape Town, on Thursday 19th March 1991:

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"We (ANC) regard it highly insensitive and arrogant that the culture of other groups can be disregarded."

"The ANC", he said, "had pledged itself to recognising Muslim personal law."¹

He did not mention the procedure nor mechanics of this recognition, according to the said report. Dr Mandela's first sentiment on culture is echoed by the Attorney General of South Australia who said (in Australia):

"...at last Parliament and law makers must acknowledge the needs of a multicultural community, that is the needs of a culturally diverse population must be taken into consideration as a natural part of the process of government."²

That is sound advice to the present and future law makers of South Africa also.

6.4.1.2 The Democratic Party of South Africa:

The said party does not have "a separate and official policy on this matter (Islamic Personal Law)." It does, however, subscribe to a "justiciable Bill of Rights for the protection of all individual rights which, quite naturally, would include the right to freedom of religion, speech and movement."

The said party further believes that "when one protects the rights of individuals, one as a consequence, protects the rights of groups, howsoever defined."³

It should be noted that the party speaks of "freedom of religion" which is different from the "freedom of the practice of religion."


6.4.1.3 The Inkatha Freedom Party:

No response received.

6.4.1.4 The National Party:

This Party's view is that "every person shall have the right to profess and practise his own faith freely and without hindrance or interference by any state institution." It further states: "....the National Party is aware of differences that exist between Islamic Personal Law and South African law, especially in the field of family law, the law of persons and the law of succession." In practice hereof the Party states: "...that rules of Islamic law ought to be recognised as valid and enforceable amongst Muslims in so far as this can be achieved without disruption of the general principles of South African law and the South African legal system."

The Party is non-committal to the form of administration for Islamic Personal Law but speaks of the "determination of rules of Islamic law being vested in recognised Islamic religious authorities", the latter of which it does not explain.¹

The Party distinctly does not state that the rules of the *shari'ah* itself will have to be followed herein.

6.4.2 RECOMMENDATION FOR PROBLEMS IN MUSLIM MARRIAGES AND DIVORCE AND RELATED ISSUES:

The most basic problem pertaining to Muslim marriages and divorces is that they have no legal consequences which creates legal problems.

Consequently, all Muslim marriages must have full *shari'ah* consequences in all spheres of the Islamic Personal Law which are legally recognised by the State.

The basic problems in Muslim marriages and divorces revolve around the following issues:

- *wilayah* (guardianship) of women in *nikah* (marriage).
- The *sadaq* (dowry).
- The `aqd al *nikah* (marriage contract) itself and the special *shurut* (conditions) the `aqd al *nikah* may set.
- The power of the *zawjah* (wife) in the dissolution of the *nikah* and effecting it as well as consequences arising from it.
- The issue of polygamy.
- The contribution of the *zawjah* (wife) to the marriage estate in movable and immovable assets.
- The *nafaqah* (maintenance) of the *mutallaqat* (divorcees) and *armalat* (widows).
- Appointment of and legal recognition of Muslim marriage officers and rules they have to comply with in their duties herein.
- Legalising the lawful operation of qualified Muslim jurists to practice in the field of Islamic Personal Law as does any other law jurist and to assist Muslims appearing before the Muslim Family Court.

There are other problems also, but those can be dealt with, in most cases, administratively with orders or the like.
6.4.2.1 **Wilayah (Guardianship):**

The *fiqh madhhab* (schools of law) followed in South Africa are *Hanafi* and *Shafi`i*, but this should not preclude the resorting to other *madhhab* also especially when the *Hanafi* and *Shafi`i* *madhhab* (schools of law) are difficult to apply as, for example, in the waiting period before a *mafqūd* (missing) person is pronounced dead. Most of the Indian community Muslims are *Hanafis* while most of the non-Indian Muslim community are *Shafi`is* and they are in the majority according to official census. This means that *wilayah* as in the *Hanafi madhab* (school of law), should be applicable to the Indian Muslim community which is a very liberal law in *wilayah* i.e a Muslim women with *ahliyyah* (contractual ability) can marry themselves off without the interference of their *wali* (guardian).

This does not happen like that here in South Africa.

The *Hanafi* ruling herein is the minority view in the *shari`ah*. The other *madhab* (schools of law) have varying degrees of and levels of applying *wilayah* to the *bikr* (never married virgin) and *thaiyyib* (previously married woman)

These have been dealt with under *wilayah*.

6.4.2.2 **Recommendation:**

It is proposed that the *wilayah* over never married Muslim ladies of repute be as is practised presently at the Cape.

This is an advisory *wilayah* in practice where the *wali* advises on the issue of *zawj*, but having the right, if there is such a right accorded him in *shari`ah*, to object and refuse consent.
He can do so if the prospective zawj has a quality or qualities or does anything which the shari‘ah refuse to endorse or accept and which is a cause for refusal of consent of nikah (marriage).

In this case, the woman may petition the qadi (judge) and if he sees benefit in her marrying, like her marrying honourably i.e. her standing as an honourable woman in Islam had not been compromised, he should allow such a nikah to take place. This should be on condition that the woman may not claim and will not be granted the right of faskh (annulment) of her nikah later on grounds of the defective nature of the man, the nature of which her wali (guardian) objected to and refused consent of the nikah.

The qadi (judge) should first impress upon her that it would be better to acquiesce to the fact that she is not marrying a good Muslim husband which will not be good for her or her nikah.

The qadi must stress this fact to her clearly.

If the qadi fears fasad (sinful conduct), within reasonable grounds of assumption, he shall ask the wali to consent and if he refuses, the qadi shall marry them off without his (the wali’s) consent.

In any case, the woman must consent to her nikah to any Muslim man she is to be married to.

A never married woman of repute whose wali (guardian) uses his wilayah (guardianship) unjustly or unfairly in order to restrain her from marrying the man of her choice, shall petition the qadi and if the qadi finds, after investigation, that the wali acts

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A qadi is a Muslim person who is qualified in Islamic law to such an extent that he can apply the said law to solve problems of the Muslims. He must know Arabic so that he can resort to the original sources of the law, apart from his being qualified in Islamic law. A four year degree in the Shari‘ah faculty of a Muslim Shari‘ah college of post matriculation level should be the minimum requirement.
unjustly and unfairly herein, he shall order him to let the nikah be enacted and consent thereto. If the wali refuses, the qadi will marry her off to her suitor.

The immediate abovementioned kind of wali and the wali who force any never married woman of repute under his wilayah to marry a man against her will, will commit a punishable offence, the latter the more severe of the two offences. A thaiyyib should be allowed to marry on her own accord on condition that the basic requirements of choice is made as prescribed in the shari'ah.

The Jordanian Family Law rules compulsion on the qadi (judge) to marry off a woman whose wali (guardian) refuses consent.\(^1\)

In principle the same procedure is followed by the Singapore Muslim Act, save that the Appeal Board for Muslim marriages intervenes and instructs the qadi to marry off the parties.\(^2\)

The Malaysian Family law code, however, insists on the consent of both the marrying parties (the man and the woman intending to marry) and that of the wali of the woman.

The Syari'ah (shari'ah) judge (qadi) consents if a woman has no wali.\(^3\)

The latter appears to be strict Shafi'i doctrine.

6.4.2.3 The Sadaq (Dowry):

There is ijma (consensus) by all the fuqaha of the necessity of sadaq for a woman marrying a man.

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1 Jordanian Family Law, Act 61 of 1976, clause 6 (b).

2 Muslim Marriage and Divorce Rules, Singapore, 1968, Clause 9.

This is not a "purchase price of the bride" as was the custom in old Europe.

As pointed out earlier in this thesis, there is no prescribed minimum nor maximum for *sadaq* set by a *shari'ah* text.

However, there is majority agreement that the *sadaq* must have value. The practice in most Muslim countries is a *sadaq* of substantial value. Some Muslim countries have prescribed a minimum *sadaq* due to some *madhāhib* (schools of law) prescribing a minimum, but not a maximum.

*Nikāh* (marriage) is an important institution in Islam and the most important social fabric of Muslim society.

Consequently, it should not be made difficult for people to marry, barring *shari'ah* prohibitions and restrictions, but it should not be made that easy either so as to defeat the aims of *nikāh* itself.

There is currently, in South Africa, two kinds of *sadaq* procedures.

- the predominant and majority Muslim group in South Africa in the Cape and elsewhere have a meagre *sadaq* (dowry) ranging from a few rand to a few hundred rand. This is utter little security for the *zawjah*.

- the Indian Muslim community have a two tier *sadaq* system - the actual *sadaq* and a "gift", which, on analysis, should actually to be taken as part of the *sadaq*. *Mutallaqat* (divorcees) and *armalat* (widows) of this community have a serious problem in the settlement at divorce or death with these items at times.
Recommendation:

- That the šadaq should preferably be calculated as being at least 10% of two years’ gross wages/earnings of all employees i.e those who work for someone and who are not self-employed or is more of an employee than self-employed if he has both occupations. Acceptable proof must be produced herein.

- In the case of self-employment of any kind, the šadaq is to be calculated, at date of the ‘aqd al nikah (marriage contract) or date of nikah, whichever the woman chooses voluntarily, and is to be 10% of turnover of business for a single year, on condition a profit was made by it, and provided it is not less than the šadaq of a woman of her standing which is calculated on the wage/salary scale.

If the qādi (judge) suspects foul play in the Financial Statements produced, he may order an auditor to verify and check the Statements to the account of proprietor concerned. Foul play herein must be made on offence.

If the concern runs at a loss, the qādi must fix the minimum šadaq for a woman of her standing.

Šadaq (dowry) is a security for the spouse and as such should be of value. The amount of it is the zawjah’s (wife’s) right and prerogative only.

- All gifts handed to the bride by the bridegroom or any of his family members at the time of the ‘aqd al nikah or actual nikah shall not be returnable on talaq (divorce) or wafat save if she voluntarily and explicitly forgoes that right.
All gifts given with the *sadaq* at the above occasions to the bride by the immediate abovementioned persons, shall be taken as being part of the *sadaq* (dowry).

- It is further recommended that the bedroom suite shall preferably be for the bride over and above the *sadaq* and is not returnable at *talaq* (divorce) or *wafat* save in the case of *talaq* due to the proven *zina* (adultery) of the *zawjah*. This should specifically be so when she has minor children in her care of her erstwhile spouse.

- A woman may set her *sadaq* as being half of that of the possessions of her *zawj* as from date of their marriage and such will be valid if the *zawj* so voluntarily consents. This is according to *fatwa* (legal dispensation) issued by the present Grand *Shaikh* of the al Azhar University of Cairo and quoted in this thesis.

- The *sadaq* (monetary part of it) is to be paid in accordance with anyone of the following methods:
  
  * either payable in full at once, by the latest on the day of the *nikah* (marriage).

  * or a deposit and later instalments over a period which the woman specifies in her *`aqd al nikah* (marriage contract).

  * or a deposit set by the woman in her *`aqd al nikah* and the full balance payable immediately on the woman’s *talaq* or *wafat* (death).

In the payment systems of the latter two patterns of payment, the woman may request security against the future payments.
The above three methods are enshrined in the Jordanian and Iraqi Family laws.\(^1\)

The Malaysian Family law, prescribes rules for *sadaq*’s registration and security lodged against payment of *sadaq*.\(^2\)

### 6.4.2.5 Motivation and Purpose of the Recommendation on Sadaq:

*Sadaq* is a "gift" to the *zawjah* on *nikah*, but has to form part of the security of a *zawjah* in that relationship. By her agreeing to become the man’s *zawjah*, she has to forego any opportunity she could have availed herself to earn what she wanted or could have earned through a lawful profession. It is in this understanding, and since she will be occupied with being a *zawjah* and, in most cases, a mother, that she is to receive, as long as the *nikah* (marriage) subsists, full *nafaqah* (maintenance) in the spheres of nourishment, clothing, residence and all other related forms of *nafaqah*. As pointed out under *sadaq* (dowry), by the majority ruling of the *fuqaha*, she does not spend on herself anything for the above from her own money.

The *sadaq* may be deposited by the *zawjah* in one of the Islamic financial institutions in her own name and be allowed to grow lawfully in value over the years irrespective of what system is used in paying the *sadaq*.

Further, the *sadaq* value and pattern, will restrain *azwaj* in the process of *talaq* (divorce) which some seem to take so lightly due to, amongst other things, the very easy *sadaq* pattern, as in the Cape areas.

In the case of *talaq*, the *sadaq* will be a form of security for her as well as in *wafat* (death) of her spouse where she has the added advantage of a compulsory

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1. Jordanian Family Law, 1976, Chapter 8, clause 45.
   Iraqi Personal Law, 1959, Chapter 3, Part I, clause 3 (1) & (2).
share of the *tarikah* (inheritance) of her late *zawj* (husband) if the *nikah* subsisted till the latter's death.

6.4.2.6 The *Aqd al Nikah* and its Contents:

There is what is generally called the *muqtadayat al aqd* (normal requirements of a contract).

The *aqd al nikah* (marriage contract) has its own normal *muqtadayat* (requirements). These *muqtadayat* are generally known, but should nevertheless be written in a standard form in each *aqd* to avoid claim of ignorance at the time of disputes.

There are special *shurut* (conditions) pertaining to the *aqd* (contract i.e. of marriage) and beneficial to the *aqd*, in which the *fuqaha* differ on.

These *shurut* should be made permissible due to the proofs advanced by those *fuqaha* who allow such *shurut* and rule it as valid and enforceable.

6.4.2.7 Recommendation:

It is recommended that each and every Muslim couple wishing to contract *nikah* must compulsorily enter into an *aqd al nikah* (marriage contract).

Such *uqūd* (contracts) must be scrutinised and approved by the Muslim Family Court's *qādi* (judge) as complying to the *shari'ah* before a licence of permission to *nikah* is issued. Such contracts must then be binding and enforceable.

It is further recommended that the basic *muqtadayat* (requirements) of the *aqd al nikah* (marriage contract) be part of all *nikah* *uqūd* (marriage contracts), such as:
- that *mu`asharah zawjiyyah hasanah* (sound marriage relations), as in the understanding of the *shari'ah*, is compulsory on both of the parties.
that the zawj provide adequate and becoming nafaqah (maintenance) to his zawjah according to his means and this will include sukna (lodgings) and kiswah (clothing) as well as medical care and such normal forms of nafaqah as the shari‘ah requires,

that the zawjah goes to live with her zawj after the actual enactment of the nikah and she received her prescribed sadaq or the deposit as she stipulated in their ‘aqd al nikah.

that the nikah is based on the principle of continuity with ma`ruf or separation with ihesan (i.e. that the laws of marriage of the shari‘ah will be upheld always, and if not, then the marriage should end with becoming grace and dignity).

that only the shari‘ah will be applied to the nikah and all its resultant consequences.

that all valid shurut (conditions) by shari‘ah set by any of the parties be executed as agreed upon.

that the nikah is not contracted verbally or by intent for a fixed duration of time.

that both parties marrying are willingly contracting the nikah and that the wali (guardian) consents within boundaries of the shari‘ah.

that each of the contracting parties have full ahliyyah (legal contracting ability).

that the contracting parties express a willingness to carry out the obligations of a Muslim nikah (marriage).
that a woman marrying shall be proven not to be in any form of `iddah (period of waiting due to divorce or death of her spouse) nor that she be pregnant from someone other than the man she is marrying.

that a woman who is proven to be pregnant when applying to marry, shall not be given permission to do so by the qadi (judge), until she can declare and prove the nasab (lineage) of the child she is carrying in which case the qadi will rule on the application in terms of the shari'ah.

An unmarried woman who is pregnant from a known man and the latter admit to having fathered that child, such a woman may be granted a licence to marry the said man, with illegitimacy of the child recorded.

