PROFESSOR AHMAD IBRAHIM

islāmic law in malaya

edited by

SHIRLE GORDON



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TO DATO LEE KONG CHIAN

May he live long in health and in the knowledge that he has used his 'trusteeship' over vast wealth to assist those who strive regardless of their race, colour or creed.

M.S.R.I.

PREFACE

The distinctive personality of a people depends upon their culture and the culture of a people is an aggregate. It is made up of borrowings which help to form a distinct pattern of life.

This culture is best seen in the laws which these people have adapted by a process of rejection and assimilation and made distinct for themselves.

The Malay converted to Islām, but through that Islāmic Law which was first spoken in 'Arabic to an 'Arab people, he re-asserted his Malay self, and gave to that distinct self a legal recognition of right under the term Malay 'Ādat or Malay Customary Law. Thus what is Islāmic Law in Malaya, is in fact a 'Malayized' Islāmic Law.

To illustrate here is an incident which now falls into place: In 1958 the writer was at the home of the Muftī of Trengganu who is of part 'Arab origin, when a Malay civil servant from Kelantan came to see him. The Malay's complaint, in rather strong terms, was that the Muftī, in the name of Islām, was attacking the Malay fisherman's habit of making an offering to propitiate the spirits of the sea.

The Malay alleged that the Muftī, in attacking this practice, was, as a person of 'Arab Culture rather than as a man of Islām, attacking an aspect of Malay Culture. The practice of propitiating spirits is *shirk* or polytheism, the most repugnant of things to monotheistic Islām, but it was part and parcel of Malay folk-life in that area. The Malay would not even admit that there was anything irreconcilable in this situation.

Indeed to approach Islām in Malaya from a 'pure' Islāmic of view, would be to attack not one, but many, elements of itutes this distinctly Malay Folk Culture.

For although Malays are Muslim one and all, Islām alone does not determine the life pattern or beliefs of the Malay mass. Those Malays who would insist on making the equation fit are apt to be isolated by their people; witness our dear late Tunku Hussein bin Yahya of the matrilineal 'Ādat Perpateh State of Negri Sembilan, who was 'banished' to the 'patrilineal' 'Ādat Temenggong State of Trengganu, for his insistence on the application of the patrilineally orientated Islāmic Law of Inheritance (*Farā'iḍ*) in a matrilineal area where woman is not only the exclusive "trustee" of the tribal lands, but where she is the receptor of political sovereignty — in the sense of tribal office.

We must bear in mind that Islāmic Law in Malaya is further complicated by the influence of British law as it has appeared through the decisions of various British Colonial judges. Thus not all decisions of the Courts reflect Malay ethics or Malay concepts of right and wrong, for example, matters of family law and property, and these decisions are cited and carried forward. The imposition of Anglo-Saxon concepts is clearly seen in Singapore where we even find that particular *waqfs,* or trusts, which are quite proper according to Islām, have been disallowed as not properly constituting trusts when judged, not against Islāmic or Malay concepts, but against Anglo-Saxon concepts of what rightfully constitutes a trust, or what is properly 'charity', etc.

Thus our Malayo-Islāmic Law has been further legally overladen in certain instances by Anglo-Saxon elements which are sometimes contradictory in their essential concepts. With the transfer of political sovereignty there is much that commends itself to reconsideration.

It may be said that our era is the era of Ideology, of a struggle for better forms, more rational institutions. Sometimes in this ideological sweep there is a tragic failure to examine first the indigenous forms, to seek if possible an indigenous and therefore a hard-rock basis for this building of a People's grand future. There is too often the assumption that all of yesteryear must be anachronistic. But is this so ? Is it possible that a distinct people have no distinct contribution to make to human institutions — no contribution reflective of their own distinct reality ?

To give an objective answer to this question we mu
look to the particular institutions and forms of a peopl

persons already committed, if even unconsciously, to other forms, but as 'neutral' human minds — if one might use the term. But before one can so analyse, the basic materials are needed: the delineation and documentation of a culture, of its institutions, of its forms, and of its laws.

'To know one's self is the most glorious of all Jihāds', thus spake Muḥammad. To that *Jihād* of self-knowledge, and often to what has become of ourselves, and to an eventual self-assessment and perhaps a selective self-assertion, and a possible contribution to that future world of Man's new forms, this book is humbly contributed.

SHIRLE GORDON,
Editor.

PUBLISHER'S NOTE

The research presented herein is but one of the subjects of an overall research project on Islām in Malaya.

We should like to tell you how this project came into being. Many in Malaya have felt that Islām has had a pervasive influence, but little or nothing had been published on the subject. It was felt that no one individual was qualified to deal with all of its ramifications — a group study was necessary.

This group was formed in 1957 under the guidance of Malaya's Grand Old Pandita, Pak ZA'BA or Dr. Tuan Haji Zainal Abidin bin Ahmad. The work brought forty-nine people together, all but a few of whom were Malayans.

A Committee was formed to sponsor the project: Dr. Za'ba as Chairman, Nazir Mallal as Honorary Treasurer, this writer as Organiser and General Editor, Francis Thomas, then a Minister in the Singapore Government and Gerald de Cruz, then Research Director of the ruling party.

Public funds supported the work of finding those qualified, organizing and editing materials, and carrying out necessary translations. Those who gave their time, experience, money and most of all their dedication, gave without it being possible to demonstrate that this endeavour would have a meaningful conclusion. To those scattered many belongs our gratitude.

After two years of work the realization of the overwhelming need for further research into other aspects of the society was such that a blueprint of a permanent research institute was drawn up by Professor Fatimi and this writer. This visualization was shown to H. H. Prince Sadruddin Aga Khan on his visit to Singapore and it was he who assured to us a grant sufficient to found the Malaysian Sociological Research Institute. The signatories to the Memorandum and Articles of Association are:

Dr. Tuan Haji Zainal Abidin bin Ahmad (ZA'BA), the first Chairman of the Board of Governors.

Dato Sir Mahmud bin Mat, the first Vice-Chairman of the Board of Governors.

Nazir Mallal, the first Honorary Treasurer of the Board of Governors.

Shirle Gordon, Honorary Secretary of the Board of Governors and Director of the Institute.

Professor S. Q. Fatimi, one of the initial members of the Board of Governors.

Dr. Quah Quee Guan.

Dr. Ho Yuen, who later agreed to serve in Prof. Fatimi's stead on the Board of Governors and is now Chairman of the Board.

The M.S.R.I., a non-profit organization, was inaugurated on November 27, 1959, with Prince Sadruddin generously agreeing to serve as its Patron. In October, 1960, the M.S.R.I. was declared "an institution of a public character" by the State of Singapore, a status also recognized by the Government of the States of Malaya. Contributions are tax-deductible.

The Objects of the M.S.R.I. setting forth the why of its formation are:

(a) To analyse the existing cultures of Malaysia and Malaya in particular in order to determine both their essential character and their ultimate objectives.

(b) To contribute towards the crystallization of Malayan consciousness through a discovery of the factors of unity in the national life as manifest in the cultures of Malaya in their continuous stream.

(c) To encourage the development of a functioning intelligentzia within the Malayan context.

(d) To preserve and consolidate the national heritage in such form as it may exist.

(e) As a part of object (a) above to research into the phenomenon of Islam in Malaya and its impact on the plural society.

(f) As a part of object (e) above to carry on, further the purpose, the intent and the subjects dealt with in the project: 'Islam in Malaya'.

(g) To foster and encourage the research of any intellectual of this country within the scope and not contrary to the direction of the Institute as set forth above and the Institute shall retain the copyright thereof.

(h) As part of the objects stated above, to set up a Scholarship/Fellowship Fund to give Scholarships and/or Fellowships to people considered suitable material in order to enable them to further their research or studies in the manner and according to the continuous direction of the Institute. They shall be responsible to the Institute for any research or studies which they shall embark upon and the Institute shall retain all rights thereto including full copyright to all such works. Such studies do not necessarily mean a study course in a recognized Institution.

(i) To foster and/or publish any work, in any language, the Institute deems of national value and the Institute shall retain the copyright thereof.

(j) To foster the use of Malay as the National Language in the additional publications of the Institute.

(k) To disseminate the work of the Institute among the masses and to bring awareness to and encourage knowledge of its objects and its work.

(l) For the purpose of carrying out the objects stated above to establish under the Institute a full research and reference library.

(m) To receive, purchase, hire or build premises and all equipment necessary for publication in accordance with the objects set out above.

(n) To receive, purchase, hire or build premises to house the Institute and/or lodge research workers in an atmosphere congenial to research.

(o) To take such steps by personal or written appeals, public meetings or otherwise as may from time to time be deemed expedient for the purpose of procuring contributions to the funds of the Institute in the shape of donations, annual subscription or otherwise.

Since its inception the M.S.R.I. has moved forward to publish the results of its research, follow up on collateral materials which were uncovered and commence further research; to publish a tabloid called *Benih* in the Malay edition, *Seed* in the English edition and *Chung-tze* in the Chinese edition, and to publish *Intisari,* a scientific quarterly whose initial numbers contain original research of M.S.R.I. *Intisari* deals with but one subject per issue and includes reproductions of the original work of Malaysian artists.

M.S.R.I. has endeavoured to build up an Associate Membership of those who would freely contribute their talents; has established a Regional Office in Kuala Lumpur, purchased premises in Singapore; expanded its Board of Governors to include representatives of diverse institutions, and attempted to consolidate its funds so that its work can continue.

We commend to you this volume, those published and those in publication (as listed on the dust jacket) and ask for your support; intellectual, moral or financial.

SHIRLE GORDON

Singapore,
July, 1965.

EDITOR'S NOTE

This book presented an unusual problem of transliteration.

What appears as a final *h* on words such as Sunna*h*, Sharī'a*h*, Ḥanīfa*h*, etc. is in fact not *h* but the Arabic *tā marbūṭa* i.e. the joining *t*, so called because it is pronounced with the first vowel of the next word. However, if there is no word after *tā marbūṭa* it simply becomes a short *a* quickly pronounced, which is often wrongly transliterated as *ah*.

This is for such words *from an Arabic point of view*.

But while the Malay language initially assimilated these words into a Malay written in a varied and augmented form of Arabic script, Malay, unlike Arabic, was subsequently romanized, under the influence of the English language, (rather than Dutch as happened with Indonesian Malay).

And in Romanized Malay they do put such an *h* at the end of Sunna*h* etc.

However, we have given what we hope is a comprehensive Glossary of Legal Terms where, when the word is cited under the Arabic column, we have omitted the final *h*.

A more embarrassing phenomenon is the word *mut'ah*, also spelt *matta'ah* in some Malay States. In Malay this means 'consolatory gift' given to a woman on divorce, and so we have used it; but in Arabic unfortunately it means 'temporary marriage', and survives today in the language only with the worst possible connotation.

Thus do not assume meanings; please see the Glossary to avoid misunderstanding.

We must thank Mr. S. A. Ali for having been the first to react and underline the necessity for such a note.

We have attempted to show the differences in spellings in Parts II, III, IV where we discuss the theoretical position of Islāmic Law and Islāmic Law in Malaya on any particular subject.

Here we would, for instance, use the Arabic *waqf* when discussing the institution of 'pious foundations' *per se,* and *wakaf* when discussing the institution in Malaya; so with a 'judge', in Arabic *Qāḍī,* in Malay *Kathi* or *Kadzi.*

We hope that this will assist Malaysians who might be encouraged to read further into the roots of a portion of their law and who would be at a loss to find *wakaf, Kathi,* or some other such Malay variation when going through the books on Islāmic Law.

Shirle Gordon.

ACKNOWLEDGEMENTS

The research project Islām in Malaya was supported financially as a unit. Many have given and it is not possible to isolate any one contribution as being the particular contribution responsible for the costs of any particular manuscript. Thus our gratitude must go to all who so generously contributed to the total research project of which this book is but one part. Their names appear at the back of this volume.

We must thank Mr. S. A. Ali, Honorary Secretary, Indian Institute of Islāmic Studies, for being good enough to check the transliterations of 'Arabic into English done by the Editor, Lois Kieffaber for her tireless spirit in assisting the Editor in the preparation of the many indices, Raymond Tan for meticulously typing the indices, Menejeh Namazie of the Library, University Singapore — Che Mansor Adabi of M. L. J. — and Mr. Pakriswamy Naidu Ramoo of the State Advocate General's Office for patiently answering queries, Fred Zimmermann, who so loved the book, and finally we must thank Erna K. Gordon for extensive reading of proofs.

M.S.R.I.

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CONTENTS

CHAPTER PAGE

I. SOURCES AND DEVELOPMENT OF MUSLIM LAW

THE RELIGIOUS BASIS OF MUSLIM JURISPRUDENCE 1

THE DEVELOPMENT OF MUSLIM LAW .. 45

SOME MUSLIM JURISTS AND THEIR WRITINGS

ḤANAFĪ JURISTS 119
MĀLIKĪ JURISTS 125
SHĀFI'Ī JURISTS 130
ḤANBALĪ JURISTS 140
OTHER SUNNĪ JURISTS 143
SHĪ'Ī JURISTS 143

II. FAMILY LAW

ADMINISTRATION 147
BETROTHAL 173
SOLEMNISATION OF MARRIAGE .. 176
'IDDA AND THE MARRIAGE OF WIDOWS 188
MAS-KAHWIN (MAHR) AND PEMBERIAN 191
PROHIBITED MARRIAGES 194
ṬALĀK (ṬALĀQ) 197
CHERAI TA'ALĪK (DIVORCE BY THE BREAKING OF A CONDITION) 208
KHULA, KHOLO', KHUL' OR CHERAI TEBUS ṬALĀK 210
FASAH (FASKH) 213

PRESUMPTION OF DEATH 216
APPOINTMENT OF ḤAKAM 218
NUSUS (NUSHŪZ) 222
MUT'AH (MATTA'AH) OR CONSOLATORY GIFT 223
MAINTENANCE OF A WIFE 224
HARTA SAPENCHARIAN 228
DISTRIBUTION OF PROPERTY ON DIVORCE UNDER 'ĀDAT PERPATEH .. 233
LEGITIMACY OF CHILDREN, CUSTODY OF CHILDREN AND ADOPTION .. 234
MARRIED WOMEN'S PROPERTY .. 240

III. LAW OF PROPERTY .. 245

GENERAL INHERITANCE 251
WILLS 263
CUSTOMARY LAND TENURE 270
WAKAF (WAQF) AND NAZR 276
BAYT UL-MĀL 290
GIFTS 297
INTERPRETATION OF WILLS AND SETTLEMENTS IN SINGAPORE 300
MORTGAGE BY CONDITIONAL SALE .. 311

IV. OFFENCES - EVIDENCE - PROCEDURE

MUSLIM OFFENCES 315
Matrimonial Offences 317
Unlawful Sexual Intercourse 321
Consumption of Intoxicating Liquor .. 329
Spiritual Aspects of Individual Life also Affecting Muslim Communal Life
Friday Prayers 330
Fasting in Ramaḍān 333
Non-Payment of Zakāt and Fiṭrah .. 335
Commencement of Ramaḍān (Fasting) and the Eid ('Īd) 349
Conversion and Adoption .. ..
Conversion 350

Adoption of Muslim Children 353
Miscellaneous Offences 354
Jurisdiction 362
Administration 366

EVIDENCE AND PROCEDURE 367
Number of Witnesses 368
Status of Witnesses 369
Quality of Witnesses 370
Direct and Hearsay Testimony 371
Acknowledgment or Iqrār 371
Procedure in Criminal Cases in Kathi's Courts 372
Procedure in Civil Cases 373

APPENDIX A
ARABIC TEXT OF QUOTATIONS FROM THE QUR'ĀN 375

APPENDIX B
LIST OF ABBREVIATIONS 383

GLOSSARY OF LEGAL TERMS 384

GLOSSARY OF MINORITY SECTS AND MOVEMENTS CITED 400

TABLE OF CASES 403

TABLE OF ACTS, ORDINANCES, ENACTMENTS AND RULES 408

BIBLIOGRAPHY 413

STATE INDEX 424

GENERAL INDEX 429



The Sower, symbolic of the Malay proverb:

"Cast good seed into the sea,
and an Island will grow".

SOURCES AND DEVELOPMENT OF MUSLIM LAW

THE RELIGIOUS BASIS OF MUSLIM JURISPRUDENCE

It is only . . . 'exertion' that God has enjoined on them, not the 'certainty of exactitude' which they may not reach.

Shāfi'ī, *al-Risāla*

THE RELIGIOUS BASIS OF MUSLIM JURISPRUDENCE

ISLĀM literally means submission to the will of God and the will of God is that we should pursue *ḥusn*, that is beauty of life and character and avoid *qubḥ*, that is ugliness of life and character. What is *ḥusn* or morally beautiful and what is *qubḥ* or morally ugly, can only be discovered from divine revelation. The value of each human action must be considered in the sight of God; its earthly consequences are incidental. What is morally beautiful must be done; what is morally ugly must not be done. That is the path to be pursued, the *Sharī'ah*.

The word *Sharī'ah* is the name given to the whole system of the law of *Islām*, the totality of God's commandments. Each one of such commandments is called *ḥukm* (pl. *aḥkām*). The *Sharī'ah* is defined as "that which would not be known had there not been a divine revelation".[1] This definition is wide enough to include all the divine revelations, including those made by the Hebrew Prophets and Jesus, but the divine revelations through Muḥammad are considered as confirming the earlier revelations, and therefore constitute the *Sharī'ah* in its purest and final form. Only what is expressly stated in the divine revelations or may be inferred from them properly comes under the *Sharī'ah*. The *Sharī'ah* embraces all human actions; it is, therefore, strictly not law in the modern sense but might be regarded as a guide to ethics.

The Muslim term which corresponds more closely to law is *fiqh*. *Fiqh* is defined as "the deduction of the *Sharī'ah* values relating to conduct from their respective particular (*tafṣīlī*)

1. Ṣadr ash-Sharī'ah's *Tawḍīḥ* p.21. The word *Sharī'ah* is sometimes confined to the Divine law laid down in the *Qur'ān* and through the Prophet. See Farukī, *Islamic Jurisprudence*, pages 12 - 19. In this view the *Qur'ān* and the *Sunnah* of the Prophet contain the *Sharī'ah* of the Muslims but when the Muslims seek to understand the *Sharī'ah* and apply their understanding of the *Sharī'ah* to any particular matter their conclusions become the human interpretation of the *Sharī'ah*, namely *fiqh*.

evidences"[2]. A *Sharī'ah* value (*ḥukm Sharī'ah*) is defined as the quality determined as a result of divine revelation e.g. the fact of a human act being prohibited in the *Sharīah* is its *Sharī'ah* value. The *Sharī'ah* evidence (*adillat ash-Sharī'ah*) are the prescriptions contained in the *Sharī'ah*, and with reference to the source from which these evidences are obtained, four types of *Sharī'ah* evidences are distinguished, namely, the *Qur'ān*, the *Sunnah*[3], the *ijmā'*[4] and *qiyās*[5]. The use of the word 'conduct' (*'amaliyyāt*), excludes that part of the *Sharī'ah* which deals with matters of belief (*i'tiqādiyyāt*) and matters of ethics (*wijdāniyyāt*), but it still makes *fiqh* wider than law in the modern sense inasmuch as *fiqh* includes not only civil transactions (*mu'āmalāt*) but also religious ritual (*'ibādāt*). The use of the word "deduction" in the definition excludes knowledge derived from another person and points to the need for personal enquiry and thought. To be a *faqīh* or a jurist a man must have the quality of independent judgment. The term particular (*tafṣīlī*) in the definition indicates that the premises which the *fiqh* uses are not immediately and directly obtained from the four *Sharī'ah* evidences, namely the *Qur'ān*, the *Sunnah*, the *ijmā'* and *qiyās*. These evidences are too general (*ijmālī*) as they stand and are not available for the purpose of *fiqh* until they have been reduced by a particular science to logical propositions each relating to one particular set of values. The particular science which prepares its premises for *fiqh* is the *uṣūl al-fiqh*, which has been defined as the science of the principle whereby one reaches *fiqh* in the true way.[6] The *uṣūl al-fiqh* determines only those principles which are necessary for reaching the *fiqh*. It does not concern itself with less immediate subjects like language and syntax or dialectics (*kalām*) although they too are necessary. The subject matters of *uṣūl al-fiqh* are the four *Sharī'ah* evidences, that is the *Qur'ān*, the *Sunnah*, *ijmā'* and *qiyās*. It provides for the *fiqh* certain general

2. Aghnides, *Mohammedan Theories of Finance*, p.24; Al-Ḥaṣkafī defines *fiqh* as "the science of the derived substantive legal rules as acquired from their particular sources" – *Durr al-Mukhtār*, quoted in S. Maḥmaṣānī, *The Philosophy of Jurisprudence in Islām*, translated by Farhat J. Ziadeh (Ziyādah).
3. *Sunnah*: Model Conduct of the Prophet.
4. *Ijmā'*: Consensus, Agreement.
5. *Qiyās*: Analogical deduction.
6. Ṣadr ash-Sharī'ah, *op. cit.*, p.27.

propositions to be used by *fiqh* in deriving the provisions of the law applicable to particular cases. For example *uṣūl al-fiqh* tells us that in such and such conditions *ijmā'* constitutes an evidence for the establishment of a *Sharī'ah* value. *Fiqh* takes this proposition as a premise and deduces from it the conclusion that a particular practice is lawful because there is *ijmā'* to that effect.

Ḥukm or a rule of law is defined by the Muslim jurists as "that which is established by a communication (*khiṭāb*) from God with reference to men's acts, expressive either of demand or prohibition or indifference on His part or being merely declaratory" of the cause, condition or sign of a rule of law.[7] Laws may be classified into two main divisions according to their objectives, that is the mandatory (or *taklīfī*) laws and the declaratory (or *waḍa'ī*) laws. When the communication (*khiṭāb*) from the Lawgiver takes the form of a demand it may be absolute or not absolute. If it is absolute, the demand may consist in requiring human beings to do something, in which case the act demanded is regarded as obligatory (*farḍ*) or it may require them to forbear or abstain from doing something, in which case the act to be forborne or abstained from is said to be forbidden (*ḥarām*). When the demand is not of an absolute character, the act to which it refers, if it be one of commission is called commendable (*mandūb*) or if it is one to be forborne or abstained from it is called condemned or improper (*makrūh*). An act with reference to the doing or omission of which there is no demand or, in other words, with respect to which the Lawgiver is indifferent, is regarded as permissible (*mubāh*). All acts which are neither obligatory nor forbidden nor commendable nor condemned fall within the category of permissible (*mubāh*). Laws which thus define the characteristics of a man's acts, namely whether they are obligatory, forbidden, commendable, improper, permissible, or indicate the legal effects of an act, as for instance, that the right of ownership arises from an act of purchase, are called *taklīfī* or mandatory laws. The other class of laws are the declaratory laws of *waḍa'ī* which indicate the component elements of a mandatory law, namely whether certain facts or events are the cause, condition or constituents of a command. The function of a declaratory law is interpretative in

7. 'Abdur Rahim, *The Principles of Muhammadan Jurisprudence*, pp. 50-51.

relation to a mandatory law. The declaratory law is the law which has been promulgated as a reason, a condition or a deterrent for actions, or which states whether these actions are valid or void or whether they are allowed by concession or are permissible *ab initio*. For instance, it is by means of a declaratory law that we know that proposal and acceptance in a transaction of sale are the cause originating proprietory rights in the thing sold in the buyer and extinguishing those of the vendor; and that the pronouncement of divorce is the cause of the extinction of the marital rights and the obligations of the husband and the wife.

A declaratory law derives its character from the connection (*ta'alluq*) between one fact and another. If the connection between the two be such that one is included in the other, the former is called the *rukn* (formal cause) of the latter, as for example the offer and acceptance of two parties to a sale are the *rukn* of sale because they are included in the fact of sale. If the fact so connected is not contained in, but is external to, the fact to which it is connected, then if it has been indicated in the Holy *Qur'ān* or the *ḥadīth* as the effective cause (*mu'aththir fīh*) of the latter fact, it is called its effective cause (*'illah*). If it is not so indicated, but on the whole, that is to say not directly and immediately but remotely, it leads to the other fact, it is called its occasion or cause (*sabab*); if it does not lead to it but the other fact is dependent upon it, it is called a condition (*sharṭ*) and if the other fact is not dependent upon it but is indicated by it, it is called a sign (*'alāmat*) of the other fact. When the *Sharī'ah* value does not consist in a connection of one thing with another, it is either a quality of an act by a legally responsible person (*mukallaf*), such as the quality of an act being allowed (*ibāḥah*) or prohibited (*ḥurmah*) in the *Sharī'ah;* or it is the effect (*athar*) of such an act, such as ownership which is the effect of the act of purchase.[8]

The Muslim jurists classify declaratory laws (*ḥukm waḍa'ī*) into three groups:—

(a) those which indicate the cause (*sabab*) of a mandatory law (*ḥukm taklīfī*), as for example, marriage is the cause of the right of inheritance;

8. 'Abdur Rahim, *op. cit.*, pp.109-110.

(b) those which indicate the condition (*sharṭ*) which governs the operation of a mandatory law, as for example, the requirement that property should be possessed for one year as the condition for the payment of *zakāt;* and

(c) those which prevent (*ma'ānī*) the application of a mandatory law, thus impurity of the person prevents the validity of prayer and indebtedness may prevent the obligation to pay *zakāt* from arising.[9]

The emphasis of a *Sharī'ah* value may be laid on the worldly consideration or religious consideration. By "worldly consideration" is meant in matters of worship (*'ibādāt*) the freeing of the person from performing the particular act ot worship, as for example, the performance of prayer and in temporal matters (*mu'āmalāt*) the securing of the various intentions and objects which pertain to the particular temporal matter, as for example, the acquisition of property pertaining to the act of purchase. From the point of view of the worldly consideration the value of an act is said to have (a) validity (*ṣiḥḥah*), if the act results in the realization of the worldly consideration, as for example, a sale is valid (*ṣaḥīḥ*) if it results legally in the transfer of ownership from the seller to the buyer; (b) nullity (*buṭlān*) if it does not result in the transfer of ownership from the seller to the buyer; and (c) imperfection (*fasād*), if the essential elements (*arkān*) and the conditions (*sharā'iṭ*) of the act are conducive to the realization of the worldly consideration but its outward qualities (*awṣāf khārijiyyah*) are not so conducive, as for example a marriage is *fāsid,* when a man already married to one sister marries another sister.[10]

A juristic act is said to exist if it possesses its essential elements (*arkān*) and conforms to the necessary conditions (*sharā'iṭ*) insisted on by the law. If it also possesses such qualities of an extrinsic character as the law takes notice of it is said to be legally correct (*ṣaḥīḥ*) otherwise it is regarded as faulty or vitiated in law (*fāsid*). But if a juristic act is wanting in any of its essential elements or conditions it is called (*bāṭil*) or null and void. The *Shāfi'ī* jurists do not recognise vitiated acts as forming

9. M. Hasbi ash-Shiddieqy, *Pengantar Hukum Islām,* p.214.
10. Aghnides, *op. cit.,* pp.110-111.

a separate class and hold that juristic acts are either valid or void.[11]

Three things generally speaking are the essential elements of a secular transaction (a) legal fitness or capacity of the person entering into it, for instance he must be a man of understanding; (b) fitness of the subject matter, that is, whether it can be dealt with by such a transaction; and (c) consent of the parties. A gift by an infant is void in law as he lacks legal fitness to make a disposition of property without consideration. A sale of a carcass is void as it is not a proper subject matter, so also is a marriage within the prohibited degrees of relationship. As regards consent, the general rule is, if a transaction is a contract, consent of both the parties is necessary; if it is an act extinguishing a right, consent of the owner of the right is necessary.

The necessary conditions of a transaction vary according to the nature of the transaction and may relate to either of the three elements. For instance, the condition that the testimony of a witness who is not a man of rectitude is not to be accepted, is one relating to the capacity of that person for that particular juristic act. An example of a condition relating to the subject matter is the rule that the sale of gold for gold is not allowed unless both the articles of exchange are equal in quantity. As regards consent, generally speaking the law requires as a condition that a person should act with free will and with the full knowledge of the effect of the act.[12]

Where the emphasis is laid on the religious consideration, we are primarily thinking of the act as resulting in religious merit (*thawāb*), although we may be thinking of the act, in a secondary way, also as securing freedom from an obligation (*tafrīq al-dhimmah*). From the point of view of the religious consideration, *Sharī'ah* values are either *'azīmah* (ideal) or *rukhṣah* (permissible or conceded). They are said to be *'azīmah* (ideal), when they are considered *a priori* and in their original rigor, without reference to any attenuating circumstances in life, which may soften their rigor or even entirely suspend them; they are the law as intended in the first instance by the Lawgiver. They are said

11. 'Abdur Rahim, *op. cit.*, pp.198-199.
12. *Ibid.*, pp.200-201.

to be *rukhṣah* (permissible or conceded) when they are considered with reference to the attenuating circumstances of life.[13]

The main objective of the *Sharī'ah* is to construct human life on the basis of *ma'rūfāt* (virtues) and to cleanse it of *munkarāt* (vices). The term *ma'rūfāt* denotes all virtues and good qualities that have always been accepted as good by the human conscience; conversely *munkarāt* denotes all the sins and evils that have always been condemned by human nature as evil. The *Sharī'ah* gives a clear explanation of these virtues and vices and states the norms to which the individual and social behaviour should conform.

Human acts, according to the *'azīmah* values which attach to them, are grouped under the following categories:—

(a) *Farḍ* (imperative), that is, the act whose value has been established by the *Holy Qur'ān* or a *mutawātir ḥadīth*.[14] The legal effect (*ḥukm*) of the *farḍ* is that it must be given absolute faith and obedience and that it must be executed, and failure to believe in it, entails unbelief, and failure to execute it, causes impiety (*fisq*). The execution of the *farḍ* results in the acquisition of religious merit (*thawāb*). Examples of the *farḍ* are faith (*īmān*), and the performance of the daily prayers. The *farḍ* is divided into two kinds (1) *farḍ al-'ayn* (personal *farḍ*), the act which everyone must personally perform, as for example, the performance of the daily prayers and (ii) *farḍ kifāyah* (social *farḍ*), the act which every person is under obligation to perform, until a sufficient number of persons have performed it, the rest being then absolved from the obligation of performance, as for example, the performance of prayers for a dead person. The reward in the case of *farḍ kifāyah* belongs to those who perform the act, but the rest are not punished for its omission; if however no one performs the act, then all are punished.

(b) *Wājib* (obligatory), that is the act whose value has been established by a *Sharī'ah* evidence, other than the *Qur'ān* or a *mutawātir ḥadīth*. An example of such an act is the giving of alms for breaking the fast. The legal effect of

13. Aghnides, *op. cit.*, pp.110-111.
14. See p.16 below.

the *wājib* is that it must be executed like the *farḍ* although it need not be given absolute faith like the latter. Imām Shāfi'ī[15] merged the *farḍ* and the *wājib* into one single category, calling it by either one of the two names and defining it as that whose commission is rewarded and omission punished.[16]

(c) *Sunnah* or *Nafl*, that is, acts which are not obligatory to the degree of being *farḍ* or *wājib* and whose commission is still rewarded and is preferable to their omission, although their omission does not entail punishment. Such acts are said to be *sunnah*, if they are the way habitually followed in the religion, that is, if they are acts that were performed by the Prophet habitually. According to the *Ḥanafīs*,[17] *sunnah*, unless there is an indication to the contrary, may mean habitual acts performed by the Prophet or the Companions but Imām Shāfi'ī held that it can only mean acts performed by the Prophet. The *sunnah* is of two kinds (i) *sunnah mu'akkadah*, such as the *adhān* in prayer whose omission is evil and improper (*makrūh*); and (ii) *sunnah az-zawā'id*, such as the personal ways of the Prophet in dressing, walking and sitting, whose omission is not improper. Acts are said to be *nafl*, if they are acts which the Prophet performed at one time and omitted at another time. An example of *nafl* is to perform more prostrations in the prayer or to give more than the legal rate of *zakāt*. The omission of the *nafl* is not improper (*makrūh*). The *nafl* is also called *mandūb* or *mustaḥabb*.

(d) *Mubāḥ* or *jā'iz* (indifferent), that is, acts whose commission is not rewarded but whose omission is not punished.

(e) *Makrūh* (improper), that is, acts whose omission is preferable to their commission. According to the *Ḥanafī* jurists *makrūh* is of two kinds (i) *makrūh karāhat at-tanzīh*, that which has been considered improper and to be avoided for the purpose of keeping pure — this kind is nearer to the *mubāḥ* than the *ḥarām*, that is, its commission is not punish-

15. A founder of one of the *Sunnī* Schools of law.
16. Aghnides, *op. cit.*, p.113.
17. There are four orthodox or *Sunnī* Schools of law, that is, the *Ḥanafī*, *Mālikī*, *Shāfi'ī* and *Ḥanbalī* Schools.

ed but its omission is rewarded, though by a lower reward than that of the omission of *ḥarām;* and (ii) *makrūh karāhat at-taḥrīm,* that is, improper to the degree of prohibition — this kind is nearer *ḥarām,* that is, its commission results in deprivation of *thawāb,* including the intercession of the Prophet.

(f) *Ḥarām* (prohibited), that is, acts whose commission is punished and omission rewarded.[18]

The rigor of the *'azīmah* prescription is subject to the softening influence of *rukhṣah.* For instance if a Muslim is compelled to deny his faith, he is permitted to do so, although the *'azīmah* would be for him to persist in his faith till death; the excuse in this case is the right of a person to live. In certain cases, it is even obligatory to make use of the benefit of *rukhṣah,* as for example, to eat a dead animal when on the point of starvation; while in other cases it is only commendable (*mandūb*), as for example, to reduce the length of prayer during a journey, or indifferent (*mubāḥ*) as for example, to break fast while journeying.

With regard to the performance of the various prescriptions of the *Sharī'ah,* the following distinctions have been made by the *Shāfi'ī* School:—

(a) *adā'* is the performance of the obligation at the time prescribed for it:

(b) *qaḍā'* is the performance of the obligation after the time prescribed for it; and

(c) *i'ādah* is the second performance of the obligation at its prescribed time, the first performance having been non-valid for some reason or other.[19]

The norm as regards the *Sharī'ah* injunctions is permission (*ibāḥa*). All human acts are permitted or indifferent unless and until some authority can be discovered in the *Sharī'ah* evidence which makes them *farḍ* or *sunnah* on the one hand or *makrūh* or *ḥarām* on the other. This conception has allowed pre-Islāmic law and social usage to be recognised as part of the legal system of Islām; has enabled the recognition of customary law in various countries; and has left open a large class of acts indifferent in the sight of God to be the subject of man-made laws.

18. Aghnides, *op. cit.,* pp.111-115.
19. *Ibid.,* pp.115-116.

The essential requirement of Muslim jurisprudence is, *īmān* or faith, one essential constituent of which is belief in God and acknowledgment of His authority over our actions. Belief in God is founded on reason for it is only when reason illuminates a man's faculty that he can perceive in sufficient clearness the proofs which are discernible in the universe of the existence of One Supreme Intelligence, Creator and Ruler of life and things. The ultimate basis and justification for law must therefore be sought in human reason (*'aql*).

The authority to enact laws primarily belongs to God, and He alone has supreme legislative power in the Muslim system. Ever since the days of Ādam, God has promulgated His laws on this earth from time to time through his messengers and prophets. All these messengers and prophets and all these revelations are recognised and accepted but before the birth of Muḥammad the laws previously revealed had been considerably corrupted. It was because of this that Muḥammad was charged with the mission of reviving the eternal principle of all laws, namely submission to the Divine Will, by preaching Islām. Hence belief in the truth of Muḥammad's mission is another constituent element of *īmān* (faith).

When Muhammad died the teachings of Islām had been perfected as is stated in the *Qur'ān*: "This day have I perfected your religion". [Islām][20] In his last sermon the Prophet said "O people, bear in mind what I am saying, for I might not see you again. I have left you two things. If you hold fast to them, never will you go astray after me. They are: God's Book [the *Qur'ān*] and His Prophet's *Sunnah*".[21]

The *Qur'ān* is the name of the book containing the direct revelations from God. Every word of the *Qur'ān* is regarded as being the direct utterance of the Almighty. The *Qur'ān* is divided into *Sūrahs* or chapters of uneven length. The authority of the *Qur'ān* is supreme and it is the first source of law not only in point of time but also in point of importance. The injunctions in the *Qur'ān* which deal with law are few in number. Such prescriptions are comparatively few and limited. Regarding

20. *The Holy Qur'ān*, V:4, Note: whenever *The Holy Qur'ān* is cited the text in Arabic is given in Appendix A.
21. Ibn 'Abd al-Barr, *Jāmi' Bayān al-'Ilm wa Faḍlih*, V, p. 1; Ramadan, *Islamic Law*, p.24.

family law, these are laid down in 70 injunctions; civil law in another 70; penal law in 30; jurisdiction and procedure in 13; constitutional law in 10; international relations in 25; and economic and financial order in 10.[22] Such an enumeration however can only be approximate. The legal bearing of some injunctions is disputable, whereas of others it simultaneously applies to more than one sphere of law. The major portion of the *Qur'ān* is a code of Divine exhortation and moral principles.

The present form of the *Qur'ān* is one and the same in every part of the Muslim world, and it has been so all through the centuries. This, Muslims believe, is due to the fact that the compilation and arrangement of the chapters was completed — under Divine instructions — by the Prophet himself. During his lifetime every revealed portion would be recorded in writing by many Companions; some of them even memorized the whole of the *Qur'ān*. Abū Bakr the first *Khalīfa* ordered all the original manuscripts made in the Prophet's lifetime to be collected and copied. Zayd bin Thābit, who was entrusted with this job, had been the personal assistant of the Prophet in Madīnah, in charge of writing down every revelation. He applied a twofold method of verification, comparing the original manuscripts with the texts memorized by the Prophet's Companions. In the Khalīfate of 'Uthmān, the third *Khalīfa*, 'Uthmān ordered copies to be made of the *Qur'ān* from the original copy in the possession of Ḥafṣah, the widow of the Prophet, and when the required number of copies were made they were sent to the various parts of the Muslim world.[23]

The study of the *Qur'ān* has occupied some of the best talents among the Muslims and the science of its interpretation (*tafsīr*) is regarded as of the highest importance. Of the numerous commentaries that have been written, those by Abū Ja'far Muḥammad bin Jarīr aṭ-Ṭabarī (*d.* 310 A.H.), Abū'l-Qāsim Maḥmūd bin 'Umar az-Zamakhsharī (*d.* 538 A.H.), Nāṣir ud-Dīn Abū Sa'īd 'Abd Allāh bin 'Umar al-Bayḍāwī (*d.* 683 A.H.), Fakhr ud-Dīn Abū 'Abd Allāh Muḥammad bin 'Umar b. al-Ḥusayn ar-Rāzī (*d.* 606 A.H.) and the two Jalāl ud-Dīns — Jalāl ud-Dīn Muḥammad bin Aḥmad al-Maḥallī (*d.* 864 A.H.) and Jalāl ud-Dīn 'Abd ur-

22. 'Abd al-Wahhāb, *'Ilm Uṣūl al-Fiqh*, pp.34-35.
23. Ramadan, *op. cit.*, p.32.

Raḥmān bin Abū Bakr as-Suyūṭī (*d.* 811 A.H.) are the best known.

The second source of Muslim law is the *Sunnah*. This in essence means the practice followed or enjoined by the Prophet. It includes what the Prophet said, did or agreed to. In practice anything of utility that did not contradict a principle of Islām was accepted and sanctioned by the Prophet and it thus became a part of his *Sunnah*. In the lifetime of the Prophet it was evidenced by the living example of the Prophet and after his death it was evidenced by the knowledge of the Companions of the actions of the Prophet and the example of the Companions themselves who strove to model their lives on the life of the Prophet. The formidable influence and authority of the Prophet not only on individual Muslims but also on the actual shaping of their entire society were strong enough to enable later generations of Muslims to verify what the Prophet had said or done. Actual adherence, devotion and memory, had been strong guarantees for the authority and authenticity of the *Sunnah*. Thus there grew up a living tradition of the ideal practice of the community which was followed as being based on the example of the Prophet and his Companions. With the lapse of time, the spread of Islām to foreign lands and the laxity of Muslim life and practice, it became unsafe to resort to the established practice and it was necessary to go back to the foundations of the *Sunnah* in the very actions and sayings of the Prophet.

The *Sunnah* provides a concrete implementation of the Divine guidance. The tangible form of the *Sunnah* cannot therefore be neglected when we try to understand the spirit of Islām. According to Shāh Walī Allāh every act prescribed by the *Sunnah* (with the *Qur'ān* as its ultimate basis) is a definite, invariable form permeated with a spirit or general abstract idea or high moral consideration. The understanding and appreciation of the latter far from promoting any contempt for the former should only compel veneration and strict adherence to it. The form is the ideal representation and the perfect actualisation of the spirit — the one denotes, stands for and symbolises the other, like the word and the idea, the script and the spoken word and the picture and the object.[24]

The recording of traditions or reports of the actions and

24. Yusuf, "The Sunnah: Its Place in Islām".

sayings of the Prophet was not encouraged in the early days of Islām for fear that the supreme authority of the *Qur'ān* might be impugned but in later times it became necessary to collect and sift these traditions. Imām Shāfi'ī was the first jurist to insist on the necessity of basing the *Sunnah* primarily on traditions from the Prophet and this came to be the accepted view. The *Sunnah* then becomes the *Sunnah* of the Prophet as directly evidenced by his actions and sayings. In the collections of the traditions, each tradition (or *ḥadīth*) is vouched by an *isnād* or chain of reporters through whom it is related back to the Prophet or an eye-witness or hearer of the Prophet's actions or utterances. The traditions of the Prophet came to be regarded as indirect revelation and together with the *Qur'ān* form the foundation of Muslim Law. The authority of the traditions of the Prophet is based on many Qur'ānic verses[25], among which are the following:—

> He who obeys the Messenger of God,
> obeys God.
>
> Nor does he say anything of his desire.
> It is no less than revelation sent
> down to him.
>
> So take what the Messenger assigns to you
> and deny yourselves that which he withholds
> from you.

Ḥadīth from the Prophet must have existed from the very beginning of Islām. Indeed during the lifetime of the Prophet it was perfectly natural for Muslims to talk about and remember what the Prophet did or said, especially in a public capacity. But the *ḥadīth* in the Prophet's time was largely an informal affair used to guide the actual practice of the Muslims and given directly by the Prophet himself. Besides the *ḥadīth* which were memorised by the Companions there were a number of recorded compilations of the *Sunnah* by the early Muslims some of which were written down in the presence of the Prophet. After the death of the Prophet the *ḥadīth* seems to have attained a semi-

25. *The Holy Qur'ān*, IV:80; LIII:3-4; LIX:7. The Holy Qur'ān speaks of the *Kitāb* (the Qur'ān) in conjunction with *ḥikmah*. *Ḥikmah* signifies propriety of judgment as manifested and embodied in propriety of conduct. The *ḥikmah* is equated with the *Sunnah* — the pattern of behaviour exemplified by the Prophet — see Qur'ān, II:129; II:151; III:164; LXII:2; II:231; IV:113 and *Shāfi'ī's Risālah*, trans. by Khaddūrī, pp.109-122.

formal status for it was natural for the new generation to enquire about the Prophet. But whatever *ḥadīth* there were existed for practical purposes, that is as something which could generate and be elaborated into the practice of the community. For this reason it was interpreted by the rulers and judges freely according to the situation at hand and the result of this interpretation produced in course of time the living *Sunnah*. But when by the third and fourth quarters of the first century of the *Hijrah*, the living *Sunnah* had expanded in different regions of the Muslim empire though this process of interpretation in the interests of actual practice, and differences in law and legal practice widened, the *ḥadīth* began to develop into a formal discipline. The continuous development of doctrine in the ancient schools based on the practice of the Community was outpaced by the seeking for traditions, particularly those from the Prophet in the period before the ancient schools of law were already on the defensive against the traditionists when Ash-Shāfi'ī appeared. This contrast between doctrine and tradition gave Ash-Shāfi'ī his opportunity; he identifies the *Sunnah* of the Prophet with the contents of traditions from the Prophet to which he gave overriding authority, thereby cutting himself from the continuous development of doctrine before him.

Although the Prophet in order to avoid a possible confusion of his sayings with the Qur'ānic texts did not encourage his Companions to record what he said, there were some Muslims who recorded them and some of these records were written down in the presence of the Prophet himself[26]. Some examples are the records of 'Abd Allāh ibn Amr ibn al-Āṣ and of Anas ibn Mālik. The authenticity of the *Sunnah* has been further ensured by the great works of Muslim Scholars in the field of its compilation and authentication. Each *ḥadīth* or tradition was prefaced by a chain of authorities (*sanad*) going back to the original narrator and the process was called *isnād* or backing. In the course of time, a separate science of *ḥadīth* was built up, whereby not only the chains of authorities could be traced back to the Prophet himself, but also the biographical data about the narrators had been inves-

26. Some examples are the records of 'Abd Allāh ibn Amr ibn al-'Āṣ, Anas ibn Mālik and Ḥammām ibn Munabbih. See Ḥamīdullah, "Early Compilation of the Ḥadīth".

tigated and classified. The outcome of all this research is the classification of every recorded item of the *Sunnah* according to its status of authenticity[27].

There are a number of *ḥadīth* which can be shown to be historical. The rules as to prayer, *zakāt*, fasting and pilgrimage for example, are undoubtedly historical. The biography of the Prophet as related in the *ḥadīth* is in its main points historically clear and would serve as the chief anchoring point for the interpretation of the *ḥadīth* in general. The overall character of the Prophet and of the early Muslim Community is in its essential features, not open to question, even though there may be questions about the historical details. It is against the background of what is historically known of the Prophet and the early Muslim Community (besides the *Qur'ān*) that we can interpret the *ḥadīth*.

A large part of the *ḥadīth* is however probably not historical in its actual formulation. It is well known and admitted by the classical traditionists themselves that moral maxims and edifying statements and aphorisms may be attributed to the Prophet irrespective of whether this attribution is strictly historical or not. The majority of the contents of the *ḥadīth*-corpus would appear to be in fact the *Sunnah-Ijtihād* of the first generations of the Muslims, an *ijtihād* which had its source in individual opinion but which in course of time and after struggles and conflicts against heresies and extreme sectarian opinion received the sanction of *ijmā'*, that is the adherence of the majority of the community. The earlier living *Sunnah* came to be reflected in the mirror of the *ḥadīth* with the necessary addition of chains of narrators. But while many of the *ḥadīth* verbally speaking do not back to the Prophet, their spirit certainly does and the *ḥadīth* may be regarded as the situational interpretation and formulation

27. In their criticism of narrators and in their search for chains of authority, accuracy and trustworthiness, the Muslim scholars established a scientific and truthful criterion which made study in this field reliable and trustworthy. This tradition of scholarship has been followed by the leaders of the *Salafiyyah* School in Egypt, who have attempted further research and scrutiny, to such an extent that they have questioned the authenticity of some traditions included in the two *Ṣaḥīḥs* of al-Bukhārī and Muslim — see Maḥmaṣānī, *op. cit.*, p. 76.

of the Prophetic model.[28]

Not all the traditions are of equal value and there are even some traditions which have been fabricated. Traditions are grouped into four classes according to the nature of their proof and the completeness of the chain of transmission:—

(a) *Mutawātir* (continuous). This is the report of a people numerically indefinite, whose agreement upon a lie is inconceivable, in view of their large number, reliability, and diversity of residence. Traditions of this class ensure absolute certainty of authenticity and demand implicit belief.

(b) *Mashhūr* (widespread). This is a report originally supported by a few individuals but later spread and transmitted by a people numerically indefinite of the generation succeeding the Companions, whose agreement upon a lie is inconceivable. A *mashhūr* tradition engenders conviction but not positive knowledge (*yaqīn*); its non-acceptance entails error but not heresy.

(c) *Āḥād* (isolated). This is a report transmitted by one or two, or even more, provided that their number is less than that required for *mutawātir* or *mashhūr*. These traditions neither ensure certainty of belief like the *mutawātir* nor carry conviction like the *mashhūr*, but it would be justified to base a rule of law on them.

(d) *Mursal* (or disconnected). In this case the continuity of transmission back to the Prophet is not complete: some one reports: "the Prophet said so and so" without supporting his statement by offering a complete *isnād*, by saying "so and so related to us on the authority of so and so, on the authority of the Prophet". *A mursal* report of the Companions of the Prophet is accepted since it is presumed to be based on what they heard directly from the Prophet. However, *mursal* reports of the second and third generarations are not accepted, unless their certainty is established in some other way.

Tradition may be rejected when the report contradicts an evidence stronger than itself or when there is a defect in the

28. Schacht, *Origins of Muhammadan Jurisprudence*, and articles by Fazlur Rahman in *Islamic Studies*, Vol. I (1962).

transmitter. Contradiction may occur in the following ways:—

(a) when the report contradicts the *Qur'ān*;[29]

(b) when it contradicts the established *sunnah*, that is the *sunnah* or practice based on the *mutawātir* or the *mashhūr* traditions;

(c) when it has been denounced by the Companions.

A transmitter is regarded as defective —

(a) when he is unknown (*mastūr*), that is when it is not known whether he is just or impious, although the first three generations are an exception to this rule;

(b) when he is impious (*fāsiq*);

(c) when he has not attained the age of majority or is not endowed with complete understanding; as in the case of minors, the careless, heretics and the weakminded.

Traditions are classified in three categories according to the character of the transmitter:—

(a) *Ṣaḥīḥ*, that is, those transmitted by truly pious persons of character and integrity. These are admitted to be correct beyond doubt.

(b) *Ḥasan*, that is, those transmitted by narrators who do not attain the moral excellence of the narrators of *ṣaḥīḥ* tradition, but against whose integrity of character nothing is known.

(c) *Ḍa'īf*, that is, those transmitted by persons of questionable authority.

The legal effect of a *mutawātir* tradition is that it entails certainty of belief (*yaqīn*) and a person who refuses to accept the teaching of such a tradition is guilty of unbelief (*kufr*). An *āḥād* tradition only entails probability of belief and cannot in any case displace a rule or doctrine based on a *mutawātir* tradition still less a rule or doctrine based on the Holy *Qur'ān*.

An *āḥād* tradition which can be accepted as the basis of a

29. Ash-Shāfi'ī does not accept the principle that a tradition can be rejected merely because it does not agree with the *Qur'ān*. This follows from his view that the *Qur'ān* can be repealed only by the *Qur'ān* and the *ḥadith* only by another *ḥadīth*: Whenever God changes his decision on a matter on which there is a *ḥadīth*, the Prophet invariably introduces another *ḥadīth* repealing the former. See Schacht, *op. cit.*, p.15.

legal doctrine is called *maqbūl*, when the evidence shows that it is likely that the tradition is a genuine one and that it records the actual saying of the Prophet.[30] Traditions which are *maqbūl* are divided into two main groups according to the standing of the transmitter, that is they are either *ṣaḥīḥ* or *ḥasan*.

Not all traditions which are *ṣaḥīḥ* or *ḥasan* can form the basis of the law. A tradition is only accepted as the basis of the law:

(a) if it is not contradicted by some other legal evidence, that is by the Holy *Qur'ān* or other tradition;
(b) if although it appears to be contradicted by another tradition, it can be reconciled with that tradition;
(c) if it contradicts another tradition but is subsequent in time to it, so that it can be said to have abrogated the previous tradition;
(d) if it contradicts another tradition but can be shown to be superior to it.

Six great collections of traditions are regarded as authoritative by the *Sunnī* Schools of Muslim law[31]:—

(a) *Jāmi' aṣ-Ṣaḥīḥ al-Bukhārī* by Muḥammad bin Ismā'īl al-Bukhārī (*d.* 256 A.H. — 870 A.D.).
(b) *Ṣaḥīḥ al-Muslim* by Muslim ibn al-Ḥajjāj (*d.* 261 A.H. — 875 A.D.).
(c) *Jāmi' at-Tirmidhī* by Abū 'Īsā Muḥammad at-Tirmidhī (*d.* 279 A.H. — 892 A.D.).
(d) *Sunan Abū Dā'ūd* by Abū Dā'ūd as-Sijistānī (*d.* 275 A.H. — 888 A.D.).
(e) *Sunan Nasā'ī* by 'Abd ar-Raḥmān an-Nasā'ī (*d.* 303 A.H. — 915 A.D.).
(f) *Sunan Ibn Mājah* by Abū 'Abd Allāh Muḥammad ibn Mājah (*d.* 273 A.H. — 886 A.D.).

In addition to the above collections of traditions, there are the *al-Muwaṭṭa'* of Imām Mālik bin Anas, which is properly speaking a work of law, in which *ḥadīths* are quoted in support

30. See *Shāfi'ī's Risālah, op. cit.*, p.109f and Maḥmaṣānī, *op. cit.*, p.74.
31. In the *Shī'a* School the most prominent compilations of traditions were *Al-Kāfi* by Muḥammad ibn Ya'qūb al-Kulainī (*d.* 328 A.H.); *Man la Yaḥduruhu 'l-Faqīh* by Ibn Bābūyah (*d.* 381 A.H.); *Al-Istibṣār fī ma Ikhtilāf min al-Akhbār* and *Tahdhīb al-Aḥkām* by Ja'far Muḥammad aṭ-Ṭūsī (*d.* 411 A.H.).

of the author's views and the *Musnad* of Imām Aḥmad bin Ḥanbal, which is a collection of the *musnad* type, that is a collection where *ḥadīths* transmitted by the same Companion are classed together without respect to their content. There are also other collections of *ḥadīths* which, though they are not included among the six canonical collections, nevertheless enjoy great esteem. Among these are the *Sunans* of 'Abd Allāh bin Abū ar-Raḥmān Dārimī (*d.* 255 A.H.), 'Alī bin 'Umar ud-Dāraquṭnī (*d.* 385 A.H.) and Aḥmad bin al-Ḥusayn Abū Bakr al-Bayhaqī (*d.* 548 A.H.), the *Ṣaḥīḥ* of Imām Abū Bakr Muḥammad bin Isḥāq ibn Khuzaymah (*d.* 311 A.H.) and the *Muntaqā* of Imām Abū Muḥammad 'Abd Allāh bin 'Alī ibn al-Jārūt (*d.* 307 A.H.).

As in the case of the Holy *Qur'ān,* voluminous commentaries have been written on the *Sunnah.* Among the best known are the commentaries of Ibn Ḥajar al-'Asqalānī (*d.* A.H. 852), of al-Qasṭallānī (*d.* A.H. 932), and of Badr ud-Dīn Abū Muḥammad Maḥmūd bin Aḥmad al-'Aynī al-Ḥanafī (*d.* A.H. 855) on the *Ṣaḥīḥ al-Bukhārī* and of an-Nawawī (*d.* A.H. 676) on the *Jāmi' aṣ-Ṣaḥīḥ* of Muslim.

The *Sunnah* of the Prophet was regarded by the early Muslims not as an exactly laid down series of rules for the minutiae of life but rather as an ideal which they sought to approximate to by interpreting the example of the Prophet in terms of the new materials at their disposal and the new needs to be met. The instrument whereby the Prophetic model was progressively developed into a definite and specific code of human behaviour by the early generations of Muslims was responsible free thought activity. This rational thinking called *ra'y* or personal opinion produced an immense wealth of legal, religious and moral ideas during the first century and a half of the *Hijrah.* But with all its wealth, the product of this activity became rather chaotic and the *Sunnah* of different regions — the Ḥijāz, 'Irāq, Syria and Egypt — became divergent on almost every issue of detail. It was in the face of this interminable conflict of free opinion that Ibn al-Muqaffa' (*d.* 140 A.H.) declared that there was no agreed *Sunnah* of the Prophet and he advised the *Khalīfa* to exercise his own *ijtihād.* But the intellectual and religious leaders of the community thought otherwise. The individual free thought, *ra'y,* had gradually given way to a more systematic

reasoning on the already existing *Sunnah* and on the *Qur'ān*. This systematic reasoning was called *qiyās*. The existing *Sunnah* too was slowly being evolved to a point where it resulted in acceptance by the *ijmā'* or consensus of the community. The *Sunnah* therefore has its starting point in the ideal *Sunnah* of the Prophet which had been progressively interpreted by *ra'y* and *qiyās;* and by *ijmā'* this *Sunnah* came to be commonly accepted as such by the consent of the community.

The actual content of the *Sunnah* of the early generations of the Muslims was largely the product of *ijtihād,* that is *ra'y* and *qiyās,* when this *ijtihād,* through an incessant interaction of opinion, developed the character of general acceptance or consensus of the community, that is, *ijmā'*. The *ijmā'* of the early Muslims did not rule out difference of opinion. Not only was this *ijmā'* regional so that the *Sunnah-Ijmā'* of Madīnah differed from that of 'Irāq but even within each region difference existed, although a general opinion of the region was crystallising. This itself, reveals the nature of the process whereby *ijmā'* was being arrived at, that is, through differences in local usage and through different interpretations, a general public opinion was developing, although at the same time the process of fresh thinking and interpretation was going on. But in the meantime a powerful movement had gained momentum to achieve standardization and uniformity throughout the Muslim world. This movement for uniformity, impatient with the slow moving but democratic *ijmā'* process recommended the substitution of *ḥadīth* for the twin principles of *ijtihād* and *ijmā'* and relegated these to the lowest position and severed the organic relationship between the two. This movement which began in the first century of the *Hijrah* became fairly advanced by the middle of the second century.[32]

The classical view of *ijmā'* became a formal and total one. Ash-Shāfi'ī for example demanded an agreement which left no room for disagreement. The early schools of law regarded *ijmā'* not as an imposed or manufactured static fact but as an on-going democratic process; it was not a formal state but an informal growth which at each step tolerates and indeed demands fresh and new thought and therefore must live not only with

32. Fazlur Rahman, "Sunnah, Ijtihād and Ijmā' in the Early Period", and, "Sunnah and Ḥadīth"

but also upon a certain amount of disagreement. The early lawyers contended that *ijtihād* should continuously be exercised so that the area of agreement will widen. But it was precisely this living and organic relationship between *ijtihād* and *ijmā'* that was severed in the successful formulation of Ash-Shāfi'ī and the classical school. The place of the living *Sunnah-Ijtihād-Ijmā'* they gave to the Prophetic *Sunnah* which instead of being a general directive became something absolutely literal and specific and whose only acceptable source was the *ḥadīth*. The next place they assigned to the accepted practice of the Companions, especially that of the first four *Khalīfas*. In the third place they put *ijmā'* and lastly they accepted *ijtihād* or *qiyās*. *Ijmā'* instead of being a process and something forward-looking — came to be something static and backward-looking.[33]

A study of juristic works on *al-ijmā'* reveals a basic disagreement not only as regards its validity, but even as regards its very existence. Abū Ḥanīfah, for instance, was never reported to have introduced by himself a definite conception of *ijmā'* with a definite legal bearing. Mālik considered the unanimity of the people of Madīnah as a probable reflection of some early Prophetic practice. Ash-Shāfi'ī, in his *Ar-Risālah*, almost denies the existence of *al-ijmā'*, except on fundamentals of religion which have been handed down from generation to generation and the validity of which rests on some authentic text. Ibn Ḥanbal is known to have said that any claim of unanimity is a mere lie and that the most one could claim is that he does not know of any disagreement on the particular issue. The *Shī'as*[34] totally deny the conception of *ijmā'*. Ibn Ḥazm[35] considers only the consensus of opinion among the Companions of the Prophet as being a sign of an early Prophetic sanction or approval.[36]

Prof. Abū Zahrah says: "The very validity of *al-ijmā'* is not a matter of consensus among Muslims. There are prominent jurists who have explicitly denied its very existence. There are others who have admitted its validity, but when an issue came with a claim of a previous *ijmā'*, they denied its very existence."

33. Fazlur Rahman, "Sunnah, Ijtihād and Ijmā' in the Early Period".
34. See note 42.
35. See p.143.
36. Ramadan, *op. cit.*, p.32.

He then concludes: "It was but for the maintenance of national unity and as a check against individual deviations, that *al-ijmā'* was legalized as an authority after the sacred texts".[37]

While the development of the concept of *al-ijmā'* was a concrete expression of a commonly-felt need for a collective authority, as against individual interpretations and opinions, the juristic rules relating to *al-qiyās* came to be considered next to *al-ijmā'* as a means of bringing about a unification of thought. The result was the division of Muslims into various legal schools. That the desire for social unity was an overriding factor in the establishment of these schools is clear from the fact that their works are mostly similar.[38]

The four *Sunnī* Schools of Law have come to hold *ijmā'* to be a valid source of law. The laws laid down by *ijmā'* are presumed to be what God intended and are thus by the definition of law considered as a revelation from God. Though in strict theory the jurists so acting in a body only expound the law, the law which they so lay down has the attributes of legislative enactments. Their validity cannot be disputed and is not affected by the reasons given in support. According to the orthodox opinion Muslim *mujtahids* or jurists alone have a voice in *ijmā'*; and it is laid down that to be a *mujtahid* a person must be conversant with the science of law in both its branches; namely the principles of jurisprudence (*uṣūl*) and the rules of law in different departments (*furū'*) or branches.[39]

The usual arguments for the validity of *al-ijmā'* can be summarized as follows:

(1) The Qur'ānic injunction: "And whoever acts hostilely to the Messenger after guidance has become manifest and follows other than the way of the believers, we turn him to that to which he himself turns and make him enter hell; and it is an evil resort." IV: 115

(2) The Prophetic Tradition: "My nation shall never be unanimously in error."

According to the majority of jurists, *ijmā'* cannot be reached except upon evidence, that is, its constituent opinions must be

37. Abū Zahrah, *Abū Ḥanīfah*, quoted in Ramadan, *op. cit.*, p.85.
38. Ramadan, *op. cit.*, pp.83-85.
39. 'Abdur Rahim, *op. cit.*, p.116-119.

based on a *Sharī'ah* evidence. *Ijmā'* is of several grades in point of authority. Absolute *ijmā'* ensures certainty of belief (*yaqīn*), so that anyone not believing in the validity of a rule based on such *ijmā'* becomes chargeable with unbelief. An *ijmā'* is said to belong to this category if it be one in strict conformity with the requirements of the law and proved by infallible testimony. There are other *ijmā'* which impart binding authority to the rulings founded on them but do not ensure certainty of belief; these are *ijmā'* which are either not constituted in strict accordance with the law or not proved by universal testimony. Again the *ijmā'* of the Companions of the Prophet have in some respects a higher authority than the *ijmā'* of other jurists. According to the accepted doctrine of the four *Sunnī* Schools, there must be uniformity of opinion among all the jurists of the age in which the decision in question is arrived at, in order that such decision may have the force of *ijmā'* in the absolute form. But if the majority of jurists who agree on a certain conclusion do not admit that those who dissent from them possess the qualifications of jurists, such dissent will not preclude the formation of absolute *ijmā'*. It is also held by the *Ḥanafīs, Shāfi'īs* and *Mālikīs* that, if the number of dissentients is not large, the view of the majority will be valid and binding authority, though not absolute in the sense that a person disputing it would become an infidel.[40]

Ijmā' may be constituted by a decision expressed in words (*qawlī*) or by the practice of jurists (*fi'lī*). It is said to be constituted by words if the *mujtahids,* either at one meeting or on information reaching them, within a reasonable time of a question being under consideration, severally declare their opinion in so many words or if some one or more of the prominent *mujtahids* state their view and others, on hearing this at the meeting or on receiving information thereof, observe silence, expressing no dissent; in the first case *ijmā'* will be regarded as regular and in the second case as irregular. An *ijmā'* is constituted by practice, if all the *mujtahids* in their practice adopt a particular view of the law, or if some of them in practice adopt a particular view, and the others do not indicate dissent by acting to the contrary; in the former case the *ijmā'* would be regular and in the latter case it would be irregular. *Ijmā'* by words and *ijmā'* by practice are

40. *Ibid.,* pp.117 and 124.

equally authoritative. The *Ḥanafīs,* the *Mālikīs* generally and some *Shāfi'ī* jurists consider both regular and irregular *ijmā'* as valid in law and binding though they assign a higher value to the former. Some *Shāfi'ī* or *Mālikī* jurists do not recognise the validity of irregular *ijmā'* at all.[41]

Ijmā' of one age may be reversed by a subsequent *ijmā'* of the same age, in which case the first resolution ceases to have operation. Similarly, *ijmā'* of one age may be repealed by the *ijmā'* of a subsequent age with one exception, namely an *ijmā'* arrived at by the Companions of the Prophet is incapable of being repealed afterwards. In the opinion of the *Shāfi'īs* too, *ijmā'* has no force in determining the law on a matter in which the Companions of the Prophet have expressed their views.[42]

The law laid down by *ijmā'* is authoritative and binding. In its theological aspect, however, according to the *Ḥanafīs,* it is only when such collective determination conforms in its constitution and proof strictly to the requirements of the law that it can be said to be absolute in the sense that it would ensure certainty of belief (*yaqīn*), so that anyone disputing its authority would be guilty of infidelity. According to the accepted *Shāfi'ī* and *Mālikī* doctrines, a man disputing the authority of *ijmā'* does not become guilty of infidelity except when the decision is in respect of matters which are established by clear authority and universally accepted as such, as for example the obligation to observe the daily prayers, to fast during *Ramaḍān,* to pay *zakāt* and to perform the pilgrimage, the unlawfulness of *zinā',* of drinking intoxicating liquor and of dealing in usury, and the lawfulness of marriage, sale and lease.[43]

The Muslim jurists distinguish between the consensus of all Muslims, both scholars and the people, on essentials and the consensus of all scholars on points of detail; they consider the con-

41. *Ibid.,* p. 130f. Most of the Companions of Abū Ḥanīfah have regarded silence as conclusive evidence of consensus. Ash-Shāfi'ī however rejected this view. Al-Amidī chose a compromise saying that consensus by silence constituted a presumption which is not absolute — see Maḥmaṣānī, *op. cit.,* p.78.

42. *Ibid.,* p.127f. The *Shī'a* School does not accept consensus except where it emanated from the family of the Prophet or when the jurists were endorsed in their consensus by the infallible *Shī'a Imāms.* Consensus to them is the consensus which embodies the views of the infallible *Imāms* and not merely the agreement of the *'ulamā'* on an opinion.

43. *Ibid.,* p.135.

sensus in both forms as equally authoritative as representing the accepted doctrine in each generation, as opposed to individual opinions, which make for disagreement.[44]

The authority of laws deduced by the jurists was based ultimately on the retrospective approval by the community or a group within the community of their teachings. Any *ijtihād* based on wishful interpretation even if raised to the status of law by dint of political power can subsequently be rejected by the collective conscience of the Muslim Community and it will then cease to form an integral part of the Muslim system of law. As soon as the political power disappears from the political arena, such a law would cease to be followed.[45]

Although in theory *ijmā'* or consensus, plays a subordinate role to the *Qur'ān* and the *Sunnah* as sources of law, it has in practice come to be the ultimate mainstay of legal theory and of positive law in their final form. The *ijmā'* guarantees the authenticity and correct interpretation of the *Qur'ān,* the faithful transmission of the *Sunnah* of the Prophet, the legitimate use of *qiyās* and its results; in short it covers every detail of law, including the recognised differences of the several schools. Whatever is sanctioned by *ijmā'* is right and cannot be invalidated by reference to other principles.

The bulk of Muslim law has been built by the individual deductions of jurists as distinguished from their collective resolutions. But a jurist deducing a law by using the process of analogy (*qiyās*) properly speaking only expounds the law and does not establish it. It is therefore merely an application or extension of the law established by a binding authority to a particular case and not a new rule of law. *Qiyās* is defined as "the accord of a known thing with a known thing by reason of the

44. Schacht, *op. cit.,* pp.42f and 88f; Aghnides, *op. cit.,* p.64; al-Ghazzālī, *al-Mustaṣfah fī Uṣūl al-Fiqh.* Ash-Shāfi'ī's position on consensus shows a continuous development. In his earlier writings he held the view that it was the consensus of the scholars but in his later works, it is increasingly the consensus of the community as a whole which is regarded as authoritative.

