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Introduction to Islamic law

This module guide was prepared for the University of London by:

- Mashood Baderin, LLB (Hons), LLM, PhD, PGCE, Professor of Laws, School of Law, SOAS University of London
- Martin Lau, MA, PhD, Barrister at Law, Professor of South Asian Law, School of Law, Department of Law, SOAS University of London

and

- Doreen Hinchcliffe, PhD, Barrister at Law, Gray's Inn, London.

This is one of a series of module guides published by the University. We regret that owing to pressure of work the authors are unable to enter into any correspondence relating to, or arising from, the guide. If you have any comments on this module guide, favourable or unfavourable, please use the form at the back of this guide.

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Module descriptor

GENERAL INFORMATION

Module title

Introduction to Islamic law

Module code

LA3028

Module level

6

Contact email

The Undergraduate Laws Programme courses are run in collaboration with the University of London. Enquiries may be made via the Student Advice Centre at: https://sid.london.ac.uk/sid

Credit

30

Courses on which this module is offered

LLB, EMFSS

Module prerequisite

None

Notional study time

300 hours

MODULE PURPOSE AND OVERVIEW

Introduction to Islamic law is offered as an optional module to Standard Entry and Graduate Entry LLB students. It is also available to study as an Individual Module. Credits from an Individual Module do not count towards the requirements of the LLB.

The module offers an overview of Islamic law covering its religious, historical and contemporary dimensions. The module addresses first the religious and historical foundations of Islamic law before going on to address its application in contemporary jurisdictions. The theoretical, substantive and procedural aspects of Islamic law are covered.

MODULE AIM

The module aims to give students a basis from which the richness and complexity of Islamic law may be explored further. The module concentrates on various aspects of Islamic law including its legal theory, family law, succession, gifts, *waqfs*, penal law, contract, tort, and the administration of justice.

LEARNING OUTCOMES: KNOWLEDGE

Students completing this module are expected to have detailed knowledge and critical understanding of the foundations, theories, scope and principles of Islamic law. In particular they should have:

1. Detailed knowledge and critical understanding of the sources, methods and principles of Islamic law;

2. Detailed knowledge and critical understanding of the role of Islamic law in the contemporary world;
3. Detailed knowledge and critical understanding of the main features of the administration of Islamic justice, including: the role and function of Islamic courts, role of judges, evidence and proof;
4. Detailed knowledge and critical understanding of specific substantive topics of Islamic law, such as crime, contract, tort, family law, succession, courts and procedures.

LEARNING OUTCOMES: SKILLS

Students completing this module should be able to:

5. Research and analyse complex and conceptual questions on Islamic law, producing reasoned and evidenced responses;
6. Articulate well-argued solutions to complex legal problems in the areas of Islamic family law, penal law, tort, contract, succession, and administration of justice;
7. Reflect on learning, identifying areas for improvement in Islamic law, particularly in response to contemporary challenges, and responding appropriately;
8. Evaluate Islamic law issues in a social, economic and political context, taking account of their policy and doctrinal importance.

BENCHMARK FOR LEARNING OUTCOMES

Quality Assurance Agency (QAA) benchmark statement for Law 2019.

MODULE SYLLABUS

Part I

(a) *Introduction*: Understanding Islamic law; Islamic law in the modern age and its role in international law; Its importance as part of the legal system in modern states; Meaning of Shar'iah.

(b) *Origins and history*: Pre-Islamic Arabia; Arab tribal law; The life of Prophet Muhammed; The Al-Rāshidūn caliphs; The Ummayyads and the Abbasids; The Ahl al-ra'y and the Ahl al-hadīth; The role of Imām Al-Shāfi'ī.

(c) S*ources, methods and principles of Islamic law*: The Qur'an as a law text; The Sunnah of the Prophet; Hadith material and authentication; The controversy of authentication; Ijma', Qiyas, Istihsan, Maslahah, Darurah, Istishab, Ijtihad.

(d) S*chools of Islamic Jurisprudence*: The Sunni and Shi'i. The Sunni Schools: Hanafi, Maliki, Hanbali, Shafi'i. The Shi'i schools: Ithna Ashari, Isma'ili, Zaydi.

Part II

(e) *Penal law*: Hadd offences; Ta'zir offences; Qisas offences; Pakistan's Hudood Ordinances; Other Shari'ah Penal Codes.

(f) *Civil law*: Contracts and tort; Freedom of Contract, Prohibition of Riba and Gharar, Murabahah, Musharakah, Mudarabah, Pre-emption; Gifts; Tortious actions and liability.

(g) *Family law*: Marriage contract; Rights and duties; Incidents of Marriage; Guardianship; Maintenance; Stipulations; Dissolution of marriages; Children; Legitimacy; Child custody.

(h) *Succession*: Intestate and Testate Rules, Qur'anic heirs, Agnates; the Mafqūd; Death sickness; Waqfs.

(i) *Courts and procedure*: The Qadi's court; General rules of procedure, evidence and proof.

LEARNING AND TEACHING

Module guide

Module guides are the students' primary learning resource. The module guide covers the topics in the syllabus and provides the student with the grounding to complete the module successfully. The module guide contains the Module Descriptor which sets out the learning outcomes that must be achieved. The guide also includes the core, essential and further reading and a series of activities designed to enable students to test their understanding and develop the relevant skills. The module guide is supplemented each year with pre-exam updates, made available on the VLE.

The Laws Virtual Learning Environment

The Laws VLE provides one centralised location where the following resources are provided:

- a module page with news and updates;
- a complete version of the module guides;
- mini lectures are provided in some modules;
- pre-exam updates;
- past examination papers and reports;
- discussion forums where students can debate and interact with other students;
- quizzes – multiple choice questions with feedback are available for some chapters.

The Online Library

The Online Library provides access to:

- the professional legal databases Lexis+ and Westlaw;
- cases and up-to-date statutes;
- key academic law journals;
- law reports;
- links to important websites.

Core texts

Students should refer to at least one of the following core texts. Specific reading references are provided in each chapter of the module:

- **Abd al 'Ati, H. *The family structure in Islam*. (Chicago: The American Trust Publications, 1995) fourth edition [ISBN 9780892590049].**
- **Baderin, M.A. *Islamic law: a very short introduction*. (Oxford: Oxford University Press, 2021) [ISBN 9780199665594].**
- **Coulson, N.J. *A history of Islamic law*. (Edinburgh: Edinburgh University Press, 1994) [ISBN 9780748605149] (available in VLeBooks via the Online Library).**
- **Kamali, M.H. *Principles of Islamic jurisprudence*. (Cambridge: The Islamic Texts Society, 2003) third edition [ISBN 9780946621828].**

ASSESSMENT

Learning is supported through tasks in the module guide and online activities. The Formative Assessment will prepare students to achieve the module learning outcomes tested in the summative assessment.

Summative assessment is through a timed unseen examination. Students are required to answer four questions out of eight. The examination will be divided into two parts from which students will be required to answer at least one question from each part. The questions in Part One of the examination relate to Chapters 1–3 in Part I of the

guide and the questions in Part Two of the examination relate to Chapters 4–12 of Part II of the guide.

Please be aware that the format and mode of assessment may need to change in light of events beyond our control. In the event of any change, students will be informed of any new assessment arrangements via the VLE.

Permitted materials

None.

Part I

1 Introduction

Contents

Introduction

Islamic law is an immensely complex and rich system of law, which has spread widely throughout the world. Many legal systems have either incorporated some elements of Islamic law, which govern the Muslim citizens of these countries (as in India, Singapore or South Africa), or are completely based on classical Islamic law (as in Saudi Arabia).

In an introductory module like this one, we cannot hope to do complete justice to the richness and complexity of Islamic law. Rather, we would like to give you a basis from which to explore Islamic law further by first introducing you to Islamic legal theory and then examining some aspects of Islamic substantive law such as Islamic family law, Islamic law of succession, Islamic criminal law, Islamic law of contract, Islamic law of trust and Islamic judicial procedure. We would like to encourage you to tackle and understand the foundations of Islamic law first before you go on to examine the application of Islamic law in the different jurisdictions where it applies throughout the world.

You will also need to know some of the basic Islamic law terminologies in Arabic and understand their meaning, as you will be coming across them frequently. Most English textbooks on Islamic law have a glossary of the Arabic terminologies. Two good examples are:

- **Coulson, pp.235–41.**
- **Kamali, pp.522–26.**

1.1 What is Islamic law?

Islamic law is one of the major systems of law in the world today. It is applicable in various forms as part of state law in different countries of the Middle East, Asia and Africa but also has a strong influence on Muslim communities in the West, who apply it informally in different aspects of their daily lives. Yet, it is often misunderstood. Being a legal system based on Islamic religious texts and teachings with its primary sources in the Arabic language, Islamic law often raises questions about whether it is really law or simply rules of religious ethics. It is a system based on sources, methods and principles, with different Arabic terminologies applying to its different aspects. Apart from the English phrase 'Islamic law', alternative phrases such as '*Shari'ah* law', 'Islamic legal tradition' and 'Islamic jurisprudence' are also used in reference to it.

Broadly understood as a system of law, Islamic law shares similar characteristics with other systems of law. It consists of theoretical, substantive and practical aspects in a similar manner to other legal systems. Although reference to Islamic law in Western literature is often focused on its legal theories and jurisprudence, a holistic understanding of Islamic law requires coverage of all its three aspects.

The study of Islamic law will lead you into areas that in the past have rarely been visited by lawyers practising law under Western legal systems. For example, whereas English law and the English legal system are, for all practical purposes, largely secular, Islamic law is firmly based on the Islamic religion. The main sources of Islamic law, the Qur'an and the *Sunnah*, represent not only the foundations of Islamic law but embody the religion of Islam as well. Although there is usually some difference between legal and theological rulings on particular issues, a total separation between law and religion is not possible in Islam. The religious basis and nature of Islamic law contrast sharply with the ideals of secularism, both in the political and in the legal sphere, that have formed the basis of the English legal system in the modern age. While there can be no doubt that many principles of English law are informed by Christian ethics and values, unlike in Islamic law, these origins remain unacknowledged in most law degree courses. In contrast, Islamic law cannot be understood, and cannot be studied, without an appreciation of the religious nature of its sources.

1.1.1 A study of religion as much as law

The study of Islamic law is as much a study of religion as it is of law. This fact has implications for the way you will study Islamic law in contrast to English law. Your studies on English law subjects will have introduced you to a range of sources. The primary sources (i.e. reported case law and legislation) are normally supported by a wide range of secondary sources, including textbooks on individual subjects, academic writing and collections of cases and materials.

The study of Islamic law, however, will lead you to traditional sources that are quite different from case law and legislation. The primary sources of Islamic law, the Qur'an and the *Sunnah*, cannot be compared to English case law or legislation. It is therefore necessary to go beyond these primary sources and to consult other jurisprudential sources (or methods) in order to understand how Islamic law emerged as a complete legal system from these religious origins. In this module guide you will therefore find many references to books that are not, strictly speaking, 'legal' in nature but are concerned with the religious jurisprudence and historical aspects of Islam. It is essential to consult this background literature in order to understand and appreciate the basic principles of Islamic law. It is only when you have grasped the religious and historical foundations of Islam that you will be introduced to Islamic law proper. There are a number of textbooks on Islamic law and the study of these principles is not all that different from the study of English law subjects. The only important difference is that the basic principles of Islamic law are not contained in case law but were developed by jurists over time. For the same reason, legislation *per se* also has no role to play in the emergence of these basic principles, though in many modern legal systems Islamic law has now been codified and supported by legislation.

The study of English law subjects is concerned with those laws that are applied by English courts. In contrast, the study of Islamic law is not primarily based on the legal systems of individual countries but on basic principles of law developed by different **schools of Islamic jurisprudence** over a long period of time. Some of these principles now form the basis of the codified law in contemporary legal systems of different Muslim-majority states, and the basis of law applicable to Muslims in some Muslim-minority states. For instance, in India and Pakistan, Muslims are governed in most areas of family law by Islamic law as codified by these countries. Thus, your first step in the study of Islamic law is the study of its basic principles and jurisprudence. From time to time we will highlight individual countries to show you how these principles are applied in practice. Apart from these 'excursions', your encounter with Islamic law will not be concerned in much detail with contemporary legal systems or countries.

1.1.2 Aims of this module guide

The primary aim of this module is to enable you to gain an overview of the vast and complex body of law commonly referred to as Islamic law. This guide does not amount to a textbook and you should note that it is impossible to pass the examination by studying this module guide alone. The main purpose of this guide is to offer navigational markers to you to enable you to embark on the study of Islamic law in a systematic and logical fashion. The **syllabus** indicates the range of topics the examiners will expect you to know. Make sure you read the syllabus and are aware of the full range of topics it covers.

We have attempted to include guidance by way of sample examination questions at the end of each chapter. It probably goes without saying that these are samples only and that anything contained in the syllabus can be subject to examination. It is important constantly to bear in mind when answering questions that, unless the question specifically refers to the law of a particular school of Islamic jurisprudence, the jurisprudence of all four schools of Sunni Islam and the law of Shi'ah Islam should be considered as much as possible.

This guide should enable you to gain an overview of the subject and to understand the main features of particular areas of Islamic law. As Islamic law is not simply based on case law, there can be diverse legitimate jurisprudential views on any particular issue. The focus of this module is on 'traditional' or 'classical' Islamic law (i.e. the basic concepts and principles of Islamic law), so accounts of contemporary Islamic legal systems (though helpful for an understanding of the topic) should be interrogated against relevant traditional or classical jurisprudence. The literature on Islamic law is vast but we have attempted to reduce it to books and articles that are easily available and accessible to you as a student. We have identified several textbooks that are widely available and are regarded as 'classic' introductions to Islamic law. We have also suggested Further reading in each section. However, you will find that there are many more excellent introductions to Islamic law available if you cannot obtain the recommended textbooks or articles. The library SOAS University of London, jointly with the SOAS Centre of Islamic and Middle Eastern Law, maintains its own website, which contains useful bibliographies, articles and general information on Islamic law. Also check the Online Library, the **Introduction to Islamic law** section of the Virtual Learning Environment (VLE) and other online sources.

1.2 How to use this module guide

The module guide offers a basic introduction to the main principles of Islamic law. It is therefore not sufficient to rely entirely on the information contained in this guide to pass the examination. You are expected to deepen your knowledge of any area of Islamic law contained in the syllabus through further reading. You should therefore regard this introduction to Islamic law as a stepping stone. Attempt one chapter at a time, read it carefully and then deepen your understanding of the topic by consulting other books and articles. You should also attempt the self-assessment exercises as well as the the sample examination questions provided at the end of each chapter to test your understanding of the issues covered.

1.3 Three short background readings

To familiarise yourself with the subject, you should read and reflect on the following three short background readings on Islamic law. They will provide you with the necessary background insight to prepare you for the substantive understanding of the module.

- **Baderin, M.A. 'Historical and evolutional perceptions of Islamic law in a continually changing world' (2009) 6(2) *The Middle East in London* 7–8.**
- **Baderin, M.A. 'Understanding Islamic law in theory and practice' (2009) 9 *Legal Information Management* 186–90 (available in Lexis+ and Westlaw via the Online Library).**
- **Spells, S. 'Researching Islamic law: an introduction' (2009) 9 *Legal Information Management* 191–94 (available in Lexis+ and Westlaw via the Online Library).**

1.4 Introductory activity

- Write a 100-word summary for each of the three background readings without recourse to the articles. On completion, check whether each of your summaries covered all the main points of each article.
- Post a sample of your summary on the VLE forum for online discussion.

Core texts

It is strongly recommended that you buy your own copy of any one of these textbooks and possibly access the others through your local library, where available.

- **Abd al 'Ati, H. *The family structure in Islam*. (Chicago: The American Trust Publications, 1995) fourth edition [ISBN 9780892590049].**
- **Baderin, M.A. *Islamic law: a very short introduction*. (Oxford: Oxford University Press, 2021) [ISBN 9780199665594].**
- **Coulson, N.J. *A history of Islamic law*. (Edinburgh: Edinburgh University Press, 1994) [ISBN 9780748605149] (available in VLeBooks via the Online Library).**
- **Kamali, M.H. *Principles of Islamic jurisprudence*. (Cambridge: The Islamic Texts Society, 2003) third edition [ISBN 9780946621828].**

In this module guide the core texts will be referred to by the author's name. Where you are being directed to another publication by the same author, the full title of that publication will be given.

Essential and further readings

We also recommend the following materials for a general introduction to Islamic law.

- **Baderin, M.A. (ed.) *International law and Islamic law*. (Aldershot: Ashgate Publishing Ltd, 2008) [ISBN 9780754627159] (available in E-book Central).**
- **Baderin, M.A. (ed.) *Islamic law in practice*. Vol.3 of the Ashgate Islamic Law Series (Farnham: Ashgate Publishing Ltd, 2014) [ISBN 9780754628774]. This book is expensive and only recommended if you have access to a copy in a library. But you should read the introduction, 'The application of Islamic law in context'.**
- **Baderin, M.A. (ed.) *Islamic legal theory*. Vol.1 of the Ashgate Islamic Law Series (Farnham: Ashgate Publishing Ltd, 2014) [ISBN 9780754628781]. This book is expensive and only recommended if you have access to a copy in a library. But you should read the introduction, 'Islamic legal theory in context'.**
- **Baderin, M.A. (ed.) *Issues in Islamic law*. Vol.2 of the Ashgate Islamic Law Series (Farnham: Ashgate Publishing Ltd, 2014) [ISBN 9780754628767]. This book is expensive and only recommended if you have access to a copy in a library. But you should read the introduction, 'Islamic substantive law in context'.**

- **Cotran, E. and C. Mallat (eds) *Yearbook of Islamic and Middle Eastern law.* (London: Kluwer Law International) 1995: Vol. 2 [ISBN 9789041102577] and 1996: Vol. 3 [ISBN 9789041108838] (available in HeinOnline). This book has been published since 1994. It contains useful country surveys of all Arab and North African countries but also covers Islamic law as applied in other parts of the world, such as South Africa, Malaysia and Pakistan.**
- **Fyzee, A. (ed.) *Outlines of Muhammadan law.* (Delhi: Oxford University Press, 2009) fifth edition [ISBN 9780198063605].**
- **Hallaq, W.B. A history of Islamic legal theories. (Cambridge: Cambridge University Press, 1997; reprinted 2005) [ISBN 9780521599863] (available in Cambridge Core).**
- **Hallaq, W.B. *An introduction to Islamic law.* (Cambridge: Cambridge University Press, 2009) [ISBN 9780521678735].**
- **Hallaq, W.B. *Shari'a: theory, practice, transformations.* (Cambridge: Cambridge University Press, 2009) [ISBN 9780521678742].**
- **Hallaq, W.B. *The origins and evolution of Islamic law.* (Cambridge: Cambridge University Press, 2005, third printing 2007) [ISBN 9780521005807] (available in VLeBooks via the Online Library).**
- **Liebesny, H.L. *The law of the Near and Middle East: readings, cases and materials.* (Albany: State University of New York Press, 1975) [ISBN 9780873952569].**
- **Mahmood, T. 'Law in the Qur'an: a draft code' (1987) VII *Islamic and Comparative Law Quarterly* 1.**
- **Mansoori, M.T. *Family law in Islam: theory and application.* (Islamabad: Shariah Academy, 2006) [ISBN 9789698263485].**
- **Pearl, D. and W. Menski (eds) *Muslim family law.* (London: Sweet & Maxwell, 1998) third edition [ISBN 9780421529809].**
- **Peters, R. *Crime and punishment in Islamic law: theory and practice from the sixteenth to the twenty-first century.* (Cambridge: Cambridge University Press, 2005) [ISBN 9780521796705].**
- **Schacht, J. *An introduction to Islamic law.* (Oxford: Oxford University Press, 1982) [ISBN 9780198254737].**
- **Schacht, J. *The origins of Muhammadan jurisprudence.* (Oxford: Clarendon Press, 1950; paperback 1979) [ISBN 9780198253570].**
- **Weiss, B. 'Interpretation in Islamic law: the theory of *Ijtihad*' (1978) 26(2) *American Journal of Comparative Law* 199.**
- **Welchman, L. *Women and Muslim family laws in Arab states.* (Amsterdam: Amsterdam University Press, 2007) [ISBN 9789053569740] (available in VLeBooks via the Online Library).**

English translations of classical manuals on Islamic law

You should be aware of important classical books of Islamic law or jurisprudence that are considered as key primary texts on the subject. Listed below are three such texts available in English translation.

- **Khadduri, M. al-Shafi'i's Risala: treatise on the foundations of Islamic jurisprudence. (Cambridge: The Islamic Texts Society, 1991; reprinted 2008) [ISBN 9780946621156].**

This is an English translation of what is acknowledged by Islamic legal scholars as the first formal treatise on Islamic jurisprudence written by Imam al-Shafi'i, the founder of one of the four Sunni schools of Islamic jurisprudence, in the second century of Islam. On the basis of this text al-Shafi'i is symbolically referred to today as the 'Father of Islamic Jurisprudence'. The text continues to have a significant influence on the study of Islamic jurisprudence.

- **Nyazee, I.A.K. *The distinguished jurist's primer: Bidāyat al-Mujtahid wa Nihāyat al-Muqtasid, Ibn Rushd*. Vols I and II (Reading: Garnet Publishing Ltd, 1994) [ISBN 9781859641392].**

This is an English translation of one of the most acknowledged books on comparative Islamic jurisprudence (*khilāf*). The author is the 12th century Muslim jurist and philosopher Ibn Rushd, commonly known as Averroes in the West. It records the views of the different schools of Islamic jurisprudence on issues of Islamic jurisprudence and compares them, sometimes indicating what the author considers to be the better view. It is a standard primary source on Islamic jurisprudence used in many universities in the Muslim world for the study of Islamic law. Volume I covers the religious aspects of the *Shari'ah*, while Volume II covers temporal aspects, including some of the issues on substantive Islamic law covered in this module.

Free electronic copies are available see: Volume I and Volume II.

- **Nyazee, I.A.K. *Al-Hidāyah: the guidance*. (Bristol: Amal Press, 2006) [ISBN 9780954054496].**

This is an English translation of the 12th century al-Marghinani's *al-Hidāyah*, which is acknowledged as one of the finest classical sources of Islamic jurisprudence of the Hanafi school. The text played a key role in the development of the amalgam of Islamic and British law to form the so-called Anglo-Muhammadan law in the Indian sub-continent. It is in two volumes covering both the religious and temporal aspects of the *Shari'ah*.

1.5 The examination

Important: the information and advice given below applies to the examination structure used at the time this guide was written. However, the University can alter the format, style or requirements of an examination paper without notice. Because of this, we strongly advise you to check the instructions on the paper you actually sit.

You will be asked to answer four questions out of a total of eight in an unseen timed examination. The examination will be divided into two parts from which you will be required to answer at least one question from each part. The questions in Part One of the examination relate to Chapters 1–3 in Part I of the guide and the questions in Part Two of the examination relate to Chapters 4–12 of Part II of the guide. Always use your time so that you can answer four questions, devoting, if possible, the same amount of time to each question. Remember that **all** questions carry the same amount of marks. It is essential to write clearly. Marks may be lost if an answer is illegible. Try to collect and arrange your thoughts before you begin to write in order to present a logical argument and to avoid repetition.

NOTES

2 Introducing Islamic law

Contents

Introduction

A study of Islamic law without an appreciation of the history of Islam as a religion would be impossible. The origins of Islam offer explanations for many of the fundamental features of Islamic law. You will have to familiarise yourself with an outline of the early history of Islam and Islamic law, the main sources of Islamic law and the emergence of different schools of Islamic jurisprudence. It should be noted that this is not just 'background' reading but forms an essential and examinable part of the syllabus.

Islamic law is often referred to as the *Shari'ah*, which literally translated means 'the path'. Technically, however, the term *Shari'ah* can be used in different contexts in relation to Islamic law. The jurisprudential science of Islamic law is called the *fiqh* which, literally translated, means 'understanding' but technically means 'jurisprudence'. It is important to appreciate the difference and link between the two terms.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **describe the history of Islam from its pre-Islamic Arabian setting up to the Abbasid dynasty**
- **explain the basic influence of pre-Islamic tribal customary law on the development of Islamic law**
- **analyse the historical development of Islamic law**
- **display a sound knowledge of the life of the Prophet Muhammad**
- **describe the role of Islam and relevance of Islamic law in the contemporary world in general terms.**

2.1 Islamic law in the modern age

Core text

- **Coulson, Chapter 12 'Administration of Shari'a law in contemporary Islam'.**

Further reading

- **Schacht (1982) Chapter 15 'Modernist legislation'.**
- **Hallaq, *An introduction to Islamic law*. Chapter 8 'The law in the age of nation-states' and Chapter 9 'State, ulama and Islamists'.**

The relevance of Islamic law in the modern age is reflected in its continued influence on both domestic and international law, particularly in parts of the world generally referred to as the 'Muslim world'. In many Arab and non-Arab countries, it still forms the basis of the legal system, though in many instances it has been reformed and codified. Many countries with majority Muslim populations (such as Afghanistan, Iran and Pakistan) are officially designated as Islamic Republics and the constitutions of many others (such as Saudi Arabia, Libya, Morocco and the Maldives) contain provisions to the effect that Islam is the state religion and that all laws should be in conformity with Islam. However, Islamic law is not only relevant in countries with majority Muslim populations: many legal systems allow Muslims to be governed in the area of family law by Islamic law. The best example of this partial recognition and application of Islamic law is the Republic of India. India is constitutionally a secular state but its Muslim population is governed in the area of family law by Islamic law. Other examples include Singapore and the Philippines, where Islamic personal laws apply to the minority Muslim populations.

Malaysia and Nigeria, both of which have Muslim majority populations, are examples of a mixed legal system. Islam is the state religion of Malaysia but the majority of laws in force in Malaysia today were introduced during British colonial rule. However, Islamic law is nevertheless an important source of law, especially in the area of family law where it is applied by special Islamic courts (the *Syariah* courts, as they are called in Malaysia). These courts also have a very limited jurisdiction to deal with minor offences against Islamic law. However, the jurisdiction of the Islamic courts is limited to Muslim citizens.

Nigeria does not designate Islam as a state religion but operates a mixed system of law consisting of English law introduced during British colonial rule, Islamic personal law and customary law. However, in recent years some of the states in Northern Nigeria have begun not only to apply Islamic law in matters of personal status such as marriage, divorce, custody of children and succession on death, but also to criminal offences. The aim of the governments of these Muslim states is to re-introduce the application of the *Shari'ah* in its entirety within their jurisdictions.

2.2 The role of the *Shari'ah* in international law

Core text

- **Baderin, Chapter 8 'International law'.**

Essential reading

- **Baderin, *International law and Islamic law* 'Introduction'. This is available on the VLE.**

The Islamic law of nations (*Siyar*), the area of law that classically regulated the relationship between an Islamic state and a non-Islamic state, is not a separate body of law but an extension of Islamic law to the relationship of states. Islam and Islamic law were conceived traditionally as intended for all humankind and during the initial expansionist phase of Islam, under the reigns of the successors to the Holy Prophet Muhammad, it was assumed that eventually all of humankind, or most of humankind, would have converted to Islam. This has not happened, however, and Islamic states came into existence which had to establish proper relations with their non-Islamic neighbours. The Islamic law of nations therefore reflects not only the expansionist

phase of Islamic history, with its emphasis on the rules regulating warfare (*jihad* or *qital*), but also relations in times of peace and the emergence of distinct Islamic states. It follows that, though the Islamic law of nations is essentially based on the Qur'an and the *Sunnah*, it nevertheless incorporates many practices derived from Islam's direct experiences with neighbouring countries and the circumstances of the time.

At the core of the Islamic law of nations is the concept of the Muslim *ummah*. The Muslim *ummah* is the community of all those who profess the Islamic faith. Theoretically, at least, the *ummah* is potentially capable of embodying the whole of humankind. In practice, however, the world was split into the territory of Islam (the *dar al-Islam*) and the rest of the world, which was collectively known as the 'territory of war' (*dar al-harb*). Within the war-prone situations of the time, it was considered a duty of the Muslim ruler to bring the 'territory of war' within the *ummah*. The Shafi'i school of law recognises a further category, namely the 'territory of peaceful arrangement' (*dar al-sulh*). (See Section 3.4 for an explanation of the schools of Islamic law.)

The existence of the 'territory of war', which entailed that all relations with this territory were necessarily temporary until it was integrated into the *ummah*, did not mean that no agreements could be concluded between the Islamic and the non-Islamic state. In practice, agreements were concluded even though the non-Islamic state was not recognised as equal. Some of the jurists argued that the treaty-making powers of a Muslim ruler were restricted in that he could not enter into a permanent peace-treaty with a state within the 'territory of war' since this would defeat the duty to integrate the 'territory of war' into the *ummah*.

The tool that was to convert the 'territory of war' into the 'territory of Islam' was *jihad*, which literally means 'striving' but also included just wars. *Jihad* is the obligation on every Muslim to achieve Islam's ultimate aim, namely the universalisation of Islam. This does not, however, necessarily entail aggressive wars, since the obligation to spread Islam can also be carried out by peaceful and persuasive means. *Jihad*, however, necessarily entails defensive war to protect the religion from annihilation by the enemy. The Islamic law of nations regards as unjust any war that does not entail the concept of *jihad*, particularly in defence of the Islamic faith.

The concept of the 'territory of Islam' (*dar al-Islam*) does not imply that within that territory no non-Muslim is allowed to live. One of the cardinal principles of Islam is the absence of coercion. Non-Muslims were traditionally allowed to retain their religions and were given a special status of either protected subjects (*ahl al-dhimmah*) or safe aliens (*musta'minin*).

Over time, the jurists had to recognise that the existence of the 'territory of war' was more permanent than initially envisaged and that the relations between the two worlds had to be conducted by peaceful means. In the 21st century the 'territory of Islam' and the Muslim *ummah* is itself split into numerous Islamic countries and these Islamic states are fully integrated into the wider community of nations on the basis of equality and reciprocity. The concept of *jihad*, significant in the early phase, owing to the circumstances of the time, has now given way to the desire of Muslim nation states to co-exist with non-Islamic nations. Thus, the rules of peaceful co-existence under the classical Islamic law of nations are awarded much greater prominence over the rules of warfare by contemporary Muslim nation states in consonance with similar rules of modern international law. Unfortunately, this desire has been threatened by 'Islamic' extremists of various persuasions who have challenged this aim.

Self-assessment questions

1. **Describe the importance of Islamic law in the modern world.**
2. **Compare and contrast the position of Islamic law in (a) Saudi Arabia, (b) Pakistan and (c) Malaysia.**
3. **Describe the role of the *Shari'ah* in international law.**

Further reading

- **Harding, A. 'Islamic law in Malaysia' in Cotran and Mallat, Vol.2. This reading is available on the VLE.**
- **Pearl and Menski, pp.45–50.**
- **Gibb, H.A.R. *Islam: a historical survey*. (Oxford: Oxford University Press, 1978) [ISBN 01988880170] Chapter 10. This reading is available on the VLE.**

2.3 The historical basis of Islamic law

Core texts

- **Baderin, Chapter 1 'Historical development'.**
- **Coulson, Chapter 1 'Qur'anic legislation' and Chapter 2 'Legal practice in the first century of Islam'.**

Essential reading

- **Schacht (1982), Chapter 2 'The pre-Islamic background' and Chapter 3 'Muhammad and the Koran' (available on the VLE).**
- **Fyzee, pp.2–9 (available on the VLE).**

2.3.1 Pre-Islamic Arabia

It is important to understand the historical setting of the advent of Islam in order to understand the basic principles of Islamic law. Pre-Islamic Arabia was inhabited by tribal communities who followed animistic religions. The tribal community was the focal point for the individual. Survival outside the tribal community was difficult if not impossible. The tribes themselves developed their own sets of customary laws that were binding on all members. Besides the tribal communities there were trading communities in Mecca and Medina who enjoyed commercial relations with areas outside Arabia. The merchants and traders had developed their own set of mercantile laws.

2.3.2 The early years of Islam

The advent of Islam following the revelations of God's word to the Prophet, the spokesman of God, led to the founding of a formal Islamic community in Medina in the year 622 ce, after the Prophet's migration there from Mecca. The tribal communities by and large converted to Islam and gradually Islamic codes of conduct and Islamic law modified or completely replaced tribal customary law. As will be seen throughout this module guide, in many instances Islamic law did not completely replace tribal customary law but merely modified it. This can be seen most clearly in the law of homicide and the law of marriage, both of which have retained substantial elements of pre-Islamic tribal law.