6.4.2.8 Special Shurut (Conditions) Benefitting the Zawjah:

It must be permissible for a woman to specify in the `aqd al nikah that:

- she wish to have a monogamous nikah with the man she will marry.
- that she do not wish to accompany her zawj on his journeys if his work is such that he has to go on journeys often. "Journeys" being journeys in their domicile or outside it.
- that if she marries someone from another country or region in South Africa, that she will not be removed from her place of residence and domicile.

Any breaking of any of these shurut will automatically give the zawjah the right of faskh (annulment) of the nikah or she may condone her zawj's action, preferably in writing and such be duly signed by her in the presence of and signed by the qadi of the Muslim Family Court.
It is further recommended that:

- the age of *nikah* be set for both males and females.

The *shari`ah* rules permissibility for both at puberty while the Family laws of most Muslim countries have set age limits, quite possibly due to custom and practice as well as, at least, in some cases, to ensure that the *zawj* (husband) would be able to maintain a spouse and home. The latter is a requirement of marriage. Any lower age group persons than the one set shall have to petition the *qadi* (judge) for permission to marry, the latter who must see if *nikah* (marriage) will be beneficial to the parties and that they can shoulder the obligations of *nikah* including *nafaqah* (maintenance).

- that people who are not sane and who will never ever recover, may not be married off. If sexual abuse from them is feared or occurs, the *qadi* may on or without the request of the *wali* (guardian) of such persons, consent or order the sterilisation of such persons.

### 6.4.2.9 Motivation of Recommendations:

There is gross ignorance, overall, amongst Muslims, as to what is the *muqta`dayat* (requirements) of an `aqd al *nikah* (marriage contract). Thus the reason for its entry in the `aqd al *nikah*.

The special *shurut* (conditions) benefitting the *zawjah* is required to act as a deterrent to *azwaj* who are quick in contracting polygamous *ankihah* (marriages) and cannot do justice to more than one *zawjah* as well as enacting a situation which might
develop into an unacceptable state, which the zawjah refuse to acquiesce to and which will have to be ended before a sinful situation occurs.

As for the age restriction, the *nikah* of a minor should, generally, be prohibited. This process, in earlier times, had been instituted by righteous and pious persons for the benefit of the minors involved. One cannot expect, generally, this attitude to exists, amongst the Muslim public, nowadays, hence the protection of persons by the age restriction.

Consent of *mukallaf* parties (persons who reached puberty) will enact a situation of mutual acceptance and application in the *nikah* situation and thus aid success of the *nikah*.

It should, however, be an age where one expect both males and females to have average knowledge of human situations.

Applicants younger than the agreed age, should, generally, not be allowed to marry, as they might not be able to shoulder the responsibilities of *nikah*. There might be rare exceptions and hence the *qadi*’s (judge) involvement therein.

The Iraqi law rules 18 years a minimum age for *nikah* for both males and females and the minimum age of application to the *qadi* is 15 years.\(^1\)

The Jordanian law rules 16 years for males and 15 year for females.\(^2\)

The Malaysian law rules 18 years for males and 16 year for females\(^3\) and younger persons must petition the *Syari’ah (shari’ah)* Court for permission.

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1. The Iraqi Personal Law, Baghdad, Act 188 of 1959 as amended, Chapter 3, clause 7 (1) & (8).
The Singaporean Marriage law rule 16 years for both males and females. Younger females who have reached puberty should petition the Syari'ah Court for permission to marry. The law makes no mention of younger males.¹

This must also be the rule if the woman is pregnant already and under age at application to marry. There is no system of legitimising illegitimate children in the shari'ah thus that will not be a factor in this matter.

As for the rules with regards to pregnancy before nikah (marriage), such are required as nasab (lineage) of persons are cardinal to nafaqah (maintenance) and other rights and privileges.

There is an erroneous belief amongst some Muslims that a child conceived before a nikah becomes legitimate on nikah. Some even marry for a short time "to give the child a name" and then divorce to go their own ways. This is utterly repugnant and there is no such rule anywhere in the shari'ah.

The provisions mention previously will end such improper acts.

As for the insane persons, the ruling is for protection of such persons from being exploited by others as well as preventing the birth of children, possibly permanently defective mentally, from being born to persons who cannot possibly care for them, the burden of which will then cede to the Muslim community and the State.

Various Muslim Family laws of various Muslim countries and Muslim minorities have some of the above rules in their codes.

The Jordanian law states:

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¹ Singaporean Administration of Muslim Law Act, 1985, Chapter 3, clause 96 (4).
"If one of the parties of the (marriage) contract prescribe a shart (condition) which is beneficial, it will be necessary to execute it..."¹

The same in meaning is prescribed in the Iraqi law.² While the same section of that law gives right of faskh (annulment) to the zawjah if the shurut are not executed.³

There is no direct mention of these special shurut in the Singaporean and Malaysian Family laws, but there is a clause that states that faskh is allowed to the zawjah "on any other grounds which is recognised as valid for the dissolution of marriage by faskh under the Muslim law."⁴ This allows for faskh for non-compliance to special shurut of the `aqd al nikah (marriage) by implication.

Malaysia and Singapore are overwhelmingly Shafi`i and that madhhab is restrictive in the issue of special shurut benefitting the zawjah.

6.4.2.10 The Issue Of Talaq And Related Issues:

There is generally a litany of complaints on the "unfair status" of Muslim zawjat (wives) in a Muslim divorce.

This is either based on an abject misunderstanding of Islam and the Islamic Personal Law, or is based on disinformation or the actions of Muslims who act against the laws of the shari`ah.

¹ Jordanian Family Law, 1976, clause 19.
² The Islamic Personal Law, Baghdad 1959, as amended, Chapter 1, Section 2, clause 3.
³ Ibid, chapter 1, section 2, clause 4.
From previous chapters of this thesis, it is clear that the zawjat (wives) can institute talāq (divorce), when the zawj (husband) ceded that right to her or faskh (annulment) proceedings or request tatliq (judicial divorce) from the qādi (judge). The latter process is valid by ruling of Malik of the Maliki madhab (school of law) as set out in chapter 4 under Tatliq. There is only the administrative difference in that the qādi intervenes in her application for relief as he can enforce the decision administratively, seeing that some men might intimidate and obstruct their zawjat in this matter. The zawj has the right of talāq which he has to use justly and fairly.

There is thus a faulty understanding amongst certain people that only azwaj (husbands) can institute talāq an end to marriage and no one else. Her application has to be made to the qādi and is not automatic. If she feels that she wishes to continue the awkward situation of an upset nikah (marriage) with an unjust partner, she is free to do so and if she petitions the qādi, she will obtain relief if her application is proper in terms of the shari'ah.

6.4.2.11 Recommendations For Relief Applications to the Qādi:

The zawjah must have the right for application of relief from her nikah in the following cases:

- any physical defect in the man hidden from her before the nikah.
- any physical defect afflicting the zawj after the nikah and which is such that the husband/wife relationship is so impaired as to render the marriage covenant impossible to execute.
- when the zawj becomes mentally incapacitated or defective in such a manner that the zawjah no longer feels she can live with him as his zawjah.
Faskh (annulment) of nikah is allowed when there had been deception by one of the marrying parties in hiding a defect from the other. That had been dealt with in chapter 5. The other two conditions mentioned above are comparable in consequences to sterility and/or impotence and that is a reason for faskh (annulment) by ruling of `Umar. This had also been mentioned in chapter 5.

• when she ceases to love him as a husband. She has to resort to khul` herein. This had been dealt with under khul` in chapter 4 also. The law herein should be that the maximum to be returned is the sadaq given at nikah (marriage) which is the ruling of the senior fuqaha` al Sha`bi, al Zuhri and al Hasan al Basri. This is reflected in the Laws of Khul` in chapter 4. The profit accrued from the sadaq (dowry), if it was money and invested by the zawjah, should be excluded from this.

• when her zawj neglects in providing her with the basic nafaqah (maintenance) for a period of three continuous months or interruptedly as to be construed to be intended neglect of providing nafaqah. This had been done referred to under Ta`liq (judicial divorce) in chapter 4.

• when the zawj fails to cohabit with her and perform his marital obligations to her. The Qur'an obligates this as a part of nikah. 1 Al Shafi`i speaks of once every four days while Ahmad rule once every four or six months as minimum. 2

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1 Al Qur'an, Surah al Baqarah: 222.
• when the zawj was impotent before the *nikah* and this was hidden from her and he continued to be impotent after the *nikah*. The same applies if he was and is sterile in the mentioned cases. `Umar’s ruling on *faskh* applies here.

• when the zawj is sentenced to imprisonment for two or more years and sentence is finally confirmed.

• when he habitually assaults her or makes her life unbearable and or miserable with his cruelty to her be such cruelty physical or mental cruelty.

• when the zawj associates with women of ill-repute or womanises even if he is not actually sexually involved with them.

• when the zawj lives with and or cohabits sexually with another woman or other women to whom he is not married as per the *shari’ah* definition of *nikah* (marriage).

• when he attempts to force her to live an immoral life for or without gain.

• when he obstructs her in the performance of her Islamic obligations.

• when his conduct is contrary to the *shari’ah* requirements herein. This includes slandering her, insulting her, injuring her honour and or her name in such a way as not ordained in the *shari’ah*.

Grounds for *tālīq* by Malikis and others for reason of *darar* (harm to her) and breaking of the laws of *nikah* are found in the above.

• any other grounds which is recognised as valid for ending the *nikah* as in the *shari’ah*.

• any zawj ceding and possessing his zawjah of *talaq* by *tafwid* (ceding of divorce to her) should not be allowed to retract such *tafwīd*. This *tafwīd*
should be valid even after the session in which it was made, as some Hanbalis rule.

6.4.2.12 Motivation for the above:

There is a general understanding, even amongst some Muslims, that once a Muslim nikah is enacted, only the zawj has the right to end it. The laws mentioned on talaq (divorce) and faskh (annulment) clearly negate that. A zawj is the head of the family in the shari'ah, but that does not mean that he can do what he wants to do and be his own judge thereof also. He is the head and is to be obeyed by the family as long as he follows the shari'ah and instructs in it.

6.4.2.13 Recommendations on Use of Power of Talaq by the Nikah:

As pointed out earlier in this thesis, the zawj has the direct power of talaq, but this is subject to the exhortation to be just and fair therein. It is sinful to use it when it should not be used.

It is further the duty of the Authority in Islam to see that sinful acts are not committed and that an adequate penalty is available to the offender. Thus we see a situation where a zawj issues talaq (divorce) in a wrong way, the act of talaq is legally executed but by doing so he commits a sin. This situation should be rectified under the general Quranic rule of "ordering with the good (virtue) and restraining and abstaining from vice and sin." It is this principle,

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1 Al Qur'an, Surah al 'Imran: 110.
amongst others, which makes the Muslims, according to the Qur'an, “the best of people ever to tread the surface of the earth”.¹

The following is recommended in the issue of *talaq* by the *azwaj*:

- All procedures of *talaq* issued by *azwaj* (husbands) must be done through the Muslim Family Court in order to regulate the system and avoid misuse and abuse by *azwaj*.

- The said Court will not permit two or three *talaqat* (divorce pronouncements) in one session to avoid the sinful situation of closing the door of reconciliation and resorting to unlawful means to nullify the effect of such divorce pronouncements, like *tahlil*.

- *Talaq* procedures outside the Court, in the presence of two Muslim male witnesses, will be valid when so registered in the Family Court. This procedure will be an offence warranting a reasonable deterrent in the form of a fine, like 5% of gross annual income from each party involved.

- *Talaq* issued by the *zawj* without a *shari`ah* sanctioned reason, will be executed with a very heavy fine levied. It is recommended that a minimum of 25% of annual gross earnings, or profit, if self employed, be levied and such be given to the disadvantaged *zawjah* in this unfair a form of *talaq*.

- That every *mutallaqah* (divorcee) be given *mut`ah* (a gift) on her *talaq* (divorce). Such a gift is to be determined by the *qadi* (judge). *Talaq* due to the proven *zina* of the *zawjah* will be excluded from this.

¹ Al Qur'an, Surah al `Imran:110.
There is no *mut`ah* (gift) in *khul`* for the *zawjah*.

- Every *zawj* who intends divorce must petition the Muslim Family Court for arbitration. This must specifically be so for all first time applications and such shall compulsorily be referred to the *hakaman* procedure (arbitration procedure). The *hakaman* (two arbitrators) must apparently be Muslim males (as the grammatical usage of the verb and the word *hakaman* being in the masculine form)\(^1\) of righteous and pious conduct and demeanour and have knowledge of basic Islamic knowledge in *nikah* (marriage) and related matters and preferably have knowledge of people and their ways. They must preferably be one from his side and one from her side which means that they must be related to them.

The Court must execute the joint decision reached by the *hakaman* if it is in conformity with *shari`ah* and the welfare of the spouses. If the *hakaman* cannot agree, the *qadi* dismisses them and appoints new *hakaman*. If they again fail to resolve the case and effect a reconciliation, the *qadi* must hear the case and act in the best interest of the parties and in conformity with the *shari`ah*.

- All *talaq* procedures must be done verbally in front of the *qadi* as well as in writing and certification issued thereof as well as entry made in the Court's register.

- *Talaq* in *haid* or in *tuhr* in which there was actual sexual cohabitation, will be invalid and *istirja`* (retraction) will be necessary by order of the *qadi*.

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\(^1\) *Al Qur`an, Surah al Nisa*: 35.
This is the Maliki ruling in this form of *talaq* as well as of al Shafi'i and Ahmad. Ibn Hazm rule this *talaq* as of no consequence whatsoever. The word of the *zawjah* with her *yamin* will be accepted in this case.

6.4.2.14 Motivation for the above:

Firstly, it is found necessary to restrict procedures of *talaq* by *azwaj* to the Court for proper control. This is the procedure in all Muslim countries in one way or another. There is no other way for effective control.

Secondly, the *fuqaha* differ on the issue of issuing more than one *talqah* in one session as to its consequences. The Prophet (S.A.W.S) himself strongly disapproved of three *talaqat* (divorce pronouncements) issued in one session during his lifetime. There is consensus by the *fuqaha* that giving three *talaqat* in one session is sinful. Sinful acts are not condoned nor should they be allowed to happen, most certainly not with impunity. Sinful situations are prevented from coming into being, not encouraged to come into being. Thus, by ruling that all matters of *talaq* be brought to the Court, and restricting the Court not to issue *talqatan* (two divorce pronouncements) or three *talaqat* in one session, will effectively avoid the juristic problems involved in the differences of the *fuqaha* herein as well as restraining the *azwaj* from resorting to that sinful act in matters of *talaq* (divorce).

Thirdly, the issue of *talaq* without a valid reason in the *shari'ah* is a sin by consensus. It unnecessarily destroys families and family relationships. However, one cannot refuse acceptance of the *talaq* as such as the *zawj* might, if he is refused execution of his
talaq, resort to issues most unwholesome, unbecoming and sinful to force the issue. This is not a preferable situation. On the other hand, it is an unacceptable act and hence the penalty.

It is proposed that the entire penalty levied be given to the mutallaqah (divorcee) as damages for the unacceptable act of her mutalliq (divorce). This is, of course, over and above what is due to her in such a case as a mutallaqah (divorcee).

The issue here is deterrent.

Fourthly, the issue of mut'ah (gift) to the mutallaqah had been dealt with before and is based on the views of those fuqaha' sanctioning it.

Fifthly, the issue of hakaman (two arbitrator) is for solving problems in a nikah (marriage) situation which the parties cannot solve and which may cause the nikah to end.

Talaq is the last resort, hence the hakaman (two arbitrators) procedure to effect saving the relationship.

If no reconciliation is effected, or can be effected, the qadi (judge) will have to intervene and act as the shari'ah commands in a situation like that. Muslims are married on the principle of "staying together with ma'ruf (with fairness) or separating with ihsan (grace)". There is no humanly possible third way out in this matter, according to the shari'ah.