45. Thus for any change in Muslim law or its administration to be successful it must be acceptable to learned orthodox authority. The *'ulamā'* in all ages possess that collective instinct which indicates to them how far to go, what compromises to accept and where to stand firm in upholding the system – see Tibawi, "English Speaking Orientalists", pp.185f and 298.

equality of the one with the other in respect of the effective cause (*'illah*) of its law".[46]

The structure of Muslim law was completed during the lifetime of the Prophet in the *Qur'ān* and the *Sunnah*. The *Qur'ān* and the *Sunnah* are the two sources from which spring the invariable texts of Muslim law. All other juristic sources are dependent upon these two, both in reference and authority. In his *Ar-Risālah*, which is generally considered to be the earliest sound work on the science of Muslim jurisprudence, Ash-Shāfi'ī answers the question, "What is *al-qiyās?* Is it *al-ijtihād* or is it different?", by saying, "They are two expressions of one meaning." Asked, "What is it?", he answers, "For every issue concerning a Muslim, either there is a binding text (of the *Sharī'ah*) that rules it, or there is a guidance that may indicate the way to truth. If there is a text, then the Muslim has to follow it. In case there is no text directly applicable, then he has to seek a guidance to truth by *al-ijtihād*. *Al-ijtihād* is *al-qiyās*." Then follows a series of questions: "And when people exercise *al-qiyās*, can they be sure that what they have opined is the truth in the eyes of God? And can they differ in the *qiyās?* And do they have one way of reasoning or different ways?... And is there a differentiation between the authoritativeness of one's *qiyās* upon himself and upon others?..." In sound answer to all that, he states: "Knowledge applies to two categories of truth: one which is a factual truth in appearance and in fact, and one which is a seeming probability of truthfulness. The first category applies only to the texts of the *Qur'ān* and the *Sunnah* successively authenticated generation after generation. These texts alone may allow or forbid, and this, in our opinion, is the basic fact that no Muslim may either ignore or doubt... Knowledge attached through the medium of *al-ijtihād* by *al-qiyās*, belongs to the second category; thus what it attains is binding only on the one who exercised *al-qiyās* and not on other men of knowledge." Thereupon Ash-Shāfi'ī proceeds to illustrate the differentiation between the two categories by means of an example. He asks: "When we find ourselves in the Sacred Mosque at Mecca and see the *Ka'aba*[47] before us, are we

46. Tāj ud-Dīn Subkī, *Jāmi' al-Jawāmi'*, IV, p.1.
47. The *Ka'ba* (*Ka'aba*) is the sacred shrine in the center of the sacred *Masjid* at Makka in which direction the Muslims face in prayer.

obliged to face it with exactitude?" When his interlocutor answers, "Yes", Ash-Shāfi'ī proceeds: "Are we obliged, wherever we may be, to turn in our prayers towards the *Ka'aba?*" The answer is naturally, "Yes". Thereupon Ash-Shāfi'ī asks, "Are we in such a case absolutely certain that we are facing the *Ka'aba* with exactitude?" The answer is: "If you mean that you are facing it with the same exactitude as when you had it before your eyes, then the answer is no. But even so, you have done your duty." Then Ash-Shāfi'ī states: "It follows, therefore, that our obligation with regard to something that is not visible to our eyes is different from our obligation with regard to something that is directly seen. Similar is the case with regard to that on which there is no binding injunction in the text of *Qur'ān* or *Sunnah;* for in this case we are striving only by means of *al-ijtihād* and we are obliged only to the extent of what we consider to be the truth."[48]

Speaking about *al-ijtihād* in a later chapter, Ash-Shāfi'ī answers a question about its validity by recalling the Prophetic Tradition: "Whenever a ruler does his best and rules correctly, he will be doubly rewarded (by God). If he does his best but the result is incorrect, he will also be rewarded." Thereupon he presents the three main conclusions on the whole issue: (1) that *al-ijtihād,* by virtue of its nature and function, cannot guarantee correct results; (2) that rules arrived at by means of *al-ijtihād* are apt to differ; and (3) that these rules should by no means be binding on anyone other than those who consider them to be the truth. He again recalls the example of the *Ka'aba,* quoting the Qur'ānic verse: "From whatsoever place thou comest forth, turn thy face toward the Sacred Mosque, and wheresoever ye may be (O Muslims), turn your faces towards it when you pray." (Qur'ān II: 150) Then he says that God has only mentioned the Sacred Mosque and prescribed that every Muslim should turn his face in prayers thereto. As for the exactitude with which they face the *Ka'aba,* it is left to the Muslims who, with the minds God has granted them and with all possible means of knowledge, should try their best to achieve such an exactitude. One of the Qur'ānic verses which he quotes is: "And (He has cast) landmarks and by the stars they may find the right way." (Qur'ān XVI:

48. *Shāfi'ī's Al-Risālah, op. cit.,* p.288f; Ramadan, *op. cit.,* p.74f.

16) "If they exert their minds and means of knowledge, then they have done their duty." It is only this 'exertion' that God has enjoined on them, not the 'certainty of exactitude', which they may not reach. On the other hand, they have no right to say, 'since the certainty of exactitude is unattainable, then let us turn our faces any way we like'.[49]

The exercise of individual opinion is traditionally based on the example of Mū'ādh ibn Jabal. Mu'ādh was appointed by the Prophet as a judge in Yaman. On the eve of his departure to assume his office there, the Prophet asked him: "According to what will you judge?" He replied, "According to the Book of God." "And if you find nought therein?" "According to the *Sunnah* of the Prophet of God." "And if you find nought therein?" "Then I will exert myself to form my own judgment." And thereupon the Prophet said "Praise be to God who has guided the messenger of His Prophet to that which pleases His Prophet".[50]

The reference in the *ḥadīth* relating to Mu'ādh ibn Jabal is to the exercise of *ijtihād* or judgment. Tradition has it that it was the second Khālifa 'Umar who in his instruction to Abū Mūsa Ash'arī gave a clear direction about *qiyās* or analogy. The *Khalīfa* is reported to have said: "When you are in doubt on a question and find nothing about it in the *Qur'ān* or in the *Sunnah* of the Prophet, think over the question and think again. Ponder over the precedents and analogous cases, and then decide by analogy."[51]

The concept of individual opinion was even recognised and applied by the Prophet with reference to himself. Only what he said, did or agreed to in his capacity as a Prophet is to be considered a binding *Sunnah*. The context of a particular tradition usually indicated the legal bearing involved. In the absence of such an indication and in cases of ambiguity, it became for the Muslims a matter of consideration, in which spiritual factors

49. Ramadan, *op. cit.*, p.76f; *Shāfi'ī's Al-Risālah, op. cit.*, p.295f.
50. Ramadan, *op cit.*, p.64. It is likely that this *ḥadīth* which is of the *mursal* type is of later origin and has been projected back to the time of the Prophet — see Schacht, *op. cit.*, pp.105-106 and *Islamic Studies*, Vol.II (1959) pp.288-289; Maḥmaṣānī, *op. cit.*, p.81.
51. Shibli Numani, *'Umar the Great*, Vol.II, p.67. Schacht is of the view that this has been projected back to the time of 'Umar — see Schacht *op. cit.*, p.104. Some Muslim authorities *e.g.* Ibn Ḥazm have doubted its authenticity — see Maḥmaṣānī, *op. cit.*, p.97.

as well as individual and collective reasoning played the decisive role.

Thus even in the authority of Muḥammad over the Muslims there is a clear line between the revelation given to him, and himself as a human being. His followers' complete faith in his prophethood went hand in hand with a comprehension of his humanness. In the battle of Badr he was asked "This place where we have been stationed, is it God's ordained selection (by Revelation) or is it your plan?" He replied "It is my plan". Then said al-Hubbāb ibn al-Mundhir "This does not seem to be the proper stationing". And he suggested some other place for reasons which he explained. The Prophet convinced by his reasoning ordered the Muslim army to change station.[52]

The renowned compiler of *ḥadīth*, Muslim,[53] records in his *Ṣaḥīḥ* a still more illustrative incident. On his arrival at Madīnah, the Prophet observed some people of Madīnah pollinating their palm-trees. He made the remark "Perhaps it would be better if you do not do it". The people concerned took his remark as an order, and the result was not what he had expected. This being reported to him he said "I am but a human being. Only when I order you something of your religious duties will you have to abide by it. If I issue an instruction upon my personal opinion, then it is a mere guess and I am only a human being. Rather you may better know your worldly affairs."[54]

This conception of individual opinion was a clear aspect of the intellectual life of the earliest Muslim society. Ibn al-Qayyim[55] records many authentic incidents to this effect. 'Umar, the second *Khalīfa*, once asked a litigant after his case had been judged by 'Alī and Zayd, who had both been Companions of the Prophet: "How was the judgment?" The man told him. 'Umar then said: "Had I been the judge, I would have decided differently." The man asked him: "Why, then, don't you force your decision, you being the *Khalīfa?*" 'Umar answered: "If it were a decision based upon a specific ordinance of the Book or the

52. Ramadan, *op. cit.*, p.44.
53. See p.80.
54. Muslim, *Ṣaḥīḥ*, Vol.VII, p.95; Ramadan, *op. cit.*, p.67.
55. See p.142.

Sunnah, I should have done that, but this here is a matter of opinion, and thus we are all the same."[56]

In his survey and analysis of the many traditions on the subject of individual opinion, Ibn al-Qayyim tried to establish three conditions for the validity of individual opinion: (1) that it may be resorted to only in the absence of an applicable text of the *Sharī'ah,* that is, the *Qur'ān* or the *Sunnah;* (2) that in no way should it contravene the *Sharī'ah;* and (3) that the course of reasoning should not become entangled in any kind of sophistry or complication of expression which might affect the people's direct attachment to the *Sharī'ah* or distort the clarity thereof.[57]

It is clear therefore that the Companions and the early jurists did not consider individual opinion to be a binding authority over Muslims. 'Umar, the Second *Khalīfa,* is reported to have said "Tradition is only what the Prophet has laid down and prescribed. Do not permit an error of opinion to become a tradition for the community."[58] In his *Kitāb al-Umm* Ash-Shāfi'ī states that in cases of differences between those who exercise individual reasoning in the absence of binding texts, each of them is bound only by what he himself opines, and none of them may abandon what he personally considers to be right in order to follow blindly the opinion of another person.[59]

Ash-Shawkānī[60] reports many statements explicitly made by the great jurists in whose names the four *Sunnī* Schools of law were gradually built up.

Thus said Abū Ḥanīfah:[61]

> It is not right on the part of anyone to adopt what we opine unless he knows from where we derived it.

He also said:

> Slanderous is their saying that we give our *qiyās* any priority over the *Sharī'ah.* Do we need to opine when there is a sacred text?

Said Mālik:[62]

> I am but a human being. I may be wrong and I may be right.

56. Ibn al-Qayyim, *A'lām al-Muwaffaqīn;* Ramadan, *op. cit.,* pp.67-68.
57. Ramadan, *op. cit.,* p.67f.
58. *Ibid.,* p.74.
59. Shāfi'ī, *Kitāb al-Umm,* VII, pp.148-149.
60. See p.142.
61. See pp.119-120.
62. See pp.125-126.

So first examine what I say. If it complies with the Book and the *Sunnah,* then you may accept it. But if it does not comply with them, then you should reject it.

Said Ash-Shāfi'ī:

If ever I opine in deviation from a tradition, then you should follow the tradition and never imitate me. And if a report is later authenticated as being a tradition, then whatever I had opined contrary to it is no more valid, and you should only follow the tradition.

Said Ibn Ḥanbal:[63]

Do not imitate me, or Mālik, or Ash-Shāfi'ī, or ath-Thawrī,[64] and derive directly from where they themselves had derived.[65]

Ibn al-Qayyim records specific statements testifying to the fact that all of these jurists even gave priority to traditions which were not fully authenticated over their own individual conclusions. An incident illustrative of the probity of the early Muslim jurists is the famous attitude of Mālik against the proposal of the *Khalīfa,* Hārūn ar-Rashīd, to enforce *Al-Muwaṭṭa'* (Mālik's book) as a uniform legal code throughout the Islāmic State. Hārūn ar-Rashīd insisted on this proposal and even went so far as to suggest that the book be hung in the *Ka'ba* to symbolize the general reverence for the book and to bring about the legal uniformity of the nation. But Mālik, with a clarity of mind and heart, rejected the enticing proposal of the *Khālifa* and said:

O Leader of the Believers! The Companions of the Prophet went here and there carrying with them what they had heard and seen during the lifetime of the Prophet. They also carried with them different opinions on many details. Difference among Muslim scholars is but a divine mercy for this nation. Each of them is following what he considers to be right, and each of them has his argument, and all of them are sincerely striving in the way of God.[66]

The *Ḥanafī* jurist, Ṣadr ash-Shārī'ah[67], in his *Tawḍīḥ* describes *qiyās* as "to extend (*ta'diyah*) the *Sharī'ah* value from the original cause (*aṣl*) over to the subsidiary (*far'*) by reason of an effective cause (*'illah*) which is common to both cases". The use of *qiyās* therefore requires the determination of the effective cause (*'illah*) of the law. *'Illah* has been variously defined as some-

63. See pp.140-141.
64. See p.75.
65. Quoted in Ramadan, *op. cit.,* pp.77-78.
66. Abū Zahrah, *Mālik,* pp.211-214; Ramadan, *op. cit.,* p.78.
67. Ṣadr ash-Shārī'ah, *op. cit.,* p.444.

thing which makes known (*mu'arrif*) or a sign (*'alāmat*) or something which brings into existence (*mu'aththir*). In plain words it may be defined as the fact, circumstance or consideration which the Lawgiver had in regard in laying down the law embodied in a text. When the effective cause has been determined the jurist is in a position by *ta'līl* (reasoning) based on that cause, to apply the law of the text in a case in which the same cause is present.[68]

The accepted *Sunnī* doctrine is that the Lawgiver in enacting laws has in regard a certain policy (*ḥikmat, maṣlaḥaḥ*). This policy is to promote the welfare of men by securing to them positive advantages or averting them from injury and, in so far as the cause or reason for a law advances that policy, it is said to be proper (*munāsib*). Generally speaking, it is not permissible for a jurist to make deductions merely from the broad policy of the law; the effective cause must have a particular reference to the subject to which the text relates. The general rule is that the effective cause must be definite and perceptible; for instance the consent of parties to a contract is imperceptible and therefore the law proceeds upon the acts of proposal and acceptance. According to the *Shāfi'ī* school, *prima facie* a text is capable of extension by analogy or in other words it is *mu'allāh,* that is, based on a cause that can be extended to other cases; but it is necessary that there should be some reason for separating the particular facts to which the text may relate from the general considerations on which the law is based.[69]

The effective cause of law may be the quality of a thing, manifest or hidden, a combination of qualities, a generic name or a rule of law. The effective cause is sometimes expressly stated or suggested by indications in the text itself and sometimes established by consensus of opinion (*ijmā'*). When the effective cause is not indicated by the text itself or determined by *ijmā'*, we have to find out what is the proper fact or reason on which the law of the text is based. A reason is said to be proper (*munāsib*) if it promotes the welfare of men. But it is a condition that the reason must not only be proper but must also be appropriate (*mulā'im*) for the purpose of deduction. A fact or

68. 'Abdur Rahim, *op. cit.*, pp.138 and 146f.
69. *Ibid.*, p.146f.

reason is said to be appropriate when the law considers facts and reasons of the same genus as efficient in giving rise to rules of the same genus as the rules of the text which is sought to be extended. The closer the connection of an effective cause with the text, the stronger is the deduction based on it.[70]

According to all the *Sunnī* Schools, a deduction based on a proper fact or reason, which is also considered appropriate for purposes of analogical deduction is valid. In the opinion of the *Shāfi'īs* and *Mālikīs* the *mujtahid* is bound to make the necessary deduction if such a cause is available. On the other hand according to the *Ḥanafīs*, he is not so bound unless such cause be also authoritative (*mu'aththir*). A cause or reason is said to be authoritative if a cause of the same variety or near genus has been held by the *Qur'ān* or the *Sunnah* or consensus of opinion to hold good in laws of the same variety or of a near genus as that of the text of the *Qur'ān* or the *Sunnah* from which the deduction is sought to be made.[71]

According to Imām Ghazzālī, a cause is proper (*munāsib*) if it is like the causes considered proper by the early Muslims, "...who used to consider as causes those attributes which were proper to the values".[72] He also held that an attribute is proper, if the connection of the value to it would lead to a useful purpose (*maṣlaḥah*) and that it is lawful to make a deduction from reasons based on general considerations of public policy, if it be called for by absolute necessity affecting the Muslims as a body.

The conditions of a valid analogical deduction are as follows:—

(a) The law enunciated in the text to which analogy is sought to be applied must not have been intended to be confined to a particular state of facts. Thus for example, the tradition in which the Prophet says: "If Khuzayma testifies for anyone that is sufficient for him" does not lay down a rule of general application to the effect that the testimony of a single witness is sufficient in law to support a claim.

(b) The effective cause of the original law should not have been itself against the rules of analogy, as for example where

70. *Ibid.*, p.151f.
71. Aghnides, *op. cit.*, p.81f.
72. Ghazzālī, *Kashf*, p.1070, quoted in Aghnides, *op. cit.*, p.81.

the law of the text is such that its reason and purpose cannot be understood by human intelligence.

(c) The analogical deduction must be founded on the law established by a text of the Holy *Qur'ān* or *Sunnah* or (according to some *Shāfi'īs* and the *Ḥanbalīs*) on another analogical deduction; and the rule so deduced must not be opposed to the rule as laid down in the original prescription nor covered by the words of a separate prescription (*naṣṣ*).

(d) The deduction must not be such as to involve a change in the law embodied in the original prescription (*naṣṣ*).[73]

S. Maḥmaṣānī summarizes the pre-requisites of analogy according to the prevalent view of Muslim jurists as follows:—

(a) the cause must be the compelling factor, that is, the idea intended by the *Sharī'ah.* It should be apparent, complete in itself and not hidden or ambiguous;

(b) the cause should be identical in both the original subject and the subject of analogy. Mere similarities in attributes are not sufficient to justify analogy as analogy may only be resorted to if both subjects are equal in every respect;

(c) the rule in the original cause should be generally applicable. Analogy is not permissible in the case of a rule which has a specific reference.[74]

A number of refinements of the use of *qiyās* have been introduced by the Muslim Schools of Law. The *Ḥanafī* School recognises the application of *istiḥsān,* which might be translated as "choosing for the better" or "favourable construction". It is applied in two main classes of cases, firstly where the application of a strict *qiyās* would lead to abolishing an already existing and salutary or at least harmless custom, and secondly when the application of a strict *qiyās* would lead to an unnecessarily harsh result.[75] The *Mālikī* School made use of the principle of *istiṣlāḥ* or public policy which consists in prohibiting or permitting an act

73. 'Abdur Rahim, *op. cit.* p.142.
74. Maḥmaṣānī, *op. cit.,* p.82.
75. Sarakhsī defines *istiḥsān* as "the setting aside of analogy and seeking what is more suitable for the people". A number of *Mālikī* jurists also accepted preference in this sense and defined it as the attention to public interest and justice. Ash-Shāfi'ī however rejected it—see Maḥmaṣānī, *op. cit.,* p.86.

because to do so would serve a "useful purpose" (*maṣlaḥaḥ*). Shāfi'ī introduced the principle of *istiṣḥāb* or the seeking for a link. This is more a principle of evidence than of law, namely that an existing state of affairs shown to have existed may be presumed to have a legal origin and to continue in existence until the contrary is shown. Another principle that has been applied in the development of Muslim Law is that of *ḍarūrah* or necessity, which would justify the adoption of a *rukhṣah* (permissible) rule instead of the more rigorous *'azīmah* (ideal) rule.[76]

Connected with the principle of public utility is the principle that anything which conduces to a forbidden end is itself forbidden while anything conducive to a desirable end is itself desirable. Thus regard is had to the repercussions and final results of all actions. If they are conducive to the public interest, which constitute the aim and objective of the dealings of man with man, then they are as desirable as those aims themselves. But if they are not equally desirable or if their results might be evil, then they are forbidden — just as that evil is forbidden, even though the means may be somewhat less objectionable. In a choice between two actions the rule adopted is that it is preferable to avoid an evil rather than to secure a benefit.[77]

Qiyās does not have the same authority as the *Qur'ān* or the traditions. The essential characteristic of a rule based on *qiyās* is that its authority is merely presumptive and it is open to a judge or jurist not to follow a particular ruling of this category if in the exercise of his judgment, he holds it to be based on an incorrect deduction. It must not be acted upon if it is found to be in conflict with the text of a revealed law. A corollary of the presumptive authority of *qiyās* is that an interpreter or

76. The conception of *maṣlaḥah* has been further developed by the *Ḥanbalī* jurist aṭ-Ṭufi (*d.*716 A.H.) who basing his concept on the tradition "There shall be no harm done or suffered" regarded the consideration of *maṣlaḥah*, the counterpart of harm, as the foremost principle that should be given priority in the application of the texts of the *Shar'īah*. Among the *Shāfi'īs*, the principle is accepted by al-Ghazzālī.

77. Sayed Kotb, *Social Justice in Islām*, trans. by Hardie, p.263f. This principle is expressed in the form of a maxim in the *Majallah*, "Repelling an evil is preferable to securing a benefit" (Article 30). The *Ḥanafī* School built upon this principle the theory of the abuse of rights. It provided that a person may be denied the exercise of his right if such exercise should result in excessive injury to others — see Maḥmaṣānī, *op. cit.*, p.158.

judge should not hold to an opinion of his if it becomes apparent to him that he has erred. The gist of this view is contained in the instructions traditionally said to be conveyed by the Khalīfa 'Umar to Abū Mūsa al-Ash'arī:

> After giving judgment, if upon reconsideration you come to a different opinion, do not let the judgment which you gave stand in the way of retraction; for justice may not be disregarded, and you are to know, that it is better to retract them than to persist in injustice.

When there exist in the *Sharī'ah* two evidences one of which refutes what the other establishes, the following cases are possible:—

(1) both evidences are of equal strength but one is later in time: this involves abrogation (*naskh*) of one evidence by another;
(2) both evidences are of equal strength but it is not known which is the later: this is a case of conflict without preference (*mu'āraḍah*);
(3) one of the evidences is stronger by virtue of a secondary difference; this is a case of conflict with preference (*mu'āraḍah ma' at-tarjīḥ*); and
(4) one of the evidences is stronger by virtue of an essential difference: this is not really a case of conflict or preference, for these terms are only used when the two evidences are of equal strength.[78]

Abrogation is the occurrence in the *Sharī'ah* of evidence of a later date than another already existing, establishing the opposite of what the earlier does. Only the *Qur'ān* and the *Sunnah* may be abrogators (*nāsikh*) and according to the *Shāfi'īs* the *Qur'ān* can be abrogated only by the *Qur'ān* and the *Sunnah* of the *mutawātir* or *mashhūr* kind only by another *Sunnah* of the *mutawātir* or *mashhūr* kind.[79]

78. Aghnides, *op. cit.*, p.89f.
79. The principle was controversial; the abrogation of the *Qur'ān* by the *Qur'ān* is recognized by the great majority of jurists and only one jurist, Abū Muslim ibn Baḥrānī, took exception to the principle. Most instances of abrogation occurred in relation to detailed rules affecting transactions in the verses revealed at Madīnah and there is very little abrogation in the general rules occurring in the verses revealed at Makka. As-Suyūṭī in his *al-Itqān* mentions twenty instances where abrogation occurred. Although Mālik, the Companions of Abū Ḥanīfah, and some followers of the *Ẓāhirī* School ruled that it was

Where there is a conflict between two verses of the *Qur'ān* or between one verse and a pair of verses, or between one *Sunnah* and a pair of *Sunnah*, and between one *qiyās* and a pair of *qiyās*, it is a case of conflict between equals, since strength does not consist in number and consequently the single verse, *sunnah* or *qiyās* is not necessarily set aside to make room for the pair. In the event of a conflict, if between two *qiyās*, one or other is preferred according to one's convictions. If however the conflict is between two verses or two readings of the *Qur'ān* or two *Sunnahs* and it is not known which of the conflicting evidences is the later in time, one should attempt if possible to reconcile them by reference to their value (*ḥukm*), subject-matter or time, but if this is not possible the conflicting evidences are set aside and other evidences are referred to, as for example if the conflicting evidences are verses of the *Qur'ān* reference is made to the *Sunnah*, and, if no provision is found in the *Sunnah*, to *qiyās* and the sayings of the Companions.

In case of inequality, the stronger evidence is always preferred to the weaker, for example a *mashhūr ḥadīth* is preferred to an individual (*āḥād*) *ḥadīth*.[80]

The Muslim system also recognizes the force of customs and usages in establishing rules of law. The validity of such laws rests on principles somewhat similar to those of *ijmā'*. In the case of those customs and practices which prevailed in the time of the Prophet when revelation, the primary source of law, was still active, and which were not abrogated by any text of the *Qur'ān* or the traditions, the silence of the Divine legislator is regarded as amounting to a recognition of their legal validity. As to customs which have sprung up since the Prophet's death, their validity is justified on the authority of the text, which lays it down that whatever the people generally consider to be good for themselves is good in the eyes of God. Customary law has no legal force if it is repugnant to the revealed law or to the law founded on *ijmā'*.[81]

The principle of the retention of pre-Islāmic legal insti-

possible for the *ḥadīth* to abrogate the *Qur'ān* on the ground that both are revelations from God, Ash-Shāfi'ī and Aḥmad ibn Ḥanbal rejected this view — see Maḥmaṣānī, *op. cit.*, pp.64-65.

80. Aghnides, p.89f.

81. 'Abdur Rahim, *op. cit.*, pp.55 and 136.

tutions under Islām was acknowledged. Abū Yūsuf held that if there exists in a country an ancient custom which Islām has neither changed nor abolished and people complain to the *Khalīfa* that it causes them hardship, he is not entitled to change it; but Mālik and ash-Shāfi'ī held that he may change it even if it be ancient, seeing that he ought to prohibit in similar circumstances even a lawful custom which has been introduced by a Muslim.[82]

Custom has come to be an important source of law in some Muslim countries, especially in Morocco, where the principle of *'amal* or judicial practice has been developed by the jurists. In Andalusia there prevailed a tendency to require judges to follow the practice of Cordova and part of the material thus introduced into the law was incorporated in the *Tuḥfah* of Ibn 'Āṣim (*d.* 829 A.H.), which came to be very popular in Morocco. At Fez the jurisdiction of the *qāḍīs* was combined with the activities of the municipal authorities and had to take into account special customs. The result of this procedure, when set down in writing, was the *'amal* which found a recognised place in Muslim jurisprudence in Morocco from the end of the 9th Century of the *Hijrah* (15th Century). This was developed by subsequent jurists. Under the title of "opinions" (*ajwiba*), judgments (*aḥkām*) or precedents (*nawāzil*), each jurist reproduced and on occasions revised the contributions of his predecessors. *'Amal* was eventually reduced to a purely technical place; when local customs require it the *qāḍī* has the right to refer the isolated or anomalous opinion (*shādhdh*) to the predominant opinion (*mashhūr*). This right, limited by numerous conditions and differentiations, could produce only temporary and isolated solutions. The law based on *'amal* was a pragmatic law but it remained subject to doctrinal criticism which at any moment could revoke it.

In order to co-ordinate actual practice with ideal theory, from the second century of Islām, Muslim jurists devised the use of *ḥiyal* or legal fictions, devices by which the interested parties might achieve by perfectly legal means, results made desirable by the economic conditions of the time but which would be unacceptable to legal theory as such. The earliest *ḥiyal* were

82. Schacht, "Pre-Islamic Background and Early Development of Jurisprudence", pp.35-36.

merely simple evasions of irksome prohibitions by merchants, but very soon the religious scholars themselves started creating little masterpieces of elaborate constructions and advising interested parties in their use. Legal devices or fictions are of two types in Muslim Law. The first category are those that are permissible, those which represent an attempt to utilise a legal device laid down for a specific purpose to attain another purpose aimed at upholding a right, preventing an injury or easing a situation because of necessity. Such legal fictions do not destroy any *Sharī'ah* percept and are therefore recognised and accepted by all the Islāmic schools. An example is the device of sale (*bay' bil wafā'*) to circumvent the prohibition of long-lease contracts. The other category of legal fictions was devised to change well-established *Sharī'ah* rules into other different rules through an action which is ostensibly correct but implicitly void. Abū Ḥanīfah is reported to have said: "It is prohibited to intend to suspend rules overtly but the suspension of such rules implicitly is not prohibited". This type of legal device has been used by *Ḥanafī* and some *Shāfi'ī* jurists to evade for example the prohibition against the taking of interest.[83]

The function of law, in the Muslim view, is to control and guide men's conscious actions by creating restraint on their freedom. This presupposes an ability in man to choose to do or not to do an act, namely the existence in him of will-power (*ikhtiyār*). The scope of law which is determined by the end it has in view, covers the entire field of men's actions. The purpose of law is to promote the welfare of men both individually and socially. The welfare of men as individuals which the law seeks to promote is not in respect merely of life on this earth but also of the future life, so that the imperishability of human life is another principle underlying the Muslim conception of law.

There are four main principles of action implanted in our natures, namely the instincts of self-preservation, of self-multiplication, of self-development and the social instinct. These in the language of Islām are the signs as it were in the pathway of life laid down by the Creator for our guidance. The instincts of self-preservation and self-multiplication mainly indicate the range of our freedom, and the social instincts and the instinct of

83. Schacht, "Problems of Modern Islamic Legislation", p.99f.

self-development indicate chiefly the character and amount of control to which our freedom is subject. The control implied by the social instincts is the expression of the relation of the individual to the communal life and the control necessitated by the instinct of self-development represents that side of our nature which impels us to strive after progress. With regard to man's spiritual welfare, the purpose of law is the discipline of human life, so that it may attain *qurbat* or nearness to God. So far as the regulation of man's actions in their bearing on earthly existence is concerned, the aim of law is the preservation of the human species and the support and well-being of individual and social life.[84]

The media through which the law exercises its functions are rights (*ḥuqūq*) and obligations (*wujūb*). The two are generally speaking correlative terms. Right means the authority recognised by the law to control in a particular way the action of the person against whom it exists, the latter being obliged or under an obligation to act as required. Rights are primarily the privilege of God, but inasmuch as men in their communal life are dependent on each other for their wants, God having regard to such necessities has authorized men individually to control each other's actions, though within limitations. That is, the law permits one man to acquire rights against another and thus to control the freedom of the latter to a certain extent. In so far however as there is no legal restraint on a man's actions by virtue of a right existing either in another individual or in God, his innate freedom of action remains unaffected and hence according to many Muslim jurists *'ibāhat* or permissibility, is the original principle of human action.[85]

Rights are principally classified by the Muslim jurists into rights of God (*ḥuqūq Allāh*) and rights of man (*ḥuqūq 'ibād*). Rights of the former class are such as involve benefit to the community at large and not merely to a particular individual. They are referred to God because of the magnitude of the risks involved in their violation and of the comprehensive benefits which would result from their fulfilment. It is not to be understood that these rights are called rights of God, because they

84. *Ibid.*, p.55f.
85. *Ibid.*, pp.56-57.

are of any benefit to God, for He is above all wants, nor because they are the creation of God for all rights are equally the creation of God who is the creator of everything. There are matters which are purely the right of God, that is public rights involving benefit to mankind generally; and there are matters which are entirely the right of individual men, that is private rights. There are also matters in which the rights of the community and of individuals are combined and in such cases sometimes the rights of the community preponderate, sometimes the rights of the individual. What chiefly distinguishes a public right from a right of man or a private right is that the enforcement of the former is the duty of the State, while it is at the option of the person whose private right is infringed whether to ask for its enforcement or not. It may be that certain acts which give rise to a public right affect some particular individuals more than others but that fact will not entitle those individuals to condone the acts of the offender. It is however entirely at the discretion of the individual injuriously affected by the infringement of a private right, whether to pardon the wrongdoer or insist upon redress.[86]

Legal capacity is divided by the Muslim jurists into two parts, capacity for the inherence of rights and obligations and capacity for the exercise of rights and the discharge of obligations. The former may be described as the receptive and the latter as the active legal capacity. Every man is inherently clothed with legal capacity but the active part of such capacity is necessarily conditioned on maturity of the human faculties, mental and physical, and therefore comes into play gradually and by degrees. For instance, when the child is still in the womb as an embryo its life is joined to that of its mother and hence even its receptive capacity is defective while it has no active capacity at all. On birth the receptive capacity in the child becomes complete and his active capacity gradually develops itself, until it is perfected with the maturity of his mental and physical faculties. Infancy therefore is one of the circumstances which affect legal capacity although it is a circumstance which is inevitable in man's natural being. There are also other circumstances which impair legal capacity in a general way by their effect on a man's faculties, such as lunacy, or entail its forfeiture either wholly or partially by

86. *Ibid.*, p.201f.

reason of hostility to the law, such as apostacy, or cause its suspension in order to safeguard the rights of others, such as death-illness or insolvency. A person with full legal capacity (*mukallaf*) is therefore a living being of mature age and understanding, free, of Muslim faith, not seized with death-illness and solvent.[87]

The term *Sharī'ah* is not limited to mandatory commands, far less to commands enforceable by the Court. It includes all expressions of the Lawgiver's will and wisdom, whether laying down what a man must do or must not do, what he may do and what he ought to do or ought not to do, or merely making a declaration. Enforceability by a distinct human tribunal is not an essential attribute of law in the Muslim jurisprudence. The means by which compliance with the laws is secured are of a wider character in the Muslim system than the sanctions of modern European laws. Since Muslim law has a twofold object, spiritual benefit and social good, its policy is to encourage obedience by offer of reward and to discourage disobedience by imposition of penalty. Penalty may be awardable in this world (*'iqāb*) or in the next (*'adhāb*) or in both, but rewards (*thawāb*) are awardable only in the future life.[88]

The laws may be broadly divided into religious and secular laws. Thus Taftāzānī[89] in the *Talwīḥ* says:—

> It [*Fiqh*] is the knowledge of such laws of the *Sharī'ah* as are intended to be acted upon. These laws relate to matters appertaining to the next world, namely acts of worship (*'ibādāt*) or to matters appertaining to this world. Of laws of the latter class, some have in view the continued existence of men as individuals and are called laws relating to *mu'āmalāt*, that is dealings among men, while the others namely laws relating to domestic relations *munākaḥāt*) and to punishments (*'uqūbāt*) have in view the continued existence of men as a species, having regard respectively to their mutual place in the scheme of life and as members of organized society.[90]

The administration of Muslim law is carried on by *qāḍīs* (*kathis*) or judges. The first *Qāḍī* was appointed by the Khalīfa 'Umar who enforced the principle that the majesty of the law was supreme and that the administration of justice must be above the suspicion of subservience to executive authority. No one can be

87. *Ibid.*, p.217f.
88. *Ibid.*, pp.56-59.
89. 'Abdur Rahim, *op. cit.*, pp.62-63.
90. Taftāzānī, *Talwīh*, p.693.

appointed a *Qāḍī* (*Kathi* in Malay) unless he is a Muslim, free, major and of virtuous character. The *Qāḍī's* function is to redress wrongs and to enforce rights and it is not necessary for him to be a jurist. Where difficult questions of law arise it is a common procedure to refer the matter to a qualified jurist for his opinion. Such a consultant is called a *Muftī* and his reply is embodied in a *fatwā* or statement of the legal issues. In the early periods of Muslim law the *muftīs* maintained their independence of the secular administration but later they were appointed by the secular authority. The collection of *fatwās* (*fātāwā*) by eminent jurists came to be regarded as an authoritative source for legal rulings.

Muslim law cannot be properly understood without relating it to its religious background. It consists of laws ordained by God relating to the individual and social life of human beings. The great *Imāms* of Muslim jurisprudence, the founders of the four *Sunnī* schools, were not only lawyers; they were men of piety who combined spiritual illumination with religious knowledge of a very high level. An-Nawawī in the Preface to the *Minhāj aṭ-Ṭālibīn* well sums up the spirit of the system when he says that "the best way to manifest obedience to God and to make right use of precious time is assuredly to devote oneself to the study of the law."[91]

One of the best definitions of the *Sharī'ah* was given by Ibn Qayyim al-Jawziyyah who said:

> The foundation of the *Sharī'ah* is wisdom and the safeguarding of the people's interests in this world and the next. In its entirety it is justice, mercy and wisdom. Every rule which sacrifices justice to tyranny, mercy to its opposite, the good to the evil, and wisdom to triviality does not belong to the *Sharī'ah* although it might have been introduced therein by implication. The *Sharī'ah* is God's justice and blessing among His people. Life, nutrition, medicine, light, recuperation and virtue are made possible by it. Every good that exists is derived from it and every deficiency in being results from its loss and dissipation — for the *Sharī'ah*, which God entrusted His Prophet to transmit, is the pillar of the world and the key to success and happiness in this world and the next.[92]

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91. Nawawī, *Minhāj aṭ-Ṭālibīn*, p.xi.
92. Ibn Qayyim, *A'lām*, III, 1, quoted in Maḥmaṣānī, *op. cit.*, p.106.

SOURCES AND DEVELOPMENT OF MUSLIM LAW

THE DEVELOPMENT OF MUSLIM LAW

Whatever the people generally consider to be good for themselves — is good in the eyes of God.

THE DEVELOPMENT OF MUSLIM LAW

THE history of Muslim law may be divided into seven distinct periods. The first period is the period when the Holy Prophet was alive from the year 609, 13 before *Hijrah*[1] (622 A.D.) to 10 A.H. (632 A.D.). The mission of the Prophet was progressively to reclaim and reform humanity. The *Qur'ān* itself was revealed bit by bit. When a problem arose among the Muslims the matter was referred to the Prophet and he would then give his ruling in the matter either in the form of a revelation from God, which would be a verse of the *Qur'ān,* or in the form of his own saying or explanation. Most of the verses of the *Qur'ān* dealing with legal matters were recorded during the last ten years of the Prophet's life when the Muslim community had been organised in Madīnah and later in the whole of Arabia. The revelations collected in the *Qur'ān* were made in God's own words and contain His wishes and commands. Many of the verses laying down rules of law were revealed with reference to cases which actually arose. Often, however, questions arose for the solution of which there was no direct revelation or certain matters had to be explained and made clear. The pronouncements of the Prophet on all such matters are known as *ḥadīth* and came to be regarded as of sacred authority on the authority of the *Qur'ān* which says "Nor does he (Muḥammad) say aught of his own desire. It is no less than inspiration sent down to him"[2]. The sayings of the Prophet on matters of law and religion are thus regarded as inspired and suggested by God, though expressed in his own words. The Prophet's actions and usages (*Sunnah*) were likewise guided by God and furnished a guide as to what was right and lawful. Sometimes when the Prophet was not readily available to deal with a matter the Companions would exercise their own judgment. Subsequently, the matter

1. The year of the migration of the Prophet to Madīnah, from which date the Islāmic calendar begins.
2. *The Holy Qur'ān,* LIII : 3-4.

would be referred to the Prophet who would then either agree to the action taken or say that it was wrong.

In this first period, the basis of Muslim religion and law was to be found in the directly inspired guidance of the *Qur'ān* and the personal guidance of the Prophet. The structure of Muslim Law based on the *Qur'ān* and the *Sunnah* was completed during the lifetime of the Prophet. The *Qur'ān* was arranged as a book in the Prophet's lifetime but the traditions were not collected. Only a few of the Companions recorded the traditions of the Prophet in his lifetime; among those who did so were 'Abd Allāh ibn 'Amr ibn al-'Āṣ, Anas bin Mālik and Ḥammām ibn Munabbih.

Although the *Qur'ān* is the word of God it was nevertheless immediately addressed to a given society, that is, the seventh century 'Arabs, with reference to their social and economic conditions. Therefore in its actual legislation it was bound to have immediate regard for that society as a model, although of course its message is for the whole world and for all times. Similarly in regard to the *Sunnah,* Shāh Walī Allāh says that the Prophet's immediate task was to create a model out of the conditions and materials that he had for the rest of the world and for posterity.[3] The prophetic method of teaching according to Shāh Walī Allāh is that, generally speaking, the law revealed through a prophet takes special notice of the habits, ways and peculiarities of the people to whom he is specifically sent. The Prophet who aims at all-embracing principles, however, can neither prescribe different principles for different people nor leave them to work out their own rules of conduct. His method is to train one particular people and to use them as a nucleus for the building of a universal *Sharī'ah.* In doing so he emphasizes the principles underlying the social life of mankind and applies them to concrete cases in the light of the specific habits of the people immediately before him. The *Sharī'ah* values resulting from this application (as for example relating to penalties for crimes) are in a sense specific to that people; and since their observance is not an end in itself they cannot be strictly enforced without modification in the case of future generations.[4]

3. *Islamic Studies,* Vol. II No. 2, p. 289; Sir Muḥammad Iqbāl, *Reconstruction of Religious Thought in Islām,* p. 171 - 172.
4. *Ibid.*

In the early days of Islām there was a continuing activity in the interpretation and the practical application of the injunctions of the *Qur'ān* and the *Sunnah* in different walks of life. The early Muslim Community was free from prejudices and superstitions and were not hide-bound by the letter of the text of the *Qur'ān* or the expression of the *Sunnah* in the *ḥadīth*. They recognised that the *Qur'ān* and the *Sunnah* were meant to constitute the basis of Muslim Law rather than the Muslim legal system itself. Where the strict application of the letter of the *Qur'ān* or the *ḥadīth* would violate the principles of justice, the early Muslims were prepared to depart from it in the interests of implementing the essence of the *Qur'ān* or the *ḥadīth*.[5]

The Prophet's aim was to create a model out of the conditions and materials in his time for the rest of the world and posterity. The *Qur'ān* and the *ḥadīth* do exhort people to regulate their conduct according to the moral principles revealed to the Prophet, but they constitute the basis of Muslim Law rather than the Muslim legal system itself. Many of the rules laid down in the *Qur'ān* and by the Prophet have specific reference to the situation and time in which they were revealed although there is a substratum of principle meant for all times and places. Moreover the Companions of the Prophet, after he had said or done something, would enquire from him as to whether the statement or act in question was revealed or not. When the Prophet's answer was that it was non-revelatory, the Companions would consider themselves free (with the Prophet's approval) to reach their own conclusions and express them. When these conclusions were at variance with those of the Prophet, it is on record that often the Prophet accepted the prevailing opinion of the Companions.[6]

The aim of Muḥammad as Prophet was not to create a new system of law; it was to teach men how to act, what to do and

5. Fazlur Rahman, "Social Change and the Early Sunnah," p. 205f. The Second Khalīfa, 'Umar, especially did not shrink from overruling old interpretations of texts, if the *Sharī'ah* policy or the interests of the Muslims made that imperative. Thus, for example, he discontinued payments of alms to those whose hearts are to be reconciled" (*Holy Qur'ān* IX:60). Re divorce, he declared that if a person repudiated his wife three times in one sitting, this was to be considered as three separate declarations, which made the declaration irrevocable. He also prohibited the sale of slave girls who had given birth to children as a result of intercourse with their masters. See Maḥmaṣānī, *op.cit.*, p. 110f.

6. Kemal A. Farukī, *Islamic Jurisprudence*, p. 126.

what to avoid in order to gain approval on the Day of Judgment and to enter paradise. The *Qur'ān* therefore applied religious and ethical principles to existing legal norms and relationships which it took for granted and only occasionally completed or modified them on religious and ethical grounds. The Qur'ānic legislation stood outside the existing legal system on which it imposed moral and not properly speaking legal rules.[7]

The second period is the period from 10 A.H. to 40 A.H. (A.D. 631—660), the thirty years of the rightly guided *Khalīfas,* the period of the Companions of the Prophet (*Aṣḥāb*) and their immediate successors (*Tābi'ūn*). The period was characterised by close adherence to the practice, that is the *Sunnah,* of the Prophet. Law was administered by the Head of the State, the *Khalīfa* or under his direct supervision. The first four *Khalīfas* (Abū Bakr, 'Umar, 'Uthmān and 'Alī) were men of action and law in their hands while it was not separated from religion became imbued with principles of practical application.

With the death of the Prophet, there was no longer anyone through whom God could promulgate his wishes and commands for the guidance of the Muslims. The religion of Islām had been perfected[8] and the *Qur'ān* and example of the Prophet were available for reference and instruction. If a text of the *Qur'ān* or pronouncement of the Prophet had decided a similar case there could be no difficulty. But fresh facts and new circumstances often arose for which no direct provision had been made, especially as the affairs of the community became more complex with the growth of the Muslim Empire. In the absence of direct authority, the Companions had to guide themselves by the light of their reason (*'aql*) having regard to the usages of the community, some of them from pre-Islāmic times, which had been approved or were not condemned by the Prophet. Those who had been associated with the Prophet as his Companions and had often

7. Schacht, "Problems of Modern Islamic Legislation", p. 106f. This feature of Qur'ānic legislation has survived in Muslim jurisprudence and the purely juridical attitude which attaches legal consequences to certain acts is often subordinated to the Muslim ethical tendency which tells man what he must do and what he must not do. Muslim jurisprudence did not grow out of an existing Muslim law as did Roman jurisprudence out of an existing Roman law; Muslim law created itself out of the customary and administrative law and the various other ingredients which went to its making.

8. *The Holy Qur'ān,* V:4.

shared his counsels must have known, as if by instinct, the policy of Muslim law and whether a particular rule or decision was in harmony with its principles. Thus an agreement among the Companions in a particular view would vouch for its absolute soundness and even their isolated opinions are regarded as of high authority.

As the Muslim community was to be governed in the main on the principles already laid down for that purpose, the necessity of collecting and preserving the verses of the *Qur'ān* forced itself upon the attention of the early Muslims. The text of the *Qur'ān* during the lifetime of the Prophet was preserved in the memories of the Companions or by being inscribed on bones, leaves or tablets of stone. In the expedition against the impostor Musaylimah, during the Khalīfate of Abū Bakr, a large number of the *ḥāfiẓ* (the reciters of the *Qur'ān* by heart) were killed, and at the suggestion of 'Umar, Abū Bakr had an official edition of the *Qur'ān* prepared. Zayd bin Thābit, who had been constantly with the Prophet and acted as his Secretary, was employed on this task, which was completed between A.H. 11 and A.H. 14. But several different *qirā'āt* or readings of the *Qur'ān* crept into use and 'Uthmān, the third *Khalīfa,* perceiving the need for a correct reading, again utilized the services of Zayd bin Thābit in preparing an authoritative edition of the *Qur'ān* based on the manuscript compiled during Abū Bakr's Khalīfate. Copies of the authoritative edition were sent to the various centres of the Muslim Empire, Madīnah, Damascus, Baṣra and Kūfa, and all the incorrect versions were ordered to be destroyed. It is due to the action of the Khalīfa 'Uthmān that at the present day there is one authoritative and uniform text of the *Qur'ān* in use throughout the Muslim world.[9]

The traditions of the Prophet however, were not collected by authority of the State as was done in the case of the *Qur'ān.*[10] Their collection was left to the piety and private enterprise of the Muslims. The *ḥadīth* were known to various people and those who were most learned in the *ḥadīth* soon gathered around them

9. Ramadan, *op.cit.,* p. 31f.
10. The Umayyad Khalīfa, 'Umar ibn 'Abd al-'Azīz, attempted a compilation of the traditions in the early part of the Second Century A.H. (8th Century A.D.). But he was not successful in his plan as he died before the compilation was completed. See Maḥmaṣānī, *op.cit.,* p. 39

a band of students eager to learn and store every tradition of the Prophet. Those whose duty it was to decide questions of law did not readily accept *ḥadīth* which were not known personally to them. It was only when they were convinced of the genuineness of the *ḥadīth* that they accepted and acted on it. We are told that Abū Bakr and 'Umar usually required two witnesses who could independently vouch for the truth of a *ḥadīth* while 'Alī bin Abī Ṭālib refused to accept a *ḥadīth* unless the person reciting it took an oath that he was correctly reciting what he had heard from the Prophet or had seen him doing.[11]

Ḥadīth from the Prophet existed from the earliest days of Islām. During the lifetime of the Prophet it was natural for the Muslims to talk about what the Prophet did or said, especially in a public capacity. The *Sunnah* of the Community was based upon and has its source in the *Sunnah* of the Prophet. But *ḥadīth* in the Prophet's own time was largely an informal affair — its only use would be to guide the actual practice of the Muslims and this need was fulfilled by the Prophet himself. After his death the *ḥadīth* attained a semi-formal status. The Companions of the Prophet had seen him behave in all sorts of situations and had acted in his spirit; the succeeding generations had in turn witnessed the behaviour of the Companions; and through this process, involving mutual advice and criticism, by the third generation, the Prophetic *Sunnah* was established and accepted in the community and therefore it was not necessary to have recourse to *ḥadīth* to support this *Sunnah*. Whatever *ḥadīth* existed, as the carrier of the Prophetic *Sunnah*, existed for practical purposes, that is, as something which could generate and be elaborated into the practice of the community. For this reason it was interpreted by the Companions freely according to the situation in hand and this interpretation produced the living *Sunnah*.[12]

When the matter arose for decision, reliance was placed on the *Qur'ān* and the *Sunnah*. If no solution was to be found either in the *Qur'ān* or the *Sunnah*, some of the Companions would use their own judgment to decide the matter. Thus we are told that Abū Bakr, the first *Khalīfa*, whenever he had to pass a judgment "looked into the *Qur'ān*. If he found an applicable

11. M. Hasbi ash-Shiddieqy, *Pedoman Hukum Sjary* Vol. I., p. 22.
12. Fazlur Rahman, "Sunnah and Ḥadīth", p. 4. See note (5) *Supra*.

text therein, he would apply it. If not, he turned to the *Sunnah*. If he found an applicable precedent therein he would apply it. If not, he would ask the people whether any of them knew of a judgment passed by the Prophet on the particular issue. It sometimes happened that some people would come forward and state that the Prophet had passed a judgment on it. If there was nothing at all, he would summon the chief representatives of the people and consult with them".[13]

'Umar, the second *Khalīfa*, did the same, except that he would ask whether Abū Bakr had passed judgment on the issue before he passed a new one. In a letter which he wrote to a judge, Abū Mūsa al-Ash'arī stated:

> Jurisdiction is to be administered on the basis of *Qur'ān* and *Sunnah*...clear understanding of every case that is brought to you for which there is no applicable text of the *Qur'ān* and *Sunnah*. Yours then is a role of comparison and analogy, so as to distinguish similarities and dissimilarities — thereupon seeking your way to the judgment that seems nearest to justice and apt to be the best in the eyes of God.[14]

The *Khalīfas* did not claim legal authority for their opinions. 'Umar was questioned and called to account for any judgment that seemed to anyone to go against the basic texts of the *Qur'ān* and the *Sunnah*. History records open discussions in the mosque at Madīnah wherein these texts were the only reference and wherein 'Umar sometimes admitted that he was wrong.

Among the Companions who thus used their reasoning and exercised *ijtihād* (independent judgment) to arrive at a solution of a problem were 'Umar ibn al-Khaṭṭāb and 'Abd Allāh ibn Mas'ūd. There were some Companions however like 'Abd Allāh ibn 'Abbās, Zubayr and 'Abd Allāh ibn 'Umar, who hesitated to go beyond the *Qur'ān* and the *Sunnah*. In any case the need for *ijtihād* or independent judgment was limited; it was not relied on in all cases but only where necessary. Most of the matters which had to be decided could be decided on the authority of the *Qur'ān* and the *Sunnah* but in some cases it was necessary to apply the rulings of the *Qur'ān* and the *Sunnah* by analogy (*qiyās*) to new situations. In the more important matters it was usual for the *Khalīfa* to call together the Companions to discuss the

13. Ramadan, *op.cit.*, pp. 24-25.
14. *Ibid.*, p. 25.

matter, and the matter would then be decided by the unanimous view (*ijmā'*) of the Companions.

There were some among the Companions of the Prophet who by their learning and aptitude in deducing rules of secular and canon law acquired eminence as jurists — among them were 'Alī bin Abī Ṭālib, 'Umar ibn al-Khaṭṭāb, 'Abd Allāh ibn 'Umar, 'Abd Allāh ibn Mas'ūd and 'Abd Allāh ibn 'Abbās. In this period many of the Companions of the Prophet and the *tābi'ūn* (or followers) dispersed into the various Muslim provinces and many of them achieved fame, such as 'Abd Allāh ibn 'Abbās in Makka, Zayd ibn Thābit and 'Abd Allāh ibn 'Umar in Madīnah, 'Abd Allāh ibn Mas'ūd in Kūfa and 'Abd Allāh ibn 'Amr ibn al-'Āṣ in Egypt. The legal opinions of a Companion or follower residing in a particular province achieved prominence in that area.[15]

There were in some cases differences among the Companions in interpreting the law. These differences could arise from differences in interpreting the *Qur'ān* or the *ḥadīth,* differences in the standard demanded for accepting *ḥadīth* and differences of opinion on matters not directly covered by the *Qur'ān* or *ḥadīth.* The differences were however small as the Companions did not use their own personal opinion in deciding matters except when necessary. An opinion was expressed only when a matter arose which had to be decided and for which no solution could be found in the *Qur'ān* or *ḥadīth.* The Companions moreover preferred to discuss matters in order to arrive at agreement or *ijmā'.* The matters which required the use of independent judgment were comparatively few and it was only a few persons who felt themselves sufficiently qualified to give *fatwās* or rulings. No attempt was made in this period to collect or publish the *fatwās.*

The third period of Muslim law is the period of the 'Umayyad Khalīfate (from 41 A.H. to 132 A.H. or 661 A.D. to 750 A.D.). In this period the learned among the Muslims spread themselves in the various parts of the Muslim Empire. Persians, Syrians, Copts, Berbers and others flocked within the fold of Islām and intermarried with the 'Arabs, and there arose a number of learned men from the non-'Arab Muslims, among them Ḥasan al-Baṣrī. The twin cities of 'Irāq, Baṣra and Kūfa, became centres of the intellectual activity in the Muslim world. An effort was made

15. Maḥmaṣānī, *op.cit.,* p. 16f.

to collect and transmit the traditions of the Prophet, and in this also the non-'Arabs like 'Ikrimah, the freedman of 'Abd Allāh bin 'Abbās, Nāfi', the freedman of 'Abd Allāh bin 'Umar, Muḥammad bin Sīrīn, the freedman of Anas bin Mālik and 'Abd ar-Raḥmān ibn Hurmuz, the freedman of Abū Hurayrah, played an important part. During this period arose the difference between the *Shī'a* and the *Sunnīs*. The difference between the *Shī'a* and the *Sunnīs* originated with political matters and grew into a separation on doctrinal and legal points. The *Shī'a* repudiate entirely the authority of the *Jamā'at* (the universality of the people) to elect a spiritual chief and hold that the appointment to the *Imāmat* or spiritual lordship of the Muslim Empire had been indicated by the Prophet Muḥammad, as he had designated 'Alī, his cousin and son-in-law, to be his successor. The *Shī'a* therefore consider that 'Alī was wrongly deprived of the Khalīfate during the Khalīfates of Abū Bakr, 'Umar and 'Uthmān, and after the death of 'Alī, they refused to accept the authority of the Khalīfa Mu'āwīyah and his successors. The term *Shī'a* means 'faction' and is an abbreviation of the term *Shī'a 'Alī* or the party which attached itself to 'Alī after the death of the Prophet. The *Shī'a* accept the authority of the *Qur'ān* but differ from the *Sunnī* as regards the traditions and other sources of law. The *Shī'a* do not admit the genuineness of any tradition not received from the *Ahl al-Bayt* (the People of the House) consisting of the Prophet's son-in-law 'Alī, the Prophet's daughter and 'Alī's wife, Fāṭimah, and their descendants, and repudiate entirely the validity of all decisions not approved by their own spiritual *imāms*.

The *Shī'a* divided themselves into two groups after the death of the fourth Imām, 'Alī Zayn al-'Ābidīn, the son of Ḥusayn. One of his sons, Zayd bin 'Alī (*d.* A.H. 122) was accepted as Imām by certain people. Thus arose the *Zaydī* School. Zayd bin 'Alī is reputed to be the author of the *Majmū al-Fiqh,* which however has not come down to us in its original form. The majority of the *Shī'a,* the *Imāmiyyah* School, followed Imām Muḥammad al-Bāqir and after him Imām Ja'far aṣ-Ṣādiq (*d.* 148 A.H.) who is distinguished not merely as an Imām of the *Shī'a* but also as a man well versed in law and science. After its initial phase of a purely political legitimism, the *Shī'a* functioned for a time as a movement of socio-cultural protest and reform

within Islām and then went underground during the second and third centuries of the *Hijrah* and under suppressive pressure from without adopted subversive tactics.

In this period the *Khārijīs* also arose. At first they supported 'Alī, but later they became the deadly opponents of 'Alī and the *Shī'a,* as well as of the *Sunnīs.* In endeavouring to maintain the primitive, democratic principles of Islām, the puritanical *Khārijīs* caused strife and bloodshed in the first three Muslim centuries. Today they survive in the form of a subdivision, the *Ibāḍiyyah* School, which has adherents in Algeria, Tripoli and Zanzibar.

The *Sunnīs* at the outset mediated between the two extremes and strove to preserve the unity of the Community. Instead of the *Shī'a* legitimist claims they successfully insisted on the *ijmā'* of the community and its representative the *Khalīfa* who was in theory deposable. But against the *Khārijī* rebellion and in the face of the civil wars, the *Sunnīs* advocated the policy of political pacificism. The original impulse behind this doctrine was the doctrine that any law is better than lawlessness but as it developed the doctrine became one of submissiveness to the *de facto* authority.[16]

The earliest Muslim *qāḍīs,* officials of the Umayyad administration, by their decisions laid the foundations of what grew to become Muslim Law. They gave judgment according to their own discretion or opinion (*ra'y*) basing themselves on customary practice which incorporated administrative regulations and taking into account the letter and spirit of the Qur'ānic legislation and of the *ḥadīth* and the *Sunnah.* The work of the *qāḍīs* became more and more specialised and in the late Umayyad period (*c.* A.H. 100 — 130) appointments as a rule went to specialists, that is persons sufficiently interested in the right administration of justice to have given the subject serious thought in their spare time, either individually or in discussions with friends. The *qāḍīs* were recruited from among those pious persons whose interest in religion caused them to elaborate by individual reasoning a Muslim way of life in all its aspects and their main concern was to ascertain whether customary law conformed to the Qur'ānic law and Muslim principles generally. In their theoretical contemplations they considered possible objections that could be made to recognised prac-

16. Fazlur Rahman, "The Post-Formative Developments in Islām", p.3f.

tices from the religious and in particular from the ritualistic or ethical point of view and as a result endorsed, modified or rejected them. The customary legal practices were interpreted and modified in the light of religious and ethical ideas, based on Qur'ānic and Muslim principles, and incorporated into the body of duties incumbent on every Muslim. In doing this they achieved on a much wider scale what the Prophet had tried to do for the early Muslim Community of Madīnah. As a consequence the popular and administrative practice of the late Umayyad period was transformed into Muslim Law. As the groups of pious specialists grew in number and cohesion they developed in the first few decades of the second century of the *Hijrah* into what may be called the "ancient schools of law" although there was as yet no definite organization or any uniformity of doctrine in each school. The scholars or lawyers, members of the ancient schools of law, continued to be private individuals interested and knowledgeable in Muslim ideals as they ought to prevail. Overlying the common Muslim background there had developed in several widely separated centres of the Muslim world during the first century of the *Hijrah* local practices, those concerning details of ritual, for example, or special transactions adapted to local conditions. Apart from these variations in subject matter, the difficulties of communication made differences among the ancient schools of law unavoidable. These differences were however conditioned by geography rather than by any noticeable disagreement on principles or methods. The general attitude of all the ancient schools of law towards Umayyad popular practice and Umayyad administrative regulations was essentially the same whether they endorsed, modified or rejected the practice which they found. Apart from this common basic attitude there existed at the earliest stage of Muslim jurisprudence a considerable body of common doctrine. The most important ancient schools of law were those of Kūfa and of Baṣra in 'Irāq, of Madīnah and Makka in the Ḥijāz, and of Syria.[17]

Recent research has shown that it was the second half of the first century of the *Hijrah* (*circa* 670-720 A.D.) which was the most important period in the development of Muslim Law. During that period under the Umayyad *Khalīfas* of Damascus two important

17. Schacht, "Pre-Islamic Background and Early Development of Jurisprudence", p.38-41.

elements were blended into Muslim Law and jurisprudence, the Umayyad popular and administrative practice and regulations and the ideas and customs of the conquered territories. It was in 'Irāq about A.H. 100 that Muslim legal science started. The development of doctrine in Madīnah was secondary to and dependent upon that in 'Irāq. The influence exercised in early Muslim Law by the legal systems of the conquered territories was not restricted to legal customs and practices but extended to the field of legal concepts and principles and even to fundamental ideas of legal science such as the methods of systematic reasoning and the idea of the consensus of scholars.[18]

The ancient schools of law were distinguished not by personal allegiance to a master nor to any essential difference of doctrine but simply by their geographical distribution. Every capital of the Muslims was a seat of learning whose people followed the opinion of one of their countrymen in most of the teachings. The three great geographical divisions that appear in the ancient texts are 'Irāq, Ḥijāz and Syria. Within 'Irāq there was a further division into the scholars of Kūfa and of Baṣra. Although there are occasional references to the scholars of Baṣra in the ancient texts little is known of their doctrine in detail and the texts deal mainly with the scholars of Kūfa. In Ḥijāz there were also two centres, Madīnah and Makka, but the information on Madīnah is more detailed. The Syrian School is mentioned rarely, but there are texts dealing with the doctrine of its main representative Awzā'ī (*d.* A.H. 157). There was no essential difference between the Madīnese, the 'Irāqians and the Syrians in their general attitude both to Umayyad popular practice and to Umayyad administrative regulations and their several reactions to each particular problem were purely fortuitous, whether they endorsed, modified or rejected the practice which they found. Legal practice in the several parts of the Umayyad empire was not however uniform and this accounts for some of the original differences in doctrine between the ancient schools of law.[19]

The attitude of the ancient schools to legal traditions was essentially the same. Traditions from the Prophet were often

18. Schacht, "Foreign Elements in Ancient Islamic Law"; p. 13; Schacht, "Pre-Islamic Background and Early Development of Jurisprudence", p.28f.; Schacht, *The Origins of Muḥammadan Jurisprudence.*
19. Schacht, *The Origins of Muḥammadan Jurisprudence,* p. 6f.

superseded by traditions from the Companions or even disregarded. They were regularly interpreted in the light of traditions from the Companions on the assumption that the Companions knew the *Sunnah* of the Prophet best. Traditions might be accepted or rejected according to whether they agreed or disagreed with the established practice. The ancient schools of law shared the concept of *Sunnah* or living tradition as the ideal practice of the community and as expressed in the accepted doctrine of the school. It was not yet exclusively embodied in traditions from the Prophet, although the 'Irāqians had been the first to claim for it the authority of the Prophet by calling it the *"Sunnah* of the Prophet".[20]

The real basis of legal doctrine in the ancient schools was the living tradition of the school as expressed in the consensus of the scholars. The opinion of the scholars on what the right decision ought to be, preceded, systematically and also historically, its expression in traditions. The material on which the ancient lawyers started to work was the popular and administrative practice as they found it towards the end of the Umayyad period. It started with the exercise of personal opinion and of individual reasoning on the part of the earliest *qāḍīs* and lawyers. Individual reasoning in general was called *ra'y* or opinion. When it was directed towards achieving systematic consistency and guided by the parallel of an existing institution or decision, it was called *qiyās* or analogy. When it reflected the personal choice of the lawyer guided by his idea of appropriateness, it was called *istiḥsān* or preference. Individual reasoning, both in its arbitrary and in its systematically disciplined form, was freely used by the ancient schools, although it was not necessarily called by any of the terms mentioned. This process of systematization was accompanied by a tendency to Islāmize, that is to find a basis for the law in the principles laid down in the *Qur'ān* and the *Sunnah* of the Prophet. The tendency to Islāmize took various forms: it made the ancient lawyers criticise Umayyad popular and administrative practice, it made them pay attention to the details and implications of the rules laid down in the *Qur'ān,* it made them attribute the living tradition of their schools of law to the Prophet and his Companions, it made them take account of the rising tide of traditions ascribed to the

20. *Ibid.,* p. 21f.

Prophet and it provided them with part of the material considerations which entered into their systematic reasoning.[21]

The ancient schools of law shared not only a common attitude towards Umayyad practice and a considerable body of positive religious law, but also the essentials of legal theory. The central idea of this theory was that of the living tradition of the school, as represented by the constant doctrine of its authoritative representatives. This idea dominated the development of legal doctrine in the ancient schools of law during the whole of the second century of the *Hijrah*. It presented itself under two aspects: retrospective and contemporaneous. Retrospectively, it appeared as a *Sunnah* or practice (*'Amal*) or as a well established precedent or ancient practice. This practice partly reflected the actual custom of the local community but it also contained a theoretical or ideal element, so that it came to mean normative *Sunnah*, the usage as it ought to be. This ideal practice was found in the unanimous doctrine of the representative scholars of each centre, in the teaching of those whom the people of that region recognised as their leading specialists in religious law, whose opinion they accepted and to whose decision they submitted. The consensus of the scholars, representing the accepted doctrine in each generation, expressed the contemporaneous aspect of the living tradition of each school. Originally the consensus of scholars was anonymous, that is, it was the average opinion of the representatives of the school and not the individual doctrines of the most prominent scholars. The living tradition of the ancient schools maintained its essentially anonymous character well into the second half of the second century of the *Hijrah*. Nevertheless the idea of continuity inherent in the concept of *Sunnah* or idealized practice, together with the need of creating some kind of theoretical justification for what so far had been an instinctive reliance on the opinions of the majority led from the first decades of the second century onwards to the living tradition being projected backwards and to its being ascribed to some great figures of the past. The Kūfians were the first in attributing the doctrine of their school to the ancient Kūfian authority, Ibrāhīm Nakha'ī, although it would appear that the body of elementary legal doctrine attributed to him had very little to do with the few authentic opinions of the historical Ibrāhīm. It

21. *Ibid.*, p. 98f and 283f.

rather represented the stage of legal teaching achieved in the time of Ḥammād ibn Abī Sulaymān (*d.* A.H. 120). By a literary convention which found particular favour in 'Irāq it was customary for a scholar or author to put his own doctrine or work under the aegis of an ancient authority. The Madīnese followed suit and projected their own teaching back to a number of authorities who died in the last years of the first or in the very first years of the second century of the *Hijrah*. At a later period seven of them, the most prominent of whom was Sa'īd ibn Musayyib (*d.* A.H. 93 or 94), were chosen as representatives although the transmission of legal doctrine in Madīnah becomes historically ascertainable only at about the same time as in 'Irāq with Zuhrī (*d.* A.H. 124) and his younger contemporary, Rabī'a ibn Abī 'Abd ur-Raḥmān (*d. circa* A.H. 136). The process of going backwards for a theoretical foundation of Muslim religious law did not stop with the choosing of these relatively late authorities. At the same time at which the doctrine of the school of Kūfa was retrospectively attributed to Ibrāhīm Nakha'ī, that doctrine, and the local practice which in the last resort was its basis, was directly connected with the very beginnings of Islām in Kūfa, beginnings associated with Ibn Mas'ūd, a Companion of the Prophet. The corresponding original authority of the Makkans was Ibn 'Abbās, another Companion of the Prophet. The two main authorities of the Madīnese among the Companions of the Prophet were the Khalīfa 'Umar and his son Ibn 'Umar. Nor did the search for a theoretical foundation for the doctrine of the ancient schools of law stop at the Companions of the Prophet. There remained a further step — a step taken in 'Irāq where not later than the very first years of the second century of the *Hijrah* the practice of the local community and the doctrine of its scholars were called the 'Sunnah of the Prophet'. This step put the ideal practice of each community of Muslims directly under the authority of the Prophet. It expressed the belief that the Prophet had by his words or actions in fact originated or approved that practice. This originally 'Irāqī concept was subsequently taken over by the Syrians;[22] their idea of living tradition came to be the uninterrupted practice of the Muslims beginning with the Prophet, maintained by the first *Khalīfa* and by the later rulers and verified by the scholars.