Muhammad himself came from the tribe of the Quraysh, the tribe that held Mecca. He established himself as a trader and married his first wife, Khadija, at the age of 25. They had two sons and four daughters but his sons died in infancy. The marriage of his daughter Fatima to Ali is important: the Shi'ah look upon the descendants of Fatima and Ali as the true successors of the Prophet. Muhammad was 40 years old when the first messages from God were revealed to him in Mecca. One of God's revelations commanded him to proclaim publicly what he had been told by God. The first conversions took place and a small community of believers emerged in Mecca – initially restricted to his family. One of the first converts, perhaps even **the** first convert, was Abu Bakr, his friend and subsequent father-in-law, since Muhammad married Abu Bakr's daughter Ayesha after the death of his first wife. Once the fact of the establishment of a community of believers had spread through Mecca, the citizens took against the community, fearing for their trading interest and their income. In the year 622 ce Muhammad was forced to migrate from Mecca due to religious persecution and he established a Muslim community in neighbouring Medina, and it is this year which marks the beginning of the Islamic calendar.

After the death of the Prophet Muhammad his friend and father-in-law, Abu Bakr, was elected Caliph, that is, the leader of the community of believers (the *ummah*). Under his leadership the empire of Islam expanded considerably, spreading as far as Egypt. Under Umar, the second Caliph, this expansion continued. After Umar's death a council of elders elected Uthman as the third Caliph, but his reign was marred by an army rebellion that led to Uthman being murdered at Medina. His successor was Ali, the Prophet's son-in-law, who was to become the 'founding father' of the Shi'ah sect. The reign of Ali marks the end of the rule of the four 'righteous' Caliphs (*al-Rashidun*), who are regarded in Sunni Islam as the undisputed successors of the Prophet. The difference between the Shi'ah and Sunni is explained in more detail in Chapter 3.

2.3.3 The development of Islam

From then onwards the Islamic world was divided into the Shi'ah and the Sunni. A succession of dynasties, beginning with the Ummayyads, who were followed by the Abbasids, ruled over the Muslim world. However, independent Muslim empires emerged in the middle of the eighth century and by the end of the century Persia, Spain, Morocco, Tunisia and Egypt were all governed by independent rulers.

The political fragmentation of the Islamic world had an effect on the development of Islamic law. In the early phase of Islamic expansion and unified political control under the Medina Caliphs, who were seen as 'the rightly guided ones' (*al-Rashidun*), it had been possible to achieve a consensus about the contents of Islamic law. However, during the rule of the Ummayyad dynasty a divergence of opinion began to emerge: scholars would pronounce their own ideas of standards of conduct and the true nature of Islamic law. It was under the Abbasid dynasty that the early schools of Islamic law began to develop. The main distinction between these early schools was their dispute over the role of legal reasoning. The traditionalists (the *ahl al-hadith*) maintained that there was no right for jurists to reason for themselves since the only authority on Islamic law was the Qur'an and the precedents set by the Prophet. In contrast, the rationalists (the *ahl ar-ra'y*) argued that jurists had the right to reason for themselves.

SELF-ASSESSMENT QUESTIONS

Write short answers to the following questions:

1. **What is the role of Islamic law in the world today?**
2. **Discuss the six major periods in the historical development of Islamic law.**
3. **In what ways did pre-Islamic tribal law influence the development of Islamic law?**
4. **Describe the emergence of Islam as a religion.**
5. **Write a 500-word summary of Coulson, Chapter 2.**
6. **Write an 800-word summary of Baderin, Chapter 1.**

FURTHER READING

- **Armstrong, K. *Islam: a short history*. (London: Orion Publishing Group, 2001) [ISBN 9781842125830] Chapters 1 and 2.**
- **Guillaume, A. *Islam*. (London: Penguin Books, 1977) [ISBN 9780140135558] Chapters 1 and 2. This reading is available on the VLE.**

Summary

The history of Islam and the emergence of Islamic law constitute essential background knowledge. It is equally important for you to realise the importance of Islamic law in the world today. This area of the syllabus is therefore not concerned with any specific area of law but expects you to demonstrate a good knowledge of the early stages of Islamic history.

Reminder of learning outcomes

Having completed this chapter and the relevant readings, you should be able to:

- **describe the history of Islam from its pre-Islamic Arabian setting up to the Abbasid dynasty**
- **explain the basic influence of pre-Islamic tribal customary law on the development of Islamic law**
- **analyse the historical development of Islamic law**
- **display a sound knowledge of the life of the Prophet Muhammad**
- **describe the role of Islam and Islamic law in the contemporary world in general terms.**

Sample examination questions

Question 1 **Discuss the role of pre-Islamic tribal customary law in the development of Islamic law.**

Question 2 **Compare and contrast the role of Islamic law in the legal systems of Malaysia and Pakistan.**

ADVICE ON ANSWERING THE QUESTIONS

Question 1 A good answer will display a good knowledge of the nature of the pre-Islamic law of Arabia. There should be a discussion of the patriarchal nature of the legal system and the lack of status accorded to women. It is important for a good answer to move the discussion forward so as to analyse the changes brought about by the coming of Islam. There should also be an indication of the extent to which pre-Islamic customs were completely abandoned, modified or retained.

Question 2 This question is best tackled through a historical approach, analysing and describing the colonial legacy of laws, including Islamic laws, which these countries inherited at the time of independence. In this respect it is important to note deviations from the classical law of the schools prevalent in these countries. There should be a discussion of the changes effected by statute and by judicial decisions (particularly in Pakistan) as well as a description of the institutional and legal mechanisms used to introduce Islamic laws.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can describe the history of Islam from its pre-Islamic Arabian setting up to the Abbasid dynasty.	☐	☐	☐
I can explain the basic influence of pre-Islamic tribal customary law on the development of Islamic law.	☐	☐	☐
I can analyse the historical development of Islamic law.	☐	☐	☐
I can display a sound knowledge of the life of the Prophet Muhammad.	☐	☐	☐
I can describe the role of Islam and Islamic law in the contemporary world in general terms.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
2.1	Islamic law in the modern age	☐	☐
2.2	The role of the *Shari'ah* in international law	☐	☐
2.3	The historical basis of Islamic law	☐	☐

NOTES

3 The origins, sources and evolution of Islamic law

Contents

Introduction

CORE TEXTS

- **Baderin, Chapter 2 'The nature of Islamic law' and Chapter 3 'Theory, scope and practice'.**
- **Kamali, Chapter 1 'Introduction to Usul al-Fiqh'.**

ESSENTIAL READING

- **Baderin, M.A. 'Islamic legal theory in context' in Baderin, *Islamic legal theory*, pp.xi–xlii.**

A sound knowledge and understanding of the origins, sources and evolution of Islamic law are essential for the study of Islamic law. This forms part of Islamic legal theory (*usūl al-fiqh*), which covers the jurisprudential rules relating to the nature, sources, methods and principles of Islamic law as well as its legal hermeneutics and juristic methodologies of interpretation. Islamic jurists consider Islamic legal theory as the basis of Islamic jurisprudence.

In every legal system the sources of the law constitute the foundation from which the law draws its validity. Thus, ascertaining the sources of the law is the first major objective of Islamic legal theory, followed by the rules and methodologies of interpretation of the sources. Islamic law is primarily a religious law as it is based on religious sources. All the schools and sects of Islam accept that the two main sources of the *Shari'ah* are the Qur'an and the *Sunnah*. These two sources are not only the basic textual sources of Islamic law but are also the principal religious texts of Islam. It is important to appreciate the divine origins of both the Qur'an and the *Sunnah* in order to understand why and how Islamic law has developed sophisticated methods of interpretation and law-finding so as to arrive at concrete legal rules capable of solving real legal problems. This chapter on the origins, sources and evolution of the law is therefore not confined to an exposition of the textual sources of Islamic law but is also concerned with an introduction to the different methods of law-finding. You will see that, especially on the latter, there exist considerable differences between the schools of Islamic jurisprudence (also called schools of Islamic law). For example, there are differences between the Sunni and the Shi'ah schools as to what constitutes the *Sunnah,* as the Shi'ah consider traditions from their own Imams as being of divine inspiration.

The secondary sources, which are also called methods of Islamic law, are *ijmā'* (consensus) and *qiyās* (analogy) based on *ijtihad*. There are also different principles for the application of the law, such as *istihsan* (juristic preference), *maslahah* (welfare), *darurah* (necessity), *istishāb* (presumption of continuity), *urf* (custom), *takhayyur* (eclectic choice) and *talfiq* (patching up), all of which are covered in the readings. As will be explained below and in the readings, the application of the methods and different principles varies widely between the different schools of Islamic jurisprudence.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings, you should be able to:

- **describe and discuss the main characteristics of Islamic law**
- **distinguish between the sources, methods and principles of Islamic law**
- **explain the emergence, development and role of the different schools of Islamic jurisprudence**
- **produce a chronology of the evolution of Islamic law.**

3.1 The *Qur'an* and the *Sunnah*

Core texts

- **Coulson, Chapter 1 'Qur'anic legislation', Chapter 2 'Legal practice in the first century of Islam' and Chapter 5 'Concluding stages of growth'.**
- **Kamali, Chapter 2 'The first source of Shari'ah: the Qur'an' and Chapter 3 'The Sunnah'.**

3.1.1 The Qur'an

Muslims believe that the Qur'an was revealed piecemeal by God to the Prophet Muhammad through the angel Gabriel, over a period of about 23 years. The fount of revelation came to an end with the death of the Prophet Muhammad in 632 ce, because it was only to him that the divine will was revealed. The Qur'an thus contains the divine commands of God and it is the duty of every Muslim to submit themselves to these commands. The word 'Islam' itself denotes 'submission to the will of God'. The Qur'an contains about 6,219 verses, collected in 114 chapters called *surahs*, but no more than about 600 deal with specifically legal matters. You will observe from the readings that there is a great difference between Western scholars, such as Coulson, and Muslim scholars, such as Kamali, as to the number of specifically legal verses in the Qur'an.

The essentially legal verses deal mainly with areas of family law, but also cover issues of penal and civil law, some of which will be discussed in later chapters. In family law, among the most important issues dealt with are the introduction of the *iddah* period (the waiting period after divorce or death during which a woman may not contract a new marriage) and the specific naming of nine heirs (Qur'anic heirs) in the verses dealing with succession on death. The verses in the Qur'an which are of a more general nature, eschewing evil and seeking good, however, have also proved to be foundations for important principles of Islamic law. For example, the verse 'O Believers abide by your stipulations' (*Surah* 5 verse 1) is considered as the basis of the Islamic law of contract and the verse 'The recompense for an injury is an injury equal thereto' (*Surah* 42 verse 40) as the basis of the Islamic law of tortious liability.

The Qur' anic verses are classified under Islamic legal theory into different categories such as the definitive (*qat'ī*), the speculative (*žannī*), the general (*āmm*) and the particular (*khāss*), among others.

It is historically uncertain whether the Qur'an was committed to writing during the lifetime of the Prophet. One view is that some companions of the Prophet personally wrote verses of the Qur'an on materials such as animal skins, shoulder blades of animals and pieces of tablets, whereas other views propose that the writing-down happened after the death of the Prophet. What is certain is that official written versions of the Qur'an were compiled during the reign of the first Caliph, Abu Bakr, and the third Caliph, Uthman. Muslims believe that the version of the Qur'an compiled during the reign of Caliph Uthman is what constitutes the standard text today.

3.1.2 The *Sunnah*

The *Sunnah* of the Prophet is the other main source of Islamic law. The *Sunnah* comprises the sayings, practices and tacit approvals of the Prophet. In pre-Islamic Arabia the tribes followed their own various customary practices (i.e. their own *Sunnah*). With the coming of Islam the jurists began to place a new emphasis on the *Sunnah*. Imam Shafi'i, one of the greatest of the early Islamic jurists, after whom the Shafi'i school of law was named, held that the Sunnah of the Prophet was as important as the Qur'an itself – because like the Qur'an it was also of divine inspiration. He quoted the injunction to Muslims contained in the Qur'an to obey the *kitab* (the book, i.e. the Qur'an) and the *hikmah* (wisdom), and argued that, as the Qur'an does not usually contain two different words that have the same meaning, 'the book' and 'the wisdom' are two different concepts. The former relates to God and the latter relates to the Prophet. Some historical scholars have suggested that the theory of the divine inspiration of the *Sunnah* of the Prophet pre-dated Shafi'i. However, we can say that

from the time of Shafi'i onwards certainly the *Sunnah* played as important a role as a source of law as did the Qur'an. It is a fundamental principle of Islamic law that the Qur'an and the *Sunnah* would not contradict but complement one another.

Shafi'i categorised the *Sunnah* into three types, namely, the *Sunnah* which prescribes the like of what God has revealed in His book, then the *Sunnah* which explains the general principles of the Qur'an and clarifies the will of God, and lastly the *Sunnah* in which the Prophet has ruled on matters on which the Qur'an is silent.

SELF-ASSESSMENT QUESTIONS

1. **How did the Qur'an come into existence?**
2. **What is the position of the Qur'an as a source of law?**
3. **Describe how the divine character of the Qur'an impacts on the development of Islamic law.**

3.1.3 *Hadīth* material

The *Sunnah* comprises the reported sayings, practices and precedents of the Prophet Muhammad himself. These were recorded after the death of the Prophet Muhammad and compiled in collections of *ahādith* (the plural of *hadīth*). A *hadīth* is an oral communication traced back to the Prophet Muhammad. Each *hadīth* consists of two parts. The first part charts the chain of communication (*isnad*) of the sayings of the Prophet from the first to the last informant. The status and the credibility of a *hadīth* depends therefore, to some extent, on the status and the credibility of the informants. The second part of the *hadīth* concerns the formal content (*matn*) of the saying or practice of the Prophet itself.

Islamic legal theory later developed a sophisticated science of *hadīth* for verifying whether or not a *hadīth* can indeed be traced back to the Prophet or, later, to one of his companions. *Ahādith* are accordingly classified by *hadīth* scholars depending on the reliability with which this chain of communication can be established and the veracity of the formal content. The highest grade of transmitted *hadīth* is 'sound' (*ahsan*). Next comes 'good' (*hasan*). The lowest grade of credibility is termed 'weak' (*da'īf*).

SELF-ASSESSMENT QUESTIONS

1. **What is the place and role of *hadīth* in Islamic law?**
2. **At what point in the development of Islamic law did *the Sunnah* become a source of law?**
3. **Describe and explain the relationship between Qur'anic provisions and *the Sunnah*.**
4. **How would you distinguish between *Sunnah* and *hadīth*?**

FURTHER READING

- **Mahmood, T. 'Law in the Qur'an: a draft code' (1987) VII *Islamic and Comparative Law Quarterly* 1.**
- **Schacht, J. 'A revaluation of Islamic traditions' (1949) 2 *Journal of the Royal Asiatic Society of Great Britain and Ireland* 143–54.**
- **Hallaq, W. 'The authenticity of Prophetic *hadīth*: a pseudo-problem' (1999) 89 *Studia Islamika* 75–90.**
- **Liebesny, Chapter 1 'Basic characteristics of Islamic law'.**

3.2 *Ijmā'* and *qiyās*

Core texts

- **Kamali, Chapter 8 'Ijma' or consensus of opinion' and Chapter 9 'Qiyas (analogical deduction)'.**
- **Coulson, Chapter 4 'Master architect: Muhammad Ibn-Idris ash-Shafi'i' and Chapter 6 'The classical theory of law'.**

3.2.1 I*jmā'*

Ijmā' (consensus) represents the third source of Islamic law. The authority of *ijmā'* as a secondary source of Islamic law is based, principally, on a *hadīth* attributed to the Prophet which states that 'My people will never agree on an error'. However, the different schools of law interpret *ijmā'* in different ways. See Section 3.4 for more details about the schools of law.

The classical view of Shafi'i was that *ijmā'* is binding only when it is a consensus of the entire Muslim community. According to Shafi'i the role of *ijmā'* is restricted to matters of religious belief and religious practice: matters such as the number of times a day a Muslim should pray, the fast of Ramadan and the performance of the pilgrimage to Mecca and so on (i.e. matters on which all Muslims are agreed).

The view of the other three schools of Sunni Islam was not so confined. Their conception of *ijmā'* allows Islamic law to arrive at authoritative interpretations of the two most important sources of Islamic law (the Qur'an and the *Sunnah*). Only those interpretations, forms of worship and legal practice that are approved by consensus are authoritative and binding on the *ummah* (the community of believers) without exception. However, the scope for *ijmā'* was wider than just providing binding interpretations of the Qur'an and the *Sunnah*, as questions not covered by the Qur'an and the *Sunnah* could also be answered by *ijmā'*.

Nevertheless, the principle of *ijmā'* did not mean that the masses could somehow collectively agree on a certain course of action. The group of people whose consensus was capable of establishing a binding rule of Islamic law was confined to those learned in the law (Islamic jurist-theologians of a given period). The practical value of *ijmā'* became very limited since it was impossible to obtain a consensus on a given problem by just asking all those learned in Islamic law. There was no organisation that represented all jurists and as a result *ijmā'* has come to be determined by looking into the past. For example, if there is doubt about a certain interpretation of the Qur'an, it is possible to look into the past and to find out that a certain interpretation has become accepted through *ijmā'*, because all jurists had agreed on that particular interpretation and it had been followed for a long time. It goes without saying that *ijmā'* can never be contrary to the Qur'an or the *Sunnah*.

Once a certain legal principle or a certain interpretation has been established by the consensus of the jurists it cannot be repealed or deviated from. The reason for this is simple; *ijmā'* represents the truth, since God would not allow His followers to err collectively. There can be no reason why the right principle, once established, should become wrong at a later stage.

A good illustration of the principle of *ijmā'* occurred right after the death of the Prophet. No guidance was available on how to determine who would act as a political leader after the death of the Prophet. The election of Abu Bakr to the post of Caliph by the votes of the people was the first manifestation of *ijmā'* among the companions of the Prophet.

During the development of Islamic law, certain qualifications came to be regarded as essential for deciding who would be allowed to participate in the process of arriving at a rule of law on the basis of *ijmā'*. Minors and lunatics were excluded, as were non-Muslims, and eventually the power to participate in *ijmā'* was confined to jurists (i.e. persons learned in Islamic law).

Shafi'i believed that if the doctrine of 'consensus' prevailed, the differences between the then existing schools of jurisprudence, of which the most significant were the Hanafi and the Maliki, would be removed. However, by the time of Shafi'i's interpretation of the sources of law, the differences in the actual law being applied by the Hanafis and the Malikis were well established. Some of these differences concerned matters of minor importance but others were of major significance, such as the right of an adult Hanafi woman to contract her own marriage (a right denied to a Maliki woman) and the right of Maliki women to petition the court for divorce (a right denied to women by the Hanafi school). Both schools accepted Shafi'i's doctrine of the sources of law but were not prepared to change their practical application of it. They relied on a *hadīth*, allegedly of the Prophet, that states 'Difference of opinion amongst my people is a sign of the bounty of God'. This *hadīth* was accepted by all the schools and resulted in an acceptance of each other's orthodoxy and consequently an acceptance of different concepts of *ijmā'* within each separate school.

3.2.2 *Qiyās*

The fourth universally accepted source of Islamic law is *qiyās* (analogy). Unlike the other three sources, which are based more or less directly on the divine commandments, *qiyās* depends on human judgement, with indirect reference to the Qur'an and the *Sunnah*. *Qiyās* represents the attempt to deduce, from earlier decisions, a rule that can be applied to a case not directly covered by either the Qur'an or the *Sunnah*. The search for an analogy to the case in point is not restricted to any particular legal provision contained in the Qur'an or the *Sunnah* but can include the examination of the totality of law in order to find a solution which is most closely in line with the general spirit of Islamic law.

While *ijmā'* and *qiyās* are traditionally considered as the third and fourth sources of Islamic law respectively, they are jointly perceived as non-divine methods of Islamic law to distinguish them from the *Qur'an* and the *Sunnah* as the only divine and immutable sources of Islamic law.

Historically, Shafi'i is acknowledged as having played a significant role in the emergence of this hierarchy of sources for Islamic law before the formal development of the classical schools of Islamic jurisprudence (see Section 3.4). At the beginning of the 9th century, before the emergence of the Hanafi, Maliki, Shafi'i and Habali schools of jurisprudence, the Muslim jurists were divided into the adherents of *hadīth* or the traditionalists (*ahl al-hadith*) and the adherents of *ra'y* or the rationalists. There was mutual disagreement and disintegration between these two groupings regarding the use of text and reasoning as sources of law. Shafi'i sought to harmonise the two groupings through combining text and reasoning in identifying the law. Through his famous work, *al-Risālah*, he laid down the essence of his legal theory and provided a systemised scheme of identifying the sources from which the law must be derived through the hierarchical harmonisation of both the divine sources (the *Qur'an* and the *Sunnah*) and the human methods (*ijmā'* and *qiyās*). He is therefore symbolically recognised as the 'father of Islamic jurisprudence'.

ACTIVITY 3.1

a. Write a 250-word summary of Coulson, Chapter 6.

b. Write a 250-word summary of Kamali, Chapter 9.

c. Read Abdal-Haqq, 'Islamic law: an overview of its origin and elements' (2002) 7 *The Journal of Islamic Law and Culture* 27–81 (available in HeinOnline).

No feedback provided.

SELF-ASSESSMENT QUESTIONS

1. **What is the legal basis for *ijmā'*?**
2. **Whose consensus is required to bring about *ijmā'*?**
3. **Does *ijmā'* represent the making of law or does it only involve a new interpretation of existing law?**

4. **What are the limits on *ijmā'* as a source of law?**
5. **Do you consider *qiyās* to have had an important influence on the development of Islamic law?**
6. **Discuss the role of Shafi'i in the development of Islamic law.**

3.3 Further 'sources' and principles of Islamic law

Core text

- **Kamali, Chapters 12–15 and 19.**

Essential reading

- **Weiss, B. 'Interpretation in Islamic law: the theory of *Ijtihad*' (1978) 26(2) *American Journal of Comparative Law* 199 (available in JSTOR).**
- **Ali-Karamali, S.P and F. Dune 'The ijtihad controversy' (1994) 9(3) *Arab Law Quarterly* 238 (available in HeinOnline and JSTOR).**

There are also other 'sources' of Islamic law that do not come within the framework of Shafi'i's main hierarchy of the sources of the law. These are often referred to as principles of Islamic law to differentiate them from the main and subsidiary sources. These include *ijtihād* (individual reasoning), *istihsan* (juristic preference), *maslahah* (welfare), *darurah* (necessity), *istishāb* (presumption of continuity) and *urf* (custom), among others. A few of them are discussed below, while others can be found in the readings.

3.3.1 *Ijtihād*

Ijtihād, or individual reasoning, is the source of law most removed from the infallible divine inspiration. The idea that individual reasoning could be used in order to find legal solutions to legal questions not directly covered by the Qur'an and the *Sunnah* allowed jurists to provide answers even if *qiyās* (analogical interpretation of the existing sources of Islamic law) did not provide a solution to the case in point. The jurist could employ his own mental faculties to find a solution to the case from the totality of the law. *Ijtihād* is therefore a careful opinion formed by somebody learned in the law based on his comprehensive understanding of the main sources.

It is generally acknowledged that the privilege of *ijtihād* is restricted to the great scholars of Islamic law called the *Mujtahid*s. The question whether or not *ijtihād* can still be performed now is therefore controversial. There is a strong opinion in classical Sunni Islamic law, which is contested in modern Islamic legal scholarship, that by the 10th century all main principles of Islamic law had been completely settled by the great scholars and therefore 'the gates of *ijtihād*' had been closed. Shi'ah jurisprudence did not accept the concept of the 'closing of the gates of *ijtihād*'. For the Shi'ah, the hidden Imam (the 12th Imam of the Shi'ah, who was subsumed in the mosque of Samara near Baghdad) has always been a source of reinterpretation of existing concepts and even of fundamental changes. But, as a matter of fact, Shi'ah jurisprudence, like that of the Sunni, entered into a period of stagnation around the 10th century.

However, there are contemporary Islamic jurists who argue that the gates of *ijtihād* were never closed and that, for this reason, *ijtihād* should be employed to adapt Islamic law to the modern world. In practice, in many instances law reform measures carried out by way of legislation have adapted Islamic law to the requirements of the modern world. This is the case in many Arab countries and also in countries like Pakistan and Bangladesh. You will see examples of these reform measures in Chapter 7, dealing with the rights and obligations of a Muslim marriage.

The first tentative use of *ijtihād* in modern legislation was the Egyptian Law of Testamentary Dispositions of 1946. Verse 180 of *Surah* 2 of the Qur'an enjoins Muslims when they are approaching death to make bequests in favour of their nearest kinsmen. Most Sunni jurists considered that this verse was abrogated by later verses in the same *surah* which set out specific shares to certain heirs. Some jurists, however,

held that this abrogation applied only to the heirs specifically named in the Qur'an and that the verse constituted a genuine command to make bequests in favour of kinsmen who were not specified in the Qur'an as heirs. The Egyptian reformers adopted this view and then exercised *ijtihād* to designate orphaned grandchildren as the only heirs entitled to such an obligatory bequest.

Another tentative example of legislative *ijtihād* was the reason given by the Tunisian reformers when prohibiting polygyny. The memorandum accompanying the Tunisian Law of Personal Status of 1956 states that the juristic basis for the reform was the Qur'an itself. *Surah* 4 verse 3 of the Qur'an provides that a man may marry polygynously only where he is able to deal equally with several wives. Verse 129 of the same *surah*, however, states that however hard a man tries he will never be able to treat several wives equally. Interpretation of these apparently contradictory verses in traditional jurisprudence was that, as long as the man dealt equally with his wives in practical matters such as maintenance, housing and spending time equally between them, he had fulfilled all the obligations imposed upon him. The Tunisian lawmakers rejected this interpretation and adopted the interpretation advanced by the 19th century Egyptian jurist, Muhammad Abduh, that the two verses read together amounted to a prohibition of polygyny.

Another tentative example of the use of *ijtihād* is the Supreme Court of Pakistan's decision in *Khurshid Bibi* v *Muhammed Amin* PLD 1967 SC 97. In its decision, the Supreme Court gave a new interpretation of the verse on *khul'* which effectively gave the court the right to grant a judicial *khul'* (see Chapter 9).

An interesting use of judicial *ijtihād* was the judgment of Mr Justice Rabbani in *Md Hefzur Rahman* v *Shamsun Nahar Begum* 15 BLD (1995) 34. In this judgment, the learned judge re-interpreted the Qur'anic verses to mean that a woman was entitled to receive maintenance as long as she remained a divorcee (i.e. until she re-married). The traditional interpretation is that following divorce a woman will receive maintenance only while she is observing the *iddah* (see Section 9.5).

3.3.2 *Istihsan*

The recognition of *ijtihād* as a source of Islamic law was accompanied by an acknowledgement that certain principles of law could be applied to all cases so as to achieve an equitable, fair and just result. The recognition of equitable principles mitigated seemingly unfair or hard results. For instance, a legal rule derived by *qiyās* could at times lead to unattractive results. These unattractive results could be a conflict with another principle of Islamic law laid down by some other text, or the legal rule itself might, in the eyes of the jurist, be unsuitable for the situation at hand because it was too narrow or caused hardship.

The Hanafi school developed the principle of *istihsan* (juristic preference). It allowed a jurist to accept a rule that, in his opinion, would produce a better result. *Istihsan* is mostly confined to the Hanafi school of jurisprudence. The Malikis developed a similar principle of equitable jurisdiction that they termed *istislah* or *maslahah*. However, in contrast to the Hanafis, the Malikis never took full advantage of this form of judicial preference or equitable jurisdiction but applied it very cautiously. There has, however, been much more emphasis placed on the broad use of the Maliki principle of *maslahah* or *istislah* in recent times to address different modern questions confronting traditional juristic interpretations under Islamic law.

3.3.3 *Istishab*

Istishāb, or the presumption of continuity, is often referred to as a source of law but perhaps it would be better classified as a presumption of evidence. *Istishāb,* which is particularly prominent in the doctrine of the Shi'ah, denotes a legal presumption that a certain state of affairs continues to be regarded as persisting as long as there is no proof that that state of affairs has come to an end. The distribution of the estate of a *mafqūd* (a person who has disappeared) can serve as an illustration of this principle. Applying *istishāb* the Shafi'is would say that since there is no evidence of this person's

death his estate cannot be distributed to his heirs – legally he is presumed to be still alive since there is no evidence of his death. *Istishāb* is in this case acting as a shield to protect the estate of the *mafqūd*. However, the Shi'ah would go further and say that he is also entitled to receive any share to which he is entitled from the estate of another person who died during the period of his disappearance. On this the Sunni schools would disagree. According to the four schools of Sunni Islam any existing rights of the *mafqūd* will continue to exist until there is confirmation of death but no new rights can accrue. Under Sunni law the disappeared would therefore not be entitled to receive any shares of an inheritance. See Chapter 11 for more information about the issue of succession in Islamic law.

3.3.4 *Pre-Islamic law*

Finally, mention must be made of the debt that Islamic law owes not only to the pre-Islamic Arab customary law but also to external legal regimes. The influence of the Arab customs during the *Jahiliyyah* ('the period of ignorance' before the coming of Islam) is particularly strong in the law of the Sunni schools relating to succession on death. The pre-eminence accorded to the male agnatic line ('agnatic' meaning descended from the same male ancestor) has its origins in the former tribal law (see Al-Jabari's rule referred to in Chapter 11). Also, the obligatory dower paid to the wife on an Islamic marriage can be traced back to the bride price, which was paid to the parents or guardians of the bride in pre-Islamic Arabia, with the difference being that the Qur'an proclaimed the dower as a direct property of the bride rather than her parents or guardian.

Within a few years of the establishment of the Islamic community in Arabia its armies had conquered much of the surrounding territory. From these conquered territories the infant Islamic law also derived many of its concepts. From the Roman Byzantine law of Anatolia, for example, principles of civil contract were absorbed. Also, the administration of bazaars and markets was modelled on the Roman law. From the law of the Sassanian rulers of Persia, concepts of equality in marriage were adopted, particularly by the Hanafi school, whose origins were in the garrison city of Kufa, which was located close to the boundaries with the Sassanian empire.

It is also worth noting that at the time of Prophet Muhammad a considerable Jewish community flourished in Medina. By this time the Babylonian Talmud was complete and a well-established Rabbinical law was in place.

Self-assessment questions

1. **Explain the difference between *qiyās* and *ijtihād*.**
2. **What is meant by the 'closing of the gate of *ijtihād*' and what has its effect been on the development of Islamic law?**
3. **Does Islamic law recognise equitable principles?**
4. **Identify and briefly discuss the different views on the 'closing of the gate of *ijtihād*'.**

Further reading

- **Schacht (1982) Chapter 10.**
- **Hallaq, W. 'On the origins of the controversy about the existence of *mujtahids* and the gate of ijtihad' (1986) 63 *Studia Islamika* 129–41.**
- **Ali-Karamali, S.P. and F. Dunne. 'The *ijtihād* controversy' (1984) 9(3) *Arab Law Quarterly* 238–57.**
- **Hasan, A. 'Al-Shafi'ī's role in the development of Islamic jurisprudence' (1966) 5(3) *Islamic Studies* 239–73.**
- **Calder, N. '*Ikhtilāf* and *Ijmā*' in Shāfi'ī's *Risāla*' (1983) 58 *Studia Islamika* 55–81.**
- **Hourani, G.F. 'The basis of authority of consensus in Sunnite Islam' (1964) 21 *Studia Islamika* 13–60.**

- **Liebesny, Chapter 1 'Basic characteristics of Islamic law'.**
- **Hursh, J. 'The role of culture in the creation of Islamic law' (2009) 84 *Indiana Law Journal* 1401–23.**

3.4 Development of the classical schools of Islamic jurisprudence

Core Text

- **Coulson, Chapter 7 'Unity and diversity in Shari'a law' and Chapter 8 'Sectarian legal systems in Islam'.**

Further reading

- **Hallaq, *An introduction to Islamic law*. Chapter 3 ' The legal schools' and Chapter 4 'Jurists, legal education and politics'.**

After the death of the Prophet Muhammad, Islam continued to expand. Distances between the different areas under Muslim rule grew and as a result different centres of learning emerged. These centres of learning consisted of groups of pious persons who surveyed the existing law and engaged in *fiqh* (the science of law). These groups were initially geographically determined but later became known by the name of the individual jurists whom the members of these groups followed. There are four recognised schools of Sunni law: the Hanafi school, the Maliki school, the Shafi'i school and the Hanbali school. There are also three main schools of Shi'ah law: the Ithna Ashari school, the Ismaili school and the Zaydi school.