The ruling by other secular systems that differing married partners must stay apart before a divorce is granted is self defeating - they will do, during that period, what their marriage bond has denied them.
As for the verbal *talaq* (divorce) in the Court and the recording of it, it is to be clear of all *shari'ah* rulings herein and effect modern administrative procedures in *talaq* matters without compromising the *shari'ah*.

6.4.3 **THE ISSUE OF POLYGAMY**

As shown previously, polygamy was not the invention of Islam nor is it the original law of *nikah* (marriage) in Islam either. It is an exception. The general rule is monogamy.

However, Islam being a realistic system of life, recognises that certain situations may arise which will warrant the institution of polygamy to prevent social and sexual evils.

Sound morality is the norm in Islamic societal existence and this is the basic principle in the permissibility of polygamy under certain circumstances.

When an imbalance in the normal sex ratio occurs, the *shari'ah* does not allow the institution of call-girls or "sophisticated escort girls", brothels and the like kind of evils to be created to solve the problem.

6.4.3.1 **Situations Permissible for Practice of Polygamy:**

- An over population of females.

When such a situation definitely arises, instead of a woman engaging in prostitution or setting up institutions for extra-marital activities, with its resultant evils and dangers in social and health spheres, amongst others, Islam opts for *nikah* in a polygamous union where the natural inclinations and urges can be lawfully satisfied and where obligations of the
requirements of *nafaqah* (maintenance) are discharged as well as avoiding
the bringing forth of illegitimate children. This kind of union will also prevent
the destruction of the institution of *nikah* (marriage) by the organised
institution of mistresses and prostitutes, something which, at least, believing
people abhor and their religions prohibit in clear terms.

It is clear that, generally, Non-Muslim society is highly critical of the Muslim
practice of polygamy, yet they allow prostitution, some officially under the
control of the Health Ministries of their countries and or *de facto* situations
where a man, while even still married, can lawfully engage in other sexual
situations and persons of such situations being, at least partially, protected
by law, especially children. Some joint property issues are also protected
of such *de facto* situations. Australia is a classical case in the latter situation
as indicated in the Introduction of this thesis.

This is not only an anomaly, but gross hypocrisy.

- When a man has a genuine sexual appetite which cannot be satisfied with
being married to one woman only.

In this situation, which admittedly will be quite rare, if polygamy is not
allowed for such persons, the only other alternative will be for them to
satisfy it elsewhere. This is against the Islamic, and indeed most other
religions’ moral laws.

Those who genuinely and provenly have this unfortunate problem should
be permitted to engage in a polygamous union.

- After, usually, major wars when many men may be killed leaving
defenceless widows and orphans behind. Rather than leaving such women
to fall prey to the lustful desires of men, with its resultant socio-moral problems, and neglect of the orphans in such a situation, the Islamic system allows the polygamous union in such cases, where obligations can be enforced and the moral code upheld.

- Sometimes one's zawjah may contract a disease or a defect or a permanent illness which makes husband-wife relationships impossible. Rather than divorce such an unfortunate woman, the shari'ah allows the husband to keep her and marry another woman, so that his natural urges can be lawfully satisfied.

This is more merciful than dumping the sick zawjah.

This will also alleviate the social security system, at least to some extent.¹

These are the basic reasons for the exception of the practice of polygamy in Islam and is nowhere near the prevailing concept amongst many, even professional people, of what they perceive to be the Islamic concept and practice of polygamy.

Thus the practice of polygamy is subject to two main requirements:

- there must be a need for having more than one zawjah and this must be factually ascertained by such professional people the Court may feel should give an opinion herein.

- that there be justice and fairness between all the zawjat in all the forms of nafaqah (maintenance) required, including his physical presence and his cohabitation with them on an equitable revolving basis.

proof of financial means must be produced to the Court by the zawj that more than one spouse can be properly maintained as required in shari’ah. There is only one exception and that is love - it is impossible to love them all equally and on the same level. This exemption falls under the general law of the Quranic ayah: "Allah burdens not a soul beyond its scope..."¹

It had been previously stated that a woman may prescribe in the `aqd al nikah (marriage contract) the shart (condition) of a monogamous nikah with the man. In a situation where the issue of polygamy is necessary to be applied, like when there are provenly more women than men, the Hakim of the Muslims will probably issue a temporary order for the prohibition of that right until the situation normalises again. Herein he is faced with two options: to allow the legitimate right of a woman to require a monogamous nikah and allow the evil of women without men. Both are situations with rights attributed to parties. The latter case is more in need to be solved than the former and has more right to be addressed.

6.4.3.2 Recommendation:

It is recommended that polygamy be allowed as an exception and in controlled conditions and that all requirements of the shari’ah be fully and provenly met herein.

Further, application must be made to the qađi (judge) for permission to contract such a nikah (marriage), the latter who will have to satisfy himself that all the issues, as per shari’ah, have been satisfied before granting permission.

In this way polygamy will not be the free domain for all nor will any unnecessary suffering be brought on any party involved.

¹ Al Qur’ān, Surah al Baqarah: 286.
6.4.3.3 Polygamy Laws in Islamic Personal Law Codes of Some Muslim Communities:

- The Jordanian law states:

  "He who has more than one wife shall deal justly and equally between all of them."\(^1\)

- The Singaporean law rules that no marriage shall be solemnised under the Marriage Act "unless all conditions necessary for the validity thereof in accordance with the Muslim law and the provisions of this Act, are satisfied."

  The said law further restricts already and still married men from contracting a subsequent marriage, save with the consent of the *Kadi* (*qadi*) or by the *wali* (guardian) of the woman to be married and the written consent of the *Kadi*.\(^2\)

  The law further states that the *qadi* (judge) gives consent for the subsequent marriage when he satisfied himself that "there is no lawful obstacle according to the Muslim law (*shari`ah*), or this Act (i.e the Muslim Law Act) to such a marriage."\(^2\)

- The Malaysian law is more explicit in this matter.

  The law rules for permission to be obtained from the *Syari’ah* (*shari`ah*) Judge for a subsequent marriage. It requires, further, a special written application where the grounds for the proposed subsequent *nikah* (marriage) is spelled out. The income, liabilities and financial obligations

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must be declared by the zawj. He must also declare all his dependants, including prospective dependants.

The law goes much further in that it requires the existing zawjah or zawjat to consent to the proposed new nikah.

(There is, incidentally, no such ruling in the shari'ah, save, of course, if such a stipulation was made in the 'aqd al nikah of the zawjah or zawjat. Perhaps the lawmakers tried to prevent a situation where a zawjah will not consent and thus start a process of feuding ending that specific nikah.)

The law further specifies when the Court can consent to such a subsequent marriage and gives as examples: the sterility of the zawjah, her physical infirmity, physical unfitness for conjugal relations, wilful avoidance by her of an order to restore conjugal relations or her insanity.

The applicant must further satisfy the Court that he has the means to support all the zawjat as required in the shari'ah, including all the dependants.

He must also prove that he can accord equal treatment to all the zawjat and that the new marriage would not cause darar syarie i.e harm to the zawjat in shari'ah terms.

The Court must be satisfied that the new marriage will not lower the standard of living of the existing zawjah or zawjat and all the dependants.

The Court is required to hear the application in camera.¹

- The Iraqi law also rule necessity for the qadi's (judge's) permission for marrying another woman and that the man must prove that he has enough

means to support more than one zawjah and that there is a reason by the shari‘ah for such a subsequent nikah (marriage).

The law prescribes a penalty of one year’s imprisonment or one hundred dinars fine for anyone marrying outside the Court in contracting a subsequent nikah in addition to the already existing nikah.

No additional zawjah or zawjat will be allowed if it is feared that justice will not be done to the zawjat in a polygamous union.¹

- The Egyptian law was amended in matters of polygamy in 1985.

An amendment as introduced which rules that:

The Court requires the zawj to mention his zawjah or zawjat and their places of residence in his marriage document when he wishes to remarry.

The Court is to inform by registered mail the zawjah or zawjat of the new nikah.

The zawjah is permitted to request talaq (divorce) from him if he enters into another nikah while still married to her if she is harmed physically or otherwise by this new nikah which makes her continued married life with him impossible. This is so irrespective whether she prescribed that special shart of a monogamous nikah with him or not.

If the zawj refuses and the qadi cannot reconcile them, the qadi resorts to tatliq with one talqah ba‘inah (one irrevocable judicial divorce).

A zawjah whose zawj enters into a polygamous union with another woman while still married to her has this right, for one year from the date of her knowledge of the new nikah, to request talaq from him. She forfeits this

¹ Islamic Personal Law, Iraq, Act 188, 1959, as amended, chapter 1, part I, section 6.
right if she accepted the new nikah, openly or by implication. Her right of talaq or tatliq applies each time her zawj marries another woman while still married to her. The new zawjah who did not know that her proposed zawj was already married, may likewise request tatliq from the qadi (judge).\textsuperscript{1}

Tatliq is Maliki law. However, the Egyptian law had gone further than most Muslim Family laws. Some of the above rulings have no shari'ah standing.

From the above laws, it is clear that polygamy is not an easy licence for Muslim men.

Admittedly, some regulations have gone too far and have no shari'ah sanction, but overall there is agreement with some other view within the shari'ah of the stand that had been taken.

Most of the above mentioned laws are derived from two Quranic laws, namely:

"...then marry (other) women of your choice, two or three or four, but if you fear that you shall not be able to deal justly (with them), then only one..."\textsuperscript{2}

"You will never be able to do perfect justice between wives even if it is your ardent desire, so do not incline too much to one of them (by giving her more of your time and provisions), so as to leave the other hanging (in the air - i.e. neither married nor divorced)."\textsuperscript{3}

The last ayah specifically state that absolute and complete equality and justice in every aspect of a polygamous married life is impossible.

This is due to the natural human inclination, affections and the like.

\textsuperscript{1} Islamic Personal Laws, Egypt, Act 100, 1985, article 11.

\textsuperscript{2} Al Qur'an, Surah al Nisa': 3.

\textsuperscript{3} Ibid, op. cit. 129.
A mufassir of the Tabi‘un, al Mujahid says:

"This āyah is taken to mean: do not calculatedly do injustice in the treatment and affections to your wives, but be calculatedly just and fair in your attention and provision to each of them, for this is humanly possible to achieve."\(^1\)

The interpretation given by a small minority of the modern scholars to āyah 129 of Surah al Nisa' that it is prohibition of polygamy is weak. The assertion by some that the aforementioned āyah abrogated the āyah consenting to polygamy is far fetched and has no proven record of cancellation. Furthermore, the vast overwhelming majority of fuqaha’, past and present have the opposite view and the Personal Law legislation of Muslim countries and communities add weight to it.

6.4.4 MARITAL PROPERTY:

The basic rule is that what the zawjah brings to the marriage is her own and remains as such. This includes her šadaq (dowry), her gifts and her own possessions as well as what she procures during the nikah (marriage) for herself.Whatever she inherits from anyone is hers also, before and after her nikah. She is at liberty to make a voluntary gift thereof to her zawj, of course. The same is not true for the zawj as he is under compulsory obligation to provide for her.

The issue now arises of the contribution of the zawjah to the married estate (there is incidentally no such thing as a joint married estate as in the general sense in secular systems).

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The *shari'ah* prohibits the taking and using of the wealth of others, save if it is business by agreement of partners (in business).

The *Qur'an* states:

"And eat up not one another's property unjustly..."¹

*Nikah* in Islam is not an automatic financial partnership.

If, due to some inability of the *zawj*, the *zawjah* provides *nafaqah* (maintenance) for herself and or the children born from the *nikah*, such is a debt owing to her by the *zawj*, save if she voluntarily gives it as a gift. The loan that the *qadi* (judge) makes in the *zawj*'s name for *nafaqah* (maintenance) for the *zawjah* when he is unable to provide, is a liability solely of the *zawj*.

In the matter of the *zawjah* acquiring assets for the household, such is hers. In the acquiring of fixed assets in which she contributed, like paying off the price of a dwelling or land or the like or contributes to her *zawj*'s business, she becomes a partner in that venture with a percentage equal to her input of the concern being hers.

If she assists him in his concern without remuneration, such is due to her from him at market price.

The *zawj* has no marital control whatever over the assets of his *zawjah*. He can only interfere when she engages in business or trade or practices which are against the *shari'ah*.

In this regard he is to admonish and order her to desist from such acts and she is under obligation to respond positively therein.

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¹ *Al Qur'an*, *Surah al Baqarah*: 188.
The zawjah has the same right with regard to the zawj if he does wrong in his business in that she can seek relief from the qadi if he refuses to change his ways of operation.

Community of Property as is known in South Africa, is thus unknown to the Islamic Order. The A.N.C. (Ante Nuptial Contract) will not suffice nor is it proper in all respects either.

The only issue which may be possible, in some respects, is the A.N.C. - Accrual System, on condition that the contract rules only shari'ah as consequence and is in full conformity with the shari'ah as required in its laws.

Thus the agreement by the man and the woman, before their nikah (marriage), in their 'aqd al nikah, that the woman will have half of everything he has as from the date of the nikah, on her talaq (divorce) or his wafat, is valid as a sadaq (dowry) agreement, provided the assets are lawful and have been lawfully procured in terms of the shari'ah. This is in accordance with the agreement principle of the sadaq (dowry).

The Grand Shaikh of the al Azhar University, Shaikh Jad al Haqq, in his fatwa (legal dispensation), pronounced validity hereof.  

6.4.4.1 Recommendation:

It is recommended that all the above rules be enacted in marital property.

In addition, in the case of a zawjah opting for half of the zawj's possessions as at nikah, (marriage) this should be subject to such sadaq (dowry) in this case, on talaq (divorce), being equal to the sadaq of a zawjah of her standing in the case of a zawjah whose sadaq is from the remuneration of her employee zawj.

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This would prevent disadvantage to the zawjah when she is divorced soon after the nikāh and the zawj has little to his name at that time.

The sharing system should not be allowed when the zawj carries on business with any form of a loan and his liabilities are more than his assets.

6.5 **NAFAQAH (MAINTENANCE) OF THE MUTALLAQAT (DIVORCEEÉS) AND ARMALAT (WIDOWS)**

The Ṷafqah of the varying degrees of muṭallaqāt, on the ending of their `iddah revert to their wali (guardian), which will usually be their legitimate father. If he is not found, the next in line of wilāyah as per the scale of the ‘asabāt (agnates) in the wilāyah (guardianship) scale as mentioned in previous chapters. If one person of the ‘asabāt (agnates) cannot supply the Ṷafqah, then they should jointly be held responsible for it. This is also the case when the muṭallaqah (divorcee) has no money and or assets of herself and she avails herself to her ‘asabāt for Ṷafqah. If she has insufficient means, the wali (guardian) or the ‘asabāt will have to augment it.

If these persons, due to circumstances, cannot produce the required Ṷafqah, the broad Muslim Community is to bear that responsibility.

This will necessitate the establishing of a special fund, by law, for this purpose.

The latter rule is from the Quranic āyah (verse):

"The believers, men and women, are the protectors of one another..."¹

¹ Al Qurān, Surah al Tawbah: 71.
The nafaqah (maintenance) of the mutallaqat (divorcees) and armalat (widows) during their respective `iddad (pl of `iddah), have been dealt with previously in chapter 4.

6.5.1 RECOMMENDATION:

It is recommended that:

• all mutallaqat (divorcees) be given full nafaqah during their `iddad, save those who committed proven adultery.

There is no nafaqah for `iddah of khul` (period of waiting in divorce by compensation).

• There is no nafaqah for `iddah of faskh (period of waiting in divorce by annulment).

• There is to be full nafaqah for the armalah (widow) for the duration of her `iddah of wafat.