22. Schacht, "Pre-Islamic Background and Early Development of Jurisprudence", p.42-45.

It was not long before various movements arose in opposition to the opinions held by the majorities in the ancient schools of law. In Kūfa for example, opinions were put forward in opposition to the traditional doctrine and the authority of the Khalīfa 'Alī was invoked as authority for them. In contrast to the opposition in Kūfa, the opposition in Madīnah reflected the activities of the traditionists. The movement of the traditionists was the most important single event in the history of Muslim Law in the second century of the *Hijrah* and was the natural outcome and continuation of the movement of religiously and ethically inspired opposition to the ancient schools of law. The main thesis of the traditionists was that formal traditions deriving from the Prophet superseded the living tradition of the school. The traditionists were not confined to Madīnah but existed in the other centres of Islām where they formed groups in opposition to, but nevertheless in contact with, the local schools of law. The traditionists disliked all legal reasoning and personal opinion and their general tendency was a certain inclination towards strictness and rigidity. The ancient schools of law, Madīnese as well as 'Irāqī, at first offered strong resistance to the disturbing element represented by the traditions from the Prophet. But it was obvious that once the authority of the Prophet had been invoked, the thesis of the traditionists consciously formulated was certain of success and the ancient schools of law had no real defence against the rising tide of traditions from the Prophet. The ancient schools had to pay lip service to the principle of the traditionists but they accepted traditions from the Prophet only as far as they agreed with their own living tradition or idealized practice.[23]

The endeavour to Islāmize the law was accompanied by a parallel and contemporary tendency to reason and systematise. Reasoning was inherent in Muslim Law from its very beginnings. It started with the exercise of personal opinion and of individual judgment on the part of the earliest specialists and *qāḍīs*. This was accompanied by a rudimentary analogy and the striving after consistency. Both elements were found intimately connected in the earliest period. This individual reasoning, whether completely independent and personal or inspired by an effort for consistency, started from vague beginnings, without direction or method, but it

23. *Ibid.*, p.45-48.

moved towards an increasingly strict discipline. The results of this early systematic reasoning were not infrequently expressed in the form of legal puzzles or in the form of legal maxims, which became a favourite mode of expressing legal doctrine in the 'Irāq and in the Ḥijāz of the first half of the second century of the *Hijrah*. The element of personal discretion and individual opinion in Muslim Law was prior to the growth of traditions, particularly of traditions from the Prophet and it was due only to the success of the traditionists that most of these originally independent decisions of scholars were put into the form of traditions.[24]

The fourth period in the development of Muslim law is the period from 132 A.H. to 350 A.H. (750 A.D.—961 A.D.), or the period of the great jurists of the *Sunnī* School of law in whose names the schools of law were subsequently established. The Umayyads of Damascus were overthrown by the 'Abbāsids in A.H. 132. The early 'Abbāsids continued and reinforced the Islāmizing trend which had become more and more noticeable under the later Umayyads. The office of *Qāḍī* was in this period permanently connected with the *Sharī'ah* or sacred law. It became a fixed rule that a *qāḍī* had to be a specialist in the *Sharī'ah*. He was no more the legal secretary of the governor but was normally appointed from the centre of the empire. The centralising tendency of the early 'Abbāsids also led to the creation of the office of *Chief Qāḍī*. The Qāḍī Abū Yūsuf was the first to receive this title and the Khalīfa Hārūn not only solicited his advice on financial policy and similar questions but consulted him on the appointment of all *qāḍīs* in the empire.[25]

24. *Ibid.*, p.48-50.

25. Under the Umayyads the administration of justice had been left to the provincial governors and their *qāḍīs*. Under the 'Abbāsids however, when the main features of the *Sharī'ah* had already been definitely established, when Muslim Law had come to be recognised, in theory at least, as the only legitimate norm of behaviour for Muslims, when the *qāḍīs* bound to apply this law were being appointed under the direct authority of the *Khalīfa*, the *Khalīfa* himself had to be incorporated into the system. The solution that was adopted was to endow the *Khalīfa* with the attributes of a religious scholar and lawyer, to bind him to the sacred law in the same way in which the *qāḍīs* were bound to it and to give him the same right to the exercise of personal opinion as was customary in the ancient schools of law. According to this doctrine, the *Khalīfa*, though otherwise the absolute Chief of the Muslim Community, had not the right to legislate but only to make administrative regulations within the limits laid down by the sacred law. The later *Khalīfas* and other secular rulers often had occasion

In the third and fourth quarters of the first century of the *Hijrah*, the living *Sunnah* had expanded vastly in different regions of the Muslim Empire through the process of interpretation in the interests of actual practice, and as the differences in law and legal practice widened, the *ḥadīth* began to develop into a formal discipline. The activities of the *ḥadīth-transmitters* was largely independent of and in some cases developed even in opposition to the practice of the lawyers and the judges. Whereas the lawyers based their legal work on the living *Sunnah* and interpreted their materials freely through their personal judgment in order to elaborate law, the *ḥadīth-transmitters* saw their task as consisting of reporting with the purpose of promoting legal fixity and permanence. Although the exact relationship between the lawyers and the transmitters of the *ḥadīth* in the earliest period is obscure, it would appear that these two represented in general the two aspects of a tension between legal growth and legal permanence; the one interested in creating legal materials, the other seeking a neat methodology or framework that would give stability and consistency to the legal system. Due to a natural paucity of Prophetic *ḥadīth* in the early stages, the majority of the *ḥadīth* did not go back to the Prophet but to previous generations. In the extant work of the second century A.H., most of the legal and even moral traditions are not from the Prophet but are traced back to the Companions, the successors and to the third generation. But as time passed the *ḥadīth* movement tended to project the *ḥadīth* back to the person of the Prophet. The legal schools whose basis was the living and expanding *Sunnah* rather than a body of fixed opinion attributed to the Prophet naturally resisted this development.[26]

The early 'Abbāsid *Khalīfas* were patrons of learning, and their support and encouragement gave rise to the growth and development of learning and culture, notably in Kūfa and Baghdād. The scholars did not confine their search for knowledge to Islāmic learning but also sought to learn from foreign cultures, notably from Greek philosophy. There was comparative freedom of thought and

to legislate but they called it administration, and they maintained the position that their regulations served only to apply, to supplement and to enforce the *Sharī'ah* and were well within the competence of the political authority.

26. Fazlur Rahman, "Sunnah and Ḥadīth", p. 5.

opinion and more scope for differences of views and opinions. There was also a greater tendency to deal with matters in the abstract. In law for example the scholars began to interest themselves in the analysis of legal concepts of rights and duties and of the sources of law. These various influences worked to give rise to the different schools of Muslim law. Iqbāl says:

> . . . from about the middle of the first century up to the beginning of the fourth not less than nineteen schools of law and legal opinion appeared in Islām. This fact alone is sufficient to show how incessantly our early doctors of law worked in order to meet the necessities of a growing civilization. With the expansion of conquest and the consequent widening of the outlook of Islām these early legists had to take a wider view of things, and to study local conditions of life and habits of new peoples that came within the fold of Islām.[27]

The literary period in Muslim Law begins about the year 150 A.H. and from then onwards the development of technical legal thought can be followed step by step from scholar to scholar. It tended first to become more and more perfected until it reached the zenith of its development at the end of the second century A.H. Secondly, there was an increasing dependence on traditions as a greater number of authoritative traditions came to be known. Thirdly, considerations of a religious and ethical kind, which represented one aspect of the process of Islāmizing the legal subject-matter, tended to permeate systematic reasoning and both tendencies became mixed in the result. All three tendencies culminated in the teachings of Ash-Shāfi'ī. The opinions of the Syrian, Awzā'ī (*d.* A.H. 157), for instance, represent the oldest solutions adopted by Islāmic jurisprudence, whether he maintained the current practice or regulated it or Islāmized it or gave a simple and natural decision as yet untouched by systematic refinements. His systematic reasoning though appreciable in extent was generally rudimentary and his legal thought showed as a rule a rigid formalism. The reasoning of the Madīnese Mālik (*d.* A.H. 179) on the other hand depended more on the practice, the living tradition and the consensus of scholars, rather than on systematic thought. The accepted doctrine of the Madīnese school, which Mālik aimed to set forth, was itself to a great extent founded on the individual reasoning of the school's representatives. In combining the use of reasoning with dependence on the living tradition, Mālik seems

27. Iqbāl, *Reconstruction of Religious Thought in Islām*, p. 165.

typical of the Madīnese. In 'Irāq the discussion of technical legal problems started slightly earlier, in the time of Ibn Abī Layla, a *Qāḍī* of Kūfa (*d.* A.H. 148). His doctrine showed a considerable amount of technical legal thought but it was generally of a primitive kind. In a great number of cases, Ibn Abī Layla's doctrine represented natural and practical common-sense and rough and ready decisions. This practical common-sense reasoning of his often took both practical and Muslim ethical considerations into account.[28] Connected with these considerations, was Ibn Abī Layla's regard for actual practice, a tendency enforced by his being a *Qāḍī*. His loose and imperfect method was coupled at times with a rigid formalism.

With respect to 'Irāqī legal reasoning as represented by Ibn Abī Layla, Abū Ḥanīfah (*d.* A.H. 150) seems to have played the part of a theoretical systematiser who achieved considerable progress in technical legal thought. In Abū Ḥanīfah's doctrine, systematic reasoning has become normal. The emphasis shifts from the practical aspects of legal reasoning — Islāmizing, common-sense decisions and other considerations — to the technical and formal qualities of legal thought.

Abū Ḥanīfah an-Nu'mān ibn Thābit, commonly known as Imām Abū Ḥanīfah, was born in the year A.H. 81 (A.D. 700) during the time of the Umayyad Khalīfa, 'Abd al-Mālik, (A.H. 65-86 or 684-705 A.D.) and died at an advanced age in A.H. 150 (A.D. 767) eighteen years after the 'Abbāsids came into power. He first studied scholastic divinity but soon abandoned it in favour of jurisprudence. He attended the lectures of Ja'far aṣ-Ṣādiq, a descendant of the Prophet, who was noted for his learning and piety and is regarded as the sixth *Imām* of the *Shī'a* School, and of Ḥammād ibn Abī Sulaymān (*d.* A.H. 120-737 A.D.), a disciple of Ibrāhīm an-Nakha'ī (*d.* A.H. 95 or 96, 713-714 A.D.) a noted jurist of Kūfa. Abū Ḥanīfah was endowed with talents of an exceptional nature and had the true lawyer's gift of deducing nice distinctions. He possessed remarkable powers of reasoning and deduction which, combined with the resources of a retentive memory and a clear understanding, brought him into rapid prominence as a master of jurisprudence. Abū Ḥanīfah played

28. Schacht, "Pre-Islamic Background and Early Development of Jurisprudence", p.50-52.

the role of a theoretical systemiser who achieved considerable progress in technical legal thought. He relied on his personal judgment (*ra'y*) and conclusions by analogy (*qiyās*) and his School subsequently came to be known as the Upholders of Private Opinion (*Ahl ar-Ra'y*). It would not, however, be correct to suppose that Abū Ḥanīfah lacked a sufficient knowledge of the traditions or that he did not regard them as a legitimate source of law. As Ibn Khaldūn (*d.* 808 A.H./1405 A.D.) said:

> ...some prejudiced men say that some of the *Imāms* had a scanty knowledge of the traditions, and that is the reason why they have respected so few of them. This cannot be true of the great *Imāms*, because the law is based on the *Qur'ān* and the Traditions and it is a duty incumbent on them to seek the traditions. But some of them accept only a small number of traditions, because of the severity of the tests they apply.[29]

The basis of Imām Abū Ḥanīfah's analogical reasoning was the *Qur'ān;* he accepted traditions only when he was fully satisfied as to their authenticity and as the great collectors of traditions had not yet commenced the work of collection and as Kūfa, his centre of activity, was not a great centre of that branch of learning, Imām Abū Ḥanīfah accepted very few traditions and more often resorted to the *Qur'ān* for his juristic views. Later on when traditions were collected and sifted, the adherents of the *Ḥanafī* School made more use of traditions. Abū Ḥanīfah like all the early jurists of Islām relied on the *Qur'ān* and the *Sunnah* as the primary sources of the law.

The methods and opinions which later became characteristic of the *Ḥanafī* School were not introduced or formulated by him. Thus as regards the two basic conceptions of *ijmā'* and *qiyās* it is recorded that it was the *Ḥanafī* Scholars, who after his death, deduced those juristic rules from what they had collected of his opinions on different issues. Professor Abū Zahrah in his biography of Imām Abū Ḥanīfah said:

> We have gone to all the references relating to the biography of Abū Ḥanīfah in order to find something that would testify to what his followers ascribe to him concerning the implementation of *al-ijmā'*.

29. Ibn Khaldūn, *Muqaddimah,* Ibn Khaldūn's contention that Abū Ḥanīfah had accepted only seventeen sayings of the Prophet is not correct. Khawārizmī (*d.* 655 A.H.) compiled in the volume entitled *Jāmi' Masānīd al-Imām,* fifteen works of traditions carrying the authority of Abū Ḥanīfah – see Maḥmaṣānī *op.cit.,* p.20.

We could find only two statements: one by al-Makkī to the effect that Abū Ḥanīfah was a strict follower of the common usage of his fellow citizens and the second by Sahl ibn Muzāhim "The course of Abū Ḥanīfah was (1) the authoritativeness of authentic texts (2) the strong re-action to all indecency and (3) the consideration of human dealings in order to see what is best for their benefit and stability".[30]

The *Ḥanafī* School was the first to give prominence to the doctrine of *qiyās,* or analogical deduction, though as a principle of law it was undoubtedly in practical operation long before. The *Ḥanafī* jurists, however, assigned a distinctive name and prominence to the principle by which in Muslim jurisprudence the theory of law is modified in its application to particular facts, calling it *istiḥsān* or juristic preference, which in many points bears a resemblance to the doctrine of equity in English law. *Istiḥsān* technically denotes the abandonment of the opinion to which reasoning by analogy (*qiyās*) would lead in favour of a different opinion supported by stronger evidence. Such a departure from *qiyās* may be justified by evidence based on the traditions or *ijmā'* or necessity and in such cases would be allowed by all the *Sunni* Schools of law. It may happen, however, that the law deduced by analogy fails to commend itself to the jurist, owing to its narrowness and inadaptability to the habits and usages of the people and being likely to cause hardships and inconveniences. In that event, also according to the *Ḥanafīs,* a jurist is at liberty to refuse to adopt the law to which analogy points and to accept instead a rule which in his opinion would better advance the welfare of men and the interests of justice.

The *Ḥanafī* jurists also extended the doctrine of *ijmā'* (consensus of opinion). Some other jurists were of opinion that the validity of *ijmā'* as a source of law should be confined to the Companions of the Prophet and others would extend it to their successors but no further. The *Ḥanafī* jurists affirmed its validity for every age. They also recognised the authority of local customs and usages as guiding the application of law. However, the *Qur'ān* and the traditions of the Prophet are with them, as well as with all other jurists, the primary sources, *ijmā'* coming

30. Abū Zahrah, *Abū Ḥanīfah,* p. 309.

next to them and then *qiyās, istiḥsān,* and local customs which are regarded merely as secondary sources.[31]

In the work of Abū Ḥanīfah in the sphere of jurisprudence he was assisted by many able disciples. The way he preached was more a method of learning. Whenever a problem was brought to him, he would place it before his students and then join them in searching for its solution. Each one was free to present his opinion, which sometimes contradicted that of Abū Ḥanīfah. This sometimes led to heated discussions and even shouting. Not until the issue became clear before them did Abū Ḥanīfah present the resumé of this collective study and suggest what he himself thought on the subject. The fact that Abū Ḥanīfah continuously applied this method of learning until his death made him always a student whose knowledge continued to grow and whose thought flourished.[32]

Abū Ḥanīfah also instituted a committee consisting of forty men from among his principal disciples for the codification of the laws. The committee would discuss any practical or theoretical question that arose or suggested itself, and the conclusions which they agreed upon after a full and free debate were duly recorded. It took thirty years for the code to be completed, but each part was issued and circulated as it was published. The entire code has unfortunately been lost.[33]

The two chief disciples of Imām Abū Ḥanīfah were Abū Yūsuf (*d.* A.H. 182) and Muḥammad ash-Shaybānī (*d.* 189 A.H. 804 A.D.) Abū Yūsuf who for a long time acted as the Chief Qāḍī of Baghdād enjoyed the confidence of his teacher and was held by him in great esteem for his talents, learning and knowledge of the world and many a principle of practical application in *Ḥanafī* law may be traced to his influence. Muḥammad ash-Shaybānī was a copious writer. He compiled the application of the principles laid down by his master into a *corpus juris* —the *al-Jāmi' aṣ-Ṣaghīr* — which served as the basis for commentaries on the application of the law, and constitutes the most authoritative source-book for the *Ḥanafī* doctrines. Shaybānī depended more on traditions than did Abū Yūsuf. This was shown not only

31. 'Abdur Rahim, *op.cit.*, p. 23f.
32. Abū Zahrah, *op.cit.*, p. 76.
33. 'Abdur Rahim, *op.cit.*, p.26.

in changes of doctrine under the influence of traditions but in his habit of duplicating systematic reasoning by arguments from the traditions, including Madīnese traditions. Shaybānī made use of systematic reasoning by *qiyās* and he was the great systematiser of the Kūfian 'Irāqi doctrine. He was a prolific writer and his voluminous works became the rallying point of the *Ḥanafī* school which emerged from the ancient Kūfian 'Irāqian School.[34]

The books which Muḥammad ash-Shaybānī compiled were of two types. The first were called *Zāhirāt ar-Rawiyyah* or books of primary questions and were transmitted by reliable men on his authority. The second type of books were written on his authority by less reliable authorities and were called *Al-Nawādir* (*Rare Problems*). There are six books of the first type, *al-Mabsūṭ, al-Jāmi' al-Kabīr, al-Jāmi' aṣ-Ṣaghīr, as-Siyar al-Kabīr, as-Siyar aṣ-Ṣaghīr* and *al-Ziyādāt* and these have been collected in one volume known as *Al-Kāfī* by Al-Marwazī (*d.* 344 A.H.).[35]

The second great jurist of this period was Mālik ibn Anas who was born between A.H. 90 and 97 in Madīnah, where he studied and taught and did all his work. He is looked upon as the highest authority on the *Sunnah* and in formulating his School of law he leaned more upon traditions and the usages of the Prophet and the precedents established by the Companions of the Prophet. Being in a better position than Abū Ḥanīfah to be acquainted with the laws as laid down by the Companions and their successors, he embodied them more largely in his system. He attached weight to the usages and customs of Madīnah, relying on the presumption that they must have been transmitted from the time of the Prophet. It was only when no solution was to be found in the *Qur'ān* and the *Sunnah* that he relied on the exercise of judgment. Imām Mālik also recognised considerations of the public good (*istiṣlāḥ*) as a source of law but it does not appear that this principle was much utilized by the *Mālikī* jurists. The great teachers of the *Mālikī* School were almost without exception judges and practising lawyers and the prevailing tone of their work is, therefore, practical. They based their doctrines on custom, in their case, the custom of Madīnah, more than any

34. *Ibid.*, p. 27; Schacht, "Pre-Islamic Background and Early Development of Jurisprudence", p. 53.
35. Maḥmaṣānī, *op.cit.*, p. 22.

of the other schools. Imām Mālik died in 179 A.H. (A.D. 795), twenty-nine years after Imām Abū Ḥanīfah. His *al-Muwaṭṭa'* — a small collection of traditions arranged under legal titles with his own views and decisions thereon — is probably the oldest work of Muslim law still extant.[36]

The third great jurist of this period was Imām Muḥammad bin Idrīs ash-Shāfi'ī. He was born in Ghazza, in A.H. 150 (A.D. 767) being descended from 'Abd al-Muṭṭalib, the grandfather of the Prophet. He attended lectures on law and traditions at Madīnah under Imām Mālik ibn Anas and at Baghdād under Muḥammad, the disciple of Imām Abū Ḥanīfah. At an early age he showed proof of great talents and while still a youth delivered lectures in jurisprudence. He conceived the idea of harmonizing the two schools of Abū Ḥanīfah and Mālik but succeeded instead in founding a distinct school of law. He taught for a time in Baghdād and later in Egypt where he died in A.H. 204 (A.D. 820). Imām Shāfi'ī was noted for his balance of judgment and moderation of view and though reckoned among the upholders of tradition, he examined the traditions more critically and made more use of analogy than Imām Mālik. He allowed greater scope to *ijmā'* (consensus of opinion) than Imām Mālik. Imām Shāfi'ī objected to the principle of *istiḥsān* (juristic preference) introduced by Abū Ḥanīfah, but he himself introduced the principle of *istiṣḥāb*. According to this principle, when the existence of a thing has been established by evidence, even though later some doubt should arise as to its continuance in existence, it is still considered to exist. Thus a practice once proved to be widespread may be presumed to be both ancient and continuing. It is called *istiṣḥāb al-ḥāl,* if the presumption is that what is proved in the past still continues, and *istiṣḥāb al-māḍī,* if the converse is the case. The principle of *istiṣḥāb* is a limited one. It only applies to cases where there is no evidence obtainable, and at best establishes the continuance of a fact in existence, which was already proved to have existed. The principle of *istiṣḥāb* is admitted by the *Ḥanafī* School but only to refute an assertion, that is as an instrument of defence, and not to establish a new claim, but the *Shāfi'ī* School allows it to be used for both purposes. In practice Imām Shāfi'ī preserved more faithfully

36. 'Abdur Rahim, *op.cit.*, p. 27f.

the spirit of the traditions than Imām Abū Ḥanīfah and used them more extensively.[37]

In his *Risālah* he says:—

> ...God has not permitted any person since the Prophet's time to give an opinion except on the strength of established [legal] knowledge. [Legal] knowledge [after the Prophet's death] includes the Qur'ān, the *sunna*, consensus, narrative, and anology based on these [texts], as I have already explained.
>
> Nobody should apply analogy unless he is competent to do so through his knowledge of the commands of the Book of God: its prescribed duties and its ethical discipline, its abrogating and abrogated [communications], its general and particular [rules], and its [right] guidance. Its [ambiguous] communications should be interpreted by the *sunna* of the Prophet; if no *sunna* is found, then by the consensus of the Muslims; if no consensus is possible, then by analogical deduction.
>
> No one is competent to apply analogy unless he is conversant with the established *sunna*, the opinions of [his] predecessors, the agreement (consensus) and disagreement of the people, and has [adequate] knowledge of the Arabic tongue.[38]

Imām Shāfi'ī is regarded as the creator of the classical theory of Muslim jurisprudence. He may be described as an eclectic who acted as an intermediary between independent legal investigation and the traditionalism of his time. Not only did he work through the legal material available but in his *Risālah* he has investigated the principles and methods of jurisprudence. He emphasized the necessity of basing the *Sunnah* on traditions from the Prophet and indirectly gave an impetus to the collection and sifting of such traditions. Imām Shāfi'ī did not, however, reject traditions from the Companions of the Prophet. He relied on them when no traditions from the Prophet were available. The principal books written by Imām Shāfi'ī were the *Kitāb al-Umm*, the *Kitāb al-Ḥujjah* and the *Risālah al-Uṣūl*. The doctrines of Imām Shāfi'ī were developed in two phases or periods, the first the older period, when Imām Shāfi'ī was in 'Irāq, and the other the newer period when Imām Shāfi'ī was in Egypt. He changed his opinion on many issues after moving from 'Irāq to Egypt. When asked "Why have you changed your mind?", he answered "That

37. For a judicial exposition of the views of Imām Ash-Shāfi'ī see the case of *Khursid Jan* v. *Fazal Dad*, P.L.D., 1964 Lahore 558.
38. *Shāfi'ī's Risālah, op.cit.*, p. 306.

was according to what we saw and this is according to what we see."[39]

Among the transmitters of the older teachings of Imām Shāfi'ī are al-Ḥasan bin Muḥammad aṣ-Ṣabāh az-Zafarānī (*d.* 260 A.H. — 873 A.D.); and Abū 'Alī Ḥusayn bin 'Alī al-Karābīsī (*d.* 245 A.H. or 859 A.D.) while among the transmitters of the newer teachings of Imām Shāfi'ī are Abū Ya'qūb Yūsuf bin Yahyā al-Buwayṭī(*d.* 231 A.H. — 845 A.D.), Abū Ibrāhīm Ismā'īl bin Yaḥyā al-Muzanī (*d.* 264 A.H. — 877 A.D.), ar-Rabī' bin Sulaymān bin 'Abd al-Jabbār al-Murādī (*d.* 270 A.H. — 883 A.D.), Ḥarmalah bin Yaḥyā bin 'Abd Allāh at-Tujaybī (*d.* 243 A.H. — 857 A.D.) and Yūnus bin 'Abd al-A'lā aṣ-Ṣadafī (*d.* 264 A.H. — 877 A.D.).

Imam Shāfi'ī's legal theory and his positive legal doctrine represent a systematic innovation, based on formal traditions from the Prophet as against the living tradition of the ancient schools of law. When Shāfi'ī wrote, the process of Islāmizing the law, of impregnating it with religious and ethical ideas had been essentially completed. Shāfi'ī's legal thought was hardly ever influenced by material considerations and considerations of a religious and ethical kind, considerations which played an important role in the doctrine of Ibn Abī Layla, Abū Ḥanīfah and Mālik. On the other hand, Shāfi'īs fundamental dependence on formal traditions from the Prophet implied a different formal way of Islāmizing the legal doctrine. Shāfi'ī insisted that nothing can override the authority of the Prophet, even if it be attested to only by an isolated tradition, and that every well authenticated tradition going back to the Prophet has precedence over the opinions of his Companions, the successors and later authorities. He said:

> Every tradition related by reliable persons as going back to the Prophet, is authoritative and can be rejected only if another authoritative tradition from the Prophet contradicts it; if it is a case of repeal of a former ordinance by a later, the later is accepted; if nothing is known about a repeal, the more reliable of the two traditions is to be followed; if both are equally reliable, the one more in keeping with the *Qur'ān* and the remaining undisputed parts of the *Sunnah* of the Prophet is to be chosen; traditions from other persons are of no account in the face of a tradition from the Prophet, whether they confirm or contradict it, if other persons had been

39. 'Abdur Rahim, *op.cit.*, p. 28; Aghnides, *op.cit.*, p. 142f; Ramadan, *op.cit.*, p. 82.

aware of the tradition from the Prophet, they would have followed it.[40]

The classical theory of Muslim Law with its dependence on the four principal sources, the *Qur'ān*, the *ḥadīth* of the Prophet, the consensus of the community and the method of analogy, was in its essentials created by Shāfi'ī. Shāfi'ī recognised in principle only strict analogical and systematic reasoning to the exclusion of arbitrary opinions and discretionary decisions such as had been customary among his predecessors. As a general safeguard against arbitrariness Shāfi'ī insisted that analogy must start from the outward and obvious meaning of the texts on which it was based. This is one of the important innovations by which his legal theory became utterly different from that of the ancient schools. His legal theory was much more logical and formally consistent than that of his predecessors. It was based on the thesis that nothing could override the authority of a formal tradition from the Prophet. In accepting this, Shāfi'ī cut himself off from the natural and continuous development of doctrine in the ancient schools. For him the *Sunnah* was no longer the approved practice as recognised by the representative scholars, but was identical with the content of formal traditions from the Prophet even though such a tradition be transmitted by only one person. This new idea of the *Sunnah* as embodied in formal traditions from the Prophet, disposed of the concept of living tradition of the ancient schools, even when the living tradition was loosely called the "Sunnah of the Prophet".[41]

Shāfi'ī's notion of *ijmā'* was radically different from that of the early schools. He argued that the claims of the representatives of the older schools to have arrived at a state of general *ijmā'* was quite unacceptable; that apart from certain basic facts, like the number of prayers for example, in fact no *ijmā'* but difference prevailed on almost all issues and that no formal council of Muslim representatives to reach agreements had ever been convened nor was such a step feasible. His idea of *ijmā'* was that of a formal and a total one; he demanded an agreement which left no room for disagreement. He was undoubtedly responding to the exigencies of the time and represented the trend that had long set in, working towards equilibrium and uniformity. But the notion of

40. Schacht, *The Origins of Muḥammadan Jurisprudence*, p. 12.
41. *Ibid.*, p. 1 and 125; Schacht, "Pre-Islamic Background and Early Development of Jurisprudence", p. 54-55.

ijmā' exhibited by the early schools was very different. For them *ijmā'* was not an imposed or manufactured static fact but an ongoing democratic process; it was not a formal state but an informal, natural growth which at each step tolerated, and indeed demanded, fresh and new thought and therefore must live not only with but also upon a certain amount of disagreement. The early jurists contended that *ijtihād* must be exercised and progressively the area of agreement would widen; the remaining questions must be considered through fresh *ijtihād* or *qiyās* so that a new *ijmā'* could be arrived at. It was this living and organic relationship between *ijtihād* and *ijmā'* that was severed in the successful formulation of Shāfi'ī. The place of the living *Sunnah-Ijtihād-Ijmā'* he gave to the Prophetic Sunnah which for him did not serve as a general directive but as something absolutely literal and specific and whose only vehicle was the transmission of *ḥadīth*. *Ijmā'* instead of being a process and something forward looking — coming at the end of free *ijtihād* — came to be something static and backward looking. It is that which instead of having to be accomplished is already accomplished in the past. Shāfi'ī's genius provided a mechanism that gave stability to the medieval socio-religious fabric but at the cost in the long run of creativity and originality.[42]

In theory Shāfi'ī distinguished between the argument taken from traditions and the result of systematic thought but in his actual reasoning both aspects were closely interwoven; he showed himself tradition bound and systematic at the same time, and this new synthesis might be considered typical of his legal thought.

Notwithstanding the evidence of its gradual development and traces of the influence of earlier doctrine, Shāfi'ī's legal theory was an exceedingly consistent system and superior to the doctrines of the ancient schools. It was the achievement of a powerful individual mind, and at the same time the logical outcome of a process which started when traditions from the Prophet were first adduced as arguments in law. The development of legal theory was dominated by the struggle between two concepts: that of the common doctrine of the community (the living Sunnah) and that of the authority of traditions from the Prophet. The doctrine of the ancient schools represented an uneasy compromise; Shāfi'ī vindi-

42. Fazlur Rahman, "Sunnah, Ijtihād and Ijmā' in the Early Period", p. 19.

cated the thesis of the traditions; and the classical legal theory extended the consensus to the traditionist principle. The success of the traditionists and of Shāfi'ī meant however that there was little scope left for the continuing interpretation of the *Qur'ān* and the living *Sunnah* through the mechanism of the *Qiyās-Ijmā'* process. Consequently the development of the law was somewhat retarded and it was no longer as easy to adjust the concepts of law and doctrine to the ever-changing social and economic conditions.[43]

The fourth great jurist of this period was Aḥmad bin Muḥammad bin Ḥanbal, known as Imām Ḥanbal. He was born in Baghdād in A.H. 164 (A.D. 780) and studied under different masters including Imām Shāfi'ī. He appeared to have been more learned in the traditions than in the science of law. He strictly adhered to the traditions, his interpretation of which was both literal and unbending and he allowed but a narrow scope to the doctrines of *ijmā'* and *qiyās*. Imām Ḥanbal died in A.H. 241 (A.D. 855). Ibn Ḥanbal did not write any book on jurisprudence. He left only a compilation of authenticated tradition. He explicitly stated:

> I am not a man of dogmatic theology. Rather, I am against it. Only what is in the Book and the *Sunnah*, or what has been authentically related by the Companions of the Prophet may be considered.

The legal doctrine as it had been elaborated by Shāfi'ī had not satisfied the uncompromising traditionists. The traditionists preferred not to use any human reasoning in law and chose as much as possible to base every single item in their doctrine on a tradition from the Prophet preferring even a weak tradition to a strong analogy. The traditionists were in practice unable to do without reasoning but the reasoning they used was concerned with moral issues and differed widely from the systematic legal thought which had been brought to technical perfection by Shāfi'ī and which the traditionists disliked. This became apparent in the legal works containing the doctrines of Ibn Ḥanbal. For some time Ibn Ḥanbal and his adherents were regarded not as real lawyers but as mere specialists in traditions. The traditionists of the third century of the *Hijrah* do not seem to have shown much interest in

43. Schacht, "Pre-Islamic Background and Early Development of Jurisprudence", p. 54f.

legal theory except for the general ideas of the authority of traditions, but when the scholars of the *Ḥanbalī* school came to elaborate a complete system of doctrine they too had to adopt the classical legal theory which was based not on traditions but on consensus and recognised analogical reasoning. It was left to the great independent *Ḥanbalī* thinker, Ibn Taymiyyah to reject the all-embracing function of consensus in law and to affirm the necessity of analogical reasoning of an improved kind.[44]

The age of the four *Imāms* produced other teachers who had for some time a considerable following of their own. Among them were Ibn Shibrīmah (*d.* 144 A.H.), Ibn Abī Layla (*d.* 148 A.H.), al-Awzā'ī (*d.* 157 A.H.), Sufyān ath-Thawrī (*d.* 161 A.H.), al-Layth ibn Sa'd (*d.* 175 A.H.), Dawūd ibn Khalaf (*d.* 270 A.H.), Abū Ja'far aṭ-Ṭabarī (*d.* 310 A.H.) and many others, all of whom contributed in almost every sphere of legal speculation and all of whom have been quoted either in praise or in criticism by the other schools of law. Dawūd ibn Khalaf's work was in fact a kind of reaction to what he considered to be mere speculative innovations fabricated upon juristic rules without any authority in the *Qur'ān* or the *Sunnah*. It was the principle of the *Ẓāhirī* school to rely exclusively on the literal meaning (*ẓāhir*) of the *Qur'ān* and the traditions from the Prophet and to reject as contrary to religion not only the free exercise of personal opinion which had been customary before Shāfi'ī but also the use of analogical and systematic reasoning which Shāfi'ī had retained. It was not so much abstract thought itself which the *Ẓāhirīs* rejected but the technical methods of legal reasoning which they considered subjective and arbitrary. In the last resort they too were unable to do without deductions and conclusions but they tried to represent them as implied in the texts themselves. Another axiom of the *Ẓāhirīs* is that the only legally valid consensus was the consensus of the Companions of the Prophet. The *Ẓāhirī* School produced one of the most brilliant Muslim jurists in Ibn Ḥazm, more than three centuries after the death of Dawūd ibn Khalaf but it did not acquire a large following. Most of the other schools were overwhelmed by the stronger influences of the four *Sunnī* schools, but their disappearance does not imply

44. Ramadan, *op.cit.*, p. 83; Schacht, "The Schools of Law and Later Developments of Jurisprudence", p.67.

their ineffectiveness, whether in the making of Muslim jurisprudence or in setting its trends.

In the early 'Abbāsid period the ancient schools of law, which had been based mainly on the teachings in the geographic centres, transferred themselves into the later type of schools, based on allegiance to an individual master. The religious specialists of each geographical unit began by developing a certain minimum agreement on their doctrines and by the middle of the second century of the *Hijrah* many individuals, instead of working out independent doctrines of their own, started to follow the teaching of a recognised authority in its broad outlines, while reserving to themselves the right to differ from their master on any point of detail. This transformation of the ancient schools of law into "personal" schools which perpetuated not the living tradition of a city but the doctrine of a master and of his disciples, was completed about the middle of the third century of the *Hijrah*. The ancient school of Kūfa thus survived as the followers of Abū Ḥanīfah (or *Ḥanafīs*) and the ancient school of Madīnah as the followers of Mālik (or *Mālikīs*). Shāfi'ī started as a member of the school of Madīnah but he became the founder of the first school of law on an exclusively personal basis, based on a common doctrine formulated by the founder.

The classical theory of Muslim Law which was established during the third century of the *Hijrah* was in many respects more elaborate than Shāfi'ī's own theory and differed from it in one essential aspect. Shāfi'ī had rejected the principle of the consensus of the scholars, which embodied the living tradition of the ancient schools, and restricted his own idea of consensus to the unanimous doctrine of the community at large. The classical theory returned to the concept of consensus of the scholars, which it considered infallible in the same way as the general consensus of the Muslims. It also extended the sanction of the consensus of the scholars to Shāfi'ī's identification of the *Sunnah* with the contents of traditions from the Prophet. The price that had to be paid for this recognition was that the extent to which traditions from the Prophet were in fact accepted as a foundation of law was in the future to be determined by the consensus of the scholars.

The orthodox *Sunnī* Muslim of today belongs to one or other of the four schools of law. The vast majority of Muslims in

Turkey, India and Pakistan are *Ḥanafīs*. The Malays of Malaysia and Indonesia belong to the *Shāfi'ī* School, and the *Shāfi'īs* are also to be found in parts of the eastern and southern coasts of Arabia, the Malabar and Coromandel coasts of India, lower Egypt and East Africa. North Africa and West Africa are wholly of *Mālikī* persuasion while the *Ḥanbalīs* are to be found in Central Arabia. The *Mālikī* school alone is recognised in the religious courts of Morocco and Algeria; in Tunisia the *Mālikī* and *Ḥanafī* schools are on an equal footing. The *Ḥanbalī* school is officially recognised in Sa'ūdī Arabia. The *Ḥanbalī* school seemed on the verge of extinction from the 14th century onwards but it was revived by *Wahhābī* movement of the 18th century. The *Wahhābīs* have adopted the special doctrines of Ibn Taymiyyah on Islāmic theology and law, though as far as positive religious law is concerned, they follow the normal *Ḥanbalī* doctrines.

The four schools of law are recognised as equally orthodox and in agreement on all matters of vital importance. The differences between them are treated as matters of opinion and it was in theory at least open to a *Qāḍī* belonging to a particular school to adopt the opinions of a jurist of another school which he preferred. The practice has been adopted, however, of confining a *Qāḍī* to deciding cases according to the law of the school to which he belongs. The law as applicable to individual Muslims is personal and hereditary. A man is a *Ḥanafī* or *Shāfī'i* because his ancestors were so. An adult Muslim is, however, free to choose the law by which he is to be governed and some authorities allow a man to change his school of law in one particular matter if his conscience so permits. The courts in India and Malaysia have allowed a person to change his school of law partially to avoid an inconvenient rule of his own school.[45]

The *ḥadīth* movement which represents the new change in the religious structure of Islām demanded by its very nature that *ḥadīth* should expand and that new *ḥadīth* should be found or formulated in the new situation to face new problems. It is well known and admitted by the classical traditionists themselves that moral maxims and edifying statements and aphorisms may be attributed to the Prophet irrespective of whether this attribution is strictly

45. *Mohamed Ibrahim* v. *Gulam Ahmad*, 1 Bom. N.C. Rep. 239; *Salmah* v. *Soolong* (1878) *Kyshe* 421; *Noordin* v. *Shaik Noordin* (1908) 10 *S.S.L.R.* 72.

historical or not. The majority of the contents of the *ḥadīth-corpus* would appear in fact to be the result of the *Sunnah-Ijtihād* of the first generation of Muslims, an *ijtihād* which has its source in individual opinion but which in course of time and after struggles and conflicts against heresies and extreme sectarian opinion received the sanction of *ijmā'*, that is, the adherence of the majority of the Community. In other words the earlier living *Sunnah* was reflected in the mirror of the *ḥadīth* with the necessary addition of chains of narrators. But there was one major difference: whereas the *Sunnah* was largely and primarily a practical phenomenon geared as it was to behavorial norms, the *ḥadīth* became the vehicle not only of legal norms but of religious beliefs and theoretical principles as well.[46]

By the middle of the second century, the *ḥadīth* movement had become fairly advanced and although most *ḥadīth* was still attributed to persons other than the Prophet — the Companions and especially the generations after the Companions — nevertheless a part of the legal opinion and dogmatic views of the early Muslims had begun to be projected back to the Prophet. But the *ḥadīth* was still interpreted and treated with great freedom. Abū Yūsuf for example was against the uncritical acceptance of *ḥadīth*: "*Ḥadīth* multiplies so much so that some *ḥadīth* which are traced back through chains of transmission are not well known to legal experts nor do they conform to the *Qur'ān* and the *Sunnah*. Beware of solitary *ḥadīth* and keep close to the collective spirit of *ḥadīth*". He adds: "Therefore make the *Qur'ān* and the well-known *Sunnah* your guide and follow it."[47]

The *ḥadīth* materials continued to increase during the second century. Al-Awzā'ī regards the *ḥadīth* of the Prophet as being endowed with fundamental obligatoriness but the *Sunnah* or living practice is of the same status with him. His appeals to the practice of the community or its leaders, are the most regular feature of his legal argumentation. Mālik adduces *ḥadīth* (not necessarily Prophetic *ḥadīth*) to vindicate the Madīnese *Sunnah* but regards the *Sunnah* in terms of actual importance as being superior to the *ḥadīth*. The 'Irāqī school recognises the supreme importance of the Prophetic *ḥadīth* but the *ḥadīth*, according to it, must be situa-

46. Fazlur Rahman, "Sunnah and Ḥadīth", p. 12f.
47. *Ibid.*, p. 5.

tionally interpreted in order that law may be deduced from it. It was against this background that Shāfi'ī, the champion of *ḥadīth*, carried on his successful campaign to substitute the *ḥadīth* for the living *Sunnah*. Although a large part of the *ḥadīth* is not strictly historical, it cannot be said to be entirely divorced from the Prophet's *Sunnah*. Indeed there is an intimate connection between the *ḥadīth* and the Prophet's *Sunnah*. The earliest generations of Muslims — judges, lawyers, theoreticians and politicians — had elaborated and interpreted the Prophetic *Sunnah* in the interests of the needs of the Muslims and the resultant product became the living *Sunnah*. The *ḥadīth* is the reflection in a verbal mode of this living *Sunnah*. The Prophet's *Sunnah* is therefore in the *ḥadīth* just as it existed in the living *Sunnah*. But the living *Sunnah* contained not only the *Sunnah* of the Prophet but also regionally standardised interpretations of that *Sunnah*, created by the ceaseless activity of personal *ijtihād* and *ijmā'*. The result was that there were differences in the living *Sunnah*. So too, a striking feature of the *ḥadīth* is its diversity and the fact that on almost all points it reflects different points of view. The main difference between the living *Sunnah* of the earlier generations and *ḥadīth* formulation is that whereas the former was a living and on-going process, the latter is formal and sought to confer absolute permanence on the living *Sunnah* synthesis of the first three centuries of the *Hijrah*. Although the *ḥadīth* verbally speaking does not go back to the Prophet, its spirit certainly does and *ḥadīth* is largely the situational interpretation and formulation of the Prophetic model.[48]

The great *Imāms* of jurisprudence were followed by a number of great teachers of traditional learning. These bands of scholars devoted themselves to the study of traditions from the Prophet. The jurists generally, and particularly Imām Shāfi'ī, had demonstrated the need for critical sifting and examination of the traditions and from the latter half of the third until the earlier part of the fourth century A.H., this task was undertaken in the same spirit of comprehensive thoroughness which characterised the work of Abū Ḥanīfah, Shāfi'ī, Mālik and Ḥanbal in the field of jurisprudence. Abū 'Abd Allāh Muhammad Abū Ismā'īl al-Bukhārī, commonly known as Bukhārī, was the most prominent

48. *Ibid.*, p. 30.

of the scholars of tradition. His book, the *Ṣaḥīḥ*, contains about 7,000 traditions which he selected out of 600,000 as authentic. He died in A.H. 256 (A.D. 869).

At the same time as Bukhārī, in the same field and with the same scientific method, though independently, worked Muslim ibn al-Ḥajjāj Naīsābūrī, known as Muslim. He died in A.H. 261 (A.D. 875). His work, also called the *Ṣaḥīḥ*, though smaller in bulk is not inferior to that of Bukhārī although Bukhārī has precedence and the collections of Bukhārī and Muslim are distinguished as the two *Ṣaḥīḥs*, or the two correct collections, out of the six collections which are regarded by the *Sunnīs* as authentic. The remaining four collections are by at-Tirmidhī (*d.* A.H. 279 or A.D. 892), Abū Da'ūd (*d.* A.H. 275 or A.D. 888), Ibn Mājah (*d.* A.H. 273 or A.D. 886) and an-Nasā'ī (*d.* A.H. 303 or A.D. 915). They all worked independently of each other, so that the same tradition is often to be met with in more than one of their books and the greater the number of collections in which a particular tradition finds a place, its authority is held to be proportionately strengthened. The scholars of tradition were men of great piety and were imbued with the highest respect and regard for the work they undertook. They did a great service by the care and assiduity with which they examined the traditions. The influence which the scholars of tradition exercised on Muslim jurisprudence, though not perhaps apparent at first sight, has been great. Their work has directly tended to strengthen the authority of the *ḥadīth* as a source of law. Thus although Abū Ḥanīfah is reported to have accepted only eighteen traditions as genuine, the number of traditions which his followers since his time have acted upon as authentic may be counted by the hundreds.

Among the *Shī'a*, a further division arose on the death of Imām Ja'far aṣ-Ṣadiq the sixth *Imām* in 148 A.H. The majority of the *Shī'as* followed Imām Mūsā Qāzim and through him, six other *Imāms* thus making the twelve *Imāms* of the sect known as Twelvers (*Ithnā 'Asharī*). The majority after the death of Imām Ja'far, did not acknowledge Imām Mūsā Qāzim but adhered to the claims of his elder brother, Ismā'īl, and are today known as *Ismā'īlīs*. At the end of the ninth century A.D. the Ismā'īlī Sect was firmly established and in 969 A.D. an *Ismā'īlī* Sect, the *Fāṭimids* ruled in Egypt. In 1021 the first secession took place when the

Druzes refused to believe that the Khalīfa Ḥākim had died and regarded him as God. In 1094 a more serious breach occurred; at the death of Mustanṣir his younger son Musta'lī seized power displacing the elder son Niṣtar. The *Niṣtarī* or *Nizārī* branch is now represented by the *Khōjas,* who are followers of the Aga Khān. After the fall of the Fāṭimid dynasty, Yaman became the centre of the *Musta'lī* branch; from there it spread to India. In 1588 the Bohōra in Yaman did not recognise the Indian choice of Da'ūd as head of the sect and set up Sulaymān, thus starting a schism. The head of the Sulaymānī branch lives in Yaman but has a deputy in India; the head of the Da'ūdī branch lives in Surat, India.

The majority of the *Shī'a* belong to the *Ithnā 'Asharī* School which is followed in Irān and is strongly represented in 'Irāq and India. In India they are divided into two sub-sections the *Akhbārī* and the *Uṣūlī.* The *Akhbārīs* adhere to certain principles of interpretation laid down by the *mujtahidūn* or expounders of the law and are guided entirely by their expositions. The *Uṣūliyyin* on the other hand deny entirely the influence of authority in matters of opinion, unless such authority is in harmony with the dictates of reason. They accept only such traditions as are found to be genuine on a most critical examination and allow the exercise of private judgment in the application and interpretation of legal principles.

During this period the *Zaydī* doctrines were developed by Ḥasan bin Zayd, who founded a *Zaydī* State to the south of the Caspian Sea (about 250 A.H.) and by Qāsim bin Ibrāhīm (*d.* 246 A.H.). Among the *Ithnā 'Asharī* jurists of this period were Muḥammad bin Ya'qūb ar-Rāzī Kulīnī (*d.* 328 A.H.) who produced one of the *Shī'ī* canonical collections of traditions, *al-Kāfī,* and Nu'mān bin Muḥammad bin Manṣūr ibn Ḥaiyyān (*d.* 363 A.H.) the author of the principal book of the *Ismā'īlīs,* the *Da'ā'im al-Islām.*

The fundamental difference between the *Shī'ī* and the *Sunnī* systems is the doctrine of *Imāmat* developed by the former. The concept of *Imām* among the *Shī'a* is totally different from the *Sunnī* concept of the *Khalīfa,* who is the successor of the Prophet in temporal matters, but has to follow the path of the *Sharī'ah* in religious matters. The *Imām* among the *Shī'a* is the final inter-

preter of the law on earth. He is the leader not by the suffrage of the people but by divine right, because he is a descendant of the Prophet — or rather of 'Alī. In some sects like the *Zaydī* he is merely a human being; in others like the *Ithnā 'Asharī,* the *Twelfth Imām* partakes of the Divine Essence. He is the *ghā'ib* and *muntaẓar* — he who has vanished and he who is awaited — but he lives and is deathless and will appear at a preordained time and will fill the earth with justice. Among the *Western Ismā'īlīs* (*Bohōras*) the *Imām* is *mastūr,* hidden from the sight of the uninitiated but not immortal. Due to persecution, one of the earlier *Imāms* went into hiding; his descendants have continued to rule over the true believers to this day and will go on doing so for ever, but he can only be recognised by the higher initiates, the *dā'īs.* The present religious head of the *Dāwūdī Bohōras* is recognised as the *Dā'i'l-Muṭlaq.* The *Dā'ī* is the assistant of the *Imām;* but as the *Imām* is hidden from sight, the *Dā'ī* has larger powers of interpreting religion and is for all practical purposes the authoritative interpreter of religion and the leader of the community. The smaller groups of the *Bohōras* like the *Sulaymānīs* have their own religious heads but in the main their beliefs are almost identical. The *Eastern Ismā'īlīs* (the *Khōjas*) attribute to their *Imām* almost Divine powers. According to the *Khōja* belief, the Aga Khān is entitled to absolute reverence and is the final interpreter of the religion.

The fifth period of Muslim law is the period from 351 A.H. to the fall of Baghdād in 656 A.H. or 962 — 1258 A.D. In this period the schools of Muslim Law were developed into separate or independent schools. The period saw a decline in the strength of the Muslim empire which disintegrated into separate provinces. The jurists of this period did not exercise independence of thought and judgment and tended to follow and support the views held by the *Imāms* who founded the schools of law. In contrast to the friendliness, co-operation and exchange of views and ideas which existed between the founders of the schools of law, there came to be rivalry and sectarianism between the schools of law. The disciples belonging to a particular school of law actively supported the views of the founder of that particular school and wrote books in support and explanation of those views; and these books came to be regarded as authoritative statements

of the law. The *qāḍīs* or Muslim judges also tended to regard themselves as belonging to particular schools of law, and the *qāḍī* to a large extent tended to confine himself to the administration of the doctrines of the particular school to which he belonged.

The jurists of this period are called the *murajjihīn,* as they followed the views of the original founders of the schools of law and developed and systematised those views. The doctrines of the various schools of law were consolidated and codified during this period. The jurists of this period applied themselves to the task of consolidating the work done by the founders of the schools of law both in the fields of the theoretical science and the practical application of the law. They devoted their attention to concrete questions, which had not been dealt with by the founders of the different schools nor by their immediate disciples, and to the collection and arrangement of the opinions of the founders of the schools. Among the principal jurists of this period are:

Ḥanafī Madhhab:

Shams al-A'immah Abū Bakr Muḥammad bin Aḥmad as-Sarakhsī (*d.* 483 A.H. — 1090 A.D.) the author of the *Mabsūṭ;*

Abū Ḥusayn Aḥmad bin Muḥammad al-Qudūrī (*d.* 428 A.H. — 1036 A.D.) the author of the *Mukhtaṣar;*

'Alā' ud-Dīn Abū Bakr bin Mas'ūd al-Kāshānī (*d.* 587 A.H. — 1191 A.D.) the author of the *Badā'i' aṣ-Ṣanā'i';*

Burhān ud-Dīn 'Alī bin Abū Bakr al-Marghīnānī (*d.* 593 A.H. — 1197 A.D.) the author of the *Hidāyah;*

Fakhr ud-Dīn al-Ḥasan bin Manṣūr al-Uzjandī Qāḍī Khān (*d.* 592 A.H. — 1196 A.D.), the author of the *Fatāwā Qāḍī Khān.*

Shāfi'ī Madhhab:

Abū 'l-Mā'ālī 'Abd al-Mālik bin Muḥammad 'Abd Allāh al-Juwaynī, Imām al-Ḥaramayn (*d.* 478 A.H. — 1085 A.D.) the author of the *Nihāyat al-Maṭlab;*

Abū Isḥāq Ibrāhīm bin 'Alī ash-Shīrāzī (*d.* 476 A.H. — 1083 A.D.), the author of the *Tanbīh* and the *Muhadhdhab;*

Abū Ḥāmid Muḥammad bin Muḥammad al-Ghazzālī (*d.* 505 A.H. — 1111 A.D.), the author of the *Basīṭ*, the *Wasīṭ*, the *Wajīz* and the *Khulāṣah;*

Abū 'l-Qāsim 'Abd al-Karīm bin Muḥammad ar-Rāfi'ī al-Qazuīnī (*d.* 623 A.H. — 1226 A.D.), the author of the *Fatḥ al-'Azīz* and the *Muḥarrar;*

Abū Shujā' Aḥmad bin al-Ḥasan al-Iṣfahānī (*d.* before 500 A.H. — 1106 A.D.), the author of the *Taqrīb;*

Muḥyī ud-Dīn Abū Zakarīyā Yaḥyā al-Qizāmī al-Dimashqī an-Nawawī (*d.* 676 A.H. — 1277 A.D.), the author of the *Minhāj aṭ-Ṭālibīn*, the *Rawḍah*, and the *Majmū'*.

Mālikī Madhhab:

'Ubayd Allāh bin 'Abd ur-Raḥmān bin Abū Zayd al-Qairawānī (*d.* 386 A.H. — 996 A.D.), the author of the *Kitāb an-Nawādir* and the *Risālah*:

Muḥammad bin Aḥmad ibn Rushd (Averroes) (*d.* 595 A.H. — 1189 A.D.) the author of the *Bidāyat al-Mujtahid.*

Ḥanbalī Madhhab:

'Abd al-'Azīz bin Ja'far (*d.* 363 A.H. — 974 A.D.) the author of the *Muqni'*.

Muwaffaq ud-Dīn bin Qudāmah (*d.* 620 A.H. — 1223 A.D.) the author of the *Mughnī.*

Ẓāhirī Madhhab:

Abū Muḥammad 'Alī bin Aḥmad bin Sa'īd ibn Ḥazm (*d.* 456 A.H. — 1065 A.D.) the author of the *Muḥallā.*

Shī'ī:

Ibn Bābūya Muḥammad bin 'Aīī, the author of the *Risālah fī 'l-Sharā'ī'*. Abū Ja'far Muḥammad bin 'Alī ibn Bābūya, the younger (*d.* 381 A.H.), the author of *Man la Yaḥḍuruhu 'l-Faqīh*, one of the four *Shī'ī* canonical collections of traditions and the *'Uyūn Akhbār ar-Riḍā.*

Shaykh Muḥammad bin Muḥammad al-Mufīd (*d.* 413

A.H.), the author of the *Fiqh ar-Riḍā* and *al-Mughni'a fī'l Fiqh.*

Sharīf al-Murtaḍā Abū 'l-Qāsim 'Alī Abī Aḥmad al-Ḥusayn (*d.* 436 A.H.), the author of the *Kitāb al-Ghurar,* the *Intiṣār,* the *Imāmah* and *ash-Shāfī.*

Abū Ja'far Muḥammad bin Ḥasan aṭ-Ṭūsī (*d.* 458 A.H.) the author of *al-Istibṣār* and *Tahdhīb al-Aḥkām,* which are among the four *Shī'ī* canonical collections of traditions.

Abū 'Alī al-Faḍl aṭ-Ṭabarsī (*d.* 548 A.H.), the author of the *Majma' al-Bayān* and *Jāmi' al-Jawāmi';*

Ja'far bin al-Ḥasan al-Ḥillī (*d.* 676 A.H.) the author of the *Sharā'ī' al-Islām.*

One of the leading jurists of this period was Ibn Ḥazm who became the staunchest representative of the *Ẓāhirī* School. In his *al-Muḥallā* he epitomized the whole outlook of the *Ẓāhirī* School in saying:

> It is not permissible, in matters of religious law (*dīn*), to resort to deductions by analogy (*qiyās*) or to personal opinions (*ra'y*) — for there is no doubt that God has commanded us to refer all problems to His Book and His Apostle whenever a disagreement arises [*Surah* 4:59]; and whosoever refers such a problem to *qiyās* or *ta'līl* or *ra'y,* violates God's order ... God has said, "We did not omit anything in the Book"; and He said, "So that it might be a clear evidence for everything"; and He said, "So that thou, O Muḥammad, mayst make clear to mankind what has been revealed for them"; and He said, "Today I have perfected for you your religious law": and all this implies an utter rejection of *qiyās* and *ra'y.* For, even the upholders of *qiyās* and *ra'y* do not deny that it is not permissible to resort to these two methods in cases where there exists a *naṣṣ* injunction. On the other hand, God, Himself has testified that nothing has been omitted in the *naṣṣ*; further, that the Apostle of God has clearly shown to men what has been made binding on them; and, finally, that the religious law has indeed been completed in the Prophet's time: and thus it is established that the *naṣṣ* ordinances comprise the religious law in its entirety. If this is so, there is no need for anybody to resort to deductions by analogy or to personal opinions, be they his own or somebody else's.
>
> And now let us ask those who favour *qiyās*: 'Do you maintain that each and every deduction arrived at by means of *qiyās* is correct — or are there correct as well as wrong deductions?' It is

obviously impossible to answer, 'Each and every *qiyās* is correct' — for we know that those who resort to *qiyās* frequently contradict and refute each other: and it is impossible that in a question of *ḥarām* and *ḥalāl* a Yes and a No could be equally valid . . . But if the answer is, 'No, some of the *qiyās* deductions are correct and some of them wrong', I should like them to let us know by what criterion a sound *qiyās* could be discerned from an unsound one: but they have nothing to show by way of such a criterion. Now, if there is no criterion whereby it could be once and for all established what sort of *qiyās* should be regarded as sound and what as unsound, the whole of this method stands self-condemned as being based on an untenable claim . . . How could God have demanded of us that we should resort to deductions by analogy — and have omitted to show us wherein to apply analogy, and how to apply it, and what should be its standards? Such a demand is inconceivable . . . for, "God does not impose on any soul a duty beyond its ability".

And if in order to justify their claims to *qiyās* the upholders of these methods quote Traditions or Qur'ān-verses containing comparisons i.e. analogies between one thing and another, or declaring that God has ordained such-and-such a thing for such-and-such a reason — the answer is this: "All that God and His Apostle have mentioned by way of comparison or cause is truth absolute, and none may go against it": but this, precisely, is the *naṣṣ* on which we rely! But all your attempts at imitating Him in matters of religious legislation and at ascribing 'causes' beyond what God and His Apostle have made manifest by means of *naṣṣ*: all this is utterly wrong — a way which God has not permitted us to go . . .

All upholders of *qiyās* contradict each other in their deductions; and you won't find a single problem of law in which the *qiyās* of one group of scholars, claimed by them to be right, is not diametrically opposed to a *qiyās* evolved by another group. All of them agree that not each and every *qiyās* could possibly be sound, and not each and every *ra'y* true: but whenever we call upon them to produce an objective criterion which would enable us to discriminate between a sound *qiyās* or *ra'y* on the one hand, and a bad *qiyās* or *ra'y* on the other hand — they merely stutter in confusion. Whenever one presses them on this point, the futility of all their claims becomes manifest: for they are absolutely unable to give a sensible answer . . .

And so we tell them: The *naṣṣ* [of *Qur'ān* and *Sunnah*] is absolute truth; but what you are aiming at — namely, at arbitrary additions to the *naṣṣ*-laws by means of your personal opinions — is utterly wrong . . .

The *Sharī'ah* in its entirety refers either to obligatory acts (*farḍ*), the omission of which constitutes a sin; or to prohibited acts (*ḥarām*), the commission of which constitutes a sin; or to allowed

acts (*mubāḥ*), the commission or omission of which does not make man a sinner. Now these allowed acts are of three kinds: firstly, acts which have been recommended (*mandūb*) — meaning that there is a merit in doing them, but no sin in omitting them; secondly, acts which have been disapproved of (*makrūh*) meaning that there is merit in abstaining from them, but no sin in doing them; thirdly, acts which have been left unspecified (*muṭlaq*) — being neither meritorious nor sinful whether done or omitted. For, God has said "He has created for you all that is on earth"; and He also said, "It has been distinctly shown to you what you are forbidden to do". Thus it has been made manifest that everything is lawful (*ḥalāl*) except what has been clearly described as forbidden (*ḥarām*) in the *Qur'ān* and in the *Sunnah* . . .

. . . In one of his sermons the Apostle of God said: "O people! God has made the *ḥajj* obligatory on you; therefore perform it". Thereupon somebody asked, "Every year, O Apostle of God?" The Apostle remained silent; and the man repeated his question thrice. Then the Apostle of God said: "Had I answered Yes, it would have become incumbent on you to perform a *ḥajj* every year: and indeed it would have been beyond your ability to do so. Do not ask me about matters which I leave unspoken: for, behold, there were communities before you who went to their doom because they had put too many questions to their prophets and thereupon disagreed about their teachings. Therefore, if I order you anything, do of it as much as you are able to do; and if I forbid you anything, abstain from it."

The above *ḥadīth* circumscribes all principles of the religious law from the first to the last. It shows that whatever the Prophet has left unspoken — neither ordering nor forbidding it — is allowed (*mubāḥ*), that is, neither prohibited nor obligatory. Whatever he ordered is obligatory (*farḍ*), and whatever he forbade is prohibited (*ḥarām*): and whatever he ordered us to do is binding on us to the extent of our ability alone . . .[49]

In spite of his revolt against juristic elaborations, one can meet in Ḥazm's works bold notions directly deduced from the texts of the *Sharī'ah*. For example, he quotes the Qur'ānic verse: "Mothers shall suckle their children for two whole years; (that is) for those who wish to complete the suckling. The duty of feeding and clothing nursing mothers in a seemly manner is upon the father of the child. No one should be charged beyond his capacity. A mother should not be made to suffer because of her child, nor should he to whom the child is born (be made to suffer) because of his child. And a similar duty devolves on the father's

49. Quoted by Muḥammad 'Asad, "This Law of Ours", p. 139f.

heir."[50] Thereupon Ibn Ḥazm states that "in case the husband is poor and unable to maintain himself while his wife is rich, the latter is obliged to spend on him, the legal ground being the fact that she is his heir after his death". This deductive rule introduced by Ibn Ḥazm was, in spite of its clever argumentation, only held by him and his followers.[51]

The sixth period of Muslim law is the period from 656 A.H. or 1258 A.D. to the abolition of the Khalīfate in 1922. The jurists of this period are called the *muqallidin,* as they regarded themselves as the followers of the different schools of law. These jurists took a narrow view of their functions and occupied themselves in determining which of the conflicting versions of the principal jurists, that is, the founder of each school and his disciples on a given question, was correct and in the event of difference of opinion among them, whose view was to be taken as representing the law.

By the beginning of the fourth century of the *Hijrah* (about A.D. 900) the point had been reached when the scholars of all the surviving schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards no one could be deemed to have the necessary qualifications for independent reasoning in law and that all future activity would have to be confined to the explanation, application and at the most interpretation of the doctrine already laid down. The denial of *ijtihād* brought with it the unquestioning acceptance of the doctrines of established schools and authorities (*taqlīd*). *Taqlīd* connotes the act of following and it has the significance that "the servants of God who are linked together by obedience to God, receive the commandments of God through such and such a chain". A jurist of this period does not approach a legal problem on his own evaluation of the *Sharī'ah* values but follows the law of the school to which he belongs, laid down by its founder, his disciples and followers. It has been said that this process denies the jurist the use of his independent judgment. It is true that the right of *ijtihād* has not been claimed by modern jurists. *Ijtihād* literally means 'striving with full exertion' and denotes the endeavour of choosing in the light of the *Qur'ān* and the *Sunnah* between two or more differing legal

50. *The Holy Qur'ān,* II:233.
51. Ramadan, *op.cit.,* p. 80.

interpretations and of deducing from the *Qur'ān* and the *Sunnah* new rulings for meeting new legal situations. The right of *ijtihād* demands a high standard of knowledge of Islām and a high degree of spiritual illumination. Although the right of *ijtihād* in the full sense has not been claimed by modern jurists, a number of such jurists have exercised the right to examine the original sources of the law notably the Holy *Qur'ān* and the *ḥadīth* and on that basis to criticise the adopted views of the schools of law. Among these may be mentioned Ibn Ḥazm (*d.* 456 A.H. — 1064 A.D.), the author of the *Kitāb al-Muḥallā;* Ibn Taymiyyah (*d.* 728 A.H. — 1321 A.D.); Ibn Qayyim al-Jawziyyah (*d.* 751 A.H. — 1350 A.D.); Ibn Ḥajar al-'Asqalānī (*d.* 852 A.H. — 1448 A.D.) the author of the *Fatḥ al-Bārī* and the *Bulūgh al-Māram;* Muḥammad bin Ismā'īl bin Ṣalāḥ al-Amīr al-Kaḥlānī aṣ-Ṣan'ānī al-Yamānī the author of *Subul aṣ-Salām;* Shawkānī, the author of the *Nayl al-Awṭār;* Shaykh Muḥammad 'Abduh (*d.* 1905 A.D.), and Shaykh Muḥammad Rashīd Riḍā (*d.* 1935 A.D.), the editor of *al-Manār.*

At the end of the eighth century A.H. (14th century A.D.) we arrive at the age of commentators and annotators. Though carrying on their work under a modest title, the contributions of these learned men to the science of law have been most valuable and important. It is wrong to suppose that the commentators merely explained the texts and added nothing to the law. In fact it is only in the writings of the commentators and annotators that it is possible to find the doctrine of the different schools expounded in their fullness. No Muslim lawyer would undertake to answer a question for example on the *Shāfi'ī* law without consulting the *Shāfi'ī* commentaries. The reliance on commentaries and annotations and the process of *taqlīd* or adherence meant that there was little independent thought in this period and the writings of the founders of the schools and their immediate disciples tended to be forgotten.

The activity of the later jurists, after the closing of the door of independent reasoning, was no less creative than that of their predecessors within the limits set by the very nature of the *Sharī'ah.* New sets of facts constantly arose and they had to be mastered and moulded with the traditional tools provided by legal science. This activity was carried on by the *muftīs.* The doctrinal development of the Muslim Law owes much to the activity of the *muftīs.* Their *fatwās* were often collected in separate

works, which are of considerable historical interest as they reveal the most urgent problems which arose from the practice of that particular place and time. As soon as a decision reached by a *muftī* on a new kind of problem had been recognised as correct by the common opinion of the scholars, it would be incorporated in the handbooks of the school and some of these *fatwā* acquired an authority only slightly less than that of the handbooks themselves. Compilations were also made of the *fatwās* of more than one scholar, covering the whole extent of the law and becoming a kind of supplement to the handbooks. The judgments given by the *qāḍīs* on the other hand, have had no comparable influence on the development of Muslim Law after the end of its primitive period in early 'Abbāsid times.

Among the principal jurists of the early part of this period were:—

Ḥanafī Madhhab:

Kamāl ud-Dīn Muḥammad bin 'Abd al-Wāhīd al-Humām (*d.* 861 A.H. — 1457 A.D.), the author of the *Fatḥ al-Qadīr;*

Akmal ud-Dīn Muḥammad bin Maḥmūd al-Bābartī (*d.* 786 A.H. — 1384 A.D.) the author of the *'Ināyah;*

Jalāl ud-Dīn bin Shams ud-Dīn al-Khawārizmī al-Karlānī (*d. circa* 747 A.H. — 1346 A.D.), the author of the *Kifāyah;*

Ḥāfiẓ ud-Dīn Abū 'l-Barakāt 'Abd Allāh bin Aḥmad an-Nasafī (*d.* 710 A.H. — 1310 A.D.), the author of the *Kanz al-Daqā'iq*;

Muḥammad bin Farāmurz bin 'Alī Mullā Khusraw (*d.* 885 A.H. — 1480 A.D.), the author of the *Durar al-Ḥukkām.*

'Alā' ud-Dīn Muḥammad bin 'Alī al-Ḥaṣkafī (*d.* 1088 A.H. — 1677 A.D.), the author of the *Durr al-Mukhtār;*

Muḥammad Amīn bin 'Ābidīn (*d.* 1252 A.H. — 1836 A.D.), the author of the *Radd al-Mukhtār.*

Shāfi'ī Madhhab:

Abū Yaḥyā Zakarīyā al-Anṣārī (*d.* 926 A.H. — 1520 A.D.) the author of the *Manhaj aṭ-Ṭullāb,* the *Fatḥ al-Wahhāb,* the *Taḥrīr at-Tanqīh,* and the *Asnā 'l-Maṭālib;*

Aḥmad bin Muḥammad ibn Ḥajar al-Haithamī (*d.* 974 A.H. — 1567 A.D.), the author of the *Tuḥfat al-Muḥtāj;*

Muḥammad bin al-Khaṭīb ash-Sharbīnī (*d.* 977 A.H. — 1569 A.D.), the author of the *Iqnā'* and the *Mughnī al-Muḥtāj;*

Shams ud-Dīn Muḥammad bin Aḥmad ar-Ramlī (*d.* 1004 A.H. — 1596 A.D.), the author of the *Nihāyat al-Muḥtāj;*

Muḥammad bin al-Qāsim al-Ghazzī (*d.* 918 A.H. — 1512 A.D.) the author of the *Fatḥ al-Qarīb;*

Zayn ud-Dīn al-Malībarī (*d.* 982 A.H. — 1574 A.D.) the author of the *Qurrat al-'Ayn* and the *Fatḥ al-Mu'īn;*

Ibrāhīm bin Muḥammad al-Bājūrī (*d.* 1277 A.H. — 1861 A.D.) the author of numerous commentaries and glosses.