3.4.1 The Sunni schools

The doctrines of the Hanafi school, which was founded by Imam Abu Hanifa in what is now Iraq at the beginning of the eighth century, spread to Syria, Afghanistan, Turkish central Asia and South Asia. The Maliki school became dominant in the North African littoral, now the countries of Algeria, Tunisia and Libya, and over central and western Africa and the eastern Arabian coasts, including the emirates of Dubai and Abu Dhabi. The Shafi'i school can be found in eastern Africa, South Arabia, some parts of eastern India and South East Asia. The Hanbali school prevails in the Kingdom of Saudi Arabia, in the five non-Maliki emirates of the United Arab Emirates, and also in Qatar. All schools of Sunni law recognise each other as mutually orthodox.

3.4.2 The Shi'ah schools

There exists a broad division in Islamic jurisprudence between the Sunni schools and the sects of the Shi'ah. The most significant sect in Shi'ah Islam is the Ithna Ashari (the Twelvers). This Shi'ah sect, which is nowadays found mainly in Iran, Iraq and Bahrain (but also has sizeable minorities in other countries, including Yemen, Lebanon and Pakistan) differs in many respects from the Sunni schools. The Shi'ah emerged as a result of a political division in the Islamic community after the death of the Prophet. The term Shi'ah itself means faction and denotes the party which, after the death of the Prophet, attached itself to Ali, the son-in-law of the Prophet, considering him the successor of the Prophet both in temporal and religious matters. Central to Shi'ah jurisprudence is the role of the Imam, a descendant of Ali, who is regarded as the leader by divine right.

The Shi'ahs are divided into three main sub-sects. The prevalent sect is the Ithna Ashari followed by the Ismaili and the Zaydi. The Zaydis represent a very small minority within the Shi'ah sect. The distinctive hallmark of the Zaydis is that they regard the Imam as an ordinary human being who has no closer link to God than any other member of the community. Both the Ismaili and the Ithna Ashari, the latter being the most numerous Shi'ah sect, believe that the Imam has a close link to God, having been appointed by Him. However, the Ithna Ashari believe that there were no further Imams after the 12th Imam 'retired from the world' in 874 CE. In contrast, the Ismaili have

maintained an unbroken chain of Imams from the time of Ali down to the present Agha Khan.

By the end of the third century of the Islamic era the schools of law had crystalised and the law entered a period of rigidity and inflexibility. The role of the jurists was now to interpret the law rather than seeking its development by *ijtihād*. Many jurists and commentators have argued that the phenomenon of the 'closing of the gates of *ijtihād*' had taken place. Ibn Khaldun stated that all that remained after the basic texts had been produced and the continuity of their transmission had been established was to hand down the respective traditions of the schools and for each individual adherent to act in accordance with the traditions of their own school.

Little development and change occurred before the 19th century when the Ottoman Empire, which controlled the greater part of the Middle East, sought to modernise its laws along the European pattern. This was effected by the so-called Tanzimat reforms. Codes of Western inspiration were introduced, including a commercial code and a maritime code, based on the French code, and a penal code, which was also inspired by the French example.

The mid-19th century had of course seen the industrial revolution take place. Wealth began to be calculated by manufacturing ability and trade rather than land ownership. At this time the Ottoman Empire felt itself at a disadvantage in commercial matters, when the only law to which it had recourse was the *Shari'ah*. Accordingly the decision was taken to put aside certain areas of *Shari'ah* and replace them with codes of Western inspiration, mainly French and German. The Ottomans' reasoning was that the *Shari'ah* was God-given, immutable, but suited only to the 'perfect' world and that until perfection was achieved it was preferable to set aside portions of the law rather than attempt to change any of its divine provisions.

A significant change also took place in the civil law of contract and, to a lesser extent, when the *Mejella* was enacted in 1876. This was a law of 'obligations' as understood in civil law jurisdictions and was a codification derived solely from the law of the Hanafi school, the official law of the empire. The codification did not, however, include only accepted doctrines of Hanafi law but also the views of jurists which had never become the settled doctrine of the school. The *Mejella* was the first codification of the Islamic law of contract and tort and its importance continued long after the Ottoman Empire had ceased to exist. It was still being referred to in the early days of the Federation of the United Arab Emirates.

Although the Ottomans felt able to effect changes in the commercial, maritime and penal law of the empire, no attempt was made to change the law of the family considered as the very heart of the *Shari'ah*. However, in 1915 putative reforms took place by way of two imperial Firmans (imperial decrees issued by the Sultan). At this time many men from the provinces of the empire were coming into metropolitan Turkey for employment. Many of these men married local women and then all too often when their period of employment ended they would return home, leaving their Turkish wife behind without divorcing her or making provision for her maintenance.

Under the Hanafi law, the official law of the empire, such women were unable to petition the court for a divorce once their marriage had been consummated, nor could a married woman call upon her blood kinsmen to support her. One of the Firmans gave such women a right to seek a judicial decree from the court in accordance with Shafi'i doctrine. (The other Firman allowed women whose husbands had become insane to obtain a divorce.)

These initial reforms were followed two years later by the enactment of the Ottoman law of family rights which, after the dissolution of the empire at the end of World War I, continued to apply until comparatively recently in many former regions of the empire, such as Palestine and Jordan.

Most countries of the Middle East have now enacted laws of personal status, two most recent being the UAE law of 2002 and the Qatari law of 2006. The aim of all the laws is to codify the law, to make it as certain and easy to access as possible and to effect changes in the traditional law to make it more consonant with the modern age.

To achieve this aim most codes have introduced minimum ages for marriage, placed restrictions on polygyny, given women more grounds for divorce and have restricted, to some extent, the husband's right of repudiation. Most of the codes also extend the mother's period of custody of her children following divorce, and the law of succession has been amended to allow orphaned grandchildren to inherit.

In the Indian sub-continent a major reform took place in 1939 when the Dissolution of Muslim Marriages Act was promulgated. This law gave the women of the Hanafi majority a right to divorce hitherto denied them. This law was largely based on the doctrine of the Maliki school. Further statutory reforms occurred in Pakistan and Bangladesh by virtue of the Muslim Family Laws Ordinance 1961. Reform has also occurred in the sub-continent through case law, particularly in Pakistan, from judgments emanating from the Supreme Court. Reference to all the statutory and judicial reforms of the Middle East and the Indian sub-continent will be made in the relevant chapters of this guide.

The time after the end of the First World War which led to the demise of the Ottoman Empire also led to the creation of new nation states, such as Iraq, Jordan, Palestine and the Lebanon, and saw the secularisation of Turkey. When Kamal Ataturk became the President of Turkey he summoned the *Ulema* (legal scholars) and asked them to prepare a code which introduced reforms into the area of family law beyond those introduced by the Ottoman Law of Family Rights of 1917. The *Ulema* singularly failed to meet his demands and in 1926 he adopted the Swiss civil code with only slight amendments. Turkey thus became the first country of the Islamic world to secularise its law, stating in the preamble to the civil code that 'legislation must establish a separation between law and religion'.

After the end of the Second World War civil codes were enacted in rapid succession in the Middle East, beginning with the Egyptian Code of 1949, which was drafted by Abdel Razzak Sanhuri, as were basically all the other codes subsequently enacted in the Middle East (including to a great extent the code of the United Arab Emirates). Unlike the Turkish civil code, these codes did not seek secularisation but made provision for the *Shari'ah* as a source of law and, in case of a gap in the code itself, provided that this should be filled by reference to the *Shari'ah*. Sanhuri himself stated that in drafting the codes he 'did not leave out a single sound provision of the *Shari'ah* which could have been included'.

Self-assessment questions

1. **Describe the emergence of the four Sunni schools of Islamic law and assess their role in the development of Islamic law.**
2. **What are the main differences between the Shi'ah and the Sunni sects of Islam?**

3.5 Attempts at modern Islamic legal theory

Core Text

- **Coulson, Chapter 14 'Neo-Ijtihad' and Conclusion.**

Essential reading

- **Hallaq, *A history of Islamic legal theories*. Chapter 6 'Crises of modernity: toward a new theory of law?'. This is available on the VLE and in Cambridge Core.**

The 19th and 20th century processes of moving Islamic law forward to meet the challenges of modernity and the dynamics of human life led to attempts to incorporate a modern Islamic legal theory into Islamic law. Three main imperatives have been identified as influencing this attempt: namely, the need for greater unity, coherence and efficiency in Islamic law; the need for a proper Islamic legal identity which would meet modern challenges without renouncing the fundamental gains of the past; and the need to respond to elements of modern power and social progress, as exemplified by Western nations. This has led to new approaches in Islamic law, described by different scholars as 'neo-*ijtihād*', 'religious utilitarianism', 'religious liberalism' and 'moderation and balance'.

The first attempt at formulating a modern Islamic legal theory is often traced back to the Egyptian judge and jurist Muhammad Abduh (1849–1905). He is, however, considered to have been preceded by Jamaluddin al-Afghani (1838–97), who, in reaction to Western colonial activity in the Muslim world, urged Muslims to first reform and modernise their laws. Whether the concept of a modern Islamic legal theory has succeeded or not is still a subject of academic debate. There is no doubt, however, that those early efforts laid the foundations for a vibrant engagement with the classical and traditional perspectives on Islamic law, leading to the emergence of valuable modern academic debate and a broadminded approach that has greatly enriched our understanding of Islamic law in modern times.

Further reading

- **Kamali, M.H. *Shari'ah law: an introduction*. (Oxford: Oneworld Publications, 2008) [ISBN 9781851685653] Chapter 12 'Adaptation and reform' and Chapter 13 'Reflections on some challenging issues' (available in VLeBooks via the Online Library).**
- **Layish, A. 'Contribution of the modernists to the secularization of Islamic law' (1978) 14 *Middle Eastern Studies* 263–77.**
- **Clark, P. 'The Shahrur phenomenon: a liberal Islamic voice from Syria' (1996) 7(3) *Islam and Christian-Muslim Relations* 337–41.**
- **Bonderman, D. 'Modernization and changing perceptions of Islamic law' (1968) 81 *Harvard Law Review* 1169–93.**

Activity 3.2

1. **Write a 200-word summary of Hallaq, Chapter 6 (available in Cambridge Core).**
2. **Make a list of the similarities and differences in the legal approaches of the so-called 'religious utilitarians' and 'religious liberalists'.**

No feedback provided.

Summary

The historical circumstances of the emergence of Islamic law in the seventh century continue to determine the essential features of Islamic law today. The fact that Islamic law is a divine (i.e. religious) law has had a profound impact on the development of the sources of Islamic law. The divine character of Islamic law is not only reflected in the hierarchy and essential characteristics of these sources but also explains the conceptual limitations on individual law-making. However, the Islamic polity has developed legal methods to deal with situations not directly provided for in the Qur'an and the *Sunnah* of the Prophet. Indeed, many Arab countries have implemented modern codifications of Islamic law which, while being in harmony with Islamic law, nevertheless provide legal solutions for situations not contemplated in the main source of Islamic law.

Further reading

- **Humphreys, R.S. *Islamic history: a framework for inquiry*. (London: IB Tauris, 1995) [ISBN 9781850433606] Chapter 3 'Early historical tradition and the first Islamic polity'. This reading is available on the VLE.**
- **Goldziher, I. 'On the development of the hadith' in Stern, S. (trans.) *Muslim studies*. (London: Allen & Unwin, 1971) Vol.2 [ISBN 9780042900094].**
- **Burton, J. *An introduction to the hadith*. (Edinburgh: Edinburgh University Press, 1995) [ISBN 9780748604357] Chapter 1. This reading is available on the VLE.**
- **Burton, J. *The sources of Islamic law: Islamic theories of abrogation*. (Edinburgh: Edinburgh University Press, 1990) [ISBN 9780748601080].**
- **Makdisi, G. *The rise of colleges*. (Edinburgh: Edinburgh University Press, 1984) [ISBN 9780852243756].**

- Johansen, B. 'Legal literature and the problem of change' in Mallat, C. (ed.) *Islam and public law*. (Washington: CQ Press, 1993) [ISBN 9781853337680].
- Anderson, J.N.D. 'Law as a social force in Islamic culture and history' (1957) 20(1) *Bulletin of the School of Oriental and African Studies* 13–40.
- Ansari, Z.I. 'The contribution of the Qur'an and the Prophet to the development of Islamic fiqh' (1992) 3(2) *Journal of Islamic Studies* 141–71.
- Hallaq, W. 'Was the gate of *ijtihad* closed?' (1984) 16(1) *International Journal of Middle East Studies* 3–14.
- Hasan, A. 'An introduction to collective *ijtihad* (*ijtihad jama'i*): concept and applications' (2003) 20(2) *The American Journal of Islamic Social Sciences* 26–49.
- Yilmaz, I. 'Pakistan Federal Shariat Court's collective *ijtihad* on gender equality, women's rights and the right to family life' (2014) 25(2) *Islam and Christian Relations* 181–92.
- See also the readings listed in the Introduction and Chapter 1.

Reminder of learning outcomes

Having completed this chapter and the relevant readings, you should be able to:

- describe and discuss the main characteristics of Islamic law
- distinguish between the sources, methods and principles of Islamic law
- explain the emergence, development and role of the different schools of Islamic jurisprudence
- produce a chronology of the evolution of Islamic law.

Sample examination questions

Question 1 Discuss the importance of the Qur'an as a legal code.

Question 2 'As a divine law, the *Shari'ah* does not change.' Discuss.

Question 3 The 'closing of the gates of *ijtihād*' is a theory that was supported by such prominent scholars as Joseph Schacht and Noel Coulson. Explain and discuss the validity of this theory and opposing views.

Question 4 Discuss, with relevant examples, the classification and legal approaches of the so-called 'religious utilitarians' and 'religious liberalists'.

Advice on answering the questions

Question 1 In the answer to this question the primacy or otherwise of the Qur'an as a source of law must be discussed. Other sources of law should be examined and their importance considered. Special mention should be made to the reforms of the pre-Islamic system effected by the Qur'an itself.

Question 2 A good answer will include a careful discussion of the nature of law in Islam. In addition, there will have to be a discussion of the problems facing reformers seeking to bring a law which reached its peak of development over 1,000 years ago, but which is still in application, into a modern context. Explain how reformers have attempted to effect changes while remaining within an Islamic framework.

Question 3 This theory has been exposed to challenge. You should discuss the main theory and the contrary views to it and present your own views, bearing in mind that Islamic law remained virtually unchanged until the 19th century and the Tanzimat reforms. Discuss the continued use of *ijtihād* in various forms in the 20th and 21st centuries to bring about reform.

Question 4 A good answer will start by giving a brief background of what led to the emergence of these two groups. You will then define each of the two groups and acknowledge that this classification is specifically that of Hallaq. You will then discuss and engage with their respective legal approaches in relation to the interpretation and application of Islamic law in modern times. You must identify and cite examples of relevant scholars who have been associated with each of the two groupings and possibly discuss the significant divergence in their respective approaches.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can describe and discuss the main characteristics of Islamic law.	☐	☐	☐
I can distinguish between the sources, methods and principles of Islamic law.	☐	☐	☐
I can explain the emergence, development and role of the different schools of Islamic jurisprudence.	☐	☐	☐
I can produce a chronology of the evolution of Islamic law.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
3.1	The *Qur'an* and the *Sunnah*	☐	☐
3.2	*Ijmā'* and *qiyās*	☐	☐
3.3	Further sources and principles of Islamic law	☐	☐
3.4	Development of the classical schools of jurisprudence	☐	☐
3.5	Attempts at modern Islamic legal theory	☐	☐

Part II

4 Penal law

Contents

Introduction

CORE TEXT

- **Baderin, Chapter 7 'Penal law'.**

ESSENTIAL READING

- **Baderin, M.A. 'Islamic substantive law in context' in Baderin, *Issues in Islamic law*, Vol.2, pp.xiii–xl.**

FURTHER READING

- **Schacht (1982) Chapter 24 'Penal law'.**

While Islamic legal theory (*usul al-fiqh*), covered in the last two chapters, deals with the principles of Islamic jurisprudence, Islamic substantive law (*furu al-fiqh*) deals with the different specific branches of the law relating to issues under penal or civil law. These include Islamic criminal law, Islamic law of contract, Islamic law of tort, and Islamic family law among others. Starting with Islamic criminal law in this chapter, a number of these substantive issues in Islamic law will be covered in the remaining chapters of this module guide.

Islamic criminal law is one of the areas of law that is deeply influenced by pre-Islamic tribal law. The laws of homicide, bodily injury and rape, for example, are closely related to tribal law, and in many respects Islamic law can be regarded as an attempt to reform these earlier norms. It is also an area of law that exhibits fundamental differences with Western law in many of its characteristics. The most important of these differences is the fact that traditional Islamic law regarded many criminal offences as a matter of private law, whereas the distinguishing feature of Western criminal law is the fact that it is primarily the state and not the individual who is responsible for the prosecution and punishment of an offender. Nevertheless, in Western criminal law, the role of the victim is significant in these matters. It should be noted that even English law is increasingly prepared to give the victim of crime a role in the punishment of an offender. Thus, criminals can, for instance, be compelled to pay compensation to their victims by a criminal court.

While in most of the countries in the Muslim world modern penal codes have been enacted which depart from traditional Islamic penal law, one of the effects of the rise of political Islam has been the reintroduction of Islamic criminal law into the legal systems of some states. In Iran, following the establishment of the Islamic Republic, Islamic criminal law replaced the previous code which was based on a Western pattern. Pakistan, as part of the Islamisation programme initiated by General Zia ul Haq, also introduced some aspects of Islamic criminal law, as has Nigeria in those states of Northern Nigeria which are largely of Muslim majority. In the Kingdom of Saudi Arabia, of course, Islamic law applies in criminal law as well as in all other areas of the law. Brunei Darussalam also promulgated a Syariah Penal Code in 2013.

Some aspects of Islamic criminal law, especially the laws on sexual offences and on corporal punishment, are considered controversial within and outside the Muslim world. In this chapter, we will look at classical Islamic criminal law and examine the application of these laws in some modern Muslim-majority states, in particular the Islamic Republic of Pakistan.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings, you should be able to:

- **explain the principal features of Islamic criminal law**
- **distinguish between different types of offences**
- **understand and explain the evidential requirements for offences carrying the *hadd* punishment**
- **explain how Islamic criminal law is applied in Pakistan and its scope of application in some other Muslim-majority states.**

4.1 *Hadd*, *ta'zir* and *qisās* offences and punishments

Essential reading

- **Peters, Chapter 2 'The classical doctrine' (available on the VLE).**
- **Baderin, M.A. 'Effective legal representation in "Shari'ah" courts as a means of addressing human rights concerns in the Islamic criminal justice system of Muslim states' (2006) 11 *Yearbook of Islamic and Middle Eastern Law* 135–67 (available in HeinOnline).**

Islamic law distinguishes between offences for which the punishment is determined in the Qur'an or the *Sunnah*, and offences for which the punishment is established by the judge at his own discretion. Offences and punishments specified in the Qur'an or the *Sunnah* are called *hadd*, from the Arabic term for 'limit' or 'boundary'. Of these the most important offence is apostasy, the abandonment of Islam by a Muslim. Punishments which are at the discretion of the judge are called *ta'zir*.

Where an offence has been committed but there is insufficient evidence to warrant the application of the *hadd* punishment, the *ta'zīr* punishment is applied, subject to the discretion of the judge. However, it may never exceed the *hadd* punishment. The offences of homicide and bodily injuries are known as *qisās* offences.

4.1.1 Apostasy (*riddah*)

The punishment for apostasy under classical Islamic law is death, but before the sentence is carried out the accused must be offered the chance to return to Islam and belief. Apostasy is still a capital offence in Saudi Arabia, Yemen and the Islamic Republic of Iran. Apostasy does not appear as a criminal offence in either the Pakistan Penal Code (PPC) or the Code of Criminal Procedure of Pakistan. However, since the amendment of Article 295-C of the PPC to make blaspheming the name of the Prophet an offence punishable by death or life imprisonment, it is likely that an apostate would suffer the same penalty, as there can be no greater blasphemy of the Prophet than renouncing Islam and the role of the Prophet as the Messenger of God. Conversely, blaspheming the Prophet amounts to apostasy under classical Islamic law.

4.1.2 Sexual relations outside marriage (*zina*)

The second most serious *hadd* offence is that of *zina* (i.e. sexual relations outside of marriage). The offence therefore can either be the committing of adultery or fornication. Sexual acts which do not amount to having actual sexual intercourse are punished at the discretion of the judge and are, accordingly, *ta'zir* offences. The punishment for a person found guilty of *zina* who has at any time been married is death by stoning. In the case of a person who has never been married the punishment is a hundred lashes. To prove the *hadd* offence of *zina* the testimony of four eye-witnesses of the act of intercourse itself is required. Moreover, the eye-witnesses must be adult sane male Muslims possessing the highest degree of moral probity. Guilt may also be established by the confession of the accused, which must be maintained until punishment is carried out. It should be noted that in traditional Islamic law pregnancy outside marriage does not in itself constitute proof of the *hadd* offence of *zina*.

The early years of the new Islamic Republic of Iran saw the execution of many women charged with the offence of *zina*. There is no record of how the conviction of these women was obtained but it would have been virtually impossible for the *Shari'ah* standard of proof (i.e. eye-witness accounts of the act of sexual intercourse) to have been met or for all of the women convicted to have made a complete confession which they maintained even while punishment was carried out.

4.1.3 Theft (*sariqah*)

The third *hadd* offence is theft, known as *sariqah*, which is defined as taking and carrying away, without right, a thing of value from a protected place. Things that have no value in Islam such as pigs, pork or wine, cannot be the object of the *hadd* offence

of *sariqah*. The object itself must also have some worth, which is expressed usually in monetary terms. Keeping something that is found does not constitute *sariqah*. Again, to establish the *hadd* offence the testimony of two eye-witnesses of the highest moral probity is required. Circumstantial evidence can never suffice to procure a conviction to the *hadd* offence although it can result in the application of a lesser *ta'zir* punishment. The punishment for a first offence of *sariqah* is the amputation of the right hand. Subsequent offenders lose the left foot, then, if they steal again, the other hand and finally the remaining foot.

4.1.4 Other *hadd* offences

The fourth *hadd* offence is *qadhf* – falsely making an accusation of *zina*. Because of the jeopardy in which a person accused of *zina* is placed, and because of the draconian punishments which may result, to make such an accusation falsely is punished by 80 lashes.

The drinking of wine or other intoxicating liquids is also a *hadd* offence. Some countries, such as Saudi Arabia, have also made the taking of hallucinatory drugs a *hadd* offence. The punishment for this offence is 80 lashes. Unlike the lashes inflicted in the case of *ta'zir* for *zina* and for the false accusation of adultery, the lashes inflicted for drinking are not meant to inflict harm on the person but to shame him. Traditionally, it is recommended that the lash be held between the first and the second fingers of the hand (i.e. lightly). Similarly, under Maliki law, it is recommended that the person inflicting the lashes should hold an object under the armpit which must not be allowed to drop during the lashing. This prevents the infliction of heavy lashes due to the inability to raise the arm beyond the shoulders to prevent the object under the armpit from dropping.

The final *hadd* offence is *hirābah,* which is often translated as highway robbery, but which covers other offences committed by stealth. The punishment for *hirābah* was traditionally crucifixion, among other punishments prescribed in *Surah* 5 verse 33.

In Malaysia, a federal law – the Muslim Courts (Criminal Jurisdiction) Act of 1965 (as amended) – has limited the jurisdiction of the *syariah* courts by providing that the punishments imposable by the courts shall be limited to a maximum of three years imprisonment, or a fine of RM5,000, or a maximum of six lashes, or a combination of all these. The *syariah* courts in Malaysia can therefore not apply any of the traditional *hadd* punishments such as whipping above six lashes, amputations, crucifixion, stoning or the death penalty.

A further distinction is made in Islamic law between those crimes that involve a 'right of God' and those that involve only the right of an individual. In the first category fall the *hadd* offences (i.e. theft, illicit sexual relations, the drinking of alcohol, the unproved assertion of a chaste person's immorality and apostasy from Islam). Crimes involving 'the right of God' can be compared to the concept of a crime in English criminal law: the court, once seized of the matter, cannot drop the case nor can the aggrieved party withdraw the case or come to an out-of-court settlement with the accused. The second category, namely offences against the right of an individual but not against a right of God, includes homicide and wounding. These are regarded very much like a tort in English law: the aggrieved party can accept compensation, insist on retaliation or pardon the offender.

4.1.5 Homicide and injuries (*qisās*)

Islamic criminal law on homicide and wounding constituted a major reform of pre-Islamic tribal custom. Customary law demanded that a homicide was dealt with by revenge killings of not only the murderer but also of several of his fellow-tribesmen, since tribal pride regarded only several members of the murderer's clan to be equal to the victim from their own tribe. The result was inevitably a blood feud between clans that would last for many years.

Islamic law introduced three major reforms:

1. only the guilty party was liable for the crime and could be punished by being killed or wounded
2. a punishment was only imposed if the wounding or killing had been committed deliberately and wrongfully
3. the facts of the crime and the guilt of the accused had to be established before the ruler or a judge.

However, the principle of personal vengeance is preserved in Islamic criminal law: once guilt is established it is not the ruler or the judge who decides on the punishment of the guilty party but the victim or, in cases of homicide, the victim's heirs. The first option of the victim is to insist on **retaliation**. The second option is to waive the right of retaliation and to accept instead **monetary compensation** from the culprit. This sum payable to the victim or to the heirs is called *diyah*. The amount of *diyah* depends on the status of the victim. For instance, the blood-money payable for a woman is fixed at half the rate for a man; for a slave the amount was not fixed but determined by the slave's value. Where a slave is killed by a free Muslim, only the Hanafis allow retaliation for deliberate homicide. The other schools restrict the punishment to the payment of blood-money to the owner. The same principles apply to the killing of a non-Muslim: only the Hanafis allow for retaliation, whereas all other schools and sects restrict the punishment to blood-money, which is reduced to a lower level than that payable for a Muslim. The third option is **remission** (to forgive the culprit and not to insist on either retaliation or blood-money).

The McLauchlan and Parry case

Aspects of the criminal law of Saudi Arabia – both substantial and procedural – have been highlighted by the 1996 case of Lucille McLauchlan and Deborah Kim Parry, two English nurses who were accused of murdering an Australian colleague in Saudi Arabia. This was perhaps the most 'open' trial conducted under the criminal law of the Kingdom. The two accused were – for what is believed to be the first time – represented before the court by Saudi counsel. Counsel, in a submission to the court on their behalf, discussed the role of confession under the *Shari'ah*. He stressed that the Islamic jurists would not recognise a confession obtained under duress, whether physical or moral. He stressed that the Islamic jurists included in the concept of duress promises, threats and violence, irrespective of the degree of pressure, in a prolonged interrogation, and every interrogation which was made in the late hour of the night. He also argued that under the *Shari'ah* a confession is nullified when:

> the interrogator conveys to an accused that his co-accused incriminated him or that much evidence has been found against him at the crime scene etc and other similar tricks and deceptions if these contribute to the pressure and the breakdown of the accused and his admission of things which he did not do in order to get rid of his psychological and physical sufferings.

Counsel argued that confessions should be corroborated by other evidence, because 'confessions are the start of the evidence and not the end'.

He argued that in the case before the court the two accused must have been subject to duress as defined in accordance with the principles of the *Shari'ah*. Initially and while the trial was still in progress the brother of the victim was urged to accept blood money, *diyah*. At first he demanded retaliation which, on a finding of guilt, would have meant the execution of the two accused. However, intensive diplomatic efforts by the British government and other parties resulted in his agreeing to accept blood money. The trial itself was somewhat inconclusive, for although Lucille McLauchlan was found guilty of being an accessory to murder there is no report of any finding in respect of the guilt of Deborah Kim Parry. It appears that there must have been a finding of guilt in both cases, however, as both the accused were pardoned by the late King Fahd and repatriated to the UK.

SELF-ASSESSMENT QUESTION

What criteria must be satisfied before a confession may be accepted as evidence of guilt?

ACTIVITY 4.1

Write a brief summary (not more than 100 words) of Section 4.1, paying particular attention to the differences between the *hadd*, *ta'zir* and *qisās* offences and punishments.

No feedback provided.

4.2 Honour crimes

In many countries of the Muslim world where Islamic criminal law does not apply, there are provisions in the statutory law to justify so-called honour killings. In Jordan, for example, Article 34 of Law 16 of 1960 (the Penal Code) states that:

> A man who catches his wife or one of his female kinswomen who is within the prohibited degree of relationships having sexual relations with a man to whom she is not married and who kills or wounds both of them is exempt from any punishment.

The law further provides that a man who catches his wife or a female ascendant or descendant or his sister with a male person in 'an unlawful bed' (presumably in bed with a man other than her husband) and who kills or wounds either of them will receive a reduction of his sentence. Provisions such as the ones in Jordanian law also appear in the laws of Iraq and Egypt. In 1999 King Abdullah of Jordan removed these provisions – which he considered offensive – from Jordanian law by decree when Parliament was not in session. The Jordanian Parliament, however, refused to ratify the decree. It should be noted that there are no provisions in Islamic law that justify honour killings. Honour killings are more a matter of tribal customs and the tribal customary belief that 'the honour of the tribe rests in its women'.

4.3 Pakistan

4.3.1 The *Hudood* Ordinances

In most Arab countries modern penal codes have been established that depart from Islamic penal law. In the Indian sub-continent India does not apply Islamic penal law at all but Pakistan has introduced Islamic penal law for certain types of offences, for instance unlawful sexual intercourse. Traditional Islamic penal law is also applied in Saudi Arabia and some Gulf states. Pakistan introduced Islamic criminal law in 1979 in the form of three Ordinances, which are collectively referred to as the *Hudood* Ordinances. They are the:

- Offences against Property (Enforcement of *Hudood*) Ordinance, 1979
- Offence of *Zina* (Enforcement of *Hudood*) Ordinance, 1979
- Offence of *Qazf* (Enforcement of *Hadd*) Ordinance, 1979.

The *Hudood* Ordinances provide for *hadd* punishments that, however, can only be awarded if the very high evidential burden imposed under Islamic law is satisfied. The proof of theft liable to a *hadd* punishment (i.e. the amputation of the right hand for the first offence) requires that either the accused pleads guilty to the commission of the theft or that at least two Muslim adult male witnesses, other than the victim of the theft, who are regarded by the court to be truthful persons and who have in the past abstained from major sins, give evidence as eye-witnesses of the occurrence. Further, the statement of the victim of the theft has to be recorded before the statements of the eye-witnesses are recorded.

Under the Offence of *Zina* (Enforcement of *Hudood*) Ordinance, 1979 (the *Zina* Ordinance, 1979), before it was amended in 2006, any sexual intercourse between

a man and woman who were not validly married constituted a criminal offence. This meant that adultery, rape and fornication were all criminal offences liable to *hadd* punishments if the required evidential burden was met. Anybody who falsely accused somebody else of having committed *zina* was liable to be punished under the provisions of the Offence of *Qazf* Ordinance, 1979. *Qazf* in traditional law is the *hadd* offence of falsely accusing someone of *zina* and is punishable by 80 lashes.

The *Zina* Ordinance, 1979 had an effect on the legal status of women. If a woman alleged that she had been raped and the matter came to trial it could happen that the accused was actually acquitted because of lack of evidence. In this situation the woman faced an awkward legal position: in order to prove rape she had had to admit that sexual intercourse had taken place. After the acquittal of the accused the possibility of rape was excluded and the woman now faced charges for either adultery if she was married, or for fornication if she was not. The *Zina* Ordinance, 1979 had therefore made it quite dangerous for a woman to press rape charges since she might in fact end up as an accused herself.

In 2006, the Protection of Women (Criminal Law Amendment) Act was enacted in Pakistan. This Act seeks to redress much of the injustice and hardship caused to women by the *Zina* Ordinance, 1979.

First, the 2006 Act returns a number of offences from the *Zina* Ordinance back to the Pakistan Penal Code. The offence of kidnapping or abducting a woman in order to compel her to marry against her will or to force her into illicit sexual intercourse, or kidnapping a male in order to subject him to 'unnatural lust', or selling a person for the purpose of prostitution, have now been reinserted into the penal code of 1860.

Also, the offence of rape has been returned to the penal code. The offence of rape is so defined that marital rape becomes a criminal offence. Sexual intercourse with a female below the age of 16, even with her consent, is defined as rape. The punishment for rape may be death or imprisonment for up to 25 years, with a minimum of 10 years.