• That a Special Fund be created, under the control of an officer of the Muslim Family Court, to administer the Fund to which all employed Muslims must contribute compulsorily on a monthly basis, preferably deducted together with the monthly taxes paid by employees generally. There will be a quarterly payment from self-employed Muslims.

This Fund’s income may be invested in lawful shari’ah sanctioned investment portfolios to generate continuous income for the Fund.

All fines levied for offences in the Muslim Family Court will likewise be for the said Fund.
This Fund will aid the muṭallaqat (divorcees) and armalat (widows) who do not have nafaqah (maintenance) and have no wali (guardian) nor any ‘asabat (agnate) relatives or whose awliyā (guardians) or ‘asabat cannot afford their nafaqah or can only afford a part of their required nafaqah (maintenance), until such time as muṭallaqat (divorcees) and armalat (widows) become self sufficient again or their wali or their ‘asabat (agnates) can afford their nafaqah or until they remarry.

The Fund may also be augmented from the State Treasury annually.
The Auditor General of the State will issue the Audited Statement of the said Fund to the authorities annually and such must be made public.
The said Fund may have other usages related to Islamic Personal Law situations, but such is beyond the scope of this thesis.

6.5.2 APPOINTMENT OF MUSLIM MARRIAGE OFFICERS AND RELATED MATTERS

It is recommended that the Muslim Board of Islamic Personal Law appoint Muslim marriage officers who will conduct a Muslim marriage ceremony for Muslims who enter upon marriage.

It is recommended that such marriage officers be Muslims of repute who have not committed any such wrongdoing as may preclude them, by shari‘ah, from being a Muslim marriage officer. The proposed appointment of such officers shall be made public calling for any objections from the Muslim public before as final decision is made by the abovementioned Board.
Such marriage officers as are appointed, are to be instructed in all the administrative procedures required from them by the Board and their duty, in the law, to report and register all marriages they conducted, together with all documentation, preferably not more than fourteen days after contracting such marriages, to the Registrar of the Muslim Family Court.

6.5.3 LEGAL PRACTICE OF MUSLIM JURISTS

In terms of current South African legislation, a Muslim jurist cannot practice. It is recommended that this discriminatory issue be rectified. All those Muslims who have obtained a suitable Islamic law qualification from an Islamic institution of Higher learning and qualified in Islamic Personal Law, should be allowed to practice in that field and to assist Muslim litigants and persons appearing in the Muslim Family Court with their cases. Licence for practice should be issued by the Muslim Family Court and registration to be effected by the Permanent Board of Islamic Personal Law.

6.5.4 APPARATUS FOR THE IMPLEMENTATION AND ADMINISTRATION OF MUSLIM MARRIAGES AND DIVORCES:

From all the previously mentioned information of Islamic Personal Law, it will be clear that the *shari' ah* is a very different code from the current South African one in origin, philosophy, fundamentals, aims and practice.
It is thus impossible to assimilate such a law into the current South African legal system. Those who propose assimilation do not know the shari‘ah properly nor understand the divine nature of it.

The issue that now arises is, is it permissible for Non-Muslim persons to be engaged in the shari‘ah’s application to Muslims. Some countries have this system, but the Muslims are minorities there and thus cannot make the law themselves. This is typical of India, apart from it being a secularist country. This issue is explained in Appendix 2.

Both famous fuqaha’ and expert authors on al Aḥkām al Sulṭāniyyah,1 al Mawardi and al Farrā’, have expressed juristic opinion on this matter. Al Mawardi states that there are necessary qualifications for quṣṣah (Muslim judges) and they are, briefly, to be a Muslim and to have full ahliyyah including being a male person, thorough and sound knowledge of the shari‘ah and noble and exemplary conduct.

Expounding on the requirement of Islam, he quotes the ayah:

“And Allah did not grant to the unbelievers any way over the Muslims.”2

Abu Ḥanīfah, however, allows the appointment of a Non-Muslim wāli (governor) and a Non-Muslim qādi (judge) over the non-Muslims to rule according to their Faith, customs and traditions.

Abū Ḥanīfah has some form of exception to the qualification of dhukurah (masculinity) in that he rules the right to qāda (to be a judge) of women in matters in which the shahādah (evidence) of women are acceptable.

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1 Islamic Constitutional law.

2 Al Qur‘ān, Sūrah al Nisa': 141.
Ibn Jarir al Tabari goes against the *ijma* when he rules it fit for all cases i.e. a woman being a *qadi* (judge).  

Al Farra' mentions more or less the same qualifications under the *shurūt* for the *Imāmah* (caliphate). One of the *shurūt* (conditions) for the *Imām* (caliph) being to be fit for the *qada* (to be a judge).  

The present Grand Shaikh of the al Azhar University, Shaikh Jad al Haqq 'Ali Jad al Haqq, has also pronounced hereon in *fatwa* (legal dispensation). 

"...Thus, it is forbidden for Muslims to submit to the judicial authority of a Non-Muslim *qadi* (judge) save under absolute necessity (*darurah*)

It is necessary on a Muslim minority in this case to rid themselves of such a situation, either by independence (from such judicial power) or migration (to another country) or to have the qualified *`ulama*` of the Muslims in which the disputing Muslim parties have trust, judge Muslim matters, especially in *halal* (the permissible) and *haram* (the forbidden) of which the Islamic Personal Law of *nikah, talaq, nasab* (marriage, divorce and lineage respectively) and *mirath* (inheritance) form a part. This will be best for the Muslims in (their affairs) of a worldly or religious nature than submitting to the judicial authority of a Non-Muslim *qadi* (in matters pertaining to the shari'ah).

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3 *Darurah* is , in the Jurisprudence, really absolute necessity, where the Non-Muslim authority imposes its will by force, physically or administratively, usually with the penalty of death or torture or punishment as penalty for opposition.

4 Shaikh al Azhar: Fatwā No: 611, Cairo, al Azhar University, dated 26th November 1990.
In matters of a purely administrative nature pertaining to the above matters and in which no issue of *qada* (judicial matter) or *ifta'* (dispensationary matter) applies, a Non-Muslim may be appointed to administer such.¹

It is in the light of these rules that the apparatus for the implementation and application of the Islamic Personal Law has to be seen and planned.

Prior to actually offering recommendations, it is felt that the following points have to be made:

- there is virtual unanimity that the apartheid system is an unacceptable system for conducting human relations. This system, as was practised in South Africa, was the entrenchment of white minority privilege at the expense of the suppression and or oppression of the vast overwhelming majority of South Africans and denial of their most basic human rights. It is thus understandable that specific political extra-parliamentary organisations would strongly oppose such a system or something which resembles it. However, one must also be wary that political parties and political organisations do not use the sins of the National Party to impose a view they consider to be akin to the apartheid system which, in practice, will amount to the same form of denial, in principle, the apartheid system meted out.

Thus to assert that "no group should receive special treatment in the new South Africa", can, if irreconcilable genuine differing human systems cannot be accommodated justly and fairly, perpetuate a system of apartheid in another name and with another form of "new" apparatus.

the second serious misdemeanour of the apartheid system was the way of application of the law. In most instances it amounted to nothing less than administrative violence in enforcing the doctrine of apartheid.

At times, the State was accused of "State terror" by its opponents. The end result was the imposition of the will of a minority on the majority, be the application moral or immoral.

This brings us to the application and accommodation of the communities in the new South Africa, and the accommodation of the Islamic Personal Law, amongst other things.

The new system should not resort to the same administrative force on grounds of the majority of the country not wishing to accord special recognition to defenceless minorities in matter of their religion and freedom in the practice of their religion.

If this form of the democracy of numbers is going to be used to ensure such an improper system, then that form of democracy will be nothing else than the oppression of defenceless minorities by the democratic process.

This, in the minds of fair people, can be anything but what people are made to believe, is democracy in its glorious practice.

The recognition and application of the Islamic Personal Law, amongst other things, is inextricably linked to the entrenched Bill of Rights or entrench rights in the new constitution of South Africa and not to the political statements or promises made by political parties or political organisations especially in the era of the power struggle within the new South Africa.

It is with these thoughts in mind that the apparatus of implementation and application of the Islamic Personal Law should be seen.
The following are proposed:

- Firstly, as previously mentioned, there has to be acceptance of the fundamental principle that Muslim marriages and the shari'ah consequences of Muslim marriages will be recognised as valid in South Africa. Thereafter those rights should either be entrenched clauses of a Bill of Rights or such rights must be entrenched in the new constitution of the country.

A draft of this recommendation will follow later under the Appendices.

- Secondly, the establishment of the following:
  - A Permanent Muslim Board of Islamic Personal Law, the basic constitution of which should be as follows:
    - that the said Board should consist of at least five Muslims who have a degree in shari'ah from an Islamic law University or an recognised Islamic law institution of higher Islamic learning of post Matriculation level and where the medium of instruction is preferably Arabic. In any event, any such expert as mentioned herein, must be proficient in Arabic. Such degree must be obtained in a predominantly Muslim country.
    - that the said Board shall have the sole legal power to draw up the marriage and divorce laws and its relevant consequences according shari'ah and they will not be restricted to any madhhab, (school of law) but should be from any of the
madhāhib (schools of law) of the Ahlu Sunnah Fiqh madhāhib for this purpose.

They may also refer to the Family laws of Muslim countries on condition that such laws which they will incorporate will be in conformity with the shari‘ah as in the Ahlu Sunnah understanding and practice in Fiqh.

- the said Board will be empowered to make such amendments as required or repeal such laws as the need arises. They may act herein solely by themselves, but bound to the shari‘ah restrictions in such amendments and repeal of legislation. They may also be guided and advised herein by the quqah (Muslim judges) of the Muslim Family Court. They may also, should they so deem it necessary, refer to shari‘ah higher authorities in Muslim countries.

- the said Board submits such legislation to the relevant authority for the administrative enactment into law. Such authority to be, preferably, the signing into law authority. The said authority must not have the right to amend or repeal or alter any of the legislation presented save with the full approval of the said Board and the said Board must be guided only by the shari‘ah in such a situation.

This right has to be entrenched in a suitable form in a suitable form of law.
the Secretary of the said Board must be a Muslim and will not be a decision maker of the said Board nor partake in its actual law and decision making processes.

- the sitting qudah of the Muslim Family Court may serve on commissions investigating amendments to nikah, talaq (divorce) and consequences relating thereto.

- membership of the Board should be for a minimum of five years with permissibility of being re-appointed for another term of five years.

- the Board is requested by the authorities to recommend the qudah to the Muslim Family Court and the said Board shall compulsorily follow the guidelines of shari’ah in their recommendations.

- the Board shall function strictly according to shari’ah only in all its operations.

- the Board must see that all Muslims who seek redress or relief from the Muslim Family Court can do so. No one must be denied access to the Court in matters the shari’ah prescribes access is to be had.

- a Muslim Family Court shall be founded by legislation and should function according to shari’ah only.

The said Court will operate as follows:

- the said Court will have jurisdiction throughout the country and will have branches in the regions where so required.
the said Court shall hear, give rulings and issue orders in all matters pertaining to *khitbah* (engagement), *nikah* (marriage) and all its consequences, including all contracts relating to *nikah* and its consequences, all forms of *talaq* (divorce) and *faskh* (annulment), division of property on *talaq* or *faskh*, all matters relating to *sadaq* (dowry) and arising from it and all such matters pertaining or relevant to these issues.

all matters of *khitbah* (engagement) shall be recorded in the register of the said Court.

all parties wishing to marry shall apply to the said Court for a licence to marry and if granted by the said Court, may be married by a Muslim marriage officer so appointed by the Permanent Board of Islamic personal law and so registered with the said Board.

all *ankihah* shall be registered by the Registrar of the said Court who shall forward a copy to the Permanent Board of Islamic Personal Law and such copies to such authorities deemed necessary for administrative purposes.

a further *nikah* or *ankihah* of an already married man shall only be done through the Muslim Family Court and according to its procedures in such matters. Failure to abide by these rules will be an offence.
• the said Court will have the right, so duly declared in law, to punish offences in the field of its operations and for any form of contempt of Court.

• all Muslim births and deaths shall also be registered with the said Court and the said Permanent Board of Islamic Personal Law. Likewise, shall the two said bodies, keep full records of the `asabat (agnate) relatives of all minors and of all Muslim women.

• the said Court shall keep a register of all those who convert to the Islamic Faith and shall, after the required conditions have been met, issue a certificate to such a convert. The Court shall also keep a register of those who leave the fold of Islām. Such registers shall be open for inspection by the public on application to the Registrar of the Court.

• the said Court shall publish, at least two weeks before the actual nikāh (marriage), but not later than the date of the signing of the `aqd al nikāh (marriage contract), the personal details of each of the marrying parties for public information.

• the Court shall also keep a register of all children who are foster parented in order that the shari`ah law herein is observed.

• the Court will sit permanently in the capitals of major regions like, Cape Town, Johannesburg, and Durban and Circuit sessions in Pretoria, Port Elizabeth, Northern Cape and Pietermaritzburg.

• there shall be an Appeal Division of the Muslim Family Court presided over by three senior shari`ah graduates from Muslim
Shari'ah Universities or Muslim Shari'ah Colleges of Muslim countries. They must be proficient in Arabic and must be graduated in comparative Islamic Personal Law, comparative Fiqh and Islamic Jurisprudence principles (Usul al Fiqh). The decision of this Division will be final and not subject to any review by any body in South Africa. This must be entrenched in law.

- it is further recommended that the Muslim Family Court be empowered to levy sentence for offences in the Islamic Personal Law code breaches. Such sentences may take the form of accepted forms of rebuke, fines, community work and imprisonment.
Muslims have been in South Africa for about three centuries now. Their arrival here, as Muslims, was not planned as such, but was rather aimed at destroying them and their religion due to their opposition to Dutch colonial rule in their fatherland. This philosophy appears to have been the foundation of discrimination against Muslims and their religion in this country, an example of which is that after nearly three centuries, Islamic Personal Law, amongst other Islamic laws, is never recognised as yet.

As pointed out in chapter 1 of this thesis, Islamic law is a peculiar form and system of law based on divine commands. An issue like nikah (marriage), for example, is a religious as well as an administrative law, both inextricably linked. There is no such parallel in other systems of law in this country. The principles, format and scope of the Islamic law are cardinally different from Roman Dutch law and as such is incapable of being incorporated into it and still retain its validity, content and legal force. This is apart from such incorporation being forbidden in the Islamic law as shown in this thesis in chapter 6.

The South African Legislature was calculatedly discriminatory to Muslims when it legislated certain indigenous African customary marriage consequences as valid in certain cases. The Courts did no better, calculatedly refraining from departing from its legal philosophy and law as shown in the court cases quoted in chapter 6.
As a consequence, certain Muslim organisations and societies tried to organise Islamic personal law, individually, into some kind of workable form. This was bound to give rise to conflict and disjointed administration as each followed its own style and madhhab (Jurisprudence school). Thus what is valid in the north of South Africa might not be so in the south. These organisations and societies are only responsible to themselves and there is no body that oversees or supervises these organisations. Above all, there is no system of appeal or review in Islamic Personal Law matters in South Africa as is normal, usually, in countries where there is recognition of Islamic Personal Law.

There is serious conflict in the personal lives of Muslims with regards to Muslim family laws. Since these laws are not recognised legally in South Africa, a Muslim nikah is an illegitimate union with all the offspring being illegitimate in terms of current South African law.

A disastrously serious denial of rights, obligations and privileges result from the non-recognition of Islamic Personal Law. Any order issued by a Muslim jurist or theologian etc. in matters of Islamic Personal Law cannot be administratively executed.