Mālikī Madhhab:

Ḍīyā ud-Dīn Abū aṣ-Ṣafā Khalīl bin Isḥāq (*d.* 767 A.H. — 1365 A.D.) the author of the *Mukhtaṣar.*

Ḥanbalī Madhhab:

Mar'ī bin Yūsuf (*d.* 1030 A.H. — 1621 A.D.) the author of the *Dalīl aṭ-Ṭālib.*

Shī'ī:

Ibn al-Muṭahhar, the author of the *Nahj al-Mustarshidīn*, the *Kashf al-Fawā'id* and *Mukhtalaf ash-Shī'a.*

A number of factors contributed to the petrification of Muslim Law during this period. The bitter controversy about the dogma of the eternity of the *Qur'ān* became impossible to resolve and more complex as two opposing camps, the Rationalists and the Conservatives, grew further and further apart in the nature of their convictions. To preserve the social integrity of Islām, the Conservatives wished to render the structure of their legal system as rigorous as possible. Secondly, the dry as dust subtleties of the contemporary jurists drove some of the most acute minds of Islām to Ṣūfism, which fostered a kind of revolt against the verbal quibbles of the early doctors of law. By gradually developing a purely speculative spirit, ascetic Ṣūfism with its spirit of otherworldliness not only absorbed the best Muslim minds but further

obscured from men's vision the very important aspect of Islām as a social policy. The development of Muslim Law was thus left generally in the hands of intellectual mediocrities and the unthinking masses of Islām, having no possibility of a higher calibre to guide them, found their security in blindly following the established Schools. If these developments were not enough to undermine the flexibility of Muslim Law, the destruction of Baghdād by the Mongols certainly was. This blow brought in its wake a period of political decay, during which the conservative thinkers of Islām, fearing further disintegration, focussed all their efforts on one point: the preservation of a uniform social life for the people by the jealous exclusion of all innovations in the law of the *Sharī'ah* as expounded by the early doctors of Islām.[52]

It was against the background of this period of decay and of the state of petrifaction to which Islāmic law had been reduced, that Ibn Taymiyyah (661 A.H. to 728 A.H.) represented the reaction to all innovations contrary to the Book of God and the Traditions of the Prophet. Although belonging to the *Ḥanbalī* School, he did not follow all its opinions blindly. On many points he rejected *taqlīd* and even *ijmā'* (consensus). In the majority of his works he claimed to follow the letter of the *Qur'ān* and the *Sunnah* but he did not think it wrong to employ *qiyās*, reasoning by analogy, in his arguments. A bitter enemy of innovations (*bid'a*) he attacked the cult of saints and pilgrimages to tombs. In many cases he rejected the opinion of the principal jurists. He rejected the practice of *taḥlīl* by which a woman irrevocably divorced by a triple repudiation could be married again after having contracted an intermediate marriage with another man who had agreed to repudiate her immediately afterwards. He held that taxes which are not prescribed by divine order are admissible and if one pays them one is freed from *zakāt*. He also held that to hold an opinion contrary to *ijmā'* (consensus) is neither infidelity nor impiety. Ibn Taymiyyah was followed by his disciple, Ibn Qayyim (*d.* A.H. 751 — 1350 A.D.).[53]

The teachings of Ibn Taymiyyah and Ibn Qayyim were the inspiration of the *Wahhābī* movement, which started in 1157 A.H. (1744 A.D.) when Muḥammad 'Abd al-Wahhāb (1703 —

52. Iqbāl, *op.cit.*, p. 149-151.
53. *Art.*: "Ibn Taimiya", *Shorter Encyclopaedia of Islām.*

87) with the support of the House of Ibn Sa'ūd began a revivalist campaign based on the puritan *Ḥanbalī* School and the anti-*Ṣūfī* policies of Ibn Taymiyyah and his followers. Directed in the first instance against the laxity of manners and corruption of religion in the local settlements and tribes, the *Wahhābī* movement condemned saint-worship and all other *Ṣūfī* innovations as heresy and infidelity and finally attacked the other orthodox schools as well for their compromises with these innovations. In their zeal to restore the primitive purity of the faith, the Sa'ūdī princes took up arms against their neighbours and after conquering Central and Eastern Arabia, turned them against the 'Uthmāniyyah princes in the north and the hereditary Sharīfs of Makka in the Ḥijāz. Karbalā' in 'Irāq was sacked in 1802 and Makka finally captured and occupied in 1806. The Governor of Egypt, Muḥammad 'Alī, was constrained to take up arms against them on behalf of the Sulṭān of Turkey, and by 1818 the Wahhābī power was broken. This eclipse of its political power did not mean the end of the *Wahhābī* movement. Even on the political plane, its effects were too enduring to be easily uprooted. A Sa'ūdī Emirate lingered on in Najd and it renewed its strength and gained an Arabian empire in the twentieth century under the leadership of 'Abd al-'Azīz, the creator of the kingdom of Sa'ūdī Arabia. Still more profound has been its influence as a religious force within the Muslim community. In its original phase it shocked the conscience of the Muslim community by the violence and intolerance which it displayed not only towards saint-worship but towards the accepted orthodox rites and schools. By holding them all guilty of infidelity to the pure transcendental ideal and excluding them from the status of true believers, the early *Wahhābīs* repeated the error of the *Khārijīs* and alienated the sympathy and support of the orthodox Muslims. But in its ideal aspect, in the challenge which it flung to the contamination of pure Muslim monotheism by the infiltration of animistic practices and pantheistic notions, *Wahhābīs* had a salutary and revitalizing effect which spread little by little over the whole Muslim world.[54]

During the greater part of the nineteenth century however the revitalizing element in *Wahhābism* was obscured by its revolutionary theocratic aspect. It set an example of revolt against

54. Gibb, *Mohammedanism*, p. 166f. and *Modern Trends in Islām*, p. 25f.

an apostate Muslim government; and its example was the more eagerly followed in other countries as their Muslim governments fell more and more under European influence and control. At the beginning of the nineteenth century it inspired the Indian movements led by Sharī'at Allāh and Sayyid Aḥmad against the decadent Mughal Sulṭānate, the Sikhs and the British. These came to a head in the Indian Mutiny of 1857. A few years later in the middle and second half of the nineteenth century the militant and reformist order founded by the Algerian Shaykh, Muḥammad ibn 'Alī as-Sanūsī, set up a theocratic state in Southern Libya and equatorial Africa in protest against the secularist laxity of the 'Uthmāniyyah Sulṭāns; and the Mahdiyyah brotherhood was organized by Muḥammad Aḥmad as the instrument of revolt in the eastern Sūdān against Turko-Egyptian rule and its European agents. Even in such distant regions as Nigeria and Sumatra, where the Paderi War, 1803 — 1838 took place in the Minangkabau region, the *Wahhābī* influence contributed to the outbreak of militant movements.[55]

The same revolutionary impulse underlay the activity of the famous revivalist, Jamāl ud-Dīn Afghānī (1839 — 1897) but with a significant change in direction. By this time the current of European infiltration was in full force. Jamāl ud-Dīn Afghānī strove with all his energies to dam and if possible to sweep back the tide by means of the organized power of the existing Muslim governments. He brought inspiration and a popular programme to the pan-Islāmic movement by restating the basis of the Muslim community in terms of nationalism. But though Pan-Islāmism was, on the political side, aimed against European penetration, it had an internal reforming aspect as well. Jamāl ud-Dīn Afghānī attacked with the same vigour the abuses which he saw within Islām and the evils of Muslim governments. It was an essential element in his thought that the Muslim peoples should purify themselves from religious errors and compromises, that Muslim scholars should be abreast of modern currents of thought and that the Muslim State should stand out as the political expression and vehicle of sound Qur'ānic orthodoxy.

Jamāl ud-Dīn Afghānī's most influential pupil was Shaykh Muḥammad 'Abduh (1849 — 1905), who helped to isolate the

55. *Ibid.*

religious element in the reform movement from the emotional influences of the revolutionary or nationalist programme. As a young teacher in al-Azhar he had tried to introduce a broader and more philosophical conception of religious education and later in exile in France he collaborated with Jamāl ud-Dīn Afghānī in a semi-religious, semi-political journal *al-'Urwa al-Wuthqā.* In 1888 he returned to Egypt and later became Rector of the al-Azhar. There in spite of opposition from the Conservative *'ulamā'* he exerted by his character and his teaching an immense influence on the new generation. He urged the pursuit of modern thought, confident that in the last resort it could not undermine but only confirm the religious truth of Islām. By restating the rights of reason in religion he restored some measure of flexibility to what had become a rigid and apparently petrified system and allowed the possibility of reformulating doctrine in modern terms. The effect of his teaching was to separate the religious issue from the political conflict, so that they were no longer interdependent and each was free to develop along its own appropriate lines. The programme which he bequeathed to the reform movement can be summed up under four main heads:— (1) the purification of Islām from corrupting influences and practices (2) the reformation of Muslim higher education (3) the reformation of Muslim doctrine in the light of modern thought and (4) the defence of Islām against European influences and Christian attacks. In the matter of doctrine he made a stand against the uncritical acceptance of authority or *taqlīd.* He rejected the traditional view that the teachings of the *Qur'ān* had been authoritatively expounded once and for all by the doctors of the first three centuries of Islām, that their expositions had been confirmed by an irrevocable *ijmā'* and that no free investigation of the sources could be tolerated. The ideas of Shaykh Muḥammad 'Abduh did not win general support though they remain alive and continue to bear fruit in present day Islām.

The immediate results of Shaykh Muḥammad 'Abduh's activity found expression in two different and opposing tendencies. On the one hand there grew up in secular circles a widespread "modernism" which while holding to the basic dogmas of Islām is strongly influenced by Western ideas. In its most advanced forms, modernism tends to become confounded with the move-

ment for secularization which aims at separating religion from the State and substituting Western systems of law for Muslim Law. The most extreme application of secularist principles has been furnished by Turkey since the abolition of the 'Uthmāniyyah Khalīfate in 1924. But though secularism has its supporters in other Muslim countries, the majority of modernists adopt a much more moderate attitude towards the religious organization and its tradition. Whatever their views on matters of law and politics, their doctrinal position may be summed up as a general rejection of the final authority of the medieval doctors, and an assertion of the right of private judgment.[56]

The second consequence of Shaykh Muḥammad 'Abduh's activities was the emergence of a new school calling themselves the *Salafiyyah*. *Salafiyyah* implies following in the footsteps of the early Muslims, thus revealing a characteristic tendency in line with the old revolt of Ibn Taymiyyah. The most influential centre of activity of the *Salafiyyah* School was for years the magazine *Al-Manār* published in Cairo. Its editor, Shaykh Rashīd Riḍā, (1865-1935) was famous for his harsh criticism which brought him many attacks. In its doctrinal aspect as well as in its social programme the *Salafiyyah* took on increasingly the character of a rationalizing puritan movement. Although Shaykh Rashīd Riḍā was attacked in his lifetime by the conservatives, on his death in 1935 the magazine of al-Azhar accorded him a generous tribute:

> . . . acknowledging his learning and his service to Islām, above all in overthrowing the reign of *taqlīd*, which had imposed on Muslims a division into two parties, one that remains petrified in its following of the traditional usages which are opposed to the spirit of the faith and a second group which revolted against Islām and has adopted a way that is not the way of true Believers.[57]

The modernist reform movement has had its effect in the Indian subcontinent. One of the leaders of the reform movement in India was Shāh Walī Allāh of Delhi (1703 — 1763). He grew up watching the Mughal Empire crumble and, unlike Ibn 'Abd al-Wahhāb, thought and worked from within one of the passing medieval empires, rather than from outside. His object was to refashion and revive rather than to reject. His works were marked

56. *Ibid.*
57. Quoted by Ramadan, *op.cit.*, p. 72.

by a rationalist attitude which sought the reconciliation of opposite extremes. Thus while he attacked the degeneration of the corrupted *Ṣūfī* practice of his time, he was himself a *Ṣūfī*. He strove to postulate an interpretation of Islām that would coalesce a purified Ṣūfism with a purified *Sunnah*. His opinions were based on sane moderation. He held aloof from ultra-rationalism, refusing to allow any selfish, evasive pleading of reason to undo the obligations of the law. He sought to temper authority with reason. In his view moral injunctions should not be peremptory but should seek and enlist a rational consent. The element of authority is accepted but it is combined with arguments based on expediency and utility. In this spirit Shāh Walī Allāh voiced his disapproval of blind *taqlīd* or adherence to this or that *Imām*. But he does not go beyond such disapproval but rather recommends adoption of the best opinion within the four schools. His works show a keen awareness of the necessity of conserving what is best in the Muslim heritage.[58]

A more direct effect of the *Wahhābī* movement is to be found in the preaching of puritanism and the revolt against saint worship shown by such leaders as Sharī'at Allāh and Sayyid Aḥmad of Bareilly in India in the early decades of the nineteenth century. Several organizations have explicitly carried on these principles, notably the fanatical *Farā'iḍī* sect in Bengal and the more numerous congregation of the *Ahl al-Ḥadīth* who maintain their own mosques and schools. But within the wider community too, their campaign for the purification of doctrine has found a ready response.[59]

In this way the door was opened for the more personal and individual attempts to formulate Islāmic doctrine in terms of modern thought. The first of these was made by Sir Sayyid Aḥmad Khān (1817 — 98). Believing, like Shaykh Muḥammad 'Abduh, that Islām and science could not prove antagonistic in the long run, he took the further step of asserting that the true justification of Islām was its conformity to nature and the laws of science, and that nothing which conflicted with this principle could be regarded as authentically Islāmic. In order to encourage and develop this line of thought, he founded at Aligarh in 1875 a college in which religious education should be

58. Smith, *Islam in Modern History*, p. 44-45.
59. Gibb, *Mohammedanism*, p. 180 and *Modern Trends in Islam*, p. 27.

combined with modern scientific studies, and thus established the first 'modernist' organization in Islām. The new college and its founder naturally became the target of violent opposition, and that not only from the orthodox *'Ulamā'* but also from Jamāl ud-Dīn al-Afghānī, who bitterly attacked the *necharī* philosophy as pure materialism and treason to the Faith. Nevertheless, the Aligarh movement prospered, though the college itself (which became in 1920 the Muslim University of Aligarh) has gradually moved away from its original doctrinal position.[60]

The new liberalizing theology that followed from Sir Sayyid Aḥmad Khān's rationalist approach to Islām brought with it a re-evaluation of the traditional social ethics of the Muslim community. The latter was probably one of its strongest attractions for the growing body of Muslim intellectuals, who were becoming acutely aware of the social evils linked with such practices as slavery and unregulated polygamy and divorce. In this respect, indeed, the influence of this school extended far beyond the boundaries of Indian Islām through their new presentation, partly apologetic but also implicitly reformist, of Muslim practice and social doctrine.

Among the several Indian writers who popularized the new liberal theology and ethics, the leading figure was Syed 'Āmir 'Alī, (1849 — 1928) a *Shī'a* and a distinguished jurist. His book, *The Spirit of Islam,* first published in 1891, furnished the awakening political consciousness of Muslims with a reasoned basis of self-esteem which it required in face of the Western world. In the writings of Syed 'Āmir 'Alī we find a detailed and analysed apologetic for Islām in the matters of war, intolerance, women, slavery, literary and scientific spirit, rationalism and democracy. He showed that not only were the teachings of Islām compatible with modern ideas on these subjects but that Islām's teachings and spirit are precisely those ideas. Islām, he said, raised women from their previous degradation to a lofty pinnacle. Not only is slavery not inherent in Islām, but it was the Prophet who taught those very principles which imply the abolition of slavery from human affairs. Socially, at a time when everywhere the masses were in hopeless subjection, Islām elaborated a political system fundamentally republican and stressing the duties of rulers

60. Gibb, *Mohammedanism,* p. 181f. and *Modern Trends in Islam,* p. 58f.

towards their subjects and the freedom and equality of the people. Islām was in effect shown as the first religion to proclaim all the virtues. So exactly did it conform to the mood of his contemporaries that few educated Muslims observed that 'Āmir 'Alī was reformulating Islāmic doctrine in terms of Western thought just as much as his *nechari* predecessors had done.[61]

Another Muslim thinker of this period was Ṣalāḥ ud-Dīn Khudā Bukhsh of Calcutta. In his writings he expressed the view that the Qur'ānic rules covering the law of family and succession were conditioned by the state of the contemporary 'Arab Society, compared to which they represented a considerable progress. He therefore suggested that these rules should not be regarded as in themselves being of eternal value, that it was rather their tendency to reform and to correct social injustices rather than their positive contents which ought to matter, and that nothing prevented the Muslims, in conditions which had improved thanks to the message of the Prophet, from going one step further in the path of reformation and progress. "The Qur'ān, rightly understood . . . is a spiritual guide . . . putting forward ideals to be followed . . . rather than a *corpus juris civilis* to be accepted for all time." Islām stripped of its theology is, he maintained, a perfectly simple religion. Its cardinal principle is belief in one God and belief in Muḥammad as His Prophet. The rest is mere accretion and superfluity. He wanted Islām to get rid of all those aspects which hinder a full acceptance of modern culture. He said:

> The requirements of Islām are at once easy and simple and leave scope to Muslims to take part in their duties as subjects or citizens, to attend to their religious obligations, without sacrificing their worldly prosperity and to adopt whatever is good in any community or civilization, without interference on the part of their religion.[62]

The social and political conflicts that have distracted India since the beginning of the twentieth century also effected the religious outlook of the Muslim community and created new

61. *Ibid.*

62. S. Khudā Bukhsh, *Essays Indian and Islamic.* Another writer was S. 'Abdur Raḥmān, who too felt that the Muslim Law of family and succession as commonly understood did not fit in with modern conceptions, but instead of looking for the tendencies underlying the relevant passages of the *Qur'ān* and the relevant traditions attributed to the Prophet, he interpreted them in such a way as to make them agree with his own ideas of what a modern legislation on those subjects ought to be like — see Schacht, "Problems of Modern Islamic Legislation", p. 104-105.

groupings within it. Of its various leaders, the most outstanding intellectual was Sir Muḥammad Iqbāl (1876 — 1938), the exponent of the most sweeping modernist reformulation of Muslim doctrine. In contrast to the earlier modernists, the Muslim foundations of Iqbāl's philosophy are derived from Ṣūfistic philosophy which he reinterpreted in terms of the Nietzchean superman and Bergson's theory of creative evolution. His own activist philosophy which found expression first in a series of Persian and Urdu poems made a powerful appeal to the younger generation of Indian Muslims and contributed to the rise of Pakistan as a Muslim State in 1947. His concepts were given in a more systematic form through a series of lectures in English in 1928 published under the title: *Reconstruction of Religious Thought in Islām.*[63]

In Indonesia the reformist Muslim organization, Muḥammadiyyah, was founded in 1912 by Kiayī Ḥaji Aḥmad Dahlān in Jogjakarta, after the example of the reform movements in Egypt and India. By founding schools, establishing and running public libraries, by selling books and pamphlets, by founding hospitals, poor homes and orphanages, by creating a Muslim information and propaganda service, by managing *waqf* funds and by having Muslim literature translated into native dialects, it acquired a considerable influence and was able to assist materially in the adaptation of Islām to new conditions.[64]

The influence of *al-Manār* of Egypt was felt in Indonesia and Malaya, especially through the young Indonesians and Malays who studied at al-Azhar or in Makka. This modernism manifested itself in the condemnation of what were considered to be abuses (*bid'a*) which had crept in during the course of time and in the defence of new forms required by the spirit of the age, as for instance reforms in the education system, the use of Latin characters and European clothing, and calculation instead of observation of the beginning of the fasting month (*Ramaḍān*). The modernists manifested a preference for the use of intellect and insight (*'aql*) in place of slavish submission to the old *mujtahids*. They rejected the opinion that only the *Tuḥfah* and the *Nihāyat,* the two *Shāfi'ī* law books most widely used in Indo-

63. Gibb, *Mohammedanism,* p. 181f. and *Modern Trends in Islam* p. 58f.
64. Berg, "Indonesia" in *Whither Islam?* Ed. Gibb, p. 239f.
65. *Ibid.*

nesia, should be the reliable guides when determining legal questions.[65] In Malaya the modernist movement was introduced in the early years of the twentieth century, mainly through journals like the *al-Imām* of Singapore and the *al-Ikhwān* and *Saudara* of Penang. The chief among the writers to these journals were Shaykh Muḥammad Ṭāhir bin Jalāl ud-Dīn (1861 — 1957) and Syed Shaykh bin Aḥmad al-Ḥādī (1867 — 1934). The prime emphasis in these journals was the necessity to return to the *Qur'ān* and *Ḥadīth*, the basic texts of Islām, and to practise *ijtihād* rather than blind acceptance of intermediate authority (*taqlīd buta* or 'blind taqlīd') for their interpretation.[66]

Although the impact of modernism is significant we should not exaggerate its extent or its importance. The strength and influence of conservative Islām remained dominant. There was little modernism outside the large cities. In Egypt itself the *'ulamā'* kept a sharp watch on the activities of the modernists, ready to fall upon them as soon as they appeared to go beyond the limited range secured for them by Shaykh Muḥammad 'Abduh. For the most part official Islām and the masses followed the orthodox and accepted teachings contained in the law books.

The sixth period of Muslim law may be said to end with the abolition of the Khalīfate in 1922 and the abolition of the Sulṭānate of Turkey in 1924. After that, *Sunnī* Islām had no recognised head and the history of Muslim Law in this period is the history of its application in separate Muslim countries. In the political sphere we find the rise of independent Muslim countries, like Egypt, Pakistan, Indonesia, Malaysia, 'Irāq, Algeria, Libya, Morocco, Nigeria and the other Muslim States in Africa. In this period, great inroads were made by the secular law into the domain of the *Sharī'ah* in all Muslim countries. In Turkey, the *Sharī'ah* has been totally abandoned and has been replaced by a codified secular law and in many other Muslim countries the *Sharī'ah* has been replaced by codified secular laws in all fields of law except those relating to family law and personal status. Even in the field of family law and personal status, recent years have seen a change in some of the Middle Eastern countries and in the Indian subcontinent.

66. Roff, "Kaum Muda - Kaum Tua" p. 162f.; See also: *Selections from the Writings of Syed Shaykh al-Hady* (al-Ḥādī) under publication by M.S.R.I., Singapore.

In the Middle East, western influence on Muslim Law and jurisprudence exerted itself through the general cultural medium of Islāmic modernism. Modernism aims at adapting Islām to modern conditions by renovating those parts of its traditional equipment which are regarded as medieval and out of touch with modern times. The criticism is directed not against the concept of an Islāmic law, the concept that Islām as a religion ought to regulate the sphere of law as well, but against the traditional form of Muslim jurisprudence and against the way in which the Muslim scholars of the middle ages have applied the message of Islām to the sphere of law. Although the whole of the modernist movement extends over a variety of fields, its mainspring is the desire to put a new Muslim jurisprudence in place of the old one. Many of the modernists are lawyers by profession and it is the modernist jurists who prepared, provoked and guided the new legislation. It is only in the present generation that the ground has been prepared for legislation by Muslim governments on the law of family, the law of succession, the law of *waqf* or charitable endowments, subjects which have always formed part of the central domain of Muslim Law. A modern government is differently placed with regard to Muslim Law from a traditional Muslim ruler. The legislative power is no longer content with the sphere assigned to it by strict theory or traditionally conceded to it in practice; it wants itself to determine and to restrict the sphere left to traditional Muslim Law and to modify according to its own requirements what has been left.[67]

The *Sharī'ah* rules were not officially codified until recent times. The *Qur'ān* was collected in a recognised version during the Khalīfate of 'Uthmān ibn 'Affān in the year 30 A.H. The traditions were, however, never compiled in this manner. The second *Khalīfa,* 'Umar, refused to sanction the compilation of the traditions for fear they would be favoured in preference to the *Qur'ān.* The Umayyad *Khalīfa,* 'Umar ibn 'Abd al-'Azīz, attempted a compilation of traditions in the early part of the second century A.H. but

67. Muslim Law does not recognise legislation by human agents; it is and claims to be the doctrinal interpretation of the Commands of Allāh which have been revealed once and for all to Muḥammad. The Government is in theory entitled only to enact administrative regulations within the limits assigned to it by the sacred law and without materially impinging on it — see Schacht, "Problems of Modern Islamic Legislation", p. 110.

he was not successful in his plan as he died before the compilation was completed. Ibn al-Muqaffa' (*d.* A.H. 144) in his report to the 'Abbāsid Khalīfa, Ja'far al-Manṣūr, stressed the benefit that would accrue from laying down a general code of law which would be applicable to all the Muslim provinces. Such a code he suggested should draw its principles from the *Qur'ān* and the *Sunnah* and in the absence of explicit texts recourse could be had to opinion in accordance with the dictates of justice and the public interest and in accordance with the will of the *Khalīfa* and his authority. The proposal of al-Muqaffa' was not implemented because of the fear of jurists and those in authority that errors would be committed in the interpretation of the *Sharī'ah*. They were unwilling to bear the responsibility of forcing the people to imitate them. The same attitude was taken by Imām Mālik when the Khalīfa Abū Ja'far al Manṣūr requested him to make the *Al-Muwaṭṭa'* the standard and authoritative text of Muslim Law among the Muslims.[68]

Awrangzēb, one of the Mughal Sulṭāns in India in the 11th century A.H., interested himself in the collection of *fatwās*. He formed a Committee of India's leading jurists with Shaykh Nizām as President to prepare a comprehensive book containing the books of *Ẓāhirāt ar-Rawiyyah*, which had been approved by the most distinguished jurists and the *Al-Nawādir* containing solutions accepted by some jurists. The *Fatāwā al-'Alamgīriyyah* was produced in six large volumes arranged on the model of the *Hidāyah* and it is still one of the major references in *Ḥanafī* jurisprudence. This semi-official compilation was not however a code, but dealt with many juridical questions some real, others hypothetical, with a statement of the prevalent views on each question.[69]

The *Sharī'ah* laws remained officially uncodified till the time of the Ottoman regime. In the 19th century a number of European Codes were prepared and the Ottoman State felt that the needs of the age necessitated the issuing of codes of appropriate laws. Thus was enacted the Commercial Code of 1850, the Land Code of 1858, the Criminal Code, the Code of Commercial Procedure and the Civil Procedure Code, all based on foreign Codes in text, spirit and arrangement. It was also decided to have a civil code. A seven-man committee of jurists called the Committee of *Majallah* was appointed "to prepare a book on judicial

68. Maḥmaṣānī, *op.cit.*, p. 39f.
69. *Ibid.*

transactions which would be correct, easy to understand, free from contradictions, embodying the selected opinions of the jurists and easily readable by everyone". The Committee began its work in 1285 A.H. (1869 A.D.). It submitted the introduction and the first book of the *Majallah* to the Shaykh al-Islām and other dignitaries who incorporated certain modifications and refinements. The members of the Committee then divided the work among themselves, so that each member participated in writing some section. The compilation was completed in 1293 A.H. (1876 A.D.). It was enacted by royal decree under the title *Majallat-i Ahkami Adliye.*[70]

Under the impact of modern conditions and the pressing need to bring the family law into line with the demands of society many changes were effected in the law as traditionally applied. In the early stages these reforms were justified on the juristic basis of the doctrine of *siyāsah,* which in general terms defines the position of the political authority in relation to the *Sharī'ah* law and in particular enables him to make administrative regulations to define the jurisdiction of the courts. Such administrative regulations, for the purpose of the reforms, fall into two distinct categories. The first defines the jurisdiction of the courts in the sense that it orders them to apply one particular rule among several variant legal rules on the same question. The authority of the medieval handbooks of the *Sharī'ah* law was accepted but the political authority has altered the traditionally applied law by choosing from among the authoritative opinions recorded in those handbooks and directing the courts to apply the opinion selected.[71] For example in place of the traditionally dominant *Ḥanafī* law which confines a wife's petition for divorce to the one ground of sexual impotence of her husband, the *Mālikī* law, under which the wife's petition may be grounded on the husband's incurable and contagious disease,

70. *Ibid.*

71. This method, which can not only be deduced from the enacted laws but is explicitly stated in numerous publications, speeches and official explanatory notes prefixed to the laws themselves, savours of unrestrained eclecticism; any opinion held at some time in the past is apt to be taken out of its context and used as an argument. On the one hand the modernists are inclined to deny the religious and Muslim character of the relevant sections of Muslim Law; on the other hand they do not disdain to use somewhat arbitrary and forced interpretations of the *Qur'ān* and the other traditional sources of Muslim Law, whenever it suits their purpose Materially they are bold innovators; formally they try to avoid the semblance of interfering with the essential contents of Muslim Law – Schacht, "Problems of Modern Islamic Legislation", p.119.

desertion, failure to maintain or cruelty, has been widely adopted. It is again by this process of selection that certain harsh details of the *Ḥanafī* law relating to repudiation of a wife or *ṭalāq* have been whittled away. For example the rule that a repudiation pronounced in drunkenness was valid and effective was discarded in favour of the contrary opinion of the other schools. Similarly, the Ottoman Law of Family Rights, 1917, followed by the later codifications in Syria and Jordan, adopted the *Ḥanbalī* view that a husband who agreed in his marriage contract not to take a second wife during the continuance of the marriage would be bound by such a stipulation, so that the first wife would be entitled to a dissolution of the marriage in the event of its breach.[72] The limits of this process of choosing the best opinion of the recognised schools of law are apparent and it was soon found necessary to go beyond the limits established by the general consensus. Doctrines of isolated jurists outside the four *Sunnī* schools, referred to in the texts as historical curiosities, were selected and embodied in the modern modifications. In some cases it was necessary to 'patch up' legal rules by a procedure aptly termed *talfīq*, from a combination of the views or particular elements from the views, of different schools and jurists.[73]

The second category of administrative regulations is that by which the sovereign defines the jurisdiction of the courts in the sense that he restricts their competence to certain cases. One of the formal devices (*ḥiyal*) used by the early Muslim jurists which has proved invaluable to the modern jurists is the restriction of the competence of *qāḍīs* by political power. The competence of a *qāḍī* depends on the terms of his appointment and the *qāḍīs* have always been appointed each for a certain restricted sphere or to a certain tribunal. From a very early period too, *qāḍīs* have been appointed to hear within their respective spheres of authority certain classes of cases, for instance concerning marriage or succession. This is the historical starting point of the doctrine of Muslim Law which declares that the *Sulṭān* or the Government is entitled to restrict the competence of the *qāḍīs* with regard to place, time and subject matter. The earlier doctrine knew of restrictions with

72. The *Ḥanafī* and *Shāfi'ī* Schools of Law would hold such a stipulation to be void.

73. Coulson, "Islamic Family Law", p. 241f.

regard to persons, place and subject matter and restrictions with regard to time were added when the 'Uthmāniyyah Sulṭān Sulaymān I in 1550 instructed his *qāḍīs* not to hear actions which without a valid ground had not been brought for more than fifteen years, thereby introducing a uniform period of limitation. His Shaykh al-Islām, Abū 'l-Su'ūd, who had himself suggested this measure, gave legal opinions (*fatwā*) accordingly. Abū 'l-Su'ūd completed and consolidated a development which had started earlier. He formulated consciously and in sweeping terms the principle that the competence of the *qāḍīs* derives from their appointment by the *Sulṭān* and that they are therefore bound to follow his directives in applying the Muslim Law.[74]

A number of important reforms have been achieved by this method in the Middle East. Under traditional *Ḥanafī* law, for instance, a child born to a widow or divorcee within two years of the dissolution of her marriage was presumed legitimate, for such was the maximum period of gestation laid down in the *Ḥanafī* texts. The Egyptian Law No. 25 of 1920 declared that the courts would not entertain any disputed claim of legitimacy on behalf of a child born more than a year after the dissolution of the marriage of the child's mother and alleged father, and thus restricted jurisdiction in such matters to claims in which the factual situation involved was in accord with modern medical opinion concerning the gestation period. This procedural method has been used sparingly and only in regard to matters which are essentially matters of evidence. Thus in addition to the matter of the gestation period already mentioned, the Sharī'ah Courts in Egypt have been forbidden to entertain suits involving disputed claims of a marriage or a repudiation which has not been registered. Such regulations, though essentially dealing with matters of legal proof, might have the effect of altering substantive rights. Thus when in Egypt in 1923 officials competent to register marriages were forbidden to register marriages between parties below certain minimum prescribed ages, and the courts were precluded from entertaining claims dependent upon the existence of such a marriage, when it was disputed, this directly affected the substantive right of marriage

74. Schacht, "Problems of Modern Islamic Legislation", p. 102-3.

guardians under the Muslim Law to contract their minor wards in marriage.[75]

The first major example of reform through the method of issuing administrative regulations was provided by the Ottoman Law of Family Rights, 1917, which though it proved short-lived in Turkey, was applied with minor modifications at the end of the First World War in Syria and Lebanon and with further modifications in Jordan. Following that were the series of Egyptian reforms in the Decree Laws, No. 25 of 1920 and No. 25 of 1929 on the law of the family, Decree Law No. 78 of 1931 on the organization of the *qāḍī's* tribunals (incorporating further important modifications of the law of the family), Law No. 77 of 1943 on the law of succession, Law No. 48 of 1946 on the law of *waqf*, Law No. 71 of 1946 on legacies and finally an act of 1955 which abolished the *qāḍī's* tribunals (together with all denominational jurisdictions of personal status) and unified the administration of justice in the hands of the secular courts. These reforms were preceded, interspersed and followed by similar but much more piece-meal innovations in the Anglo-Egyptian Sūdān. Then came the Jordanian Law of Personal Status of 1951 and the Syrian Law of Personal Status of 1953.

But far reaching though some of the reforms introduced by the methods of issuing administrative regulations may have been, these methods were limited in their scope and were in particular of no avail against the two institutions of the *Sharī'ah* which were the concern of the modern reformer — the husband's rights of polygamy and repudiation or *ṭalāq*. In order seriously to challenge the essence of these traditional rights of the husband some more extreme and incisive approach was required. Such an approach had been suggested by the great Egyptian reformer, Muḥammad 'Abduh as early as 1898. His argument was that the *Qur'ān* may be so interpreted as to deny both the right of polygamy and the right of extra-judicial divorce by repudiation. In the first place the *Qur'ān* qualifies its permission of polygamy by requiring that the husband should be financially capable of supporting a plurality of wives and that he should be able to treat them impartially. If these qualifications should be interpreted not as mere moral injunctions, but as positive legal conditions precedent to the exercise of

75. *Ibid.*, p.114.

the right itself, then it would be open to a modern court, in the light of present social circumstances, to hold that these conditions were incapable of fulfilment and thus refuse to sanction a second marriage. In the second place the *Qur'ān* orders the appointment of arbitrators in the event of 'discord' between husband and wife. The pronouncement of a repudiation by the husband clearly gives rise to discord and the court can therefore assume the necessary function of arbitration. A repudiation should not therefore be effective in itself but should require at least the consent of the court. The court can consider the husband's motive and in giving its consent may do so upon such terms, particularly as to the financial provision for the divorced wife, as it sees fit.[76] The proposals of Muḥammad 'Abduh were not immediately acceptable and it was not till 1953 that the first hesitant steps were taken in the actual implementation of this new approach. The Syrian Law of Personal Status, 1953, required the consent of the court for a second marriage and such consent can only be given where the husband could establish financial ability to support his wives adequately.[77] In regard to *ṭalāq* the approach was less extreme and the only provision is that which enables the court to award a repudiated wife compensation, with the maximum of one year's maintenance, where the repudiation was pronounced without just or proper motive and was injurious to the wife.[78] Since then however further advances have been made. The Tunisian Law of Personal Status of 1956 carried the thesis of Muḥammad 'Abduh to its logical conclusion, by prohibiting polygamy and making *ṭalāq* dependent upon the consent of the court.[79] The Moroccan Code of Personal Status, 1958, is less drastic than the Tunisian Law for it has contented itself with enunciating the principle that "if any injustice is to be feared between co-wives, polygamy is not permitted" and with providing that a wife whose husband concludes a second marriage may always (even where she has made no such stipulation or condition in the marriage contract) refer her case to the court to consider any injury which may have been caused to her.[80] As regards *ṭalāq* the Moroccan Code of Personal Status provides that every

76. Coulson, *op.cit.*, p. 244f.
77. Syrian Law of Personal Status, 1953, Article 17.
78. *Ibid.*, Article 117.
79. Tunisian Law of Personal Status, 1956, Articles 18 and 31
80. Moroccan Code of Personal Status, 1957, Article 30.

husband who takes the initiative in repudiating his wife must give her a consolatory gift (*mut'ah*) in proportion to his means and her circumstances.[81] The 'Irāqī Code of Personal Status, 1959, provides that marriage with more than one wife is not permitted without the permission of the *qāḍī* and such permission will not be given except on the following two conditions (i) that the husband is financially competent to support more than one wife and (ii) that there is some lawful benefit involved. It is further provided that if any failure of equal treatment between co-wives is feared, then polygamy is not permitted and the determination of this matter is left to the discretion of the *qāḍī*.[82]

In Morocco, Islāmic jurisprudence had developed the principle of the application of *'amal* or judicial practice. The jurists in Morocco took considerable notice of conditions prevailing in fact, not by attempting to change the scholastic doctrine which their predecessors had arrived at, but by recognising that the actual conditions did not allow the strict legal theory to be translated into practice. It was felt that it was better to try and control the practice as much as possible than to abandon it completely. The jurists therefore proclaimed the principle that the practice of the tribunals prevails over the best attested scholastic doctrine. When local customs require it the *qāḍī* has the right to prefer the isolated or anomalous opinion (*shādhdh*) to the predominant opinion (*mashhūr*). This right, limited by numerous conditions and differentiations, is apt to produce temporary and isolated solutions. Thus *'amal* becomes a pragmatic law but it remains subject to doctrinal criticism which can at any moment revoke it.[83]

In 1949 'Allāl al-Fāsī, a well-known public figure in Morocco, put forth a programme of modern Islāmic legislation. 'Allāl al-Fāsī shares with the legal modernists in the Middle East the conviction that law must be based on religion, but he is prepared to admit modern French legislation as one of the essential legal bases of the Moroccan Islāmic legislation, which he advocates. He justifies this by saying:

> We know that Islāmic Law had Divine inspiration as its primary source. But in details, it did not fail to make use of a number of foreign legal rules, and even customs which were followed in

81. *Ibid.*, Article 60.
82. 'Irāqī Code of Personal Status 1959, Article 3.
83. *Art.* "Amal", *Encyclopaedia of Islām.*

the countries where Islām penetrated. It did that every time those rules or customs could be brought into agreement with the general juridicial principles of Islāmic Law.

Actual modernist legislation in Morocco has not followed the lines indicated by 'Allāl al-Fāsī. Towards the end of 1957 a Royal decree promulgated the first two books, on marriage and on the dissolution of marriage, of the *Mudawwanah* or Islāmic Code of Personal Status and Inheritance; books three and four have also been promulgated. The General Reporter of the Commission charged with drafting the Code, in his report laid stress on the recognised method of later Muslim jurisprudence in Morocco, of giving preference to a less well attested doctrine if it agrees with practice; and the work of the Commission might be regarded as creating a new judicial practice in Morocco.[84]

In Tunisia, while the *cadis'* (*qāḍī's*) courts applied the traditional Muslim Law in those subject matters which were usually reserved to it in Muslim countries; the rest of the civil and the whole of criminal jurisdiction were in the hands of the secular tribunal of the Ouzara. The French re-organized the tribunal of the Ouzara on modern lines and in order to provide it with a civil code and to put an end to uncertainty and arbitrariness, nominated a commission on whose behalf the late Professor D. Santillana (*d.* 1931), an eminent specialist in Islāmic Law and at the same time a practical lawyer, produced the draft of a Civil and Commercial Code of Tunisia in 1899, part of which was enacted as the Tunisian Code of Obligations and Contracts in 1906. In 1947 the *Mālikī Grand Muftī* of Tunisia, Muḥammad bin Ja'īṭ, was appointed Minister of Justice and he took the step of appointing a Commission charged with elaborating a code of the Muslim Law of family which would harmonise the doctrines of the *Mālikī* and *Ḥanafī* schools of law, both of which enjoyed validity in Tunisia. Owing to a change of Ministry in Tunisia, this project came to nothing and copies of the draft code, which had already been printed, were destroyed. Finally by legislation in 1956, the public *waqf*s were abolished and their property became the property of the State; the separate jurisdiction of the *cadis'* courts was abolished; and a new Tunisian Code of Personal Status was enacted. Although the Tunisian Ministry of Justice claimed that the code had received

84. Schacht, "Problems of Modern Islamic Legislation", p.123-4.

the approval of eminent specialists in Muslim Law, and although the Code has retained some typically Islāmic institutions, such as dower and foster-parentship and agrees in many details with the doctrine of one or other of the *Mālikī* or *Ḥanafī* schools of law, it cannot be regarded as being merely an adaptation of traditional Muslim Law. The section of the Code on the law of succession in the main reproduces the traditional doctrine but the law of marriage and divorce has been considerably modified. Polygamy for instance has been prohibited and made a criminal offence; marriage is concluded by the consent of the bridegroom and the bride; and divorce can be pronounced only by a court of law (a) at the request of one of the spouses on the grounds specified in the Code (b) in the case of mutual consent and (c) at the request of one of the spouses, in which case the judge fixes the indemnity due by one spouse to the other.[85]

Parallel with the tendency to modify the existing doctrine of traditional Muslim Law, which has prevailed in the 'Arab countries of the Middle East, there has been a seemingly opposite trend — the desire to create a modern law of contracts and obligations on the foundations of the basic principles of Muslim jurisprudence, using not the main institutions of positive Muslim Law, but the general formal principles which were elaborated by the early Muslim lawyers. This secular Islāmic legislation has brought into being a number of studies in which the modernist Muslim jurists in the Middle East try to set forth the technical formal principles embodied in traditional Muslim jurisprudence, to compare them with the corresponding principles in Roman and in modern European Law and to present the Muslim Law of contract and obligations, sometimes from a comparative angle, in the categories of modern legal thought.

In Egypt three committees were formed for the purpose of revising the Egyptian Civil Code on Islāmic lines, the first in 1936, the second in 1938 and the third later that same year under the chairmanship of Dr. 'Abd al-Razzāq as-Sanhūrī. The result of the task of these committees was the Egyptian Civil Code of 1949. The introductory paragraph of this Code mentions the principles of Muslim Law together with custom and natural justice as rules to follow in cases in which the Code itself gives neither an explicit

85. *Ibid.*, p.125.

nor an implicit directive. Similar Codes were issued in Syria in the Syrian Civil Code of 1949 and in 'Irāq in the 'Irāqian Civil Code of 1953.[86]

In the Indian subcontinent the interaction of English and Muslim Law has moulded the Muslim Law into a unique form. When the East India Company decided in 1772 to claim sovereign rights and the power of jurisdiction outside its trading factories, the preservation of the institutions of Muslim Law concerning the law of the family, succession and other matters sanctioned by religion, were guaranteed to the Muslims. According to strict theory the whole of Muslim Law, including the rest of civil law, penal law and the law of evidence ought to be regarded as sanctioned by religion but no significant voice of dissent was raised when Muslim Law in these fields was superseded by codes of British inspiration in the course of the 19th century. This was a very important departure for it showed that the idea of secular law had for the first time been accepted by the leaders of an important Muslim community. In 1772 two British judges replaced the *qāḍīs* in British India. The judges were originally assisted by legal officers or *muftīs* chosen from among Muslim scholars whose duty it was to state the correct doctrine of the Muslim Law for the benefit of the judge but in time the judges came in the Muslim parts of India to be recruited from the Muslims themselves. These judges were trained in the English Law, and English concepts such as the doctrine of precedent, and general principles of English common law and equity, infiltrated more and more into Muslim Law as applied in India. Muslim Law in India has grown in this manner into an independent legal system, in many ways different from pure Muslim Law. Out of this law, a new Anglo-Muḥammadan jurisprudence has grown, a jurisprudence whose aim is not to evaluate a foreign body of legal raw material from the Muslim angle, but to apply, inspired by modern English jurisprudence, autonomous juridical principles to Anglo-Muḥammadan law. The application of the law of the authoritative *Ḥanafī* texts was subject to the twin influences of the doctrine of precedent and overriding legislation, both of which are strictly foreign to the pure *Sharī'ah* doctrine. Thus while the Middle Eastern countries have chosen to apply the *Mālikī* law concerning the possible grounds of a wife's petition for disso-

86. Maḥmaṣānī, *op.cit.*, p. 50f.

lution of marriage, substantially the same reforms were effected in India by the direct and overriding legislation of the Dissolution of Muslim Marriages Act, 1939. Similarly, while the Middle Eastern countries have used the procedural device of denying judicial relief, the Indian Evidence Act, 1872, superseded the traditional *Ḥanafī* law concerning the maximum period of gestation by adopting the English Law relating to presumptions of legitimacy; while the Child Marriage Restraint Act, 1929, imposed penalties in cases of child marriage (that is, in the case of boys under eighteen years and girls under fourteen years) upon the male party if adult, the celebrant of the marriage and the guardian of the child concerned. Finally, the practice of the courts in enforcing stipulations in marriage contracts, if they were "reasonable and not contrary to the provisions or policy of the law", would appear to be a case of judge-made law stemming from English influence.[87]

The Muslim Family Laws Ordinance, 1961, of Pakistan continues the particularly Anglo-Muḥammadan tradition of law. It provides for the registration of marriages and for the setting up of Arbitration Councils to deal with second marriages, repudiations and claims for maintenance. A second marriage during the subsistence of an existing marriage is prohibited without the written permission of the Arbitration Council. A repudiation or *ṭalāq* will not be effective until ninety days after delivery of notice to the Chairman of the Arbitration Council or where the repudiated wife is pregnant until delivery of the child, whichever period is the longer. During such period the Arbitration Council is empowered to take all steps necessary to bring about reconciliation between the parties. The Arbitration Council is given power in case of disputes to determine what maintenance is adequate for the wife or wives and issue a certificate to that effect.

The position in Malaysia is different from that in India and Pakistan. Questions of Muslim marriage and divorce are not adjudicated in the ordinary courts but in special *Kathi's* or *Sharī'ah* Courts. The law applicable in such courts is normally of the orthodox *Shāfi'ī* School, but power is given to Councils of Religion in the various States to issue rulings on law, which may be based on the less orthodox doctrines of the *Shāfi'ī* School or on the doctrines of the *Ḥanafī, Mālikī* or *Ḥanbalī* Schools. Administrative enact-

87. Coulson, *op.cit.*, p. 246.

ments and regulations have been issued to provide for the registration of marriage and in some States to control the exercise of the rights of polygamy and repudiation.

It is significant that the legislative or administrative reforms in the Middle East, in the Indian subcontinent and in Malaysia, were made applicable to every Muslim, to whatever school of law he may belong. So instead of each country following the laws of the school or schools predominant in that region, an eclectic system of legislation has been evolved. All of which is in contrast to the earlier practice of applying the law of the school to which the person belongs. It is true that there were provisions in the various schools of law whereby in cases of hardship the law of a different school could be applied, but this could only be used in limited and special cases. The tendency of the recent legislative reforms has been to assimilate the teachings of the various schools of law and this might eventually result in the obliteration of the differences between the schools in matters of law.

In practice it would be difficult in modern times to recognise a person as having the right of *ijtihād,* and 'Allāma Muḥammad Iqbāl has suggested that the principles of *ijmā'* should be extended and that the power of *ijtihād* should reside not in individuals but in a body of learned Muslim scholars, who may interpret the law so that it falls in line with modern legal and social ideas and with current needs. This suggestion has in fact been followed to a certain extent in the legislative reforms in the Middle East, in the Indian subcontinent and in Indonesia.

Sa'īd Ramaḍān in his book on Islāmic Law has suggested that the edifice of all Muslim jurisprudence may be epitomized by three fundamentals:—

(a) the *Qur'ān* and the authentic traditions;

(b) the general will of the nation as ordained by the *Qur'ān* and practised by the Prophet and the early *khalīfas* — not as conceived obscurely and variably by the disputable *ijmā'* but sought through consultation and full representation;

(c) the conception of *al-maṣlaḥah* or common interest, being the obvious outcome of all texts of the *Sharī'ah,* to be considered both in the application of the sacred texts and in

the legal speculation for all occurrences in the absence thereof.

After quoting Iqbāl's suggestion that the power of *ijtihād* should be transferred from individual representatives of the schools to a Muslim legislative assembly, he agrees with Iqbāl that "in this way alone we can stir into activity the dormant spirit of life in our legal system and give it an evolutionary outlook".[88]

The subject matter of Muslim Law was to a great extent not originally Qur'ānic or Islāmic; it became Muslim only through having the categories of Islāmic jurisprudence imposed upon it. The fundamentals of Islāmic jurisprudence were derived from the *Qur'ān* and the *Sunnah*, but these were elaborated and developed, thereby creating an integrating principle which made of an agglomerate of varied elements a unique phenomenon. During the first two centuries of Islām the Muslim jurists created a central core of ideas and institutions which went beyond the contents and implications of the *Qur'ān* and the practice of the Prophet, but which the Muslims considered and have continued to consider specifically Islāmic. In the course of this development, foreign elements which were compatible with the central Muslim core of doctrine were absorbed but the central core exerted a strong attracting and assimilating power permeating them both with the true Islāmic spirit until their foreign origin came to be well nigh unrecognisable. This assimilating power of the Islāmic core over foreign elements anticipated and was followed by the assimilating power and spiritual ascendancy of Islāmic Law, as a religious ideal over the practice, after the two were finally separated. The assimilation of non-Islāmic elements by the Islāmic core in the formative period and the assimilation of practice by the theory in the Islāmic middle ages are stages of one and the same process, a process which resulted in the creation of an equilibrium between the theory of law and actual practice. This equilibrium was destroyed by the impact of Western influence in modern times and a new period of indiscriminate reception from abroad began. It remains to be seen whether history will repeat itself and whether the Islāmic core of doctrine will once more exercise its power and assimilate and Islāmize the new legal doctrines and institutions.

88. Ramadan, *op.cit.*, pp. 88, 89.

One of the major problems in the application of Muslim Law in modern times is the failure to distinguish between what is laid down by Allāh in the Holy *Qur'ān* and the *Sunnah* of the Prophet on the one hand, and the elaborations on their basis by the Muslim jurists on the other. The Holy *Qur'ān* and the *Sunnah* alone constitute the *Sharī'ah* (the Divine Law) of God which is binding on all Muslims and they alone form the ideological and practical basis of the Muslim nation. There is nothing strange in the fact that disagreements exist among the Muslims with regard to the interpretation of certain Qur'ānic verses or the authenticity of certain Prophetic traditions and their rendering. These disagreements should however remain subject to the final authority of the Holy *Qur'ān* and the *Sunnah* and the opinions of particular schools of Muslim Law on controversial points should not be elevated to the point where they begin to be considered as more authoritative than the texts of the Holy *Qur'ān* and the *Sunnah*. The *Sharī'ah* should remain the criterion for all differences of opinion and every generation of Muslims should feel it to be its duty to follow the command of Allāh —

> and if you have a dispute concerning any matter refer it to God and the Messenger.[89]

The jurists of Muslim Law though they disagreed among themselves did not claim infallibility for their opinions. Their disagreements were based on the texts of the *Sharī'ah* available to them and also arose in regard to their interpretation of them. As Imām Mālik said:—

> I am a human being. I can be right and I can be wrong. Examine every one of my opinions; accept those which conform to the *Qur'ān* and the *Sunnah;* reject those which do not conform to them.

The *Sharī'ah,* as embodied in the Holy *Qur'ān* and the *Sunnah,* does not bind mankind in *mu'āmalāt* (wordly dealings) except by providing a few broad principles of guidance and a limited number of injunctions. The *Sharī'ah* only rarely concerns itself with details. The confinement of the *Sharī'ah* to broad principles and its silence in other spheres are due to divine wisdom and mercy. The Holy Prophet is reported to have said:—

> God has enjoined certain commandments, so do not abandon them. He has imposed certain limits, so do not transgress them. He has prohibited certain things, so do not fall into them. He has remained

89. *The Holy Qur'ān* IV:59.

silent about many things, out of mercy and deliberateness, as He never forgets, so do not ask about them.

The fact that the *Sharī'ah* is silent on these points means that the application of the general injunctions of the *Sharī'ah* to the multifarious details of human life and the confrontation of new problems according to the dictates of the public good have been left to the discretion of the body of conscious Muslims.

The future development of Muslim Law must be based on the principle that the *Sharī'ah* is embodied in the Holy *Qur'ān* and the *Sunnah* and it is only the Holy *Qur'ān* and the *Sunnah* which are binding. The opinions of the jurists of Muslim Law should not be neglected. They should be studied in order that we should derive the utmost benefit from them. These jurists had earnestly endeavoured to interpret the *Sharī'ah* in the face of continually new problems of life regarding which the *Sharī'ah* had observed silence, in the light of the public good and with a due regard for the circumstances of their age. While profiting from their experience the Muslims should adopt the same attitude to the *Sharī'ah*. Following in their footsteps, the Muslims should apply their minds to understand the *Sharī'ah*. The Muslims of today should treat the circumstances of today as the great jurists did theirs and try to face their special problems in the light of the public good, as they did. The recourse to the vast rich *fiqh* heritage should serve to strengthen their bonds with the Holy *Qur'ān* and the *Sunnah*, rather than prevent reference to these two original sources. It should help us to apply the Holy *Qur'ān* and the *Sunnah* to the circumstances in which we live in the same way as our ancestors did for their part. It is altogether unrealistic to seek from the jurists of the past solutions to the problems of our own age — an age of which they could have no knowledge — or to impose upon ourselves regulations devised to fit circumstances which no longer exist. While the unequivocal ordinances of the Holy *Qur'ān* and the *Sunnah* must for all times remain valid as the unchangeable Muslim law, the Muslims are not only permitted but definitely encouraged to develop side by side with this unchanging law, a changeable and changing law, which would apply the spirit and the actual injunctions of the Divine Law to the social requirements of each time and place.[90]

90. Ramadan, "Three Major Problems Confronting the World of Islām"; Muḥammad 'Asad, "Islām and Politics".

SOURCES AND DEVELOPMENT OF MUSLIM LAW

SOME MUSLIM JURISTS AND THEIR WRITINGS

Difference among Muslim scholars is but a divine mercy for this nation. Each of them is following what he considers to be right, and each of them has his argument, and all of them are sincerely striving in the way of God.
Said Mālik, when the ruler, Hārūn ar-Rashīd thought to enforce Mālik's book — *al-Muwaṭṭa'*.

SOME MUSLIM JURISTS AND THEIR WRITINGS

ḤANAFĪ JURISTS

Abū Ḥanīfah al-Nu'mān bin Thābit, the founder of the *Ḥanafī* School of Law, was born in the year 81 A.H. (700 A.D.) at Kūfa in 'Irāq during the reign of the Umayyad Khalīfa, 'Abd al-Malik. Allegedly his ancestors came from Persia. He studied scholastic divinity but soon abandoned it in favour of jurisprudence. He attended the lectures of Ḥammād bin Abī Sulaymān (*d.* 120 A.H. — 737 A.D.), a disciple of Ibrāhīm an-Nakha'ī, a noted 'Iraqī jurist. He also learned traditions from ash-Sha'bī, Qatādah and al-A'mash. Abū Ḥanīfah was endowed with talents of an exceptional nature and had the true lawyer's gift of detecting nice distinctions. He possessed remarkable powers of reasoning and deduction which combined with a retentive memory and a clear understanding brought him into rapid prominence as a master of jurisprudence. Men flocked to his lectures and among his pupils the names of Abū Yūsuf, Muḥammad and Zufar are closely connected with the science of Muslim law. Abū Ḥanīfah instituted a committee consisting of forty men from among his principal disciples for the codification of laws. Of this committee, Yaḥyā ibn Abī Zayd, Ḥasan bin Ziyād, Abū Yūsuf, Dāud aṭ-Ṭa'ī, Ḥabbān and Mandāl were men of great reputation as traditionists, Zufar bin al-Hudhayl was noted for his power of deducing rules of law and Qāsim ibn Na'īm and Muḥammad were great Arabic scholars. The Committee would discuss any practical or theoretical question that arose or suggested itself and the conclusions which they agreed upon after a full and free debate were duly recorded. It took thirty years for the code to be completed, but each part was distributed as it was completed. The code has now been lost. Abū Ḥanīfah devoted the whole of his life to the study of jurisprudence. He made his living as a cloth merchant. He persistently refused to accept the office

of *Qāḍī* which the Umayyad Governor in 'Irāq, 'Umar bin Hubayra, and later the Khalīfa al-Manṣūr wanted him to accept. By his refusal he incurred corporal punishment and imprisonment and he died in prison in 150 A.H. (767 A.D.).

Abū Yūsuf Ya'qūb bin Ibrāhīm al-Anṣārī was born in 113 A.H. He was a pupil of Imām Abū Ḥanīfah and was held in great esteem for his talents, learning and knowledge of the world. He was appointed *Qāḍī* of Baghdād and later became the *Chief Qāḍī* under the Khalīfa Hārūn ar-Rashīd. He is the author of *Kitāb al-Kharāj,* a treatise on financial and political questions. The sayings of Abū Yūsuf also appear in the later sections of Shāfi'ī's *Kitāb al-Umm.* He died in 182 A.H.

Muḥammad ibn al-Ḥasan ash-Shaybānī was born at Wāsiṭ in 'Irāq in 132 A.H. He studied under Imām Abū Ḥanīfah and later under Abū Yūsuf. He is the writer of the standard works of the *Ḥanafī* School among which are the *Mabsūṭ,* which is said to have been dictated by Abū Yūsuf and compiled by Muḥammad with additions; the *Jāmi' aṣ-Ṣaghīr;* the *Jāmi' al-Kabīr;* and the *Kitāb as-Siyar al-Kabīr.* He died in 189 A.H. — 804 A.D.

Zufar ibn al-Hudhayl born in 110 A.H. was a scholar of *ḥadīth,* who became one of the leading disciples of Abū Ḥanīfah. He was Chief Judge at Baṣra, where he died in 158 A.H.

Ḥasan bin Zīyad was another disciple of Abū Ḥanīfah, whose views are held as authoritative in the *Ḥanafī* School. He died in 204 A.H.

Abū Bakr Aḥmad bin 'Umar al-Khaṣṣāf (*d.* 261 A.H.) was the author of the *Adab al-Qāḍī,* a book on the duties and functions of judges, the *Ḥiyal ash-Sharīyy'ah,* a book on legal devices and the *Aḥkām al-Waqf,* a book on pious foundations.

Ja'far Aḥmad bin Muḥammad aṭ-Ṭaḥāwī (*d.* 321 A.H.) is the author of a commentary on the *Jāmi' aṣ-Ṣaghīr* of Imām Muḥammad and the *Mukhtaṣar fī'l-Fiqh,* a synopsis of the *Ḥanafī* doctrines.

Muḥammad bin Muḥammad al-Marwazī al-Ḥākim (*d.* 334 A.H.) is the author of the *Kāfī fī'l-Fiqh*

which is an authority for determining the views of Imām Abū Ḥanīfah and his two disciples.

Abū'l-Layth Naṣr bin Muḥammad as-Samarqandī (*d.* 375 A.H.) is the author of the *Kitāb an-Nawāzil*, a collection of *fatwā*, legal determinations and opinions.

Abū Ḥusayn Aḥmad bin Muḥammad al-Qudūrī (*d.* 428 A.H.—1036 A.D.) was an eminent jurist and the author of the *Mukhtaṣar*, a compendium of very great reputation. It has been said that a person who commits it to memory becomes secure from poverty and that the person who studies it under a pious teacher and on the completion of his studies invokes upon him God's blessings, acquires as many dirhams as there are legal determinations in the book. These are said to be 12,000.

Shams al-A'immah Abū Bakr Muḥammad bin Aḥmad as-Sarakhsī (*d.* 483 A.H. — 1090 A.D.) is the author of the *Mabsūṭ*, a commentary on the work of Imām Muḥammad and al-Ḥākim, which he dictated while in prison at Uzjand. The *Mabsūṭ* is a legal work of great merit and the arguments used by later *Ḥanafī* jurists are based on this work.

Abū'l-Ḥasan 'Ubayd Allāh bin al-Ḥasan al-Karkhī (*d.* 340 A.H.) is the author of the *Mukhtaṣar fil Fiqh*, a compendium of the doctrines of the *Ḥanafī* School.

Shams al-A'immah 'Abd al-'Azīz bin Aḥmad al-Ḥalwānī (*d.* 448 A.H.) is the author of a commentary on the *Mabsūṭ* of Imām Muḥammad.

Shaykh al-Islām Abū Bakr Khawāharzāde (*d.* 482 A.H.) is the author of another well-known commentary on the *Mabsūṭ* of Imām Muḥammad.

Fakhr al-Islām 'Alī bin Muḥammad al-Bayḍāwī (*d.* 482 A.H.) is the author of a well-known commentary on the *Jāmi' aṣ-Ṣaghīr* of Imām Muḥammad and of the *Kanz al-Uṣūl*, a classical book on *uṣūl ul-fiqh*.

Abū Bakr bin Muḥammad bin Muḥammad as-Sarakhsī (*d.* 544 A.H.) is the author of the *Muḥīṭ*, a work which gives legal determination to the works of Imām Muḥammad together with their motives and meanings.

Burhān ud-Dīn Maḥmūd bin Aḥmad aṣ-Ṣadr ash-Shahīd al-Bukhārī bin Māzah (*d.* 570 A.H.) is the author of the *Muḥīṭ*, which deals with the legal opinions of Imām Muḥammad as well as those of later jurists.

'Alā' ud-Dīn Muḥammad bin Aḥmad as-Samarqandī is the author of the *Tuḥfat al-Fuqahā'* a commentary on the *Mukhtaṣar* of al-Qudūrī.

'Alā' ud-Dīn Abū Bakr bin Mas'ūd al-Kāshānī (*d.* 587 A.H.) is the author of the *Badā'i' aṣ-Ṣanā'i'* which is based on the *Tuḥfat al-Fuqahā'* of as-Samarqandī. This is a systematic exposition of the law. It quotes the views of Imām Shāfi'ī and sometimes of Imām Mālik, with their arguments, mentioning the *Ḥanafī* arguments last.

Burhān ud-Dīn 'Alī bin Abū Bakr al-Marghīnānī (*d.* 593 A.H. — 1197 A.D.) is the author of the *Hidāyah* one of the most esteemed *Ḥanafī* compendiums. The work is a commentary on the writer's own *Hidāyah al-Mubtadī* which in turn is a commentary on the *Jāmi' aṣ-Ṣaghīr* of Imām Muḥammad and the *Mukhtaṣar* of al-Qudūrī. The author as a rule mentions the opinion and argument of Abū Ḥanīfah after that of his disciples unless it be that he sides with the latter. Imām Shāfi'ī's differences and the arguments of each side are mentioned.

Fakhr ud-Dīn al-Ḥasan bin Manṣūr al-Uzjandī Qāḍī Khān (*d.* 592 A.H. — 1196 A.D.) is the author of a commentary on the *Jāmi' aṣ-Ṣaghīr* of Imām Muḥammad and a collection of *fatwā*, which is held in high esteem. Qāḍī Khān was a judge as well as a jurist and the collection of *fatwā* is replete with cases of common occurrence and is therefore of great practical utility.

Sirāj ud-Dīn Muḥammad bin Muḥammad al-Sajāwandī who died towards the end of 6th century is the author of the *al-Farā'iḍ as-Sirājiyyah* which with its commentary the *Sharīfiyyah* of al-Jūrjānī are the standard works on inheritance.

Jamāl ud-Dīn Aḥmad bin Muḥammad al-Ghaznawī (*d.* 600 A.H.) is the author of the *Ḥāwī al-Qudsī*, written in Jerusalem. It deals with *uṣūl ud-dīn, uṣūl al-fiqh* as well as with *fiqh* proper.

Burhān ud-Dīn Maḥmūd bin Ṣadr ash-Sharī'ah al-Awwal who died about 680 A.H. is the author of the *Wiqāyat ar-Riwāyah*, a compendium based on the *Hidāyah*.

Abū'l-Faḍl Majd ud-Dīn 'Abd Allāh bin Maḥmūd bin Maudūd al-Mawṣilī (*d.* 683 A.H.) is the author of the *Mukhtār*, an esteemed text of the *Ḥanafī* School and the *Ikhtiyār*, a commentary on the *Mukhtār*.

Muẓaffar ud-Dīn Aḥmad bin 'Alī bin as-Sā'atī al-Baghdādī (*d.* 696) is the author of the *Majma' al-Baḥrayn*, an esteemed text of the *Ḥanafī* School. Al-Baghdādī also wrote a commentary on the *Majma'*.

Najm ud-Dīn Mukhtār bin Maḥmūd az-Zahidī (*d.* 658 A.H.) is the author of the *Mujtabā*, a commentary on the *Mukhtaṣar* of al-Qudūrī, and the *Qunyat al-Munshi'*.

Hisām ud-Dīn Ḥusayn bin 'Alī as-Sighnāqī (*d.* 710 A.H.) is the author of the *Nihāyah*, a commentary on the *Hidāyah*.

Ḥāfiẓ ud-Dīn Abū'l-Barakāt 'Abd Allāh bin Aḥmad an-Nasafī (*d.* 710 A.H. — 1310 A.D.) is the author of the *Kanz al-Daqā'iq*, one of the most important and esteemed texts of the *Ḥanafī* School. It is an abridgement of the author's *al-Wāfī*, which was modelled after the *Hidāyah*. An-Nasafī is also the author of *Manār al-Anwār*, a compendium on the *uṣūl al-fiqh*.

Qiyām ud-Dīn Muḥammad bin Muḥammad al-Bukhārī al-Kākī (*d.* 749 A.H.) is the author of the *Mirāj al-Dirāyah*, a commentary on the *Hidāyah*.

'Āmir Khaṭīb bin 'Āmir 'Umar al-Itqānī (*d.* 758 A.H.) is the author of the *Ghāyat al-Bayān*, a commentary on the *Hidāyah*.

Akmal ud-Dīn Muḥammad bin Maḥmūd al-Bābartī who died in 786 A.H. — 1384 A.D. is the author of the *'Ināyah*, a commentary on the *Hidāyah*.

Jalāl ud-Dīn bin Shams ud-Dīn Khawa-

rizmī al-Karlānī (*d. circa* 747 A.H. — 1346 A.D.) is the author of *Kifāyah*, a commentary on the *Hidāyah*.

Fakhr ud-Dīn 'Uthmān bin 'Alī al-Zayla'ī (*d.* 743 A.H.) is the author of the *Tabyīn al-Ḥaqā'iq*, a commentary on the *Kanz al-Daqā'iq* of an-Nasafī.

'Ubayd Allāh bin Mas'ūd Ṣadr ash-Sharī'ah ath-Thānī al-Maḥbūbī (*d.* 747 A.H.) is the author of a commentary on the *Wiqāyat* of his grandfather Ṣadr ash-Sharī'ah al-Awwal, the *Nuqāyah*, an abridgement of a commentary on the *Wiqāyat*, and the *Tawḍīḥ*, a compendium on *uṣūl al-fiqh*.

Badr ud-Dīn Muḥammad bin 'Abd Allāh ash-Shiblī (*d.* 769 A.H.) is the author of the *Yanābī'*, a commentary on the *Mukhtaṣar* of al-Qudūrī.

Abū Bakr bin 'Alī al-Ḥaddādī al-'Abbādī (*d.* 800 A.H.) is the author of the *Sirāj al-Wahāj* and the *Jawharah an-Nayyirah*, commentaries on the *Mukhtaṣar* of Qudūrī.

Kamāl ud-Dīn Muḥammad bin 'Abd al-Wāhīd al-Humām (*d.* 861 A.H. — 1457 A.D.) is the author of the *Fatḥ al-Qadīr* a commentary on the *Hidāyah*, which contains the opinions, dicta and decisions of judges explaining, illustrating and elucidating the principles of the Muslim law; and the *Taḥrīr*, a book on *uṣūl al-fiqh*.