The offence of *zina* is defined as 'adultery' if one of the parties is married at the time the intercourse occurs and 'fornication' if they are not. The 2006 Act inserts a new offence of fornication into the penal code. The offence is punishable by imprisonment for up to five years and a fine not exceeding 10,000 rupees. The new offence is, however, safeguarded from abuse by the creation of a new offence of false accusation of fornication. The new provision provides that anyone who brings or gives false evidence of fornication shall be punished with imprisonment of up to five years and a fine of up to 10,000 rupees. Very importantly, once a prosecution for fornication results in an acquittal, the trial judge can, in the same proceedings, try and sentence the person bringing the charge.

The offence of adultery is the only offence retained by the *Zina* Ordinance. It is an offence for anyone to make a false accusation of adultery. The punishment for the offence follows the punishment of fornication in the penal code. A new definition of 'confessions' has been added to the Ordinance. The new definition serves to prevent women being placed in the position of having been deemed to have 'confessed' to *zina* when they brought an accusation of rape before the court which the court found unproven.

The definition of what constitutes a valid marriage has also been deleted. The original definition had caused hardship to many women and resulted in confusion regarding the interpretation of s.7 of the Muslim Family Laws Ordinance 1961. All too often, a husband would repudiate his wife by *talāq* (see Chapter 9) but would fail to comply with the requirement of 'notice' enjoined by s.7 of the Ordinance. The woman would believe herself divorced and re-marry, whereupon the first husband would bring a charge of *zina* against her, citing his failure to give notice of *talāq* as required by law and claiming, in effect, that, the woman was still his legal wife. The 2006 Act removes all reference to *ta'zir* punishments. The result is that now, under the *Zina* Ordinance, adultery may only be proved if the act itself is witnessed by four pious Muslim eye-witnesses, or if the accused confesses to the offence, for which the only punishment is death by stoning.

Finally, the 2006 Act amends the procedure governing sexual offences under both the penal code and the *Zina* Ordinance. Any complaint of adultery must be lodged directly in court, not made to the police. The judge hearing the case must examine on oath the complainant and at least four adult male eye-witnesses, who the court has established to be truthful. The witnesses must testify on oath to the committing of the act of penetration (i.e. the strict evidence required by the *Shari'ah*). Moreover, the offence of *qazf* in the *Qazf* (Enforcement of the *Hadd)* Ordinance, 1979 has been amended. If the prosecution fails, punishment for *qazf* is now virtually automatic. If a prosecution for adultery fails and the judge is satisfied that the offence of *qazf* has been committed, he shall not require proof of *qazf* and will proceed to pass sentence against the complainant. Punishment for the offence is 80 lashes. The testimony of a person convicted of *qazf* is thereafter inadmissible in any court proceedings.

The procedure regarding allegations of fornication follows that of allegations of adultery, but only two eye-witnesses are required. The complainant and the eye-witnesses must be examined in court before the judge can issue a summons for the accused to attend court.

The law of Pakistan now expressly recognises honour crimes as criminal offences. The amended Article 311 of the penal code provides a mandatory sentence of 10 years' imprisonment if the offence is committed in the name of, or on the pretext of, honour. A compulsory sentence of imprisonment must also be given to anyone convicted of an attempted murder or assault in the name of honour.

4.3.2 Blasphemy

Article 295-C of the Pakistan Penal Code 1860 provides that:

> Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (Peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.

The Federal Shariat Court has held that, despite the discretion in the statute accorded to the trial judge, the only punishment for blasphemy is death. Although there have been many cases brought under the blasphemy provision and convictions obtained, what actually constituted the blasphemy is not reported, presumably because this would be to repeat the blasphemy.

The Christian community and the Ahmadiyyas (the followers of Mirza Ghulam Ahmad (1835–1908), who consider themselves as Muslims, although they are not so regarded under the law of Pakistan) have suffered the most as a result of the blasphemy laws. Pakistan also makes it a criminal offence for non-Muslims to hold themselves out as Muslims. Following an amendment to the Pakistani constitution, members of the Ahmadiyya sect are not regarded as Muslims even though they regard themselves as such.

The Pakistan Supreme Court, in reversing the decisions of the courts below, held that blasphemy is a serious offence that must (always) be proved beyond reasonable doubt in its recent decision delivered on 03 November 2018 in the case of *Asia Bibi* v *The State etc.* (Criminal Appeal No.39-L of 2015).

4.4 Brunei Darussalam

Pursuant to Articles 39 and 83(3) of its Constitution, Brunei Darussalam promulgated a Syariah Penal Code Order in October 2013, which fully legalises the application of Islamic penal law in the country, consisting of the *hudūd*, *qisās* and *ta'zīr* punishments. The applicable offences are provided in Part IV of the Code, with Chapter 1 covering the *hudūd* offences and Article 55 defining *hadd* as 'punishment or penalty as ordained by the Al-Qur'an or Sunnah … for the offences of *sariqah*, *hirabah*, *zina*, *qazaf*, drinking intoxicant drinks and *irtidad*'. Chapter 2 covers the *qisās* offences and punishments, with the listed offences under that section including, *inter alia,* the offence of '*qatl*

[murder] by black magic' in Article 151. Chapter IV covers 'Offences', which include, *inter alia*, the offence of "Failure to perform Friday prayer" under Article 194, which provides that:

> Any male who is *mukallaf* [mature] who fails to perform the Friday prayer in a mosque without *uzur syar'ie* [a valid excuse under the shari'ah] or without reasonable excuse is guilty of an offence and shall be liable on conviction to a fine not exceeding $200 for a first offence, a fine not exceeding $300 for a second offence, and a fine not exceeding $1000 for a third or subsequent offence.

This provision can be controversial as it crosses the general jurisprudential distinction between acts of worship (*ibādāt*) and social relations (*mu'āmalāt*) under classical Islamic jurisprudence. Ordinarily, acts of worship are not classified as criminal offences that attract criminal punishments but are acts that are rewarded by God based fundamentally on belief and voluntary intention rather than the fear of criminal sanction by the state. The jurisprudential books are very scanty on the criminalisation of acts of worship under classical Islamic law. According to some jurists, even though the ruling authority has *ta'zīr* powers to rebuke people who persistently neglect their acts of worship, making it a punishable criminal offence is a very contentious matter. The Code also makes it an offence to propagate any religion other than the religion of Islam in the country under Article 209 of the Syariah Penal Code.

Self-assessment questions

1. **How does Islamic law categorise offences?**
2. **What are *hadd* punishments?**
3. **What are *qisās* offences?**
4. **In what type of cases are discretionary punishments applied?**
5. **Explain the difference between *ta'zir* and *hadd* punishments.**

Further reading

- **Wasti, T. *The application of Islamic criminal law in Pakistan*. (Leiden: Brill, 2009) [ISBN 9789004172258].**
- **Shah, N. 'The 2006 Women Protection Act of Pakistan: an analysis' (2010) 5 *Religion and Human Rights* 1–10.**
- **Cherif Bassiouni, M. *The Islamic criminal justice system*. (London: Oceana, 1982) [ISBN 9780379207453].**
- **Kamali, M.H. 'Punishment in Islamic law: a critique of the Hudud Bill of Kelantan, Malaysia' (1998) 13 *Arab Law Quarterly* 203–34.**
- **Lippman, M., S. McConville and M. Yerushalmi *Islamic criminal law and procedure*. (New York: Praeger, 1988) [ISBN 9780275930097].**
- **Anderson, J.N.D. 'Homicide in Islamic law' (1951) *BSOAS* 811–28. This reading is available on the VLE.**
- **Mehdi, R. *The Islamization of law in Pakistan*. (Richmond: Curzon Press, 1994) [ISBN 9780700702367] pp.109–42.**
- **Lau, M. 'Twenty-five years of Hudood Ordinances – a review' (2007) 64(4) *Washington and Lee Law Review* 1291–314.**
- **El-Awa, M.S. *Punishment in Islamic law*. (Indianapolis: American Trust Publications, 1984) [ISBN 9780892590155].**
- **Rahman, F. 'The concept of hadd in Islamic law' (1965) 4 *Islamic Studies* 237–51.**

Reminder of learning outcomes

Having completed this chapter and the relevant readings, you should be able to:

- **explain the principle features of Islamic criminal law**
- **distinguish between different types of offences**
- **understand and explain the evidential requirements for offences carrying the *hadd* punishment**
- **explain how Islamic criminal law is applied in Pakistan and its scope of application in some other Muslim-majority states.**

Sample examination questions

Question 1 **'Islamic criminal law appears to be harsh but a closer look reveals that in practice the most severe punishments are hardly ever applied.'**

Discuss.

Question 2 **'Islamic criminal law is at times closer to the English law of torts than it is to English criminal law.'**

Discuss.

Question 3 **To what extent does the traditional law of *zina* apply in Pakistan?**

Advice on answering the questions

Question 1 Give a brief description of Islamic criminal law and the division between *hadd*, *ta'zir* and *qisās* offences. Discuss the severity of the *hadd* punishments, but explain the very high standard of proof required before they may be inflicted, so that it is not only extremely difficult but in many cases (e.g. *zina*) virtually impossible to prove the offence if the accused does not confess. Then proceed to discuss briefly the law regarding confessions.

Question 2 This question relates largely to murder and assault on the person. Discuss the right of the heirs of the victim or of the victims themselves to prosecute or not and, where there is a conviction, to determine the punishment to be inflicted, which can include compensation or the payment of blood money.

Question 3 This question requires an examination of the old, unreformed *Zina* (Enforcement of *Hudood*) Ordinance, 1979, taking note of and analysing the practical effects of the law, especially on women's rights. The answer should then critically analyse the reforms to the law brought about by the Protection of Women (Criminal Law Amendment) Act 2006.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can explain the principal features of Islamic criminal law.	☐	☐	☐
I can distinguish between different types of offences.	☐	☐	☐
I can understand and explain the evidential requirements for offences carrying the *hadd* punishment.	☐	☐	☐
I can explain how Islamic criminal law is applied in Pakistan and its scope of application in some other Muslim-majority states.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
4.1	*Hadd*, *ta'zir* and *qisās* offences and punishments	☐	☐
4.2	Honour crimes	☐	☐
4.3	Pakistan	☐	☐
4.4	Brunei Darussalam	☐	☐

5 Civil law: contracts and torts

Contents

Introduction

Trade constituted an important area of economic activity in early Islamic society. Muhammad himself was a merchant, before his call to prophethood. It is therefore not surprising that Islamic law developed an extensive body of rules concerned with the performance and enforcement of contractual obligations. The main thrust behind these rules is to impose a moral dimension on the principle of freedom of contract. It is therefore possible to identify a distinct area of law that is concerned exclusively with contracts.

The underlying principle of trade and commerce under Islamic law as contained in the Qur'an is the legality of trade and the prohibition of usury (*ribā*) and excessive risk or uncertainly (*gharar*). This is based on *Surah* 2 verse 275, which provides that: 'God has permitted trade and has forbidden usury (*ribā*)'.

In contrast, the law of torts does not represent a distinct body of rules but is to a large extent part of Islamic criminal law.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings, you should be able to:

- **outline the rules for capacity to enter into a contract**
- **identify the characteristics of *Murābahah* and other contracts**
- **explain the transfer of property by gift**
- **explain the role of pre-emption in the sale of real property**
- **describe the limitations of civil liability for tortious actions in Islamic law.**

5.1 Contract law

Core text

- **Baderin, Chapter 6 'Law of financial transactions'.**

Essential reading

- **Hallaq, *Shari'a: theory, practice, transformations*. Chapter 7 'Contracts and other obligations' (available on the VLE).**
- **Usmani, M.M.T. *An introduction to Islamic finance*. (Leiden: Brill, 2012) [ISBN 9788171012367].**
- **Zahraa, M. 'Negotiating contracts in Islamic law and Middle Eastern laws' (1998) 13 *Arab Law Quarterly* 265–77 (available in JSTOR and HeinOnline).**

Further reading

- **Schacht (1982) Chapter 20 'Obligations in general' and Chapter 21 'Obligations and contracts in particular'.**

Islamic law has not developed a general theory of contract but, like Roman law, recognises a series of nominate contracts such as lease, sale, gift and hire. There are, however, certain general principles which apply to all contracts. Contracts, with the exception of a gift, are concluded by an offer made by one party and acceptance being given by the other party – the offer and acceptance being given by two competent parties. The offer and acceptance must take place at the same meeting (*majlis*) and, with rare exceptions, are of immediate effect. Islamic law abhors contracts *in futuro* as these necessarily involve an element of risk and uncertainty.

5.1.1 Capacity

Contractual capacity, other than for contracts of marriage, is attained, for both males and females, at the onset of physical puberty. There is an irrebuttable presumption of law that no male below the age of 12 and no female below the age of nine has achieved majority, and an equally irrebuttable presumption of law that by the age of 15 both males and females are adult. In between the minimum and the maximum ages whether majority has been attained is a question of fact. Property of children below the age of majority is subject to the control of the guardian of that property. The person with the prior right to deal with the property of the child is the father. If the father is absent then a person appointed by the father has the right. If the father has not named the guardian of the property of his infant child the right passes to his nearest male kinsmen in the order of succession on death. The guardian of the property has the duty to safeguard the interests of the minor and to deal with the property of the minor equitably as a trustee.

A child below the age of majority who has reached the age of seven, which the Muslim jurists considered the age of discernment, has a restricted contractual capacity. The child may enter into a contract which is manifestly to their advantage so that they may be the recipient of a gift. Conversely, the child may not enter a contract manifestly contrary to their advantage such as making a gift. Other contracts made by a child below the age of majority are not void but are deemed to be suspended pending the guardian's consent or otherwise to their execution. The only exception to the general rules relating to contractual capacity are insane persons, persons who are, although not certifiably insane, feeble-minded, acknowledged spendthrifts and persons who are easily deceived. In the case of persons possessing these defects the guardianship of minority may, with the permission of the judge, be extended. Also, persons who are in their death-sickness are under an interdiction restricting their contractual rights (see Chapter 11 on succession).

There is a perception that under the Maliki school a woman does not attain contractual capacity at puberty and that a married woman cannot enter a civil contract without the consent of her husband. She achieves limited contractual

capacity only upon consummation of a valid marriage, whereby she may not dispose gratuitously of more than one-third of her property. This appears to be reflected, for example, in the UAE Commercial Transactions Law (Federal Law No. 18) of 1993, which provides in Article 21(2) that 'A foreign wife who practices trade is assumed to have obtained her husband's approval to do so'. Mahdi Zahraa has noted in his article on 'The capacity of women in Islamic law" ((1996) 11 *Arab Law Quarterly* 245–63 at p.256) that this view is contradicted by Shafi'i in his classical jurisprudential work, *Al-Umm*, in which he states that '…none of the jurists whom I have known have differed in opinion on the fact that both men and women upon their attainment of the age of puberty and maturity are alike in their ability to conduct their affairs by themselves…'. As Shafi'i studied under Malik, he would have certainly known if Malik generally differed from the opinion that both men and women attain the ability to conduct their civil affairs by themselves upon attainment of maturity. Rather than a general restriction of the capacity of women to contract under the Maliki school, a leading Maliki jurist, Sahnun, indicated that a married woman has full capacity to conduct all her civil transactions except those concerning her charitable dispositions, noting that such charitable dispositions are not valid if they exhaust more than one-third of the married woman's property. This is based on the presumption that, as a married woman would be having sexual relations with her husband, there is a possibility that she would become pregnant, with the inevitable result that she would deliver a child, and thus she is interdicted from gratuitously disposing of her entire property. The courts of Pakistan have also sought to safeguard the interests of women. Where a Purdashin woman disposes gratuitously of property, the burden of proof is on the person who is claiming a right under the property she executed to prove that she had proper understanding of the effect of the contract.

In many parts of the Muslim world today the age of majority for the purpose of commercial contracts has been fixed by the various civil codes and varies from country to country.

5.1.2 Freedom of contract

The first principle of Islamic contract law is that 'Muslims must abide by their obligations'. This is based on *Surah* 5 verse 1 of the Qur'an. This principle of '*pacta sunt servanda*' does not entail complete freedom of contract but is accompanied by a recognition of the ethical dimension of a transaction. Freedom of contract is restricted by ethical considerations. Unjust enrichment is the most important limitation on the freedom of contract. The general principle is that there should be no monetary advantage gained without the beneficiary having given a counter-value. The most important forms of unjust enrichment are the charging of excessive interest, or usury, called *ribā*, the re-letting of a hired object for a greater sum, and the reselling of a bought object for a higher price before payment has been made.

Two principles central to Islamic law, namely the prohibition on usury (*ribā*) and on *gharar* (i.e. an uncertainty in the object of a contract), limit the scope of commercial activity in Islamic law. All schools of Islamic law agree that the taking of usury (i.e. the exchange of money for money with excess and delay), is prohibited. The prohibition placed by Islamic law on interest-based loans is derived directly from the Qur'an, which is the primary source of Islamic law. *Surah* 2 verses 275–79 provide, *inter alia*, that:

> **Those who devour usury stand like one whom Satan has smitten with insanity. That is so because they say: 'trade is like usury'; whereas Allah has made trading lawful and has made usury unlawful.**

The prohibition on interest-bearing loans is strict in Islamic law. Islamic banking practice is therefore limited to financial agreements that do not involve the charging of interest. One normal means of avoiding the charging of interest is the *Murābahah* contract that is widely used in Islamic banking today.

5.1.3 *Murābahah* contracts

A *Murābahah* contract can be defined as the sale of a commodity for the price at which the vendor has purchased it, with the addition of a stated profit known to both the vendor and the purchaser. It is therefore at its most basic an ordinary contract of sale. As such it must satisfy all the usual conditions of a regular contract of sale.

A *Murābahah* contract is not a loan given on interest but a sale of a commodity for a deferred price, which includes an agreed profit, added to the cost. In order to make a *Murābahah* contract distinguishable from an ordinary, interest-bearing loan the following essential conditions have to be fulfilled.

- The *Murābahah contract must fulfil all the usual requirements of an ordinary contract under Islamic law.*
- *The institution providing the finance to the client must purchase the commodity in its own name from a third party.*
- *At the point of purchase the commodity must come into the possession of the institution and the commodity must remain at the risk of the institution until the commodity is sold to the client.*

In addition, the *Murābahah must comply with the basic rules of a contract of sale under Islamic law.*

- The object of the sale must be property (i.e. an object having a legal use).
- The commodity must be in the ownership of the seller at the time of sale (i.e. it must be in the physical or constructive possession of the seller when it is sold to another person). Constructive possession means that the commodity has not been physically delivered but has come into the control of the seller and all rights and liabilities in the commodity, including the risk of its destruction or disappearance, are borne by the seller.
- The delivery of the commodity must be certain and not dependent on contingency or chance.
- The price must be certain at the time of the contract.
- 'In the event of an intrinsic defect existing in the object, the buyer has the unconditional right to rescind the sale. This right (*khiyar al-'ayb*) cannot be ceded by a contractual stipulation, any such stipulation would be null and void.'

  See Nicholas D. Ray *Arab Islamic banking and the renewal of Islamic law.* (Bath: Graham & Trotman, 1995) [ISBN 9781859661048] p.39 and N. Coulson *Commercial law in the Gulf states.* (Bath: Graham & Trotman, 1984) [ISBN 9780860105749] pp.65–67.

The above requirements are regarded as essential for the validity of a *Murābahah* contract, since the contract would otherwise be indistinguishable from an ordinary interest-bearing loan, which, of course, is invalid under Islamic law.

The rules formulated by the *Shari'ah* compliance supervisory boards of the main Islamic banking organisations insist that the bank can only legally sell the object of the *Murābahah* contract to the client once the bank has received it. Nicholas D. Ray, in his book *Arab Islamic banking and the renewal of Islamic law* (see above), found that the rules of the International Association of Islamic Banks stipulate that 'Selling is postponed until the bank gets actual ownership and possession of goods and becomes responsible for any defects therein'. The same applies to the Faisal Islamic Bank of Egypt, the Islamic International Bank for Investment and Development, and the Second Conference of Islamic Banks.

In a 2000 decision, the Supreme Court of Pakistan defined the essential characteristics of a *Murābahah* agreement.

> [...] *Murābahah* is a sale and not a financing in its origin. It must, therefore, conform to all the basic standards of a sale. It may be used only where the client of the bank really wants to purchase a commodity. The bank must purchase it from the original supplier after taking into its ownership and (physical or constructive) possession sells it to the client. All these elements must be visibly present in a valid *Murābahah* with all their legal and logical consequences, including in particular, that the bank must assume the risk of the commodity so long as it remains in its ownership and possession. This is the basic feature of the *Murābahah* which makes it distinct from a interest-based financing and once it is ignored, though for the purpose of simplicity, the whole transaction steps into the prohibited field of interest-based financing.
> (*M. Aslam Khaki* v *Muhammad Hashim* PLD 2000 SC 225, at 748–49, *per* Justice Maulana Muhammad Taqi Usmani.)

The ownership of the goods by the bank for the interval between the two sales can be identified as the most important difference between an interest-bearing loan and a *Murābahah* agreement. During that interval the bank bears the risk that the goods may be destroyed or harmed, or develop a defect. In practice, Islamic banks will procure insurance cover for the period during which they bear the risk in the object of the *Murābahah contract*.

Compensation for late payment is permitted in modern Islamic banking practice as long as it does not amount to the charging of interest. A contractual provision for the payment of liquidated damages which is calculated on the basis of an annual or daily interest would obviously be prohibited since it amounts to *ribā* (i.e. interest) which is, as explained above, repugnant to Islamic law. In practice, damages for late payment by the purchaser can be contractually provided for by agreeing a pre-determined (i.e. contractually fixed) price for the object of the *Murābahah* contract if payment takes place after a certain settlement date. This price will be higher than the price payable for the object if payment is effected on the due date.

Other restrictions include the prohibition of an exchange of an obligation for an obligation and the prohibition of a delay in the exchange of goods.

The essential ingredients of a contract are the offer and the acceptance which must be made in the same meeting *(majlis*). The offer can be withdrawn as long as no acceptance of it has taken place and the *majlis*, or meeting, has not been terminated. The object of the contract must be specified in order to prevent speculation or interest. A classic example for the specificity requirement is the prohibition on the selling of dates which are still unripe, to be delivered when ripened. Since it is unknown when they will ripen the contract is void. For the same reason Islamic law prohibits gambling, although some of the present-day civil codes of the Middle East, for instance the Jordanian Civil Code, allow gambling on racecourses.

Contractual liability arises out of the non-performance of a contractual obligation or the negligent performance of a contract. Liability and obligation are extinct as soon as the contract is properly performed or the debtor is 'acquitted' (i.e. the creditor waives his right to the performance of the contract unconditionally). An amicable settlement is also possible, as is the renegotiation of the contract. Another way to extinguish a contractual obligation is to transform it into a new one by way of assignment. A debt owed can, for instance, be assigned to satisfy a claim.

Other means of avoiding charging of interest in transactions are the *Mudārabah and Mushārakah* contracts, which are also used in Islamic banking and finance transactions today.

5.1.4 Pre-emption

In contracts for the sale of real property the right of pre-emption (*Shuf'ah*) may arise. *Shuf'ah* means that in certain cases where property is sold a third party may replace the vendee by paying to him the amount which the vendee paid for the property. The right to pre-empt arises first when property is jointly held. Where one of the co-owners sells his share the other co-owner may repurchase the property from the purchaser. Also, where a person is a joint owner of an easement attached to the property sold, he has a

right to pre-emption. In Hanafi law a person whose property is immediately adjacent to the sale property has a right to pre-empt. The Hanafi law giving the neighbour a pre-emptive right is preserved in the Egyptian civil code. In many cases where Hanafi law applied, the right of a neighbour was thwarted by the vendor making a gift to the purchaser of a narrow strip of land adjacent to the neighbour's property and then selling the purchaser the remainder of the property. This device was effective as the right of pre-emption does not arise over gifted property. A person wishing to exercise the right of pre-emption must act immediately upon learning of the sale and must exercise the right with due formality and in the presence of witnesses.

5.1.5 Gifts

All sane Muslims who have attained majority (with the exception of women according to a Maliki view as explained above) may dispose of their entire property by gift. A transfer of property by one person to another constitutes a Hibah (i.e. a gift) if the transfer of the property is made immediately, is accepted by or on behalf of the other person and nothing is given in exchange for the property so transferred. With the exception of Maliki law a gift is completed once accepted by the donee and transferred. The Malikis, however, consider that the gift is completed before the handing over is made. It is essential for the validity of a gift that donors should divest themselves completely of all ownership of and control over the property which is the subject of the gift. However, as explained in Chapter 11 on succession, certain conditions exist in respect of death-bed gifts: a gift made by a Muslim during a death-illness cannot take effect beyond a third of the estate nor can it be made in favour of an heir, unless the other heirs give their consent to the gift after the donor's death.

The development and growth of the concept of Islamic banking and finance in recent times has increased the global relevance of, and interest in, Islamic law governing financial transactions. This aspect of Islamic law is based on the general principles of contract and commerce under the *Shari'ah* and the fundamental rules are based on legality of trade and the prohibition of *ribā* and *gharar* as discussed above. The relevant rules of partnership and agency are currently employed as necessary tools in the formulation of different agreements and products in modern Islamic banking and finance.

5.2 Law of torts

You have seen in Chapter 4 that some crimes, particularly *qisās* offences, are treated in a fashion that is more similar to torts in English law than it is to criminal law. The law of civil liability for tortious actions is not well developed in Islamic law. Perhaps the basis of the law lies in the Prophetic *hadīth* 'There is no *darar* (harm) or *dirār* (prejudice) in Islam'. The basic principle of the Islamic law of torts is that compensation is only available for actual damage. No damages in traditional law can be awarded for moral damage, like injury to one's reputation or for pain and suffering. However, many codes in the countries of the Middle East do allow damages to include compensation for pain and suffering. The courts in Saudi Arabia, however, still apply traditional law and, besides refusing compensation for future loss, also refuse moral damages. Various regulations in the Kingdom do provide for compensation to be awarded for pain and suffering but such compensation can only be ordered by a tribunal appointed to enforce the regulation itself, like the Labour Court, which hears cases of work-related injuries suffered by workers.

Further reading

- **Zahraa, M. 'The legal capacity of women in Islamic law' (1996) 11(3) *Arab Law Quarterly* 245–63.**
- **Kamali, M.H. *Islamic commercial law: an analysis of futures and options*. (Cambridge: The Islamic Texts Society, 2001) [ISBN 9780946621804].**
- **Mansuri, M.T. *Islamic law of contracts and business transactions*. (New Delhi: Adam Publishers & Distributors, 2006) [ISBN 9788174354594].**

- Bin Mohamad, A.B. *Islamic law of tort*. PhD Thesis submitted at the University of Edinburgh, January 1997. Available at: www.era.lib.ed.ac.uk/bitstream/handle/1842/17549/Mohamad1997.pdf
- See also the readings listed in the Introduction and Chapter 1.

Reminder of learning outcomes

Having completed this chapter and the relevant readings, you should be able to:

- outline the rules for capacity to enter into a contract
- identify the characteristics of *Murābahah* and other contracts
- explain the transfer of property by gift
- explain the role of pre-emption in the sale of real property
- describe the limitations of civil liability for tortious actions in Islamic law.

Sample examination questions

Question 1 Ahmad wishes to sell his field. Ahmad's neighbour informs him that he is interested in purchasing the field. However, Ahmad wishes to sell it to his son-in-law.

Advise Ahmad.

Question 2 'Muslims acquire the right to deal with their property once they have attained puberty.'

Discuss.

Advice on answering the questions

Question 1 This is obviously a question concerning the right of pre-emption. You must explain the neighbour's right of pre-emption and explain the device by which an owner may avoid the application of the law.

Question 2 Discuss the age of contractual capacity in Islamic law, explaining the different view of the Maliki school regarding women's acquisition of contractual capacity. Discuss the contractual rights, if any, possessed by infants and explain how in certain cases the interdiction of minority may be continued after the attainment of majority.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can outline the rules for the capacity to enter into a contract.	☐	☐	☐
I can identify the characteristics of *Murābahah* and other contracts.	☐	☐	☐
I can explain the transfer of property by gift.	☐	☐	☐
I can explain the role of pre-emption in the sale of real property.	☐	☐	☐
I can describe the limitations of civil liability for tortious actions in Islamic law.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
5.1	Contract law	☐	☐
5.2	Law of torts	☐	☐

6 Marriage

Contents

Introduction

Islamic family law is one of the core substantive aspects of Islamic law that remains applicable in all parts of the Muslim world where Islamic law still applies today. Its main elements are rules relating to the formation and dissolution of marriages and the incidental issues arising from that.

The institution of marriage occupies a central place in Islamic law and a thorough knowledge of this area of law is essential. The relevance of Islamic marriage law transcends national boundaries mainly because there are now substantial Muslim communities even in countries that until recently had no or very little exposure to the Islamic world. In the United Kingdom, English courts frequently have to decide on the validity of an Islamic divorce or marriage that came into effect, for example, under the laws of India or Pakistan. These cases normally involve parties who migrated to the UK but who have retained strong links with the Islamic tradition.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **explain the rules and requirements surrounding the formation of a marriage contract in Islamic law**
- **evaluate and determine what conditions have to be fulfilled to conclude a valid marriage**
- **outline the effects of non-compliance with these conditions**
- **describe and discuss the impediments to marriage**
- **explain how the rules on dower may determine the validity of a marriage.**

Core Texts

- **'Abd al 'Ati, Chapter 3 'Marriage in Islam'.**
- **Baderin, Chapter 4 'Family law.'**

Essential reading

- **El Alami, D.D. and D. Hinchcliffe *Islamic marriage and divorce laws of the Arab world*. (London, The Hague, Boston: Kluwer Law International, 1996) [ISBN 9789041108968] pp.5–18 (available on the VLE).**
- **Anderson, N. 'Islamic family law' in *International encyclopedia of comparative law*. (The Hague, Boston, London: Tubingen and Martinus Nijhoff Publishers, 1983) Vol.4 'Persons and family', Chapter II, pp.105–08 (available on the VLE).**

Further reading

- **Pearl and Menski, Chapter 6 'Muslim marriage: form and capacity', Chapter 7 'Marriage: legal effects' and Chapter 8 'Polygamy' (available on the VLE).**

6.1 The marriage contract

Marriage in Islamic law is a contract that is concluded by an offer made by one party and an acceptance given by the other. No particular form of words is required as long as the intention to conclude a contract of marriage is clear. The offer and acceptance have to be of immediate effect and take place in the same meeting but the parties do not need to be in each other's presence. According to Hanbali, Hanafi and Shafi law two adult males must be present when the offer and acceptance are given. Under the Maliki and Ithna Ashari schools the presence of witnesses is recommended but not mandatory provided that, in Maliki law, sufficient publicity is given to the marriage.

Marriage contract: offer and acceptance

<table>
<tr><th>Schools</th><th>Requirement for witnesses</th><th>Conditions</th></tr>
<tr><td>Hanbali</td><td rowspan="3">Two adult males must be present</td><td rowspan="3"></td></tr>
<tr><td>Hanafi</td></tr>
<tr><td>Shafi'i</td></tr>
<tr><td>Ithna Ashari</td><td rowspan="2">Presence of witnesses recommended but not essential</td><td></td></tr>
<tr><td>Maliki</td><td>Sufficient publicity must be given to the marriage</td></tr>
</table>

Self-assessment questions

1. **What is the essential characteristic of a marriage under Islamic law?**
2. **What formal requirements are imposed on the formation of the marriage contract?**

6.2 Capacity of the parties

Can any Muslim enter into a valid marriage contract or does Islamic law require certain conditions to be fulfilled before a Muslim can get married? Apart from the formal requirements under certain schools, such as the presence of witnesses, Islamic law also requires the parties to a marriage contract to have the capacity to enter into the contract. The most important issue concerns the age at which a Muslim is considered capable of binding themselves in marriage.

6.2.1 Hanafi and Ithna Ashari schools

According to Hanafi and Ithna Ashari law any sane adult, whether male or female, has the capacity to conclude their own contract of marriage. According to traditional Islamic law majority is attained at the onset of physical puberty. There is an irrebuttable presumption of law that no female below the age of nine and no male below the age of 12 has attained majority and an equally irrebuttable presumption that by the age of 15 majority has been attained by both sexes.

The right of a female to contract her own marriage is, however, not absolute according to Hanafi doctrine. If a woman contracts her own marriage for less than the proper dower (see Section 6.7) her guardian may demand that the proper dower be paid or the marriage dissolved. A further restriction on the right of the Hanafi woman to contract her own marriage is the doctrine of 'equality' (*kafā'ah*). Her guardian may seek a dissolution of the marriage if she marries a man who is not her equal according to the law. In Hanafi law equality is determined with regard to piety, lineage, wealth and occupation. However, the right of the guardian to dissolve the marriage lapses if the woman becomes pregnant.