The problem is further compounded when Muslims, who after entering into a nikah, also enter into a civil marriage. Many do not know that when this is done, the consequence of such a civil marriage is only South African law. Islamic Personal Law has no place in this situation as the court cases, quoted in chapter 6, clearly showed. Such Muslims have serious problems when they, for example, wish to draw up a Muslim Will. The matter is still further compounded when the zawjah (wife) so married i.e both by Islamic law and South African law, obtains a civil divorce which may or may
not agree with Islamic Personal Law and the zawj (husband) refuse to grant a talaq (Muslim divorce).

The 'Ulama' will also not accept a civil divorce, generally speaking. There will thus be confusion in rights, obligations, privileges as well as the al halal wa al haram (the lawful and unlawful) as in the Islamic law concept. This is untenable.

An argument that is sometimes raised by secularists States against granting any legal recognition to minorities, such as a Muslim minority, is that there has to be uniformity in the law and anything which upsets the standards of that uniform law should be rejected.

Here uniformity is used to deny human rights or oppress minorities in the name of the law. In the case of Muslims, it is specifically a denial of the freedom of the practice of their religion in community with their co-religionists. Uniformity of the law here is calculatedly unjust and oppressive.

Another related secularist argument used with the "uniformity" idea, is that granting minorities rights, such as, for example, recognition of Islamic Personal Law, will be to grant "special privileges" to them which again mitigates against "fairness and justice" to all in a uniform system. This, again, is a misplaced argument as unfair and unjust treatment will result to minorities if they are to be forced into an assimilated mass by the command of the law. Apart from this fact, in the case of Muslims and Islamic Personal Law, the latter will be applicable to Muslims only and Non-Muslims will have nothing to do with it whatsoever.

It had been pointed out in this thesis and especially in appendix 2, that certain Muslim minorities have some minimal form of recognition and application of Islamic
Personal Law in their countries. This system of invariable incorporation of this law into the secular law system of that specific country and its application by, invariably, Non-Muslim courts, as in India, causes serious problems at times. Singapore may be singularly different in that the 16% of Muslims of that State control their own Islamic Personal Law as well as some other forms of Islamic law, through a special administrative apparatus, sanctioned in law. It is interesting to note that the Singaporean Muslim Administration enacts the laws themselves and it is then sent to the responsible cabinet Minister who presents it to the president for signing it into law. The Non-Muslim government and its apparatus have no say in this matter.

It is possible to administer Islamic Personal Law in South Africa properly and in accordance with the requirements of the Islamic law. This had been shown in this thesis by highlighting the major problem areas and recommending what action is to be taken as well as what system of administration should be used to implement Islamic Personal Laws including how it is to be constituted. It had been clearly proven in this thesis that Islamic Personal Law cannot be assimilated or incorporated into any Non-Muslim system of law.

However, the South African authorities should, when legally recognising Islamic Personal Law, avoid the pitfalls in this field and not repeat the errors nor encourage anomalies which certain Non-Muslim countries have in their systems of law in relation to the Islamic Personal Law as shown in Appendix 2.

South Africa is lagging far behind many countries in this matter, is out of step with international Resolutions of the United Nations in this matter, as well as seriously compromising its moral stand by continuing to deny giving proper, correct and effective legal recognition of Islamic Personal Law.
The major political parties and organisations have expressed a varying degree of willingness to accord legal recognition to Islamic Personal Law. Care should be taken that this matter should remain a purely Muslim religious issue and should under no circumstances be made a political or other issue.

Finally, 1994 is a double historic year for Muslims in South Africa - it will be the tricentenary of the arrival of Shaikh Yusuf of Java here, one of the great pioneers of Islam in South Africa, as well as the start of a new order in South Africa. Proper legal recognition of the Islamic Personal Law in that year, will end the three centuries of utter hardship, anguish and anxiety Muslims had to bear in denial of their basic family rights in their own country.
<table>
<thead>
<tr>
<th>Arabic Term</th>
<th>English Translation</th>
</tr>
</thead>
<tbody>
<tr>
<td>A`immah</td>
<td>plural of <em>Imam</em>. One who lead the prayers or senior Muslim jurists in Islamic Law.</td>
</tr>
<tr>
<td>Adab</td>
<td>plural of <em>Adab</em>. good manners, etiquette.</td>
</tr>
<tr>
<td>`Adalah</td>
<td>justice.</td>
</tr>
<tr>
<td>`Adil</td>
<td>just.</td>
</tr>
<tr>
<td>Af`al</td>
<td>actions, deeds.</td>
</tr>
<tr>
<td>Ahadith.</td>
<td>pl of <em>Hadith</em>. Record of the sayings and practices of Prophet Muhammad (S.A.W.S),</td>
</tr>
<tr>
<td>Ahkam</td>
<td>pl. of <em>Hukm</em>, laws, injunctions.</td>
</tr>
<tr>
<td>Ahl al Kitab</td>
<td>People of the Book, meaning Jews and Christians.</td>
</tr>
<tr>
<td>Ahliyyah</td>
<td>having legal capability to execute a legal act.</td>
</tr>
<tr>
<td>Ahsan</td>
<td>best.</td>
</tr>
<tr>
<td>Ahwâl al Shakhsiyah</td>
<td>personal law.</td>
</tr>
<tr>
<td>`Aib</td>
<td>a defect, fault.</td>
</tr>
<tr>
<td>Ajnabi</td>
<td>a stranger (masc.).</td>
</tr>
<tr>
<td>Ajnabiyyah</td>
<td>a stranger (fem.).</td>
</tr>
<tr>
<td>Ajza`</td>
<td>pl of <em>Juz</em>, parts.</td>
</tr>
<tr>
<td>Akh li Abb</td>
<td>consanguine brother.</td>
</tr>
<tr>
<td>Akh li Umm</td>
<td>uterine brother.</td>
</tr>
<tr>
<td>Akhras</td>
<td>dumb.</td>
</tr>
<tr>
<td>Al Ijma`</td>
<td>juristic consensus of opinions.</td>
</tr>
<tr>
<td>Al Talaq al Ba`in</td>
<td>irrevocable divorce.</td>
</tr>
</tbody>
</table>
AI Qiyas analogical reasoning.

AI Kafa’ah equality in standing and status.

AI Istishâb acceptance of an existing situation until the contrary can be proven.

AI Istihsân one of the secondary sources of Islamic law. An inference, in the best interest of the Ummah, as long as it does not negate the established Islamic principle.

AI Talaq al Raj’i revocable divorce.

AI Istislah a secondary source of Islamic law. A legal term implying "seeking a solution to a problem which has no ruling yet in the best interest of the Ummah.

AI Bâ’ah al Asliyyah original innocence (i.e. everyone is taken as innocent until proven guilty).

AI Khulafa’ al Rashîdîn the four righteous caliphs (i.e Abu Bakr, ‘Umar, ‘Uthmân and ‘Ali). (R.A.)

AI Ibhah al Asliyyah original permissibility (i.e everything is lawful until the contrary is proven).

Al Ijtihâd judicial inference by way of reasoning in the light of the original source.

AI Ummah al Islamiyyah the Muslim Nation (i.e all the Muslims in the world).

AI ‘Urf custom.

AI Siyâsah al Sharîyyah constitutional law.

‘Alaqah a blood clot.

‘Amm general.

Amsâr pl of Miṣr, meaning cities.

‘Aqd al Bai contract of sale.

‘Aqd a contract.

‘Aqd al Nikâh marriage contract.
`Aqidān

singular: `Aqid two contracting parties.

`Aqīl

sane.

`Aql

sanity/logic.

Aqwa’l

sayings/rulings.

`Ar

disgrace.

Arkan

principles, pillars.

Arma‘ah

pl. Arma‘al, a widow.

Arma‘al Ha‘ilah

non-pregnant widows.

`Aṣabat

agnates.

Ashhur

pl. of Shahr, months.

`Asib

agnate.

`Atiyyah

a gift.

Awliya

guardians.

`Awrah

a part of the body legally prescribed to be covered.

Ayah

pl. Ayāt, a verse of the Qur’an.

`Azl

coitus interruptus.

Azwaj

spouses.

Ba‘in

irrevocable (masc).

Ba‘inah

irrevocable (fem).

Ba‘l

husband.

Bai‘ al Salam

a kind of sale in which goods are delivered at a future date.

Bainūnāh

irrevocability.

Bainūnūnāh Suqhra

irrevocability of a minor degree.

Bait al Mal

public treasury.
Balaghah | rhetoric.
---|---
Baligh | pubescent, one who becomes of age.
Batil | invalid/void.
Bid'ī | innovative i.e against the practice or ruling of the Prophet (S.A.W.S).
Bikr | a virgin woman.
Buʿūl | pl of Baʿl, husbands.
Bulūgh | puberty.
Daiyyūth | a man who does not care about his wife's moral life, especially her extra-marital sexual life.
Dalīl Sharʿī | an Islamic legal proof.
Dar al Islām | A State governed under Islamic laws.
Dar al Ḥarb | A Non-Muslim state with which the Islamic State is at war.
Dā'ar | harm.
Dā'urah | necessity.
Dawām | permanency.
Dhakar | male.
Dharaʿī | pl. of Dhariʿah, locking of ways and may means which may lead evil and sin.
Dhukūrah | masculinity.
Dirham | a silver coin.
Diyānah | religious-wise in matters of dispensation as opposed to qaḍāʾ (judicial-wise).
Faqih | a jurist.
Faskh | annulment.
Fatawa | pl of fatwā, legal dispensations.
Fatawa
pl of fatwa, legal dispensations.

Fi`l
an act.

Fiqh
Islamic Jurisprudence.

Firaq
separation.

Fuqaha`
pl of Faqih jurists.

Ghafil
negligent or heedless.

Ghaibah
absence.

Ghair Mu`tamad
not accepted/not applicable. (specifically applying to conflicting verdicts in a School of Thought).

Ghair Lazim
non-binding.

Ghiyab
absence.

Habs
imprisonment.

Hadaya`
pl of Hadiyah, gifts.

Hadd
pl Hudud, meaning a punishment prescribed by the Qur’an of the Prophet (S.A.W.S).

Hadm
destruction.

Haid
menstruation.

Haidah
a single menstrual period.

Hakam
an arbitrator (masc).

Hakaman
two arbitrators (masc).

Halal
lawful/valid.

Hamil
pregnant.

Haml
pregnancy.

Haqq
a right.

Haram
forbidden, unlawful.
<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hasan</td>
<td>good.</td>
</tr>
<tr>
<td>Hazil</td>
<td>joker</td>
</tr>
<tr>
<td>Hibah</td>
<td>a gift.</td>
</tr>
<tr>
<td>Hiyad</td>
<td>menstrual cycles.</td>
</tr>
<tr>
<td>Hudud</td>
<td>fixed criminal punishments.</td>
</tr>
<tr>
<td>Hukm</td>
<td>a ruling.</td>
</tr>
<tr>
<td>Hukm Shar'i</td>
<td>Islamic legal injunction or ruling.</td>
</tr>
<tr>
<td>Hukum Ihtiyat</td>
<td>ruling of caution. sake.</td>
</tr>
<tr>
<td>Hukumah</td>
<td>government.</td>
</tr>
<tr>
<td>Huquq</td>
<td>rights.</td>
</tr>
<tr>
<td>Huquq ghair Madiyyah</td>
<td>non-material rights.</td>
</tr>
<tr>
<td>Hurr</td>
<td>free.</td>
</tr>
<tr>
<td>Husn al Mu`asharah</td>
<td>good way of living.</td>
</tr>
<tr>
<td>`Ibadat</td>
<td>pl of `Ibadah, worship, act of worship, ritual.</td>
</tr>
<tr>
<td>`Iddad</td>
<td>pl of `Iddah periods of waiting for Muslim divorcee and widows before they may remarry.</td>
</tr>
<tr>
<td>Al <code>Iddah al Raj</code>iyyah</td>
<td>period of waiting of a divorcee in a revocable divorce situation.</td>
</tr>
<tr>
<td>lfta</td>
<td>legal dispensation or opinion.</td>
</tr>
<tr>
<td>Ihram</td>
<td>pilgrim's garb.</td>
</tr>
<tr>
<td>Ihsan</td>
<td>goodness, beneficence, performance of good deeds.</td>
</tr>
<tr>
<td>Isab</td>
<td>offer of marriage.</td>
</tr>
<tr>
<td>Ijma` Sarih</td>
<td>clear judicial consensus of opinion.</td>
</tr>
<tr>
<td>Ijazah</td>
<td>permission.</td>
</tr>
<tr>
<td>Ijhad</td>
<td>abortion.</td>
</tr>
</tbody>
</table>
AI Ijma 'al Iqlimi
AI Ijma' al Maḥalli
Ijma' al Ummah
Ijma'
Al Ijma' al Sukūtī
Ijtihad
Ilḥad
`Ilaḥ
`Iman
Iqrar
Irth
`Iṣa
`Iṣa`
`Isār
Ishhad
Iṣlah
Isqat al Ḥaml
Istihḍah
Istihṣān Darūrah
Istihṣān Qiyāsī
Istihbab

regional judicial consensus of opinion.

local judicial consensus of opinion.

universal judicial consensus of opinion.

juristic consensus.

silent judicial consensus of opinion.

inference of Islamic laws from the Qur'ān and or Sunnah.

atheism.

reason for a given ruling.

belief, Faith.

pl Iqrārat approval, assent, consent.

estate of the deceased or inheritance.

Prophet Jesus (A.S).

an instruction of a person for an act to be done after his death, like marrying off his daughter after his death.

difficulty.

evidence/witnessing.

to make good or reform.

abortion.

continuous or irregular menstrual blood discharges.

a secondary source in Islamic law by which a ruling is given under the compulsion of necessity.

a secondary source in Islamic law based on analogical reasoning in the best interest of the community under the compulsion of a certain situation.