Abū Muḥammad Maḥmūd bin Aḥmad al-'Aynī (*d.* 855 A.H.) is the author of the *Ramz al-Ḥaqā'iq*, a commentary on the *Kanz al-Daqā'iq* of an-Nasafī.

Muḥammad bin Maḥmūd bin 'Āmir al-Ḥaj al-Ḥalabī (*d.* 879 A.H.) is the author of the *Taqrīr*, a commentary on the *Taḥrīr* of al-Humām.

Muḥammad bin Farāmurz bin 'Alī Mullā Khusraw (*d.* 885 A.H. — 1480 A.D.) is the author of the *Durar al-Ḥukkām*, a commentary which enjoyed particular favour in Turkey; and the *Mirqāt al-Wuṣūl*, a commentary on *uṣūl al-fiqh*.

Mu'īn ud-Dīn Muḥammad bin Ibrāhīm Mullā Miskīn al-Harawī who is the author of the *Tabyīn al-Ḥaqā'iq*, written in 811 A.H., which is a commentary on the *Kanz al-Daqā'iq* of an-Nasafī.

Shams ud-Dīn Muḥammad al-Kūhistānī (*d.* 950 A.H.) is the author of the *Jāmi' ar-Rumūz,* a commentary on the *Nuqāyah* of Ṣadr ash-Sharī'ah ath-Thānī.

Ibrāhīm bin Muḥammad al-Ḥalabī (*d.* 956 A.H.) is the author of the *Multaqa'l-Abḥur,* a code of the *Ḥanafī* School of Law.

Zayn al-'Ābidīn bin Ibrāhīm Nujaym al-Miṣrī (*d.* 970 A.H.) is the author of the *Baḥr ar-Rā'iq,* a well-known commentary on the *Kanz al-Daqā'iq* of an-Nasafī and the *al-Ashbāh wā'l Naẓā'ir,* a book on legal principles.

Maḥmūd bin Muṣṭafā al-Wānqūlī (*d.* 1000 A.H.) is the author of the *Naqd ad-Durar,* a commentary on the *Durar al-Ḥukkām* of Mullā Khusraw.

Shams ud-Dīn Muḥammad 'Abd Allāh al-Ghazzī at-Timurtashī (*d.* 1004 A.H.) is the author of the *Tanwīr al-Abṣār.*

'Alā' ud-Dīn Muḥammad bin 'Alī al-Ḥaṣkafī (*d.* 1088 A.H. — 1677 A.D.) was the *Muftī* at Damascus. He wrote the *Durr al-Mukhtār* which is a commentary on the *Tanwīr al-Abṣār* of Timurtashī.

'Abd ur-Raḥmān bin Shaykh Muḥammad (*d.* 1078 A.H.) is the author of the *Majma' al-Anhur,* a commentary on the *Multaqā al-Abḥur* of al-Ḥalabī.

Muḥammad Amīn bin 'Ābidīn (*d.* 1252 A.H. — 1836 A.D.) is the author of the *Radd al-Mukhtār,* a commentary on the *Durr al-Mukhtār.* This is the best modern authority on the *Ḥanafī* School of law. It contains a critical resume of previous decisions, the opinions of the most important earlier jurists, with a full account of the reorganised and accepted principles in modern times.

MĀLIKĪ JURISTS

Abū 'Abd Allāh Mālik ibn Anas, the founder of the *Mālikī* School of law was born between 90-7 A.H. in Madīnah. He studied under a number of teachers in Madīnah and heard and transmitted traditions from az-Zuhrī, Nāfi', Abū'l-Zinād, Hāshim bin 'Urwa, Yaḥyā bin Sa'īd, 'Abd Allāh bin Dīnār, Muḥammad bin al-Munkadir, Abū'l-Zubair and others.

He lent his support to Muḥammad bin 'Abd Allāh against the Khalīfa Manṣūr and on the failure of the rebellion he was punished by flogging by Ja'far bin Sulaymān, the Governor of Madīnah. He later made his peace with the government and he was consulted by the Khalīfa al-Mahdī on structural alterations to the *Ka'ba.* Imām Mālik died in the year 179 A.H. — 795 A.D. and was buried in al-Baqī' at Madīnah. His great work, the *Kitāb al-Muwaṭṭa',* is the earliest surviving *Sunnī* law book. Its object was to give a survey of law and justice, ritual and practice of religion according to the *ijmā'* of Islām in Madīnah and according to the *Sunnah* usual in Madīnah and to create a theoretical standard for matters which were not settled from the point of view of *ijmā'* and *sunnah.* The main characteristic of the juristic thought that appears in the *Muwaṭṭa'* is the permeation of the whole legal system by religious and moral ideas.

Abū Muḥammad 'Abd Allāh ibn Wahb was born in Egypt in 126 A.H. and studied under Imām al-Laīts and Imām Mālik. He was renowned for his learning and piety and was called by Imām Mālik: the jurist and *Muftī* of Egypt. He died in 197 A.H.

Abū 'Abd Allāh 'Abd ur-Raḥmān ibn Qāsim was born in Egypt and studied under Imām al-Laīts and Imām Mālik. He became one of the leading jurists in Egypt of his time. The *Mudawwanah,* one of the leading *Mālikī* authorities, consists of answers given by him. He died in 191 A.H.

'Abd Allāh 'Abd al-Ḥakam al-Miṣrī (*d.* 214 A.H.) is the author of *al-Mukhtaṣar.*

Saḥnūn 'Abd as-Salām bin Sa'īd bin Ḥabīb at-Tanū'khhī (*d.* 240 A.H.) was a pupil of Imām Ibn Qāsim and compiled and edited the *Mudawwanah,* which consists of questions put by Saḥnūn and answers by Ibn Qāsim.

Marwān 'Abd al-Mālik bin Ḥabīb as-Sulamī (*d.* 238 A.H.) originated from Spain and studied under Imām Ibn Qāsim. He helped to spread the *Mālikī* doctrines in Spain. He is the author of the *Wāḍiḥa,* a standard work of the *Mālikī* School.

Muḥammad bin Aḥmad al-'Utbī al-Qurṭubī (*d.* 255 A.H.) was a student of as-Sulamī. He wrote the *'Utbiyyah*, another standard work of the *Mālikī* School.

Muḥammad bin 'Abd Allāh ibn 'Abd al-Ḥakam (*d.* 268 A.H.) is the author of the *Aḥkām al-Qur'ān* and *Ādāb al-Quḍāh*.

Ismā'īl ibn Isḥāq al-Qāḍlī who died in 282 A.H. is the author of *al-Mabsūṭ*.

Muḥammad bin Ibrāhīm bin al-Mawāz (*d.* 281 A.H.) is the author of the *Mawāziyyah*, another standard work of the *Mālikī* School.

Muḥammad bin Yaḥyā bin Lubābah al-Andulusī (*d.* 336 A.H.) is the author of the *Muntakhab* and *Wathā'iq*.

Abū Bakr al-Qusharī who died in 349 A.H. is the author of *al-Aḥkām*.

Abū Isḥāq Muḥammad bin al-Qāsim ibn Shībān al-Ausy who died in 355 A.H. is the author of *az-Zāhir*.

Muḥammad ibn Ḥārith al-Kasanī (*d.* 361 A.H.) is the author of *al-Ikhtilāf wa'l-Ittifāq*.

Abū Bakr al-Muithy al-Andalusī (*d.* 367 A.H.) is the author of *Istī'āb*.

Yūsuf bin 'Umar Ibn 'Abd al-Barr who died in 463 A.H. is the author of the *Istidhkār* and the *al-Kāfī*.

'Ubayd Allāh bin 'Abd ur-Raḥmān bin Abū Zayd al-Qairawānī who died in 386 A.H. — 996 A.D. is the author of the *Kitāb an-Nawādir* and the *Risālah*, a short compendium of the *Mālikī* School of law.

Abū Bakr Muḥammad bin 'Abd Allāh al-Abhārī (*d.* 395 A.H.) is the author of a commentary on the *Mukhtaṣar Kabīr* of Ibn 'Abd ul-Ḥakam.

'Abd Allāh al-Barrī (*d.* 399 A.H.) is the author of *al-Muntakhab fī'l Aḥkām*.

Abū Haṣan 'Alī bin Muḥammad bin Khalaf Mu'afirī (*d.* 403 A.H.) is the author of

*al-Mumahhad.**

'Abd al-Wahhāb ibn Nashr al-Baghdādī al-Mālikī (*d.* 422 A.H.) is the author of *an-Nashshār.*

Abū'l-Qāsim Muḥammad al-Lubidī (*d.* 440 A.H.) is the author of *al-Mulachchash.*†

Abū'l-Walīd Sulaymān bin Khalaf al-Bājī (*d.* 494 A.H.) is the author of *al-Iṣṭifā'.*

Abū Sa'īd al-Barādhi'ī who lived in the second half of the fourth century A.H. is the author of *Tahdhīb* a condensation of the *Mudawwanah,* which found great favour with the jurists of North Africa.

Abū Bakr Muḥammad bin 'Abd Allāh bin Yūnus aṣ-Ṣaqalī of West North Africa who died in 451 A.H. wrote an authoritative commentary on the *Mudawwanah.*

Abū'l-Ḥasan bin 'Abd Allāh al-Lakhmī of West North Africa (*d.* 478 A.H.) wrote an authoritative gloss on the *Mudawwanah.*

Muḥammad bin Aḥmad bin Rushd al-Qurṭubī (*d.* 520 A.H.) is the author of the *Kitāb al-Bayān,* a commentary on the *'Utbiyyah* of al-'Utbī and *al-Muqaddimah,* which deals with the etymology and the justification of the words and meanings of the *Mudawwanah.*

Abū 'Abd Allāh Muḥammad bin 'Alī al-Mazirī (*d.* 536 A.H.) is the author of a well-known commentary on the *Mudawwanah.*

Abū Bakr Muḥammad ibn 'Abd Allāh ibn al-'Arābī (*d.* 543 A.H.) is the author of *Aḥkām al-Qur'ān, al-Masālik* and *al-Maḥṣhūl.*

Ismā'īl bin Makky al-Aufy (*d.* 581 A.H.) is the author of *al-Aufiyah.*

Abū Muḥammad 'Abd Allāh ibn as-Sa'dy (*d.* 610 A.H.) is the author of *al-Jawāhir.*

Muḥammad bin Aḥmad ibn Rushd al-Qurṭubi, the famous Averroes, (*d.* 595 A.H. — 1189 A.D.)

* As quoted by Shiddieqy, *Hukum Islām,* p.128.
† *Ibid.,* p.129.

is the author of the *Bidāyat al-Mujtahid,* a systematic account of the *Mālikī* views, which gives an analysis of the main legal issues with the views held by the jurists of the various school.

'Umr 'Uthmān bin 'Umar bin al-Ḥājib (*d.* 646 A.H.) is the author of the *Mukhtaṣar,* a compendium that combines all the *Mālikī* views, and was much read in North Africa in the time of Ibn Khaldūn.

Ḍīyā ud-Dīn Abū aṣ-Ṣafā Khalīl bin Isḥāq (*d.* 767 A.H. — 1365 A.D.) is the author of the *Mukhtaṣar* which is the most famous compendium of the *Mālikī* School and has virtually become the most authoritative summing-up of the *Mālikī* doctrines. It is an attempt to include in the briefest possible compass the accepted doctrines of the school on the minutest details and this makes the work at times difficult to understand.

Tāj ud-Dīn Bahrām bin 'Abd Allāh al-Damīrī (*d.* 805 A.H.) is the author of a commentary on the *Mukhtaṣar* of Khalīl.

Ibrāhīm bin 'Alī bin Farḥūn al-Andalusī (*d.* 799 A.H.) was a Spanish jurist who wrote the *Tabṣirat al-Ḥukkām,* a book intended for judges.

Muḥammad bin Muḥammad al-Warqamī al-Tunisī bin 'Arafah (*d.* 803 A.H.) is the author of the *Mukhtaṣar,* a compendium on the *Mālikī* School of law.

Abū Bakr Muḥammad bin Muḥammad bin 'Āṣim of Granada (*d.* 829 A.H.) is the author of the *Tuḥfat al-Ḥukkām,* a celebrated compendium in verse, which is brief and clear.

Abū 'Abd Allāh Muḥammad bin Yūsuf al-Mauwāq (*d.* 897 A.H.) is the author of a commentary on the *Mukhtaṣar* of Khalīl.

Aḥmad bin Yaḥyā al-Wansharīsī (*d.* 914 A.H.) is the author of the *Mi'yār al-Mughrib,* a comprehensive collection of *fatwā.*

Muḥammad bin Ibrāhīm at-Tatā'ī (*d.* 942 A.H.) is the author of the *Fatḥ al-Jalīl* and the *Jawāhir al-Durār,* commentaries on the *Mukhtaṣar* of Khalīl.

'Abd al-Bāqī bin Yūsuf az-Zurkānī (*d.* 1090 A.H.) is the author of a commentary on the *Mukhtaṣar* of Khalīl.

'Abd Allāh Muḥammad al-Khirshī (*d.* 1101 A.H.) is the author of a number of well-known commentaries on the *Mukhtaṣar* of Khalīl.

'Alī al-'Adawī (*d.* 1189 A.H.) wrote a gloss on the commentary by al-Khirshī on the *Mukhtaṣar* of Khalīl.

Aḥmad bin Muḥammad al-Dardīr (*d.* 1201 A.H.) is the author of a commentary on the *Mukhtaṣar* of Khalīl; of the *Aqrab al-Masālik,* an abridgement of the *Mukhtaṣar;* and of the *Sharḥ aṣ-Ṣaghīr,* a commentary on the *Aqrab al-Masālik.*

Muḥammad bin al-Ḥasan al-Bannānī (*d.* 1173 A.H.) is the author of a gloss on the commentary by Zurkānī on the *Mukhtaṣar* of Khalīl.

Muḥammad bin 'Arafah al-Dāsūqī (*d.* 1230 A.H.) is the author of a gloss on the commentary by al-Dardīr on the *Mukhtaṣar* of Khalīl.

Muḥammad bin Muḥammad as-Sunbawī (*d.* 1232 A.H.) is the author of the *Majmu' fī'l Fiqh,* a compendium on the law based on the *Mukhtaṣar* of Khalīl.

'Abd Allāh Muḥammad bin Aḥmad 'Alīsh (*d.* 1299 A.H.) is the author of a commentary on the *Mukhtaṣar* of Khalīl; and the *Fatḥ al-'Alī,* a collection of *fatwā.*

Aḥmad bin Muḥammad aṣ-Ṣāwī (*d.* 1241 A.H.) is the author of the *Bulgat as-Salik,* a gloss on the *Aqrab al-Masālik* of al-Dardīr.

SHĀFI'Ī JURISTS

Abū 'Abd Allāh Muḥammad bin Idrīs Ash-Shāfi'ī, the founder of the *Shāfi'ī* School of Muslim law, was born in the month of Rajab in 150 A.H. (767 A.D.) in Ghazza. He belonged to the tribe of Quraysh, was a Hāshimī and was distantly related to the Prophet. At an early age he lost his father and was brought up by his mother in poor circumstances in Makka, where he was brought to from Syria after his father's death. He spent some time among the Bedouins

of Banū Hudhayl and acquired from them a thorough knowledge of the 'Arabic language and 'Arab poetry. He became a *ḥāfiẓ* of the Holy *Qur'ān* while still a child and studied *fiqh* under Muslim bin Khālid az-Zanjī (*d.* 180 A.H. — 796 A.D.), who was a *Muftī* in Makka, and *ḥadīth* under Sufyān bin 'Uyaynah (*d.* 198 A.H. — 813 A.D.). He knew the whole of Imām Mālik's *Muwaṭṭā'* by heart. When about twenty years old he went to Madīnah to Imām Mālik bin Anas and stayed with him as his guest and pupil. He visited 'Irāq and met the *Ḥanafī* jurists Imām Abū Yūsuf and Imām Muḥammad bin al-Ḥasan. From 'Irāq, Imām Shāfi'ī returned to Madīnah and stayed with Imām Mālik till the latter's death in 179 A.H. (795 A.D.). After the death of Imām Mālik, Imām Shāfi'ī went to Yaman to work in the government service. There he became involved in *'Alid* intrigues and was brought with other *'Alids* as a prisoner to the Khalīfa Hārūn ar-Rashīd in Raqqa, 'Irāq in 187 A.H. (802 A.D.) He was pardoned and released and went to stay at Baghdād, where he met a number of *Ḥanafī* jurists and also formulated some of his teachings and taught these to his disciples. In 181 A.H. (797 A.D.) he returned to Makka and stayed there till 198 A.H. (813 A.D.) when he went again to Baghdād. There he attached himself to 'Abd Allāh the son of the newly appointed Governor of Egypt, 'Abbās bin Mūsa, and went with him to Egypt in 198 A.H. (813 A.D.) As a result of unrest in Egypt he went to Makka, but returned finally to Egypt in 200 A.H. (815 A.D.) He died and was buried in Fusṭāṭ, Egypt in 204 A.H. (820 A.D.).

Imām Shāfi'ī was a man of great piety and learning and he was a skilled debater. There were two periods of creative activity in his teachings and writings; the earlier in 'Irāq and the later in Egypt. These two periods may be discerned in his own writings as well as in the tenets of the later *Shāfi'īs*. Four pupils are regarded as the transmitters of the older teachings: az-Zafarānī (*d.* 260 A.H. — 873 A.D.), Abū Thawr (*d.* 240 A.H. — 854 A.D.), Aḥmad bin Ḥanbal (*d.* 241 A.H. — 856 A.D.) and al-Karābīsī (*d.* 245 A.H. — 859 A.D.); and six pupils are regarded as the transmitters of the later teachings: al-Muzanī (*d.* 264 A.H. — 877 A.D.) ar-Rabī' bin Sulaymān al-Jīzī (*d.* 256 A.H. — 869 A.D.), ar-Rabī' bin Sulaymān al-Murādī (*d.* 270 A.H. — 833 A.D.) al-Buwayṭī (*d.* 231 A.H. —

845 A.D.), Ḥarmalah (*d.* 243 A.H. — 857 A.D.) and Yūnus bin 'Abd al-A'lā aṣ-Ṣadafī (*d.* 264 A.H. — 877 A.D.). The principal publications of Imām Shāfi'ī which have come down to us are (a) the *Kitāb al-Ḥujjah,* a collection of his older writings; (b) the *Kitāb al-Umm,* a collection of his writings and lectures; (c) the *Risālah,* a book on the methods and principles of *uṣūl al-fiqh.*

Abū Ya'qūb Yūsuf bin Yaḥyā al-Buwayṭī was a friend and disciple of Imām Shāfi'ī who collected and edited his writings. He was born in Egypt and he studied not only under Imām Shāfi'ī but also under Imām Ibn Wahb in Egypt. He was a very learned man and after the death of Imām Shāfi'ī he succeeded him in Egypt in giving rulings (*fatwā*) and instruction. He died in 231 A.H. (845 A.D.) at Baghdād where he had been imprisoned for doctrinal differences by the Khalīfa al-Māmun. He was the author of the *Mukhtaṣar al-Kabīr* and the *Mukhtaṣar aṣ-Ṣaghīr* which are compendiums of the doctrines of Imām Shāfi'ī and a book on the *Farā'iḍ* or the laws of inheritance.

Abū Ibrāhīm Ismā'īl bin Yaḥyā al-Muzanī was another friend and disciple of Imām Shāfi'ī. He was born in Egypt in 175 A.H. (791 A.D.). When Imām Shāfi'ī came to Egypt in 198 A.H. (813 A.D.) al-Muzanī studied under him and became one of his most learned and ardent disciples. He appeared to have been a popular teacher himself and attracted a number of learned men from Khurāsān and 'Irāq to study under him. He died in 264 A.H. (877 A.D.). He wrote the *Mukhtaṣar al-Kabīr,* the *Mukhtaṣar aṣ-Ṣaghīr,* the *Jāmi' al-Kabīr* and the *Jāmi' aṣ-Ṣaghīr,* which are compendiums and synopses of the doctrines and views of Imām Shāfi'ī.

Ḥasan bin Muḥammad aṣ-Ṣabāh az-Zafarānī originated from Zafarān, but he studied and lived in Baghdād. He studied under Imām Sufyān bin 'Uyaynah and Imām Shāfi'ī and became the principal transmitter of the older teachings of Imām Shāfi'ī. He was proficient in *ḥadīth,* and the collectors of *ḥadīth* like Imām Bukhārī recorded many *ḥadīth* from him. He died in 260 A.H. (873 A.D.).

Abū 'Alī Ḥusayn bin 'Alī al-Karābīsī

began his studies under the *Ḥanafī* jurists in Baghdād but later studied under Imām Shāfi'ī and became a jurist of the *Shāfi'ī* School. He died in 245 A.H. (859 A.D.).

Ar-Rabī' bin Sulaymān bin 'Abd al-Jabbār al Murādī was born in Egypt in 174 A.H. (790 A.D.) and studied under Imām Shāfi'ī when the latter was in Egypt. He was a devoted follower of Imām Shāfi'ī and was one of the principal transmitters of the newer teachings of Imām Shāfi'ī. He died in 270 A.H. (883 A.D.).

Ḥarmalah bin Yaḥyā bin 'Abd Allāh at-Tujaybī was born in Egypt in 166 A.H. (782 A.D.) and studied *ḥadīth* under Imām Ibn Wahb from whom he is reputed to have memorized 10,000 *ḥadīth*. When Imām Shāfi'ī was in Egypt, Ḥarmalah studied under him. He was the author of *al-Mukhtaṣar* and died in 243 A.H. (857 A.D.).

Yūnus bin 'Abd al-A'lā aṣ-Ṣadafī was born in Egypt in 171 A.H. (787 A.D.). He studied *ḥadīth* under Imām Ibn Wahb, Imām Sufyān bin 'Uyaynah and Imām Aṣbagh bin al-Farrāj. When Imām Shāfi'ī came to Egypt, aṣ-Ṣadafī studied *fiqh* under him and became one of the most renowned of the *Shāfi'ī* jurists in Egypt. He died in 264 A.H. (877 A.D.).

Abū 'l-Ḥasan 'Alī bin Muḥammad al-Māwardī (*d.* 450 A.H. 1058 A.D.) is the author of the *Ḥāwī al-Kabīr,* an exhaustive treatise of *fiqh;* the *Iqnā',* a condensation of the *Ḥāwī;* and the *Aḥkām as-Sulṭāniyyah,* a justly renowned work giving the description of an ideal State.

Abū Bakr Aḥmad bin al-Ḥusayn bin 'Alī al-Bayhaqī was born at Bayhaq near Nīsābūr, Persia, in 384 A.H. (994 A.D.). He was renowned as a jurist and a scholar of *ḥadīth* in Khurāsān. He is the author of the *Sunan al-Kubra,* a collection of *ḥadīth* dealing with legal matters. He died in 458 A.H. (1065 A.D.)

'Abd al-Jabbār bin Aḥmad Asadabadī (*d.* 415 A.H.) is the author of *'Ahd.*

Abū'l Ḥusayn Muḥammad bin 'Alī al-Baṣrī (*d.* 436 A.H.) is the author of the *Mu'tamad,* a commentary on the *'Ahd* of 'Abd al-Jabbār.

Abū'l-Mā'ālī 'Abd al-Malik al-Juwaynī the Imām al-Ḥaramayn, was born in 419 A.H. (1028 A.D.) in Bushtanikān, a village near Nīsābūr, in Irān. He was a follower of the school of al-Ash'arī in dogmatics, and when the followers of this School were persecuted in Irān he left Nīsābūr with Abū'l-Qāsim al-Qushayrī and went first to Baghdād, and thence in 450 A.H. (1058 A.D.) to the Ḥijāz, where he taught for four years at Makka and Madīnah, and thus gained his title. When the Vizīr, Niẓām al-Mulk, had risen to power in the Saljūq Empire he favoured the *Ash'arīs* and requested the refugees to return. Al-Juwaynī was one of those who returned, and he taught at Nīsābūr until his death in 478 A.H. (1085 A.D.). His literary activity was so great that Subkī in the *Ṭabaqāt* thinks that one can only comprehend his works by a miracle. His principal works are:—

(i) the *Kitāb al-Irshād fī Uṣūl al-I'tiqād;*
(ii) the *Kitāb al-Waraqāt fī Uṣūl al-Fiqh;*
(iii) the *Kitāb al-Burhān fī Uṣūl al-Fiqh,* which has been lost; and
(iv) the *Nihāyat al-Maṭlab.*

Abū Ḥāmid Muḥammad bin Muḥammad al-Ghazzālī was born at Ṭūs in 450 A.H. (1058 A.D.) and was educated there and at Nīsābūr especially under al-Juwaynī, the Imām al-Ḥaramayn, with whom he remained until the Imām's death in 478 A.H. (1085 A.D.). From Nīsābūr he went to the Court of Niẓām al-Mulk, and formed part of his retinue of canonists and theologians until 484 A.H. (1091 A.D.) when he was appointed to teach in the Niẓāmiyyah *Madrasah* at Baghdād. During this time he became an absolute sceptic, not only as to religion but also as to the possibility of certain knowledge. He studied diligently the different schools of thought around him, especially philosophy, and finally he turned to Ṣūfism. In 488 A.H. (1095 A.D.) he put aside his brilliant position and worldly ambitions and fled from Baghdād as a wandering dervish, giving himself to the ascetic and contemplative life. After two years in strict retirement in Syria, he went on the pilgrimage at the end of 490 A.H. (1096 A.D.) Then came nine years of retirement in different places with, from time to time, periods of return to his family and the world. In 499 A.H.

(1105 A.D.) he was compelled to become a teacher at the Niẓāmiyyah *Madrasah* at Nīsābūr but his yearning for quiet and contemplation continually drew him, and he finally returned to Ṭūs and lived in retirement with some personal disciples. There he died in 505 A.H. (1111 A.D.). Ghazzālī was a great theologian, philosopher and *Ṣūfī*, and his writings on law formed only a small part of his literary activity. His principal works which deal with the law are: (1) *al-Basīṭ*, (2) *al-Wasīṭ*, (3) *al-Wajīz*, (4) *al-Khulāṣah*, (5) *Bidāyat al-Hidāyah*, (6) the *Iḥyā' 'Ulūm ud-Dīn*, and (7) *al-Mustaṣfāh*, a book on *uṣūl al-fiqh*. *Al-Basīṭ* is based on the *Nihāyat al-Maṭlab* of the Imām al-Ḥaramayn, and *al-Wasīṭ* and *al-Wajīz* are synopses of *al-Basīṭ*.

Abū Shujā' Aḥmad bin al-Ḥasan al-Isfahānī (*d.* before 500 A.H. — 1106 A.D.) wrote the *Taqrīb fī'l Fiqh*, which is the most widely spread *Shāfi'ī* compendium of the law. The commentary on this compendium by Muḥammad bin Qāsim al-Ghazzī is widely used by students in Indonesia and Malaya.

Abū Isḥāq Ibrāhīm bin 'Ali ash-Shīrāzī, (*d.* 476 A.H. — 1083 A.D.) is the author of the *Tanbīh*, a well-known compendium of the *Shāfi'ī* school of law; and the *Muhadhdhab fī'l Madhhab*.

Fakhr ud-Dīn Muḥammad bin 'Umar ar-Rāzī (*d.* 606 A.H.) is the author of the *Maḥṣūl*, a condensation of four works including the *Mustaṣfah* of al-Ghazzālī and the *Mu'tamad* of al-Baṣrī.

Abū 'l-Qāsim 'Abd al-Karīm bin Muḥammad ar-Rāfi'ī al-Qazuīnī was born in 557 A.H. (1161 A.D.). He is the author of the *Fatḥ al-'Azīz 'alā Kitāb al-Wajīz*, a commentary on Imām Ghazzālī's *al-Wajīz* and the *Muḥarrar*, based on the works of Imām Ghazzālī. Nawawī's *Minhāj aṭ-Ṭālibīn*, the principal textbook of the *Shāfi'ī* School is based on the *Muḥarrar* of ar-Rāfi'ī. Ar-Rāfi'ī died in 623 A.H. (1226 A.D.).

Abū Muḥammad 'Abd al-Ghanī al-Maqdisī was born in 541 A.H. and died in 600 A.H. He is the author of the *Umdat al-Aḥkām*.

Al-Qazwīnī (*d.* 665 A.H.) is the author of the *Ḥāwī* which is based on the works of al-Ghazzālī.

Muḥyī ud-Dīn Abū Zakarīyā Yaḥyā an-Nawawī was born in 631 A.H. (1233 A.D.) in Nawā, south of Damascus. The ability of the boy very early attracted attention, and his father brought him in 649 A.H. (1251 A.D.) to the *Madrasah ar-Rawāḥiyyah* in Damascus. There he first of all studied medicine but very soon went over to Islāmic learning. In 651 A.H. (1253 A.D.) he made the pilgrimage with his father. About 655 A.H. (1257 A.D.) he began to write and was called to the *Ashrafiyyah* School of tradition in Damascus in succession to Abū Shāma who had just died. Although his health had suffered severely during his life as a student, he lived very frugally and even declined a salary. His reputation soon became so great that he even dared to approach the Sulṭān Baybars to ask him to restore the confiscated gardens of the Damascenes, to free the people of Syria from war taxes, and to protect the teachers at the *Madrasahs* from a reduction in their income. Eventually the Sulṭān Baybars expelled him from Damascus when he refused to sign a *fatwā* approving the legality of the Sulṭān's actions. He died unmarried in his father's house at Nawā in 676 A.H. (1277 A.D.). His principal work, the *Minhāj aṭ-Ṭālibīn,* came to be regarded as of the highest authority, and since the 10th century A.H. (16th century A.D.) the two commentaries on this work, Ibn Ḥajar's *Tuḥfah* and Ramlī's *Nihāyat* have been regarded as the text-books of the *Shāfi'ī* School. The *Minhāj aṭ-Ṭālibīn* consists of excerpts from the *Muḥarrar* of ar-Rāfi'ī and was intended to be a commentary on it. Among his other works are the *Rawḍah fī Mukhtaṣar Sharḥ ar-Rāfi'ī, al-Majmū',* the *Uyun al-Masā'l,* a collection of *fatwā,* and a commentary on the *Ṣaḥīḥ Muslim* called *al-Minhāj fī Sharḥ Muslim bin al-Ḥajjāj.*

'Abd Allāh bin 'Umar al-Bayḍāwī (*d.* 682 A.H.) is the author of the *Minhāj al-Wuṣūl,* an abridgment of the *Maḥṣūl* of ar-Rāzī.

Muḥammad Ibrāhīm al-Fazari al-Firqāḥ (*d.* 690 A.H.) is the author of the *Fatāwā al-Firqāḥ,* a collection of *fatwā.*

*Abū 'l-Fatah Taqī ud-Dīn Muḥammad ibn 'Alī ibn al-Daqiqil-'Id** was born in 625 A.H. He was for a time *Qāḍī* in Cairo. He wrote a number of books including *al-Imām* and *Iḥkām al-Aḥkām*, a commentary on the *Umdat al-Aḥkām* of al-Maqdisī. He died in Cairo in 702 A.H.

Jamāl ud-Dīn bin Ḥasan al-Asnawi (*d.* 772 A.H.) is the author of the *Nihāyat as-Sul*, a commentary on the *Minhāj al-Wuṣūl* of al-Bayḍāwī.

'Abd Allāh bin Ṣa'd Allāh bin Muḥammad bin 'Uthmān al-Kazwīnī, (*d.* 780 A.H. — 1378 A.D.), is the author of the *Rāwī*, a commentary on the *Fatḥ al-'Azīz* of ar-Rāfi'ī.

Tāj ud-Dīn 'Abd al-Wahhāb bin as-Subkī (*d.* 772 A.H. 1370 A.D.) is the author of the *Ṭabaqāt ash-Shāfi'iyyah*, which is a biographical history of the *Shāfi'ī* school of law in which the author often quotes long passages from the works of the jurists and relates at length debates and discussions; and the *Jāmi' al-Jawāmi'*, which is a comprehensive compendium on *uṣūl al-fiqh*.

Badr ud-Dīn Muḥammad bin Bahadar al-Zarkashī (*d.* 794 A.H.) is the author of *Fātāwā al-Zarkashī*, a collection of *fatwā*.

Jalāl ud-Dīn Muḥammad bin Aḥmad al-Maḥallī, (*d* 864 A.H. — 1459 A.D.), is the author of a commentary on the *Minhāj aṭ-Ṭālibīn* of Nawawī.

Aḥmad bin 'Alī bin Ḥajar al-'Asqalānī, (*d.* 852 A.H. 1448 A.D.) is the author of the *Fatḥ al-Bārī*, a well-known commentary on the *Ṣaḥīḥ* of al-Bukhārī and the *Bulūgh al-Marām*.

Sharaf ud-Dīn Ismā'īl bin Abū Bakr al-Muqri', (*d.* 837 A.H. — 1433 A.D.) is the author of the *Rawḍ aṭ-Ṭālib*, which is based on the *Rawḍah* of Nawawī; and *al-Irshād*, a commentary on the *Ḥāwī* of al-Qazwīnī.

Muḥammad bin al-Qāsim al-Ghazzī, (*d.* 918 A.H. — 1512 A.D.) is the author of the *Fatḥ al-Qarīb*, a commentary on the *Taqrīb* of Abū Shujā'.

* *Ibid.*, p. 142.

Shihāb ud-Dīn Aḥmad bin Muḥammad al-Khaṭīb al-Qasṭallānī, (*d.* 923 A.H. — 1517 A.D.), is the author of the *Irshād as-Sārī lī Ṣaḥīḥ al-Bukhārī*, a commentary on the *Ṣaḥīḥ* of al-Bukhārī.

Aḥmad bin Muḥammad bin 'Alī ibn Ḥajar al-Haythamī was born in the year 909 A.H. (1504 A.D.) at Maḥallat Abū al-Haytam in the Gharbiyyah province in Egypt. He lost his father in infancy and his education was arranged by the Shaykhs, Shams ud-Dīn ibn Abū'l-Ḥamā'il a well-known mystic and Shams ud-Dīn Muḥammad ash-Shanāwī, a disciple of the latter. Ash-Shanāwī brought him to the *Maqām* of Sayyid Aḥmad al-Badawī, and from 924 A.H. (1518 A.D.) he continued his studies at al-Azhar. Notwithstanding his youth he attended the lectures of the scholars of the time among others those of Zakarīyā al-Anṣārī (*d.* 926 A.H. — 1519 A.D.), 'Abd al-Ḥaqq as-Sunbāṭī (*d.* 931 A.H. — 1524 A.D.), Shihāb ud-Dīn Aḥmad ar-Ramlī (*d.* 958 A.H. — 1551 A.D.), Nāṣir ud-Dīn aṭ-Ṭablāwī (*d.* 966 A.H. — 1558 A.D.), Abū Ḥasan al-Baqrī (*d.* 952 A.H. — 1545 A.D.) and Shihāb ud-Dīn an-Najjār al-Ḥanbalī (*d.* 949 A.H. — 1542 A.D.). Owing to his proficiency in theological and juridical studies, though barely twenty years old, he obtained permission to give *fatwā* and to teach. In 933 A.H. (1526 A.D.) he went on a pilgrimage to Makka, where he stayed and wrote books on law. He returned to Egypt in 935 A.H. (1528 A.D.) but in 937 A.H. (1530 A.D.) he again made the pilgrimage and remained in Makka. In 944 A.H. (1537 A.D.) he made his third pilgrimage and took up permanent residence in Makka. He died in 974 A.H. (1567 A.D.). His best known work, the *Tuḥfat al-Muḥtāj li-Sharḥ al-Minhāj*, a commentary on the *Minhāj aṭ-Ṭālibīn*, has become an authoritative code of the *Shāfi'ī* law. His collection of *fatwā* called the *Fatāwā al-Kubrā* is also highly esteemed.

Abū Yaḥyā Zakarīyā bin Muḥammad al-Anṣārī, (*d.* 926 A.H. — 1520 A.D.) is the author of a number of well-known works in the *Shāfi'ī* School of Muslim law. Among them are the *Manhaj aṭ-Ṭullāb* an abridgement of the *Minhāj aṭ-Ṭālibīn* of Nawawī which itself became classical and is used in instruction; the *Fatḥ al-Wahhāb*, a commentary on the *Manhaj aṭ-Ṭullāb*; the *Taḥrīr at-Tanqīh*, an extract from

the *Tanqīḥ al-Lubāb* of Abū Zurah al-'Irāqī with additions; the *Tuḥfat aṭ-Ṭullāb,* a commentary on the *Taḥrīr at-Tanqīḥ;* the *Asnā 'l-Maṭālib,* a commentary on the *Rawḍ aṭ-Ṭālib* of al-Muqri'; and a commentary on the *Mukhtaṣar* of al-Muzanī.

Shihāb ud-Dīn Abū'l-Abbās Aḥmad bin Aḥmad Ramlī, who died in 957 A.H. (1550 A.D.), was the author of a gloss on the *Asnā 'l-Maṭālib* of Zakarīyā al-Anṣārī. His *fatwā* were edited and published by his son Shams ud-Dīn Muḥammad ar-Ramlī.

Muḥammad bin al-Khaṭīb ash-Sharbīnī, (*d.* 977 A.H. — 1569 A.D.) was the author of the *Mughnī al-Muḥtāj ilā Ma'rifat Ma'ānī Alfāẓ al-Minhāj,* a commentary on the *Minhāj aṭ-Ṭālibīn* of Nawawī which is exhaustive and gives the views that have found acceptance; and the *Iqnā fī Ḥal Alfāẓ Abī Shujā',* a commentary on the *Taqrīb* of Abī Shujā'.

Zayn ud-Dīn al-Malībārī (*d.* 982 A.H. — 1574 A.D.) is the author of the *Qurrat al-'Ayn* and the *Fatḥ al-Mu'īn,* a commentary on the *Qurrat al-'Ayn.*

Shams ud-Dīn Muḥammad bin Aḥmad ar-Ramlī was a well-known teacher at al-Azhar. He is the son of Shihāb ud-Dīn ar-Ramlī who was also a learned jurist. He is the author of the *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj,* a commentary on the *Minhāj aṭ-Ṭālibīn* of Nawawī. He died in 1004 A.H. (1596 A.D.).

Abū'l-Ḍīyā Nūr ud-Dīn 'Alī bin 'Alī ash-Shabramalesi, (*d.* 1087 A.H. — 1676 A.D.), is the author of a gloss on the *Nihāyat al-Muḥtāj* of ar-Ramlī.

Aḥmad bin Muḥammad 'Abd al-Razzāq ar-Rashidī is the author of a gloss on the *Nihāyat al-Muḥtāj* of ar-Ramlī, written in 1086 A.H. (1675 A.D.).

Muḥammad bin Ismā'īl bin Ṣalāḥ al-Amīr al-Kaḥlānī aṣ-Ṣan'ānī al-Yamānī was born in 1099 A.H. and died in 1182 A.H. He is the author of the *Subul us-Salām,* a commentary on the *Bulūgh al-Marām* of Ibn Ḥajar al-'Asqalānī.

Sulaymān bin 'Umar al-Bājirmī was born in 1131 A.H. (1718 A.D.) and died in 1221 A.H. (1806 A.D.).

He is the author of a gloss on the *Fatḥ al-Wahhāb* of Zakarīyā al-Anṣārī.

Ibrāhīm bin Muḥammad al-Bājūrī was born in Bājūr, near Cairo in 1192 A.H. (1778 A.D.). He studied at al-Azhar but left Egypt for the Ḥijāz when Egypt was occupied by the French. He returned to Egypt in 1216 A.H. (1801 A.D.) and continued his studies at al-Azhar. Later he became a well-known and popular teacher at al-Azhar. In 1263 A.H. (1846 A.D.) he was made Rector of al-Azhar and remained in that post till his death in 1277 A.H. (1861 A.D.). He wrote a number of glosses and commentaries, among them being (a) Gloss on the *Fatḥ al-Qarīb* of al-Qāsim al-Ghazzī; and (b) Gloss on the commentary of 'Abd Allāh Shinsūrī on the *Rahbia.**

'Abd Allāh ash-Sharqāwī was born in 1150 A.H. (1737 A.D.) and died in 1227 A.H. (1812 A.D.). He is the author of a gloss on the *Manhaj aṭ-Ṭullāb* of Zakarīyā al-Anṣārī.

'Abd al-Ḥamīd ash-Shirwānī, (d. 1289 A.H. — 1872 A.D.) is the author of a commentary on the *Tuḥfat al-Muḥtāj* of Ibn Ḥajar.

Syed Bekri Abū Bakr bin Muḥammad ad-Dimyāṭī is the author of the *I'ānaṭ aṭ-Ṭālibīn,* a gloss on the *Fatḥ al-Mu'īn* of Zayn ud-Dīn al-Malībārī, which is very much used in East Africa, Malaya and Indonesia.

ḤANBALĪ JURISTS

Aḥmad bin Muḥammad bin Ḥanbal, known by the name Ibn Ḥanbal, was born in Baghdād in 164 A.H. (780 A.D.). During his studies in his native town and on extensive travels as a student, which led him through 'Irāq, Syria and Ḥijāz to the Yaman, he strove to acquire a knowledge of the *ḥadīth.* After he returned to Baghdād, he took lessons from Shāfi'ī in *fiqh* and in its *uṣūl.* His religious turn of mind was in creed and law unalterably determined by the old traditional views. He suffered persecution under the *Khalīfas* Ma'mūn, al-Mu'taṣim and al-Wāthiq, who attempted to impose the Mu'tazilite doctrines. It was only under Mutawakkil that his trials ceased. He was later on several occasions distinguished by the *Khalīfa.* The fame of his learning, piety and unswerving faithfulness to tradition, gathered

* As quoted by Fitzgerald, *Muhammadan Law* p. 236.

a host of disciples and advisors around him. He died in Baghdād in 241 A.H. (855 A.D.). His principal work, the *Musnad,* is a collection of *ḥadīth* on legal matters. Ibn Ḥanbal did not claim to establish a school of law of his own but in his answers to his pupil's questions, he made pronouncements on specific disputed questions. His teachings were systematised even in his own lifetime by some of his disciples and subsequently developed into a distinct School of Law.

Aḥmad bin Muḥammad Abū Bakr (*d.* 260 A.H. — 873 A.D.) is the author of the *Sunan fī'l Fiqh.*

Abū Bakr al-Khallāl (*d.* 311 A.H. — 923-4 A.D.) collected and systematised the teachings of Ibn Ḥanbal. He is the author of the *Jāmi'.*

Abū 'l-Qāsim 'Umar al-Kharaqī, (*d.* 334 A.H. — 945-6 A.D.) is the author of a renowned compendium on *Ḥanbalī* Law, the *Mukhtaṣar.*

'Abd al-'Azīz bin Ja'far, (*d.* 363 A.H. — 974 A.D.) is the author of the *Muqni',* which has been for centuries the groundwork for compendiums and commentaries.

Abū 'l-Wafā' 'Alī bin 'Aqīl (*d.* 515 A.H. — 1121-2 A.D.) is the author of several books, including the *Tadhkiya* and *Fusūl.*

'Abd al-Qādir al-Jīlī (*d.* 561 A.H. — 1166 A.D.) was a renowned *Ṣūfī* and adherent of the *Ḥanbalī* School. He is the author of the *Ghunya.*

Muwaffaq ud-Dīn ibn Qudāmah (*d.* 620 A.H. — 1223 A.D.) is the author of the *Mughnī,* a commentary on Kharaqī's *Mukhtaṣar.*

Shams ud-Dīn ibn Qudāmah al-Maqdisī (*d.* 682 A.H. — 1183-4 A.D.) is the author of the *Sharḥ al-Kabīr,* a commentary on the *Mughnī.*

Taqī ud-Dīn Aḥmad ibn Taymiyyah was born in 661 A.H. in Ḥarrān. Fleeing from the Mongols, his father took refuge in Damascus, where the young Aḥmad devoted himself to the study of Muslim science. At the age of twenty years, he became a Professor of *Ḥanbalī* Law. In 691 A.H. he

made the pilgrimage to Makka. Because of his teachings he was removed from the post of Professor in 699 A.H. and imprisoned in 707 A.H. He resumed his post of Professor in about 712 A.H. but was again removed and imprisoned in 720 A.H. He died in 728 A .H. — 1321 A.D. . Although belonging to the *Ḥanbalī* School, Ibn Taymiyyah did not follow all its opinions blindly but claimed independence of thought. In the majority of his works he claimed to follow the letter of the *Qur'ān* and the *Sunnah*. He wrote a number of works including the *Majmu'at ar-Rasā'il al-Kubrā*.

Ibn Qayyim al-Jawziyyah was born in Damascus in 691 A.H. — 1292 A.D. and died there in 751 A.H. — 1350 A.D. He was a faithful disciple of Ibn Taymiyyah and he adopted the latter's literary mode. Even during the lifetime of Ibn Taymiyyah he was persecuted and imprisoned. He is the author of *A'lām al-Muwaqqi'īn ar-Rab al-'Ālamīn, aṭ-Ṭurūq al-Ḥikmiyyah fī as-Siyāsah ash-Shar'iyyah* and *Zad al-Ma'ad fī Hādy Khair al-'Ibād*.

Abū'l-Faraj 'Abd ur-Raḥmān bin Rajab (*d.* 795 A.H. — 1392-3 A.D.) is the author of the *Ṭabaqāt al-Ḥanābila*.

Mar'ī bin Yūsuf (*d.* 1030 A.H. — 1621 A.D.) is the author of the *Dalīl aṭ-Ṭālib*.

'Abd al-Qādir bin 'Umar al-Dimishqī (*d.* 1035 A.H. — 1625-6 A.D.) is the author of the *Nail al-Ma'ārib*, a commentary on the *Dalīl aṭ-Ṭālib* of Mar'ī bin Yūsuf.

Muḥammad bin 'Alī bin Muḥammad bin 'Abd Allāh ash-Shawkānī was born in 1172 A.H. (1759 A.D.) and died in 1250 A.H. (1834 A.D.). He is the author of a number of books, including the *Nayl al-Awṭār*, a commentary on the *Muntaqā'l-Akhbār* of Taimiyyah al-Ḥarrānī.

Shaykh Muḥammad ibn 'Abd al-Wahhāb was born in the town of 'Uyaynah in Najd in 1115 A.H. — 1703 A.D. and died in 1201 A.H. (1787 A.D.). He was a rejuvenator of the *Ḥanbalī* School and propagated his beliefs in a number of

essays among which are *Risālah al-Qawa'id al-Arba'*, *Kitāb Kashf ash-Shubuhāt* and *Kitāb Masa'il al-Jāhliyyah.*

OTHER SUNNĪ JURISTS

Abū Muḥammad 'Alī bin Aḥmad ibn Ḥazm was born in Cordoba in 384 A.H. — 994 A.D. and died in 456 A.H. — 1065 A.D. He was a devoted advocate of the *Ẓāhirī* School and in his writings defended with vigour his position that the details of legal deduction not resting on the *Qur'ān* or the Traditions must be rejected. He wrote a number of works including the *Kitāb al-Muḥallā*, *Kitāb al-Faṣl fī'l-Milal wa'l-Ahwā' wa'l-Niḥal*, *Kitāb al-Iḥkam fī Uṣūl al-Aḥkām* and *Risālat al-Nubdha fī'l-Fiqh aẓ-Ẓāhirī.*

Abū Ja'far Muḥammad ibn Jarīr aṭ-Ṭabarī was born in 224 A.H. — 839 A.D. and died in 310 A.H. — 923 A.D. He distinguished himself in several fields of learning and is the author of a famous history and a great exegesis of the *Qur'ān.* He studied the jurisprudence of Mālik and Shāfi'ī, but later founded a new school which spread in Baghdād. His books dealing with jurisprudence include *al-Latīf min al-Bayān 'an Aḥkām Sharā'i' al-Islām*, *Tahdhīb al-Āthār*, and *Ikhtilāf al-Fuqahā'.*

SHĪ'Ī JURISTS

Ja'far bin Muḥammad aṣ-Ṣādiq was born in 80 A.H. — 699 A.D. and is one of the *Imāms* of the *Shī'as.* He was celebrated for his thorough knowledge of tradition. He died in Madīnah in 148 A.H. — 765 A.D..

Zayd bin 'Alī (*d.* 122 A.H. — 739 A.D.) is the founder of the *Zaydī* School of Law. He is reputed to be the author of the *al-Majmu'a,* a compendium of *fiqh,* which, if it was written by Zayd bin 'Alī, is the oldest extant codification of Muslim Law.

Muḥammad ibn al-Ḥasan ibn Farūq ash-Shaffār ibn Ja'far al-Qummī (*d.* 290 A.H. — 902 A.D.) is the author of the *Baṣā'ir.*

Muḥammad ibn Ya'qūb ibn Isḥāq al-Kulīnī ar-Rāzī (*d.* 328 A.H. — 939 A.D.) is the

author of the *Kāfī fī 'Ilm ud-Dīn*, one of the *Shī'a* canonical collections of traditions.

Nu'mān bin Muḥammad bin Manṣūr bin Aḥmad ibn Ḥaiyyān at-Tamīmī (*d.* 363 A.H. — 973 A.D.) is the author of *Da'ā'im al-Islām*, the leading textbook of the *Isma'īlī* School of the *Shī'a*.

Abū Ja'far Muḥammad ibn 'Alī ibn Ḥusayn ibn Bābūya al-Qummī (*d.* 381 A.H. — 991-2 A.D.) is the author of a number of works including the *Ma'āni'l-Akhbār*, *al-Mughnī*, the *Kitāb al-'Amal* and the *Man la Yaḥduruhu 'l-Faqīh*, which is one of the *Shī'a* canonical collections of traditions.

Shaykh Muḥammad ibn Muḥammad ibn an-Nu'mān ibn 'Abd Allāh al-Mufīd was born in 333 A.H. — 944 A.D. and died in 413 A.H. — 1022 A.D. He was a renowned *Shī'a* jurist who had numerous pupils. He is the author of *al-Muqni'a fī'l Fiqh*.

Abū Ja'far Muḥammad bin Ḥasan aṭ-Ṭūsī was born in 385 A.H. — 995 A.D. and died in 458-460 A.H. (1065-1068 A.D.). He was one of the most distinguished disciples of Shaykh Mufīd and has left numerous works which are regarded as authoritative and binding among the *Shī'a*. Among them are the *Istibṣār*, the *Tahdhīb al-Aḥkām*, the *Khilāl wa'l Wifāq*, the *Nihāyat al-Fiqh fī Baḥr al-Fiqh* and lastly the *Mabsūṭ*, the most important and erudite of all. He was an enlightened and liberal lawyer and far in advance of many of his successors.

Sharīf al-Murtaḍā Abū'l-Qāsim 'Alī Abī Aḥmad al-Ḥusayn a descendant of the Prophet was born in 355 A.H. — 965 A.D. and died in 436 A.H. — 1070 A.D. He was a pupil of Shaykh Mufīd and was one of the most prominent lawyers of his time. Among his works are the *Kitāb al-Ghurar wa-Durar*, *Masā'il*, the *Imāmah*, the *Intiṣār* and *Ash-Shāfī*.

Ja'far bin al-Ḥasan bin Ya'qūb bin Sa'īd 'Alī al-Ḥillī al-Muḥaqqiq was born at Ḥillah on the Euphrates in 602 A.H. — 1205 A.D. He was a *Qāḍī* and Professor of law and died in 676 A.H. — 1277 A.D. He is the

author of the *An-Nāfi'*, several commentaries on the *Nihāya* of Shaykh Ṭūsī and the *Sharā'i' al-Islām*, his best known work.

Shaykh Muḥammad Ḥasan an-Najafī is the author of the *Jawāhir al-Kalām*, a copious and erudite commentary on the *Sharā'i' al-Islām*.

Abū 'l-Makārim Muḥammad ibn Idrīs al-Ḥillī is the author of the *Sarā'ir*.

Ibn Zuhra is the author of the *Ghunia*.

Abū Ja'far aṣ-Ṣāduq is the author of the *Muqni'a* and the *Hidāya*.

Shaykh Syed Murtaḍā is the author of the *Nāsiriya*.

Shaykh 'Allāmah Jamāl ud-Dīn Ḥasan ibn Yūsuf ibn al-Murtaḍa al-Ḥillī is the author of the *Talkhīṣ al-Marām*, the *Ghāyat al-Aḥkām*, the *Taḥrīr al-Aḥkām* and the *Irshād al-Adhhān*.

Bahā' ud-Dīn Muḥammad 'Āmilī (*d.* 1031 A.H. — 1621 A.D.) is the author of the *Jāmi' al-'Abbāsī*, a concise and comprehensive treatise on *Shī'a* law.

Muḥammad ibn Murtaḍā is the author of the *Mafātīḥ*.

Shaykh Abū Ḥasan, the Chief *Mujtahid* of Teheran, is the author of the *Ṣirāṭ an-Nijāt*.

Sharaf ud-Dīn al-Ḥusayn ibn Aḥmad al-Himi (*d.* 1221 A.H. — 1806 A.D.) is the author of the *Rawd an-Naẓīr*, a commentary on the *Majmū'a al-Fiqh al-Kabīr* of Zayd bin 'Alī.

The *Jāmi' ash-Shatāt* is a collection of decisions and dicta by the leading *Mujtahids* of Persia.

FAMILY LAW

And one of His signs is that He created mates for you from yourselves that you may find quiet of mind in them and He put between you love and compassion . . .

The Holy Qur'ān, *Surāh XXX : 21*

II
FAMILY LAW

THE law in the States of Malaya and Singapore relating to marriage and divorce affecting Muslims is the Muslim law as modified by Malay Custom. A number of enactments and ordinances in the various States provide for the application and administration of Muslim law and for the registration of Muslim marriages and divorces.

ADMINISTRATION

In Perak the Majlis Ugama Islam dan Adat Melayu Enactment, 1951 (No. 6 of 1951) provides for the setting up of a *Majlis Ugama Islām dan 'Ādat Melayu* (Council of Religion and Malay Custom), to aid and advise the Ruler in all matters relating to the Muslim religion and Malay Custom, and to exercise such powers as may be conferred upon the *Majlis* by any written law. The *Majlis* is a corporate body with power to hold and dispose of property and to enter into contracts and to administer estates.[1] It is given power under the Baitulmal, Zakat and Fitrah Enactment, 1951 (No. 7 of 1951) to manage and control the *Bayt ul-Māl* and to collect *zakāt* and *fiṭrah*.[2] There is a Department of Religious Affairs responsible for the day to day administration of matters relating to the Muslim religion headed by a lay administrator. Provision is made in the Muhammadan Marriage and Divorce Registration Enactment (Cap. 197 of the F.M.S. Laws) for the registration of marriages, divorces and revocations of divorces. Power is given to the Ruler in Council to order the cancellation or rectification of any entry made in any register or any certificate issued under the Enactment.[3] *Kathis* and

1. Perak Majlis Ugama Islam dan Adat Melayu Enactment, 1951 (No. 6 of 1951), s.4 – 9.
2. Perak Baitul-Mal, Zakat and Fitrah Enactment, 1951 (No. 7 of 1951), s.4 – 6.
3. Perak Muhammadan Marriage and Divorce Registration Enactment (Cap. 197 of the 1935 Edition of the Laws of the Federated Malay States), s.3 and 8.

Assistant Kathis (*Naib al-Kathi*) are appointed by the Ruler in Council for the areas mentioned in their *kuasa* (letter of authority). There are courts of a *Kathi* and courts of an *Assistant Kathi*. A *Kathi* or *Assistant Kathi* has such powers in all matters concerning the Muslim religion, marriage and divorce and in all other matters regulated by Muslim law as may be defined in his *kuasa*.[4] Appeals from the court of a *Kathi* or of an *Assistant Kathi* are heard and determined by the Ruler in Council. The Ruler in Council may appoint a Committee consisting of the *Mentri Besar* (Chief Minister of a State) as Chairman or a person nominated by him to be Chairman, three members of the Council who practise the Muslim Religion and two *'Ulamā's* who are members of the Council of Religion and Malay Custom to hear and determine such appeals.[5] The court of the *Kathi* and the court of the *Assistant Kathi* are constituted under the Courts Enactment (Cap. 2).[6] Power is given to such courts, like all other civil courts, to refer any question of Muslim law or Malay Custom to the State Council for determination under the provisions of the Determination of Muslim Law Enactment.[7]

In Negri Sembilan the Administration of Muslim Law Enactment, 1960, constitutes a *Majlis Ugama Islām,* Negri Sembilan, (Council of Muslim Religion, Negri Sembilan) to aid and advise the Ruler on all matters relating to the Muslim religion in the State. It is provided that the *Majlis* shall consist of a Chairman, who shall be appointed from among the members of the State Executive Council, the President of the Religious Affairs Department, the *Muftī,* the *Chief Kathi,* the Inspector of Religious Schools, five members of the State Legislative Assembly and five other members of whom at least one shall be a non-Malay Muslim. The Secretary of the Religious Affairs Department is *ex-officio* the Secretary of the *Majlis.*

The *Majlis* is a corporate body with power to hold and dispose of property, to enter into contracts and to administer estates. It is given power to administer the *Bayt ul-Māl,* to collect *zakāt* and *fiṭrah,* to act as the trustee of all mosques in the State and to

4. Courts Enactment (Cap. 2 of 1935 Edition of the Laws of the Federated Malay States), s.9 and 63 – 67.
5. *Ibid.*, s.67 (as amended by Perak Enactment No. 3 of 1955).
6. *Ibid.*, s.63.
7. Muslim Law and Malay Custom (Determination) Enactment (Cap. 196 of 1935 Edition of the Laws of the Federated Malay States).

act as the executor of a will or as the administrator of the estate of a deceased person or as a trustee of any trust. There is a Department of Religious Affairs, which is concerned with the day to day administration of Muslim affairs. Power is given to the Ruler to appoint a *Muftī* for the State. The *Muftī* is an *ex-officio* member of the *Majlis* and together with two other members of the *Majlis* and not less than two or more than six other fit and proper persons who are not members of the *Majlis*, constitute the Legal Committee of the *Majlis*. The *Muftī* is the Chairman of the Legal Committee. Any person may by letter addressed to the Secretary of the *Majlis* request it to issue a *fetua* or ruling on any point of Muslim law or doctrine[8]. On receiving any such request the Secretary shall forthwith submit it to the *Muftī* as Chairman of the Legal Committee. The Legal Committee shall consider every such request and shall, unless in its opinion the question referred is frivolous or for other good reason ought not to be answered, prepare a draft ruling thereon. If any ruling is unanimously approved by the Legal Committee the ruling can be issued by the Chairman in the name of the *Majlis*. If the Legal Committee is not unanimous, the question shall be referred to the *Majlis* which shall issue its ruling in accordance with the opinion of the majority of its members. Any court other than the court of the *Kathi Besar* or a *Kathi* can request the opinion of the *Majlis* on any question of Muslim law and such question shall be referred to the Legal Committee which shall give its opinion thereon and certify such opinion to the requesting court. The *Majlis* may at any time of its own motion make and publish any *fetua*. In making and issuing any ruling the *Majlis* and the Legal Committee shall ordinarily follow the orthodox tenets of the *Shāfi'ī* School. If it is considered that the following of such orthodox tenets will be opposed to the public interest, the *Majlis* or the Legal Committee may, unless the Ruler otherwise directs, follow the less orthodox tenets of the *Shāfi'ī* School. When it is considered that the following of either the orthodox or the less orthodox tenets of the *Shāfi'ī* School will be opposed to the public interest, the *Majlis* or the Legal Committee, may with the special sanction of the Ruler, follow the tenets of the *Ḥanafī*, *Mālikī* or *Ḥanbalī* Schools, as may be considered appro-

8. In some other States, *fetuas* may also be issued on Malay customary law.

priate but in any such ruling the provisions and principles to be followed shall be set out in full detail and with all necessary explanations. Any ruling given by the *Majlis* whether directly or through the Legal Committee shall if the Ruler so directs, be published in the Gazette and shall thereupon be binding on all Muslims resident in the State.[9]

Provision is made in Negri Sembilan for the registration of Muslim marriages, divorces and revocations of divorce. Power is given to appoint a *Kathi Besar* Negri Sembilan, and *Kathis* for such areas as may be prescribed. The *Kathi Besar* and *Kathis* are *ex-officio* Registrars of Muslim Marriages and Divorces. Power is given to the President of the *Majlis* after receiving the report of a Committee of Enquiry appointed by him to order the rectification or cancellation of any entry in any register or in any certificate issued under the Enactment. Power is also given to constitute a Court of the *Kathi Besar* with jurisdiction throughout the State and Courts of *Kathis* having prescribed local jurisdiction. The Court of the *Kathi Besar* has jurisdiction to deal with actions and proceedings in which all parties profess the Muslim religion and which relate to betrothal, marriage, divorce, nullity of marriage, judicial separation, dispositions of and claims to property arising out of marriage or divorce, maintenance of dependents, legitimacy, guardianship and custody of infants, division *inter vivos* of *sapencharian* property, *wakāf* and *nazr* and other matters in respect of which jurisdiction is given by any written law; and also to try any offence committed by a Muslim and punishable under the Administration of Muslim Law Enactment. The court of a *Kathi* can deal with all such actions and proceedings where the amount in dispute or value of the subject matter does not exceed one thousand dollars or is not capable of estimation in terms of money and with such offences for which the maximum punishment does not exceed imprisonment for two months or a fine of two hundred dollars or both. An appeal from the decision of the Court of the *Kathi Besar* or a Court of a *Kathi* lies to an Appeal Committee, selected from a panel constituted by the *Muftī* and seven or more fit and proper Muslims nominated by the Ruler. The President of the *Majlis* shall elect three persons from the panel to form an Appeal Committee to hear the appeal and the *Muftī* if he

9. Negri Sembilan Administration of Muslim Law Enactment, 1960 (No. 15 of 1960), s.4-38, 89, 102 and 106.

is a member shall be Chairman of such Appeal Committee. Any member of the Appeal Committee may call for and cause to be examined by the Committee the record of any civil or criminal proceedings before the Court of a *Kathi* or *Kathi Besar* for the purpose of satisfying the Committee as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such Court. After examining such record the Appeal Committee may exercise any of the powers exercisable by it on appeal.[10]

In Selangor the Administration of Muslim Law Enactment, 1952, constitutes a *Majlis Ugama Islām dan 'Ādat Istiadat Melayu* Selangor (the Council of Religion and Malay Custom, Selangor) to aid and advise the Ruler on all matters relating to Islām and Malay Custom. The *Majlis* is the chief authority in the State in all such matters and is empowered to take notice of and act upon all written laws in force in the State, the provisions of the *Hukom Shara'* (Muslim law) and the ancient custom of the State or Malay customary law.

The *Majlis* consists of a President and not less than seven persons, appointed by the Ruler, one of whom shall be an Indian Muslim and one a Pakistani Muslim. The *Majlis* is a corporate body and has power to hold and dispose of property, to enter into contracts and to administer estates. It is given power to administer the *Bayt ul-Māl*, to collect *zakāt* and *fiṭrah* and to act as an executor of a will or as administrator of the estate of a deceased person or as trustee of any trust, and to act as the trustee of all mosques. There is a Religious Affairs Department which is concerned with the day to day administration of Muslim affairs. The President of the Religious Affairs Department is *ex-officio* the President of the *Majlis* and its chief executive officer.

Power is given to the Ruler in Council to appoint a *Muftī* for the State. The *Muftī* is an *ex-officio* member of the *Majlis* and together with not more than two other members of the *Majlis* and not less than two other fit and proper persons who may be members of the *Majlis* or not, constitute the Legal Committee of the *Majlis*. The *Muftī* is the Chairman of the Legal Committee. Any person may by letter addressed to the Secretary of the *Majlis* request it to issue a *fetua* or ruling on any point of

10. *Ibid.*, s.39 — 43; 115 and 130.

Muslim law or doctrine or Malay customary law. On receiving any such request the Secretary shall transmit it to the *Muftī* as Chairman of the Legal Committee. The Legal Committee shall consider every such request and shall unless in its opinion the question referred is frivolous or for other good reason ought not be answered prepare a draft ruling thereon. If any ruling is unanimously approved by the Legal Committee, the ruling can be issued by the Chairman in the name of the *Majlis*. If the Legal Committee is not unanimous, the matter has to be referred to the *Majlis* which shall issue its ruling in accordance with the opinion of the majority of its members. In lieu of issuing such ruling, the *Majlis* may refer the question to the Ruler for his determination. Any court, other than the court of the *Kathi Besar* or a court of a *Kathi*, can request the opinion of the *Majlis* on any question of Muslim law or doctrine or Malay customary law, and such question shall be referred to the Legal Committee who shall give its opinion in accordance with the opinion of the majority of its members and certify such opinion to the requesting Court. The *Majlis* may at any time of its own motion make and publish any *fetua*. In making and issuing any ruling, the *Majlis* and the Legal Committee are enjoined to follow the orthodox tenets of the *Shāfi'ī* School, but if it is considered that the following of such orthodox tenets will be opposed to the public interest, the *Majlis* or the Legal Committee may, unless the Ruler shall otherwise direct, follow the less orthodox tenets of the *Shāfi'ī* School. Where it is considered that the following of either the orthodox or the less orthodox tenets of the *Shāfi'ī* School will be opposed to the public interest, the *Majlis* or the Legal Committee may, with the special sanction of the Ruler, follow the tenets of the *Ḥanafī*, *Mālikī* or *Ḥanbalī* School as may be considered appropriate, but in any such ruling the provisions and principles to be followed are required to be set out in detail and with any necessary explanation. In making and issuing any ruling the *Majlis* is required to have due regard to the *'Ādat Istiadat Melayu* or Malay customary law applicable in the State. Any ruling given by the *Majlis* or the Legal Committee or any determination of any question by the Ruler shall if the *Majlis* so determines or the Ruler so directs be published

in the Gazette and shall thereupon be binding on all Muslims resident in the State.[11]

Power is given to the Ruler to appoint a *Kathi Besar* Selangor, and *Kathis* for such areas as he may prescribe; and power is also given to constitute a court of the *Kathi Besar* with jurisdiction throughout the State and courts of a *Kathi* having prescribed local jurisdiction. The court of the *Kathi Besar* has jurisdiction in all actions and proceedings in which all the parties are Muslims and which relate to betrothal, marriage, divorce, nullity of marriage, judicial separation, dispositions of or claims to property arising out of marriage or divorce, maintenance of dependents, legitimacy, guardianship and custody of infants, division of or claims to *sapencharian* property, determination of the persons entitled to share in the estate of a deceased person who professed the Muslim religion or of the shares to which such persons are respectively entitled, gifts *inter vivos* and settlements and *wakāf* or *nazr* and other matters in respect of which jurisdiction is conferred by any written law. The Court of the *Kathi Besar* has also jurisdiction to try an offence committed by a Muslim and punishable under the Administration of Muslim Law Enactment. The court of a *Kathi* can deal with all such matters, when the amount or value of the subject matter does not exceed one thousand dollars or is not capable of estimation in terms of money and to try offences for which the maximum punishment provided does not exceed imprisonment for one month or a fine of one hundred dollars or both. An appeal from the court of the *Kathi Besar* or a court of a *Kathi* lies to an Appeal Committee constituted from a panel of Muslims nominated by the Ruler. The President of the Appeal Committee shall be a person who holds or has held the office of Magistrate in a Malay State.[12] Provision is made for the registration of marriages and divorces by Registrars of Marriages and Divorces. Power is given to the President of the *Majlis* after receiving the report of a Committee of Inquiry appointed by him to order the rectification or cancellation of any entry in any register or any certificate issued under the Enactment.[13]

11. Selangor Administration of Muslim Law Enactment, 1952, (No. 3 of 1952), s.5 — 42; 94, 107 and 111.
12. There is no express provision for revisions in the Selangor Enactment.
13. *Ibid.*, s.43 — 46; 120 and 136.

In Pahang the Administration of the Law of the Religion of Islam Enactment, 1956 (No. 5 of 1956) establishes a *Majlis Ugama Islām dan 'Ādat Istiadat Melayu,* Pahang, (Council of Religion and Malay Custom Pahang), to aid and advise the Ruler in all matters relating to the Muslim religion and Malay custom. It is provided that the *Majlis* shall be the chief authority in the State in all matters relating to the Muslim religion and Malay custom and that the *Majlis* shall take notice of and act upon all written law in force in the State, the provisions of the *Hukum Shara'* and the ancient custom of the State or Malay customary law. The *Majlis* is a body corporate with power to administer property and enter into contracts. It is given power to administer the General Endowment Fund for Muslim charitable purposes, to collect *zakāt* and *fiṭrah,* to be the trustee of all mosques in the State and to act as the executor of a will or the administrator of the estate of a deceased person or as a trustee of any trust. There is a Religious Affairs Department, which is concerned with the day to day administration of all Muslim matters.