Although a Hanafi or Ithna Ashari woman may contract her own marriage it is the usual practice to ask her guardian (i.e. her father or nearest male agnatic kinsman) to conclude the contract on her behalf. The guardian is acting in such a case as the representative of the woman – whose consent is nevertheless required. Consent must be express if she is not a virgin. If she is a virgin her acceptance may be implied by conduct. However, the Hanafi interpretation of conduct is not rigid. For example, if she remains silent when asked if she consents to the marriage this will be interpreted as shyness on her part and regarded as consent. Some Hanafi jurists have stated that even if she weeps this will also held to be consent because this is merely a sign that she is sad to be leaving her parents.

6.2.2 Maliki, Shafi and Hanbali schools

In Maliki, Shafi and Hanbali law a woman may never conclude her own marriage contract. A marriage guardian must always act on her behalf. In Maliki law the hierarchy of marriage guardians strictly follows the order of succession. Accordingly, the son of the woman ranks before her father. If the father is not alive the paternal grandfather assumes the role of marriage guardian; failing him, the nearest male agnatic kinsman. In Hanbali law the guardian having first priority is the father, followed as in Maliki law by the paternal grandfather and the other agnatic kinsmen. Both schools recognise that the person having the right of guardianship may appoint his successor.

Moreover, according to the law of these schools, if the guardian is the woman's father or the paternal grandfather, he may under the right of *ijbār* contract her hand in marriage without her consent and even against her express wishes, even if she is adult, provided she has not previously been married. The right of the guardian to compel, known as *Ijbār*, has been removed by modern legislation in many Muslim-majority countries. Morocco was the last Muslim country to have retained the right of *Ijbār* in its statutory law but the code was subsequently amended to remove it in the new *Mudawwanah* of 2004. The right of *Ijbār*, however, continues in countries which have not yet made statutory reform to the traditional law.

In Pakistan the right of a Hanafi woman to contract her own marriage was challenged in the case of *Abdul Waheed* v *Asma Jehangir* PLD 1997 Lahore 301 (*Saima Waheed* case). involving an adult woman whose father objected to the marriage on the ground that he had not given his consent. The Lahore High Court very reluctantly rejected the father's application because the court saw itself bound by a precedent set by the Federal Shariat Court which had decided that an adult Muslim woman did not need the consent of her *wali* (i.e. her guardian) to enter into a valid marriage.

Further reading

- **Ali, S.S. 'Is an adult Muslim woman *sui juris*? Some reflections on the concept of "consent in marriage" without a wali' in Cotran and Mallat (eds), Vol.3, pp.156–73. This reading is available on the VLE.**
- **Lau, M. 'Opening Pandora's box: the impact of the Saima Waheed Case on the legal status of women in Pakistan' in Cotran and Mallat (eds), Vol.3, pp.518–31. This reading is available in HeinOnline and on the VLE.**
- **Siddiqui, M. 'The concept of wilāya in Hanafi law: authority versus consent in al-Fatawa al- Alamgiri' (1998/9) 5 *Yearbook of Islamic and Middle Eastern Law* 171–85. This reading is available in HeinOnline.**

Self-assessment questions

1. **Does an adult Muslim woman require the consent of her *wali* to enter into a valid marriage?**
2. **What are the differences between the schools and sects of Islamic law on the question of consent to marriage?**
3. **'The consent of both parties is required for the validity of a Muslim contract of marriage.'**

   Prepare a short oral presentation discussing Question 3.

6.3 Child marriage

In traditional Islamic law no specific minimum age is laid down for marriage. Certain guardians can contract their infant wards in marriage without their consent. However, in Hanafi law a girl who is contracted in marriage during her infancy may on attaining puberty repudiate the marriage. She retains this right until she becomes aware of the marriage and assents to it by, for example, allowing the marriage to be consummated. However, the woman does not possess this 'option of puberty' if the guardian who contracted her marriage was her father or paternal grandfather.

6.3.1 The option of puberty

This right is available to both males and females. However, it is, of course, most significant for females, since the male, on reaching puberty, will be free to exercise his unlimited power of *talāq* – the pronouncement of a divorce (see Chapter 9).

The next problem to consider is whether or not a decree of the court is necessary to dissolve a marriage that is repudiated by the exercise of the option of puberty according to traditional Islamic law. When a girl wishes to repudiate a marriage contracted by her guardian, she must approach the *qadi* (i.e. the judge). Until the *qadi* issues a decree, the marriage is deemed to subsist.

Minimum ages have been laid down for marriage in an attempt to curb the practice of child marriage, for example in the Indian subcontinent by the Child Marriage Restraint Act 1929 and in the various modern codes of personal status enacted in the Arab world. However, it should be noted that under some of these laws the marriage itself is not rendered invalid because of the age of one or both of the parties, but penal sanctions are imposed.

Further reading

- **Buchler, A. and C. Schlatter. 'Marriage age in Islamic and contemporary Muslim family law' (2013) *European Journal of International and Middle Eastern Law* 37–74.**
- **Welchman, L. 'Jordan: capacity, consent and under-age marriage in Muslim family law' (2001) *International Survey of Family Law* 243–65.**
- **Carroll, L. 'Marriage-guardianship and minor's marriage at Islamic Law' (1987) 7 *Islamic and Comparative Law Quarterly* 249–60.**

Self-assessment questions

1. **What is the legal effect of a child marriage?**
2. **What is meant by the 'option of puberty'?**
3. **Is this option available in respect of all child marriages?**

Activity 6.1

Explain and discuss the legal provisions on child marriage of any one Arab, South Asian or South East Asian Muslim-majority country.

You will need to do some further research and reading to answer this question.

No feedback provided.

6.4 Impediments to marriage

6.4.1 Permanent impediments

There are many impediments to marriage under Islamic law based on specific prohibitions by the Qur'an, such as in *Surah* 4 verse 24, as well as by the *Sunnah*. The impediments that are permanent (i.e. which can never be removed) are those of relationship by blood, fosterage and affinity.

Under the bar arising from relationship of **blood** a man may not marry any of his ascendants or descendants, any descendant of his father or mother, or the immediate child of any ascendant. Similarly, a woman may not marry any corresponding male.

Foster relationship is sometimes referred to as relationship through milk because it arises from the suckling of a foster-mother's milk. Under the bar of fosterage this relationship through milk constitutes as much a bar to marriage as the bar of relationship of blood. It should be noted that two persons who were suckled by the same foster-mother are permanently barred from marrying each other.

The bar of **affinity** arises from marriage, so a man may not marry the former wife of any ascendant or descendent, or any ascendant or descendent of a former wife with whom he had consummated his marriage.

6.4.2 Temporary impediments

The first category of temporary impediments stipulates that a man may not marry:

- a woman who is already married
- a woman who is still observing the *iddah* period (see Section 7.2) following the termination of a previous marriage
- a woman whom he has triply repudiated, unless she has in the intervening period contracted marriage with another man and that marriage has been terminated and the *iddah* period observed
- two women who, if one were a male, would not be allowed to be married to each other (i.e. he may not marry at the same time two sisters or a mother and her daughter).

A further impediment is that a man who already has four wives may not validly marry a fifth (see Section 7.4.3).

A Muslim man may contract marriage with a non-Muslim woman provided she is a *khitabiyah*. A *khitabiyah* literally translated means a religion of the book and refers to Christianity and Judaism. It follows that a *khitabiyah* is either a Christian or a Jew. A Muslim woman, on the other hand, may only validly contract marriage with a Muslim man. The non-Hanafi schools of Sunni Islam hold that a marriage concluded by the woman herself without a guardian is also invalid, as is a marriage concluded by a person performing *haj* (i.e. the pilgrimage to Mecca that a Muslim is obliged to perform at least once in his lifetime, if he can afford to do so). Finally, Maliki law prohibits the marriage of a person who is in a state of death-sickness.

FURTHER READING

- **Anderson, J.N.D. 'Invalid and void marriages in Hanafi law' (1950) 13(2) *Bulletin of the School of Oriental and African Studies* 357–66.**
- **'Abd al 'Ati, Chapter 4 'Marriage (continued)'.**

ACTIVITY 6.2

Draw up a chart or table categorising the impediments to marriage.

No feedback provided.

6.5 The effects of impediments to marriage

The presence of an impediment to marriage may render the marriage either **void** or **irregular**. The impediments that have the potential to render a marriage void are those that are permanent: relationship by blood, suckling or affinity and those where the impediment, although of a temporary nature, is one that the parties themselves have no power to remove, such as if the woman is married to another man. Where any other impediment exists the marriage is not void but **irregular**. If the marriage is irregular certain effects will flow from it. The parties will not be found guilty of *zina* (illicit sexual relations). Any children the parties have together will be held to

be legitimate. When the parties separate, and separate they must, the woman must observe an *iddah* period.

The union raises the bar of affinity in respect of any other marriage and the woman is entitled, if consummation has taken place, to the dower stipulated in the contract or the proper dower, whichever is less.

A marriage which may be held to be potentially void will be regarded as irregular if the parties have acted in good faith, that is, they were unaware of the existence of the impediment, or knew of its existence but did not realise its effect in law. This is the only case where the principle that everyone is presumed to know the law is not applied and is the only instance where Islamic law recognises ignorance of the law as a defence.

The basic approach of the different schools to the effects of impediments to marriage is similar although their approach to the question and their terminology is different. Thus, the Hanafis use the terms '*batil*' and '*fasid*' to describe a marriage that is respectively void or irregular, whereas the other Sunni schools use the two terms indiscriminately but speak of an irregular marriage where there is a 'semblance' to a valid marriage.

Self-assessment questions

1. **What is the difference between a void and an irregular marriage?**
2. **What are the main features of permanent and temporary impediments to marriage and what is their effect on the validity of a marriage under Islamic law?**
3. **To what extent do the different schools and sects differ on the legal effects of the various impediments to marriage?**
4. **Classify and explain the impediments to marriage.**

6.6 Proof of marriage

In traditional Islamic law, a marriage may be proved by direct evidence where two witnesses who have the capacity to give evidence in a *Shari'ah* court testify that they were present at the conclusion of the contract. These witnesses must be adult, sane, male Muslims with the quality of an *adālah* (i.e. they must be deemed to be of the highest moral probity). If no direct evidence as to the conclusion of the contract of marriage is available, the marriage may be proved by indirect evidence such as that the parties have lived together for a long period as husband and wife and that their family and acquaintances have accepted them as husband and wife.

At the present time many countries, such as Pakistan, Egypt, Tunisia, Kuwait and Jordan, have enacted legislation that requires registration of marriage and, obviously, in these countries the production of a marriage certificate is the best proof of marriage. Failure to register a marriage will not, however, in most of these jurisdictions, invalidate the marriage and the marriage may be proved as in traditional law. Today the courts will also accept video and DVD evidence to prove that a marriage ceremony took place.

Self-assessment questions

1. **Why is proof of marriage of crucial importance in many Islamic countries?**
2. **What forms of proof are recognised by Islamic law?**

6.7 Dower (*mahr*)

A unique feature of Muslim marriage is the requirement of dower. The husband must give dower to the wife. The parties may stipulate an amount to be paid as dower in the marriage contract itself but even if no dower is stipulated in the contract or indeed if the contract expressly states that there shall be no dower payable the wife is nevertheless entitled to receive dower. In this case the dower is entitled the 'dower

of equivalence' (or the 'proper dower' as it is usually referred to). The proper dower is calculated by taking into account the amount of dower received by comparable members of the wife's family such as her sisters or cousins. Her personal attributes are also relevant: her virginity, age, education, beauty and so on. The parties may agree between themselves when the dower shall be paid, either at the conclusion of the contract of marriage or at some later stage. The parties may also agree that part of the dower shall be paid upon the contract (prompt dower) and part deferred until the termination of marriage by death or divorce (the deferred dower).

The wife may refuse to consummate the marriage until the husband pays her the first portion of the dower. She is entitled to the whole of the dower once consummation of the marriage takes place or by the death of the husband before consummation takes place. If the wife is divorced before the marriage is consummated she is entitled to receive half of the stipulated dower and if no dower has been fixed in the contract she is entitled to a *mut'a al-talāq* (i.e. a gift of consolation).

The requirement of dower is one of the most significant reforms effected by the Qur'an. The Qur'an enjoins 'give women their dower', whereas in the pre-Islamic period a bride price was paid to the father of the bride.

Self-assessment questions

1. **Would it be correct and legally accurate to translate the term 'dower' as the contractual term 'consideration'?**
2. **Can the husband avoid paying dower and nevertheless enter into a binding marriage contract?**

Further reading

- **Anderson, J.N.D. 'Invalid and void marriages in Hanafi law' (1950) 13(2) *Bulletin of the School of Oriental and African Studies* 357–66. This reading is available on the VLE.**
- **Siddiqi, M. 'Mahr: legal obligation or rightful demand?' (1995) 6(1) *Journal of Islamic Studies* 14–24. This reading is available on the VLE.**

Reminder of learning outcomes

Having completed this chapter and the relevant readings, you should be able to:

- **explain the rules and requirements surrounding the formation of a marriage contract in Islamic law**
- **evaluate and determine what conditions have to be fulfilled to conclude a valid marriage**
- **outline the effects of non-compliance with these conditions**
- **describe and discuss the impediments to marriage**
- **explain how the rules on dower may determine the validity of a marriage.**

Sample examination questions

Question 1 Answer both (a) and (b):

a. **When and in what circumstances is a wife entitled to:**
   i. **specified or proper dower**
   ii. **prompt or deferred dower**
   iii. **full dower, half of the dower, or no dower?**
b. **What remedies are available to a wife whose dower remains unpaid?**

Question 2 Describe the option of puberty and explain its effect on the validity of a marriage.

Question 3 'Under Islamic law both man and woman have equal rights and obligations when it comes to marriage.'

Discuss.

Advice on answering the questions

Question 1 No specific advice on how to answer this question should be needed – it is self-evident. A good answer would be marked by a high degree of precision and careful demarcation between the schools.

Question 2 Explain what is meant by the option of puberty and describe when and in what circumstances it may be exercised and any reforms that have taken place.

Question 3 Discuss the rights and obligations which arise and are incurred upon marriage by both the wife and the husband. Give an opinion as to whether the two parties have equal rights and obligations. Explain the cases where the rights of one party and the obligations of the other are reciprocal.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can explain the rules and requirements surrounding the formation of a marriage contract in Islamic law.	☐	☐	☐
I can evaluate and determine what conditions will have to be fulfilled so as to conclude a valid marriage.	☐	☐	☐
I can outline the effects of non-compliance with these conditions.	☐	☐	☐
I can describe and discuss the impediments to marriage.	☐	☐	☐
I can explain how the rules on dower may determine the validity of a marriage.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
6.1	The marriage contract	☐	☐
6.2	Capacity of the parties	☐	☐
6.3	Child marriage	☐	☐
6.4	Impediments to marriage	☐	☐
6.5	The effects of impediments to marriage	☐	☐
6.6	Proof of marriage	☐	☐
6.7	Dower (*mahr*)	☐	☐

7 The incidents of a Muslim marriage

Contents

Introduction

Islamic law recognises a law of nominate contracts, each contract having its own incidents and effects. As stated in Chapter 6, marriage under Islamic law is a contract and, following the general principles of contracts, marriage has its own specific incidents and effects.

The law defines the rights and duties of husband and wife, some of which are mutual and some of which are peculiar to one or other of the parties.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **distinguish between the rights and obligations of husband and wife arising out of the marriage contract**
- **determine when and to what extent the husband is under a duty to maintain his wife**
- **explain and discuss the Islamic law on polygyny.**

Core Text

- **'Abd al 'Ati, Chapter 4 'Marriage (continued)' and Chapter 5 'The web of domestic relations'.**

Essential Reading

- **Welchman, Chapter 7 'Polygyny' (available in VLeBooks via the Online Library).**
- **Arabi, O. 'The itinerary of a fatwa: an ambulant marriage (*al-zawaj al-misyar*), or grassroots law-making in Saudi Arabia of the 1990s' in Arabi, O. (ed.) *Studies in modern Islamic law and jurisprudence*. (The Hague, London: Kluwer, 2001) [ISBN 9789041116604] (available on the VLE).**

Further Reading

- **El Alami, D. and D. Hinchcliffe *Islamic marriage and divorce laws of the Arab world*. (London: Kluwer, 1996) [ISBN 9789041108968].**
- **Pearl and Menski, Chapter 7 'Marriage: legal effects' (available on the VLE) and Chapter 8 'Polygamy'.**

7.1 Mutual rights

Perhaps the most important mutual right of the parties is the legitimacy of any offspring of the union. We will discuss the rights and obligations of parents to their children later. Another mutual right of the parties is the right to inherit from the estate of the other. This will also be discussed in Chapter 11 ('Succession'). The parties have a mutual right to sexual intercourse, but the wife may refuse consummation in certain circumstances.

7.2 The *iddah* period

The *iddah* period is a waiting period following the end of a marriage by either divorce or the husband's death. During the period the wife or widow cannot remarry. The *iddah* period in the case of death is four months and 10 days. In the case of divorce it is three menstrual cycles or three lunar months or, if the woman is pregnant, until the birth of the child.

7.3 Rights of the wife

The right of the wife to receive dower has been discussed in Chapter 6. In addition to this, the wife has the right to be maintained by her husband. The right to be maintained belongs to the wife even if she is wealthy and her husband poor. Maintenance consists of the provision of accommodation, food, clothing and, depending on her background, servants. The husband is required to provide the wife with a '*Shari'ah*-compliant dwelling', that is, a dwelling that is safe both structurally and in location and is free from any other member of his family, including other co-wives. The only exception is that the husband can require his wife to live with the infant children of his previous marriage (although the Shi'ah school does not allow her husband to do this). The scale of maintenance is calculated in Hanafi, Maliki and Hanbali law as the mean between the means of the husband and the previous living standard of the wife. The Shi'ah view is perhaps more realistic in having regard to the means of the husband alone when fixing the quantum of maintenance. The Ithna Ashari view, on the other hand, is that it is the wife's previous standard of living that is the sole relevant factor.

Although the husband has a duty to maintain his wife, she in turn is under a duty to obey him, and the rights of obedience and of maintenance are thus reciprocal. The husband's duty to maintain his wife begins as soon as she submits herself to his control. If the marriage has been contracted during the minority of the wife the husband's duty to maintain her begins as soon as she declares herself ready, able and willing to begin cohabitation with him. If the husband chooses not to take her to live with him despite her declaration he will nevertheless be obliged to maintain her, even though she is still living in the house of her parents or other guardian, as the law considers that she has done everything she can to submit herself to his control. The husband's duty to maintain his wife continues throughout marriage unless the wife forfeits her right to maintenance by being disobedient to her husband. In this case, as the husband's duty to maintain is dependent on his wife's obedience, his obligation terminates until his wife abandons her disobedience and submits herself to her husband's control. However, if the wife disobeys her husband for some lawful reason she does not lose her right to maintenance.

Even a husband who is a minor is obliged to maintain his wife if she is of an age where consummation of the marriage would be possible.

The wife's right to maintenance terminates on the husband's death and there is no provision for a wife to be maintained out of her husband's estate. If the marriage is terminated by divorce the right to maintenance depends on whether the divorce was revocable or irrevocable. All the schools and sects are agreed that if the marriage is terminated by a repudiation that is of the revocable type, the wife retains her right to maintenance throughout the *iddah* period. The reasoning of the jurists on this

point is that since this divorce is revocable and revocation is solely in the hands of the husband, the wife remains subject to his control. If, however, the divorce is of the irrevocable variety, only the Hanafi school allows the wife to retain her right to maintenance during the *iddah* period. According to the law of the other schools and sects, during the *iddah* following an irrevocable repudiation the wife is only entitled to have a dwelling provided for her by her husband. Legislative changes have taken place on the question of post-divorce maintenance and we will cover these in Chapter 9.

Mention should also be made of the so-called *Misyar* marriage in this context. This form of marriage, although it has been practised for many years in the Arabian peninsular, has only been subject to legal discussion in recent times. Under this marriage contract, which is concluded in the normal way, the parties agree that they will not cohabit, that the wife will remain in her parental home and the husband will visit her there at times mutually agreed between them (hence the title of the marriage meaning 'ambulatory' or 'walking', with the husband walking from his place of residence to that of his wife). In this marriage the husband is under no obligation to provide maintenance for his wife, nor for any children they may have. However, both parties will have mutual rights of inheritance and there will be mutual rights of inheritance between them and their children.

SELF-ASSESSMENT QUESTIONS

1. **To what extent are the rights and obligations of husband and wife reciprocal?**
2. **Is it possible to change the fundamental balance of these rights and duties?**

7.4 Polygyny

The Arabs of the pre-Islamic era were governed by tribal customary law that permitted unlimited polygyny. Islamic law severely restricted this customary right by providing that a husband could not have more than four wives concurrently. The verse of the Qur'an that deals with polygyny occurs in *Surah* 4 verse 3:

> And if you fear that you cannot deal justly with orphans, then marry from the women who seem good to you, two or three or four. But if you fear that you cannot deal equitably, then only one, or those whom your right hand possesses. This is better that you do not injustice.

This verse has been interpreted to the effect that the law obliges the husband to treat his wives equitably and he must spend an equal amount of time with each wife. The former condition is construed by the jurists as a matter for the husband's own conscience but does not establish a condition precedent for entering into a polygynous marriage. All the schools and sects are agreed that it is not necessary for a man to obtain any sort of permission before he marries a second or subsequent wife. His right to marry polygynously is virtually absolute (although certain restrictions are imposed which will be discussed below).

7.4.1 Restrictions to polygyny

A man may exercise his right to marry more than once at will providing he does not exceed the maximum number of four wives at any one time. The Ithna Ashari sect of the Shi'ah also allows a man to have, in addition to four permanent, an unlimited number of temporary wives (see Chapter 8). A man may not validly conclude a marriage with a woman who is related to his existing wife within the prohibited degrees of kinship – it is unlawful to have two wives concurrently who, if one had been a male, would have been forbidden to marry each other. Thus, a man may not be married to two women who are sisters by blood or fosterage, or to a mother and daughter.

Although the law does not require the husband to obtain prior permission from the court to marry a second or subsequent wife, it does concern itself with the rights of his several wives. He must provide each of them with a separate dwelling which is

free from the presence of his other wives, and which is safe both structurally and in its location. A wife who is offered accommodation that does not fulfil the required standard may refuse to cohabit with her husband and she will not be deemed to be in disobedience to him. The husband is required to maintain each of his wives to the appropriate standard (i.e. each of the co-wives is equally entitled to maintenance *pro parte* (see Section 7.3). This results, under Shafi'i law, in each wife being entitled to the same amount of maintenance because, as explained above, the husband under Shafi'i law must pay maintenance according to his means. Under the law of the other three Sunni schools the amount of maintenance to be paid is the mean between the wife's previous standard of living and the husband's financial capability. In Ithna Ashari law, maintenance is based solely on the wife's previous standard of living. It is part of the duty of the husband to treat his several wives equally, as enjoined by the Qur'an itself. He must divide his time equally between them.

This right of each wife to share the companionship of their mutual husband is dealt with at length in the traditional jurisprudential texts and is known as *qasm* (partition, division). The jurisprudential texts speak of the duty of the husband to divide his nights equally between his wives and, if he fails to do so, to give compensation to any wife who is passed over. The right of the wife is merely to companionship, not to sexual relations. The system of equal division of nights might be altered when a husband takes a new wife with whom, if she is a virgin, he may spend seven consecutive nights. If she is not a virgin he may spend three consecutive nights with her. In such cases the husband is under no duty to make up these nights to his other wives or to pay them compensation. The right of *qasm* does not exist in Ithna Ashari law in the case of temporary wives.

7.4.2 Unwilling co-wives

The next question to consider is does the law provide any remedy for a wife who finds she is unwillingly going to become a co-wife? The traditional law provided no solution whatsoever for the majority of such women. In this respect the Hanbali wife was the most fortunate as Hanbali law allows a stipulation to be inserted into a contract of marriage that the husband will not take a second or subsequent wife. The insertion of such a stipulation into the contract is not, of course, the decision of the wife or her family alone and the husband must himself agree to it. The basis for the Hanbali doctrine is the Qur'an itself which in *Surah* 5 verse 1 enjoins 'Oh believers, abide by your contracts'. The Hanbali interpret this verse strictly, which indeed forms the entire basis of their law of contract. According to their interpretation, as polygyny is merely a right of a husband which arises on marriage and is not a duty imposed upon him he is free to forgo it. However, Hanbali law does not give the right to a wife, in whose marriage contract a stipulation against the taking of other wives has been inserted, to seek the assistance of the courts to prevent the husband from marrying another wife. If, contrary to the agreement, the husband contracts a marriage with another woman this marriage will be valid in law but the first wife will have the right to go to the court and seek a dissolution of her marriage on the grounds that her husband is in breach of his stipulation.

The view of the non-Hanbali schools is that the incidents of the contract are laid down by Allah and are therefore not susceptible to change at the wish of the parties. As polygyny is permitted by the Qur'an itself, any stipulation that the husband will not take a second wife is void and will be expunged from the contract, which will itself remain valid. Accordingly, a woman of these schools who finds herself a co-wife against her will cannot seek a divorce on the grounds of her husband marrying polygynously. This is the case unless her husband has delegated to her or to her proxy the right to divorce if he takes a second wife, or if the husband has pronounced a repudiation against his first wife conditional on his taking a second wife.

It is possible, however, for a determined Maliki wife to obtain her freedom from a polygynous marriage by following a rather tortuous route. She could first petition the court on the ground of *dharar* (harm, prejudice), relying on the *hadīth* that 'There is no harm or prejudice in Islam'. The Maliki texts are adamant that the taking of a co-wife

alone cannot of itself constitute *dharar*, as polygyny is recognised by the Qur'an. She will have to prove that she has been unequally treated compared with the other wife or wives or that the husband has caused her physical harm. If she fails to prove her allegation and she persists in pursuing her claim, the Maliki court may re-constitute itself into an arbitration tribunal and, relying on *Surah* 4 verse 34, appoint an arbitrator from both the husband's and the wife's sides, whose first task is to attempt to effect reconciliation between the parties. If their attempt fails the tribunal must then examine the evidence before them and allot the blame for the obvious breakdown of the marriage. The tribunal will then decide which party is primarily to blame for the breakdown. If they decide that it is the husband, the wife will be given a judicial *talāq*. If it is the wife, she will be given a judicial *khul'* and will usually be required to return her dower to her husband or to remit her dower debt. See Chapter 9 for more information about *talāq* and *khul'*.

7.4.3 The fifth wife

If a man has four wives already and goes through a ceremony of marriage with another woman, this 'marriage' will be invalid. However, it will not be an absolute nullity as certain effects will flow from it. Perhaps the most important of these is that any children born of the union will be recognised as legitimate. Also of great importance is the fact that the husband and fifth wife will not be guilty of *zina* (for which, under traditional law, a guilty party could be sentenced to death – see Chapter 4). The fifth 'wife' will be entitled to receive dower. In Hanafi law either the stipulated or the proper dower, whichever is less, will be due and in the law of the other schools it is the stipulated dower. The wife will have to observe an *iddah* following the separation which must inevitably take place as soon as the true number of wives is brought to light. If the husband dies before the separation, the *iddah* of death is not incumbent on the woman, who, as she was never a valid wife, cannot be a widow. She must, however, observe an *iddah* of three menstrual cycles to establish pregnancy or otherwise.

All schools and sects are agreed that a husband may not validly contract a marriage with a fifth woman while one of his four wives is observing an *iddah* following a revocable divorce. If, however, the wife is observing an *iddah* following an irrevocable divorce, the Malikis hold that the now former husband may validly contract a further marriage with another woman while his divorced wife is still observing *iddah*. The Hanafis and Hanbalis hold that such a marriage may not be validly concluded until the *iddah* has been completed. Taking the view that the husband still has duties towards the divorced wife, according to Hanafi law, full maintenance and shelter must be provided.

7.4.4 Inheritance in polygynous marriages

If a husband dies the Qur'an provides that the wife's share of the inheritance is one-quarter if the husband is survived by no child (a child of a son how low so ever, i.e. a descendant of any degree, in Sunni law and the child of either a son or daughter in Shi'ah law) and one-eighth if there is such a surviving descendant. If a man dies survived by more than one wife, one-quarter or one-eighth will be divided between them. Thus, the child or children of any wife, or any legitimate child of the husband from another wife, will reduce the share of wives who are childless to their minimum share. In Ithna Ashari law a temporary wife has no right to inherit from her husband but her children, as his legitimate offspring, have a right of inheritance and will accordingly restrict the permanent wife or wives to their minimum collective shares. See Chapter 11 for more information about succession in Islamic law.

7.4.5 Reform of the law of polygyny

Polygyny has been the subject of reform and many countries in the Muslim world have legislated to impose restrictions – for instance requiring a husband who wishes to marry polygynously to first obtain the permission of the court to do so. Only Tunisia has banned polygyny outright, however, and has declared a polygynous marriage void.

Tunisia

'Polygyny is forbidden'. With this terse enactment Tunisia became the first and, to date, only country of the Muslim world within the framework of the *Shari'ah* to ban polygyny outright. Article 18 of the Tunisian Law of Personal Status of 1956 states 'Polygyny is prohibited. Any man who marries whilst he is already married…shall be punished by one year in jail and a fine…'.

The Memorandum accompanying the law states that the juristic basis is the Qur'anic verse on polygyny itself. The Memorandum states that the verse allows polygyny only where the man is able to treat several wives equally but that a later verse in the same *Surah* states that this is an impossibility for all but the Prophet. Verse 129 of *Surah* 4 states that 'no matter how hard you strive you will never be able to deal equitably between wives'. The traditional interpretation of this verse was that, read with the earlier verse, if a husband gave his wives equal maintenance, spent his time equally with each of them and did not favour one at the expense of others he had done all he could to satisfy the injunction placed upon him by the Qur'an. Whether he in fact loved one more than the other or others was something over which he had no control.

The Tunisian reformers, however, following the views of the Egyptian jurist Muhammad Abduh, held that the two verses read together meant that the Qur'an had prohibited polygyny for all but the Prophet. This was an interesting example of the use of *ijtihād* to effect reform (see Section 3.3.1) while staying within the boundaries set by the *Shari'ah*. President Habib Bourguiba stated that, in abolishing polygyny, he had not contravened any principle of the *Shari'ah*. When the Memorandum was first brought into effect, doubt was cast by commentators, academics and others as to whether a polygynous marriage was then valid, despite incurring penal sanctions. Any such doubts were removed by the coming into force of the law on 20 February 1964, which declared that any marriage by a person who was already married was void. No other jurisdiction in the Muslim world has followed the example of Tunisia in banning polygyny outright. However, most countries which have undertaken reform in matters of personal status law have attempted to limit and control its practice.

Syria and the Middle East

Syria was the first country to restrict the husband's right to polygyny. The Law of Personal Status 1953 provided in Article 17 that a judge may refuse permission for a man already married to take a second wife unless he has a 'lawful justification and is capable of maintaining both wives'. However, the Memorandum to the 1953 law stated that a marriage in contravention of the law shall be deemed valid although it will incur penal sanctions.

Most countries of the Middle East have followed the precedent set by Syria and have placed restrictions on the husband's right to marry polygynously. Most emphasise his financial ability to deal with several wives as the prime consideration to be taken into account by judges who are asked to give permission for a second marriage in accordance with the legislation. See, for example, Article 13 of the Libyan Law 10 of 1984 and the Yemini decree 20 of 1992 as amended in 1998.

The Algerian Family Law of 1984 was amended in 2005. Article 8 of this law requires *inter alia* that the husband must prove his ability to treat co-wives equally and to provide necessities for married life. He must have a sound reason for wanting to marry polygynously and show that he has informed his existing wife or wives and the potential future wife of his legal marital status. Further, his existing wife or wives may seek a judicial divorce in cases where the husband does not comply with this provision or attempts to deceive them by other means.

Mohammed VI of Morocco introduced a new code on family law in 2004 after appointing a commission in 2001 to consider revising the existing family law. This law does not prohibit polygyny but requires the prior permission of the court to be obtained. This will not be given unless the court is satisfied that the husband is capable of treating two or more wives equally, as well as their respective children, and that he can guarantee to each wife and their children the same quality of life. Further, the court must be satisfied that the husband has sound reasons to marry polygynously.

Under the law of Iraq the husband, in addition to financial capacity, must prove that there is some 'lawful benefit' to the second marriage (Law of Personal Status of 1959). Further, the law provides that if 'lack of equality between wives is feared', a fact which the statute states must be assessed by the judge, polygyny is not allowed. Iraqi judges were not happy with this provision, some stating that it required them to assume the role of a prophet foreseeing the future. In practice, most courts in Iraq limit themselves to considering only the financial aspects of a second marriage.