agreeable.
Istirfa' withdrawal/repeal.
\`Itirad opposition/objection.
`lwad Mali monetary compensation.
`lwad compensation.
Jahannam Hell.
Janin foetus.
Jannah Paradise.
Jibril Archangel Gabriel (A.S)
Jihad active struggle in the way of Allah, one aspect of which is war for the sake and benefit of Islam.
Jinn an invisible being.
Juz a part.
Kafa'ah equality in status.
Kaffarah of Yamin compensation for breaking an oath.
Kaffarah penalty/compensation.
Kaffaratan two penalties or compensation.
Khalah maternal aunt.
Khalifah caliph/successor.
Khass special/private.
Khatib fiancé.
Khilaf difference of opinion.
Khitbah engagement.
Khiyar choice.
Khul a form of divorce demanded by a wife.
Khulwah seclusion.
<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Al Khulwah al Sahihah</td>
<td>true seclusion.</td>
</tr>
<tr>
<td>Kifayah</td>
<td>sufficiency.</td>
</tr>
<tr>
<td>Al Kinayah al Khafiyyah</td>
<td>indirect declaration of intent, not clearly expressed.</td>
</tr>
<tr>
<td>Al Kinayah al Zahirah</td>
<td>indirect but clearly expressed intent.</td>
</tr>
<tr>
<td>Kinayat</td>
<td>indirect expressed intent.</td>
</tr>
<tr>
<td>Kiswah</td>
<td>clothing.</td>
</tr>
<tr>
<td>Kitab</td>
<td>a book.</td>
</tr>
<tr>
<td>Kitabi</td>
<td>a male belonging to the People of the Book. (a Jew or Christian male).</td>
</tr>
<tr>
<td>Kitabiyyah Ankiyah</td>
<td>marriages to women of the People of the Book.</td>
</tr>
<tr>
<td>Kitabiyyah</td>
<td>a woman belonging to the People of the Book. (a Jewess of Christian woman).</td>
</tr>
<tr>
<td>Lazim</td>
<td>binding.</td>
</tr>
<tr>
<td>Li`an</td>
<td>mutual imprecation in the case of adultery of a woman and the husband has not the required number of witnesses and he actually witnessed the actual adulterous act of his wife.</td>
</tr>
<tr>
<td>Lobola</td>
<td>African customary marriage bride price</td>
</tr>
<tr>
<td>Ma`qul</td>
<td>logic proof.</td>
</tr>
<tr>
<td>Ma`ruf</td>
<td>good/kind/just in married life.</td>
</tr>
<tr>
<td>Madani</td>
<td>belonging to the city of al Madinah.</td>
</tr>
<tr>
<td>Madarrah</td>
<td>that which is harmful or detrimental.</td>
</tr>
<tr>
<td>Al Madhahib al Fiqhiyyah</td>
<td>schools of law.</td>
</tr>
<tr>
<td>Madhush</td>
<td>surprised.</td>
</tr>
<tr>
<td>Mafqud</td>
<td>a missing person.</td>
</tr>
<tr>
<td>Mafsadah</td>
<td>harm/detriment.</td>
</tr>
<tr>
<td>Mafsukh</td>
<td>cancelled/annulled.</td>
</tr>
<tr>
<td>Arabic Term</td>
<td>English Translation</td>
</tr>
<tr>
<td>-------------</td>
<td>---------------------</td>
</tr>
<tr>
<td>Mahbus</td>
<td>imprisoned.</td>
</tr>
<tr>
<td>Mahr Mithl</td>
<td>dowry of woman equal to that of what is generally in her family or of a woman of her standing.</td>
</tr>
<tr>
<td>Mahram</td>
<td>a male person a woman is not allowed to marry.</td>
</tr>
<tr>
<td>Majhul</td>
<td>unknown.</td>
</tr>
<tr>
<td>Makhtubah</td>
<td>fiancéé.</td>
</tr>
<tr>
<td>Makki</td>
<td>pertaining to Makkah.</td>
</tr>
<tr>
<td>Mal</td>
<td>wealth.</td>
</tr>
<tr>
<td>Man' al Ḥaml</td>
<td>contraception.</td>
</tr>
<tr>
<td>Manafi'</td>
<td>benefits/usufructs.</td>
</tr>
<tr>
<td>Mandub</td>
<td>permissible.</td>
</tr>
<tr>
<td>Mani' Shar'i</td>
<td>prohibited according to Islamic law.</td>
</tr>
<tr>
<td>Mani' Tabi'i</td>
<td>a natural prohibition.</td>
</tr>
<tr>
<td>Mani' Haqiqi</td>
<td>a real prohibition.</td>
</tr>
<tr>
<td>Mansukh</td>
<td>cancelled.</td>
</tr>
<tr>
<td>Marad</td>
<td>illness.</td>
</tr>
<tr>
<td>Marad al Mawt</td>
<td>sickness during which one dies.</td>
</tr>
<tr>
<td>Marasil</td>
<td>sing. Mursal a category of weak Prophetic traditions.</td>
</tr>
<tr>
<td>Maridah</td>
<td>a sick woman.</td>
</tr>
<tr>
<td>Masaliḥ</td>
<td>sing. Maslah, benefits, interests.</td>
</tr>
<tr>
<td>Mashi'ah</td>
<td>the Will of someone, usually that of God</td>
</tr>
<tr>
<td>Mashru'</td>
<td>valid/lawful.</td>
</tr>
<tr>
<td>Mashru'iyah</td>
<td>validity.</td>
</tr>
<tr>
<td>Mashiyyun</td>
<td>sing. Mashi, (m.) christians.</td>
</tr>
<tr>
<td>Masjun</td>
<td>imprisoned.</td>
</tr>
</tbody>
</table>
Matti`u enjoy!

Mawquf a situation where a jurist does not express an opinion on a given situation or a situation where a guardian’s consent is required for the proper enactment of a contract.

Miraḥ deceased estate or inheritance.

Mu`ajjal deferred.

Mu`ajjal paid immediately.

Mu`amalat everyday social transactions with legal implications, civil law by some definitions.

Mu`asharah married life.

Zawjiyyah intimate association.

Mu`taddah a woman observing the period of waiting due to either divorce or death of her husband.

Mubah permissible.

Muddah al Tarabbus period of waiting (in divorce or death of a husband).

Mudghah a lump (an embryo before it becomes a foetus).

Mufassir exegetist.

Mufawwid a husband who cedes the right of divorce to his wife.

Muṭi learned Muslim jurist who gives legal opinions.

Muhaddithun learned Muslim scholars of the Prophetic precepts.

Muḥarram the first Muslim month of the Islamic calendar.

Muḥarramāt Mu`abbadah women a man can never ever marry.

Muḥarramāt women prohibited in marriage to a man.

Muḥarramāt Mu`aqqah women a man may not marry at a given time due to a prohibition existing then, but whom he may marry if such a prohibition no longer exists.

Mujahid pl. Mujahidun, one who fights the holy war.
Mujtahid

pl. Mujtahidun, independent legist.

Mukallaf

pubescent/legally responsible.

Mukhtal`ah

a woman divorced by compensation method (khul`).

Mukhtal`ah

one who commits an error.

Mukrah

one coerced into an act.

Mukrih

one who coerces someone else.

Mula`anah

mutual imprecation.

Mumayyiz

discerning of age i.e. from seven years upwards but before puberty.

Munafiq

pl. Munafiqun, hypocrite.

Muqtad`ayat al `Aqd

requirements of the contract.

Muraja`ah

reconciliation.

Musaharah

affinity, relationship by marriage.

Mushaf

the Qur'an.

Mushrik

a polytheist (masc).

Mushriakah

a polytheists.(fem).

Mushrikat

polytheists (fem).

Mushrikun

polytheists (masc).

Mustahhab

preferred/preferable.

Mustahad`ah

the woman with continuous or irregular menstrual discharge.

Mut`ah of Tafriq

gift given to a divorcee on the eve of her divorce.

Mut`ah

a form of temporary marriage forbidden according to the Sunni Schools of law.

Mutallaqah

a divorcee.

Mutalliq

a divorcé.
Muwakkilah a female agent or representative.
Nafaqah maintenance/support.
Nafidh executed (of a contract) or to be legally implemented.
Naqs decrease, loss, defect.
Nasab lineage.
Nasara the early non-trinitarian christians.
Nasikh something that cancels (something else) out.
Nasir helper.
Nifas puerperium
Nikah marriage.
Nikah Fasid an invalid marriage.
Nikah Sahih a correct marriage.
Nikah Batil a void marriage.
Niyyah intention.
Nusrah help/assistance.
Nutfah a drop.
Qabul acceptance.
Qada’ judiciary.
Qadhf slander.
Qadi judge.
Qarib a relative.
Qatl killing, murder.
Qatl al Nafs murder or killing of a living being.
Qawi ruling.
<table>
<thead>
<tr>
<th>Arabic Term</th>
<th>English Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Qintar</td>
<td>a heap of gold.</td>
</tr>
<tr>
<td>Qiyas</td>
<td>analogy</td>
</tr>
<tr>
<td>Qurr'</td>
<td>pl. Quru', the menstrual period or the non menstrual period.</td>
</tr>
<tr>
<td>Rabibah</td>
<td>daughter of woman you marry and you are not her father.</td>
</tr>
<tr>
<td>Rada`ah</td>
<td>fostering.</td>
</tr>
<tr>
<td>Raj`ah</td>
<td>revocability (of divorce).</td>
</tr>
<tr>
<td>Ribā</td>
<td>usury or interest.</td>
</tr>
<tr>
<td>Riddah</td>
<td>apostasy.</td>
</tr>
<tr>
<td>Ruḥ</td>
<td>soul.</td>
</tr>
<tr>
<td>Rukn</td>
<td>principle/pillar.</td>
</tr>
<tr>
<td>Șadaq</td>
<td>dowry.</td>
</tr>
<tr>
<td>Sadaqah</td>
<td>charity.</td>
</tr>
<tr>
<td>Sadd</td>
<td>prevention.</td>
</tr>
<tr>
<td>Șagha`ir</td>
<td>minors.</td>
</tr>
<tr>
<td>Șaghir</td>
<td>male minor.</td>
</tr>
<tr>
<td>Șaghirah</td>
<td>female minor.</td>
</tr>
<tr>
<td>Șaḥabah</td>
<td>sing. Sahabi, companions of the Prophet (S.A.W.S).</td>
</tr>
<tr>
<td>Salaf</td>
<td>pl. Aslaf, predecessors of learned Muslim scholars.</td>
</tr>
<tr>
<td>Salah</td>
<td>goodness.</td>
</tr>
<tr>
<td>Salamah</td>
<td>soundness.</td>
</tr>
<tr>
<td>Salawat</td>
<td>blessings.</td>
</tr>
<tr>
<td>Șadaq Mufawwad</td>
<td>a dowry which had not been mentioned or specified in the marriage contract.</td>
</tr>
<tr>
<td>Șarah</td>
<td>clear</td>
</tr>
</tbody>
</table>
clarity.
clear.
evidence.
a male witness
a female witness.
two male witnesses.
a month.
doubt
Syria.
full brother.
pl. Shaqiqat, full sister.
the Islamic Law.
pl. Shurut, a condition.
a form of unlawful marriage prevalent in pre-Islamic Arabia.
doubt.
legally sound and acceptable conditions.
conditions necessary for the execution of a contract.
unlawful conditions.
lawful conditions.
conditions of execution (of a contract).
void conditions.
formula.
fasting.
Islamic international law.
Subh
Sukna
Sultan
Surah
Ta'addut al Zawjah
Ta'iq
Tabi`i
Tafsil
Tafsir
Tafwid
Tahdid al Nasl
Tahkim
Tahliil
Tahrim
Talaq Ba`in
Talaq Ba`in Kubra
Talaq Ba`in Sughra
Talaq Sunni Hasan
Talaq `Ala al Mal
Talaq Sunni
early morning (pre-dawn).
lodgings.
Islamic authority or Ruler.
pl. Suwar, a chapter of the Qur'an.
Polygamy.
conditional (in matter of divorce pronouncement).
pl. Tabi`un, a student of a companion of the Prophet (S.A.W.S).
detail.
Quranic exegesis or commentary.
ceding of the right of divorce by the husband to his wife.
birth control.
process of a woman who appoints the Muslim ruling authority or his deputy to marry her off to her groom. This is for the Muslim woman who has no Muslim male relatives.
making an unlawful marriage legal by a certain unlawful process in order to circumvent the requirements of the law herein.
prohibition.
irrevocable divorce.
irrevocable divorce of a major degree.
irrevocable divorce - minor degree.
proper divorce according to directives of the Prophet (S.A.W.S).
divorce by offering financial compensation.
divorce according to the instructions of the Prophet (S.A.W.S).
<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ṭalaq Sunni Aḥsan</td>
<td>best divorce procedure according to the instructions of the Prophet (S.A.W.S.)</td>
</tr>
<tr>
<td>Ṭalaq Ṣajjā'ī</td>
<td>revocable divorce.</td>
</tr>
<tr>
<td>Ṭalaq</td>
<td>divorce.</td>
</tr>
<tr>
<td>Ṭalaq Li`an</td>
<td>divorce by mutual imprecation.</td>
</tr>
<tr>
<td>Ṭalaq Bid`i</td>
<td>divorce in conflict with the instructions of the Prophet (S.A.W.S.).</td>
</tr>
<tr>
<td>Ṭalaq Mu`allaq</td>
<td>conditional divorce.</td>
</tr>
<tr>
<td>Ṭalaq al Batt</td>
<td>a form of irrevocable divorce.</td>
</tr>
<tr>
<td>Ṭalaq Zihār</td>
<td>a form of divorce in which the divorcé compares his wife to his mother implying prohibitive range of married partners.</td>
</tr>
<tr>
<td>Ṭalaq al Far</td>
<td>divorce enacted by a husband during an illness from which he eventually dies usually intending to rob his wife of her share in his estate.</td>
</tr>
<tr>
<td>Ṭalaq Muḍaf</td>
<td>divorce conditional on a future date or happening.</td>
</tr>
<tr>
<td>Ṭalaqat</td>
<td>divorce pronouncements.</td>
</tr>
<tr>
<td>Ṭalfiq</td>
<td>devising an invention for inter-mixing rules of Schools of law.</td>
</tr>
<tr>
<td>Ṭaqīq</td>
<td>a single divorce pronouncement.</td>
</tr>
<tr>
<td>Ṭaquṭān</td>
<td>two divorce pronouncements.</td>
</tr>
<tr>
<td>Ṭamkin</td>
<td>ability.</td>
</tr>
<tr>
<td>Ṭaqṣim</td>
<td>division.</td>
</tr>
<tr>
<td>Ṭarikhah</td>
<td>deceased estate, inheritance.</td>
</tr>
<tr>
<td>Ṭartīb</td>
<td>sequence or order.</td>
</tr>
<tr>
<td>Ṭaṭṭliq</td>
<td>judicial divorce.</td>
</tr>
<tr>
<td>Tawatur</td>
<td>A Hadith reported by many/a report reported by a large number of people.</td>
</tr>
</tbody>
</table>
Tawbah Nasuah sincere repentance.
Tawḥid absolute Oneness of God.
Tawqif abstaining from giving a ruling.
Thayyib a non-virgin woman.
Tuḥr pure state of a mature woman between her menstrual cycles.
Ukht li Abb consanguine sister.
Ukht li Umm uterine sister.
‘Ulama’ learned scholars/theologians in Islam.
‘Umrah the lesser pilgrimage to Makkah.
‘Uqubat punishments.
‘Urf Baṭil invalid custom.
‘Urf Sahih valid custom.
‘Urf custom.
Usul al Fiqh principles of Islamic jurisprudence.
Usuli pl. Usuliyyun, Muslim expert in the principles of Islamic jurisprudence.
‘Uyub defects, faults.
Wafat death.
Wajib necessary.
Wakil agent or representative.
Wakilan two male agents.
Walad Zina illegitimate child, a child born out of wedlock.
Wali guardian.
Waqif one who makes an Islamic endowment.
heirs

an heir (masc)

legal guardian.

legacy.

agency.

guardianship.

guardianship of a father or paternal grandfather over a minor child or grandchild.

necessity.

oath.

necessary alms payable by all Muslims at the end of the fast of *Ramadan*.

compulsory alms payable annually by all Muslims for all assets and cash which exceed the permissible normal amounts of exemption.

husband.

wife.

two husbands.

wives.

marriage.

a form of divorce in which the husband implies that his wife is his mother meaning that she is not his wife.

adultery or fornication.

sing *Zāni*, adulterer or fornicator.

pl *Zawānin*, adulteress, fornicator (fem).
There will be three appendices.

These will be:

- Appendix 1 dealing with legislative recommendations requiring and guaranteeing complete, full, unrestricted, sound, correct and proper functioning of the *shari`ah* laws for Muslims in South Africa.
- Appendix 2 dealing the status if Islamic personal of some Muslim minorities in Non Muslim States.
- Appendix 3 dealing with the Jurisprudence sects mentioned in this thesis.
APPENDIX 1

The following clause is to be incorporated and entrenched in the Constitution of South Africa or in a Bill of Rights.

"Any law, regulation, rule or the like so contained in this Constitution/Bill of Rights which clashes with the practice and/or application of the tenets or laws of the Islamic Faith generally and specifically with the practice and application of the Islamic Personal Law shall not be applicable to persons, minors or majors, of the mentioned Islamic Faith nor will the Constitutional Court of the Republic of South Africa have the power to intervene in any way whatsoever to alter or negate any law, rule or regulation pertaining to the implementation or functioning of the Islamic Personal Law and such laws having relation with it nor any Court in the Republic.

Such matters pertaining to the Islamic Faith and the application of its Personal Law especially shall be fully, completely and exclusively the responsibility of the Muslim Administration and its functioning departments."