Power is given to the Ruler to appoint a *Muftī,* who shall be *ex-officio* a member of the *Majlis.* Any person may by letter addressed to the Secretary, request the *Majlis* to issue a *fetua* on any point of Muslim law or doctrine or Malay customary law. The *Majlis* shall consider every such request and shall, unless in its opinion the question referred is frivolous or for other good reason ought not to be answered, issue a *fetua* in accordance therewith. The *Majlis* may on special grounds refer the question to the Ruler for his determination. If the issue of a *fetua* is requested urgently, the *Muftī* may on a certificate of urgency granted by the President of the *Majlis,* issue a *fetua* and such *fetua* shall be considered at the ensuing meeting of the *Majlis* where it may be confirmed. The *Majlis* may at any time of its own motion make and publish a *fetua* on any question of Muslim law or doctrine or Malay customary law. Any court, other than the Court of the *Chief Kathi* or a court of a *Kathi,* can request the opinion of the *Majlis* on any question of Muslim law or doctrine or Malay customary law and such question shall be referred to the *Majlis* which shall give its opinion thereon in accordance with the opinion of the majority of its members and certify such opinion to the requesting court. In making and

issuing any ruling the *Majlis* shall ordinarily follow the orthodox tenets of the *Shāfi'ī* School. If, however, it is considered that the following of such tenets will be opposed to the public interest the *Majlis* may, unless the Ruler shall otherwise direct, follow the tenets of other Schools,[14] but in any such ruling the provisions and principles to be followed shall be set out in detail and with any necessary explanation. In making and issuing any ruling in respect of Malay Customary Law, the *Majlis* shall have due regard in the *'Ādat Istiadat Melayu* or Malay Customary Law applicable in the State. Any ruling given by the *Majlis* shall if the *Majlis* so determines or the Ruler so directs, be published in the Gazette and shall thereupon be binding on all Muslims resident in the State, other than Muslims not being of the Malay race who are subject to a personal law other than that obtaining in the State.[15]

Power is given to the Ruler to appoint a *Chief Kathi* for the State and *Kathis* for such areas as may be prescribed; and power is also given to constitute a court of the *Chief Kathi* with jurisdiction throughout the State and courts of *Kathis* having prescribed local jurisdiction. The Court of the *Chief Kathi* has jurisdiction in all actions and proceedings in which all the parties profess the Muslim religion and which relate to betrothal, marriage, divorce, nullity of marriage, judicial separation, disputes of or claims to property arising out of marriage or divorce, maintenance, division of or claims to *sapencharian* property, determination of the persons entitled to share in the estate of a deceased Muslim and of the shares to which such persons are entitled, wills or death-bed gifts, gifts *inter vivos* and settlements, *wakāf* or *nazr* and other matters in respect of which jurisdiction is conferred by any written law. The Court of a *Chief Kathi* has also jurisdiction to try any offence committed by a Muslim and punishable under the Enactment. The Court of a *Kathi* has jurisdiction to hear and determine all such cases where the amount or value of the subject matter does not exceed one thousand dollars or is not capable of estimation in terms of money, including petitions for divorce, and to try any such offence where the punishment provided by law does not exceed two months or a fine of two

14. The Enactment refers to other *madhhab* and this is presumably confined only to the other *Sunnī* Schools, that is the *Mālikī*, *Ḥanafī* and *Ḥanbalī* Schools.

15. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, (No. 5 of 1956), s. 5—34; 86, 102 and 106.

hundred dollars or both.[16] An appeal from the court of the *Chief Kathi* or a court of a *Kathi* lies to the Religious Appeal Court constituted from a panel consisting of the *Muftī* and at least seven Muslims nominated by the Ruler. Wherever possible the *Muftī* shall be selected to be a member of the Court and when selected he shall preside. One other member shall hold or have held judicial office in a Malay state and in the event of the *Muftī* not presiding, such other member shall preside.

Any member of the Religious Appeal Court may call for and cause to be examined by the Court the record of any proceedings before the Court of a *Chief Kathi* or *Kathi* for the purpose of satisfying the said Court as to the correctness, legality or propriety of any finding, sentence or order and the Court may exercise its powers on appeal, to confirm, quash, reverse or vary the decision or sentence or order a retrial.

Provision is made for the registration of marriages and divorces by Registrars of Muslim Marriages and Divorces. The *Chief Kathi* and all *Kathis* are *ex-officio* Registrars of Muslim Marriages and Divorces. Power is given to the *Majlis* after such enquiry as it thinks proper to order the rectification of any entry in any register or any certificate issued under the Enactment.[17]

In Johore the Council of Religion Enactment, 1949, (No. 2 of 1949) establishes the *Majlis Ugama* (the Council of Religion) to aid and advise the Ruler in all matters relating to the religion of Islām. The *Majlis Ugama* consists of the President, Religious Department, the *Muftī*, the assistant *Muftī*, the *Chief Kathi*, the Inspector of Religious Schools, the Secretary, Religious Affairs, and not more than sixteen or less than twelve other persons to be appointed by the Ruler. The President, Religious Affairs, is the Chairman of the *Majlis*, the *Muftī* is the Vice-Chairman, and the Secretary, Religious Affairs, is the Secretary to the *Majlis*.[18] Provision is made for the registration of marriages and divorces by the Muhammadan Marriage Enactment (Enactment No. 17). *Kathis* and *Naib Kathis* are appointed by the Ruler, and a *Kathi* may be appointed for a particular place or district or for particular

16. The specific reference to divorce occurs only in the Pahang Enactment, but does not appear to add materially to the jurisdiction of the *Kathi*.
17. *Ibid.*, s. 35 – 39A; 116 and 135.
18. Council of Religion Enactment, 1949 (No. 2 of 1949), s. 2.

nationalities or schools. An appeal against a *Kathi's* or *Naib Kathi's* refusal to register a marriage, divorce or revocation of divorce lies to the Registrar of Muslim Marriages and Divorces, appointed by the Ruler.[19] Courts of *Kathis* and courts of *Naib Kathis* are constituted under the Courts Enactment (Enactment No. 54). A *Kathi* or *Naib Kathi* has such powers in all matters concerning the Muslim religion, marriage and divorce and in all matters regulated by Muslim law as may be defined in his *taulīah* or letter of authority. An appeal from a decision of a court of a *Kathi* or of a *Naib Kathi* lies to the Ruler in Council and is heard and determined by a Committee appointed from the members of the Muslim Community in Malaya.[20] Any court before which any question of Muslim law arises may refer such question to the *Muftī*, and the *Muftī* shall transmit to such court his opinion with the reasons therefor and references to the authorities on which it is based. An appeal may be brought from the opinion of the *Muftī* to the Ruler in Council, and such appeal may be heard and determined by a Committee appointed by the Ruler in Council from among the members of the Muslim Community in Malaya.[21]

Johore has a Religious Department, headed by the President, Religious Affairs, who is also the Chairman of the *Majlis Ugama.* The Secretary, Religious Affairs, is also an *ex-officio* member and Secretary to the *Majlis Ugama.* The Department has various offices or branches attached to it. The *Muftī* Johore has the duty of giving *fetua* or rulings on questions relating to Islām and is assisted by an *Assistant Muftī;* both the *Muftī* and *Assistant Muftī* are *ex-officio* members of the *Majlis Ugama,* the *Muftī* being its Vice-Chairman. The *Chief Kathi,* Johore is also an *ex-officio* member of the *Majlis Ugama;* he and the *Kathis* for the various districts preside over *Kathi's* courts which deal with disputes relating to Muslim marriage and divorce, claims for maintenance and other matters relating to Muslim Law. The Inspectors of Religious matters, the inspectors of burial grounds, and the *Naib Kathis,* function under the office of the *Kathis.* The *Kathis*

19. Muhammadan Marriage and Divorce Registration Enactment (Enactment No. 17) s. 4 and 12.
20. Courts Enactment (Enactment No. 54) as amended by the Courts (Amendment) Enactment, 1949 (No. 4 of 1949), s. 65 – 67.
21. Muhammadan Law Determination Enactment (Enactment No. 48) as amended by the Muhammadan Law Determination (Amendment) Enactment 1949, (No. 3 of 1949).

for the various districts also act as Registrars of Muslim Marriages and Divorces and perform functions in connection with *bayt ul-māl* and the collection of *zakāt* and *fiṭrah* and they also give advice and guidance on religious matters. The *Chief Kathi* is the Registrar of Muslim Marriages and Divorces and there is also an Assistant Registrar of Muslim Marriages and Divorces. The office dealing with *Bayt ul-Māl* matters is administered by the *Amīn* (Treasurer) of the *Bayt ul-Māl,* who performs his functions under the direction of the President, Religious Affairs, who is the *Nāthir* (Controller) of the *Bayt ul-Māl;* the *Amīn* is assisted in the districts by the *Kathis* who are Assistant Treasurers of the *Bayt ul-Māl.* The office dealing with *zakāt* and *fiṭrah* is administered by a *Penolong Naqūb,* who works under the direction of the *Chief Kathi* who is the *Naqūb Zakāt.* The office dealing with mosques and Muslim burial grounds is administered by an Assistant Controller of mosques who works under the direction of the President, Religious Affairs, who is the Controller (*Nāthir*) of mosques. Religious schools are under the control of the Office of Religious Schools, which is headed by the Inspector of Religious Schools, who is an *ex-officio* member of the *Majlis.* The Inspector of Religious Schools is assisted by a number of Assistant Inspectors of Religious Schools.

In Kedah the Administration of Muslim Law Enactment, 1962, constitutes a *Majlis Ugama Islām,* Kedah (Council of Muslim Religion, Kedah) to advise the Ruler in all matters relating to the Muslim religion in the State. The *Majlis* consists of the President of the Religious Affairs Department who is the President, the Secretary of the Religious Affairs Department, the *Kathi Besar,* the Registrar of Religious Schools, the Secretary of the Zakat Committee, the Secretary of the *Bayt ul-Māl,* five persons who are *'ālim-'ulamā'* appointed by the Ruler on the recommendation of the President and five members appointed by the Ruler on the recommendation of the Executive Council. The President of the Religious Affairs Department is the President and principal executive officer of the *Majlis* and the Secretary of the Religious Affairs Department is its *ex-officio* Secretary. The *Majlis* is a corporate body with powers to enter into contracts, to hold property and to administer estates. It is given power to administer the General Endowment Fund and the *Bayt ul-Māl* and

to act as the trustee of mosques and *wakāfs* in the state. There is a Religious Affairs Department, which is concerned with the day to day administration of all Muslim matters. The President of the Religious Affairs Department is *ex-officio* the President of the *Majlis* and its principal executive officer. The Ruler may after consultation with the *Majlis* appoint a fit and proper person to be Chairman of the Fetua Committee. The Fetua Committee consists of the Chairman, two other members of the *Majlis* and not less than two or more than six other fit and proper Muslims who are not members of the *Majlis*. Any person may by letter addressed to the Secretary of the *Majlis* request it to issue a *fetua* or ruling on any point of Muslim law. On receiving any such request the Secretary shall submit it to the Chairman of the Fetua Committee. The Fetua Committee shall consider every such request and shall, unless in its opinion the question referred is frivolous or for other good reason ought not to be answered prepare a ruling which is then issued by the Chairman in the name of the *Majlis*. The *Majlis* may at any time of its own motion make and publish any ruling or determination. Any court, other than the Court of the *Chief Kathi* or a court of a *Kathi,* can request the opinion of the *Majlis* on any question of Muslim law and such question shall be referred to the Fetua Committee which shall give its opinion and certify such opinion to the requesting court.

In making and issuing any ruling the *Majlis* or Fetua Committee shall ordinarily follow the orthodox tenets of the *Shāfi'ī* School. If it is considered that the following of such orthodox tenets will be opposed to the public interest, the *Majlis* or the Fetua Committee may, unless the Ruler shall otherwise direct, follow the less orthodox tenets of the *Shāfi'ī* School. If it is considered that the following of either the orthodox or the less orthodox tenets of the *Shāfi'ī* School will be opposed to the public interest, the *Majlis* or the Fetua Committee may, with the special sanction of the Ruler follow the tenets of the *Ḥanafī, Mālikī* or *Ḥanbalī* Schools as may be considered appropriate, but in any such ruling the provisions and principles to be followed shall be set out in full detail and with all necessary explanations. Any ruling given by the Fetua Committee or the *Majlis* shall if

the Ruler so directs, be published in the Gazette and shall thereupon be binding on all Muslims resident in the State.[22]

Power is given to the Ruler to appoint a *Kathi Besar* Kedah, and *Kathis* for such areas as may be prescribed; and power is also given to constitute a court of the *Kathi Besar* with jurisdiction throughout the State and courts of *Kathis* having prescribed local jurisdiction. The Court of the *Kathi Besar* has jurisdiction in all actions and proceedings in which all the parties profess the Muslim religion and which relate to betrothal, marriage, divorce, nullity of marriage, judicial separation, disputes of or claims to property arising out of marriage or divorce, maintenance, legitimacy, guardianship or custody of infants, *wakāf* or *nazr* or other matters in respect of which jurisdiction is conferred by any written law. The Court of the *Kathi Besar* has also jurisdiction to try any offence committed by a Muslim and punishable under the Administration of Muslim Law Enactment. The Court of a *Kathi* has jurisdiction to hear and determine all such cases where the amount or value of the subject matter does not exceed one thousand dollars or is not capable of estimation in terms of money and to try any such offence where the punishment provided by law does not exceed imprisonment for two months or a fine of two hundred dollars or both. An appeal from the Court of the *Kathi Besar* or a court of a *Kathi* lies to the Appeal Committee constituted from a panel of Muslims nominated by the Ruler. The President of the *Majlis* shall select three persons from the panel to form an Appeal Committee to hear an appeal and the Chairman of the Fetua Committee, if he is a member shall be Chairman of such Appeal Committee. The Chairman of the Appeal Committee may call for and cause to be examined by the Committee the record of any civil or criminal proceedings before the Court of a *Kathi* or *Kathi Besar* for the purpose of satisfying the Committee as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such court. After examining such record the Appeal Committee may exercise any of the powers which it could have exercised on appeal.[23]

22. Kedah Administration of Muslim Law Enactment, 1962, s. 4 — 38.
23. *Ibid.*, s. 39 — 43.

Provision is made for the registration of marriages and divorces by Registrars of Muslim Marriages and Divorces. The *Kathi Besar* and all *Kathis* are *ex-officio* Registrars of Muslim Marriages and Divorces. Power is given to the President of the *Majlis* after receiving the report of a Committee of Enquiry appointed by him to order the rectification or cancellation of any entry in any register or any certificate issued under the Enactment.[24]

In Perlis the Administration of Muslim Law Enactment, 1963, establishes a *Majlis Ugama Islām dan 'Ādat Istiadat Melayu* Perlis to advise the Ruler on all matters relating to the Muslim religion and Malay custom. The *Majlis* is a body corporate with perpetual succession and it may sue and be sued in its corporate name and may enter into contracts. The *Majlis* has power to act as an executor of a will, administrator of the estate of a deceased Muslim or as a trustee; and power to acquire by purchase, gift or otherwise, movable and immovable property and any interest therein and to dispose of or otherwise deal with any movable or immovable property or any interest therein so acquired by it. It is provided that the members of the *Majlis* shall be persons professing the Muslim religion, *Ahlu'l-Sunnah Wa'l-Jamā'ah,* and in advising the Ruler the *Majlis* shall do so in accordance with Muslim Law and such other Malay customary laws as may be applicable in the State. The *Majlis* is the trustee of all *wakāfs* and mosques in the State and administers the General Endowment Fund.[25] Power is given to the *Majlis* to issue *fetua* (rulings) on questions relating to the Muslim religion or Malay custom. Any person or any court may request the *Majlis* to issue a *fetua* and any question referred to it shall be referred to the *Shara'iah Committee,* consisting of the *Muftī* as Chairman, two members of the *Majlis* and two persons not being members of the *Majlis,* who profess the Muslim religion, *Ahlu'l-Sunnah Wa'l-Jamā'ah.* The *Shara'iah Committee* shall submit its opinion in writing to the *Majlis,* whether such opinion be approved unanimously or by a majority of the members of the Committee. If the opinion is unanimously approved by the

24. *Ibid.,* s. 115 and 131.

25. Perlis Administration of Muslim Law Enactment, 1963, s. 4 — 6; 63, 64 and 74. The *Majlis* takes over the functions and properties of the *Majlis Ugama Islām dan 'Ādat Istiadat Melayu* established under the Council of Religion and Malay Custom Enactment, 1369 (No. 1 of 1949).

Shara'iah Committee, the *Majlis* shall forthwith issue such opinion as a *fetua;* if the opinion is approved by a majority of the members of the *Shara'iah Committee,* the *Majlis* shall consider such opinion and if approved by a majority in the *Majlis,* issue a *fetua* based on such opinion; where the opinion of the majority of the members of the *Shara'iah Committee* is not approved by a majority in the *Majlis,* the *Majlis* may refer such opinion to the Ruler for his decision. The *Majlis* in issuing a *fetua* and the *Shara'iah Committee* in giving its opinion shall follow the *Qur'ān* and the *Sunnah* of the Prophet but where the following of such tenets is opposed to the public interest, the *Majlis* and the *Shara'iah Committee* shall respectively refer such *fetua* and such opinion to the Ruler for his decision. In issuing a *fetua* the *Majlis* shall have due regard to the Malay customary law applicable in the State. Any *fetua* issued by the *Majlis* and any decision given by the Ruler shall if the *Majlis* or the Ruler thinks fit be published in the Gazette and shall subject to any written law be binding on the courts of the State.[26] Power is given to the Ruler to appoint a *Muftī* of the State, a *Kathi* of the State and *Assistant Kathis* for specified areas; and power is also given to constitute a court of a *Kathi* and Courts of *Assistant Kathis.* The Court of a *Kathi* has jurisdiction in all actions and proceedings in which all the persons profess the Muslim religion and which relate to betrothal, marriage, divorce, nullity of marriage, judicial separation, dispositions of or claims to property arising out of marriage or divorce, maintenance of dependents, legitimacy, guardianship and custody of infants, divisions of and claims to *sapencharian* property, apportionment of the estates of deceased Muslims, wills or death-bed gifts of deceased Muslims, gifts *inter vivos* and settlements made by Muslims, *wakāfs* and *nazars* and other matters in respect of which jurisdiction is conferred by any written law. The Court of a *Kathi* has also jurisdiction to try an offence committed by a Muslim and punishable under the Administration of Muslim Law Enactment. The Court of an *Assistant Kathi* can deal with such matters where the amount in dispute or value of the subject matter does not exceed five thousand dollars or is not capable of estimation in terms of money and to try offences for which the maximum punishment provided does not exceed im-

26. *Ibid.,* s. 7 and 8.

prisonment for six months or a fine of six hundred dollars or both. An appeal from the Court of a *Kathi* and the Courts of *Assistant Kathis* lies to the Appeal Committee, selected from among the following: the *Muftī* and seven persons professing the Muslim religion, *Ahlu'l-Sunnah Wa'l-Jamā'ah,* nominated by the Ruler. Whenever there is an appeal, the President of the *Majlis* shall convene the Appeal Committee which shall consist of the *Muftī* as Chairman whenever he is available and two other members. Where the *Muftī* is not available, the President may appoint a member of the Appeal Committee to be Chairman. Any member of the Appeal Committee may for the purpose of determining the correctness, legality or propriety of any finding, sentence or order recorded or passed by the Court of a *Kathi* or *Assistant Kathi* or the regularity of any proceedings of such court, call for the record of such court. After examination of such record the Appeal Committee may exercise any of the powers which it could have exercised on appeal.[27] Provision is made for registration of marriages and divorces by a Registrar and Deputy Registrar of Muslim Marriages and Divorces. The Registrar is required before registering any marriage to make enquiry to satisfy himself that all the requirements of Muslim Law and of the Enactment have been complied with and that the said marriage was valid and registrable. Any person aggrieved by any order, act, refusal or omission of the Registrar may within fourteen days from the date thereof appeal to the *Majlis.* The *Majlis* may order the Registrar to do or refrain from doing any act which ought in the circumstances to have been done or omitted to be done and may make such order as justice may require, including an order for rectification of any register of marriages and the decision of the *Majlis* shall be final. Power is also given to the President of the *Majlis* to order, after making an enquiry into the circumstances of the case, the cancellation or rectification of any entry in any register or any certificate issued under the Enactment.[28]

In Kelantan the Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, constitutes a *Majlis Ugama Islām dan 'Ādat Istiadat Melayu* (Council of Religion and Malay Custom) to aid and advise the Ruler on all matters relating to the Muslim religion and Malay custom. The *Majlis* is

27. *Ibid.,* s. 9, 11 – 14.
28. *Ibid.,* s. 83, 87 and 101.

the chief authority in the State in all such matters and is empowered to take notice of and act upon all written laws in force in the State, the provisions of the *Hukom Shara'* (Muslim law) and the ancient custom of the State or Malay customary law. The *Majlis* is a corporate body with power to hold and dispose of property, and to enter into contracts and to administer estates. It is given power to administer the general Endowment Fund, to collect *zakāt* and *fiṭrah,* and to act as trustee of all mosques and *wakāfs* in the State. Power is given to the Ruler to appoint a *Muftī Kerajaan* for the State. The *Muftī* is an *ex-officio* member of the *Majlis* and together with not less than two other members of the *Majlis* and not less than six other fit and proper persons, who may be members of the *Majlis* or not, constitute the Legal Committee of the *Majlis.* The *Muftī* is the Chairman of the Legal Committee. Any person may by letter addressed to the Secretary of the *Majlis* request it to issue a *fetua* or ruling on any point of Muslim law or doctrine or Malay customary law. On receiving any such request the Secretary shall transmit it to the *Muftī.* The Legal Committee shall consider every such request and shall unless in its opinion the question referred is frivolous or for other good reason ought not to be answered prepare a draft ruling thereon. If any ruling is unanimously approved by the Legal Committee, the ruling can be issued in the name of the *Majlis.* If the Legal Committee is not unanimous, the question has to be referred to the *Majlis,* which shall issue its ruling in accordance with the opinion of the majority of its members. The *Majlis* may on special grounds refer such question to the Ruler for his determination and shall so refer it if the *Muftī* so requests. There is also a Judicial Committee of the *Majlis,* consisting of the *Muftī* and at least two other regular members. Any court other than the court of the *Chief Kathi* or the court of a *Kathi* may refer any question of Muslim law or doctrine or Malay customary law to the Judicial Committee, which shall give its opinion in accordance with the opinion of the majority of its members. In making and issuing any ruling the *Majlis,* the Legal Committee and the Judicial Committee are empowered to follow the orthodox tenets of the *Shāfi'ī* School, but if it is considered that the following of such orthodox tenets will be opposed to the public interest, the *Majlis* or the Legal Com-

mittee or the Judicial Committee may, unless the Ruler shall otherwise direct, follow the less orthodox tenets of the *Shāfi'ī* School. Where it is considered that the following of either the orthodox or the less orthodox tenets of the *Shāfi'ī* School will be opposed to the public interest, the *Majlis* or the Legal Committee or the Judicial Committee may, with the special sanction of the Ruler, follow the tenets of the *Ḥanafī, Mālikī* or *Ḥanbalī* Schools as may be considered appropriate but in any such ruling the provisions and principles to be followed shall be set out in full detail and with any necessary explanation. In making and issuing any ruling the *Majlis* is required to have due regard to the *'Ādat Istiadat Melayu* or Malay Customary law applicable in the State. All *fetuas* or rulings on any point of Muslim law or doctrine or Malay customary law issued by the *Majlis* shall be published in the Gazette. Any ruling given by the *Majlis* or the Legal Committee shall, if the *Majlis* so determines or the Ruler so directs, be published by notification in the Gazette and shall thereupon be binding on all Muslims resident in the State, other than Muslims, not being of the Malay race, who are subject to a personal law other than that obtaining in the State.[29]

Power is given to the Ruler to appoint a *Chief Kathi* for the State and *Kathis* for such areas as may be prescribed; and power is also given to constitute a Court of the *Chief Kathi* at Kota Bahru with jurisdiction throughout the State, and Courts of a *Kathi* with prescribed local jurisdiction. The Court of the *Chief Kathi* has jurisdiction to hear and determine all actions in which all the parties profess the Muslim religion and which relate to betrothal, marriage, divorce, nullity of marriage, judicial separation, dispositions of or claims to property arising out of marriage or divorce, maintenance of dependents, legitimacy, guardianship and custody of infants, divisions of or claims to *sapencharian* property, wills or death-bed gifts, gifts *inter vivos* and settlements, *wakāf* and *nazr* and other matters in respect of which jurisdiction is given to it; and also to try any offence committed by a Muslim and punishable under the Enactment. The Court of a *Kathi* can deal with all such matters where the amount or value of the subject does not exceed one thousand

29. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment (No. 1 of 1953), s. 5 – 44.

dollars or is not capable of estimation in terms of money and may try any such offence for which the maximum punishment provided by law does not exceed imprisonment for one month or a fine of one hundred dollars. An appeal from the Court of the *Chief Kathi* or a *Kathi* lies to the Ruler in Council, who may direct generally or in any particular appeal or class of appeals that the appeal shall be heard by the Judicial Committee of the *Majlis*. In any such case the Judicial Committee shall hear the appeal and advise the Ruler in writing as to the manner in which it shall be determined. In case of disagreement each member shall give his opinion separately. The Ruler in Council may determine such appeal in accordance with the advice given but if such advice is not unanimous or if the Ruler in Council is disposed to determine the appeal otherwise than in accordance with such advice, the parties shall ordinarily be heard thereon if they so desire.[30] Provision is made for the registration of marriages and divorces by Registrars of Muslim Marriages and Divorces. The *Chief Kathi* and every *Kathi* are *ex-officio* Registrars of Muslim Marriages and Divorces for the whole of the areas in which they respectively have jurisdiction, and the *Imām Tua* (Principal *Imām*) of every *Masjid* is *ex-officio* a Registrar of Muslim Marriages and Divorces for the *Mukim* of his *Masjid*. Before registering a marriage the Registrar is required to make enquiry and to satisfy himself that all the requirements of Muslim law and of the Enactment have been satisfied, and that the marriage was valid and registrable. Any person aggrieved by any order, refusal or omission of a Registrar may appeal, if the Registrar be the *Chief Kathi* or a *Kathi*, to the Judicial Committee of the *Majlis* or, in other cases, to the *Kathi* of the District in which the Registrar acts as such, subject to a further appeal to the Judicial Committee of the *Majlis*. Power is also given to the Judicial Committee to order the rectification of any entry in any register or any certificate issued under the Enactment.[31]

In Trengganu the Administration of Islamic Law Enactment, 1955, constitutes a *Majlis Ugama Islām dan 'Ādat Melayu* (Council of Religion and Malay Custom) to aid and advise the

30. *Ibid.*, s. 45 — 49. There would appear to be no provision for revision in Kelantan.
31. *Ibid.*, s. 136 and 156.

Ruler in all matters relating to Islām and Malay custom. The *Majlis* is enjoined to take notice of and act upon all written laws in force in the State, the provisions of the *Hukom Shara'* [Muslim Law] and Malay customary law. The Ruler is given power to appoint a Commissioner of the Department of Religious Affairs and a Secretary to the Department. The *Majlis* is constituted a body corporate with power to hold and dispose of property and to enter into contracts. The corporation is given power to administer the General Endowment Fund for charitable purposes and the Department of Religious Affairs is given power to collect *zakāt* and *fiṭrah*. The corporation is also made the sole trustee of all mosques in the State, and is given power to act as an executor of a will or as the administrator of the estate of a deceased person or as a trustee of any trust. Power is given to the Ruler to appoint a *Muftī* for the State. Any person, any Civil Court, the Shariah Appeal Court, the Court of the *Chief Kadzi* or of a *Kadzi*, and any Department or Institution may by letter addressed to the Commissioner for the Department of Religious Affairs request the issue of a *fetua* or ruling on any point of Muslim law or doctrine or Malay customary law. If the question is one of Muslim law or doctrine the request will be sent to the *Muftī*, who will consider the request and prepare a ruling thereon. The *Muftī* may consult the Committee of the *Majlis*, constituted of not less than three *'Ulamās* of the *Majlis* and not less than four other fit and proper persons who may be members of the *Majlis* or not; but is not obliged to accept their advice. If at any time the *Majlis* is of the opinion that it is in the interest of the Muslim community as a whole that a ruling given by the *Muftī* should be reconsidered they may by resolution request the Ruler to express an opinion thereon or take such other action as may be deemed fit and the Ruler may thereupon determine the point so referred. In making and issuing any ruling upon any point of Muslim law or doctrine the *Muftī* is required to follow the orthodox tenets of the *Shāfi'ī* School, but if the *Muftī* considers it to be in the interest and for the welfare of the Muslim community he may issue the *fetua* within the tenets of any of the four Schools. If the matter in which the ruling is requested is one of Malay customary law the Commissioner shall present the request to the *Majlis*. In making or

issuing any ruling upon a point of Malay customary law the *Majlis* shall have due regard to the *'Ādat Istiadat Melayu* or Malay customary law applicable in the State and in the event of the point concerning Muslim law shall refer the matter to the *Muftī* for his advice. Any ruling shall, if the *Majlis* so determines or the Ruler so directs, be published in the Gazette and shall thereupon be binding on all Muslims resident in the State, but a ruling on Malay custom shall be binding only on Muslims of the Malay race resident in the State.[32]

Power is given to the Ruler to appoint a *Chief Kadzi* for the State and *Kadzis* for such areas as may be prescribed; and power is also given to constitute a Shariah Appeal Court, a Court of the *Chief Kadzi* at Kuala Trengganu with jurisdiction throughout the State and Courts of a *Kadzi* having prescribed local jurisdiction. The Court of the *Chief Kadzi* has jurisdiction to hear and determine all matters where the parties profess the Muslim religion and which relate to betrothal, marriage, divorce, nullity of marriage, judicial separation, maintenance of dependents, legitimacy, guardianship, and custody of infants, division of or claims to *harta sapencharian*, wills and death-bed gifts, gifts *inter vivos* and settlements, *wakāf* and *nazar* and all other matters in respect of which jurisdiction is given to it; and also to try an offence committed by a Muslim and punishable under the Enactment. The Court of a *Kadzi* can deal with all such matters where the amount or value of the subject matter does not exceed one thousand dollars or is not capable of estimation in terms of money, and has power to try any such offence where the maximum punishment provided by law does not exceed imprisonment for one month or a fine of one hundred dollars or both. An appeal from the Court of the *Chief Kadzi* or a Court of a *Kadzi* lies to the Shariah Appeal Court, consisting of three persons, one of whom shall be the *Muftī* and the other two selected from the panel of at least seven persons nominated by the Ruler. The Chairman of such Shariah Appeal Court shall hold or have held the office of Magistrate.[33]

32. Trengganu Administration of Islamic Law Enactment, 1955, (No. 4 of 1955), s. 5 – 21. (as amended by the Administration of Islamic Law (Amendment) Enactment, 1963).

33. *Ibid.*, s. 22 – 26. There would appear to be no provision for revision in Trengganu.

Provision is made for the registration of Muslim marriages and divorces by the *Chief Kadzi,* who is the *ex-officio* Principal Registrar of Muslim Marriages and Divorces, by *Kadzis* who are the *ex-officio* Registrars of Muslim Marriages and Divorces, and by Assistant Registrars of Muslim Marriages and Divorces. Before registering a marriage the Registrar is required to make enquiry and to satisfy himself that all the requirements of Muslim law and of the Enactment have been satisfied and that the marriage was valid and registrable. Any person aggrieved by any order, act, refusal or omission of a Registrar may appeal, if the Registrar be the *Chief Kadzi* or a *Kadzi,* to the Shariah Appeal Court or, in other cases, to the *Kadzi* of the District in which the Registrar acts as such, subject to a further appeal to the Shariah Appeal Court. Power is given to the Shariah Appeal Court, after enquiry, to order the rectification of any entry in any register or any certificate issued under the Enactment.[34]

In Melaka and in Penang the Administration of Muslim Law Enactments of 1959 constitute a *Majlis Ugama Islām,* Malacca (Council of Religion, Malacca) and a *Majlis Ugama Islām,* Penang (Council of Religion, Penang) respectively to advise the Yang di-Pertuan Agong who is the Head of the Muslim religion in the States in all matters relating to the Muslim religion in these States. The *Majlis* consists of the President, the *Muftī* and not less than nine Muslims to be appointed by the Yang di-Pertuan Agong. The *Majlis* is a body corporate with power to enter into contracts, to hold and dispose of property and to administer estates. It is given power to administer the General Endowment Fund, to collect *zakāt* and *fiṭrah,* and to act as the trustee of all *wakāfs* and mosques in the States. There is a Religious Affairs Department, which is concerned with the day to day administration of all Muslim matters. It is provided that the President of the Religious Affairs Department shall be *ex-officio* the President of the *Majlis* and its Chief Executive Officer. The Secretary of the Religious Affairs Department is *ex-officio* the Secretary of the *Majlis.* Power is given to the Yang di-Pertuan Agong after consultation with the *Majlis* to appoint a *Muftī,* who

34. *Ibid.,* s. 94 and 114.

shall be *ex-officio* a member of the *Majlis*. The *Muftī* together with two other members of the *Majlis* and not less than two or more than six other fit and proper Muslims who are not members of the *Majlis* constitute the Legal Committee of the *Majlis*. The *Muftī* is the Chairman of the Legal Committee. Any person may by letter addressed to the Secretary of the *Majlis* request the *Muftī* to issue a *fetua* or ruling on any point of Muslim law. On receiving any such request the Secretary shall submit it to the *Muftī* as Chairman of the Legal Committee. The Legal Committee shall consider every such request and shall unless in its opinion the question referred is frivolous or for other good reason ought not to be answered prepare a draft ruling thereon. If such draft ruling is unanimously approved by the Legal Committee or those members thereof present and entitled to vote, the Chairman shall on behalf and in the name of the *Majlis* issue a ruling in accordance therewith. If the Legal Committee is not unanimous, the question shall be referred to the *Majlis*, which shall in like manner issue its ruling in accordance with the opinion of the majority of its members. The *Majlis* may at any time of its own motion make and publish a *fetua* on any question of Muslim law. Any court, other than the Court of the *Chief Kathi* or a court of a *Kathi*, can request the opinion of the *Majlis* on any question of Muslim law which calls for decision by it and such question shall be referred to the Legal Committee which shall give its opinion thereon in accordance with the opinion of the majority of its members and certify such opinion to the requesting court.

In issuing any ruling the *Majlis* and the Legal Committee shall ordinarily follow the orthodox tenets of the *Shāfi'ī* School. If it is considered that the following of such orthodox tenets will be opposed to the public interest, the *Majlis* or the Legal Committee may, unless the Yang di-Pertuan Agong shall otherwise direct, follow the less orthodox tenets of the *Shāfi'ī* School. If it is considered that the following of either the orthodox or the less orthodox tenets of the *Shāfi'ī* School will be opposed to the public interest, the *Majlis* may, with the special sanction of the Yang di-Pertuan Agong, follow the tenets of the *Ḥanafī*, *Mālikī* or *Ḥanbalī* Schools as may be considered appropriate, but in any such ruling the

provisions and principles to be followed shall be set out in full detail and with all necessary explanations. Any ruling given by the Legal Committee of the *Majlis* shall if the Yang di-Pertuan Agong so directs, be published in the Gazette and shall thereupon be binding on all Muslims resident in the State.[35]

Power is given to the Yang di-Pertuan Agong to appoint a *Kathi Besar* for the State and *Kathis* for such areas as may be prescribed; and power is also given to constitute a court of the *Kathi Besar* with jurisdiction throughout the State and courts of *Kathis* having prescribed local jurisdiction. The Court of the *Kathi Besar* has jurisdiction in all actions and proceedings in which all the parties profess the Muslim religion and which relate to betrothal, marriage, divorce, nullity of marriage, judicial separation, disputes of or claims to property arising out of marriage or divorce, maintenance, legitimacy, guardianship or custody of infants, division *inter vivos* of *sapencharian* property, *wakāf* or *nazr* or other matters in respect of which jurisdiction is conferred by any written law. The Court of a *Kathi Besar* has also jurisdiction to try any offence committed by a Muslim and punishable under the Enactment. The Court of a *Kathi* has jurisdiction to hear and determine all such cases where the amount or value of the subject matter does not exceed one thousand dollars or is not capable of estimation in terms of money and to try any such offence where the punishment provided by law does not exceed imprisonment for two months or a fine of two hundred dollars or both. An appeal from the Court of the *Kathi Besar* or a court of a *Kathi* lies to the Appeal Committee constituted from a panel consisting of the *Muftī* and seven or more fit and proper Muslims nominated by the Yang di-Pertuan Agong. The *Muftī*, if he is a member, shall be Chairman of such Appeal Committee. Any member of the Appeal Committee may call for and cause to be examined by the Committee the record of any civil or criminal proceedings before the Court of a *Kathi* or *Kathi Besar* for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such Court. The Appeai Committee may

35. Penang Administration of Muslim Law Enactment, 1959 (No. 3 of 1959), s. 4 — 37; Malacca Administration of Muslim Law Enactment, 1959 (No. 1 of 1959), s. 4 — 37.

after examining the record exercise any of the powers which it could have exercised on appeal.[36]

Provision is made for the registration of marriages and divorces by Registrars of Muslim Marriages and Divorces. The *Kathi Besar* and all *Kathis* are *ex-officio* Registrars of Muslim Marriages and Divorces. Power is given to the President of the *Majlis* after receiving the report of a Committee of Enquiry appointed by him to order the rectification of any entry in any register or any certificate issued under the Enactment.[37]

In Singapore the Muslims Ordinance, 1957, gives power to the Yang di-Pertuan Negara to appoint a Registrar of Muslim Marriages, who must be a Muslim, and to appoint a *Chief Kathi* and *Kathis*. A *Kathi* may be appointed for a particular district or place or for a particular school of law. *Kathis* are empowered to solemnise marriages at the request of the *walī* or guardian for marriage of the woman to be wedded but before doing so are required to satisfy themselves that there are no lawful obstacles to the marriage. Where the woman has no *walī* or where the *walī* refuses his consent to the marriage on grounds which are not considered satisfactory the marriage may be solemnised by the *Chief Kathi*, after he has satisfied himself after enquiry that there are no lawful obstacles to the marriage. *Kathis* are also empowered to register divorces and revocations of divorce to which both the husband and wife have consented. It is expressly provided that nothing in the Ordinance shall be construed to render valid or invalid merely by reason of its having been or not having been registered any Muslim marriage, divorce or revocation of divorce which otherwise is invalid or valid. A Shariah Court is constituted to be presided over by the Registrar of Muslim Marriages or some other male Muslim appointed by the Yang di-Pertuan Negara. An appeal from the decision of the *Chief Kathi* or a *Kathi* lies to the Shariah Court, and the Shariah Court is also empowered to hear and determine applications for *fasah, ta'alīk, khula* and *ṭalāk,* other than those by the mutual consent of the parties, to deal with disputes as to marriage, betrothal,

36. Penang Administration of Muslim Law Enactment, 1959, s. 38 – 42; Malacca Administration of Muslim Law Enactment, 1959, s. 38 – 42.
37. Penang Administration of Muslim Law Enactment, 1959, s. 115 and 131; Malacca Administration of Muslim Law Enactment, 1959, s. 114 and 129.

nullity of marriage and judicial separation and to make orders for the payment of *mas-kahwin,* maintenance and *matta'ah* or consolatory gifts. An appeal from a decision of the Shariah Court lies to an Appeal Board constituted of three persons to be chosen from a panel of at least seven Muslims nominated by the Yang di-Pertuan Negara. Provision is made for the appointment of a *Muftī* to assist the Registrar, the Shariah Court and the Appeal Board with advice on all matters connected with the law of Islām but so far no *Muftī* has been appointed. The Yang di-Pertuan Negara is given power to call for the record of proceedings before the Shariah Court, Registrar or *Kathi* and to order any decision to be revised, altered or modified.[38]

BETROTHAL

A Muslim marriage in the States of Malaya and Singapore is often though not always preceded by a betrothal. This is initiated by the family of the man who ascertains from the girl's family whether a proposal would be favourably received. When an understanding has been arrived at, the parties proceed to settle the date of marriage and the precise amounts of the payments for *mas-kahwin* and presents. There may be a formal ceremony of betrothal at the girl's home, which finalises the contract between the two families. Sometimes the marriage expenses and the presents are handed over at the betrothal ceremony. A man may make a proposal of marriage to a woman who is unmarried or whose *'idda* or period of retirement is completed; but a woman whose period of *'idda* is not yet completed may not be openly demanded in marriage. A woman divorced in a revocable manner cannot be demanded in marriage during her period of *'idda* but a person may, if he uses ambiguous terms, make a proposition of this nature to a widow during her period of retirement or to a woman divorced irrevocably. It is forbidden to make a proposal of marriage to a woman who has already received or formally accepted a similar proposal from another, except with the permission of such person; but until a woman has decided as to the first offer, there is no objection to making her a second proposal.[39]

The Administration of Muslim Law Enactment, 1952, of

38. Muslims Ordinance, 1957 (No. 25 of 1957), s. 3 – 5, 20 – 21 and 37 – 39.
39. Nawawī, *Minhāj aṭ-Ṭālibīn,* translated by E. C. Howard, p. 282.

Selangor provides that if any Muslim shall either orally or in writing and either personally or through an intermediary have entered into a contract of betrothal in accordance with Muslim law and shall subsequently refuse without lawful reason to marry the other party to such contract, such other party being willing to perform the same, the party in default shall be liable to pay to the other party the sum which it is agreed in the contract by which the marriage was arranged is to be paid by the party in breach of the contract, and, if a male, to pay as damages the amount of the *mas-kahwin*[40] which would have been payable together with other moneys expended in good faith in preparation for the marriage, or, if a female, to return the betrothal gifts, if any, or the value thereof and to pay as damages the amount of such other moneys as aforesaid. The damages can be recovered by action in the Court of a *Kathi Besar* or a *Kathi*.[41] Similar provisions are to be found in the Administration of Muslim Law Enactments, 1959, of Malacca and of Penang, in the Administration of Muslim Law Enactment, 1960, of Negri Sembilan and in the Administration of Muslim Law Enactment, 1962, of Kedah.[42]

In Kelantan it is provided that if any person should either personally or through an intermediary have entered into a contract of betrothal in accordance with the Muslim Law and shall subsequently refuse without lawful reason to marry the other party to such contract, such other party being willing to perform the same, the party in default shall be liable, if a male, to pay as damages the amount of the *mas-kahwin* which would have been payable together with other moneys expended in good faith in preparation for the marriage, and, if a female, to return the betrothal gifts, if any, or the value thereof, and to pay as damages the amount of such other moneys expended in good faith in preparation for the marriage and the same may be recovered in

40. The obligatory marriage payment due under the Muslim Law to the wife at the time the marriage is solemnised.
41. Selangor Administration of Muslim Law Enactment, 1952, (No. 3 of 1952), s. 124.
42. Malacca Administration of Muslim Law Enactment, 1959, (No. 1 of 1959), s. 118; Penang Administration of Muslim Law Enactment, 1959, (No. 3 of 1959), s. 119; Negri Sembilan Administration of Muslim Law Enactment, 1960, (No. 15 of 1960), s. 119; Kedah Administration of Muslim Law Enactment, 1962, (No. 9 of 1962), s. 119. In Melaka, Negri Sembilan and Kedah, the male party has to pay as damages, in addition to the *mas-kahwin*, the amount of the *hantaran*.

the Court of the *Chief Kathi* or a *Kathi*.[43] Similar provisions are to be found in the Administration of Islamic Law Enactment, 1955 of Trengganu and the Administration of the Law of the Religion of Islam Enactment, 1956 of Pahang.[44]

There are no special provisions in Perak and in Johore dealing with breaches of contracts of betrothal.

In Perlis it is provided that where a party to a contract of betrothal breaks such a contract, such party shall be liable to the other party for the sum agreed to in the contract together with, in the case where the party so liable is a male, the amount of the *mas-kahwin* payable under the contract and such other sum as may have been expended by the other party in good faith in preparation for effecting the terms of the contract; and in the case where the party so liable is a female, the return of betrothal gifts or the value thereof, and such other sum expended by the other party in good faith in preparation for effecting the terms of the contract.[45]

No express provision is made in Singapore for the award of damages for breach of the contract of betrothal but the Singapore Muslims Ordinance, 1957, gives the Shariah Court power to hear and determine disputes between Muslims in relation to betrothal.[46] In *Mong* v. *Daing Mokkah*[47] it was held that a Muslim woman has a right to bring an action in the ordinary Civil Courts against a Muslim man for breach of promise of marriage.

In the case where no express provision is made for breach of the contract of betrothal, the consequences of the breach would be expressly provided for by the parties. In Singapore for example it is usual to stipulate that if the breach is on the man's side, he will lose the expenses or payments paid by him while if the breach is on the girl's side a payment of double the expenses or presents paid by the man, will be made to the man.

In Negri Sembilan the *'ādat* lays down a set procedure for

43. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, (No. 1 of 1953), s. 137.
44. Trengganu Administration of Islamic Law Enactment, 1955, (No. 4 of 1955), s. 95; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, (No. 5 of 1956), s. 117. In Pahang the female party has to pay as damages the amount which was agreed in the contract by which the marriage was arranged to be paid by her on breach of the contract.
45. Perlis Administration of Muslim Law Enactment, 1963, s. 88.
46. Muslims Ordinance, 1957, (No. 25 of 1957), s. 21 (2) (c).
47. (1935) 4 *M.L.J.* 147.

engagement. First there is the *menghulur chinchin* or 'sending the ring' ceremony. This is done by depositing a ring with the parent of the prospective bride. This signifies a request for the bride's hand on the part of an interested groom. A feast is held, to which the bride's relatives are invited, the ring is shown and at the same time opinion and approval are sought. If the relatives do not approve the marriage, the ring is returned to the suitor. If the proposal is accepted another ceremony is held to which the relatives of both parties are invited. Here the *chinchin tanya* or 'seeker ring' is circulated to be viewed and examined by the relatives present, symbolising the discussion of the merits and demerits of the bridegroom. If the union is approved then another ring is placed beside the first. The appearance of a double ring signifies that the match is agreed upon and the pact is sealed under the customary understanding expressed as:—

Chinchin sa-bentok menanya ibu bapa-nya,
Chinchin dua bentok oso sekata,
Oso sekata janji di-ikat,
Elah si laki-laki lonchor tanda,
Elah si-perempuan ganda tanda,
Chachat chida berkembalian,
Sawan gila luar janji.

This may be translated —

One ring to sound the parents
Two rings mutual agreement
Approval entails the customary covenants
Repudiation by the man he forfeits the token
Breach by the bride she repays two-fold
Blemish of either the pact is annulled
Insanity and lunacy are outside the pact.[48]

SOLEMNISATION OF MARRIAGE

Marriage in its essentials is a civil contract in Muslim law although it also is of religious significance, being an act commended by the Prophet. The essentials of marriage according to the *Shāfi'ī* School of law are —

(a) words of proposal (*ijāb*) and acceptance (*qabūl*) must be

48. Haji Mohammed Din bin Ali, "Two Forces in Malay Society", p. 25.

uttered by the contracting parties or their agents in each other's presence and hearing, such words expressing the consent on both sides in explicit terms and showing an intention to establish the conjugal relations from the moment of acceptance and not at some future time;

(b) the consent of the woman to be married must be given through her *walī* or guardian for marriage;

(c) the words of proposal and acceptance must be said in the presence and hearing of two male witnesses who must be sane and adult Muslims.

The *Sunnah* (or recommended practice based on the example of the Prophet) has introduced the practice of stipulating in the marriage contract a fixed dower (*mahr* or *mas-kahwin*) though this stipulation is not essential; if no fixed dower is stipulated, the woman is entitled to a proportional dower, i.e. in due proportion to the dowers stipulated or obtained by other women of the same condition as herself.

The marriage feast (*Walīmah*) is also an institution of the *Sunnah*. It is permissible to have music at the marriage feast but there should be no unlawful amusements such as gambling nor may liquor be served. Marriage may be instituted without ceremony but there are usually ceremonies of a social, customary or religious nature. Although not essential to the validity of the marriage, many such ceremonies are designed to give publicity.

The marriage feast is elaborate under the *'ādat* in Negri Sembilan. For a spinster, especially if hers is the first marriage in the family, the slaughter of buffaloes or cattle is considered the usual practice. To this marriage ceremony both the *Lembaga* and the headman of the two tribes are invited, their presence being regarded as the tribe's tacit approval of the union.[49]

It is possible to include conditions in the contract of marriage, and if such conditions are legal they can be enforced. Where a condition attached to a contract of marriage is incompatible with the fundamental object of marriage as, for example, a stipulation that would deprive the husband of his right of cohabitation with his wife, the marriage, according to the *Shāfi'ī* School of law, is null and void. Conditions which are inconsistent

49. *Ibid.*

with the precepts of the law relating to marriage are illicit, but they leave the marriage intact so long as they are not incompatible with the fundamental object of marriage. In India it has been held in the case of *Badaranissa Bibi* v. *Mafittallah*[50] that a wife can stipulate directly for the power to divorce herself if the husband takes another wife but Nawawī in the *Minhāj aṭ-Ṭālibīn* classifies this condition as an illicit condition.[51] In Malaya the *Kathis* encourage the insertion of a *ta'alīk* or condition in the marriage contract to provide for example that if the husband fails to maintain the wife for more than three months, and the wife proves this failure to a *Kathi,* she will be entitled to a divorce.

In Kelantan and Trengganu it is provided that the Registrar of Muslim Marriages and Divorces shall in registering a marriage, prepare a *surat ta'alīk* in the prescribed form, obtain the signature of the parties thereto, sign the same and deliver one copy each to the parties to the marriage.[52]

Under the *Shāfi'ī* School of law no woman, whether a virgin or not, can give herself in marriage without the intervention of a guardian; though it is considered an abuse of power on the part of a guardian to refuse to give an adult woman to a husband of her choice, if he is in all respects suitable. The father or, failing him, the paternal grandfather can give in marriage not only female minors but adult women who are virgins, with or without their consent; but their consent is nevertheless considered desirable. This right is however subject to a number of conditions to ensure that the marriage is for her benefit and that the father or grandfather has not acted wickedly or carelessly in the matter.[53] Only a father or paternal grandfather can give a minor girl in marriage. An adult woman who is not a virgin cannot be given in marriage without her express consent, even by her father or paternal grandfather. The persons who have

50. (1871) 7 *B.L.R.* 442. The ground is that such a contract is lawful and not opposed to the policy of the law.
51. Nawawī *op, cit.,* p. 308. Such a condition is valid and enforceable in the *Ḥanbalī* School of Law and this view has been adopted in a number of 'Arab countries.
52. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 144 (5); Trengganu Administration of Islamic Law Enactment, 1955, s. 102 (5).
53. Nawawī *op. cit.,* p. 284; *Syed Abdullah Al-Shatiri* v. *Sharifa Salmah* (1959) 25 *M.L.J.* 137 at p. 140 – 141.

the right to act as guardians for a woman at her marriage are first of all the father, then the paternal grandfather, then the paternal great-grandfather, then the whole brother or half-brother on the father's side, then the latter's son or another agnate descendant, the father's whole brother or half-brother on the father's side, and lastly the other agnates in the order in which they are called to the succession. In default of the agnates, the right of guardianship devolves on the Ruler of the State or on the *Kathi* authorised by him.[54] Where there is no Muslim Ruler in a State, then the authorities should appoint *Kathis* whose orders will be executed as a matter of necessity. The parties will then appoint the *Kathi* to act as *walī* and he will be known as *Walī Taḥkīm.* Where a woman is given in marriage by a guardian other than the father or paternal grandfather, she must consent to the marriage. Where a person has been wrongly contracted in marriage without the consent of the proper *walī*, the marriage cannot be validated by the subsequent consent of that *walī*.[55]

It is preferable that the man to whom a woman is to be married should be of the same status (*kufū*) as herself. In order to determine whether the suitor is a good match the following must be taken into consideration:—

(a) *Absence of defects of the body,* which would give a right to apply for annulment of the marriage.

(b) *Birth.* An 'Arab woman makes a misalliance by marrying a man belonging to another nation; a woman of the Quraysh does so if her husband is not of the Quraysh; a woman who is a descendant of Hāshim or of 'Abd al-Muṭṭalib, that is one who is of the same blood as the Prophet, can make a suitable match only in the same family. In Malaya a woman of a royal or noble family would make a misalliance in marrying a commoner.

(c) *Character.* A man of notorious misconduct is not a suitable match for an honest woman.

(d) *Profession.* A man exercising a humble profession is not a suitable match for the daughter of a man in a more distinguished profession.

54. Nawawī *op. cit.*, p. 285; J. E. Kempe and R. O. Winstedt, "A Malay Legal Miscellany", p. 11 – 12.
55. T. M. Hasbi Ash-Shiddieqy, *Hukum Islām*, p. 304.

Difference of fortune constitutes no cause of misalliance. The inequality under one of the aspects abovementioned is not compensated for by the husband being superior to his wife in other respects.[56]

A guardian can never give a woman in marriage to a man who is not *kufū* i.e. of inferior condition except with her consent. According to most *Shāfi'ī* authorities such a marriage is void, even if it is the father who gives the woman in marriage to her inferior without her consent. Where there are several guardians of equal competence, a misalliance requires the consent of all such guardians as well as that of the woman herself. Neither the *Sulṭān* as ultimate guardian, nor the *Kathi* for him, can legally give a woman in marriage to a man of inferior condition, even though she may desire it.[57]

If from absence at such a distance[58] that communication would be tedious or difficult, or from other cause the proper guardian or guardians for marriage are unable to act, it is lawful for the Ruler of the State, or a *Kathi* authorised by him, to give her in marriage. Where a guardian unreasonably refuses his consent to a marriage, power is given to the *Kathi* on behalf of the Ruler to act as guardian to give the woman in marriage to the man of her choice. In Singapore it has been held in *Salmah* v. *Soolong*[59], and *Noordin* v. *Shaik Noordin*[60], following Indian cases on the subject, that a Muslim woman belonging to the *Shāfi'ī* School, can validly change her school of law to that of the *Ḥanafī* School, in order to avail herself of the privilege given under the *Ḥanafī* School for an adult woman to give herself in marriage without the consent of a guardian. The point has

56. Nawawī, *op. cit.*, p. 288; Farhat J. Ziadeh, "Equality in the Muslim Law of Marriage", p. 510.

57. *Ibid.*, p. 288 – 289. In *Re Husseinah Banoo* (Shariah Court Case No. 2 of 1963) the Shariah Court, Singapore, annulled the marriage of a girl on the application of her father, who belonged to the *Ḥanafī* School of Law on the ground that the man whom she married was not equal in status to her. See *Salmah* v. *Soolong* (1878) 1 *Kyshe* 421 and a note in 1963 *Malaya Law Review*, Singapore, p. 392 and p. 196 post.

58. The distance is the *masāfat al-qaṣr*, a journey long enough to justify the shortening of prayers. The equivalent distance is usually given as 77 kilometres or 48 miles.

59. (1878) 1 *Kyshe* 421.

60. (1908) 10 *S.S.L.R.* 72.

not arisen for decision in the Malay States as no *Ḥanafī Kathis* have been appointed in those States.

There is no minimum age of marriage under Muslim law, but in the States of Malaya and Singapore the Penal Code makes it rape for a husband to have sexual intercourse with his wife if she is under the age of thirteen years.[61] A minor of either sex can enter into a valid contract of marriage through a guardian. Under the *Shāfi'ī* law only a father or paternal grandfather can give away a minor girl in marriage. Under the *Ḥanafī* law although a guardian can give away a minor girl in marriage, she has the option of repudiating the marriage on attaining puberty. "Majority" for the purpose of marriage is attained on puberty, but in default of evidence as to puberty, a minor of either sex is to be considered adult on the attainment of his or her fifteenth year.[62]

Because of the requirement of the *Shāfi'ī* School of law that a Muslim woman can only give her consent to marriage through her *walī*, the statute law relating to Muslim marriages in Malaya is mainly concerned with the limitation of the right to solemnise marriages.

In Selangor under the Administration of Muslim Law Enactment, 1952, marriages may only be solemnised by persons authorised by the Ruler but the *walī* is allowed to solemnise a marriage in the presence and with the permission of an *Imām*.[63] A Registrar of Muslim Marriages and Divorces is allowed to solemnise a marriage at the request of the *walī* of the woman to be wedded but before solemnising the marriage he is required to make full enquiry in order to satisfy himself that there is no lawful obstacle according to Muslim Law and Malay custom to the marriage. If there is no *walī* or if a *walī* shall, without adequate reason to be approved by the Registrar of Marriages and Divorces, refuse his consent to the marriage, the marriage may be solemnised by the Registrar of Marriages and Divorces for the *kariah* (or prescribed mosque area) in which the woman to be wedded ordinarily resides, but before solemnising such marriage the Registrar shall make enquiry in order to satisfy

61. S. 375.
62. Syed 'Āmir 'Alī, *Mahommedan Law*, p. 235. In Singapore by an administrative direction issued by the Registrar of Marriages, *Kathis* are forbidden from solemnising or registering a marriage where the girl is under fifteen years of age without the consent of the Registrar.
63. The official appointed to lead congregational prayers in a *masjid*.

himself that there is no lawful obstacle according to Muslim law and Malay custom to the marriage and, in cases where the *walī* refuses to give his consent to the marriage, shall also obtain the approval of the Ruler. Marriages are required to be solemnised in the *Kariah Masjid* (or prescribed Mosque area) in which the bride ordinarily resides, but the Registrar having jurisdiction in such *Kariah* may give permission for such marriage to be solemnised elsewhere. Every marriage is required to be registered.[64] The bride is not required to sign the entry in the register of marriages. Both parties to the marriage are however required to fill and sign a prescribed form in which they are required to express their willingness to marry.

In Kelantan under the Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, and in Trengganu under the Administration of Islâmic Law Enactment, 1955, a marriage may be solemnised only by a person holding a *taulīah* from the Ruler authorizing him to solemnise marriages, but in Kelantan any other person permitted under Muslim law to solemnise such marriage may do so in the presence and with the permission of a Registrar of Muslim Marriages and Divorces and in Trengganu a *walī* of the woman who is permitted by the Muslim Law to solemnise such marriage may do so with the prior knowledge of the Registrar. It is however provided that if a marriage is solemnised in breach of the statutory provisions but in accordance with the provisions of Muslim law, it shall be valid and shall be registered, although the person solemnising it will be liable to punishment. It is expressly provided that a marriage shall be void and shall not be registered unless all the conditions necessary for the validity thereof in accordance with the tenets of the school of law to which each of the parties to the marriage belongs (or in Trengganu in accordance with the tenets of the four schools)[65], are satisfied. The Enactments also provide that a marriage shall be void unless both parties to the marriage have consented thereto and either the *walī* of the bride has consented thereto in accordance with Muslim

64. Selangor Administration of Muslim Law Enactment, 1952 (No. 3 of 1952) s. 121 and 123. Administrative directions relating to marriage and divorce issued by the Religious Department, Selangor in 1962.

65. As it is clearly impractical for the conditions of all the four schools of law to be followed, it appears to be sufficient if the conditions laid down by one of these Schools are complied with.

law or the *Kathi* having jurisdiction in the place where the bride resides or any person generally or specially authorized thereto by him, has after due enquiry in the presence of all parties concerned, granted his consent thereto as *walī rāja*[66] (*Walī Ḥakīm*) in accordance with Muslim law. The consent as *walī rāja* may be given whenever there is no *walī* available to act or when the *walī* has refused his consent without sufficient reason. Every marriage is required to be solemnised in a *Mukim Masjid* where one or both of the parties to the marriage ordinarily resides, but the *Kathi* or a Registrar having jurisdiction in such *mukim* may give permission for such marriages to be solemnized elsewhere. Every marriage is required to be registered.[67]

In Pahang under the Administration of the Law of the Religion of Islam Enactment, 1956, a marriage may only be solemnised by a person holding a letter of appointment from the Ruler authorizing him to solemnise marriages according to the Muslim law, but any other person permitted by the Muslim law to solemnise such a marriage may do so, provided that notice of the intended solemnisation is given to a Registrar of Muslim Marriages previous thereto. It is expressly provided that a marriage shall be void and shall not be registered unless all conditions necessary for the validity thereof in accordance with the Muslim law, are satisfied. A marriage, unless it is a marriage by *walī mujbir*,[68] shall be void and shall not be registered unless both parties have consented thereto and either the *walī* of the woman to be married has consented thereto or the *Kathi* having jurisdiction in the place where the woman to be married resides or any person generally or specially authorized thereto by him has, after due enquiry in the presence of all parties concerned, granted his consent thereto as *walī rāja* in accordance with the Muslim law. The consent as *walī rāja* may be given whenever there is no *walī* available to act or where the *walī* has refused his consent without sufficient reasons. Every marriage is required to be solemnised in the

66. In some other States the term used is *walī ḥākim*.
67. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953 (No. 1 of 1953), s. 138 – 140 and 142; Trengganu Administration of Islamic Law Enactment, 1955 (No. 4 of 1955), s. 96 – 98 and 100.
68. The guardian for marriage who can under *Shāfi'ī* law give a virgin girl in marriage without her consent, that is the father or the paternal grandfather.

mukim masjid in which one of the parties to the marriage ordinarily resides but the Registrar having jurisdiction in such *mukim* may on special grounds give permission for any such marriage to be solemnised elsewhere. Every marriage is required to be registered.[69]

In Negri Sembilan under the Administration of Muslim Law Enactment, 1960, a marriage may only be solemnised by a Registrar of Muslim Marriages of the place in which such marriage takes place but it is lawful for a *walī* or a person duly appointed by him to solemnise the marriage with the permission of the Registrar of the *kariah* where the marriage takes place. A Registrar may solemnise a marriage at the request of the *walī* of the women to be wedded but before solemnising such marriage he shall make full enquiry in order to satisfy himself that there is no lawful obstacle according to Muslim law to the marriage. If there is no *walī* of the woman to be wedded or a *walī* shall without adequate reason to be approved by the Registrar refuse his consent to the marriage, the marriage may be solemnized by the Registrar for the *kariah masjid* (mosque district) in which the woman to be wedded ordinarily resides but before solemnizing such marriage the Registrar shall make enquiry to satisfy himself that there is no lawful obstacle according to the Muslim law to the marriage. Every marriage is required to be solemnised in the *kariah masjid* in which the bride ordinarily resides but the Registrar having jurisdiction in such *kariah* may give permission for any such marriage to be solemnised elsewhere. Every marriage is required to be registered.[70]

In Melaka under the Administration of Muslim Law Enactment, 1959, marriages may only be solemnised by a Registrar of the place in which such marriages take place but when there is a *walī* present it shall be lawful for such *walī* to solemnise the marriage in the presence and with the permission of the Registrar of the *kariah masjid* in which such marriage takes place. A Registrar may solemnise a marriage at the request of the *walī*

69. Pahang Administration of the Law of the Religion of Islam Enactment, 1956 (No. 5 of 1956), s. 118 – 120 and 122.

70. Negri Sembilan Administration of Muslim Law Enactment, 1960, (No. 15 of 1960), s. 116 and 118; Negri Sembilan Marriage, Divorce and Reconciliation (*Rujo*) Rules, 1963 (N.S.L.N. No. 3 of 1963).

of the woman to be wedded but before solemnizing such marriage he shall make a full enquiry in order to satisfy himself that there is no lawful obstacle according to Muslim law to the marriage. If there is no *walī* of the woman to be wedded or a *walī* shall without adequate reason to be approved by the Registrar refuse his consent to the marriage, the marriage may be solemnised by the Registrar for the *kariah* in which the woman to be wedded ordinarily resides but before solemnising such marriage the Registrar shall make enquiry to satisfy himself that there is no lawful obstacle according to Muslim law to the marriage and in cases where the Registrar is not himself a *Kathi* obtain the approval of the *Kathi* or *Kathi Besar*. Every marriage is required to be solemnised in the *kariah masjid* in which the bride ordinarily resides but the Registrar having jurisdiction in such *kariah* may give permission for any such marriage to be solemnised elsewhere. Every marriage is required to be registered.[71] Similar provisions have been enacted for Penang in the Administration of Muslim Law Enactment, 1959, of Penang and for Kedah in the Administration of Muslim Law Enactment, 1962, of Kedah.[72]

There are no express provisions in Perak relating to the solemnisation of marriage, but among the particulars required to be given on the registration of a marriage are the names of the *walī* or *wakīl* (guardian for marriage) of the wife and the names of the husband's and the wife's *penghulu*.[73]

In Johore it is provided that a marriage between persons, both of whom profess the Muslim religion, shall be celebrated by a *Kathi* or *Naib Kathi* appointed under the Muslim Marriage Enactment. A marriage celebrated in contravention of the provision shall not for that reason alone be deemed invalid, but any person other than a *Kathi* or *Naib Kathi* celebrating such a marriage is liable to punishment.[74]

In Perlis it is provided that the Ruler may appoint persons

71. Malacca Administration of Muslim Law Enactment, 1959 (No. 1 of 1959), s. 115 and 117.
72. Penang Administration of Muslim Law Enactment, 1959 (No. 3 of 1959), s. 116 and 118; Kedah Administration of Muslim Law Enactment, 1962 (No. 9 of 1962), s. 116 and 118.
73. Perak Muhammadan Marriage and Divorce Registration Enactment (Cap. 197, F.M.S. 1935) s. 3.
74. Johore Muhammadan Marriage and Divorce Registration Enactment (E. No. 17), s. 16.

to solemnise marriages within and for the localities specified in the letters so appointing them. Subject to the provisions of the Enactment, no other person shall solemnise any marriage in accordance with the Muslim Law. Before a marriage can be solemnised by such person, an application in the prescribed form has to be filled up, signed and delivered to him by the person to be wedded at least ten days before the marriage is to be solemnised, unless for some good cause the marriage has to be immediately solemnised; and the person is required to make full enquiry to satisfy himself that the marriage would be legal under Muslim Law and that the *walī* of the woman to be wedded has consented to the marriage. A *walī* may in the presence and with the permission of the Registrar of Muslim Marriages, or in his absence the Deputy Registrar of Muslim Marriages, solemnise a marriage. The Registrar shall not, except in exceptional cases, withhold his permission for the solemnisation of a marriage by a *walī*. Where a woman to be wedded has no *walī* or where the *walī* of such woman unreasonably withholds his consent to the marriage, the consent may be obtained from the *walī rāja*. Every marriage is required to be solemnised in the *kariah masjid* in which the woman to be married ordinarily resides but the Registrar having jurisdiction in such *kariah masjid* may give permission in writing for any such marriage to be solemnised elsewhere.[75]

In Singapore under the Muslims Ordinance, 1957, a *Kathi* is allowed to solemnise a marriage at the request of the woman to be wedded if he is satisfied after enquiry that there is no lawful obstacle according to the Muslim law to the marriage. Where there is no *walī* of the woman to be wedded, or where a *walī* shall, on grounds which the *Chief Kathi* does not consider satisfactory, refuse his consent to the marriage, the marriage may be solemnised by the *Chief Kathi* if he is satisfied after enquiry that there is no lawful obstacle according to the law of Islām to the marriage. It is expressly provided that these statutory provisions shall not apply where the woman to be wedded belongs to a school of law under which she can be married wi hout the consent of her *walī*. The registration of marriages is compulsory, and failure to register a marriage is made an offence under the Ordinance, but the Ordinance provides that

75. Perlis Administration of Muslim Law Enactment, 1963, s. 82 – 85 and 87.

a marriage shall not be invalid by reason only of non-registration.[76] In *Syed Abdullah Al-Shatiri* v. *Shariffa Salmah*[77] it was decided by the Appeal Board that where a virgin girl is given in marriage by her father her consent is not essential to the validity of the marriage and therefore the marriage is valid even without such consent. Such a marriage cannot however be registered in Singapore.