The Egyptian law of polygyny was amended in 1985. On marrying, a man must state whether he is already married and, if so, supply the name and address of his existing wife to the public notary, who will then inform her of the new marriage. The first wife may then petition the court for divorce alleging such mental or physical harm as would make married life impossible. The judge, if unable to effect reconciliation, will dissolve the original marriage. However, this right of the existing wife will lapse if she does not institute proceedings within one year of becoming aware of the second marriage. The second wife may also petition for divorce if she was unaware of the existence of the first wife.

Finally, it should be stated that most countries of the Middle East have, by legislation, adopted the Hanbali law regarding the insertion of modifying stipulations into the marriage contract. Obviously, as in Hanbali law, such stipulations require the consent of the husband and if such a stipulation exists in the contract, although it gives the wife the right to divorce, it does not give her a right to seek an injunction against a second marriage.

Pakistan and Bangladesh

In Pakistan and Bangladesh s.6 of the Muslim Family Laws Ordinance 1961 (MFLO) provides that before a man may marry a second or subsequent wife he must obtain the permission of his local Union Council. When submitting an application for permission to the Chairman the man must state his reasons for seeking to marry another wife and whether or not his existing wife or wives have given their consent to another marriage. The Chairman will then require the husband and his existing wife or wives each to nominate a representative and the Chairman and these representatives will then constitute an arbitration council. The MFLO Rules 1961 provide guidance as to the grounds on which permission to marry polygynously may be given. These include the sickness, infertility and unfitness for marital relations of the existing wife. When giving its decision the Council must state its reasons and an appeal can be made by either party for a revision.

A man who marries polygynously without obtaining permission will be liable on conviction to imprisonment or a fine or both but the polygynous marriage itself will nonetheless be valid. In addition to penal sanctions incurred, a man who contravenes the provisions of the MFLO must pay immediately the entire amount of dower, whether prompt or deferred, to his existing wife or wives. If he refuses to pay on demand, the amount will be collected in arrears of land revenue. This means that the duty of enforcing the payment of the dower will fall not upon the magistrates' court but on the collector or divisional officer. He will be entitled to exercise his extensive powers of collection on the husband who persists in his refusal to pay. Thus, the collection of the dower from reluctant husbands is made easier while avoiding lengthy court proceedings.

A wife whose husband marries polygynously without the permission of the Council is also entitled to seek a dissolution of her marriage on this ground under s.14 of the MFLO.

In an interesting case from Bangladesh (*Yasmin Sultana* v *Muhammad Elias* 1997 17 BLD 14) Mr Justice Rabani stated in his judgment that the correct approach to polygynous marriages was the one adopted by Tunisia.

India

In the Indian sub-continent, none of the three republics has enacted legislation by statute on the right to insert stipulations into a marriage contract. However, the courts, even before partition, had long recognised the right of the parties to a marriage to do so and the subsequent right, if a stipulation was broken, to a dissolution of the marriage.

In India, Muslims may still marry second and subsequent wives without obtaining permission from the court. However, as stated above, a wife may insert stipulations in the marriage contract against a second marriage. A woman whose husband takes a second wife may also, in suitable circumstances, petition for divorce under the Dissolution of Muslim Marriages Act 1939 if her husband fails to accord her equal treatment with her co-wife or wives or on the grounds of cruelty.

The law regarding polygyny was reviewed by the courts of Allahabad in *Itwari* v *Asghari* AIR 1960 All 684. In this case the husband sought a decree of restitution of conjugal rights against his first wife who refused to live with him and accused him of cruelty after he took a second wife. Mr Justice Dhavan held that in India the institution of polygyny was tolerated but not encouraged. Counsel for the husband had contended that, under Islamic law, taking a second wife could not be construed as cruelty to the first wife. The court rejected this argument and observed that the test of cruelty in India was more or less that adopted by the English courts at the time (i.e. it will cause such bodily or mental pain as to endanger the wife's safety or health). The judge held that under the prevailing social conditions the taking of a second wife must be regarded as an insult to the first wife which is likely to cause her mental suffering and consequently affect her health. Therefore, he held her husband must be presumed to intend the natural consequences of his actions so that the taking of a second wife in the absence 'of a weighty and convincing explanation' raises a presumption of cruelty to the first wife and it would be inequitable for the court to compel her to continue to live with him.

The attitude of the Indian government towards polygyny is illustrated by various regulations which aim to restrict polygynous marriages among certain sections of the population. No government employee, civil servant or serving officer above field rank, for example, may contract a second marriage without the prior permission of the government. Similarly, a female employee may not marry anyone who has a wife already without first obtaining the permission of the government. Failure to observe these conditions will result in disciplinary actions against the offender.

The Indian Law Commission (Report No. 227, August 2009) has stated that bigamy among India's Muslims 'is against the letter and spirit of true Islam'.

In the other jurisdictions that have sought to restrict polygyny, if a husband contravenes the provisions of the law his polygynous marriage will be regarded as valid although penal sanctions may be imposed and, in the case of Pakistan, the existing wife may obtain the dissolution of her marriage.

Further reading

- **Hinchcliffe, D. 'Polygamy in traditional and contemporary Islamic law' (1970) 1(8) *Islam and the Modern Age* 13–38.**
- **Kamaruddin, Z. and R. Abdullah. 'Protecting Muslim women against abuse of polygamy in Malaysia: legal perspectives' (2008) 6(2) *HAWWA* 176–201.**
- **Abdullah, R. 'Inserting stipulation pertaining to polygamy in a marriage contract in Muslim countries' (2008) 46(1) *Al-Jāmi'ah: Journal of Islamic Studies* 153–69.**

Self-assessment questions

1. **Describe and discuss the legal characteristics of polygyny under Islamic law.**
2. **Are the various schools and sects agreed on these legal characteristics?**

REMINDER OF LEARNING OUTCOMES

Having completed this chapter and the relevant readings, you should be able to:

- **distinguish between the rights and obligations of husband and wife arising out of the marriage contract**
- **determine when and to what extent the husband is under a duty to maintain his wife**
- **explain and discuss the Islamic law on polygyny.**

SAMPLE EXAMINATION QUESTIONS

Question 1 Explain the duty upon a Muslim husband to provide maintenance for his wife.

Question 2 Discuss the right of a Muslim husband to marry more than one wife.

ADVICE ON ANSWERING THE QUESTIONS

Question 1 Discuss what constitutes maintenance in Islamic law and when the duty on the husband to provide it begins and when it ceases. Explain the right of a wife whose husband refuses or is unable to pay maintenance.

Question 2 Explain the law regarding polygyny and how the Qur'anic verses on polygyny were considered to be 'reforming'. A good answer should include a discussion of the obligations of the husband towards his wives, as well as any changes which have been effected to the law of polygyny through statute or judicial interpretation in different jurisdictions.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can distinguish between the rights and obligations of husband and wife arising out of the marriage contract.	☐	☐	☐
I can determine when and to what extent the husband is under a duty to maintain his wife.	☐	☐	☐
I can explain and discuss the Islamic law on polygyny.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
7.1	Mutual rights	☐	☐
7.2	The *iddah* period	☐	☐
7.3	Rights of the wife	☐	☐
7.4	Polygyny	☐	☐

NOTES

8 Stipulations in marriage contracts

Contents

Introduction

As discussed in Chapter 7, it is permissible to insert stipulations into marriage contracts under Islamic law. Stipulations in marriage contracts fall into three categories: those that are valid and enforceable, those that are themselves void but leave the contract of marriage valid, and those that invalidate the whole contract.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings, you should be able to:

- **identify the principles underlying valid and void stipulations and the exceptions under Hanbali law**
- **explain the stipulations that invalidate marriage contracts**
- **describe the *mut'ah* (temporary marriage) rules under Ithna Ashari law.**

FURTHER READING

- **Musa, M.Y. 'The liberty of the individual in contracts and conditions according to Islamic law' (1955) *Islamic Quarterly* 252–63.**
- **Welchman, Chapter 8 'The marital relationship' (available in VLeBooks via the Online Library).**

8.1 Valid and void stipulations

All the schools and sects regard as valid and enforceable any stipulation that merely seeks to reinforce the normal effects of marriage. Thus, agreements to fix the amount of dower that shall be paid or fixing the amount of maintenance that is to be paid are both valid and enforceable. A difference of opinion regarding the second type of stipulation exists between the Hanbali and the other three schools of Sunni Islam and the various sects of the Shi'ah. With the exception of the Hanbali school, Muslim jurists hold that the effects of the marriage contract are immutable and are not subject to change by the parties. They regard any stipulation that attempts to vary a normal incident of marriage as void. They will apply the doctrine of severance and remove the offending stipulation from the contract, which will itself remain valid.

The Hanbalis, however, regard the Qur'anic injunction 'Oh you who believe abide by your contracts' (*Surah* 5, verse 1) as the basis of the law of contract, thereby invoking the principles of both freedom of contract and *pacta sunt servanda* (see Chapter 5). Accordingly, in Hanbali law, any stipulation not itself forbidden or not contrary to or inconsistent with the essence of the contract of marriage is valid. A stipulation falling into this category would be a provision to the effect that the husband will not take a second wife or that the wife will be free to leave the matrimonial home whenever she wishes. If such a stipulation is inserted into the contract and the husband breaches it, the wife's remedy is to apply to the court to grant her a dissolution of the marriage on the grounds that her husband is in breach of contract and she is therefore no longer bound by it.

8.2 Invalidating stipulations

Stipulations that invalidate the entire contract are those held to be contrary to the essence of marriage. Into this category the four Sunni schools and the Ismaili sect of the Shi'ah place all stipulations attempting to impose a time limit on the marriage, as the law regards marriage as being a life-long union. The Ithna Ashari sect of the Shi'ah regard such stipulations as valid and recognise the institution of the *mut'ah*, or temporary marriage.

Mut'ah is concluded in the same way as the *Nikah* or permanent marriage (i.e. by an offer and acceptance). As in *Nikah,* the wife receives a sum of money on the conclusion of the contract. This is not referred to as dower but is termed salary or wages. The contract may stipulate any time limit. The wife is under no obligation to obey her husband and accordingly her husband is under no obligation to maintain her. Any children born of a *mut'ah* marriage are legitimate but if either party dies during the subsistence of the *mut'ah* the other party will not inherit from them. Either party may terminate the marriage at will. If the husband chooses to end the marriage before the expiry of the time limit he may not reclaim any of the money he has paid to his wife. However, if the wife terminates the marriage she must repay her husband a proportionate amount of the money paid by him, taking into account the time she has spent with him. When the marriage ends the woman must observe an *iddah* of 40 days or, if she is pregnant, until the delivery of the child. A man may have an unlimited number of wives by the *mut'ah* contract. A *mut'ah* marriage is dissolved *ipso facto* by the expiry of the term but if cohabitation continues after the expiry of the term, the inference is that the term was extended for the whole period of the cohabitation and that the children conceived during the extended period are legitimate.

Reformers in many parts of the Muslim world have adopted the Hanbali law allowing stipulations which vary the normal incidents of the marriage contract to be inserted if such stipulations are for the benefit of one or both parties to the contract. In the Indian sub-continent such stipulations have also been held by the courts to be valid. The courts did not, in so doing, adopt Hanbali doctrine but stated that Muslim marriage is a civil contract, and a stipulation that is not in contravention of the provisions of the Indian Contract Act 1872 is valid. The position was succinctly put by Addison J, who stated in *Muhammad Amin* v *Amina Bibi* AIR 1931 Lahore 1934 that 'marriage is a civil contract and the parties can contract in any way they care within certain limits'.

Self-assessment questions

1. **What are the limitations on the incorporation of stipulations into a marriage contract?**
2. **Are there any differences on this issue between the different schools and sects?**
3. **Why does Islamic law impose restrictions on the scope and content of these stipulations?**

Reminder of learning outcomes

Having completed this chapter and the relevant readings, you should be able to:

- **identify the principles underlying valid and void stipulations and the exceptions under Hanbali law**
- **explain the stipulations that invalidate marriage contracts**
- **describe the *mut'ah* (temporary marriage) rules under Ithna Ashari law.**

Sample examination question

To what extent can the contracting parties to a marriage change the incidents of the traditional Islamic law contract?

Advice on answering the question

You should explain that, in traditional Islamic law as applied by the three non-Hanbali schools, the only stipulations which may be inserted into the contract of marriage are those that merely reinforce the normal incidents of the marriage contract (e.g. fixing the level of maintenance). The position of the Hanbali should then be explained.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can identify the principles underlying valid and void stipulations and the exceptions under Hanbali law.	☐	☐	☐
I can explain the stipulations that invalidate marriage contracts.	☐	☐	☐
I can describe the *mut'ah* (temporary marriage) rules under Ithna Ashari law.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
8.1	Valid and void stipulations	☐	☐
8.2	Invalidating stipulations	☐	☐

Notes

9 Dissolution of marriages

Contents

Introduction

Dissolution of a marriage is possible under Islamic law. It is one of the areas of law where the schools and sects adopt, at times, very different approaches. It is therefore a substantial topic.

Divorce may be effected in a number of ways. It can be:

- by a repudiation of the wife by the husband (*talāq*)
- by mutual consent (*khul'*)
- by decree of the court dissolving the marriage (*faskh*).

LEARNING OUTCOMES

By the end of this chapter and the relevant readings, you should be able to:

- **identify and explain the rules and procedures for the dissolution of marriage (*talāq*, *khul'* and judicial divorce)**
- **Identify and explain the rules governing post-divorce maintenance, including modern reforms.**

CORE TEXT

- **Baderin, Chapter 4 'Family law'.**

ESSENTIAL READING

- **El Alami, D. and D. Hinchcliffe *Islamic marriage and divorce laws of the Arab world*. (London, The Hague: Kluwer Law International, 1996) [ISBN 9789041108968], pp.22–32 (available on the VLE).**
- **El Alami, D. 'Remedy or device? The system of khul' and the effects of its incorporation into Egyptian Personal Status Law' (1999–2000) 6 *Yearbook of Islamic and Middle Eastern Law* 134–39 (available in HeinOnline).**
- **Carroll, L. 'Qur'an 2:229: "A charter granted to the wife"? Judicial khul' in Pakistan' (1996) *Islamic Law and Society* 91–126 (available in HeinOnline and JSTOR).**

FURTHER READING

- **'Abd al 'Ati, Chapter 6 'Dissolution of the family'.**
- **Welchman, Chapter 9 'Divorce' (available in VLeBooks via the Online Library).**
- **Ahmad, N. 'A critical appraisal of "triple divorce" in Islamic law' (2009) 23 *International Journal of Law, Policy and the Family* 53–61.**
- **Munir, M. 'Triple *talaāq* in one session: an analysis of the opinions of classical, medieval, and modern Muslim jurists under Islamic law' (2013) 27 *Arab Law Quarterly* 29–49.**
- **Khan, F. '*Tafwīd al-talāq*: transferring the right to divorce to the wife' (2009) 99 *Muslim World* 502–20.**

9.1 Dissolution by unilateral repudiation (*talāq*)

The most common method of dissolving a marriage under classical Islamic law is by the husband unilaterally pronouncing the formula for repudiation known as *talāq*. Islamic law, according to all the schools and sects, gives the husband the right to unilaterally terminate the marriage at will, without showing cause and without recourse to the court. Sunni law requires neither the presence of the wife nor of witnesses for a *talāq* to be valid. In Sunni law a *talāq* may either be in accordance with the *Sunnah* (the Qur'anic verses on *talāq*) or it may be in the *bid'ah* form (see below).

9.1.1 *Talāq* in accordance with the *Sunnah*

A divorce in accordance with the *Sunnah* can fall into two categories: the most approved form and the good form. The most approved form is when the husband pronounces a single *talāq* when the wife is in the so-called period of purity (when she is not menstruating). Immediately on the pronouncement of the repudiation the wife begins *iddah,* or the waiting period, which will continue for three menstrual cycles or, if she is pregnant, until the delivery of the child. While the *iddah* is continuing, the husband may revoke the repudiation and take back his wife. No formality is attached to the revocation of the repudiation and it may be made expressly or implicitly by the conduct of the husband. During the observance of the *iddah* period the husband is under a duty to maintain his wife (see Chapter 7). If either party dies while the wife is still in the period of *iddah* the other spouse will inherit their Qur'anic portion. If the *iddah* period expires and the husband has not revoked his *talāq* the repudiation becomes irrevocable. This irrevocability is of the lesser degree and the parties may, if they so choose, remarry by a new marriage contract.

The second form of *talāq* effected in accordance with the *Sunnah* is considered by the jurists to be good but less approved than the method discussed above. In this form the husband pronounces three repudiations during three successive periods of purity. The law allows a husband to repudiate his wife three times only. Once he has pronounced three *talāqs* his wife is irrevocably repudiated to the greater extent (i.e. she can only remarry the husband after an intervening marriage to another man). If the husband has elected to repudiate his wife by the 'good form' he may revoke his *talāq* unless it is the third of the three. During the *iddah* following the third *talāq* neither party will inherit from the other and only the Hanafis consider that the husband is still under a duty to maintain his wife.

The Ithna Ashari sect of the Shi'ah only recognise as valid a *talāq* pronounced in accordance with the *Sunnah* (in the 'approved' or in the 'good form'). The law of this sect also requires that a precise set of words must be used and two witnesses, who must be adult male Muslims of good character, must be present when the pronouncement is made.

9.1.2 *Talāq al bid'ah*

Sunni Islam, however, has from early times recognised a *talāq* in the *bid'ah* form as effective and valid in law despite it being considered morally reprehensible. The most prevalent form of *talāq al bid'ah* is the triple repudiation whereby the husband pronounces three *talāq* at the same time. Other forms of *talāq* in the *bid'ah* form are repudiations suspended on a condition that could be used as a threat by the husband. Such a condition could, for instance, be that the wife is forbidden from leaving the house. If she does the marriage is dissolved.

In many countries of the Muslim world today reforms have been promulgated in the law of personal status that provide that the triple *talāq* shall only take effect as a single *talāq*. The effect of these reforms, of course, is to make almost all repudiations, except the third, revocable. In introducing this provision, reformers have accepted that, from its inception, the *bid'ah* form of divorce was held to be sinful and reprehensible and certainly not in conformity with the methods of repudiation prescribed in the *Sunnah*. Despite this, the *bid'ah* form of divorce is considered by the jurists of the four Sunni schools to be legally valid and therefore effective in terminating a

marriage immediately, with no possibility of reconciliation or a remarriage without an intervening marriage for the divorced woman. The reformers also accepted that many Sunni Muslims believed that the only method they could repudiate their wives by was using the *bid'ah* form. Accordingly, to invalidate the *bid'ah* form of *talāq* and to recognise a triple repudiation as only a single repudiation, thereby giving to a husband who had pronounced a *talāq* in anger or without due consideration a chance of revocation, seemed not only a necessary reform but one which could not be opposed by zealots seeking the continuation of traditional values.

No country in the Muslim world which has embarked upon a reform of its divorce laws now recognises a divorce in the *bid'ah* form as effecting other than a revocable divorce – unless, of course, it is the third of a series of such divorces. New legislation in different Muslim countries also now disallows extra-judicial *talāq*. Tunisia, Iran, Morocco, Malaysia, Jordan and many other Muslim countries now require, in their different modern Muslim family law codes, that all dissolution of marriages, including *talāq* by the husband, must be done under judicial supervision through the courts.

Tunisia

Article 30 of the Tunisian Law of Personal Status 1956 provides that divorce shall only take place in a court of law. Article 31 gives the grounds on which a decree of divorce will be made. These are on the petition of the husband or wife on any grounds specified in the Law of 1956, by the mutual agreement of the parties or at the request of the husband or wife. If a divorce is given at the request of either party without cause being shown, the judge will decide what compensation should be awarded to the wife by the husband or by the wife to the husband. Article 32 of the Law was amended to require that the judge must attempt to reconcile the parties before granting a dissolution of the marriage. If reconciliation fails the judge must, even if not requested by the parties to do so, make orders regarding the housing of the two parties, maintenance, custody of children and visiting rights unless the parties have already agreed on these issues.

Iran

The law of divorce in Iran has gone through a considerable number of changes in a comparatively short period of time. Until 1967 the traditional Shi'ah law applied. Article 1133 of the Civil Code stated that divorce was in the hands of the husband. No recourse to a court was necessary and no cause needed to be shown. In 1967 the Family Protection Act was promulgated by a decree of the Shah. Article 10 of the Act provided that neither the husband nor the wife could obtain a divorce until a decree of 'irreconcilability' was issued by the court. Thus, the husband's hitherto absolute right to repudiate his wife at will was abolished.

With the coming into existence of the Islamic Republic of Iran it was at first not clear whether the provisions of the Family Protection Act in respect of divorce were still applicable. The Special Civil Courts Act (Number 10088 of 11 October 1979) clarified the situation by providing that divorce was still a judicial matter but that grounds for it were confined to traditional Islamic law and the relevant provisions of the Civil Code. The Act also introduced a procedure for arbitrators to be appointed to attempt reconciliation. The Act left wives with a very restricted number of grounds for divorce, whereas husbands were not required to present any grounds for divorcing their wives. Parliament sought ways to ameliorate the position of women and in 1992 the Divorce Act was promulgated. Article 1 of the Act states that all divorces must be judicial and that for a divorce to be effective a certificate of irreconcilability must be granted by the court, irrespective of whether the application is made by the husband or the wife. (This Act virtually repeals the provisions of the 1967 legislation.) The Act further provides that where the husband petitions for divorce the wife can claim compensation in cases where she wishes the marriage to continue and is not herself in breach of any conjugal duties. Such compensation represents payment for duties which the wife undertook that she was under no obligation to perform. Hence, she would be entitled to compensation for household duties and taking care of any

children of the marriage beyond the age at which there was an obligation upon her to do so (under the amended law of Iran the wife has the duty and the right to be the primary carer of her children until they reach the age of seven).

The necessity for judicial divorce was reconfirmed in 2002 when Article 1137 of the Civil Code was amended. Article 1137 now states that 'A man can, by observing the conditions stated in this Code, go to the court and ask for the divorce of his wife'. Article 3 of the Divorce Act 1992 provides that the execution of the divorce and its registration by the Notary Public cannot be effected until payment is made to the wife of all her legal and religious rights such as dower and maintenance. The exceptions to this are where the divorce is by mutual consent, where the wife agreed to the divorce taking place before she received any payment or where the husband is declared insolvent or otherwise unable to pay.

Once issued, a certificate of irreconcilability remains valid for three months. Within three months of its issue the certificate must be presented to the divorce registry. On presentation, the registry summons the parties to attend for the execution of the divorce and its due registration.

Article 6 of the Divorce Act 1992 provides that where the wife seeks payment for work within the marriage the court must first attempt to resolve the issue through the mutual agreement of the parties. If the parties cannot reach an agreement, there are no stipulations in the marriage contract relating to financial matters and the husband is the instigator for reasons other than the misbehaviour of his wife or her failure to perform her marital obligations, the court must consider if the wife has undertaken work at the husband's request which she was under no legal obligation to perform during the course of the marriage. The court must then determine an appropriate remuneration and award compensation to the wife. In other cases the court must consider the duration of the marriage, the wife's contribution to work in the matrimonial home and the husband's financial situation and award her payment as a gift. The Exigencies Determining Council of the Nation (NEDC) has held that all the rights that a wife has by virtue of Article 6 must be paid to her before decree for divorce can be executed and registered by the divorce registry.

Morocco

Article 78 of the Moroccan Family Code of 2004 also provides that dissolution of marriage by either the husband or the wife, each according to their respective conditions, must be done under judicial supervision. Articles 79 to 97 then go on to provide details about the procedure, starting from the courts' reconciliatory role up to the dissolution of the marriage if the reconciliatory effort fails.

Malaysia

Similarly, s.47(1) of the Malaysian Islamic Family Law (Federal Territories) Act 1984 (as amended) provides that a husband or wife who desires dissolution of marriage shall present an application for that purpose to the court in a prescribed form. Other articles provide details of the procedure to be followed. Section 124 of the Act criminalises extra-judicial divorce and provides that:

> **Any man who divorces his wife by the pronouncement of talaq in any form outside the Court and without the permission of the Court commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or both.**

Jordan

Article 97 of the Jordanian Personal Status Law of 2010 provides that:

> **The husband shall register the divorce of his wife before a judge. If he divorces his wife extra-judicially without registering it, he shall consult the court to register it within one month and anyone who fails to do so shall be liable to the punishment prescribed in the penal code.**

Pakistan and Bangladesh

In India no reforms have been effected in this area but in both Pakistan and Bangladesh s.7 of the Muslim Families Laws Ordinance (MFLO) 1961 provides that:

> (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *talaq* in any form whatsoever, give the Chairman [of the Union Council] notice in writing of his having done so, and shall supply a copy thereof to the wife.
>
> (2) Whoever contravenes the provision of subsection (1) shall be punishable with simple imprisonment for a time that may extend to one year or with fine which may extend to Rs5000 or with both.
>
> (3) Save as provided in sub-section (5) a *talaq* unless revoked earlier expressly or otherwise shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman.

The Supreme Court of Pakistan decided in *Ali Nawaz Gardezi* v *Muhammad Yusuf* PLD 1963 SC 51 that the notice to the chairman was mandatory and a divorce, however pronounced, would be without effect if the required notice was not given. The decision in this case is still binding in Bangladesh. However, the Federal Shariat Court decided in *Allah Rakha* v *The Federation of Pakistan* 2000 CLR 349 that s.7(3) of the MFLO 1961 was repugnant to the principles of Islam and declared it void. Accordingly, from 31 March 2000 a divorce will be effective even if no notice has been given. However, it would appear that the penal sanctions for failure to give notice remain in force.

The Ordinance provides further in s.7(6) that:

> Nothing shall debar a wife whose marriage has been terminated by talaq effective under the section from re-marrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective.

The husband may delegate his right of repudiation to his wife so that she can divorce him herself. If an option is given to the wife to repudiate her husband she must exercise it immediately after it is given unless the husband specifically grants her an extended period of time in which to exercise it. The husband may also grant his wife the option to divorce him herself upon the happening of a specified event. Once this event occurs the wife may choose to exercise her right of divorce or not as she wishes.

India

The Indian Supreme Court has banned the so-called 'triple talaq' in its celebrated decision of 22 August 2017 in the case of *Shayara Bano* v *Union of India and others*.

A BBC reportage of the case with a video interview of one of the petitioners is also available.

9.2 Dissolution by release (*khul'*)

A marriage may also be dissolved by the wife discharging herself from the marriage. This is called *khul'*. *Khul'* is concluded by an offer and acceptance. It is the wife who makes the offer, offering to pay compensation, usually the dower, or the forgoing of the dower debt – indeed it is considered sinful for a husband to ask for compensation exceeding this – in consideration for the husband releasing her from the marriage. However, the law recognises that any amount may be agreed as compensation and only the Shafi'i school requires that the compensation be monetary. Of course the offer may emanate from the husband, although this is less common. In this case he will offer to repudiate his wife in return for a certain amount of compensation. If it is the wife who makes the offer she may retract the offer at any time before acceptance is made but if it is the husband who makes the offer he may not retract it, and it remains effective until it is accepted or rejected. This is because an offer emanating from the husband is seen to take on the nature of an oath, which cannot be retracted.

A divorce effected by means of *khul'* is immediately irrevocable but to the lesser degree, so that the parties may subsequently remarry on a new contract without the

need for an intervening marriage on the part of the wife. According to all schools of law, except the Maliki school, a *khul'* divorce may only be effected by mutual consent, as explained above. In Maliki law a *khul'* is also primarily considered to be a consensual divorce.

However, the Maliki school alone recognises a judicial *khul'* – a divorce granted by the court where a wife pays compensation to her husband in return for her freedom. Such a divorce can occur when a Maliki wife petitions the court for a dissolution of the marriage on the grounds of *darar* (harm, prejudice). Only the Maliki school accept *darar* as a ground for judicial divorce, relying on the principle that there is no harm in Islam. As will be discussed below, Maliki law has been an inspiration for many reforms, with the result that a judicial *khul'* may be obtained in many parts of the Muslim world.

Activity 9.1

Write a brief summary (no more than 100 words) of Section 9.2.

No feedback provided.

9.3 Judicial divorce (*faskh*)

It is only the husband who has the right to terminate the marriage at will. According to all the schools and sects the wife may only terminate her marriage unilaterally if she is delegated the power to do so by the husband. If no such power has been delegated to her, or if her husband refuses to agree to a *khul'*, a wife who wishes to end an unhappy marriage must seek a dissolution from the court. As mentioned above, this judicial divorce can take two forms under Maliki law, namely a judicial *khul'* or a judicial divorce (*faskh*). All other schools and sects recognise the *faskh* as the only form of judicial divorce. In order to succeed in her petition for a *faskh* divorce the wife must prove either physical defects of her husband or matrimonial offences, which vary under the doctrines of the different schools and sects.

The Hanafi school is the most restrictive towards women in matters of divorce, allowing a wife to obtain a dissolution only if her husband proves unable to consummate the union. Once consummated a Hanafi marriage may not be dissolved at the instance of the wife. It was the unfortunate position of Hanafi wives in the Ottoman empire (whose official law was that of the Hanafi school) which caused the promulgation of the first reforms in the law of personal status in 1915, as discussed earlier. The other schools of law, in addition to acknowledging the inability of the husband to consummate the marriage as a ground for divorce, also recognise that the judge may grant a judicial divorce where the husband is suffering from insanity, leprosy or venereal disease. The law of the Maliki, Shafi'i and Hanbali schools is more favourable to women and, in addition to granting a decree for the husband's physical defects, recognise other grounds for which a divorce may be granted. These include failure to maintain or desertion for a 'prolonged period' of time (usually 60 days, although in Hanbali law there is an exception if the absence is considered excusable). Hanbali law also allows a wife to obtain a judicial divorce if her husband is in breach of a stipulation inserted in the marriage contract.

The Maliki school is the most liberal with regard to the right of the wife to obtain judicial divorce. However, when the Maliki court grants the wife a decree it does so by pronouncing an irrevocable *talāq* on behalf of the husband, thereby continuing the legal fiction that it is the right of the husband alone to terminate the marriage. For this reason the Maliki school does not use the term *faskh* to describe a judicial divorce but refers to it as a judicial *talāq*. Maliki law is unique in that it gives the woman the right to obtain a divorce on the ground of *darar* (harm or prejudice). If she is unable to prove her claim that continuing to live with her husband is causing her harm but persists in her claim that there is discord between them, the Maliki court will reconstitute itself into an arbitration tribunal. Two arbitrators will be appointed, one from the family of the wife and the other from the family of the husband. The arbitrators must first attempt, with the judge, to bring about a reconciliation between the parties. If their attempts fail they must then hear the evidence of both parties and establish which of

them is primarily responsible for the breakdown of the marriage. If they decide that it is the husband they will pronounce an irrevocable *talāq*. However, if they find that it is the wife who is at fault they will pronounce a repudiation in return for the wife giving compensation to the husband (a judicial *khul'*).

Reforms have taken place in many countries of the Muslim world extending a wife's right to divorce. These reforms have sought inspiration from the Maliki doctrine. In the largely Hanafi Indian sub-continent the Dissolution of Muslim Marriages Act 1939 gave wives 10 grounds based on Maliki law to dissolve their marriages at their instigation. Article 2 of the Act provides that a woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on grounds including:

- the husband has been missing for four years
- the husband has failed to maintain her for two years
- the husband has been sentenced to imprisonment of seven years or more
- the husband has failed to perform his 'marital obligations' for three years
- the husband was impotent at the time of the marriage and has remained so
- the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease.

Another possible ground for the wife is that she, having been given in marriage by her father or other guardian before she attained the age of 15, repudiated the marriage before attaining the age of 18, provided that the marriage is unconsummated or that the husband treats her with cruelty. The Act also gives the wife the right to petition for divorce on 'any other ground which is recognised for the dissolution of marriage under Muslim law'.

ACTIVITY 9.2

Look up the 10 grounds for dissolution in the Dissolution of Muslim Marriages Act 1939 in your textbooks and sources and make a list of them.

No feedback provided.

The MFLO 1961 added a further ground, allowing a woman whose husband took a second wife without complying with the provision of the Ordinance (requiring him to obtain permission to do so from the Union Council) to obtain a divorce. In Iran, in accordance with provision 1130 of the Civil Code, the court may grant a wife a divorce if she is able to prove that she is suffering harm from the continuation of the marriage.