"There shall be a Muslim Administration section in the Ministry of Home (Internal) Affairs, under the Minister of Home Affairs and such a Muslim Administration shall be a completely autonomous Administration which shall be run by Muslims only in all matters of the Islamic shari'ah as required by that shari'ah. The State nor any of its the organs; legislative, executive or judicial, shall have any power to abrogate any law enacted by due process by that entire Administration."
The President of the Republic of South Africa shall assent to such proper decisions of the said Muslim Administration and sign them into law and will ipso facto become operational when published in the Government Gazette. All communications between the President of the Republic of South Africa and the said Administration shall take place through the Minister of Home Affairs.

The State may only appoint a Muslim person, with proven reasonable knowledge of the shari'ah, to be Secretary to the Muslim Administration. This clause may not be amended in such a manner as to render it to be in conflict with the Muslim concept of shari'ah."

- The following Bill to be enacted by Parliament;

The Muslim Administration Act of the Republic of South Africa:

Short Title of Bill: The Muslim Administration Act.

PART 1

1. This Act will be called the Muslim Administration Act of the Republic of South Africa and will become law when signed by the President of the Republic of South Africa and gazetted in the Government Gazette.

2. Definitions:

Unless otherwise indicated, the following words will have the following meanings;

- "Ahlīyyah" will mean legal contractual ability as in the shari'ah understanding of that term.
• "Ankīḥah" will mean Muslim marriages as understood in the shari‘ah.
• "Board" will mean the Permanent Board of Islamic Personal Law.
• "Court" will mean the Muslim Family Court.
• "Faskh" will mean annulment of a Muslim marriage.
• "Government Gazette" will mean the Government Gazette of South Africa.
• "Khiṭbah" will mean a Muslim engagement between two Muslim persons.
• "Khul" will mean redemption of a Muslim marriage as understood in the shari‘ah.
• "Murtadd" shall mean an apostate from Islam be such an apostate male or female.
• "Majority Muslim Country" will mean a country in which the Muslims are in majority.
• "Muslim" will mean a person, male or female, who accept the Qur‘ān and Sunnah fully and unconditionally without any form of interpretation which nullifies any law so contained in the those two sources.
• "Nasab" will mean Affinity as understood in the shari‘ah.
• "President" shall mean the President of South Africa.
• "Qādi" shall mean a Muslim judge of the Muslim Family Court.
• "Qudah" shall mean Muslims judges of the Muslim Family Court.
• "Ṣadaq" will mean dowry as in the shari‘ah.
• "Ṣaduqat" shall mean dowries as in the shari‘ah sense.
• "Shari‘ah" will mean the shari‘ah of Islam.
• "Ṭalaq" will mean divorce as in the shari‘ah.

• "Talīq" will mean judicial divorce as in the shari‘ah understanding.

• "ʿUqūd" will mean contracts as understood in the shari‘ah.

3. The Muslim Administration will consist of the following organs;

• The Permanent Board for Islamic Personal Law.

• The Muslim Family law Court.

4. Composition:

• The Permanent Board of the Islamic Personal Law shall consist of the following;

  i) five Muslim graduates in shari‘ah from an Islamic Shari‘ah College or Shari‘ah University of a majority Muslim country who have at least a four year degree in shari‘ah and comparative Islamic Personal Law must be one of the major subjects of the degree. In addition hereto, the said graduate must be proficient in Arabic to the level prescribed for such a degree in an Arabic speaking country.

  ii) the most senior in qualifications and experience in working with the shari‘ah shall be appointed as Head of the Board. iii) members of the Board must be of such sound character as prescribed in the shari‘ah and must not previously have been guilty of any crime or engaged in any form of conduct which is contrary to the shari‘ah requirements.

  iv) the said Board will have the power to formulate the laws of operation of the Islamic Personal Law and such a Bill is to be
forwarded to the Minister of Home Affairs for presentation to the President for assent and promulgation.

v) such a law will become operational when published in the Government Gazette.

vi) the said Board will have the following functions;

• the Head of the Board will have an ordinary vote and a casting vote in cases of a tie in voting.

• a quorum of the Board shall be three members including the Head of the Board.

• the Board will meet at such times as the Head decides or when three members of the Board call for a meeting.

• all meetings of the Board will be closed meetings, but the Head may allow any of the Qudah of the Muslim Family Court to sit in on meetings should he deem that such attendance would be beneficial or in the interest of the workings of the Board and/or the Muslim Administration.

• the Secretary of the Board will be responsible for all minutes of all meetings and all administration work of the said Board.

• Board members will serve for five years and may be re-appointed.

• no member of the Board is to absent himself from the Republic for more than a fortnight without the consent of the Head of the Board.
• a member of the Board may be placed in retirement by the President if he becomes incapacitated mentally or physically in such a manner as to make his execution of his duties impossible. The President may then appoint a suitable substitute member on the recommendation of the Board who will serve out the remaining term of the retired member. A member may retire voluntarily or due to ill-health or any other viable reason. In this case the President shall follow the same procedure as immediately hereinabove in matter of appointment of a substitute member. If any member is granted leave for more than one month, then a substitute member shall be appointed temporarily by the President for the duration of absence of that particular member of the Board.

• the Board will operate the shari'ah as according to the Sunni Doctrine of interpretation of shari'ah.

• the Board will have the following powers;
  • the Board will use the Seal of the Muslim Administration and will make use of it on official documents only.
  • a document of the Board will be valid if signed by the Head of the Board.
• administrative documentation of a non-shari'ah nature authorised by the Board shall be valid when signed by the Secretary of the Board.

• documentation submitted to a State official or department shall be valid when authorised by the Board and signed by both the Head of the Board or his authorised deputy and the Secretary of the Board.

• the Board will be authorised to formulate a code of Islamic Personal Law for application on all Muslims in the Republic of South Africa. Such a code shall have to conform to the shari'ah as per the Sunni doctrine.

• the Board may consult with suitably qualified Muslims in and outside the Republic during this process. The Board will have to consult with the Qudah of the Muslim Family Court in the drawing up of the Islamic Personal Law code for South Africa. This will include the initial formulation of the code and subsequent amendments and repealing of laws of the said code.

• the Board shall appoint the Qudah of the Muslim Family Court to sit as a Commission in any matter of shari'ah affecting the sphere of operations of the Board.

• The Board shall compulsorily function according to its mandate and shall act and execute its duties as
required in the *shari`ah*. If the Board, at any time, transgresses this rule, its action may be invalidated by application to the Court by any Muslim with *ahl`iyah*.

5. A Muslim Family Court shall be founded and the *Qudah* of the said Court will be appointed by the President on the recommendation of the Permanent Board of the Islamic Personal Law. Such *qudah* shall be;

- be appointed by the President and such *qudah* must be Muslims of the *Sunni* doctrine of *Islam* and have the same minimum qualifications as members of the Permanent Board of Islamic Personal Law.

- A Chief *Qadi* will be appointed from the *qudah* who must be the highest qualified candidate for *qudah* in *shari`ah*, but specifically in *fiqh* and more specifically in comparative Islamic Personal Law and *fiqh*. He must have obtained his first degree in a Muslim Arab country's *Shari`ah* College or *Shari`ah* University of post Matriculation level.

- The Court shall apply the *shari`ah* in all matters whereby it has powers of jurisdiction as per the legislation in force at a given time.

- all oaths shall be administered as per the requirements of the *shari`ah*. All Muslim persons must swear on oath. No affirmation is allowed for them.

- the Islamic law of evidence shall apply as set out in the Islamic Personal Law code.

- The Court will have the following powers;
• administer and rule all matters relating to *khītbah*.

• all matters relating to *nikaḥ* and incidental thereto, including the *sadāq* and matters relating to the *ḥakamān*.

• all matters of *ṭalaq* or of a *ṭalaq* nature as in the *shari‘ah*.

• all matters relating to *nasab*.

• all matters relating to marital property.

• issue summons and warrant of arrest of the defaulters upon whom summons have been issued.

• give effective judgment in all matters under its jurisdiction.

• try persons for offences under the Islamic Personal Law code and if found guilty convict such persons in such manner as is amenable to *shari‘ah* and prescribed in the Islamic Personal Law’s code of Offences and Punishment.

• the Court shall sit permanently in some Centres of the Republic and in circuit session in other centres as set out in the Islamic Personal Law code in operation at any give time.

• keep records of all *‘uqūd* of ankiḥah, *Saduqat, ṭalaq, tatliq, Khul‘, faskh*, births, deaths, conversions to Iṣlām, *murtadd* persons from Iṣlām, *nasab* of Muslim persons and all such records, certifications and documents related to these issues.

• issue decrees in matters under its jurisdiction and such matters as requiring hukm in *shari‘ah*. This will include the position of minors in all its aspects as well as all those persons who fall under this rule in the *shari‘ah*.
• all such other matters as permissible by *shari'ah* and required under the Islamic Personal Law code in operation.

• The Chief *Qādī* shall administer all functions of the Court and will delegate such duties to such *qūdah* of the Court as he deems fit and as they are, in his opinion, capable of. A Muslim Registrar shall be appointed by the President for the Court and such an official shall be the administrator of the Court. He should have knowledge of Islamic Personal Law. The Head of the Board and Chief *Qādī* will advise the President on such an appointment.

• The Chief *Qādī* together with two other senior *qūdah* shall sit as the Appeal Division in matters of the Islamic Personal Law code sent for appeal by the general division of the Court.
APPENDIX 2

STATUS OF MUSLIM PERSONAL LAW IN SOME MUSLIM MINORITY COMMUNITIES IN NON MUSLIM COUNTRIES:

In the Introduction to this thesis, a brief account had been given of Islamic Personal Law that are in operation in certain Non-Muslim States.

In this appendix, a more detailed presentation of the functioning of the Islamic Personal Law, or parts of it, in certain Non-Muslim States, is discussed.

This is deemed necessary so that South Africa do not commit the errors other States committed or are still committing nor that she looks for a short cut in this matter taking the example of others.

1) The Netherlands:

The Netherlands had a long colonial history of ruling Muslim lands. Its attitude to the Islamic Personal Law in its own country is thus of importance. It also had a long "mother-country" relationship with South African Whites. There is a sizeable Muslim minority in the Netherlands. There is no official statutory recognition of the Islamic Personal Law, but Dutch Courts give rulings in Islamic Personal Law matters. "Dutch Courts will apply the parties' common national law to a divorce petition."¹

¹ Statement No: 152/189 dated 04/04/89 issued by Ministerie van Justitie s'Gravenhage, p. 1.
This is according to Article 6 of The General Provisions Act of 1829. A dissolution of marriage obtained outside the Netherlands after "proper process" will be recognised if pronounced by a court or other authority having jurisdiction.¹ Unilateral dissolution of marriage outside the Netherlands by the husband only will only be recognised if in conformity with the husband's Personal Law and is valid at the place where it is effected and it is evident that the wife expressly or implicitly agreed or acquiesced in the dissolution of the marriage.² (The latter rule is in conflict with the shari'ah). A unilateral divorce pronounced by a husband in the presence of a Consular official on Netherlands soil is not recognised by Dutch Courts.³

2) Australia:

Official 1986 totals of Muslims in Australia are:

New South Wales: 57 551.

Victoria: 37 965.

Queensland: 3 731.

Muslims in South Australia & Western Australia are grouped under "other religions".⁴

¹ Ministerie van Justisie op. cit. p. 3.
² Ibid, op. cit. p. 3.
³ Ibid, op. cit. p. 3.
The Australian Bureau of Statistics (ABS) gives Muslim population as 109,500 in 1986. This leaves 10,253 for South and Western Australia, Tasmania and Northern Territories. AFIC\(^1\) gives the Muslim population as 250,000 in 1982. Current estimates are "at least" 300,000.\(^2\) Disparity is caused due to "religion" being optional to be declared during census. These figures are important to understand the following issue.

The Australian Federal Government on 2nd August 1989 noting "the fact that Australia is a multicultural society made up of people of differing cultural backgrounds and from ethnically diverse communities", instructed the Australian Law Reform Commission (ARLC) to look into;

- laws relating to formation and performance of contracts.....
- laws creating offences.\(^3\) These are very wide terms of reference.

Note should be taken of the small community of Muslims in Australia (there are about 16 million people in Australia) and yet their system would also be investigated. The Australian government also concedes that cultural differences bring forth diversity in lifestyle of people which should be legally accommodated. The ALRC's report had now been

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1. AFIC stands for The Australian Federation of Islamic Councils, an umbrella Federal Muslim organisation in Australia.


published and of its main recommendation as far as Muslims are concerned are;

- that a polygamous marriage enacted in Australia shall not be recognised at all. This is an anomalous position which is inconsistent with the principle that the law should recognise and protect the relationships people choose for themselves. There is also inconsistency between recognising as valid a person's second formally contracted marriage and government policy that attributes some of the consequences of a marriage to a *de facto* relationship (a "living together" relationship) that may be concurrent with a marriage of one of the parties or, indeed, with another *de facto* relationship. The latter relationship is totally unacceptable in the Muslim community, but a polygamous union not. There is further anomaly in this matter in that The Australian Family Law recognises a polygamous marriage validly contracted overseas and deemed it a valid marriage. If a polygamous marriage is contracted overseas while domiciled there and it is valid in that domicile, such a polygamous marriage will also be valid in Australia even if the parties to it are residents of Australia and returned there to resume residence.¹

- in matters of divorce the report states;

Recognising religious and customary divorce as legally valid would be consistent with the principles underlying the Commission's recommendations. Criteria will have to be established to determine the circumstances in which such divorces would be valid.¹

- pre-marriage contracts on property distribution, in the event of the dissolution of the marriage, should be enforceable. (Presently it is not so).²

One can notice from the above recommendation on polygamy how self-defeating it is which comes down to a simple rule of denying operation of the exception of polygamy in Muslim society but yet parties domiciled or resident in Australia may do so in a domicile where it is valid. According certain rights and privileges of a valid marriage to "living together" situations and denying it to a polygamous marriage is prejudicedly unfair and anomalous.

It is interesting to note the clear bias in Australian law presently. A person may marry as often as he wishes provided the first marriage was legally terminated. A married person may simultaneously have a marriage like relationship with another woman and have children from more than one partner. An

² Ibid, op. cit. p. 113.
unmarried person may have marriage-like relationships with more than one partner. 1

The above reflects the actual legal status of a polygamous union. A monogamous Muslim marriage contracted overseas is apparently valid in Australia, if it is valid in the domicile it was contracted in. One of the antagonist of recognition of polygamous marriages enacted in Australia, is the General Synod of the Anglican Church of Australia in its submission of 1991 to the ALRC. 2

A polygamous union enacted in Australia, however, and recognised as valid in the contracting parties' domicile may also be recognised as valid in Australia for some purposes as ruled in Hague vs Hague (1962) 108 CLR 230.

If it is not so, such a union will be recognised as a de facto relationship for certain purposes. 3

3) Canada:

The Canadian Muslim Association presented a brief to the Federal Government relating "to giving legal expression to Muslim Personal Law."

The request was refused and the Foreign Ministry "do not forsee such being done in the near future." 4

1 The Australian Law Reform Commission, Discussion Paper 46, op. cit. p. 27.
2 Ibid, op. cit. p. 27.
3 Ibid, op. cit. p. 27.
4 Statement Ref: JLA - 0739, dated 28/5/1992, Department of External Affairs, Ottawa, Canada.
4) The United Kingdom:

The British Muslim community, virtually all of migrant origin, totals 1.5 million.¹ No official recognition for shari`ah is accorded by the Mother of Parliaments. However Muslims have held seminars in which their views were put forward. Thus the Lord Chancellor’s Review of Family and Domestic Jurisdiction held in London on 4 September, 1986 declared: "Whatever the opinion chosen for the future family system in England and Wales, the concerns of the Muslim families and individuals must be taken into account as part of the general accommodation of culture and religious minorities..." The seminar further decided that there be "mandatory reference to religious and cultural factors including consultation with religious authorities, in conciliation and welfare stage", and "including Muslim lay members in conciliation and divorce court welfare services", amongst other things.²

5) India:

Muslims number 75.6 million or 11.36% of India’s total population.³ Muslim sources in India give it as 20% according to the 1981 census.⁴ Islamic Personal Law in its entirety was operating in India until the early days of British Colonial rule, but later many Islamic Laws were changed and other

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² Muslim Education Quarterly, op. cit. p. 66.