The permission given under Muslim law to a man to marry more than one wife up to a maximum of four is recognised in Malaya, and there are no statutory restrictions, except in Singapore, Selangor and Negri Sembilan, on the right of a Muslim man to have more than one wife. In Singapore it is provided that where the man to be married already has a wife or wives living the marriage may only be solemnized by the *Chief Kathi* or with the written consent of the *Chief Kathi* by the *walī* of the woman to be married or by a *Kathi* at the request of such *walī*. The *Chief Kathi* is required to hold an enquiry to satisfy himself that there is no lawful obstacle to the marriage according to the Muslim law and the parties are required to give at least fourteen days' notice of the intended marriage to enable such an enquiry to be held.[78] In Selangor and in Negri Sembilan the man must declare in the prescribed form to be filled in before the marriage whether he is already married or not. If he is already married, further enquiries will be made.[79]

Under the *'ādat*, the rule is monogamy. Wilkinson states that in Rembau a Malay could not marry a second wife without obtaining the special sanction of the Ruler while in the other States of Negri Sembilan, the first wife's consent was expected before a second wife was taken. The monogamous rule has been relaxed a little under Muslim influence, but polygamy is still exceptional; the man who takes a second wife is usually in serious difficulties

76. Muslims Ordinance, 1957 (No. 25 of 1957), s. 7 and 19.
77. (1959) 25 *M.L.J.* 137.
78. Muslims Ordinance, 1957 (as amended by the Muslims (Amendment) Ordinance, 1960), s. 7A; Muslim Marriage and Divorce Rules, 1959, rule 8C.
79. Selangor Administrative Rules issued by the Religious Department in 1962; Negri Sembilan Marriage, Divorce and Reconciliation (*Rujo*) Rules, 1963 (N.S.L.N. No. 3 of 1963).

with his first wife's family and no matter how reluctant he may be to partition the property he is generally forced to divorce her.

It has been held in *Public Prosecutor* v. *White*[80], that a man who has married by monogamous form cannot after conversion to Islām marry a second wife during the subsistence of the first marriage, and if he does so, he will be guilty of bigamy. The trend of the cases in India as shown, for example, in *John Jiban Chandra Dutta* v. *Abinash Chandra Sen*[81], is to hold that where for example a Christian embraces Islām he acquires all the rights which a Muslim possesses and can contract a valid marriage even though the first marriage with the Christian wife subsists and he will not be guilty of bigamy thereby. It is doubtful therefore whether the decision in *P.P.* v. *White* will be followed.

'IDDA AND THE MARRIAGE OF WIDOWS

Under Muslim law it is not lawful for a woman to have two or more husbands at the same time[82], and further in the interests of certainty of paternity a woman is bound to observe a minimum period of retirement, called the *'idda,* between the termination by death or divorce, of one matrimonial connexion and the commencement of another. The legal period of retirement after divorce of a woman who menstruates and has regular periods of purity, is three periods of purity; but it is understood that a woman divorced in one of her periods of purity concludes her retirement at the beginning of the third menstruation, while one divorced during one of her menstruations becomes free only upon the commencement of the fourth, including that during which she is divorced. Where a woman is not subject to menstruation, the duration of *'idda* after divorce is three months. The period of *'idda* when a marriage is terminated by death is four months and ten days. If however a woman is pregnant, the period of *'idda* continues until delivery and terminates in the case of a divorced woman, upon delivery. Where the marriage is not consummated before divorce, there is no *'idda,* but if the hus-

80. (1940) 9 *M.L.J.* 214.
81. (1939 *I.L.R.* 2 Cal. 12. See *Attorney-General of Ceylon* v. *Reid* (1965) 2 *W.L.R.* 671.
82. A Muslim married woman may be convicted of bigamy — *Reg.* v. *Rabia* (1889) 4 *Kyshe* 513.

band dies before consummation the *'idda* of widowhood is imposed as a mark of respect for the deceased husband.[83]

Special provisions are made for the marriage of *janda* in some of the enactments relating to Muslim marriage and divorce in Malaya. *Janda* is defined as a female who is neither an *anak dara* nor a married woman; and *anak dara* is defined as a female who has never been married or had sexual intercourse.[84] In Selangor, Kelantan, Trengganu, Pahang, Melaka, Penang, Negri Sembilan and Kedah it is provided that where the woman to be wedded is a *janda,* she shall not be married to any person other than the husband from whom she was last divorced, at any time prior to the period of *'idda.* A *janda* shall not be married unless she produces a satisfactory certificate to show that her husband is dead or that she has been divorced or that she is a *janda.* The period of *'idda* is to be calculated according to Muslim law but it is provided in that where a woman is divorced before the marriage was consummated, she shall not be married to any person other than the previous husband during the period of *'idda* which would otherwise have been applicable, except with the permission of the *Kathi* having jurisdiction in the place where she resides. Where a woman has been divorced by three *ṭalāk*, she shall not be remarried to her previous husband unless prior to such marriage she shall have been lawfully married to some other person and such marriage shall have been consummated and later lawfully dissolved. There is no special provision for the punishment of persons who cohabit after an irrevocable divorce of three *ṭalāk* without the woman having first been married to a third party, but such persons would be guilty of the general offence of illicit intercourse.[85]

83. Nawawi *op. cit.,* p. 365f. It would appear that according to Malay custom the period of *'idda* on divorce is three months and ten days, See J. E. Kempe and R. O. Winstedt, "A Malay Legal Miscellany" p. 14.

84. See for example Selangor Administration of Muslim Law Enactment, 1952, s. 2.

85. Selangor Administration of Muslim Law Enactment, 1952, s. 122 and 158; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 141 and 178; Trengganu Administration of Islamic Law Enactment, 1955, s. 99 (There is no provision for the punishment of illicit intercourse in Trengganu); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 121 and 156 (the Pahang Enactment has the expression "divorced three

There are no special provisions in Perak and Johore relating to the marriage of widows. In Perak it is provided that where the marriage of two Muslims has been irrevocably dissolved by the pronouncement of three *ṭalāk* by the man against the woman, it shall be unlawful for such persons to cohabit as man and wife unless the woman shall first have been lawfully married to some person other than the divorced husband and such marriage shall have been dissolved. Any person contravening such provision is liable to punishment before the Court of a Magistrate.[86]

In Johore it is provided that where the marriage of two Muslims has been irrevocably dissolved by the pronouncement of three *ṭalāk* by the man against the woman, it shall be unlawful for such persons to cohabit as man and wife unless the woman shall first have been lawfully married to some person other than her divorced husband and such marriage shall have been dissolved and the period of *'idda* elapsed. A contravention of the provision is made punishable before the Court of a Magistrate.[87]

In Perlis it is provided that a *janda* shall not be married to any person prior to the expiration of the period of *'idda*, and she shall not be married unless there is issued by the court having jurisdiction in the place where she resides a certificate that she is a *janda*. Where a woman has been divorced with three *ṭalāk* and she is to be married to the person from whom she was so divorced, she must have been lawfully married to some other person and such marriage must have been lawfully consummated and later lawfully dissolved; such a marriage may however be annulled by the *Kathi* if he is satisfied that there has been any collusion between the person from whom she was divorced with three *ṭalāk* and the said other person to whom she was married after such *ṭalāk*.[88]

In Singapore it is provided that where the woman to be

times (*ṭalāk tiga*)" instead of "divorced by three *ṭalāk*"); Penang Administration of Muslim Law Enactment, 1959, s. 117 and 150; Malacca Administration of Muslim Law Enactment, 1959, s. 116 and 149; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 117 and 150 (the Negri Sembilan Enactment punishes the offence of fornication); Kedah Administration of Muslim Law Enactment, 1962, s. 117 and 150 (Kedah, like Negri Sembilan, punishes the offence of fornication).

86. Perak Muhammadan (Offences) Enactment, 1939 (No. 5 of 1939), s. 11.
87. Johore Offences by Muhammadans Enactment (E.No. 47), s. 5.
88. Perlis Administration of Muslim Law Enactment 1963, s. 86.

wedded is a *janda* she shall not be married to any person other than the husband from whom she was last divorced at any time prior to the expiration of the period of *'idda*. If the divorce was by three *ṭalāk* she shall not be remarried to her previous husband unless prior to such marriage she shall have been lawfully married to some other person and such marriage has been consummated and later dissolved. A *janda* is defined in the Singapore Muslims Ordinance, 1957, as a female who has been married and whose marriage has been terminated by divorce or by the death of her husband. There is no provision in Singapore for the punishment of persons who cohabit after an irrevocable divorce of three *ṭalāk* without the woman having first been married to a third party.[89]

MAS-KAHWIN (MAHR) AND PEMBERIAN

Mas-kahwin or *mahr* means the obligatory marriage payment due under Muslim law to the wife at the time the marriage is solemnised, whether paid in cash or in kind or payable as a debt with or without security. It can be either prompt (*tunai*) or deferred (*hutang*). *Pemberian* means the optional marriage settlement made by the husband to the wife at the time of the marriage in cash or in kind.[90]

The *mas-kahwin* was under the *'ādat* one of the series of conventional presents payable to the woman's relatives but it has now been identified with the Muslim *mahr* and is made payable to the wife. The old theory of a customary payment shows itself in the fact that in many districts the amount of the dowry is conventional and does not depend on the wealth of the contracting parties. In Negri Sembilan the customary *mas-kahwin* is $20/–. A groom may be asked to pay varying amounts by the bride's parents, depending upon the status, education and sometimes the eligibility of the bride. But whatever sum is named, the legal and customary *mas-kahwin* must, of strict neces-

89. Singapore Muslims Ordinance, 1957, s. 8.

90. See Selangor Administration of Muslim Law Enactment, 1952 (No. 3 of 1952), s. 2. In Kelantan and Trengganu *pemberian* is defined as a gift in cash or in kind made by the husband to the wife on account of the marriage while in Kedah it is defined as the marriage gifts in cash or in kind made by the husband to the wife at the time of the marriage. In Negri Sembilan, Penang and Melaka *pemberian* means the marriage gift, other than cash, made by the husband to the wife at the time of the marriage.

sity be $20/–. The rest is regarded as being for the personal and ceremonial expenses incumbent for the occasion. Such expenses are called *belanja hangus* and are quite apart from the *mas-kahwin*.[91]

In Pahang the husband has to pay *belanja*, that is the optional expense agreed by both parties at the time of the betrothal.[92] In Negri Sembilan, Melaka and Kedah, *pemberian* is defined to mean the marriage gift other than cash made by the husband to the wife at the time of the marriage. In addition the husband has to pay *hantaran*, that is, the obligatory cash payment due to be paid under local custom by the bridegroom to the bride at the time the marriage is solemnised.[93]

The *mas-kahwin* was originally the money paid under the *'ādat* to the bride's parents though it has now been equated to the *mahr* and is now paid (or more usually promised and left as an outstanding debt) to the bride herself. By a survival of the *'ādat* however the amount by Malay custom especially among chiefs depends on the rank of the father.

In Selangor, Kelantan, Trengganu, Pahang, Melaka, Penang, Negri Sembilan and Kedah it is provided that the *mas-kahwin* shall ordinarily be paid by the husband or his representative in the presence of the person solemnising the marriage and at least two other witnesses. In Selangor, Kelantan, Trengganu, Perlis, Pahang, Melaka and Penang, the Registrar of Marriages and Divorces is required to ascertain and record in respect of every marriage to be registered —

(a) the amount of the *mas-kahwin*

(b) the amount of any *pemberian*

(c) the amount of any part of the *mas-kahwin* or *pemberian* or both which was promised but not paid at the time of the solemnization of the marriage, and

91. J. R. Wilkinson, "Malay Law", p. 53 – 54; E. N. Taylor, "Inheritance in Negri Sembilan", p. 47; Haji Mohamed Din bin Ali, "Two Forces in Malay Society", p. 24.

92. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 2.

93. Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 2 and 120; Malacca Administration of Muslim Law Enactment, 1959, s. 2 and 119; Kedah Administration of Muslim Law Enactment, 1962, s. 120. There is no definition of *hantaran* in the Kedah Enactment.

(d) particulars of any security given to the payment of any *mas-kahwin* or *pemberian*.[94]

In Pahang in addition to the particulars as to the *mas-kahwin* the Registrar has to record the particulars of the *belanja*;[95] and in Melaka, Negri Sembilan and Kedah the Registrar has to record the particulars as to the *hantaran* and *pemberian* in addition to those relating to the *mas-kahwin*.[96]

In the other States of Malaya and in Singapore provision is made for the registration of the particulars of the *mas-kahwin* and gifts given by the husband.[97]

There is no fixed legal minimum for the *mas-kahwin*. It should however possess some value, and it is recommended that it should be not less than ten or more than five hundred dirhams.[98] Where no amount is stipulated for *mas-kahwin* in the marriage contract, the law gives the wife a right to proper *mas-kahwin* proportionate to her situation and position in life. In Singapore the normal amount of *mas-kahwin* is Malaysian $22.50.

In *Janat* v. *Sheikh Khuda Buksh*[99] the order of a *Kathi* for the payment of *mas-kahwin* to a divorced wife was confirmed on appeal. It was held that the husband must pay the *mas-kahwin* in money; he may substitute articles for money with the consent of the woman but only with her consent. If articles are given they cannot be regarded as part of the *mas-kahwin* in

94. Selangor Administration of Muslim Law Enactment, 1952 (No. 3 of 1952), s. 125; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953 (No. 1 of 1953), s. 143; Trengganu Administration of Islamic Law Enactment, 1955, (No. 4 of 1955), s. 101; Penang Administration of Muslim Law Enactment, 1959 (No. 3 of 1959), s. 120; Perlis Administration of Muslim Law Enactment, 1963, s. 87 (4).

95. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, (No. 5 of 1956), s. 123.

96. Malacca Administration of Muslim Law Enactment, 1959 (No. 1 of 1959), s. 119; Negri Sembilan Administration of Muslim Law Enactment, 1960 (No. 15 of 1960), s. 120; Kedah Administration of Muslim Law Enactment, 1962 (No. 9 of 1962), s. 120.

97. See Perak Muhammadan Marriage and Divorce Registration Enactment (Cap. 197 of 1935 Edition of the Laws of the Federated Malay States); and Singapore Muslim Marriage and Divorce Rules, 1959, Schedule.

98. The *dirham* is an 'Arab coin. See Wilson's *Anglo-Muhammadan Law*, p. 116 – 117 and p. 420.

99. (1911) 2 *F.M.S.L.R.* 61.

the absence of proof of such consent and the burden is on the husband to bring the proof.

PROHIBITED MARRIAGES

Under Muslim law a man is prohibited on the ground of consanguinity from intermarrying with any ascendant, any descendant, any daughter of his father or mother, any daughter of any other ascendant, and lastly any daughter or grand-daughter, how low soever, of a brother or sister. A man is also prohibited on the ground of affinity from intermarrying with the wife of his father or father's father, how high soever; his own wife's mother or grandmother, how high soever; his own wife's daughter or grand-daughter, how low soever; and lastly the wife of his son or son's or daughter's son how low soever.

A man is prohibited from marrying any woman connected with him through some act of suckling where if it had been instead an act of procreation, she would have been within the prohibited degree of consanguinity or affinity.[100] A man is also forbidden to have two wives at the same time so related to each other by consanguinity, affinity or fosterage that if either had been a male they would have been prohibited from inter-marrying; but there is no objection to marrying two such women successively, so that for instance a man may marry his deceased or divorced wife's sister.[101]

A man cannot remarry a wife whom he has divorced by three *ṭalāq*[102] until the woman has been married to another man

100. According to *The Ninety-Nine Laws of Perak* the Law, when foster-children married, was that according to the law of this world they might do so, but their respective mothers must meet and forgive them, that they may obtain pardon. A man may even marry a woman who has been suckled by his own wife, but alms must be distributed in the *masjid* — *The Ninety-Nine Laws of Perak*, edited and translated by J. Rigby, p. 49.

101. A. A. Fyzee, *Outlines of Muhammadan Law*, p. 87 — 89. Malay custom also bars marriages between cognates, as for example between maternal cousins — See Haji Mohamed Din bin Ali, "Two Forces in Malay Society", p. 23.

102. The practice adopted by the Shariah Court in Singapore is that where a divorce by three *ṭalāk* has been pronounced by a man all at once and in the same place, then the Court will declare that there has been only one *ṭalāk*. It is only when the three *ṭalāk* have been pronounced three times on three different occasions that the Court will declare that there has been a divorce by three *ṭalāk*.

and divorced by him after consummation.

A Muslim woman cannot under Muslim law contract a valid marriage with a man who does not profess Islām, but a marriage between a Muslim man and a *kitābiyyah,* as for example a Jewess or a Christian, believing in scriptures the soundness of which is acknowledged by Muslims, is valid. The provisions for the solemnisation and registration of Muslim marriages in Malaya only apply to persons professing the Muslim religion and no provision appears to be made for the solemnisation and registration under Muslim law of marriages between a Muslim and non-Muslim woman. In the States of Malaya no marriage one of the parties to which professes the religion of Islām can be solemnised or registered under the Civil Marriage Ordinance, 1952. There is however no such express restriction in the Christian Marriage Ordinanee, 1956. In Singapore no marriage one of the parties to which professes the Muslim religion can be solemnised or registered under the Women's Charter, 1961.[103]

In the case of *In re Maria Hertogh*[104] in Singapore it was held that the rule that a marriage must be valid by the law of the respective domiciles of the parties applies to Muslim marriages, so that a Muslim marriage between a Muslim man and a Muslim girl domiciled in Holland may be invalid if the marriage is invalid by the law of the domicile of the girl.

According to Muslim Law in order that a marriage may bear the character of a suitable union in law, the husband must be the equal of the woman in social status. There is no corresponding provision that the wife should be of equal status with the husband, for by the marriage she is regarded as having been raised to his social position. The *Ḥanafī* School holds that suitability or equality (*kafā'a*) between the two parties is a necessary condition in marriage and an ill-assorted or runaway marriage is under certain circumstances liable to be set aside by the Court. The factors that are to be considered for determining equality are family, religion, profession, freedom, good character and means. Where a woman who has attained majority contracts

103. Federation Civil Marriage Ordinance, 1952 (No. 44 of 1952), s. 3 (2); Federation Christian Marriage Ordinance, 1956, (No. 33 of 1956); Singapore Woman's Charter, 1961, s. 3; *Martin* v. *Umi Kelsom* (1963) 29 *M.L.J.* 1. See note in 1965 *M.L.J.* xvi.

104. (1951) 17 *M.L.J.* 164.

herself with a man who is not her equal without the consent of any of the male relations who would be entitled to be her guardians for marriage if she were a minor, the Court on the application of such relations has the power to rescind the marriage. According to the *Shāfi'ī* School of Law a guardian cannot give a woman in marriage to a man of inferior condition except with her consent. According to most *Shāfi'ī* authorities such a marriage is void, even if it be the father who gives the woman in marriage to her inferior without her consent. Where there are several guardians of equal competence, a misalliance requires the consent of all such guardians as well as the woman herself. And further neither the *Sulṭān* nor the Judge or *Kathí* can legally give a woman in marriage to a man of inferior status, even though she may desire it. The factors to be taken into consideration in determining whether the husband is of equal status are birth, character, profession and absence of defects of the body. In the case of *Salmah* v. *Soolong*, where the daughter of an 'Arab father had married a Muslim Tamil, the Court held that as according to the authorities a Muslim girl belonging to the *Ḥanafī* School who had attained puberty is legally emancipated from all guardianship and can select a husband without reference to the wishes of the guardian, it would be wrong for the Court to interfere with her choice on the ground of inequality, as this would in effect mean that she cannot select a husband without reference to the wishes of the guardian. In contradiction to this however, the Shariah Court in Singapore has annulled a marriage on the application of a father who belonged to the *Ḥanafī* School of Law on the ground of inequality of the husband.[105]

In Negri Sembilan it is an offence under the Malay *'ādat* or custom to take two when one is given. Marriage or liaison during a wife's lifetime with another woman of her tribe was punishable with death. The exogamous rule is very strict; remarriage within the

105. A. A. Fyzee, *op. cit.*, p. 91 – 93; Nawawī, *op. cit.*, p. 288 – 289. See *Salmah* v. *Soolong* (1878) 1 *Ky.* 421 and 1963 *Malaya Law Review*, p. 392. According to the *Ninety-Nine Laws of Perak*, it was not permissible for a woman of the Hāshimite to wed an ordinary person, but if such person paid five *tahils* of gold in consideration of his low status, then the marriage could take place, but gold must be distributed in alms – See *Ninety-Nine Laws of Perak*, p. 23.

deceased wife's tribe is forbidden, except that marriage with a deceased wife's sister is allowed, as it makes for the welfare of the children of the wife's tribe. The marriage of the children of sisters is prohibited, but the children of a brother and sister can intermarry, as they belong to two different maternal tribes. The marriage of the children of brothers is also forbidden.[106] *Perpateh* custom in Negri Sembilan forbids the marriage not only of the descendants of common ancestors but even of brothers' children.

ṬALĀK (ṬALĀQ)

According to a saying of the Prophet Muḥammad divorce is the most detestable of all permitted things; but it is nevertheless permitted. The most common form of divorce is *ṭalāq* which is repudiation by or on behalf of the husband. Any Muslim of sound mind who has attained puberty may divorce his wife by *ṭalāq*. On doing so he becomes immediately liable for payment of all the *mas-kahwin* (dowry) not already paid. A repudiation is valid even where pronounced unintentionally if the husband has used explicit (*sureeh*) terms like the different forms of the word *ṭalāq*; but if he uses implicit or vague (*kināyah*) terms, he must really intend to repudiate his wife, before the repudiation takes effect.[107]

According to the *Ḥanafī* School of law there are three forms of *ṭalāq*, that is, (a) the *aḥsan* (best) form by the pronouncement of one *ṭalāq* in a period of purity where no sexual intercourse has taken place, followed by abstinence from sexual intercourse for the period of *'idda;* (b) the *ḥasan* (good) form by the pronouncement of the *ṭalāq* three times in successive intervals of purity that is between successive menstruations; and (c) the *bid'a* (innovated) form by the pronouncement of the *ṭalāq* three times at shorter intervals or even in immediate succession or by the pronouncement of three *ṭalāq* at once. In the first case the marriage relation is dissolved after the *'idda* but the parties may be reunited by a fresh marriage contract. In the second and third cases not only is the existing marriage dissolved, but a new marriage cannot be contracted between the parties, until

106. R. J. Wilkinson, "Malay Law", p. 30; R. Winstedt, "The Malays", p. 59.
107. Nawawī, *op. cit.*, p. 327f.

the woman has lawfully remarried another man and has been divorced after consummation of the marriage.[108]

The *Shāfi'ī* School of Law does not regard the pronouncement of the *ṭalāq* three times at shorter intervals or in immediate succession or the pronouncement of three *ṭalāqs* at once as *bid'a*. It distinguishes *ṭalāq* into two kinds (a) *ṭalāq raj'ī* or revocable divorce and (b) *ṭalāq bā'in* or irrevocable divorce. *Ṭalāq raj'ī* occurs when the divorce is by one or two *ṭalāq*. *Ṭalāk bā'in* is of two kinds (a) the divorce by three *ṭalāq* which puts an end to the marriage without the possibility of intermarrying, save after the woman has been lawfully remarried to another person and has been divorced after consummation and (b) a divorce where some compensation is paid by the wife or renunciation made by her, which cannot be revoked, but where it is lawful for the parties to remarry again.

A repudiation by *ṭalāq* pronounced when the wife is in a period of purity but after there has been sexual intercourse in that period and a repudiation by *ṭalāq* pronounced when the wife is in a state of impurity because of menstruation is regarded as *bid'a* or sinful but according to the four orthodox schools, the repudiation is nevertheless valid, although it is recommended that the repudiation be revoked and pronounced again (if so desired) when the wife returns to a state of purity. According to the *Shāfi'ī* School, a repudiation pronounced when the wife is pregnant is valid.[109]

Although the form of repudiation by pronouncement of the three *ṭalāq* at short intervals or in close succession or together is recognised by the four schools of law it is recommended that a person should pronounce the *ṭalāq* only once, so that he can have the opportunity of revoking the divorce. Some jurists in the 'Arab countries and in Indonesia are of the opinion that it is unlawful to pronounce the *ṭalāq* three times at short intervals or in close succession and they hold that where a person pronounces the three *ṭalāq* together, this should only have effect as one *ṭalāq*. They would also hold that repudiation pronounced while the wife is in a state of impurity is unlawful. Recent legis-

108. The *ṭalāq bid'a* though disapproved is lawful under *Ḥanafī* and *Shāfi'ī* Law — See F. B. Tyabji's *Muhammadan Law*, p. 218f, and *Sheikh Fazlur Rahman* v. *Mt. Aisha*, (1929) 8 *I.L.R.* (Patna), p. 690.

109. Nawawī, *op. cit.*, p. 336f.

lation in some 'Arab countries and Pakistan have decreed that where the three *ṭalāq* are pronounced at once this will only take effect as the pronouncement of one *ṭalāq*, but in Malaya the view of the orthodox school is still followed.[110]

Among the *Sunnīs* (as distinct from the *Shī'a*) it would appear that the presence of witnesses is not necessary to constitute a valid divorce, that no particular formula of words is required, that the *ṭalāq* need not be pronounced in the presence of the wife, and that it is doubtful whether the *ṭalāq* need be communicated to the wife. (*Syed Mohamed Yassin* v. *Syed Abdul Rahman*).[111] The statutory requirements as to registration of divorce do however provide for witnesses to the divorce and for a certificate of divorce to be sent to the wife.

In *Syed Mohamed Yassin* v. *Syed Abdul Rahman* (*supra*) the view was accepted that an irrevocable divorce can be effected by pronouncing three *ṭalāk* at short intervals or in immediate succession or by intimating the intention to dissolve the marriage once only by words showing a clear intention that the divorce should be immediately irrevocable. The better view among the *Shāfi'īs* is however that an irrevocable divorce can only be effected by the pronouncement of three *ṭalāq* or a divorce with compensation.

A repudiation extorted by violence has no legal effect unless it appears that the husband already had the intention of repudiating his wife. The divorce of one acting upon compulsion is not effective because a person who is compelled has no option, and no formal act of law is worthy of consideration unless it be purely optional.[112]

When a person has temporarily lost his reason through liquor or medicine, he is none the less regarded as capable of pronouncing repudiation or disposing of his property in general;

110. See J. N. D. Anderson, *Islamic Law in the Modern World*, p. 56 and N. J. Coulson, "Islamic Family Law: Progress in Pakistan", in J. N. D. Anderson (Editor), *Changing Law in Developing Countries*, p. 251. The practice adopted by the Shariah Court in Singapore is that where a divorce by three *ṭalāk* has been pronounced by a man all at once and in the same place, then the Court will declare that there has been one *ṭalāk*. It is only where the three *ṭalāk* have been pronounced three times on three different occasions that the Court will declare that there has been a divorce by three *ṭalāk*.

111. (1921) 15 *S.S.L.R.* 199.

112. Nawawī, *op. cit.*, p. 330.

and according to the *Shāfi'ī* School he is none the less responsible for his words and actions. Only one of the *Shāfi'ī* jurists denies all consequence to the words or actions of a drunken man; while several admit his responsibility, but maintain that he can never derive any advantage from such a condition. The *Hidāyah* says that there is an opinion recorded from Shāfi'ī to the effect that divorce ought not to take place when a person pronounces it in a state of insobriety from drinking any fermented liquor, on the ground that reality of intention is connected with the exercise of reason which is suspended during intoxication. Among the *Shāfi'ī* jurists who held that a divorce pronounced in a state of voluntary intoxication is invalid, was Muzanī.[113]

A husband who repudiates his wife once or twice, but takes her back during her period of *'idda* or marries her again after its expiry, and even after an intervening marriage with another husband, must, if he repudiates her again take count of the former repudiations when determining whether this last one is or is not revocable. If on the other hand, the new marriage has been effected after the woman has been previously repudiated thrice, she may again be three times repudiated before the new marriage is irrevocably dissolved.

Where a repudiation is revocable, it can be revoked by express declaration (*rojok*) before the expiry of the period of *'idda*. A return to conjugal union cannot under the *Shāfi'ī* School of law be effected tacitly, as for example by sexual intercourse, but the person must declare that he takes his wife back.[114]

On divorce by *ṭalāq* if the marriage has been consummated the whole of the unpaid *mas-kahwin*, whether prompt or deferred, becomes immediately payable by the husband to the wife, and is enforceable like any other debt. If the marriage had not been consummated and the amount of the dower was specified in the

113. *Ibid.*, p. 330f; *The Hedaya*, translated by Charles Hamilton, p. 76; Ibrahim Abdel Hamid, "Dissolution of Marriage in Islamic Law," p. 8.

114. Nawawī, *op. cit.*, p. 345f. According to the *Ninety-Nine Laws of Perak* the law applicable to the case of a woman who was divorced and whose husband wanted her back within three months and ten days was that if she was unwilling she might be forced to return to her husband; but the husband must give her settlements in cash. If he was forcibly rejected, the woman must pay him the amount of the marriage settlement — See *The Ninety-Nine Laws of Perak, op. cit.*, p. 48.

contract, the man is liable to pay half the amount of the dower; if none was specified, he must give the divorced wife a present (*mut'ah*). The wife has no right to payment of the *mas-kahwin* if the divorce took place by her wish or in consequence of any disqualification, as for example, apostacy on her side.

In Selangor the husband is required to make a report within seven days of a divorce to the Registrar of Marriages and Divorces for the locality in which such divorce has taken place. The Registrar on registration shall issue certificates of divorce, one for the husband and one for the wife. If however the divorce is capable of revocation no certificate of divorce shall be issued to the wife until the expiration of the period during which the divorce may lawfully be revoked.[115]

It is provided by the directions of the Religious Department that no divorce may take place except before a *kathi* and until the parties have filled in the prescribed form. No divorce or pronouncement of *ṭalāk* will be effective unless the wife agrees to the divorce and the *kathi* has approved it. It is provided that before approving a divorce the *kathi* shall endeavour to effect a reconciliation between the parties.[116]

The husband is also required to make a report within seven days of the revocation of a divorce (*rojok*) to the Registrar who has registered the divorce. In making the report the husband is required to produce the certificate of divorce issued to him. The Registrar will make enquiry to satisfy himself that the divorce has been lawfully revoked and in every case in which the revocation takes place after the expiration of one month from the date of the divorce such enquiry will be made from both husband and wife. If the Registrar is satisfied that the divorce has been lawfully revoked, he shall make a note of such revocation in the register of divorces and also in the certificate of divorce. In the event of the annulment of a divorce the Registrar shall make a note thereof in the register of divorces and shall destroy the certificate of divorce. It is provided that any person who, having lawfully divorced his wife, resumes cohabitation with her with-

115. Selangor Administration of Muslim Law Enactment, 1952, s. 126.
116. Selangor Rules relating to marriage, divorce and revocation of divorce, 1962.

out having pronounced a lawful *rojok,* shall be guilty of an offence.[117]

In Kelantan it is expressly provided that a husband may divorce his wife in accordance with Muslim law with one, two or three *ṭalāk*. In Trengganu it is provided that a husband may divorce his wife in accordance with Muslim law. In both Kelantan and Trengganu the husband is required to make a report within seven days of the divorce to the Registrar of Muslim Marriage and Divorce of the *Mukim* or district in which the divorce takes place and the Registrar shall, after such enquiry as may be necessary to satisfy him that the requirements of Muslim law have been complied with, register the divorce. Upon registering the divorce the Registrar shall issue certificates to both parties to the divorce but in Trengganu it is provided that if the divorce is revocable no certificate of divorce shall be issued to the woman until after the expiration of the period of *'idda*. If after a revocable divorce, that is a divorce by one or two *ṭalāk* not followed by such a lapse of time as to render it irrevocable, recohabitation takes place by mutual consent the parties shall within seven days report the fact of such recohabitation to the Registrar of the *Mukim* in which they reside. The Registrar shall make such enquiry as may be necessary and, if satisfied that recohabitation has taken place in accordance with Muslim Law, shall register such recohabitation by endorsement upon the counterfoil of the certificate of divorce, if such divorce was registered by him. The Registrar shall require the parties to deliver to him the relevant certificates of divorce and shall issue to them certificates of recohabitation in the prescribed form. If the divorce was not registered by the Registrar, he shall record on the certificates of divorce, the number and particulars of the certificate of recohabitation and shall forward the certificates of divorce to the Registrar by whom they were issued and such other Registrar shall thereupon register the recohabitation by endorsement upon the counterfoil of the certificate of divorce. If a revocable divorce has taken place without the knowledge of the wife, the husband shall not require or request the wife to recohabit with him without disclosing to her the fact of such

117. Selangor Administration of Muslim Law Enactment, 1952, s. 127 and 158.

divorce. If after a revocable divorce the husband has pronounced a *rojok* or revocation of divorce (a) if the wife has consented to the *rojok* she may on the application of the husband be ordered by a *Kathi* to resume conjugal relations, unless she shall show good cause in accordance with Muslim Law to the contrary in which case the *Kathi* shall appoint *ḥakam* or arbitrators (b) if the wife has not consented to the *rojok,* (in Trengganu, it is added, for reasons allowed by Muslim law), she shall not be ordered by the *Kathi* to resume conjugal relations, but on her application the *Kathi* may require her husband to divorce her and on his refusal shall appoint *ḥakam.* It is provided that any man, who having lawfully divorced his wife, resumes cohabitation with her without having pronounced *rojok* shall be guilty of an offence.[118]

In Pahang it is provided that a husband may divorce his wife in accordance with the Muslim law with one, two or three *ṭalāk.* Within fifteen days after any divorce the husband shall report the fact of such divorce and all necessary particulars concerning the same to the Registrar of the locality in which the divorce takes place and the Registrar shall forthwith register the divorce. Upon registering the divorce the Registrar shall issue certificates to both parties to the divorce. If after a revocable divorce recohabitation takes place, the parties or the husband and the representative of the wife from her family shall within fifteen days report the fact of such recohabitation and all relevant particulars to the Registrar of the locality in which they reside. The Registrar shall make such enquiry as may be necessary and, if satisfied that recohabitation has taken place in accordance with the Muslim law, shall register such recohabitation by endorsement upon the counterfoil of the certificate of divorce, if such divorce was registered by him, and shall require the parties to deliver to him the relevant certificates of divorce and shall issue to them certificates of recohabitation in the prescribed form. If the divorce was not registered by the Registrar he shall record on the certificates of divorce the number and particulars of the certificates of recohabitation and shall forward the certificates of divorce to the Registrar by whom the same were issued and

118. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 145, 151 and 178; Trengganu Administration of Islamic Law Enactment, 1955, s. 103, 109 and 136.

such other Registrar shall thereupon register the recohabitation by endorsement on the counterfoil of the certificate of divorce. If a revocable divorce has taken place without the knowledge of the wife, the husband shall not require or request the wife to recohabit with him without disclosing to her the fact of such divorce. If after a revocable divorce the husband has pronounced a *rojok*, whether the wife has consented to the *rojok* or not, she may on the application of her husband be ordered by the *Kathi* to resume conjugal relations, unless she can show good cause in accordance with the Muslim law to the contrary but the *Kathi* shall impose such conditions in accordance with the Muslim law as he thinks appropriate. It is provided that any man who, having lawfully divorced his wife, resumes cohabitation with her without having pronounced *rojok* shall be guilty of an offence.[119]

In Negri Sembilan, Melaka, Penang and Kedah the husband is required within seven days of a divorce to report such divorce to the Registrar of the locality in which such divorce has taken place. The Registrar shall enter the particulars and nature of the divorce in the register and issue certificates of divorce, one for the husband and one for the wife. If however the divorce is capable of revocation, no certificate of divorce shall be issued to the wife until the expiration of the period during which the divorce may lawfully be revoked. In Negri Sembilan, Melaka, Penang and Kedah it is provided that any man who having lawfully divorced his wife resumes cohabitation with her without having pronounced *rojok* shall be guilty of an offence. Within seven days of the revocation of a divorce the husband shall report such revocation to the Registrar who has registered the divorce and shall at the same time produce to the Registrar the certificate of divorce issued to him. The Registrar shall make enquiry in order to satisfy himself that the divorce has been lawfully revoked. In every case in which revocation takes place after the expiration of one month from the date of the divorce enquiry shall be made from both the husband and the wife. If the Registrar is satisfied that the divorce has been lawfully revoked he shall make a note of such revocation in the register of divorces

119. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 125, 126 and 156.

and also on the certificate of divorce. In the event of the annulment of a divorce the Registrar shall make a note thereof in the register of divorces and shall destroy the certificate of divorce.[120] Administrative rules have been issued in Negri Sembilan to require a person who applies for divorce, to do so in the prescribed form to the *Kathi's* court of the *kariah masjid* (mosque district) and also to require an application for *rojok* to be made in the prescribed form which is to be signed by the husband and the wife. It is provided that a report of divorce shall be made by the party desiring the divorce in the prescribed form and delivered to the court of a *Kathi* of the district who shall cause it to be recorded. On receipt of a divorce report the *Kathi's* court concerned shall call both parties on a fixed date to appear in court for investigation and hearing. If on completion of the hearing, a divorce results, a certificate of divorce may be issued by the Registrar. It is also provided that where a revocation by an ex-husband is made within his ex-wife's period of *'idda* it shall be made in the prescribed form, which contains the declaration of revocation by the ex-husband and the acceptance of the revocation by the ex-wife.[121]

In Negri Sembilan under the customary law, divorce has its own rules and rituals. Just as marriage entails the co-relationship of a host of relatives, if not of tribes themselves, so too divorce presents considerable embarrassment to the family and the tribes. Custom ordains that before a divorce takes place there should be due deliberation on the reasons for the intended dissolution. Custom demands that a husband who contemplates divorce from his wife must go through an arbitration called *bersuarang* or settlement. A small feast is held by the husband to which he invites his wife's and his own relatives. There the husband states his

120. Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 121, 122 and 152; Malacca Administration of Muslim Law Enactment, 1959, s. 120, 121 and 149; Penang Administration of Muslim Law Enactment, 1959, s. 121, 122 and 150; Kedah Administration of Muslim Law Enactment, 1960, s. 121, 122 and 150. In the case of *Amun and Somah* the facts were that Amun had been provoked by his wife's family into divorcing Somah who was very young. When he sought to return to her, her mother locked Somah up and refused to allow Amun to have access to her. It was held that the *Kathi* cannot register a *rojok* as this had obviously not taken place — E. N. Taylor, "Customary Law of Rembau", p. 69.

121. Negri Sembilan Marriage, Divorce and Reconciliation (*Rujo*) Rules, 1963 (N.S.L.N. 3 of 1963).

grievances so that they may be considered by the parties present. Often the presence of the elders has a beneficial effect in resolving what may prove to have been a petty disagreement. But should good counsel not prevail, and the husband insist on divorce, separation is allowed after a settlement of the conjugal property.[122]

In Perak the husband or wife is required within seven days of divorce to report such divorce to the *Kathi* or *Naib-al-Kathi* of the District in which such divorce takes place. On registration, certificates of divorce shall be issued to the parties. In the event of a divorce being annulled or the reunion of the parties [*rojok*], the certificates of divorce shall be returned within seven days of such annulment or reunion, as the case may be, to the *Kathi* or *Naib-al-Kathi* who issued them and the *Kathi* or *Naib-al-Kathi* shall in every case of reunion of the parties endorse a note of such reunion on the certificates and thereafter return them to the parties.[123]

In Johore in the case of every divorce or revocation of divorce the husband is required within seven days of the divorce or revocation of divorce to attend at the office of the *Kathi* or *Naib Kathi* of the District or place in which the divorce or revocation of divorce takes place or to which the parties belong or at the office of the *Kathi* or *Naib Kathi* of the nationality or sect to which the parties belong to furnish particulars for the registration of such divorce or revocation of divorce.[124]

In Perlis it is provided that on an application made by a husband for permission to divorce his wife, the *Kathi* shall for the purpose of effecting a peaceful reconciliation make such enquiries with respect to the applicant and his wife as the *Kathi* thinks fit and the *Kathi* shall not grant any permission for divorce unless he is convinced that no reconciliation is practicable. If any misunderstanding arises from the decision, the *Kathi* may order both parties to appoint arbitrators. It is provided that where it appears that no reconciliation between the parties is possible, the party applying for a divorce shall fill up the prescribed form.

122. Haji Mohamed Din bin Ali, "Two Forces in Malay Society," p. 26.
123. Perak Muhammadan Marriage and Divorce Registration Enactment (Cap. 197 of the 1935 Edition of the Laws of the Federated Malay States) s. 4 and 5.
124. Johore Muhammadan Marriage and Divorce Registration Enactment (E. No. 17), s. 7.

The rights of each party shall be agreed to in the presence of the Registrar. The husband shall deposit a sum of not less than one month's maintenance for the wife with the *Kathi* unless under the divorce the husband is not required to pay any maintenance to the wife. Each party to a divorce shall return to the other the property to which he or she is entitled. It is provided that if the husband shall fail to deposit the sum for maintenance or to return the property of the wife he shall be guilty of an offence and liable to imprisonment for a term not exceeding three months or to a fine not exceeding two hundred dollars. All divorces are required to be registered. Within seven days of the revocation of a divorce the husband and wife shall report such revocation to the Registrar who has registered the divorce and at the same time produce to him the certificate of divorce. The Registrar shall make enquiry in order to satisfy himself that the divorce has been lawfully revoked and in every case in which revocation takes place after the expiry of one month from the date of the divorce the enquiry shall be made from both the husband and the wife. If the Registrar is satisfied that the divorce has been lawfully revoked he shall make a note of such revocation in the register of divorces and on the certificate of divorce.[125]

In Singapore a fundamental change in procedure has been made by the Muslims Ordinance, 1957. A *Kathi* is only allowed to register a divorce by *ṭalāk* where he is satisfied that both the husband and wife have consented to the divorce. Where such a divorce is registered by a *Kathi*, the entry in the register shall be signed by the *Kathi*, by the husband and wife, and by the witnesses. A *ṭalāk* divorce, other than by the mutual consent of the parties, can only be effected by proceedings before the Shariah Court. Where there is a revocation of a divorce the husband and wife are required to report the revocation to a *Kathi* within seven days of the revocation and to furnish such particulars as are required for the registration of the revocation of divorce. The *Kathi* may only register a revocation of divorce where he is satisfied that both the husband and wife have consented thereto. Where a wife does not consent to the revocation of the divorce the matter has to be referred to the Shariah Court.[126]

125. Perlis Administration of Muslim Law Enactment, 1963, s. 90, 90A, 92 and 93.
126. Singapore Muslims Ordinance, 1957, s. 12 and 21.

CHERAI TA'ALĪK (DIVORCE BY THE BREAKING OF A CONDITION)

Where there has been a *ta'alīk* (condition) in the marriage contract and the condition has been broken, the wife may make a complaint and if her complaint is substantiated she will be entitled to a *cherai ta'alīk*, in accordance with the terms of the *ta'alīk*. This form of divorce is really a conditional divorce by the husband. Any lawful condition may be included in the *ta'alīk*. In Malaya the most frequent form of *ta'alīk* is the condition which gives the wife the right to ask for the divorce if the husband has not maintained her for a period of three months. Another usual stipulation is that the wife will be entitled to a divorce if the husband absents himself for six months on land or a year at sea without sending any letter or money to the wife.

The official form of the *ta'alīk* in Indonesia deals in addition with desertion of the wife for a continuous period exceeding six months, physical cruelty to the wife and neglect of the wife for a period exceeding six months. It appears also that it is possible to include conditions to provide for cases where the husband is sent to prison for a long period or where he leaves the country or where he takes another wife without the permission of the existing wife. In Indonesia the practice is to include in the form of *ta'alīk* a provision that the wife in making complaint of breach of *ta'alīk* should pay a sum of money as compensation for the divorce. This has the effect of making the *ṭalāk* a *ṭalāk bā'in* which cannot be revoked by the husband.[127]

The prescribed form of *surat ta'alīk* in Trengganu provides, as an example of a *ta'alīk*, the following:—

> On every occasion that I am estranged from my said wife for a continuous period of four months, whether I leave her or she leaves me by will or by force and upon application by her to the *Kadzi* or *Naib Kadzi* and upon satisfied by him (*sic.*) of such estrangement my marriage to my said wife shall be dissolved by one *ṭalāk*.[128]

The form of *ta'alīk* prescribed in Selangor[129] is as follows:—

> Everytime that I fail to provide maintenance to my wife for a period of four months or more, she can make a complaint to the *Kathi's*

127. Nashruddin Thaha, *Pedoman Perkahwinan Umat Islām*, p. 107.
128. Trengganu Muslim Religious Affairs (Forms and Fees) Rules, 1956, (Trengganu G. N. No. 526 of 1956), Form N.
129. Selangor Rules relating to marriage, divorce and revocation of divorce, 1962.

Court and if her complaint is proved, then she is divorced by one *ṭalāk*, and everytime I revoke the divorce and my wife refuses to agree to it, she is divorced by one *ṭalāk*.

In Negri Sembilan the prescribed form of *ta'alīk* is as follows:—

Everytime that I leave my wife or I am abroad and it is not known whether I am alive or dead or I am away at a place where I am unable to cohabit with my wife for a period of four months or more and my wife complains to a *Kathi* and her complaint is proved then she is divorced by one *ṭalāk*.[130]

In Selangor, Negri Sembilan and Melaka and (where the woman has been resident for not less than four months in the area for which the *Kathi* is appointed) in Penang and Kedah power is given to a *Kathi* having jurisdiction in that behalf to receive from a married woman an application for *cherai ta'alīk*. Upon receiving the application, the *Kathi* shall serve a notice on the husband. The *Kathi* shall then record the sworn statement of the woman and at least two witnesses, and may then if satisfied that the provisions of the Muslim Law have been complied with make such order or decree as is lawful. The particulars and nature of the divorce shall be entered in the register and certificates of divorce shall be issued to the husband and to the wife, but where the divorce is capable of revocation no certificate of divorce shall be issued to the wife until the expiration of the period during which the divorce may lawfully be revoked.[131]

In Kelantan and Trengganu it is provided that a married woman may if entitled in accordance with Muslim law to a divorce in pursuance of the terms of a *surat ta'alīk* made upon marriage, apply to a *Kathi* to declare that such divorce has taken place. The *Kathi* shall thereupon examine the *surat ta'alīk* and make such enquiry as appears necessary into the validity of the divorce and shall, if satisfied that the divorce is valid in accord-

130. Negri Sembilan Marriage, Divorce and Reconciliation (*Rujo*) Rules, 1963, (N.S.L.N. 3 of 1963)

131. Selangor Administration of Muslim Law Enactment, 1952, s. 128; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 123; Malacca Administration of Muslim Law Enactment, 1959, s. 122; Penang Administration of Muslim Law Enactment, 1959, s. 123; Kedah Administration of Muslim Law Enactment, 1962, s. 123.

ance with Muslim Law confirm and register the divorce and issue certificates of divorce to the parties.[132]

In Pahang it is provided that a married woman may, if entitled under the Muslim law to a divorce in pursuance of the terms of a *surat ta'alīk* made upon marriage, apply to a *Kathi* and such *Kathi* shall examine the *surat ta'alīk* and call the husband by delivering a memorandum to him. On the appointed day the *Kathi* shall enquire into the application to the extent he considers necessary and shall if satisfied declare that divorce has taken place in pursuance of the *surat ta'alīk* and register the divorce and issue a certificate of the same.[133]

There are no statutory provisions as to *cherai ta'alīk* in Perak, Johore or Perlis but in such states the *Kathi* has jurisdiction to register a *cherai ta'alīk* in accordance with Muslim law.

In Singapore under the Muslims Ordinance, 1957, applications for *ta'alīk* may be heard by the Shariah Court and it is provided that the procedure in applications for *fasah* shall apply *mutatis mutandis* to applications for *ta'alīk*.[134]

The form of *ta'alīk* is usually to the effect:

> If I fail to maintain my wife for more than three months or if I assault her and she complains to the Shariah Court and the Court is satisfied of the truth of her complaint, my marriage shall be dissolved by one *ṭalāk*.

KHUL', KHULA, KHOLO' OR CHERAI TEBUS ṬALĀK

A *khul'* divorce is accomplished by means of appropriate words spoken or written by the two parties or their respective agents, the wife offering and the husband accepting compensation out of her property for the release of his marital rights. The divorce is completed by the pronouncement of *ṭalāq*. It is irrevocable and is therefore classed as a *ṭalāq bā'in*. The basis of *khul'* divorce is a tradition of the Prophet which reads as follows:

> Ibn 'Abbās reported that Jamīlah binte 'Abd Allāh wife of Thābit bin Qaīs came to the Holy Prophet and said "O Messenger of Allāh as for bin Qaīs, I do not blame him about his character and piety but I dislike ingratitude in Islām. The messenger of Allāh

132. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 147; Trengganu Administration of Islamic Law Enactment, 1955, s. 105.
133. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 128.
134. Singapore Muslims Ordinance, 1957, s. 32 and 34.

asked if she was prepared to return the garden given to her by Thābit. "Yes" said she. The Prophet said to Thābit bin Qaīs "Accept the garden and give her a single divorce".[135]

According to the *Shāfi'ī* School of law, it is not compulsory for the husband to accept the compensation offered by his wife and to give her the divorce. His consent is therefore necessary and he cannot be forced to give a *khul'* divorce. In the Penang case of *Rokiah* v. *Abu Bakar*[136] it was held on appeal that a divorce by *khula* must be by consent of the parties. In the Singapore case of *Syed Ahmad* v. *Fatimah*[137] the wife agreed to the terms of the *khula* divorce but the husband refused to accept them. The *Chief Kathi* formally called upon the husband to register the divorce and it was held on appeal to the Governor that the direction of the *Chief Kathi* was in accordance with Muslim law and although there was no legal machinery for enforcing it, the husband was bound as a Muslim, to obey it.

Special provisions for an application by a woman for divorce are made in Kelantan and in Trengganu. It is provided that a married woman may apply to a *Kathi* for a divorce in accordance with Muslim law. In any such case the *Kathi* shall summon the husband before him and enquire whether he consents to be divorced. If the husband so consents the *Kathi* shall on payment of the prescribed fees cause the husband to pronounce a

135. Muḥammad 'Alī, *Manual of Ḥadīth*, p. 284. According to *The Ninety-Nine Laws of Perak*, the law where a woman wished to be divorced from her husband was that, if she established a complaint at the court on three occasions, she could have a divorce, but she must redeem herself by returning an amount equivalent to her dowry. But if there was no fault on the part of her husband, she could not have a divorce — See *The Ninety-Nine Laws of Perak, op. cit.*, p. 22 and 34. If a woman sought a divorce on the ground that she was unwilling to consummate the marriage she could have a divorce but she forfeited her dowry and must pay for the divorce a *tahil* and a *paha* of gold — *The Ninety-Nine Laws of Perak*, p. 23. According to Malay custom if a husband guiltless of offence towards his wife under religious and customary law refused her divorce she could leave him in the clothes she wore, returning her dower or otherwise paying for the divorce (*menebus talāk*). If she wanted a divorce because she could not endure her husband's behaviour but not because of any offence towards her under religious law then she could get a divorce in accordance with custom returning half her dower and all property acquired during the marriage went to the man, but each party took his or her own personal property. — J. E. Kempe and R. O. Winstedt, "A Malay Legal Miscellany", p. 6.

136. E. N. Taylor, "Mohamedan Divorce by Khula", p. 10.

137. *Ibid.*, p. 14. See *Umar Bibi* v. *Mohammad Din, A.I.R.* 1945 Lahore 51 and *Balqis Fatima* v. *Qureshi P.L.D.* (1959) W.P. Lahore 566.

divorce, register such divorce and issue certificates thereof to the parties to the marriage. If the husband does not agree to be divorced by consent, but the parties agree to a divorce by redemption or *cherai tebus ṭalāk* the *Kathi* may assess the amount of the payment to be made by the wife in accordance with the status and means of the parties and shall thereupon on payment of the prescribed fees cause the husband to pronounce a divorce by redemption and register the divorce and issue certificates to the parties to the marriage. If the husband does not agree to divorce by redemption the *Kathi* may appoint *ḥakam* (arbitrators).[138]

In Pahang it is provided that a married woman may apply to a *Kathi* for divorce in accordance with the Muslim law. The *Kathi* on receipt of such application shall enquire into the application and if such application has been caused by a disagreement of an extreme nature between the husband and the wife the *Kathi* shall appoint two arbitrators, representing the husband and the wife respectively with sufficient powers given by both parties to enable the arbitrators to effect a peaceful reconciliation of the parties, to the extent of the arbitrator of the husband divorcing the wife and the arbitrator of the wife applying for divorce by redemption (*cherai tebus ṭalāk*). If both arbitrators decide for a divorce, whether by redemption or not, the arbitrator of the husband may divorce the wife and the divorce shall then be registered. If the husband does not agree to a divorce but the parties agree to a divorce by redemption the *Kathi* may assess the amount of payment to be made by the wife in a manner as may from time to time be prescribed by the *Majlis* (Council of Muslim Religion) and shall cause the husband to pronounce the divorce by redemption and register and issue a certificate of the divorce.[139]

In Penang and Kedah, it is provided that any *Kathi* having jurisdiction to do so may receive from a married woman who has been resident for not less than four months in the area for which he is appointed an application for the divorce known as *kholo'*. Upon receiving the application the *Kathi* shall cause

138. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 146; Trengganu Administration of Islamic Law Enactment, 1955, s. 104.

139. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 127.

notice thereof to be served on the husband. The *Kathi* shall record the sworn statement of the woman and of at least two witnesses and may, if satisfied that the provisions of the Muslim law have been complied with, make such order or decree as is lawful. The *Kathi* shall enter the particulars and nature of the divorce in the register and issue certificates of divorce, one for the husband and one for the wife. If, however, the divorce is capable of revocation no certificate of divorce shall be issued to the wife until the expiration of the period during which the divorce may lawfully be revoked.[140]

In Perlis it is provided that whenever any misunderstanding arises from the decision of the court, the *Kathi* shall have power to order both parties to appoint their representatives to find ways of solving the misunderstanding and the representatives shall have power, on behalf of the husband, to receive the compensation and on behalf of the wife, to receive the divorce. If a divorce with compensation is decreed and the wife is possessed of property such property is liable to be attached for the recovery of such compensation. On satisfactory proof being given that the wife is without property and that she still refuses to return to her husband the arbitrators shall have power to decree a divorce without compensation if it appears to them that to compel her to return to her husband will cause her hardship and that a divorce is in the interests of both parties.[141]

There are no statutory provisions for *khula* in Selangor, Perak, Negri Sembilan, Johore or Melaka. In Singapore applications for *khula* can be made to the Shariah Court and it is provided that the procedure shall follow the procedure in the application for *fasah* with necessary modifications.[142]

FASAH (FASKH)

Faskh may be defined as the dissolution or rescission of the contract of marriage by judicial decree. The subject is in fact dealt with by the Muslim law authorities under the heading of *khiyār* or option. According to the *Shāfi'ī* School of law a wife who becomes aware that her husband is suffering

140. Penang Administration of Muslim Law Enactment, 1959, s. 123; Kedah Administration of Muslim Law Enactment, 1959, s. 123.
141. Perlis Administration of Muslim Law Enactment, 1963, s. 90A.
142. Singapore Muslims Ordinance, 1957, s. 33 and 34.

from impotency or insanity, leprosy or elephantiasis has an option of renouncing the marriage and similarly she has the option of renouncing the marriage where the husband is unable to maintain her. A wife may also bring an action to avoid or repudiate a marriage where the husband is not equal in status (*kufū*) to her or where he does not meet the conditions as for example of religion or genealogy stipulated. A similar option is given to the husband where he becomes aware that his wife is insane or suffering from leprosy or elephantiasis or is incapable, because of some physical cause, of sexual intercourse, but as the husband has the right of *ṭalāq*, an application for *faskh* by him is rare.[143]

A wife's right to repudiate her marriage by reason of her husband's defects is not limited to defects existing at the time of the contract, but extends to such as he may have acquired subsequently, with the exception of impotency; a husband who becomes impotent after cohabitation with the wife can no longer be repudiated by her. If a man and woman, knowing the defects in either or both enter into a marriage contract, then he or she has no option to repudiate the marriage. If a party to a marriage fails to repudiate the marriage within a reasonable time after he or she comes to know of the defect in the other party, then the option is lost. The option to void or repudiate a marriage on any of the grounds allowed by law must be confirmed by the order of a court or a *Kathi* and the marriage continues until such confirmation.[144]

Where a husband during his marriage becomes so insolvent that he can no longer give the minimum maintenance prescribed, and the wife can no longer bear such an insolvent husband she can demand the rescission of the marriage since her husband no longer fulfils his obligations. Where a husband is solvent but refuses his wife the prescribed maintenance, no claim for rescission is admissible and it is immaterial whether the husband is in the country or not. A claim for rescission may however be admissible if the husband is in the country but his property is elsewhere at a distance. Although a claim for rescission is not admissible, the Court of a *Kathi* may order the husband to pay the maintenance

143. Nawawī, *op. cit.*, p. 299f; J. E. Kempe and R. O. Winstedt, "A Malay Legal Miscellany", p. 12 – 13.
144. Nawawī, *op. cit.*, p. 299f.

and to send for the necessary money. Where insolvency is proved the court must either pronounce rescission of marriage or authorise the wife to pronounce it herself. Three days respite must however first be allowed. Only one jurist admits that the rescission may be pronounced without allowing any respite to the husband. The later opinion of Shāfi'ī is that no respite need be allowed to the husband.[145]

In Selangor, Negri Sembilan and Melaka and (where the married woman has been resident for not less than four months in the area for which the *Kathi* is appointed) in Penang and Kedah provision is made for an application by a married woman for *fasah* to a *Kathi*. The *Kathi* is required to serve notice of the application on the husband and thereafter to record the sworn statement of the wife and of at least two witnesses. If the *Kathi* is satisfied that the provisions of Muslim law have been complied with, he will make such order or decree as is lawful. He will then register the divorce and issue certificates to the husband and the wife, but if the divorce is capable of revocation, no certificate of divorce shall be issued to the wife until the expiration of the period during which the divorce may lawfully be revoked.[146]

In Kelantan, Trengganu and Pahang provision is made for a married woman to apply by suit in the Court of a *Kathi* for a decree of dissolution of marriage or *fasakh* (*faskh*) in accordance with Muslim law. Notice of the application shall be served on the husband and it is provided that no decree shall be pronounced save in accordance with the provisions of Muslim law and in pursuance of the evidence of the married woman and of at least two witnesses given on affirmation. Upon pronouncing a decree of dissolution of marriage the *Kathi* shall register it as a decree and shall issue a certificate thereof to the wife.[147]

145. *Ibid.*, According to Malay custom, a woman deserted for three years could get a divorce but must arrest the man if she meets him. — J. E. Kempe and R. O. Winstedt, "A Malay Legal Miscellany", p. 7.
146. Selangor Administration of Muslim Law Enactment, 1952, s. 128; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 123; Malacca Administration of Muslim Law Enactment, 1959, s. 122; Penang Administration of Muslim Law Enactment, 1959, s. 123; Kedah Administration of Muslim Law Enactment, 1962, s. 123.
147. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 148; Trengganu Administration of Islamic Law Enactment, 1955, s. 106; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 129.

In Perlis it is provided that a married woman may apply to a *Kathi* for a divorce and the *Kathi* shall thereupon cause notice of such application to be served upon the husband or, if her husband is not in the State or it is impossible to serve the notice on him, upon the nearest relative of the husband. If the husband does not appear at the hearing, service of the notice shall be proved by the woman and by two other witnesses and the *Kathi* if satisfied that the notice has been served shall make such order or decree as is lawful. The *Kathi* shall for the purpose of effecting a peaceful reconciliation make such enquiries with respect to the applicant and her husband as he thinks fit and the *Kathi* shall not grant permission for divorce unless he is convinced that no reconciliation is practicable.[148]

There are no statutory provisions for *faskh* in Perak or Johore.

In Singapore under the Muslims Ordinance, 1957, the application for *fasakh* may be made to the Shariah Court by a married woman who has been resident for at least four months in the State. Notice of the application is served on the husband. The court is required to record the sworn statement of the wife and of at least two witnesses and may then if satisfied that the provisions of the Muslim law have been complied with, make such order or decree as is lawful by Muslim law.[149]

PRESUMPTION OF DEATH

In Selangor, Kelantan, Trengganu, Pahang, Melaka, Penang, Negri Sembilan and Kedah it is provided that if the husband of any married woman has died or is believed to have died or has not been heard of over a prolonged period, in such circumstances that he might, for the purpose of enabling the wife to remarry, be presumed to be dead in accordance with Muslim law, but a death certificate under the Births and Deaths Registration Enactment cannot be obtained, the *Kathi* may on the application of the wife and after such enquiry as may be proper, issue in accordance with Muslim law a certificate of presumption of death of the husband and thereafter the wife shall be at liberty to marry in accordance with the provisions of the law and such certificate shall be deemed to be a certificate of the death of the husband for the purpose of

148. Perlis Administration of Muslim Law Enactment, 1963, s. 91.
149. Singapore Muslims Ordinance, 1957, s. 32.

the marriage of the woman as a *janda*. In the circumstances set out it is provided that the woman shall not be entitled to remarry in the absence of the certificate so issued, notwithstanding that the High Court may have given leave to presume the death of the husband. The certificate so issued shall be registered as if it effected a divorce.[150]

In Perlis it is provided that the *Kathi* may on the application of a woman issue a certificate of presumption of death of her husband if there is reason to believe that the said husband has died or if the said husband has not been heard of for such a period that it is reasonable to suppose that he is no longer alive. A certificate so issued shall be presumed to be a death certificate for the purpose of the marriage of the woman as a *janda*. The certificate shall operate as a certificate of divorce upon the particulars thereof being registered in the register of divorce.[151]

According to the *Mālikī* School of Muslim law, the wife of a missing person (*mafqūd al-khabar*) is entitled to observe the *'idda* of death on the expiration of four years from the date of his disappearance. In other words, his death would be presumed on the lapse of four years and after observing the *'idda* of four months and ten days prescribed in the case of the husband's death, she would be entitled to remarry. The rule of the *Mālikī* School is based upon a decision of the Khalīfa 'Umar and is in accordance with a decision of the Khalīfa 'Alī. In his earlier period Imām Shāfi'ī held the same opinion as Imām Mālik but during his stay in Egypt he adopted the doctrine that even a judicial authorisation after four years' absence and a period of *'idda* are insufficient to render a remarriage unattackable. A wife whose husband is absent and who has heard no news of him, may not according to the *Shāfi'ī* School, contract another union unless certain that he is dead or that he has repudiated her.

150. Selangor Administration of Muslim Law Enactment, 1952, s. 134; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 152; Trengganu Administration of Islamic Law Enactment, 1955, s. 110; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 131; Malacca Administration of Muslim Law Enactment, 1959, s. 126; Penang Administration of Muslim Law Enactment, 1959, s. 129; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 128; Kedah Administration of Muslim Law Enactment, 1962, s. 129. The words "over a prolonged period" are omitted in the Pahang Enactment.

151. Perlis Administration of Muslim Law Enactment, 1963, s. 95.

Where a marriage is effected in contravention of this rule it will be legal if it subsequently appears that the former husband was dead before its celebration.[152] The Evidence Ordinance contains provisions dealing with the presumption of death. Section 107 of the Evidence Ordinance provides that where the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it; while section 108 of the Evidence Ordinance provides that when the question is whether a man is alive or dead and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.[153] In the case of *Mazhar Ali* v. *Budh Singh*[154] it was held that the provisions of the Indian Evidence Act have replaced the rules of Muslim law on this point, such rule being a rule of evidence and not part of the substantive law. It would appear that this decision would probably be followed in Malaya (subject to the express statutory provisions in Selangor, Kelantan, Trengganu, Pahang, Negri Sembilan, Melaka, Penang, Perlis and Kedah for the issue of a certificate of presumption of death in accordance with Muslim law).

APPOINTMENT OF ḤAKAM

The settlement of marital disputes by arbitration is recommended in the Holy *Qur'ān*, which says:

> And if you fear a breach between the husband and wife appoint a *ḥakam* (arbitrator) from his family and a *ḥakam* from her family; if they shall desire a reconciliation God will cause them to agree.[155]

Where arbitrators are appointed but are unable to effect a reconciliation between the parties, the dominant view of the *Ḥanafī* and the *Shāfi'ī* Schools is that the powers of the arbitrators cease and that they may arrange a divorce by *ṭalāq* or by *khul'* only where they have been specifically empowered to do so, as authorised agents, by the husband in the first case and by both spouses in the second. In the dominant view of the *Mālikī* School, on

152. Syed 'Āmir 'Alī, *op.cit.*, p. 94. Nawawī *op.cit.*, p. 371.
153. Singapore Evidence Ordinance (Cap. 4), s. 108 and 109; Federation Evidence Ordinance, 1950, (No. 11 of 1950), s. 107 and 108.
154. (1884) *I.L.R.* 7 All. 297.
155. *Sūrah* IV:35.

the other hand, the arbitrators have the right to decide that nothing but divorce or *khul'* (according to whether the husband or the wife is primarily at fault or the blame must be apportioned between them) will meet the case, and this decision will be upheld and empowered by the Court. There is a minority *Shāfi'ī* opinion which follows the *Mālikī* view. Ash-Sharbīnī states:

> In one view they (the two arbitrators) are two judges (*ḥākimān*) appointed by the Ruler (or by the Judge: i.e. *ḥākim*). This view has been preferred by many on the ground that the *Qur'ān* has named them "arbitrators" (*ḥakamān*), and an agent is not an arbitrator ... So the consent of the two parties is not a condition of their appointment, and they may give what judgment they consider beneficial, whether it be that the marriage should be continued or dissolved.

Ibn Ḥajar said:

> And they are two agents who may act only by consent of the parties. But on another view they are the two judges (*ḥākimān*) appointed by the Ruler.[156]

In Kelantan, and Trengganu, it is provided that where a *Kathi* is satisfied that there are constant quarrels between the parties to a marriage he may appoint in accordance with Muslim law two arbitrators or *ḥakam* to act for the husband and the wife respectively. In making such appointment the *Kathi* shall, where possible, give preference to close relatives of the parties having knowledge of the circumstances of the case. The *Kathi* may give directions to the *ḥakam* as to the conduct of the arbitration and they shall conduct it in accordance with such directions and according to Muslim law. If they are unable to agree or, if the *Kathi* is not satisfied with their conduct of the arbitration, he may remove them and appoint other *ḥakam* in their place. The *ḥakam* shall endeavour to obtain from their respective principals full authority and may if their authority extends so far, decree a divorce and shall in such event report it to the *Kathi* for registration. If the *ḥakam* are of opinion that the parties should be divorced but are unable for any reason to decree a divorce, the *Kathi* shall appoint other *ḥakam* and shall confer on them authority to effect a divorce and shall, if

156. J.N.D. Anderson, *Islamic Law in Africa*, p. 335 quoting from Ash-Sharbīnī's *Al-Mughnī* and Ibn Ḥajar's *al-Tuḥfah*.

they do so, register the divorce and issue certificates to the parties.[157]

In Penang and Kedah it is provided that where the Court of the *Chief Kathi* or a *Kathi* is satisfied that there is serious disagreement between the parties to a marriage it may appoint in accordance with the Muslim Law two arbitrators or *ḥakam* to act for the husband and wife respectively. In making such appointment the Court is required where possible to give preference to close relatives of the parties having knowledge of the circumstances of the case. The Court may give directions to the *ḥakam* as to the conduct of the arbitration and they shall conduct it in accordance with such directions and according to Muslim Law. If they are unable to agree or if the Court is not satisfied with the conduct of their arbitration it may remove them and appoint other *ḥakam* in their place. The *ḥakam* shall endeavour to obtain from their respective principals full authority and may, if their authority extends so far, decree a divorce and shall in such event report the divorce to the Court for registration.[158]

In Pahang there is provision for the appointment of arbitrators where a married woman applies for divorce and the *Kathi* is satisfied that the application has been caused by a disagreement of an extreme nature between the husband and the wife. The arbitrators, one representing the husband and one representing the wife, shall have sufficient powers given by both parties to enable them to effect a peaceful reconciliation of the parties, to the extent of the arbitrators of the husband divorcing the wife and the arbitrator of the wife applying for a divorce by redemption (*cherai tebus ṭalāk*). If both arbitrators decide for a divorce whether by redemption or not the arbitrator of the husband may divorce the wife and the divorce shall then be registered.[159]

In Perlis it is provided that whenever any misunderstanding arises from the decision of the court, the *Kathi* shall have power

157. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 150; Trengganu Administration of Islamic Law Enactment, 1955, s. 108.