Tunisia

As in the case of polygyny it is the law of Tunisia which has conceded the most rights to women. A Tunisian wife has the power of *talāq* so that she may unilaterally terminate her marriage at will, but the pronouncement of *talāq* must be made in a court of law. Just as the Tunisian court may order a husband to pay compensation if it considers he has divorced his wife without cause, so it may order a wife it considers is divorcing her husband frivolously to pay him compensation, usually the return of the dower.

Pakistan

The decision of the Supreme Court of Pakistan in *Khurshid Bibi* v *Mohammed Amen* PLD (1967) SC 97 granted women a further ground for divorce by extending the role of *khul'*. The court considered the verse in the Qur'an which is considered to be the basis of the law of *khul'*. *Surah* 2 verse 229 states:

> **...it is not lawful for you that you take anything of what you have given them (your wives) unless both fear that they cannot observe the limits prescribed by Allah. But if you fear that they cannot preserve the limits prescribed by Allah, then it shall be no sin for either of them in that she gives to get her freedom...**

The court held that the 'you' in the words 'if you fear' referred to the judge and accordingly the court held that if the judge found that the parties to a marriage could no longer live within 'the limits prescribed by Allah' the court could dissolve the

marriage by means of a judicial *khul'* – thus requiring the wife to return to her husband her dower and all benefits which she had received from the marriage.

This decision by the Supreme Court thus gave Pakistani women the right to petition the court for divorce on the grounds that the marriage had irretrievably broken down. Although whether the marriage had so broken down was for the court to decide, the decision did give the Pakistani wife, dissatisfied with her marriage but unable to prove a matrimonial offence in accordance with the provisions of the Dissolution of Muslim Marriages Act 1939, a chance to gain her freedom. In making its decision the court did not consider the Maliki law on *darar* (harm, prejudice) and, indeed, held that, provided the court was satisfied that the parties could no longer cohabit 'within the limits prescribed by Allah', it was not for the court to allot blame to either of the parties.

Pakistani law on judicial *khul'* has been considerably extended in recent years. In the case of *Naseem Aktar* v *Mohammad Rafique* PLD 2006, SC 293 a woman sought the dissolution of her marriage by *khul'* on the grounds that she had developed such a hatred for her husband that she 'would prefer to die rather than live with him'. Her petition was rejected by the family court and the Lahore High Court, on the grounds that she had not proved the alleged hatred. The Apex court allowed her appeal, holding that she had filed a suit for dissolution, which itself showed that she no longer wished to live with her husband, 'which indicates the degree of hatred and aversion'. As a result of this decision, it seems that now the court must grant a *khul'* divorce to a wife who seeks it, as the mere fact of asking for it is evidence of hatred and aversion to her husband. Previously, the court, following the decision in *Khurshid Bibi* v *Mohammad Amin* PLD 1967 SC 97, required the wife to prove that it was impossible for the parties to live together 'within the limits provided by Allah'.

Another interesting case concerning divorce by *khul'* is *Aurangzeb* v *Gulnaz* PLD 2006 Karachi 563, where the husband appealed to the High Court of Karachi on the grounds that the lower family court had granted a divorce to his wife who had sought a *khul'* divorce, although there was an ongoing dispute over the return of the dower. The High Court held that the conduct of the husband had to be taken into account when deciding how much of the dower, if any, should be returned by the wife. Furthermore, the Court held that, even if the wife refused to return the dower, the marriage would still be dissolved once the family court had decided 'that the parties could not remain within the limits of God' and that, if a woman was entitled to *khul'*, 'it must pass such a decree in her favour'. The finding after enquiry of what – if anything – should be returned by the wife to the husband would only impose civil liability upon the wife and would not affect the dissolution itself.

Although recent case law has greatly extended the wife's right to obtain a dissolution of her marriage by the granting of a judicial *khul'*, a woman seeking a dissolution of her marriage should be advised first to consider whether she has a right to obtain a divorce on the grounds of her husband's conduct. This could be his failure to maintain her, desertion or cruelty, or physical defects on his part, such as impotence, leprosy or insanity. If her petition on any of these grounds succeeds she will be entitled not only to a divorce but also to maintenance during her *iddah* period, and she will not be under any duty or threat to pay compensation to her husband.

Egypt

The beginning of the new millennium saw a significant change in the law of divorce in Egypt. Law No. 1 of 2000 provides that, if the husband and wife are unable to agree to a divorce by mutual consent, the wife may petition the court to grant her a judicial *khul'* in return for relinquishing her financial claims and returning her dower to her husband. Before a divorce is granted the court must attempt to bring about a reconciliation, but if after three months no reconciliation has taken place and the wife formally declares that life with her husband is repugnant to her, and she cannot continue to live with him within the limits prescribed by Islam, the court must grant her a judicial *khul'*. Thus, the law of Egypt is more favourable to a woman seeking dissolution of her marriage by means of a judicial *khul'* than is the law of Pakistan. Under the law of Egypt it is the woman who declares before the judge that she can no longer live with her husband 'within the bounds prescribed by Allah'. Once she has

made her declaration the judge has no discretion to refuse the divorce. On the other hand, in Pakistan it is for the court to decide if, in the circumstances of a particular case, the parties can no longer continue to live together as husband and wife without transgressing 'the bounds prescribed by Allah'.

In Egypt many commentators have also noted that, since the enactment of Law No. 1 of 2000, many women are disregarding other grounds for divorce and are seeking a dissolution by *khul'*. They are accordingly forfeiting all rights to financial relief and, indeed, are having to pay to gain their freedom.

9.4 Other distinctive methods of effecting divorce

Finally, reference must be made to three other methods of effecting a divorce. Although recognised by traditional law, these methods have now become virtually obsolete.

9.4.1 *Īlā*

Īlā is a vow of abstinence by the husband, whereby he takes an oath that he will refrain from sexual intercourse with his wife. The time limit for such an oath under classical Islamic law is four months. If he fulfils his oath, after the expiry of the designated period, or after a maximum of four months, the marriage is dissolved automatically in Hanafi law. Under the law of the other Sunni schools and of the Shi'ah, at the expiry of the period the wife may apply to the court, which will then order the husband to resume sexual relations or to divorce his wife. If the husband refuses to do either, the court will pronounce a *talāq* on his behalf.

9.4.2 *Zihār*

The second procedure is *zihār*, where the husband compares his wife to one of his female kinswomen within the prohibited degrees of relationship. The most usual practice is for the husband to compare his wife to the back (*zihār*) of his mother. The effect of *zihār* is that sexual relations between the husband and wife become unlawful until the husband makes expiation by, according to traditional law, fasting for 60 consecutive days, or providing food for 60 people at midday and evening or freeing a slave. If the husband resumes sexual relations without having made expiation he is regarded as being in a state of grave sin and his wife may refuse to cohabit with him without losing her right of maintenance. Maliki law holds that *zihār* will result in a termination of the marriage if no expiation is made and sexual relations are not resumed. The Malikis argue logically that if no sexual relations take place for four months the situation is as if the husband had pronounced *Īlā* and the wife could accordingly ask the court to terminate the marriage.

9.4.3 *Li'ān*

Finally, marriage may be terminated by the procedure of *li'ān*. This procedure occurs when the husband accuses his wife of committing adultery without the required proof of four male witnesses, or when he denies the paternity of a child to which she has given birth. He swears four oaths to this effect, swearing that he speaks the truth, and fifthly calls upon himself the curse of God if he has lied against the wife. The wife will then swear four oaths that her husband is lying and fifthly invoke the curse of God upon herself if he has spoken the truth. In the Hanafi and Hanbali schools, following the oaths of the two parties, the judge will ask the husband to repudiate his wife and, if he refuses, the judge will then dissolve the marriage himself. According to the law of the Maliki and Shafi'i schools, and of the Shi'ah sects, the swearing of the mutual implications will automatically terminate the marriage without any recourse to the court.

At the present time, as was stated above, the procedures of *īlā'*, *zihār* and *li'ān* are virtually extinct, although *īlā'* is preserved in the statutory law of Libya, Morocco, Kuwait and Yemen and *li'ān* is preserved in the law of Yemen. In Pakistan, the

Protection of Women (Criminal Law Amendment Act) 2006 has added *li'ān* as one of the grounds for divorce to the Dissolution of Muslim Marriages Act 1939. As a result, a Muslim woman can petition a court for the dissolution of her marriage if her husband accuses her of adultery and she denies the allegation.

9.5 Post-divorce relief/maintenance

As mentioned in Chapter 7, the Muslim jurists held that the husband's duty to maintain his wife was reciprocal with her duty to obey him. Accordingly, when a marriage was terminated the wife no longer had a duty of obedience and was no longer entitled to receive maintenance beyond her period of *iddah*. The Hanafis considered that the wife had a right to be maintained whether the *iddah* followed a revocable or irrevocable divorce. This was because, in the first case, the wife remained under the husband's control as he could revoke the divorce at any time until the *iddah* was completed and, in the second case, the observance of the *iddah* was a duty imposed on the wife for the husband's benefit, in order to establish his paternity to any child in case she was pregnant before the termination of the marriage.

In the case of an irrevocable divorce the other Sunni schools and the Shi'ah merely gave the wife the right to have a dwelling house provided for her benefit unless she was pregnant. If she was, her rights to receive maintenance would continue until the birth of the child.

Many countries have now provided by legislation that a wife who is repudiated by her husband without good cause is entitled to receive relief from him amounting to maintenance, usually for a prescribed period of time. This is termed *mut'a al-talāq*, as consolation for the arbitrary termination of marriage.

In 1953 Syria became the first country in the Muslim world to legislate on this point. The law of personal status provides that, if the judge is satisfied that the husband acted arbitrarily and that the wife would suffer hardship, he may order the husband to compensate her according to his means by paying maintenance for a period of up to three years. Other countries followed the Syrian example when enacting their own codes of family law, although there are considerable differences concerning the period of time that the duty to maintain will continue. Thus, the Egyptian law provides that the wife can be awarded at least two years' maintenance but with no upper time limit. Iraq allows maintenance by way of compensation for a maximum of two years and the UAE, Yemen and Kuwait provide for maintenance for only one year.

The Tunisian Law of Personal Status 1956 as amended in 1981 provides the most detailed statement regarding how a husband who uses his right to repudiate his wife, without proper cause, must make provision for her. She must be given maintenance each month in accordance with the amount she received while the marriage subsisted, including accommodation. The amount to be paid may be varied by increase or decrease in accordance with changing circumstances, for example by her re-marriage or acquiring wealth so that she no longer needs to be maintained by her former husband. Such maintenance is considered a debt against the estate of her ex-husband if he predeceases her.

In India, the issue of post-divorce maintenance for Muslim wives was addressed in the controversial decision of *Mohd Ahmed Khan* v *Shah Bano Begum* AIR 1985 Supreme Court 945. The case concerned a Muslim wife, Ms Shah Bano Begum, who had been deserted and later divorced by her husband. In 1978 Ms Begum filed a petition for maintenance under s.125 of the Code of Criminal Procedure. Section 125 allows a court to order a husband to pay maintenance to his wife. It applies to all religious communities and the definition of wife includes a divorced wife. Mr Khan, the former husband, appealed against the order, arguing that he had already paid her the deferred dower and that as a result he had no further obligations to maintain her. The Supreme Court decided in favour of Ms Begum, holding that s.125 of the Criminal Procedure Code took precedence over any rule of Muslim personal law and that, if a divorced Muslim wife is unable to maintain herself, she is entitled to have recourse to s.125.

Controversially, the Supreme Court also held that Muslim personal law provided for the payment of post-divorce maintenance. Several Muslim organisations, chief among them the Muslim Personal Law Board, an association of Muslim religious scholars and political leaders, protested against the judgment of the Supreme Court on the ground that it interfered with the right to freedom of religion of India's Muslims.

In order to stop the protests, the government introduced the Muslim Women (Protection of Rights on Divorce) Act 1986. The Act provides that s.125 of the Code of Criminal Procedure only applies to the issue of post-divorce maintenance if both the husband and his divorced wife agree to be governed by it. In cases where s.125 does not apply, the Act provides that any Muslim divorced wife is entitled to a 'reasonable and fair provision and maintenance to be paid to her within the *iddah* period by her former husband' (s.2(1)(a)). There was some uncertainty about the meaning of this decision, with some high courts holding that a Muslim husband was only obliged to pay maintenance to his divorced wife during the three-month *iddah* period, whereas other high courts held that a Muslim husband had to pay a lump sum to his former wife within the *iddah* period which was sufficient to provide her with maintenance for the rest of her life. In *Danial Latifi* v *Union of India* (2001 7 SCC 740) the Supreme Court of India decided that the 1986 Act was constitutionally valid. Therefore, in accordance with the 1986 Act, courts were entitled to award lump sums to divorced Muslim wives, which had to be paid by the husband within the *iddah* period, if the former wife could not maintain herself.

Reminder of learning outcomes

Having completed this chapter and the relevant readings, you should be able to:

- **identify and explain the rules and procedures for the dissolution of marriage (*talāq*, *khul'* and judicial divorce)**
- **identify and explain the rules governing post-divorce maintenance, including modern reforms.**

Sample examination questions

Question 1 '*Khul'* is a divorce effected by the mutual agreement of the husband and wife.'

Discuss this statement with reference to the traditional law of the Hanafi and Maliki schools, the law of Pakistan and the law of Egypt.

Question 2 Discuss the extent to which legislation in many jurisdictions of the Middle East has extended the right of a wife to obtain a judicial divorce.

Advice on answering the questions

Question 1 Discuss the traditional role of *khul'* as primarily a consensual release of the wife by the husband. Explain the differences between the traditional Hanafi law and the law of the Maliki school. You should also explain the changes effected in the law of Pakistan by judicial decisions and the law of Egypt by statute.

Question 2 First discuss the right of a wife to obtain a divorce by petitioning the court in traditional law, explaining the differences between the schools with particular reference to the differences between the Hanafi and the Maliki schools. Discuss the changes effected by legislation in the countries of the Middle East. Particular reference should be made to the law of Tunisia and Egypt.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can identify and explain the rules and procedures for divorce (*talāq*, *khul'* and judicial divorce).	☐	☐	☐
I can identify and explain the rules governing post-divorce maintenance, including modern reforms.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
9.1	**Divorce by unilateral repudiation** (*talāq*)	☐	☐
9.2	**Divorce by release** (*khul'*)	☐	☐
9.3	**Judicial divorce** (*faskh*)	☐	☐
9.4	**Other distinctive methods of effecting divorce**	☐	☐
9.5	**Post-divorce relief/maintenance**	☐	☐

NOTES

10 Children

Contents

Introduction

Guardianship of children is an important aspect of Islamic family law. As will be seen, traditional law appears to favour the father but it should be noted that many Islamic countries have introduced legislation that, to some extent, modifies classical Islamic law. Minor children are subject to three types of guardianship: custodial care (*hadānah*), guardianship of the person and guardianship of property.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **describe the rules on legitimacy**
- **outline the principles of *hadānah* and the qualifications of the custodian**
- **explain the mother's right of custody**
- **describe the rules for the guardianship of property.**

Essential reading

- **Zahraa, M. and Malek, N. 'The concept of custody in Islamic law' (1998) 13(2) *Arab Law Quarterly* 155–77 (available in HeinOnline and JSTOR).**
- **Welchman, Chapter 10 'Parents and children' (available on the VLE and in VLeBooks via the Online Library).**

Further reading

- **Pearl and Menski, Chapter 10 'Parents and children'.**

10.1 Legitimacy

Islamic law applies the principle that 'the child belongs to the marriage bed'. Accordingly a child is presumed to be legitimate if it is born six months after a marriage has been contracted (six months being accepted by all schools and sects as the minimum period of gestation) and within the recognised periods of gestation after the marriage is terminated by either death or divorce. The four Sunni schools differ in their interpretation of the maximum period of gestation. The Hanafis say the period is two years based on the tradition that Abu Hanifa knew of a foetus that remained in its mother's womb for two years. The Malikis, Shafi'is and Hanbalis accept longer periods. There is considerable variation in the periods recognised by the different schools but the majority view is that the Shafi'is and Hanbalis recognise a period of four years and the Maliki accept a period of five years. The jurists of these three schools were aware of the period beyond which a child could viably stay *in utero* but developed the concept of the 'sleeping foetus', where the child achieves its approximate period of gestation of nine months in sporadic bursts, sleeping in the meantime. In the law of the Shi'ah the maximum period of gestation is 10 lunar months which, of course, corresponds to the medical view.

If the child is born within the minimum or maximum period of gestation, paternity is attributed to the husband of the mother unless he refutes the child by the *li'ān* procedure (see Chapter 9). In traditional law a woman who declares herself pregnant following the termination of her marriage remains in her *iddah* period until the delivery of the child. Obviously, under the law of the Sunni schools, women could claim to be in *iddah* for a considerable period and so, where the marriage was terminated by divorce, be entitled to maintenance from their husbands. Reforming legislation in the Middle East has provided that the maximum length of an *iddah* which will be recognised is approximately 10 lunar months, thus ensuring that the medically impossible periods of gestation recognised by traditional law no longer apply. However, contrary to the trend of legislation in the Muslim world, Pakistan has amended the Evidence Act of 1872, which provided that a child was presumed legitimate if born during a valid marriage or within 10 months of its dissolution. The amended text now provides that a child born within two years of the dissolution of a marriage will be recognised as legitimate, thus re-applying traditional Hanafi law.

In Hanafi law, if the marriage is concluded by proxy and, even if the parties to a marriage have never met, if the woman gives birth after six months have elapsed from the date of the marriage, the child will be regarded as the legitimate child of the husband. In the law of the other schools, however, the period of gestation is calculated only from the date when the parties could have had access to each other and in Shi'ah law it is calculated from the date of actual consummation of the marriage. Egypt was the first country to legislate that the period of gestation should run from the date when access between the parties could be proved (Law No. 25 of 1929). Since this date, other countries of the Middle East have accepted that no claim for paternity should be heard if there is proof of non-access of the parties.

These laws regarding legitimacy were introduced by the Islamic jurists to prevent as many children as possible from being declared illegitimate and thus being denied rights of inheritance, maintenance and so on. Also, the law served to protect women from charges of *zina*, for which draconian penalties were imposed (see Chapter 4). Under both Sunni law and Shi'ah law, as traditionally applied, no legal relationship exists between an illegitimate child and their biological father and, hence, their paternal kinsmen.

In Iran the Supreme Court in plenary assembly considered the obligations of the biological father to his illegitimate child. The judges were divided on the issue, with some judges following the traditional law that no relationship exists between the two. Others, however, followed an opinion of Ayatollah Khomeini that an illegitimate child was the child of their biological father whether he was adulterer or fornicator and he must accordingly fulfil all the parental duties which he would owe to a legitimate child, except that there will be no mutual rights of inheritance.

A man may acknowledge a child as his legitimate child provided that the child is clearly not the offspring of someone else (for example, born to a woman who is married or is observing an *iddah* following a divorce) and provided that there is an appropriate age difference between the man and the child.

Adoption is not recognised in Islamic law although it was a common practice in Arabia before the coming of Islam. However, it is considered a charitable act to take care of foundlings, or children without parents, and to look after them. In the coastal regions of North Africa unofficial adoption is a not infrequent practice. For example, often a man after the death of his brother would marry his sister-in-law and bring up her children as his own. In Tunisia, however, adoption has been made legal. The law of 19 June 1959 provides that not only may a child whose parentage is unknown be adopted but also a child born to known parents and to parents who are still living. This is provided, of course, that in the latter case the actual parents agree to the adoption. The adopted child has the same rights as children actually born to the adoptive parents and will take their name.

10.2 Child custody

When a marriage is terminated, perhaps the biggest issue to be resolved is the care of the children. In Islamic law, according to all schools and sects, the guardianship of the child belongs primarily to the father. In the absence of the father, guardianship belongs to the next male kinsman in the agnatic line, the first person having priority after the father being the paternal grandfather. The mother may never be the guardian of her infant children, be they male or female. The right of the mother is restricted to keeping her children in her custodial care for a defined period of time that varies among the different schools and sects. This is the right of *hadānah*. All the schools and sects are agreed that it is the mother who has the primary right of custody of the child (*hadānah*).

If the mother is dead, or is, for reasons that will be discussed later, deprived of the right, there is disagreement among the schools as to who is entitled to the custody of the infant child. The Hanafis and the Malikis hold that the *hadānah* is the right of females and accordingly the right will pass to the kinswomen of the mother. The Shafi'is and the Hanbalis, as well as the Shi'ah, do not accord such great priority to the female line. Therefore, in Shafi'i and Hanbali law, if the mother has no surviving female ascendant, the right of custody passes to the father and, in his absence, to his ascendants. In Shi'ah law, if the mother is dead or has lost her right of *hadānah*, her right passes in all cases to the father of the child and, in his absence, to the paternal grandfather.

10.2.1 Qualifications of the custodian

All the schools and sects are agreed that, in order to safeguard the welfare of young children, certain conditions must be fulfilled before a person is given the right of custody. Two self-evident requirements are that the custodian should be adult and of sound mind (neither insane nor feeble-minded). The person having the right to *hadānah* must be trustworthy (a person who can be relied upon to take proper care of the child). She must not pursue a life in any way immoral, in order to preserve the morality of the child. Finally, the custodian of the child should physically be able to take proper care of the child. The majority view of the jurists is that each case must be considered on its merits. All the schools and sects recognise a further restriction on the right of *hadānah*; all are agreed that the custodian must not be married to a man who is not related to the child within the prohibited degrees.

During the mother's period of custody the overall control of the child is in the hands of the father (or paternal grandfather or other male agnate). It is the father who is the *wali* of the child and who makes all important decisions regarding their upbringing. For example, he alone decides on the child's education or if they may travel and he may contract the child in marriage. The right of the mother is merely to keep the child

in her custodial care, to have the child live with her on a day-to-day basis. So important is the father's right of guardianship that the mother will lose her right to custody if she attempts to take the child away from the father's 'sphere of influence': that is, if she removes the child to a place so distant from the father's place of residence that he cannot visit the child on a daily basis to oversee their welfare.

If the mother of the child is a Christian or a Jew, the schools are divided on whether such a non-Muslim mother may have the custody of her Muslim child. The Hanafis and Malikis hold that the custodian of the child need not be Muslim. However, such a mother will lose the right to *hadānah* if she attempts to impose her faith upon the child. The doctrine of the Shafi'i and Hanbali differs radically; according to their doctrine a non-Muslim woman may never have the custody of a Muslim child even if she is the child's mother.

According to the Hanafi doctrine the mother has the right of custody until a male child attains the age of seven and a female child attains the age of nine. In Maliki law the mother's custodial right lasts, in the case of a boy, until he attains puberty and, in the case of a girl, until she is married and is able to begin married life. The Shafi'i school gives both girls and boys the option, once they have attained the 'age of reason' (usually assumed to be at seven years), to choose whether to remain with the mother or to live with the father. In Hanbali law this right to choose is given only to boys. In the Ithna Ashari sect of the Shi'ah, the mother's right of *hadānah* lasts until her sons are two and her daughters seven years old.

In many countries of the Muslim world the mother's custodial rights have been extended so that she is not deprived of her right to live with her children at such early ages. For example, in Morocco, in accordance with the provisions of the Family Code of 2004, the right of custody belongs first to the mother of the child, then to the father and then to the maternal grandmother. If none of these people are able to assume custody the court will decide upon the person most suitable to assume the function. It will take the opinion of the child, male or female, into account if the child is over 15. In Iran, where Ithna Ashari law applies, Article 1180 of the Civil Code now provides that 'a minor is under the natural guardianship of the father and the paternal grandfather. The custodial care of the children is in the hands of the mother until both male and female children are seven years old.'

10.3 Guardianship of property

The guardianship of property is primarily the right of the father. The father may also appoint an executor to act as the guardian of the property of his infant children by his will. The guardianship of property continues, with the exception of Maliki law, until the child, whether male or female, attains majority. As has been stated above traditional doctrine holds that majority in the case of both sexes is attained at the latest at 15 years. Upon attaining majority males and females alike may deal with their own property and will acquire contractual capacity with regard to civil and commercial contracts (see above for restrictions on the conclusion of a marriage contract). Obviously if, upon attaining majority, the child is found to be insane, feeble-minded or severely lacking in their ability to conduct their own affairs by being a spendthrift or being gullible, the guardian of property may apply to the *qadi* to extend the period of guardianship. You should note that the guardian of the property of an infant or interdicted person (i.e. a person who is deemed not to have full contractual capacity due to feeble-mindedness, gullibility or being a spendthrift) has a fiduciary relationship with his ward and is required to take as good care of the property of the child as he would of his own property.

In Maliki law, however, although guardianship of property will cease in the case of males in the same way as the other schools, females acquire contractual capacity only on contracting a valid marriage and the consummation of that marriage. Even then a married Maliki woman may not validly dispose of more than one-third of her estate gratuitously without the consent of her husband.

FURTHER READING

- **Davis, M.F. 'Child custody in Pakistan: the role of *ijtihād*' (1985) 5 *Boston College Third World Law Journal* 119–27.**
- **Mohd Zin, N. 'For the best interest of the child: the impact on the new approach of custody order in Malaysian legislation' (2003) 11 *IIUMLJ* 63.**
- **Ebrahimi, S.N. 'Child custody (hizanat) under Iranian law: an analytical discussion' (2005) 39(2) *Family Law Quarterly* 459–76.**

SELF-ASSESSMENT QUESTIONS

1. **Under all schools of Islamic law, to whom do the children of a marriage belong?**
2. **What is *hadānah*?**
3. **What are the conditions for a person to exercise *hadānah*?**
4. **What rights does the father have over the child during the mother's custodianship?**
5. **Which schools would allow a Jewish or Christian mother to have custody of her Muslim child?**
6. **What restrictions does Maliki law place upon a woman's contractual capacity in relation to property?**

REMINDER OF LEARNING OUTCOMES

Having completed this chapter and the relevant readings, you should be able to:

- **describe the rules on legitimacy**
- **outline the principles of *hadānah* and the qualifications of the custodian**
- **explain the mother's right of custody**
- **describe the rules for the guardianship of property.**

SAMPLE EXAMINATION QUESTION

Compare and contrast the rights of the mother and the father in relation to their children.

ADVICE ON ANSWERING THE QUESTION

Explain the right of the mother to the custody of her infant children, describing the duration of her right in the law of the different schools and the requirements which the mother must meet before exercising her right of custody. Discuss the nature of the father's right of guardianship.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can describe the rules on legitimacy.	☐	☐	☐
I can outline the principles of *hadānah* and the qualifications of the custodian.	☐	☐	☐
I can explain the mother's right of custody.	☐	☐	☐
I can describe the rules for the guardianship of property.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
10.1	Legitimacy	☐	☐
10.2	Custodial care	☐	☐
10.3	Guardianship of property	☐	☐

NOTES

11 Succession

Contents

Introduction

It is not possible in this module guide to deal comprehensively with the Islamic law of succession on death. The law of intestate succession is without doubt the most complex aspect of Islamic law, hence the well-known Islamic saying that 'he who knows the law of inheritance is possessed of half the knowledge of the world'. Although the law may not seem to modern eyes to be equitable, departing as it so blatantly does from contemporary concepts of equality, it is nevertheless an almost perfect legal structure. Once the complex rules are understood it is a supremely logical system.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **distinguish between testate and intestate succession**
- **understand and explain the formal requirements for a valid will**
- **assess the effect of non-compliance with these requirements on the will of the testator**
- **describe and analyse the principal features of a *waqf*.**

Core text

- **Baderin, Chapter 5 'Law of inheritance'.**

Further reading

- **Khan, H. *Islamic law of inheritance.* (Karachi: Oxford University Press, 2007) [ISBN 9780195473360].**
- **Coulson, N.J. *Succession in the Muslim family*. (Cambridge: Cambridge University Press, 1971; digitally printed version 2008) [ISBN 9780521088077].**

11.1 Intestate succession

11.1.1 Origins of the law

A surprisingly large amount is known about the system of succession on death in pre-Islamic Arabia. Only adult males who were connected to the deceased through the unbroken male line were entitled to inherit. These males inherited in accordance with the strict hierarchy known as Al-Jabari's rule. Priority was determined by three criteria: class, degree and strength of blood tie.

1. **Class**. The order of priority was firstly any son and his ascendants, secondly the father and his ascendants, thirdly the descendants of the father, the brother of the deceased and their descendants and finally the descendants of the grandfather, the uncles of the deceased and their descendants. Members of a higher class take priority over all members of a lower class so that a son takes priority over a father and a father takes priority over a brother.
2. **Degree**. Among kinsmen within the same class the nearest in degree to the deceased excluded all others so that, for example, a son excluded a grandson and a father excluded the grandfather.
3. Strength of **blood tie**. This criterion would obviously only apply when the heirs were in class three or four. Applying the rule, a full brother will exclude a consanguine brother (i.e. a brother sharing the same father with the deceased but a different mother) and a full paternal uncle will exclude a consanguine uncle.

With the coming of Islam a new class of heirs came into being, the Qur'anic heirs or the *ahl al farā'id* (the obligatory sharers). The verses of the Qur'an which are concerned with the law of inheritance are considered among the most significant of the so-called 'reforming verses'.

The Qur'an specifies nine heirs, allotting to each of them a particular fraction or fractions. The heirs listed in the Qur'an are:

1. the husband
2. the wife
3. the father
4. the mother
5. the daughter(s)
6. the germane or full sister(s)
7. consanguine sister(s)
8. uterine brother(s) (i.e. brother(s) sharing the same mother with the deceased but a different father)
9. uterine sister(s).

The inclusion of the husband and the wife in the list of heirs marks a breakaway from the pre-Islamic concept of relationship by blood being the sole basis of inheritance. The husband is allotted a share of half of his wife's estate if she dies without descendants. If there are children surviving the wife, the husband's share is reduced to 1/4. The share of the wife is 1/4 of the estate in the absence of children and 1/8 if children survive the husband. As a Muslim man may have up to four wives at the same time, the share of the wife may have to be divided so that, in the most extreme case, each wife will receive only 1/32 of her husband's estate.

The remaining seven heirs named by the Qur'an are all close blood kinsmen of the deceased. The father is allotted a share of 1/6 and the mother will take a share of 1/6 if the deceased is survived by descendants or by two or more collaterals (i.e. brothers or sisters). Otherwise her share is 1/3. The daughter is given a share of 1/2 of the estate and if there are two or more daughters the share of the full or consanguine sister is also 1/2 or 2/3 for two or more. Finally, where there is a single uterine brother or sister, they

will inherit 1/6 of the estate. If there are two or more surviving uterine brothers and/or sisters, they will inherit 1/3 of the estate collectively. The heirs will inherit equally as there is no provision in the case of uterine heirs that the male will take double the share of the female.

These nine heirs are the only sharers recognised by the Shi'ah but Sunni Islam quickly added a further three by the application of the doctrine of *qiyās* (analogy). These are:

1. the son's daughters (by analogy with the daughter) who were accorded the same share as the daughter or daughters as the case may be
2. the paternal grandfather, by analogy with the father, was given a share of 1/6
3. the paternal grandmother, by analogy with the mother, was given a share of 1/6.

The early Muslim jurists – with the Qur'anic verses creating a new set of heirs before them and a system of agnatic succession in place from the pre-Islamic era – faced the challenge of reconciling the two regimes. The Qur'an, while naming the nine new heirs, had laid down no provisions as to a priority of succession. Clearly the son and agnatic brothers of the deceased were to continue to be important heirs, hence the verse in the Qur'an commanding that the male be given double the share of the female. The efforts of the early Muslim jurists to create a law of succession based on the reconciliation of the pre-Islamic system and the Qur'anic verses resulted in the Islamic system of inheritance.

In the quest to develop a law of inheritance the Sunni and the Shi'ah adopted different approaches. Indeed, the differences between the Shi'ah and the Sunni laws of succession are perhaps the most important differences between the laws of the two sects.

11.1.2 Sunni law

The Sunni doctrine perhaps has its base in Sa'd's case. The tradition is that Sa'd Ibn Al Rabi' died leaving a wife, two daughters and a brother. The brother of Sa'd, in accordance with the practice of the pre-Islamic era, took possession of the estate and the widow approached the Prophet asking for his help. It is said that the verse of inheritance was then revealed and the Prophet ordered the brother to give the widow of the deceased 1/8 and the daughters of the deceased 2/3 and to keep the remainder for himself. From Sa'd's case is derived the so-called **golden rule** of the Sunni law of inheritance – first give the Qur'anic heirs their share and then give the residue to the entitled male agnates. Before this rule is applied, however, it must be established which of the Qur'anic heirs are entitled to inherit and which of the male agnatic kin are entitled to the residue. Sunni Islam divides the heirs first into two general categories.