³ The Statesman’s Year Book, op. cit. p. 647.

laws substituted in their place. Islamic Personal Laws were removed, but Muslims protested when these laws were amended "to rectify the position." Islamic Personal Law is administered by the General Courts and the Appeal Court hears appeals. Islamic Personal Law thus has no special standing. Generally the *Hanafi* law is applicable for *Sunnis* and *Ja`fari* law for the *Shi`ah* groupings. These laws are drawn up by Muslim jurists and codified by the Parliament of India. First codification in India was in 1937. This system of application had a serious repercussion when the Indian Appeal Court ruled contrary to *Hanafi* law in a case of *nafaqah* in a *talaq ba`in* case. Strong Muslim protests forced the Indian Parliament to pass enacting legislation rectifying the situation.¹ The above case is that between Muhammad Ahmad Khan vs Shah Banoo Begum decided under sections 125 and 127 of the Indian Criminal Procedure Code of 1973. The Muslim Divorce Bill 1986 rectifying the situation was signed by India's President on 9th May 1986.² The above case caused the `Ulama` to take a new approach to safeguarding Islamic Personal Law. An All India Islamic Personal Law Convention to protect Islamic Personal Law was convened in 27th December 1972. The `Ulama` established Muslim courts to hear and settle Islamic Personal Law cases to thwart any attempt at forcing Muslims to accept secularist rulings of the Indian courts.³

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² Islamic Legal Philosophy, op. cit. p. 366.

6) The Philippines:

Muslims totalled 1,584,963 in 1970. The total population in 1991 was 62,868,000. Presidential Decree 1083 known as the Code of Muslim Personal Law of Philippines of 1977 brought official recognition of Islamic Personal Law to the Philippines. Talfiq (eclectic selection) was incorporated into the Code which means that parties could follow one madhhab (sect) in nikah (marriage) and another in tarikah (inheritance). Note should be taken that the Sultanate of Saluq promulgated its Diwan Tausog in 1878 and a more comprehensive one was promulgated by the Sultanate of Magindanao in 1886. These are Shafi'ī codifications. Islamic Personal Law is thus not foreign to the Philippines.

7) Thailand:

The total Muslim population of Thailand in 1983 was 1,869,427. The total Thai population in 1980 was 46,961,338. In Thailand Qudah (Muslim judges) sit as local functionaries in the Courts of Law with judges during trial proceedings and offer advice. There is a special Adviser in Islamic Affairs to the Government and a Central as well as Provincial Islamic Committees. This was established in 1943. There are special concessions allowing application of Muslim laws in matters of Family relations and

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1 The Statesman's Year Book, op. cit. pp. 1008.
2 Islamic Legal Philosophy, op. cit. p. 352.
3 The Statesman's Year Book, op. cit. p. 1082.
Inheritance. This is mainly in the four southern provinces, namely, Yala, Narathiwat, Pattani and Satun. This was established in 1944.

8) Singapore:

In August 1988, 16% of Singaporeans were Muslims. In 1957, the Muslim Ordinance relating to appointment of Registrar of Muslim marriages and a Chief Qādi (Muslim judge) and amending various laws, were introduced. In 1966 The Administration of Muslim Law Act, Act 27 of 1966 was introduced. Other legislation affecting Muslims were also introduced later. The Administration of Muslim Law Act is a comprehensive Act dealing with an extremely wide spectrum of Muslim affairs, ranging from Zakah al Fitr (end of Ramadan alms) to all the branches of Islamic Personal Law, Mosques and Islamic Schools. There are special Shari'ah Courts dealing with these matters and the Majlis Ugama Islam is the overall Muslim body controlling Muslim affairs. Singapore must be unique in this matter in the world. It is interesting to note that the world community has never declared this system of Singapore as a separatist policy or something akin to apartheid.

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1 Islamic Legal Philosophy, op. cit. pp. 353, 356 - 357.
3 Islamic Legal Philosophy, op. cit. pp. 354 - 355.
9) Sri Lanka:

Islamic Personal Law operated here since 1770 when Code No: 8 dealing with special laws affecting the "Moors and other Mohammedans" were introduced. From 1806 till 1910 various amendments were made to the above including extending the legislation to other areas. In 1929 the Muslim Marriage and Divorce Registration Ordinance No: 27 was introduced and in 1931 the Muslim Intestate Succession and Waqfs Ordinance No: 10 came into existence. By the more updated and comprehensive Act 13, The Muslim Marriage and Divorce Act was introduced in 1951.\(^1\) Quqah of Sri Lanka are recognised officials. They solemnise and register marriages. They also mediate and arbitrate in disputes in married life.\(^2\) The Shari'ah Court established in Sri Lanka consists of the following five divisions;

- Board of Quqah.
- Quqah Court.
- Special Qadi Court.
- Waqf Tribunal.
- Waqf Board.\(^3\)

From the above, one notices immediately the wide discrepancy between the countries that have European descendant inhabitants and European derived law and governments and those who do not, in spite of having had a spell of colonial rule by these European powers. The Asian countries did not exhibit an anti-Muslim bias.

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\(^1\) Islamic Legal Philosophy, op. cit. pp. 356 - 357.
\(^3\) Ibid, op. cit. p. 354.
The unfairness and anomalies in the European systems are very pronounced viewed against the South East Asian background.

The customs and traditions which formulated European laws and the history of that system and the former and even current animosity between Christianity and Islām, are the main reasons for this problem experienced by Muslims living as minorities under Non-Muslim European modelled systems of government.

It should be noted that in some of the mentioned Muslim minorities’ cases cited, they have little say in the actual functioning of their Personal Law, although such is recognised legally.

A typical case is India where secular courts administer Muslim Personal Law. This is against shari'ah requirements as discussed in this thesis and causes serious problems as depicted in the celebrated divorce case of Khan vs Begum where the Indian Appeal Court awarded maintenance to Begum in conflict with Hanafī doctrine which is applicable to Hanafīs in India.

South Africa should not resort to the piece-meal approach for the implementation and administration of Islamic Personal Law as some Non-Muslim countries had when they decided to legalise Islamic Personal Law in certain respects only.

This system creates more conflict and does not solve the problem of Islamic Personal Law which is diametrically in conflict with other secular laws.

Muslims must therefore have full control over this matter which is vital to their lives and those who are going to enforce it must be properly qualified.
APPENDIX 3

MADHĀHIB (SCHOOLS) OF FIQH (ISLAMIC JURISPRUDENCE)

In the chapters of this thesis, mention was made of various schools in Islamic Jurisprudence. This appendix on some of the major schools will assist in the understanding of these schools.

There were three major movements in Islamic history - the Sunnī, Shi‘ah and Khārijī movements. Only the Sunnī and Shi‘ah schools were both theological as well as Fiqh School of Thought and are still in existence while the Khārijī movement was only a theological movement and is virtually non-existent now.

Within the Sunnī system, there were a large number of mujtahidūn (legists) and Fuqaha‘ (jurists). Some of them did not leave anything of their works as their students did not record their teachings. However some of their rulings are found in existing Sunnī fiqh works as quotations or comparisons or judgments.

The major Sunnī Fiqh (law) Schools that are in existence are;

- the Ḥanafī madhhab (law school) founded by Nu‘man bin Thābit who was born in al Kūfah, southern Iraq in 80 A.H. He is commonly known as Imām Abū Ḥanīfah.

- the Mālikī madhhab founded by Mālik bin Anas who was born in Madīnah, Arabia, in 93 A.H.
• the **Shafi`i madhhab** founded by Muḥammad Idris al Shafi`i who was born in Ghazzah in Palestine in 150 A.H.

• the **Hanbali madhhab** (law school) founded by Aḥmad bin Hanbal who was born in Baghdad in 164 A.H.

• the **Zahiri madhhab** founded by Dawud al Zahiri, who was at first a Shafi`i follower. His madhhab is not widely practised nowadays, but his student ibn Ḥazm left a voluminous work of Zahiri fiqh called al Muḥalla which reflects the views and rulings of many Fuqaha’ and gives the Zahiri ruling on masa’il.¹

The **Hanafi Madhhab:**

Its founder, **imām Abū Ḥanifah**, was born in al Kufah and studied under Ḥammad ibn Sulaiman who was the student of the famous Sahabi `Abd Allah ibn Mas`ud (R.A).

Abū Ḥanifah’s fiqh is based on ra’i (logic) for all masa’il (legal problems) in which he found no shari`ah text in his time. He used the most ra’i in comparison to other Fuqaha’ of his time.²

The **usul** (principles) of his madhhab as he himself narrated are as follows;

“I take from the Qur`ān if I found the ruling in it and if not, then in the sunnah of the Messenger of Allah (S.A.W.S). If I do not find it there, then from the fatāwa of the

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¹ Masā’il: Fiqh problems or questions.

² Madkhal il Dirasah al Shari`ah al Islamiyyah. op. cit. p. 157.
sahābah (R.A.) which I feel to take and when the matter comes to Ibrahim al Nakha’ī and al Hasan, (of the tabi‘un) then I use ijtihād (juristic opinion) as they used it.\textsuperscript{1,2}

The full Hanafī usūl (principles) are thus;

The Qur’ān, ḥadīth/sunnah, ijma‘ (juristic consensus) fatāwa (legal opinion/dispensation) of the sahābah, al qiyyās (analogous reasoning), al istihsān, al `urf (custom).\textsuperscript{3}

His madhhab was recorded for posterity by his two famous disciples and students Abu Yusuf and Muḥammad al Shaibānī, especially the latter. Other famous students were Zufar bin Hudhail and al Hasan bin Ziyād.\textsuperscript{4}

Hanafis are found mostly in Asia and the Middle East.\textsuperscript{5}

The Maliki Madhhab:

It was founded by Malik bin Anas of Madinah in Arabia.

He studied under very prominent and learned shaikhs of Madinah including ibn Hurmuz, Rabī‘ah al Ra‘i and Ja‘far al Sa’dīq.\textsuperscript{6}

Malik was both muḥaddith (expert in ḥadīth) and faqīh (jurist).

His legal theorems and its codification were all sound and derived from the ḥadīth and sunnah of the Prophet (S.A.W.S). His greatest contribution to fiqh is the codification

\textsuperscript{1} students of the Ṣaḥābah.

\textsuperscript{2} Ta’rīkh al Tashrī‘ al Islāmī, op. cit. p. 170.

\textsuperscript{3} Abū Zahra M: Ta‘rīkh al Madhāhib al Islāmīyyah, Fi Ta‘rīkh al Madhāhib al Fiqhīyyah, Cairo, Dār al Fikr al ‘Arabi, undated, p. 162.

\textsuperscript{4} Ta‘rīkh al Tashrī‘ al Islāmī, op. cit. p. 171.

\textsuperscript{5} Shari‘ah - The Islamic Law, op. cit. p. 93.

\textsuperscript{6} Ta‘rīkh al Tashrī‘ al Islāmī, op. cit. p. 175.

Ta‘rīkh al Madhāhib al Islāmīyyah, op. cit. p. 178.
of Madani fiqh (fiqh of Madinah), also called fiqh al riwayah, being fiqh derived from the Qur'an, hadith and sunnah texts. These hadith and sunnah texts are found in al Muwatta' which is still available today and is the oldest written fiqh work in Islam.

The usul (principles) of his madhhab (law school) is explained by al Qarrafi, an eminent Maliki faqih, as follows;

"The usul of our madhhab is; the Qur'an, followed by the sunnah, then the ijma' (consensus) followed by the ijma' of Madinah. Hereafter qiyas (analogous reasoning), qawl (fatwa - legal opinion) sahābi. Al istiṣlah, 'urf (custom) and 'adat (practice of people), sadd al dhara'i, al istihsān and al istiṣḥāb."¹

Malikis are found mostly in Egypt, Sudan and the Arabian Peninsula and North Africa (the Maghrib).²

The Shafi'is:

Its founder is Muhammmad Idris al Shafi'ī, a Qurashite.

He memorised the Qur'an at the age of seven and the Muwatta' at fifteen. He studied under the mufti (Muslim learned authority who gives legal opinion) of Makkah Muslim bin Khalid al Zunji and Sufyān 'Uyinah. Later also under Muḥammad Shaibāni in Baghdad where he studied Hanafi fiqh in depth.

He has two madhhab; an "old" one being of Baghdad and a "new" one in Egypt, the latter of which he had to change certain verdicts as the 'urf (customs) in Egypt was different from that of Baghdad.

¹ Madkhal li Dirāsah al Sharī'ah al Islāmīyah, op. cit. p. 164.
² Ta’īkh al Madhāhib al Islāmīyah, op. cit. pp. 223 - 224.
His "new Risalah" is available as well as Kitāb al Umm, being an usūl (jurisprudence principles) work while the "old Risalah" is only present in parts in the works of the Shafi’ī fuqaha’.

As can be expected, the Shafi’ī madhab (law school) is mid-way between the Ḥanafi and Mālikī madhāhib (law schools).¹

The usul of his madhab is as follows;

The Qur’ān, followed by the hadīth and sunnah, even the category of the ahad ahadīth (singularly reported Prophetic precepts) which are sahih (authentic). Hereafter the ijma’ (consensus) followed by the fatāwa (legal opinions) of the sahābah which are near to the text of the Qur’ān and the hadīth followed by the fatāwa of the khulafa’ al rāshidūn (the righteous caliphs - Abū Bakr, ʿUmar, ʿUthmān and ʿAlī) and their rulings take precedence over qiyas (analogous reasoning), which is the last format of proof.²

Of his famous students were Ahmad ibn Hanbal, al Tabari, al Muzani and Dawud, who later became Dawūd al Zahiri.³

Shafi’īs are found mostly in Yemen, Egypt, Iraq, Syria, Pakistan, Indonesia, Malaysia, Philippines, East and South Africa.⁴

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¹ Doi A R: Shari‘ah - The Islamic Law p. 103 - 104.
³ Ta‘rīkh al Tashrī‘ al Islāmī, op. cit. p. 186.
⁴ Shari‘ah - The Islamic Law, op. cit. p. 107.
The Hanbalis:

The founder of this *madhhab* (law school) is Aḥmad bin Hanbal. He studied under al Shafi‘ī in Baghdad and later developed his own *ijtihād* (juristic) system.

Of his famous students are al Athram, ibn Ḥajjaj and al Marūzī.¹

The Hanbali madhhab is peculiar in its strong *shari‘ah* text based system. It aligned itself as far as possible with the Prophetic era.

The Hanbalis’ *usul* (principles) are as follows;

The *Qur’ān* followed by the *ḥadīth/sunnah*, even weak *ḥadīth* text which are of the *sahih* (authentic) grade, but not rejected texts, thereafter the *fatwā* (legal opinion) of the *sahabah* which has no opposition to it (which Aḥmad calls *ijma*). If there is a difference between the *sahabah* in their *fatwā* (legal opinions), he would take the one nearest to the *Qur’ān* and *sunnah*. Hereafter comes the *marāsil ḥadīth* (a category of technically weak *ḥadīth*) and then the *qiyās* (analogous reasoning) patterns.²

According to al Tusi, Hanbalis also accept *al istiḥsān*, while ibn Qudamah states that both *al istiṣlāh* and *al istiṣḥāb* are also part of the Hanbali *usūl*.³ Sadd al dhara‘ī (blocking of the ways leading to evil and sin) is also an accepted in the Hanbali *usūl*.⁴

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