Different terminologies have been used to refer to these categories and, although none is entirely satisfactory, perhaps the most accurate is the one adopted by Coulson (1971). He describes the first category as the 'inner family', consisting of the Qur'anic sharers and the male agnatic kinsmen. The second category he calls the 'outer family', which consists of all other kinsmen, such as heirs connected to the deceased through the female link (cognates) – for example, the daughter's son or a female descendant of male agnates, such as the brother's daughter.

The most complex part of the law of succession is that dealing with the inheritance by the outer family. However, it is only in extremely rare circumstances that a member of the outer family will inherit. This is because even a far removed kinsmen, provided he is linked to the deceased through an unbroken male line, will exclude them. For example, a daughter's son will be excluded from succession by the consanguine brother's son's son.

Of most importance are the primary heirs. These are the heirs who will **always** inherit, as they cannot be excluded by the presence of any other heir. There are six such heirs: the husband, the wife, the father, the mother, the son and the daughter. Of these heirs, the husband and the wife always inherit as Qur'anic sharers. The son always inherits as a residuary. The father and the daughter may inherit sometimes as Qur'anic sharers and at other times as residuaries. The mother always inherits as a Qur'anic sharer except in one instance. See Table 11.1 below for an overview of the inheritance of the primary heirs.

The succession by the primary heirs of Sunni Islam can perhaps best be explained by way of examples.

1. A is survived by a daughter and a son. In this case, in the presence of the son, the daughter cannot inherit her Qur'anic share of 1/2 as the Qur'an enjoins that the male should inherit double the female. Accordingly, the son will convert the daughter into a residuary with himself and the son will take 2/3 of the estate and the daughter 1/3.
2. B is survived by a son and a father. In accordance with the golden rule the father will first take his Qur'anic share of 1/6 and the son will take the residue of 5/6 as the nearest male agnatic kinsman.
3. C is survived by his daughter and father. The daughter will take her Qur'anic share of 1/2. The father will take initially his Qur'anic share of 1/6 and will then take the residue of the estate in his second capacity as a residual heir.
4. D is survived by a daughter and a mother. The daughter will take her Qur'anic share of 1/2. The mother in the presence of a descendant will take her minimum Qur'anic share of 1/6. In the absence of any male agnatic kinsman the residue of the estate will be divided between the mother and the daughter in accordance with their original shares. The daughter's share will thus become 3/4 of the estate and the mother's share 1/4.
5. E is survived by a daughter and a husband. The daughter will take her Qur'anic share of 1/2 and the husband will take 1/4 in the presence of the daughter. The residue of the estate will then pass to the daughter, as the share of the spouse relict (i.e. the surviving spouse), be it husband or wife, and whether it is the minimum or the maximum share, may never be increased.

Table 11.1 The primary heirs in Sunni law

Note: h.l.s. = how low so ever, h.h.s. = how high so ever i.e. descendants or ascendants of any degree

Heir	Capacity in which inherits	Qur'anic share	Excludes	Comments
Husband	Qur'anic sharer	1/2 in absence of children or agnatic grandchildren h.l.s. 1/4 in the presence of children or agnatic grandchildren h.l.s.	None	The share of the husband and the wife may not be increased by *radd* when the estate is undersubscribed. Both their shares may be reduced by *'awl* when the estate is oversubscribed. If there are several wives surviving they will share the Qur'anic share of 1/4 or 1/8 equally between them.
Wife	Qur'anic sharer	1/4 in the absence of children or agnatic grandchildren h.l.s. 1/8 in the presence of children or agnatic grandchildren h.l.s.	None	
Father	Qur'anic sharer in the presence of child or agnatic grandchild. With daughter and agnatic granddaughter takes first as Qur'anic sharer, then takes as nearest residuary. In absence of children and agnatic grandchildren takes as residuary heir.	1/6	All collaterals and their descendants. Paternal ascendants and their descendants.	Inherits with true grandmother on the maternal side and, in Hanbali law only, with his own mother as a true grandmother. The grandmother takes 1/8 as a quasi-Qur'anic sharer.

Heir	Capacity in which inherits	Qur'anic share	Excludes	Comments
Mother	Qur'anic sharer	1/3 in the absence of children or agnatic grandchildren h.l.s. or two or more collaterals of whatever blood tie. 1/6 in all other cases.	None other than grandmothers.	Where the only heirs are the spouse relict and the father and the mother, the mother will inherit 1/3 of the residue after the spouse relict has taken their share.
Son	Always a residuary. Converts daughter into residuary with him and takes double her share.	—	All heirs except the primary heirs and the paternal grandfather h.l.s. in the absence of the father, and an entitled grandmother in the absence of the mother.	Legislation in various countries (Egypt, Syria, Tunisia, Kuwait, Morocco, Oman) has provided that orphaned grandchildren shall inherit as obligatory legatees. In Pakistan, orphaned grandchildren will inherit *per stirpes* (i.e. as representatives of their deceased parent).
Daughter	Qur'anic sharer in absence of son.	1/2. Two or more daughters will inherit 2/3 equally between them.	Uterine collaterals. A single daughter in the absence of a son or a son's son will inherit with a son's daughter, the daughter taking 1/2 and the son's daughter taking 1/6. Two daughters will exclude a son's daughter unless a son's son is present to convert her into a residuary.	If the daughter inherits with germane or consanguine sisters and there is no male (i.e. a son, a germane brother or a consanguine brother) to agnatise any of them, the sister will be converted into a residuary heir.

11.1.3 Shi'ah law

As has been stated above, the greatest difference between the law of the Sunni and the Shi'ah is in the provisions relating to succession on death. It has been said that the jurists of Sunni Islam interpreted the Qur'anic verses on inheritance, in which the Qur'anic sharers are specified, as amending legislation and developed a system to combine the new Qur'anic sharers with the former agnatic heirs, who were the sole persons to inherit in pre-Islamic Arabia. The Shi'ah, on the other hand, could be said to have held the Qur'anic verses to be repealing legislation and have developed their system of intestate succession by developing a hierarchy of classes with no preference given to the male agnatic kin.

The spouse relict in Shi'ah law inherits with any member of any class but a deviation from Sunni doctrine is that the childless widow may never inherit from the landed property of her husband. The heirs who are in class one are the immediate parents (the mother and father) and the sons and daughters of the deceased and their issue how low so ever. Within the class the nearer in degree will exclude the more remote so that a daughter will exclude the son's son. If any heir in class one survives the deceased they will exclude the members of the lower classes. Class two heirs are the grandparents on the maternal and paternal side and the collaterals of the deceased, germane, consanguine and uterine. Any heir in class two will exclude all members of class three, which comprises the uncles and aunts of the deceased and their issue.

11.1.4 Doctrine of return (*radd*) and doctrine of increase (‘*awl*)

When the only heirs are Qur’anic sharers, instances may arise when the estate is under- or over-subscribed. If the estate is under-subscribed, for example where the only heirs are a mother and a daughter, the doctrine of *radd* (return) will be applied and the shares of the heirs will be increased proportionally. Thus, in the case of a mother and a daughter as the only heirs, the mother’s share of 1/6 and the daughter’s share of 3/6 will not exhaust the estate and accordingly their shares must be increased. This is effected mathematically by changing the common denominator of the basic shares, in this case, 1/6 and 3/6, to a number representing the sum total of the collective numerators. Thus, the mother’s share of 1/6 and the daughter’s share of 3/6 will by *radd* become 1/4 and 3/4 respectively.

If a spouse relict is also present they may never participate in the *radd* and the mathematical process of increasing the shares of the other Qur’anic sharers is more complex. The simplest way of effecting distribution is that explained by Coulson (1971). First the Qur’anic share of the spouse relict is allotted and then the residue of the estate is divided between the other heirs, in accordance with the ratio of their original shares. For example, if the heirs are a husband, a daughter and a mother, the husband will take his share of 1/4. Of the remaining residue the daughter will take initially 3/6 and the mother 1/6 which will then be increased to 3/4 of the residue for the daughter and 1/4 of the residue for the mother. Thus, the result will be the husband takes 4/16, the daughter takes 9/16 and the mother takes 3/16.

The Maliki school rejects the doctrine of *radd* and, in the absence of any residuary heir, the residue will go to the public treasury.

In practice, in Sunni law the doctrine of *radd* will rarely be invoked as any male agnate, however far removed from the deceased, will be entitled as a residuary heir. In Shi’ah law on the other hand *radd* is more likely to be applied. For example, the presence of a daughter or the mother of the deceased will exclude all heirs of the second and third classes, whether they are male agnates or not. Also, a daughter in Shi’ah law will, as we have seen, also exclude all grandchildren, whether male or female.

Where an estate is over-subscribed in Sunni law the shares of all the Qur’anic heirs must be reduced proportionally using the same mathematical process as in *radd*. This process is called ‘*awl*. For an example of the application of ‘*awl* consider the situation if the heirs of the deceased are a husband, mother, father and two daughters. In this case the basic share of the husband is 1/4 (3/12), the mother’s share is 1/6 (2/12), the father’s share is 1/6 (2/12) and the two daughters’ share is 2/3 (8/12). By the process of ‘*awl* their shares are reduced so that the husband will take 3/15, the mother 2/15, the father 2/15 and the two daughters 8/15. In Shi’ah law in such a case the burden of reduction would be borne only by the daughters and the other sharers would take their basic Qur’anic shares.

It will be clear from this brief introduction to the law of succession that the law of the Shi’ah is more favourable to female heirs, in particular to the daughter and the mother of the deceased, than is the Sunni law. Table 11.2 provides a few examples that will perhaps further clarify the position.

Table 11.2 Examples of the differences between Sunni and Shi'ah law when the mother or daughter is an heir.

	Sunni	**Shi'ah**
Mother Germane brothers	1/6 Residue The mother is reduced to her minimum Qur'anic share by presence of two brothers	All Mother, being a class one heir, excludes brothers, who are class two heirs
Mother Father Husband	1/6 1/3 1/2 as Qur'anic sharer This distribution is in accordance with the Umariyyatan whereby the mother is restricted to a share of 1/3 of the residue of the estate only, not to 1/3 of the whole estate	1/3 Qur'anic share 1/6 residue 1/2 Qur'anic share
Mother Father's father	1/3 as Qur'anic sharer Residue as nearest male agnate	All as class one heir Excluded as class two heir
Mother Two consanguine brothers Father	1/6 minimum Qur'anic share in presence of brothers Excluded by father Residue	1/6 minimum Qur'anic share in presence of brothers and the father Excluded by mother and father Residue
Daughter Son's son	1/2 as Qur'anic sharer Residue as nearest male agnate	All Both are class one heirs but daughter excludes son's son as she is nearer in degree
Daughter Father	1/2 as Qur'anic sharer 1/6 as Qur'anic sharer and residue as nearest male agnate	3/4 Qur'anic share increased by *radd* 1/4 Qur'anic share increased by *radd*
Daughter Germane brother	1/2 as Qur'anic sharer Residue as nearest male agnate	All as class one heir Excluded as class two heir
Daughter Son's daughter	1/2 as Qur'anic sharer 1/6 to couple the 2/3 share of daughters Both shares will then be increased by *radd* except in Maliki law where the residue goes to the public treasury	All Excluded although a class one heir as daughter is nearer in degree
Daughter's daughter Son's son's son	Excluded as member of outer family All as nearest male agnate	All Excluded although a class one heir as daughter's daughter is nearer in degree
Daughter's daughter Son's daughter	Excluded as outer family All – 1/2 as quasi-Qur'anic sharer and residue by *radd* except in Maliki law	1/3 as representative of daughter 2/3 as representative of son

11.2 Testate succession

Subject to the limitations described below, all sane Muslims who have attained majority may dispose of their property by will. The will can be made either orally or in writing and does not require any particular form or formula. However, the testamentary powers are restricted in respect of the persons to whom and the extent to which the property may be bequeathed. A bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator. However, the Ithna Ashari sect of the Shi'ah permits a bequest to any heir as long as it does not exceed 1/3 of the testator's estate.

All schools and sects agree that Muslims cannot dispose of more than 1/3 of their estates by will. However, any bequest in excess of 1/3 of the testator's estate is not rendered void *ab initio* but is instead reduced to 1/3 of the estate. The remaining 2/3 must go to the heirs in the shares described above. A bequest in excess of the bequeathable 1/3 can also be validated if the heirs consent to it after the death of the testator.

11.3 The estate of a *mafqūd*

As mentioned in Chapter 3, all the schools and sects recognise the principle of *istishāb* (presumptions known to have existed in the past continue to exist until the contrary is proved). The Shi'ah view of *istishāb* results in the law of this sect differing from that of the Sunni schools when succession to the estate of a *mafqūd* (missing person) opens.

All the schools and sects of Islam agree that until the judicial decree of the death of the missing person is given, the presumption of *istishāb* deems that the missing person is still alive. Succession to the *mafqūd*'s estate will only open upon the decree of death. However, if between the date of the *mafqūd*'s disappearance and the decree of death, the *mafqūd* himself becomes an heir (for example if his son died a share of 1/6 of the estate would be set aside for the *mafqūd*) the views of the schools differ.

The Sunni view is that the doctrine of *istishāb* would not be applied to enable this share of 1/6 to form part of the estate of the *mafqūd*, which will be distributed at the issuing of the decree of death. The Sunni view is that *istishāb* acts as a shield to protect the estate of the person who is missing but it cannot be used as a sword to enable the *mafqūd* to succeed to the estate of another person. The Shi'ah, however, apply the presumption of *istishāb* rigidly and hold that during the time of the *mafqūd*'s disappearance, until the decree of death is declared by the court, he must be presumed to be alive. Therefore, applying that principle, he would have been deemed alive at the time of the death of his son and will therefore inherit from the son's estate.

Thus, if A went missing in 1990 and at the time of disappearance he had two sons and a grandson, when one son, the father of his grandson, died five years later, 1/6 of his son's estate would, according to all schools and sects, have been set aside for A. However, if in 2010 a court decrees the death of A, a dispute arises between the surviving son and the grandson of the *mafqūd* A as to entitlement to the 1/6 share set aside. In Sunni law the presumption will be that the *mafqūd* died at the date of his disappearance and the burden of proof will lie on the surviving son to prove that in fact the *mafqūd* was alive on the death of the second son. In Shi'ah law, on the other hand, the presumption will be that the *mafqūd* survived until the court's decree of death and the burden of proof will lie on the grandson to prove that the *mafqūd* had died before the death of the second son.

11.4 Death-sickness

A unique feature of Islamic law is the interdiction imposed on a person who is deemed to be in the so-called 'sickness of death'. This interdiction is imposed in order to safeguard the interests of the legal heirs, whose entitlement to a share of the estate of the person in the death-sickness is deemed by the jurists to be beginning to vest. The first criterion that must be satisfied in death-sickness is that the person actually dies

from the sickness, so establishing that a person was at any particular time in death-sickness is necessarily retrospective. Death-sickness may not extend beyond one year and the sickness from which the person is suffering must be likely to kill. In the law of the Indian sub-continent there is a further requirement that the person suffering must have a subjective apprehension of death.

The major restriction upon those in death-sickness is that they may not dispose gratuitously of more than 1/3 of their property by analogy with the law on bequests. Gifts in death-sickness, being completed transactions, take precedence over bequests. Therefore, if a person has made a gift of 1/3 of the estate during death-sickness and has also made a bequest, the bequest will fail as the 'disposable' 1/3 of the estate has been exhausted by the gift in death-sickness.

A contract of sale concluded by a person in death-sickness for a price below the market value will be considered as having a gratuitous element. As in the case of a bequest which is in excess of 1/3 or is made to an heir, a gift in death-sickness is not void but is *ultra vires* and can accordingly take effect only if the legally entitled heirs give their consent.

11.5 Reforms

Although many reforms have taken place in the areas of family law concerned with marriage and divorce, reforms in the area of succession have been limited – no doubt partly because precise rules have been laid down by both the Qur'an and the *Sunnah*.

When Iraq embarked upon a programme of unification of the law, the law of succession was amended and a system of inheritance by class, as in Shi'ah law, was introduced. However, in order not to offend the Sunni population, no reference was made to the fact that the inspiration for the reform was Shi'ah law. Although this law has been in place since 1957 it appears that many courts still distribute an estate in accordance with traditional Hanafi law if the deceased was a Hanafi.

Tunisia, traditionally a Maliki country, now has a law of succession on death which, in the majority of cases, restricts succession to the immediate family. This means that if, for example, a person is survived only by daughters and no sons, the daughters will take the residue of the estate in addition to their Qur'anic portions unless the other heirs present are sons or grandsons how low so ever or the father or paternal grandfather.

Many reformers in the Muslim world believed that the rigid application of the principle that the 'the nearer excludes the more remote' (a rule accepted, although with a different interpretation, by Sunni and Shi'ah alike) was inequitable in the case of grandchildren of the deceased whose parents had died beforehand. They held that the grandchild was being disadvantaged merely because his or her parent had pre-deceased their own parent. The first reform took place in Egypt with the enactment in 1946 of the Law of Testamentary Dispositions. The Law provides that where the deceased has failed to make a bequest in favour of an orphaned grandchild who is not a legal heir (e.g. a son's son where there is also a son surviving), the grandchild will be entitled to the share the dead parent would have received or to a share of 1/3 of the deceased's estate, whichever is less, by way of an obligatory bequest. Any smaller bequest or a gift *inter vivos* will be offset against the obligatory bequest. The obligatory bequest will take precedence over any other bequest that has been made, even if these are for charitable purposes. Note, however, that if the deceased has made a will in relation to part of the estate, for example 1/3 in favour of a charity, when calculating the share the parent of the grandchild would have inherited had they survived, the provisions of the will must be taken into account.

For example, say the deceased has made a bequest of 1/3 in favour of a charity and he dies survived by two sons and a grandson who is the child of his pre-deceased son. In calculating the share which the deceased parent of the grandchild would have taken, the provisions of the will must be considered, as the share of the deceased parent would have been 1/3 of the estate of his father after the will had taken effect.

He would therefore have inherited 1/3 of 2/3 of the estate (i.e. 2/9 of the total of the estate). Accordingly, the orphaned grandchild will be entitled to a share of 2/9 of his grandfather's estate. The question now arises whether or not, as this share of 2/9 does not exhaust the bequest of 1/3 made to the charity, the charity will be entitled to a bequest of 1/9 of the estate. In our opinion, the better view is that the charity will be so entitled since this appears to be the most logical solution.

The juristic basis for the reform was the so-called 'verse of bequest' in the Qur'an (*Surah* 2 verse 180) which enjoins Muslims to make bequests to 'their close kin'. Although the Sunni schools of law consider that this verse has been repealed by the later verses naming the Qur'anic sharers, many jurists within the schools, including Shafi'i himself, took the view that the verse was repealed only in respect of heirs who actually received a share of inheritance. The Egyptian reformers cited this minority view as the basis of their reform. The Egyptian reform was quickly followed by similar legislation in Syria, Morocco and Tunisia and later by reforms in Kuwait, Oman, Qatar and the United Arab Emirates.

Article 4 of the Muslim Family Laws Ordinance 1961 of Pakistan also sought to make provision for orphaned grandchildren. However, the wording of the Ordinance presented complications and if the ordinary rules of statutory interpretation were to be applied, the Islamic law of succession as interpreted in Pakistan would have been thrown into confusion. The Federal Shariat Court, in 2000, declared Article 4 to be contrary to the principles of Islamic law and stated that it should therefore no longer be applied. Instead, the court recommended that an adaptation of the Middle Eastern concept of an obligatory bequest to an orphaned grandchild should be enacted. An appeal against this decision to the Shariat Appellate Bench of the Pakistani Supreme Court was dismissed.

Self-assessment questions

1. **What are the restrictions imposed on a gift in death-sickness?**
2. **Are there any restrictions on Muslims' powers to give away their property as a lifetime gift?**
3. **Describe the extent to which the principle that 'the nearer in degree excludes the more remote' has been eroded by legislation in Egypt, Kuwait and Pakistan.**
4. **Ibrahim died leaving behind the following relatives: his wife; his mother; his father; one son; one daughter; one full brother; and one full sister. Citing relevant authorities, explain the specific share of each of these relatives in his estate under both the Sunni and Shi'ah schemes of inheritance, indicating the capacity in which each entitled person would inherit.**

11.6 *Waqfs*

The gift of property, whether real or personal, by a Muslim for a purpose that is recognised by Islamic law as religious, pious or charitable constitutes a *waqf* (trust). The dedication of the property has to be permanent both as regards the purpose of the *waqf* and as regards the period of the dedication (i.e. the *waqf* must be established in perpetuity). The person establishing the *waqf* loses his ownership of the *waqf* property and the property of the *waqf* cannot be alienated by the former owner, nor by the administrator of the *waqf*.

In the Indian sub-continent the Waqf Act 1995 contains a comprehensive list of the purposes for which a *waqf* may be created. The list includes, for instance, the support or building of mosques or colleges, the payment of moneys to the poor and the provision for reading of the Qur'an in public places.

All sane Muslims who are not a minor may dedicate their property by way of a *waqf*. No particular form is required but a *waqf* created by will or made in death-illness cannot exceed more than 1/3 of the estate of the donor unless the heirs give their consent after the death of the testator. A *waqf* will not be declared invalid only because the

specified objects of the *waqf* happen to fail. In such a situation the doctrine of *cy près* will be applied and the income of the *waqf* will be applied to objects as near as possible to the objects that failed.

Further reading

- **Rahman, H. 'The role of pre-Islamic customs in the Islamic law of succession' (1988) 8 *Islamic and Comparative Law Quarterly* 13–29.**
- **Kimber, R. 'The Qur'anic law of inheritance' (1998) 5 *Islamic Law and Society* 291–325.**

Self-assessment exercises

1. **What is a *waqf*?**
2. **For what purposes can a *waqf* be created?**
3. **Are bequests to a *waqf* exempt from the 1/3 restriction on testamentary dispositions?**
4. **Can adult Muslims give away their entire property by way of gift to a *waqf* or can their heirs prevent this, so that they are not deprived of their Qur'anic share of the inheritance?**

Reminder of learning outcomes

Having completed this chapter and the relevant readings, you should be able to:

- **distinguish between testate and intestate succession**
- **understand and explain the formal requirements for a valid will**
- **assess the effect of non-compliance with these requirements on the will of the testator**
- **describe and analyse the principal features of a *waqf*.**

Sample examination question

Explain the limitations imposed by Islamic law on adult Muslims wishing to divest themselves of their entire property by:

1. **bequeathing everything to a local mosque after their death**
2. **using all their property during their lifetime to establish a school for orphans.**

Advice on answering the question

1. Explain the restrictions placed on Muslims in respect of bequeathing their property. Explain that Islamic law is a law of forced succession and that testamentary freedom is restricted.
2. Explain the right of Muslims to divest themselves of their property in any way they wish during their lifetime. Explain any interdiction which may apply to prevent such gifts.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can distinguish between testate and intestate succession.	☐	☐	☐
I can understand and explain the formal requirements for a valid will.	☐	☐	☐
I can assess the effect of non-compliance with these requirements on the will of the testator.	☐	☐	☐
I can describe and analyse the principal features of a *waqf*.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
11.1	Intestate succession	☐	☐
11.2	Testate succession	☐	☐
11.3	The estate of a *mafqūd*	☐	☐
11.4	Death-sickness	☐	☐
11.5	Reforms	☐	☐
11.6	*Waqfs*	☐	☐

NOTES

12 The courts and procedure

Contents

Introduction

Judicial procedure is normally classified as procedural law but there are substantive jurisprudential rules and principles regulating the administration of justice under Islamic law. At first only the Caliph could administer justice. Under the reign of Caliph Umar, judges (*Qāḍīs*) were appointed. *Mazālim* courts were also established. These were connected with the local governors and police courts, could not apply *hadd* punishments (see Chapter 4) and accepted a lower standard of evidence. Judges are enjoined by relevant provisions of the Qur'an and *Sunnah* to always discharge justice fairly, but the details of doing so were laid down by the early Muslim jurists. Evidence in Islamic courts depended largely on the oral testimony of witnesses and written documents were mistrusted. Confessions and oaths were also important.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings, you should be able to:

- **explain the functions of a *Qāḍī***
- **assess the different forms of legal proof**
- **determine the function of witnesses with reference to both trial and oath**
- **explain the importance of the oath.**

CORE TEXTS

- **Baderin, Chapter 9 'Administration of justice'.**
- **Coulson, Chapter 9 'Islamic government and Shari'a law'.**

ESSENTIAL READING

- **Baderin, M. 'The application of Islamic law in practice' in Baderin, *Islamic law in practice*, pp.xi–xxxix.**
- **Schacht (1950), Chapter 8 'Consensus and disagreement' (available on the VLE).**
- **Anderson, J.N.D. 'Muslim procedure and evidence' (1949) 1 *Journal of African Administration* 123–129 and 176–183 (available on the VLE).**

12.1 Judges (*Qāḍīs*)

The position of courts and of legal procedure in Islamic law is closely related to the historical development of Islam. Like the legal systems of ancient Rome and Greece (and also Europe in the Middle Ages), Islamic law did not provide for a proper separation between judicial and executive powers. At the beginning of Islam it was the Caliph who administered justice. It was only under the rule of the Caliph Umar that judges were appointed. However, these judges, referred to as *Qāḍīs*, were regarded as the delegates of the Caliph or of the governor of a province. A *Qāḍī* court was usually a single-judge court with general jurisdiction – there were no specialist courts dealing, for instance, with just criminal or just civil cases.

The *Qāḍī* court fulfilled a number of functions. The most important were:

- the resolution of disputes between two parties either through a compromise between the litigants or through a coercive judgment
- the enforcement of claims made by plaintiffs once they had been proven
- the protection of the property rights of people with a mental illness, for instance by appointing a guardian charged with looking after their interests
- the administration of pious foundations (*waqfs*) if no administrator had been appointed
- the execution of lawful testamentary provisions of the testator
- the application of *hadd* punishments (see Chapter 4) and the exercise of police powers within the area under the *Qāḍī*s jurisdiction.

The exercise of the function of a *Qāḍī* was regarded as a religious duty. He was obliged to follow certain basic principles of procedure. The most important was to consider all people equally and to act impartially. The *Qadi* was supposed to listen carefully to the evidence given by the witnesses, to encourage compromise between parties, as long as the agreement did not violate principles of Islam and was not otherwise illegal, and to give judgment. *Qāḍīs* were not bound by previous judgments and no rule of binding precedent emerged in Islamic law.

The first function of the *Qāḍī* was to establish who, in the case before him, was the plaintiff and who the defendant. In establishing the role of each party Islamic law generally follows the principle of Roman law that the person who makes the claim is the plaintiff and is therefore the party who bears the burden of proof. The party who denies a claim is the defendant.

The courts of the *Qāḍīs* were not the only organs for the administration of justice. Because of the position of the *Qāḍīs* under the Ummayyad regime as appointees of the local governor and, in many instances, the mere secretaries of the governor, it was felt that cases involving parties of high social or political status should be dealt with by a person of higher status than the *Qāḍī*. Thus, the *Mazālim* courts came to be established. These courts were sometimes presided over by the governor. However, the law they applied was, in theory at least, Islamic law or the *Shari'ah* as understood in the region.

The police also had their own courts. These courts were not empowered to apply the *hadd* punishments but could hear evidence which did not conform to the stringent standards of the *Shari'ah* courts. Thus, in cases of theft the police courts could hear hearsay evidence and circumstantial evidence, whereas the *Qāḍī* courts (bound by the stringent rules of *Shari'ah* evidence) could only hear direct evidence by testimony from witnesses of the 'highest moral probity'. The police courts were entitled to apply 'discretionary punishments' if they found the accused guilty, but only the *Qāḍī* courts could impose a *hadd* penalty.

In Saudi Arabia at the present time the *Shari'ah* courts are still the courts of general jurisdiction. There are, however, tribunals created by various regulations which have jurisdiction to hear cases in certain specific areas. Thus, for example, in 1967 the Commission for the Settlement of Commercial Disputes was established with jurisdiction to decide litigation in private commercial disputes. However, cases in

which the government of the state of Saudi Arabia is a party go before the Grievance Board. The Grievance Board appears to be the present-day successor of the *Mazālim* jurisdiction of early Islam.

FURTHER READING

- **Liebesny, Chapter 11 'Procedure before the westernization of the law'.**
- **Powers, D.S. 'On judicial review in Islamic law' (1992) 26(2) *Law & Society Review* 315–41.**
- **Amedroz, H.F. 'The office of Kadi in the *Ahkam Sultaniyya* of Mawardi' (1910) *Journal of the Royal Asiatic Society of Great Britain and Ireland* 761–96.**
- **Amedroz, H.F. 'The Mazalim jurisdiction in the *Ahkam Sultaniyya* of Mawardi' (1911) *Journal of the Royal Asiatic Society of Great Britain and Ireland* 635–74.**
- **Haneef, S.S.S. 'The structure and procedure of the Shari'ah courts: historical dynamics and some contemporary practice' (2009) 32 *Hamdard Islamicus* 7–39.**
- **Bauer, K. 'Debates on women's status as judges and witnesses in post-formative Islamic law' (2010) 130 *Journal of the American Oriental Society* 1–21.**

12.2 Evidence and proof

Once the roles of plaintiff and defendant had been established the plaintiff was required to prove his claim through the testimony of witnesses. To give evidence before an Islamic court the witnesses had to possess the quality of *adālah* (i.e be a Muslim of the highest moral probity). The testimony of a woman was of half the value of that of a man. However, in cases where only women would have knowledge the testimony of two women was acceptable. In most cases the testimony of two *ādil* witnesses was required, although in cases involving property the testimony of one witness and the oath of the plaintiff was sufficient.

Islamic jurists distrusted documents because they could be tampered with or could be forged. For this reason the jurists accepted only three legal means of proof: the testimony of a witness, a confession and an oath. The reluctance of the jurists to accept written documents as evidence brought them in conflict both with the Qur'an, that enjoins the writing down of the contents of a contract, and with general legal and commercial practice, where written documents were widely used. Islamic procedural law developed a compromise to overcome this conflict: documentary evidence was adduced from the proof through a witness. The same principle applies to the drafting of contracts; two honourable persons should witness the contract.

The use of witnesses and the oath is therefore an important area of Islamic procedural law. The person making a claim (the plaintiff) has to be able to prove his claim through witnesses. Confronted with a claim the defendant is required to take an oath denying the claim. If he refuses to take the oath judgment is given for the plaintiff. Otherwise the matter will proceed to trial where the plaintiff calls his witnesses. As mentioned above, the evidence of women is accepted, but the testimony of two women is needed to rebut the evidence of one man.

The *Qādī* examined the reliability of witnesses on the basis of their moral standing and was empowered to reject the evidence depending on the result of his enquiry. As a result, professional witnesses emerged whose moral standing and integrity had been established by a *Qādī* and whose testimony could therefore not be rejected. Their function was not unlike the function of a notary in English law.

The second method of ensuring that the oral evidence given in court represents the truth is to require witnesses to take an oath. The oath taken by the plaintiff or the defendant has to be supported by witnesses in certain circumstances. The support of witnesses is required for cases involving serious allegations such as bodily hurt, theft and homicide.

Further reading

- **Ahmad, N. 'Comment on women's testimony in Islamic law and misconceptions: a critical analysis' (2011) 6 *Religion and Human Rights* 13–23.**
- **Badawy, T. 'Towards a contemporary view of Islamic criminal procedures: a focus on the testimony of witnesses' (2009) 23 *Arab Law Quarterly* 269–305.**

Self-assessment exercises

1. **What was the role of the *Qāḍī* in the administration of justice?**
2. **Why are witnesses so important in Islamic procedural law?**
3. **Describe the role of oaths in the Islamic law of evidence.**

Reminder of learning outcomes

Having completed this chapter and the relevant readings, you should be able to:

- **explain the functions of a *Qāḍī***
- **assess the different forms of legal proof**
- **determine the function of witnesses with reference to both trial and oath**
- **explain the importance of the oath.**

Sample examination question

Discuss the role played by witnesses in a case before an Islamic court.

Advice on answering the question

You should discuss the capacity required to be a witness under Islamic law and the reasons why Islamic law places so much importance on oral rather than documentary evidence. The impact of the stringent requirements imposed on witnesses, especially in criminal litigation, should be discussed.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can explain the functions of a *Qāḍī.*	☐	☐	☐
I can assess the different forms of legal proof.	☐	☐	☐
I can determine the function of witnesses with reference to both trial and oath.	☐	☐	☐
I can explain the importance of the oath.	☐	☐	☐

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

		Must revise	Revision done
12.1	Judges *(Qāḍīs)*	☐	☐
12.2	Evidence and proof	☐	☐

Notes