158. Penang Administration of Muslim Law Enactment, 1959, s. 126; Kedah Administration of Muslim Law Enactment, 1962, s. 127.

159. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 127.

to order both parties to appoint their representatives to find ways of solving the misunderstanding and the representatives shall have power on behalf of the husband to receive the compensation and on behalf of the wife to receive the divorce. If the two representatives are incompetent and without ability to effect a settlement the *Kathi* shall have power to appoint two arbitrators (*ḥakam*), one to act on behalf of the husband and the other to act on behalf of the wife in order to find ways of solving the misunderstanding. The arbitrator representing the husband shall have power to declare a divorce. If the two arbitrators are unable to solve the misunderstanding between the husband and the wife the *Kathi* shall refer the matter to the *Majlis* for decision and the decision of the *Majlis* shall be final. On satisfactory proof being given that the wife is without property and that she still refuses to return to her husband the arbitrators shall have power to decree a divorce without compensation if it appears to them that to compel her to return to her husband will cause hardship and that a divorce is in the interests of both parties. If a divorce with compensation is decreed and the wife is possessed of property such property is liable to be attached for the recovery of such compensation. If a reconciliation is impossible, the party applying for divorce shall fill up the prescribed form. The rights of each party shall be agreed to in the presence of the Registrar. The husband shall deposit a sum of not less than one month's maintenance for the wife with the *Kathi* unless under the divorce the husband is not required to pay any maintenance of the wife. Each party to the divorce shall return to the other the property to which he or she is entitled. The husband is required to report the divorce to the Registrar within seven days of the divorce.[160]

There is no express statutory provision for the appointment of *ḥakam* in the other States of Malaya.

In Singapore it is provided that before making an order or decree for *ṭalāk*, *fasah*, *ta'alīk*, *khula* or *nusus* the Shariah Court may appoint in accordance with the Muslim law two arbitrators (*ḥakam*) to act for the husband and wife respectively. In making such appointment the Court shall where possible give preference to close relatives of the parties having knowledge of the circumstances of the case. The Court may give directions

160. Perlis Administration of Muslim Law Enactment, 1963, s. 90A.

to the *ḥakam* as to the conduct of the arbitration and they shall conduct it in accordance with such directions and according to the Muslim law. If they are unable to agree or if the Court is not satisfied with their conduct of the arbitration it may remove them and appoint other *ḥakam* in their place. The *ḥakam* shall endeavour to effect a reconciliation between the parties and shall report the result of their arbitration to the court.[161]

NUSUS (NUSHŪZ)

Where a wife unreasonably refuses to obey the lawful wishes or command of her husband, she is said to be *nushūz* and the husband will be freed from the duty to provide maintenance and a home for her. According to Imām Shāfi'ī a wife's maintenance is obligatory only if she puts herself at her husband's disposal and not by virtue of the contract of marriage in itself. No maintenance is therefore due when the wife is *nushūz*, that is when she unreasonably refuses obedience to her husband as for example (a) when she withholds her society from him unless there were a proper excuse, such as her sickness, menstrual course, child birth, confinement, or deformity of the husband rendering sexual intercourse impossible without injury to her (b) when she leaves her house without his permission unless it were through fear of the collapse of the house or for other causes, or it was for the purpose of visiting her sick relatives during his absence, believing his acquiescence or (c) when she refuses to move with her husband to another house or another country, unless there is any valid reason to justify her refusal to do so. As soon as the wife repents and obeys the husband, she ceases to be *nushūz*.[162]

There is no statutory provision, except in Singapore for the making of an order of *nusus* (*nushūz*) against a wife; but provision is made in some states for the punishment of a woman who wilfully disobeys the lawful order of her husband. In Selangor, Kelantan, Trengganu, Pahang, Negri Sembilan and Melaka, it is provided that any woman who wilfully disobeys any order lawfully given by her husband in accordance with Muslim law shall be punishable with a fine not exceeding $ 10/- or in the case of

161. Singapore Muslims Ordinance, 1957, s. 33 (as amended by the Muslims (Amendment) Ordinance, 1960).

162. Nawawī, *op. cit.*, 318 and 385; Sheik Abdul Kadir, *The Muhammedan Law of Inheritance, Marriage and the Rights of Woman.* p. 178 — 179.

a second or subsequent offence with imprisonment for a term not exceeding seven days or with a fine not exceeding fifty dollars but it shall be a sufficient defence of her conduct if the husband has been guilty on more than one occasion during the preceding year of abusing or illtreating the wife.[163]

In Singapore the Shariah Court is given power to enquire into questions arising out of the Muslim law regarding recalcitrancy called *nusus* and may make such decree as is by Muslim law lawful.[164]

The effect of an order of *nusus* is that the wife loses her right to maintenance and it has been held that the order of *nusus* would preclude her even from applying to a civil court for maintenance (*Mohamed Saad* v. *Hasnah*).[165]

MUT'AH (MATTA'AH) OR CONSOLATORY GIFT

The payment of a consolatory gift on divorce or *mut'ah* is enjoined in the Holy *Qur'ān*:

> There is no blame on you if you divorce women before consummation or the fixation of their dower; but bestow on them a suitable gift the wealthy according to his means and the poor according to his means. A gift of a reasonable amount is due from those who wish to do the right thing.[166]

According to the *Shāfi'ī* School of law the payment of a consolatory gift is incumbent not only in the case where a woman has been divorced before consummation and before the fixation of her dower, but also in the case of every divorced woman, except a woman whose dower has been stipulated and who is divorced before consummation. The present is made incumbent according to Imām Shāfi'ī: "in the way of a gratuity or compensatory gift from the husband on account of his having thrown the woman into a forlorn state by his separation from her". The gift is therefore incumbent only when it is the husband who repudiates the wife. If the separation is caused by the wife dissolving the

163. Selangor Administration of Muslim Law Enactment, 1952, s. 156; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 176; Trengganu Administration of Islamic Law Enactment, 1955, s. 134; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 154; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 148; Malacca Administration of Muslim Law Enactment, 1959, s. 147.
164. Singapore Muslims Ordinance, 1957, s. 35.
165. (1949) *M.L.J.* p. 97.
166. *Sūrah* II:236.

marriage or by the husband's dissolving it owing to her fault no *mut'ah* is due. The consolatory gift can take the form of money, clothing or other articles.[167]

Special statutory provisions for the payment of *mut'ah* are made in Selangor, Kelantan, Trengganu, Pahang, Negri Sembilan, Melaka, Penang and Kedah. It is provided that a woman who has been divorced by her husband may apply to a *Kathi* for a consolatory gift or *mut'ah* and the *Kathi* may, after hearing the parties, order payment of such sum as may be just and in accordance with Muslim law.[168]

In Perlis it is provided that a woman who has been divorced by her husband may apply to a *Kathi* for a consolatory gift or *mut'ah* and the *Kathi* may after hearing the parties make an order for such sum as may be just.[169]

In Singapore power is given to the Shariah Court to make orders for the payment of consolatory gifts or *mut'ah*. A woman who has been divorced by her husband may apply to the court for a consolatory gift or *mut'ah* and the court may after hearing the parties order payment of such sum as may be just and in accordance with the Muslim law. The order for payment of *mut'ah* may be made at any stage of the proceedings or after a decree or order of divorce has been made.[170]

MAINTENANCE OF A WIFE

A wife is entitled to reasonable maintenance from her husband during marriage; and she is entitled to be maintained by her husband during the *'idda* on the same scale as before the divorce, conditional on her submitting to her husband's control as regards her place of residence and general behaviour. According to the *Shāfi'ī* School, a wife who has been irrevocably divorced either by three repudiations (*ṭalāq*) or by *faskh*, cannot claim

167. Nawawī, *op. cit.*, p. 313.
168. Selangor Administration of Muslim Law Enactment, 1952, s. 131; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 149; Trengganu Administration of Islamic Law Enactment, 1955, s. 107; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 130; Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 125; Malacca Administration of Muslim Law Enactment, 1959, s. 124; Penang Administration of Muslim Law Enactment, 1959, s. 125; Kedah Administration of Muslim Law Enactment, 1962, s. 125.
169. Perlis Administration of Muslim Law Enactment, 1963, s. 94.
170. Singapore Muslims Ordinance, 1957, (as amended by the Muslims (Amendment) Ordinance, 1960), s. 36 and 36A.

maintenance during her period of *'idda* from her husband, unless she be pregnant by him but it appears that a woman who has been irrevocably divorced may claim a suitable lodging during the period of *'idda*. Maintenance is not due to a woman, whose marriage has been dissolved by her husband's death or where her wrongful action has led to the divorce. According to the *Shāfi'ī* School of law the wife's maintenance is a debt on the husband and arrears are recoverable by the wife, though there be no decree of the Court or a *Kathi* or mutual agreement in respect of such maintenance.[171]

In Selangor, Kelantan and Trengganu, it is provided that a married woman may by application in the court of a *Kathi* obtain an order against her husband for the payment from time to time of any such sums in respect of her maintenance as she may be entitled to in accordance with Muslim law. A woman who has been divorced may by application in the court of a *Kathi* obtain an order against her former husband for the payment in respect of her period of *'idda,* if the divorce was by one or two *ṭalāk,* or in any case in respect of the period of pregnancy by the former husband, of any such sum in respect of her maintenance as she may be entitled to in accordance with Muslim law. It is also provided that the Married Women and Children (Maintenance) Ordinance, 1950, shall not apply in the case of any claim for maintenance by a Muslim against a Muslim. Any order made by the court of a *Kathi* may be rescinded or varied upon the application of any person interested thereunder and upon proof of change of material circumstances. In case of wilful failure to comply with such orders, the person in default may be sentenced by the Court of a *Kathi* to imprisonment which may extend, if the order provides for monthly payments, to one week for each month's allowance or part thereof remaining unpaid or in any other case to one month.[172]

171. Nawawī, *op. cit.*, p. 383f; R. K. Wilson, *Anglo-Mohammedan Law*, p. 423. According to *The Ninety-Nine Laws of Perak*, where a husband wanted a divorce he was required to pay her maintenance for three months and the whole of her dowry if not already paid — See *The Ninety-Nine Laws of Perak, op. cit.*, p. 22.

172. Selangor Administration of Muslim Law Enactment, 1952, s. 138, 143 and 144; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 158, 159, 163 and 164; Trengganu Administration of Islamic Law Enactment, 1955, s. 116, 117, 121 and 122.

In Pahang it is provided that a married woman may by application in the Court of a *Kathi* obtain an order against her husband for the payment from time to time in cash or kind in respect of her maintenance as she may be entitled to in accordance with the Muslim law. A woman who has been divorced may by application in the court of a *Kathi* obtain an order against her husband for the payment in respect of the period of *'idda,* in cash or in kind, in respect of her maintenance as she may be entitled to in accordance with the Muslim law. It is also provided that the Married Women and Children (Maintenance) Ordinance, 1950, shall not apply in the State in the case of any claim for maintenance made by a Muslim against a Muslim. Any order made by the court of a *Kathi* may be rescinded or varied upon the application of any person interested thereunder and upon proof of change of material circumstances. In case of wilful failure to comply with such orders, the person in default may be sentenced by the court of a *Kathi* to imprisonment which may extend if the order provides for monthly payments to one week for each month's allowance or part thereof remaining unpaid or in any other case to one month.[173]

In Negri Sembilan, Melaka, Penang and Kedah it is provided that a married woman may by application in the court of a *Kathi* obtain an order against her husband for the payment from time to time of any sums in respect of her maintenance as she may be entitled to in accordance with the Muslim law. A woman who has been divorced may by application in the Court of a *Kathi* obtain an order against her former husband for the payment in respect of the period of *'idda,* if the divorce was by one or two *ṭalāk* or in any case in respect of the period of her pregnancy by the former husband, of any sums in respect of her maintenance as she may be entitled to in accordance with the Muslim law. It is also provided that the Married Women and Children (Maintenance) Ordinance, 1950, shall not apply to any person professing the Muslim religion and whose wife or whose child professes the Muslim religion except in respect of the maintenance of illegitimate children. Any order made by the Court of a *Kathi* may be rescinded or varied upon the appli-

173. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 137, 138, 142 and 143.

cation of any person interested thereunder and upon proof of change of material circumstances. In case of wilful failure to comply with such orders, the person in default may be sentenced by the court of a *Kathi* to a term of imprisonment which may extend if the order provides for monthly payments to one week for each month's allowance remaining unpaid or in any other case to one month.[174]

In Perlis it is provided that a married woman may by application to a *Kathi's Court* obtain an order against her husband for the payment from time to time of any such sums in respect of her maintenance as she may be entitled to in accordance with Muslim Law. A woman who has been divorced may by application to a *Kathi's Court* obtain an order against her husband for the payment of such sum as may be provided by Muslim Law for her maintenance during the period of *'idda*. In addition a woman who has been divorced may by application to a *Kathi's Court* obtain an order against her former husband for maintenance payable monthly for so long as she remains unmarried or does not commit any misconduct; the *Kathi* shall before making such an order satisfy himself that the woman has been divorced without good cause or reason. The Married Women and Children (Maintenance) Ordinance, 1950, does not apply in the case of any claim for maintenance by a Muslim against a Muslim. Any order for maintenance may be rescinded or varied upon the application of any person interested thereunder and upon proof of change of material circumstances. In case of wilful failure to comply with such orders the person in default may be sentenced by the court to a term of imprisonment which may extend, if the order provides for monthly payments, to one week for each month's allowance remaining unpaid or in any other case, to one month.[175]

In the other parts of the Federation (where no law has been passed to provide that the provisions of the Married Women and Children (Maintenance) Ordinance, 1950,[176] shall not apply

174. Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 132, 133, 136 and 137; Malacca Administration of Muslim Law Enactment, 1959, s. 131, 132, 135 and 136; Penang Administration of Muslim Law Enactment, 1959, s. 133, 134, 137 and 138; Kedah Administration of Muslim Law Enactment, 1962, s. 133, 134, 137 and 138.

175. Perlis Administration of Muslim Law Enactment, 1963, S. 103-104 and 108.

176. F.M. Ordinance No. 36 of 1950.

to any person professing the Muslim religion and whose wife or whose legitimate or illegitimate children, profess the Muslim religion) applications for maintenance can be made under the Married Women and Children (Maintenance) Ordinance, 1950. Applications for maintenance can also be brought in the courts of a *kathi* in Perak and Johore where the *kathi* is given power to deal with such applications.

In Singapore power is given to the Shariah Court to make orders for the payment of maintenance. The Court has power to enquire into and adjudicate upon claims by married women or women who have been divorced, for maintenance. Any order for the payment of maintenance made under the Muslims Ordinance shall, it is provided, until reversed be a bar to proceedings under the Women's Charter, 1961. If any person fails or neglects to comply with an order of the Shariah Court, the Court may for every breach of the order, direct the amount due to be levied in the manner provided for levying fines imposed by a Magistrate's Court or may sentence him to imprisonment for a term which may extend to six months. Applications for the maintenance of married women may also be made under the Women's Charter, 1961, and applications for the maintenance of children can only be made under that Ordinance. There is provision to enable attachment of earnings orders to be made to enforce payment of maintenance orders made under the Muslims Ordinance, 1957,[177] as well as those made under the Women's Charter, 1961.

It has been held in *Mohamed Saad* v. *Hasnah*[178] that an order of *nusus* precludes a Muslim woman from applying to the Magistrate's court for maintenance under the provisions of the Minor Offences Ordinance and this rule would also apply to applications under the Women's Charter, 1961 and the Married Women and Children (Maintenance) Ordinance, 1950.

HARTA SAPENCHARIAN

The distribution of property among Malay families was strongly influenced by the Malay Custom of matrilineal origin.

177. Singapore Muslims Ordinance, 1957 (as amended by the Muslims (Amendment) Ordinance, 1960), s. 36, 36A and 36B; Women's Charter, 1961, Parts VII and VIII.

178. (1949) *M.L.J.* Supplement 31.

In case of divorce or on the death of the husband, the wife could claim a substantial share of land acquired during the marriage. Her rights as actually conceded in the *non-perpateh* States approximate very closely to the *charian laki bini*[179] of the matrilineal or *perpateh* tribes in Negri Sembilan, and the Naning District of Melaka.

It has been held that generally throughout Malaya, except in Singapore, a divorced wife is entitled to a share of all land acquired during the marriage, *Rasinah* v. *Said*.[180] Where she has in fact assisted to cultivate the land she is entitled to one-half of the land, and in other cases to one-third of the jointly acquired property (*harta sapencharian*) of the marriage.

In Perak the matter has been settled by a Perak State

179. Property acquired by the joint efforts of the husband and the wife. See p. 233.

180. E. N. Taylor, "Malay Family Law", p. 29. Although in that case it was stated that the rule does not apply in the Colony of the Straits Settlements, there is now provision for claims to *harta sapencharian* in Melaka and Penang. According to the Malay custom the guardians at the lawful marriage should enquire as to the separate property of the man and the woman so that on divorce it may be returned to the owner while property acquired during marriage is divided equally. If separate property has vanished during the marriage and the joint property acquired during the marriage is large, then the separate property is made good and the residue is the joint property; losses are also divided. If the husband wants to divorce his wife for no fault of hers, then the joint property is divided into three, the man taking one share and the woman two. J. E. Kempe and R. O. Winstedt, "A Malay Legal Miscellany", p. 6. According to *The Ninety-Nine Laws of Perak*, if there was a divorce at the instance of the husband and there was no blame attached to the woman he was required to provide her with maintenance for three months and the personal property would be divided. Weapons and instruments of iron went to the husband, vessels of brass and household utensils went to the wife. To the wife also belonged the house or plantation, to the husband debts and dues. If a divorce was sought owing to the misbehaviour of the woman — that is on account of her adultery, or neglect of service at bed and board or refusal to do works of charity and to pray — she forfeited her settlements only and the law was that the husband must pay a *paha* of gold. If a woman sought a divorce, if she thrice made out a case of misconduct on the husband's part, she could certainly obtain a divorce; but she must redeem herself by returning the settlements, and the moveable property went to the husband. If property was brought from the parents' home and was acquired before the marriage, each party would keep possession of it. Such property was regarded as separate property and was not thrown into the property to be divided on divorce. But if the parties had lived for three years together and had children, it would be thrown in. *The Ninety-Nine Laws of Perak, op. cit.*, p. 31 and 39.

Council minute dated the 18th January, 1907. In that minute the Council declared and ordered to be recorded:

> that the custom of the Malays in Perak in the matter of dividing up property after divorce, when such property has been acquired by the parties or one of them during marriage, is to adopt the proportion of two shares to the man and one share to the woman and the gifts between married persons are irrevocable either during marriage or after divorce.

Claims to such property are dealt with by the Court or Collectors of Land Revenue (in the case of land registered in the Mukim Registers) but *Kathis* are called in as advisors on principle.[181] The claim of the divorced wife to one-third of the value of the lands acquired during the marriage would not be defeated even if it were proved that she was divorced for adultery [*Teh Rasim* v. *Neman*][182] nor would she lose her right on *tebus ṭalāk* (*khula*) unless the consideration for the *tebus ṭalāk* was the waiver of her claim to the *harta sapencharian*. [*Wan Mahatan* v. *Haji Abdul Samat*].[183]

The divorced wife's share may be increased to one-half depending upon the nature of the work actually done by her on the jointly acquired property [*Wan Mahatan* v. *Haji Abdul Samat* (*Supra*)]. In *Re Elang, Re Kulop Degor* and *Lebar* v. *Niat*[184] Taylor J. said:

> The evidence of the six witnesses who were examined before me establishes that in the Perak river *kampongs* there is a custom almost invariably followed by which on divorce the property acquired during the marriage is divided between the parties — the division depending on the circumstances and is arranged by the two families and the *ketua-kampong* (village headman); if the woman assisted in the actual cultivation she can claim half; if she did not work on the land she received a smaller share — perhaps one third. If a man of this class earns a salary (e.g. as a government servant) and property is bought out of his earnings the wife's share is one-third.

There is some doubt as to the position where the man earns a salary (e.g. as a government servant) and property is bought out of his earnings. In *Re Elang deceased*[185] it was stated that in

181. E.N. Taylor, "Malay Family Law," p. 41.
182. *Ibid.*, p. 18.
183. *Ibid.*, p. 25.
184. *Ibid.*, p. 55.
185. *Ibid.*, p. 48.

such a case the wife's share is one-third but in the case of *Wan Mahatan* v. *Haji Abdul Samat*[186] it was stated by the *Kathi* of Larut that where a woman marries a person who earns wages and the wife merely looks after the household the property obtained by the husband during the marriage is not in partnership with the woman but is appropriated to her husband alone. In *Re Noorijah*[187] the facts were that the deceased was the wife of a public servant and left land registered in her name. The land was bought by the husband but registered in the name of the wife. There was no evidence of any gift to the deceased by her husband. It was held that the husband was solely entitled to the property and that it should not be regarded as the estate of the deceased.

In Selangor there is no reported case which gives a share in the *harta sapencharian* to the divorced wife. In *Laton* v. *Ramah*[188] the trial Judge held on the evidence of *Kathis* that a widow is entitled to one-half of the value of the immovable property of the deceased husband at the time of his death but, on appeal, the Court of Appeal held that the evidence of the *Kathis* was not admissible and they ordered a retrial. In *Haji Ramah* v. *Alpha*[189] it was merely held that a widow is entitled to claim *upah* or compensation for her share in the work of cultivating land. It would seem however that the Malay Custom whereby the wife on divorce gets a share of the *harta sapencharian* applies in Selangor and the Administration of Muslim Law Enactment, 1952, gives power to the Court of the *Kathi Besar* and to the Court of a *Kathi* to hear and determine actions and proceedings relating to the division of or claims to *sapencharian* property.[190]

In Pahang it was held in *Haji Saemah* v. *Haji Sulaiman*[191] that the evidence called in that case did not prove the existence of any custom that the widow is entitled to more than her Qur'ānic share in her deceased husband's estate and the widow's claim to a half-share of her deceased husband's lands as *harta sapencharian* was dismissed. In *Teh binte Chik* v. *Kelsom binte*

186. *Ibid.*, p. 25.
187. *Ibid.*, p. 59.
188. (1926) 6 *F.M.S.L.R.* 116.
189. (1924) 4 *F.M.S.L.R.* 179.
190. Selangor Administration of Muslim Law Enactment, 1952, s. 45 (3).
191. (1942) 11 *M.L.J.* 17; (1948) 14 *M.L.J.* 108.

Haji Abbas[192] it was assumed however that claims for *harta sapencharian* can be validly and successfully made in Pahang. It was held in that case however that *harta sapencharian* is only applicable to property acquired during marriage and not to property acquired before marriage; where property has been acquired before marriage and either spouse has put in money or labour to that property *harta sapencharian* does not apply but either spouse is entitled to claim what is known as *upah* or remuneration for work done. In 1930 the Chiefs and Kathis of Pahang gave their opinion that a woman can claim *harta sapencharian* according to Pahang custom on divorce or on the death of her husband. The claim can be made in respect of land and movable property. There is no fixed rule as to the share of the divorced wife or widow but either equal or unequal shares may be awarded pursuant to an agreement between the parties or confirming a gift or by judgment of the *Kathi*.[193]

The Court of the *Chief Kathi* and the Court of a *Kathi* is given jurisdiction to hear and determine actions and proceedings which relate to the division of or claims to *sapencharian* property.[194]

In Kedah it has been stated that on the dissolution of a Malay marriage the property acquired by the husband and wife is divided between them but there is no established rule or principle to guide the court in deciding the respective shares. (*Wan Nab* v. *Jasin*[195]). However in *Habsah* v. *Abdullah*[196] it was held that on divorce a woman in Kedah is entitled by customary law to half of any property acquired during coverture by joint effort and such a claim is not barred or extinguished by her remarriage.

In Kelantan and Trengganu, the Court of the *Chief Kathi* and the Court of a *Kathi* are given jurisdiction to hear and determine actions and proceedings which relate to division of or claims to *sapencharian* property.[197] In Negri Sembilan, Melaka and Penang the Court of the *Kathi Besar* and the Court

192. (1939) 8 *M.L.J.* 289.
193. E.N. Taylor, "Malay Family Law," p. 73.
194. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s. 37 (3).
195. E.N. Taylor, "Malay Family Law", p. 20.
196. (1950) 16 *M.L.J.* 60.
197. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 48 (1); Trengganu Administration of Islamic Law Enactment, 1955, s. 25 (1).

of a *Kathi* are given jurisdiction to hear and determine actions which relate to the division *inter vivos* of *sapencharian* property.[198]

In Perlis the Court of a *Kathi* and *Assistant Kathi* are given jurisdiction to hear and determine all actions and proceedings which relate to divisions of or claims to *sapencharian* property. A woman who has been divorced by her husband may apply to a *Kathi* for her share of the common property called *harta sapencharian* and the *Kathi* may after hearing the parties make an order for payment of such sum as may be just.[199]

DISTRIBUTION OF PROPERTY ON DIVORCE UNDER 'ĀDAT PERPATEH

In the parts of Negri Sembilan and of Melaka where the matrilineal *'ādat perpateh* is followed, the distribution of property on divorce follows the *'ādat*. Briefly, in all cases of dissolution of the marriage not only the *charian laki bini* (property acquired by the joint efforts of the married pair) but the whole of the property of both parties, movable and immovable, must be brought into account irrespective of its origin and of the name in which the land is registered. The property with which the marriage commenced must be restored or made good to the respective parties; *dapatan tinggal* — the wife's separate estate remains with her and *pembawa kembali* — the personal estate brought by the man returns to him. The *charian laki bini* (after payment of debts) is divided equally on divorce between husband and wife, irrespective even of the wife's adultery and irrespective of the number of children. There is one exception to the rule of equal division on divorce; in the case of a *cherai ta'alīk* the wife retains the whole of the property.[200]

The practice in Rembau is that claims for partition must be made at the time of divorce; relief can be given then but not afterwards, *Rahim* v. *Sintah*[201] and *Jasin* v. *Tiawan*[202]. The

198. Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 41 (3); Malacca Administration of Muslim Law Enactment, 1959, s. 40 (3); Penang Administration of Muslim Law Enactment, 1959, s. 40 (3).
199. Perlis Administration of Muslim Law Enactment, 1963, s. 11 and 94.
200. *Mahawa* v. *Manan* in E.N. Taylor, "Customary Law of Rembau", p. 20 and 111.
201. *Ibid.*, p. 114.
202. (1941) 10 *M.L.J.* 247.

Kathi is precluded from issuing the certificate of divorce until he is satisfied that all questions of property have been adjusted and if any such question is taken to the Court or the Collector, the *Kathi* must obtain the leave of the Court or Collector, before issuing the certificate. In *Hasmah binte Omar* v. *Abdul Jalil*[203] it was held that the custom in Kuala Pilah is different from that in Rembau and that according to the *'ādat* in Kuala Pilah proceedings to recover land can be commenced after divorce.

LEGITIMACY OF CHILDREN, CUSTODY OF CHILDREN AND ADOPTION

According to the *Shāfi'ī* School of law when a child is born to a woman who is married to a man (a) after six months from the date of the marriage or (b) within four years of the termination of the marriage, the mother not having remarried, the paternity of the child is established with the husband. If the child is born within six months of the marriage the paternity would not be established unless the man asserts that the child is his and does not say that the child is the result of fornication (*zinā'*).[204]

It has been held in Malaya that section 112 of the Evidence Ordinance overrides the Muslim law on this point. Section 112 of the Evidence Ordinance provides that the fact that any person was born during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time, when he could have been begotten.[205] In *Ainan* v. *Syed Abu Bakar*[206] it was held following the Indian case of *Sibt Muhammad* v. *Muhammad Hameed*[207] that the Evidence Enactment is a statute of general application and that in questions of legitimacy Section 112 of the Evidence Enactment applies to Muslims to the exclusion of Muslim law.

The Age of Majority Act, 1961, of the Federation

203. (1958) 24 *M.L.J.* 10.
204. Syed 'Āmir 'Alī, *op. cit.*, p. 190f; Nawawī, *op. cit.*, p. 362 and 367.
205. Federation Evidence Ordinance, 1950 (No. 11 of 1950), s. 112; Singapore Evidence Ordinance (Cap. 4), s. 113.
206. (1939) 8 *M.L.J.* 209.
207. *A.I.R.* (1926) All. 589. See, however *Abdul Ghani* v. *Taleh Bibi*, *P.L.D.* (1962) W.P. Lahore 531.

provides that the minority of all Muslim males and females shall cease and determine within the Federation at the age of eighteen years and every such male and female attaining that age shall be of the age of majority. The Act does not however affect the capacity of any person to act in marriage, divorce, dower and adoption or the religion and religious rites and usages of any class of persons.[208] The Act provides that the relevant Section shall not come into operation in any State until it has been adopted by a law made by the Legislature of that State. The Act has now been adopted by all States in Malaya. In Singapore the age of majority is twenty-one years, but this does not apply to Muslim marriage or divorce.

According to the *Shāfi'ī* School of law where the parents are separated and the mother has not remarried, the custody of a girl remains with the mother until she is married and that of a boy until the completion of his seventh year. A child of either sex who has reached the age of discernment is allowed to choose which of its parents it prefers to stay with, provided neither the father or mother are mad, infidel, or of notorious misconduct and provided the mother has not married again.[209] According to the Muslim law the custody of a boy until he has completed his seventh year and of a girl under the age of puberty belongs to the mother while the custody of a boy over seven years of age and of an unmarried girl who has attained puberty belongs to the father. A woman entitled to the custody of a boy or a girl is disqualified (a) by being married to a man not related to the minor within the prohibited degree, so long as the marriage subsists (b) by going to reside at a distance from the father's place of residence, except that a divorced wife may take her own children to her birth-place; (c) by failing to take proper care of the child and (d) by gross and open immorality.[210]

In the States of Malaya it is provided that the Guardianship of Infants Act, 1961, shall not apply in any State to persons professing the Muslim religion until the Act has been adopted by a Law made by the Legislature of that State. Any such State law may provide that nothing in the Act which is contrary to the Muslim religion or custom of the Malays shall apply to

208. Age of Majority Act, 1961 (No. 9 of 1961).
209. Nawawī, *op. cit.*, p. 391 – 392.
210. R. K. Wilson, *Anglo-Muhammadan Law*, p. 185.

any person under the age of eighteen years who professes the Muslim religion and whose father or (in the case of an illegitimate child) whose mother professes or professed the Muslim religion at his or her death and that the provisions of the Act, so far as they are contrary to the Muslim religion, shall cease to apply to any person upon his professing the Muslim religion, if at the date of such professing he has completed his age of eighteen years or if not having completed such age, he professes the Muslim religion with the consent of his guardian. The Act has now been adopted with such modifications in all the States of Malaya. It provides that the father of an infant shall normally be the guardian of the infant's person and property and where an infant has no father the mother of the infant shall be the guardian of his person or property. If both the parents of the infant are dead, the testamentary guardian (if any) appointed by the last surviving parent shall be the guardian of his person and property. If the parents of the infant have died without appointing testamentary guardians, the Court may appoint guardians. The Court may also remove from his guardianship any guardian, whether a parent or otherwise, and appoint another person to be a guardian in his place. In exercising its powers under the Act the Court shall have regard primarily to the welfare of the infant but shall where the infant has a parent or parents consider the wishes of such parent or both of them as the case may be.[211]

In Singapore the Guardianship of Infants Ordinance[212] applies to all persons including Muslims and it has been held that the provisions of the Ordinance must be taken to supersede whatever law might have been applied previously. The principal matter to be considered by the judge is the welfare of the infant. The father of the infant shall ordinarily be the guardian of the infant's person and property and where an infant has no lawful father living the mother of the infant shall ordinarily be the guardian of his person and property. If both the parents of the infant are dead, the testamentary guardian, if any, appointed by the last surviving parent shall ordinarily be the guardian of his person and property. If both the parents of the infant have died without appointing a testamentary guardian the Court or a judge

211. Federation Guardianship of Infants Act, 1961. (No. 13 of 1961).
212. Singapore Guardianship of Infants Ordinance (Cap. 16 of 1955 ed.).

may appoint a guardian of the infant's person and property. The Court or a judge may remove from his guardianship any guardian and may appoint another guardian in his place. In exercising the powers under the Ordinance, the Court or a judge is required to have regard primarily to the welfare of the infant but shall where the infant has a parent or parents, consider the wishes of such parent or both of them as the case may be Thus in *Re Omar bin Shaik Salleh*[213] the Court gave custody oi two infants to their mother in preference to their father, even though the mother had remarried a stranger, that is, a person unrelated to the infants.

The constitution of the Malay family under the *'ādat* is parental, children belonging to both parents. The Ninety-Nine Laws of Perak gave the practice obtaining there in the eighteenth century. If the child of divorced parents was under nine years of age, it would live with the mother, if it was over nine, it could please itself whether it lived with its father or mother, but a girl should live with the mother. In Negri Sembilan the family is matrilineal in the sense of the children belonging to the mother's tribe. On divorce the mother has custody of the children.[214]

Under the Muslim law a father is bound to maintain his minor sons until they arrive at puberty, and his unmarried, widowed or divorced daughters. A man is not obliged to maintain his adult sons, unless disabled by infirmity or disease. The father is the first who should maintain his child; and it is only in the second instance that the child can require maintenance from its mother. In default of father and mother, it is from a person's nearest ancestors that a child may claim nourishment. A person who has both ancestors and descendants alive should first claim maintenance from the latter.[215] It has been held in *Alus* v. *Mahmood*[216] that after divorce the husband is not liable for the maintenance of the children of the marriage unless and until the *Kathi* has made an order for their maintenance. A husband is therefore liable for past maintenance of his children only if a

213. (1948) 14 *M.L.J.* 186. See *Rashida Begum* v. *Shahab Din P.L.D.* (1960) W.P. Lahore 1142.
214. *The Ninety-Nine Laws of Perak, op. cit.*, Law No. 82; R.O. Winstedt, "The Malays", p. 48 and 59.
215. Nawawī, *op. cit.*, p. 390; R.K. Wilson, *Anglo-Muhammadan Law*, p. 203f.
216. E.N. Taylor, "Malay Family Law," p. 67.

Kathi's order was made directing him to pay such maintenance or authorising the wife to recover the expenses of maintenance of the children.

In Selangor, Kelantan and Trengganu a minor under the age of eighteen years may apply to the Court of a *Kathi* for an order for maintenance against his lawful father or any other person liable in accordance with Muslim law to support him, but it is provided that it shall be a sufficient defence to any such application that the applicant has sufficient means to support himself. Any person who is incapacitated by infirmity or disease from supporting himself may apply to the Court of a *Kathi* for an order of maintenance against any person liable in accordance with Muslim law to support him; but lack of means of the respondent shall be a sufficient defence to any such application. An order may be made by the Court of a *Kathi* for the payment of a monthly allowance for the maintenance of an illegitimate child, but if the claim is made against the putative father, the claim has to be brought in the Magistrate's Court.[217]

In Pahang it is provided that a minor under the age of fifteen years may by application in the Court of a *Kathi,* obtain an order against his lawful father or any other person liable in accordance with the Muslim law to support him for the payment from time to time in cash or kind in respect of his maintenance as he may be entitled to in accordance with the Muslim law. It shall be a sufficient defence to any such application that the applicant has sufficient means to support himself. If any person neglects or refuses to maintain an illegitimate child of his which is unable to maintain itself, the Court of a *Kathi,* upon due proof thereof may issue an order for the maintenance of the child by the *Bayt ul-Māl* to commence from an appointed day to the date of the child's attaining the age of majority. Any person who is incapacitated by infirmity or disease from supporting himself may by application in the Court of a *Kathi* obtain an order against any person liable in accordance with the Muslim law to support him for the payment from time to time in cash or in kind in respect of his maintenance as may be proper; lack of means in

217. Selangor Administration of Muslim Law Enactment, 1952, s. 140 — 142; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s. 160 — 162; Trengganu Administration of Islamic Law Enactment, 1955, s. 118 — 120.

the respondent shall be a sufficient defence to any such application.[218]

In Negri Sembilan, Melaka, Penang and Kedah it is provided that a minor under the age of fifteen years may by application to the Court of a *Kathi,* obtain an order against his lawful father or any other person liable in accordance with the Muslim law to support him for the payment from time to time of such sums in respect of his maintenance as he may be entitled to in accordance with the Muslim law. It shall be a sufficient defence to any such application that the applicant has sufficient means to support himself. The maintenance of illegitimate children is provided for in the Married Women and Children (Maintenance) Ordinance, 1950,[219] which gives power to the court to make an order for the payment by a person who fails to maintain his illegitimate child which is unable to maintain itself of such monthly allowance not exceeding fifty dollars as to the court seems reasonable. Any person who is incapacitated by infirmity or disease from supporting himself may by application in the court of a *Kathi* obtain an order against any person liable in accordance with Muslim law to support him for the payment from time to time of such sums in respect of his maintenance as may be proper; lack of means in the respondent shall be a sufficient defence to any such application.[220]

In the other States of Malaya, the payment of maintenance for children is governed by the provisions of the Married Women and Children (Maintenance) Ordinance, 1950, though *Kathis* may make orders for maintenance if power is given to them to do so by their *kuasa* or *taulīah.* In Singapore the payment of maintenance for children is governed by the provisions of the Women's Charter, 1961.[221]

In the parts of Negri Sembilan and Melaka, where the *'ādat perpateh* is followed, the general rule is that under the *'ādat* a hus-

218. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.139 — 141.
219. F.M. Ordinance, No. 36 of 1950.
220. Negri Sembilan Administration of Muslim Law Enactment, 1960, s. 134 — 135; Malacca Administration of Muslim Law Enactment, 1959, s. 133 — 134; Penang Administration of Muslim Law Enactment, 1959, s. 135 — 136; Kedah Administration of Muslim Law Enactment, 1962, s. 135 — 136.
221. Women's Charter, 1961, Parts VII and VIII.

band is not liable for the support of his children by his divorced wife, but it has been held that this rule does not apply where the husband is lawfully practising polygamy, as in such case his civil rights and duties in respect of wives and children fall to be dealt with under Muslim law (*Jemiah binte Awang* v. *Abdul Rashid*[222]).

Adoption is not recognised as a mode of establishing paternity in Muslim law and therefore, except in the parts of Negri Sembilan and Melaka which follow the *'ādat perpateh,* adoption where it takes place does not create any family relationship. The Adoption Ordinance, 1952,[223] of the Federation provides that the Ordinance shall not apply to any person who professes the religion of Islām, either so as to permit the adoption of any child by such person or so as to permit the adoption by any person of a child who according to Muslim law is a Muslim. The Adoption of Children Ordinance of Singapore[224] however applies to Muslims and therefore a Muslim can adopt or be adopted under the Ordinance; but the Ordinance is merely permissive and does not make customary adoptions, which do not comply with the provisions of the Ordinance, illegal. In the parts of Negri Sembilan and Melaka, which follow the *'ādat perpateh* adoption is recognised under the *'ādat* as creating a family relationship.[225]

MARRIED WOMEN'S PROPERTY

A married woman under Muslim law retains her property and any wages and earnings acquired or gained by her belong to her. She is entitled to sue and is liable to be sued in her own name in respect of her property and in respect of contracts made by her. It has been held that a Muslim woman can be convicted of criminal breach of trust of property belonging to her husband (*Re Ketuna Bibi*[226]); and that a Muslim husband can be convicted of attempting to cheat his wife (*Nuruddin* v. *Siti Aminah*[227]).

222. (1941) 10 *M.L.J.* 16.
223. No. 41 of 1952.
224. Chapter 36.
225. R.O. Winstedt, "The Malays", p. 60; E.N. Taylor, "Customary Law of Rembau", p. 39f; Lokman Yusof,, "Islām and 'Ādat — as seen in Land Inheritance", p. 18 — 19.
226. (1955) 21 *M.L.J.* 166.
227. (1929) *S.S.L.R.* 146.

In the States of Malaya the Married Women Ordinance, 1957, applies to Muslim married women, subject to the provisions of Muslim law and the customs of the Malays governing the relations between husband and wife. The Married Women Ordinance, 1957, provides that a married woman shall be capable of rendering herself and being rendered liable in respect of any contract, debt or obligation and of suing and being sued in respect of any such contract, in all respects as if she were a *feme sole*. The Married Women Ordinance, 1957, also provides that a married woman shall be capable of suing and being sued in respect of a tort as if she were a *feme sole*. A wife cannot sue her husband in tort save for the protection or security of her property. Thus a wife may sue her husband for such torts as detinue or conversion of chattels belonging to her but not for such torts as libel, negligence or personal injury. Similarly a husband cannot sue his wife in tort, except for the protection or security of his property[228]

No criminal proceedings may be taken by a wife against her husband or by a husband against his wife while they are living together as to or concerning any property claimed by her or him respectively, nor while they are living apart as to or concerning any act done by the husband or wife while they were living together concerning property claimed by the wife or husband respectively, unless such property has been wrongly taken by the husband or wife when leaving or deserting or about to leave or desert the wife or husband respectively. A wife may however take criminal proceedings against her husband for personal injuries.[229]

The Married Women Ordinance, 1957, further provides that a married woman is capable of acquiring, holding and disposing of any property in all respects as if she were a *feme sole*. Restraints on anticipation are abolished for the future. The property of a married woman is liable for all her debts and obligations and a married woman is subject to the law relating to bankruptcy and to enforcement of judgments and orders. It is provided that a married woman shall have in her own name against her husband the same remedies and redress for the

228. Federation Married Women Ordinance, 1957, (No. 36 of 1957) s. 4 and 9.
229. *Ibid.*, s. 9.

protection and security of her property as if such property belonged to her as a *feme sole*.[230]

Section 120 of the Federation Bankruptcy Ordinance, 1959, provides that a married woman shall be subject to the Ordinance in all respects as if she were a *feme sole*.[231]

In Singapore the provisions of the Women's Charter, 1961, relating to the rights and duties of husband and wife and to married women's property do not apply to Muslims and the provisions applicable are those contained in the Muslims Ordinance, 1957.[232] It is provided that all the property belonging to a woman on her marriage, whether movable or immovable, and however acquired, shall after marriage to a Muslim husband continue in the absence of special written contract to the contrary, to be her own property; and she may dispose of such property by deed or otherwise with or without the concurrence of her husband. The following are deemed to be the property of a Muslim married woman (a) wages and earnings acquired or gained by her during marriage in any employment, occupation or trade carried on by her and not by her husband; (b) any money or other property acquired by her during marriage through the exercise of any skill or by way of inheritance, legacy, gift, purchase or otherwise; and (c) all savings from and investments of such wages, earnings and property; her receipts alone shall be a good discharge for such wages, earnings and property and she may dispose of the same by deed or otherwise and without the concurrence of her husband. A Muslim married woman may maintain a suit in her own name for the recovery of property of any description which is her own property; shall have in her own name the same remedies, both civil and criminal against all persons for the protection and security of such property as if she were unmarried; and shall be liable to such suits, processes and orders in respect of such property as she would be liable to if she were unmarried. If a Muslim married woman possesses property and if any person enters into a contract with her with reference to such property or on the faith that her obligations arising out of such contract will be satisfied out of

230. *Ibid.*, s. 4 and 9.
231. Bankruptcy Ordinance, 1959 (No. 20 of 1959), s. 120.
232. Women's Charter, 1961, s. 3.

her own property, such person shall be entitled to sue her and to the extent of her own property to recover whatever he might have recovered in such suit if she had been unmarried at the date of the contract and continued unmarried at the execution of the decree; the husband shall not in the absence of special stipulations whereby he has made himself responsible as surety, joint contractor or otherwise, be liable to be sued on such contracts. The Muslim husband may however be liable for debts contracted by his wife's agency, express or implied and it is provided that such liability shall be measured according to the English law in force locally. A Muslim husband shall not by reason only of his marriage be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for and shall to the extent of her own property be liable to satisfy such debts as if she had continued unmarried. No Muslim person shall by any marriage acquire any interest in the property of the person whom he or she marries nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried. When a Muslim husband and his wife or wives live together in the same house the household goods, vehicles and household property of the husband and wife or wives, except the paraphernalia of the wife or wives, shall be held *prima facie* to belong to the husband in any question between the husband and his creditors.[233]

The Civil Law Ordinance of Singapore provides that the husband of a married woman shall not, by reason only of his being her husband, be liable in respect of any tort committed by her whether before or after the marriage or in respect of any contract entered into or debt or obligation incurred by her before the marriage or be liable to be sued or made a party to any legal proceeding brought in respect of such tort, contract, debt or obligation.[234]

It is provided in Singapore that all settlements and dealings with property between a Muslim husband and wife shall be governed by the rules of English law in force locally; and that where there is not adequate consideration on either side, such settlements and dealings shall be held to be voluntary in any

233. Muslims Ordinance, 1957, s. 52 — 55.
234. Civil Law Ordinance (Cap. 24 of 1955), s. 9.

question between the husband and wife or either of them and his or her creditors.[235]

The Singapore Bankruptcy Ordinance provides that a married woman shall in respect of her separate property, if any, be subject to the Ordinance in the same way as if she were unmarried.[236] It has been held in *Re Mahmooda binte Ismail*[237] that this provision applies to a Muslim married woman and that the court has no jurisdiction to adjudge a Muslim married woman bankrupt without proof that she has separate property at the time of the petition.

235. Muslims Ordinance, 1957, s. 56.
236. Bankruptcy Ordinance (Cap. 11 of 1955), s. 120.
237. (1961) *M.L.J.* 195.

LAW OF PROPERTY

No one eats better food than that which he eats out of the work of his hand.

Muḥammad

Bukhārī, *Ṣaḥīḥ, XXXIV : 15*

LAW OF PROPERTY

IN its origin the law of the Malays relating to property was based on the *'ādat,* or tribal custom. The *'ādat* was brought by the Malays from Sumatra where the Minangkabau tribal organization was matrilineal. In Minangkabau the exogamous matrilineal pattern was developed into an elaborate system of unwritten law called the *'ādat perpateh.* The Malays of Negri Sembilan came from this region; they brought their tribal organization with them and in some districts they have preserved it intact up to the present day. In Palembang however during the centuries of Hindu and monarchical influence, the tribal organization broke down and with the disintegration of tribes as such, the rule of exogamy necessarily perished, though the matrilineal law of property survived. The other Malay States in the Federation followed the Palembang tradition called *'ādat temenggong,* which is much the same as *'ādat perpateh* in so far as inheritance is concerned, but the absence of any tribal organization has obscured the fact that their law of property was essentially the same as that of Negri Sembilan.[1]

In Malaya before the British period therefore the law of the Malays relating to property was in Negri Sembilan, *'ādat perpateh,* and in the other States, *'ādat temenggong* in decay. The Malay rulers were Muslims but it is doubtful whether they introduced any more Muslim Law into the other Malay States than was introduced in Negri Sembilan. About 1886 the Perak State Council ordered the land of a major Chief, Tengku Long Jaffar, to be transmitted in the female line. Since then however Muslim Law has been more extensively adopted and the customary laws in the Malay States (other than Negri Sembilan and Melaka) have only survived in relation to the rights of widows and divorcees. Among the country people many estates are still

1. Wilkinson, "Malay Law", p.1f; Taylor, "Malay Family Law", p.1f.

divided according to *'ādat kampong*, but this can only take place by consent. The Muslim Law has been applied so frequently by the Collectors of Land Revenue and the Courts that the law of inheritance is now, except as to the special right of spouses, the Muslim Law.[2]

Questions of property and inheritance are seldom litigated between a woman and her own children or between the kindred of an intestate. Such matters are often settled by agreement and the tendency has been that in such agreements the widow usually receives more than her share under Muslim Law. In the vast majority of Malay families, one-eighth of the estate does not provide the widow with subsistence. The matter was therefore regulated by Malay custom rather than by Muslim Law. The fact that the Muslim Law allows distribution of the estate of a deceased person to be settled by consent of the heirs has enabled many arrangements which are in reality applications of the *'ādat kampong* to pass as distributions according to Muslim Law.[3]

In the case of *Re Timah binti Abdullah Decd.*,[4] it was held that the rule of Muslim Law that a non-Muslim is excluded from, and cannot succeed to, the estate of a Muslim is applicable in Pahang. This would seem also to be the practice in the other Malay States and in Singapore.[5] In Penang and Melaka, however, it is provided that a next of kin who is not a Muslim shall be entitled to share in the distribution as if he were a Muslim.[6]

In the States of Malaya the law relating to the application for and grant of probate of wills and letters of administration of the estate of a deceased person and the powers of executors and administrators are contained in the Probate and Administration Ordinance, 1959,[7] which applies to Muslims. The Ordinance

2. Taylor, *op. cit.*, p.4.
3. *Ibid.*, p.10. See *Shafi* v. *Lijah* (1948 - 49) *M.L.J.* Supp. p.49.
4. (1941) *M.L.J.* 51.
5. The proviso to section 42 of the Muslims Ordinance, 1957, which provided that any of the next of kin who is not a Muslim shall be entitled to share in the distribution as though he were a Muslim, has been repealed by the Muslims (Amendment) Ordinance, 1960.
6. Muslims Ordinance (Cap.57 of the Laws of the Straits Settlements, 1936), s.27.
7. No.35 of 1959.

however does not affect the rules of Muslim Law as varied by local custom in respect of the distribution of the balance of the estate of a deceased person after the debts have been satisfied. The distribution of small estates of deceased persons — that is estates consisting wholly or partly of immoveable property not exceeding ten thousand dollars in total value — is dealt with by the Small Estates (Distribution) Ordinance, 1955,[8] which also applies to customary land in Negri Sembilan. The Collector of Land Revenue in distributing the land shall have regard to the religious or customary law applicable to the distribution of the estate of the deceased. Where the Collector is satisfied that all the beneficiaries of the estate being of full age and capacity have agreed between themselves as to the manner in which the estate should be distributed, the Collector may, after recording in the distribution order the terms of the agreement, and the assent of the parties thereto, distribute the estate in the manner provided by the agreement unless it shall appear to the Collector to be unjust or inequitable to do so. Where any such agreement has been entered into by all the beneficiaries who are of full age and capacity the Collector may, if in his opinion it is in the interests of any other beneficiary, who is a minor or a person not of full capacity to do so, assent to the agreement on behalf of such minor or person and may thereupon after recording the terms of the agreement and the assent of the parties thereto and of his own assent on behalf of the minor or person distribute the estate in the manner prescribed by the agreement. Where two or more beneficiaries are entitled to share in any land comprised in one estate the Collector may at his discretion having regard to the interests of those concerned and the interests of good cultivation (a) allocate separate lots to individual beneficiaries; or (b) allocate separate lots to two or more beneficiaries as co-proprietors or tenants in common in undivided shares; or (c) subject to the provisions of any other written law restricting the sub-division of land order any lot or lots to be sub-divided by survey into parcels proportionate to the shares of the beneficiaries, fixing a time in which they are to deposit the appropriate survey fees in the Land Office and providing that in

8. No.34 of 1955 — The Ordinance is not in force in Penang or Melaka.

default of such deposit the land be registered in the names of these beneficiaries as co-proprietors or tenants in common in equal shares. The Collector at his discretion, in order to prevent the excessive sub-division of land or the holding of small lots of land in common by numerous persons or in complicated fractional interests, may (a) where the share of a beneficiary is small order the land or any part thereof allocated to any other beneficiary or a specified interest therein to be charged to the beneficiary for the amount of his share, together with interest at such rate as may be just, not exceeding five per cent per annum, in lieu of allocating to him a proprietory interest; or (b) where the value of any interest or share in land or lot allocated to a beneficiary is less than the value of the share in the estate to which such beneficiary is entitled, direct that the difference in value be made up to him in money by the other beneficiaries in such proportion as is equitable and may order, if necessary, that such payments and interest therein at such rates as may be just, not exceeding five per cent per annum, be secured by a charge upon any share or shares of such other beneficiaries; or (c) order the land or any part of it to be sold.[9]

In determining whether to make a distribution order in accordance with any agreement between beneficiaries or in settling the terms of any distribution order providing for the distribution of land the Collector shall have regard to the following considerations (a) dividing the land into several lots in several names may seriously diminish the value of the estate as a whole; (b) the real value of such shares, especially when represented by complicated fractions, is less than their proportionate value; (c) it is not conducive to good cultivation or to peace in a family for persons who have conflicting interests to be undivided co-proprietors of land; (d) it is greatly to the advantage of an infant that his co-proprietors should be those nearly related to him; and (e) valuations are necessarily estimates; it is therefore unnecessary that the estimated value of a lot should be the precise amount of a beneficiary's mathematical share and it is sufficient if the estimated value of a lot substantially corresponds to the beneficiary's calculated share. No dis-

9. Small Estates (Distribution) Ordinance, 1955 (No.34 of 1955), s.12-19.

tribution order, other than one made in pursuance of an agreement between the beneficiaries shall have effect where any beneficiary affected is a Muslim, unless every such beneficiary being of full age and capacity has assented thereto, and where any beneficiary is a minor or a person not of full capacity, such assent has been given on his behalf by a guardian appointed by order in writing by the Collector. Where there is any written law relating to *Bayt ul-Māl* the Collector shall before distributing any part of the estate of a deceased Muslim satisfy himself that any share of the estate which is due to the *Bayt ul-Māl* has been duly paid or proper provision made for the payment thereof.[10]

Part VII of the Civil Law Ordinance, 1956[11] of the Federation which contains provisions relating to the disposal and devolution of property on death does not apply to the disposal of property according to Muslim Law. The Distribution Ordinance, 1958,[12] does not apply to the estate of any person professing the Muslim religion nor does it affect any rules of Muslim Law as varied by local custom in respect of the estate of any such person.

In Selangor, Kelantan, Pahang, Negri Sembilan, Melaka, Penang and Kedah it is provided that if in the course of any proceedings relating to the administration or distribution of the estate of a deceased Muslim, any Court or authority, other than the Court of the *Kathi Besar* or the *Chief Kathi* or Court of a *Kathi* shall be under the duty of determining the persons entitled to share in such estate or the shares to which such persons are respectively entitled, the Court of a *Kathi,* if the gross value of the estate does not appear to him to exceed five thousand dollars, and the Court of a *Kathi Besar* or *Chief Kathi* in any case, may on request by such Court or authority, or on the application of any person claiming to be a beneficiary, certify upon any set of facts found by such Court or authority or on any hypothetical set of facts, its opinion as to the persons who are, assuming such facts, whether as found or hypothetical, entitled to share in such estate and as to the shares to which they are respectively en-

10. Small Estates (Distribution) Ordinance, 1955, Schedule and Sections 13 and 15 (5).
11. No.5 of 1956.
12. No.1 of 1958.

titled. The Court of the *Kathi* or *Kathi Besar* or *Chief Kathi* may, before so certifying its opinion require to hear the parties on any question of law, but shall not hear evidence or make findings on any question of fact. In any case of special difficulty, the *Kathi Besar* or *Chief Kathi* or *Kathi* may refer the question to the Legal Committee of the *Majlis* (in Kelantan to the Judicial Committee of the *Majlis* or in Pahang to the *Majlis* or in Kedah to the *Fetua* Committee) for its opinion and shall if such opinion be given, so certify in accordance therewith.[13]

In Trengganu it is provided that if in the course of any proceedings relating to the administration or distribution of the estate of a deceased Muslim any Court, other than the Court of the *Chief Kathi* or of a *Kathi* which is under a duty to determine the persons entitled to share in the estate or the shares to which such persons are respectively entitled, may request the Court of a *Kathi* if the gross value of the estate does not exceed five thousand dollars, or the Court of a *Chief Kathi* to certify upon the facts submitted by the Court its opinion as to the persons who are entitled to share in the estate and the shares to which they are entitled. The Court of a *Chief Kathi* or a *Kathi* may on the application of a person claiming to be a beneficiary similarly certify its opinion upon the facts submitted and may in any case before certifying its opinion require to hear the parties on any question of law, but shall not hear evidence or make findings on any question of fact; in any case of special difficulty the *Chief Kathi* or a *Kathi* may refer the question to the *Muftī* for his opinion and shall if such opinion be given, certify in accordance therewith.[14]

In Singapore, applications for the grant of probate and letters of administration are governed by the Probate and Administration Ordinance and the powers of administrators and trustees are dealt with in the Trustees and Settled Estates Ordinances.

13. Selangor Administration of Muslim Law Enactment, 1952, s.47; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.50; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.39; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.44; Malacca Administration of Muslim Law Enactment, 1959, s.43; Penang Administration of Muslim Law Enactment, 1959, s.43; Kedah Administration of Muslim Law Enactment, 1962, s.44.
14. Trengganu Administration of Islamic Law Enactment, 1955, s.27.

These are mainly based on English principles. The Muslims Ordinance, 1957, in Singapore provides that in all applications for letters of administration to the estate of a Muslim dying intestate and leaving a widow or widows the Court may if it thinks fit grant letters of administration to any other next of kin or person entitled to administration by English Law in force in the State if there was no widow either to the exclusion of the widow or widows or jointly with such widow or widows or any one or more of such widows. It is also provided that when any person being the wife of a Muslim dies intestate leaving property of her own and leaving male children who are above 21 years of age, such male children shall be entitled to the grant of letters of administration in preference to her husband; the husband shall be entitled next after such male children; after such male children and the husband, the daughters, father, mother, brothers, sisters, uncles, aunts, nephews and nieces of the intestate shall be entitled in that order; and failing all these the next nearest of kin according to the local English Law shall be entitled. Preference in the grant of such letters of administration shall be given to male over female relationship of the same degree; and the children of the husband by other wives shall not be considered as next of kin of the deceased wife.[15]

The investment of trust funds is governed in Singapore by the Trustees Ordinance but in *Re Alkaff's Settlements*[16] it was said that "the Court would be loathe to enforce upon a good Mohammedan any investment which will compel the acceptance by him of interest". In that case the Court in view of this and having regard to the provisions of the settlement providing for the investment of accumulations of income during minority in the purchase of lands and houses, directed investment of the proceeds of sale in immoveable property in Singapore subject to the trusts of the settlement.

GENERAL INHERITANCE

The right of succession is founded on four causes:-(1) Kinship; (2) Marriage; (3) Patronage (*Walā*) in the sense that the patron is heir to the enfranchised slave but not *vice versa;* and finally, (4) Religion, for in default of heirs of the first three

15. Singapore Muslims Ordinance, 1957, s.45 and 46.
16. (1928) *S.S.L.R.* 188.

kinds the inheritance passes to the general body of Muslims as represented by the *Bayt ul-Māl.* Legitimate male heirs are ten in number: (1) son; (2) son's son how low so ever; (3) the father; (4) father's father and other agnate ancestors; (5) brother; (6) brother's son; (7) father's whole brother and father's half brother on father's side; (8) the son of father's brother; (9) the husband; and (10) the patron. Legitimate female heirs are seven in number: (1) daughter; (2) son's daughter how low so ever; (3) mother; (4) grandmother and other true female ascendants; (5) sister; (6) wife and (7) the patroness. In a case where all the male heirs mentioned are in existence, the father, sons and wife share the succession to the exclusion of all others. If all the heiresses appear, the daughters, son's daughters, mother, whole sisters and wives alone share the estate. Finally should all possible male and female inheritors claim their portion, then the succession belongs exclusively to the father, mother, sons, daughters and husband or wives. The primitive doctrine of the *Shāfi'ī* School did not allow cognates a share in the succession and the heirs indicated in the *Qur'ān* could never obtain more than their determinate portions. Consequently in default of persons legally entitled to it, the remainder of the inheritance escheated to the State or *Bayt ul-Māl.* Later authorities have introduced the rule that in all cases where public money is not administered in accordance with the law, the heirs indicated in the *Qur'ān,* with the exception of husband and wife, may after receiving their respective portions and in default of other legitimate inheritors, demand that the remainder of the estate should be proportionately distributed amongst them. The State or *Bayt ul-Māl* is even excluded by cognates, if the deceased has left no legitimate heir. By cognates are meant all relatives except those already mentioned as legitimate heirs. They are of ten different kinds of relationship: (1) mother's father and in general any ancestor or ancestress who is not a legitimate heir or heiress; (2) daughter's children; (3) any brother's daughters; (4) sister's children; (5) uterine brother's sons; (6) father's uterine brother; (7) father's brother's daughters; (8) father's sisters; (9) mother's brothers and sisters; and (10) relatives of all these persons male and female. The "Sharers" are allotted

the shares fixed by the Holy *Qur'ān*. If the Sharers exhaust the inheritance, the agnates (*'Aṣabah*) receive nothing by virtue of their right of agnation; but otherwise they can claim what remains of the estate, after deducting these portions. There is no succession between a Muslim and a non-Muslim; and an apostate cannot inherit or be inherited from.[17]

In all parts of Malaya (with the exception of those parts of Negri Sembilan and Melaka where the *'ādat perpateh* or *'ādat temenggong* is followed to the exclusion of the Muslim Law) the Muslim rules of inheritance on intestacy are followed. These rules are however subject to the following modifications in the States of Malaya:—

(a) on the death of a peasant his widow is entitled to a special share in his estate, as her share in *harta sapencharian* unless provision has been made for her *inter vivos* by registering land in her name. If the deceased had no children and the estate is small she may take the whole estate; in other cases she takes a half or less according to circumstances;

(b) the residue of the estate is distributed according to Muslim Law but, in as much as the widow's special share is discretionary, her one-eighth or one-quarter share can and should be taken into consideration in assessing the special share.[18]

In Selangor, Kelantan, Trengganu and Pahang the Court of the *Chief Kathi* and Courts of *Kathis* are given power to hear and determine actions and proceedings relating to (a) the division of, and claims to, *sapencharian* property; and (b) the determination of the persons entitled to share in the estate of a Muslim deceased person and of the shares to which such persons are respectively entitled; but such actions and proceedings can also be brought in the ordinary courts.[19] In the other States of Malaya and in Singapore actions relating to the dis-

17. Nawawī, *op. cit.*, p.246f.
18. Taylor, "Inheritance in Negri Sembilan", p.50.
19. Selangor Administration of Muslim Law Enactment, 1952, s.45 (3); Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.48 (1); Trengganu Administration of Islamic Law Enactment, 1955, s.25 (1); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.37 (3).

tribution of the estate of a deceased can be heard and determined in the ordinary civil courts.

The rule as to *harta sapencharian* originated as a rule of the Malay custom. In the early days when ownership of land rested in bare occupation without any registration of title neither the executive nor the courts were often concerned with disputed succession to small holdings. When land was registered, matters of succession to such land came to be dealt with by Collectors, who in general accepted the division agreed on by the next of kin. Where there were disputes the matter was dealt with according to the Muslim Law as varied by local custom. The local *Kathi* who was called to give expert evidence usually declared the *'ādat,* that is *harta sapencharian,* as a rule of Muslim Law and in some such cases this property was described as *harta sharikat* or partnership property. It is clear from the resolutions of the Perak State Council in 1907 and the Pahang Committee of Chiefs and Kathis in 1930 that this rule is a rule of Malay custom. It is in fact the rule *chari bahagi* (earnings are divided) of the *'ādat perpateh.*[20]

In *Hujah Lijah* v. *Fatimah*[21] it was held that in Kelantan a suit for *harta sapencharian* can be brought as an ordinary suit in the High Court. The claim by a widow for *harta sapencharian* is not a claim for a share of the deceased's estate, but a claim adverse to the estate for property of the claimant held in the name of the deceased; this branch of the Malay *'ādat* is recognised throughout Kelantan among peasant landowners and the share usually considered to belong to the widow is one half, apart from any question of her claim to a distributive share in the deceased's estate. The claim to *harta sapencharian* arises most frequently in practice in applications for summary distribution of small estates and the practice is to regard such a claim as one of the factors to be considered in attempting to formulate an agreed scheme of distribution and such agreed schemes very often give full effect to the claim.

In the Selangor case of *Haji Ramah* v. *Alpha*[22] it was held that the widow was entitled to one quarter of the value of land

20. Taylor, *op. cit.*, p.49.
21. (1950) 16 *M.L.J.* 63.
22. (1924) 4 *F.M.S.L.R.* 179.

which she had helped to cultivate as *upah* or compensation for work done in addition to her quarter share in the estate.

The Perak State Council Minute of 1907 refers only to claims to *harta sapencharian* by a divorced wife and Raja Sir Chulan expressed the view that the widow gets only what she is entitled to under the law of inheritance in case of her husband's death losing her claim to what she had earned during marriage.[23] In *Re Elang deceased*[24] it was held that in the Perak River *kampongs* the property acquired during a marriage is divided between the parties on divorce or on the death of either spouse. If the wife assists in the actual cultivation she can claim half the property, otherwise her share is smaller.

In Pahang the Committee of Chiefs and Kathis gave their opinion in 1930 that a woman can claim *harta sapencharian* on divorce or on the death of her husband.[25]

In Penang and Melaka it is provided that the estate and effects of a Muslim dying intestate after 1st January, 1924, shall be administered according to the Muslim Law, except in so far as such law is opposed to any local custom which prior to 1st January, 1924 had the force of law; but any next of kin who is not a Muslim shall be entitled to share in the distribution as though he were a Muslim. In applications for probate or letters of administration in the case of a deceased Muslim, the petitioner is required to state the School of Law to which the deceased belongs. Questions of succession and inheritance according to the Muslim Law are dealt with by the ordinary courts, and it is provided that in deciding such questions the Court shall be at liberty to accept as proof of the Muslim Law any definite statements on the Muslim Law in all or any of certain specified books, among which is the translation of Nawawī's *Minhāj aṭ-Ṭālibīn*.[26]

In Singapore it is similarly provided that the estate and effects of a Muslim dying intestate after the 1st January, 1924, shall be administered according to the Muslim Law, except in

23. Taylor, "Malay Family Law", p.41-44.
24. *Ibid.*, p.48.
25. *Ibid.*, p.73.
26. Muslims Ordinance (Cap.57 of the 1936 Edition of the *Laws of the Straits Settlements*), s.27-29.

so far as such law is opposed to any local custom which prior to the 1st January, 1924, had the force of law. In applications for probate or letters of administration the petition shall in the case of a deceased Muslim state the School of Law to which the deceased belongs. Questions of succession and inheritance according to the Muslim Law are dealt with in the ordinary courts and it is provided that in deciding such questions the court shall be at liberty to accept as proof of the Muslim Law any definite statement on the Muslim Law in all or any of certain specified books, among which is the translation of Nawawī's *Minhāj aṭ-Ṭālibīn*.[27]

It has been held in Singapore in the case of *Syed Ibrahim Alsagoff* v. *Attorney-General*[28] that the Muslim rules of succession to the estate of an enfranchised slave are applicable in Singapore. It was held that a person who frees a slave retains over him the right of patronage; and a patron of an enfranchised slave has a right to succeed as an agnate to the estate of the deceased enfranchised slave, and on the death of the patron his agnates succeed to his right. The property of an enfranchised slave in the absence of his wife, children or other relatives, is therefore inherited by the son of the patron and does not escheat or fall to the State as *bona vacantia*.

In the case of *Re Mutchilim*[29] it was held that where a deceased Muslim belonging to the *Shāfi'ī* School of Law died leaving a widow but no next of kin the widow is only entitled to one-quarter share of the estate and the doctrine of *radd* or return does not apply to make her entitled to the balance of the estate; the remaining three-quarter share will escheat to the State.

In Negri Sembilan it was recognised from the earliest days that the law of inheritance was *'ādat*. In the tribal areas of Kuala Pilah, Jelebu and Tampin (including Rembau and Tampin

27. Singapore Muslims Ordinance, 1957, s.42-44, as amended by the Muslims (Amendment) Ordinance, 1960.
28. (1948) 14 *M.L.J.* 155.
29. (1960) 26 *M.L.J.* 25; according to the doctrine of *radd*, if there is a residue left after the claims of the Sharers have been satisfied and there is no one else entitled to take the residue, the residue reverts to the Sharers in proportion to their shares. In the early history of this doctrine neither the husband nor the wife was entitled to take by return, but a later development in the *Ḥanafī* School in India has given such a right also to the surviving spouse.

proper) the *'ādat* that is followed is the *'ādat perpateh*. The fundamental principle of this *'ādat* is tribal — the social unit is not the family but the tribe, and therefore all rules affecting persons tend to maintain the integrity of the tribe, and all rules affecting property are designed to conserve the property in and for the tribe. The tribe is the unit and it is matrilineal and exogamous. The main object of the *'ādat* is to provide for the continuance of the tribe through its female members and to prevent alienation of property so that there will always be sufficient to provide maintenance for the women through whom alone the tribe can be continued. From the principle that the matrilineal tribe is the social unit, four cardinal principles of distribution have been deduced:—

(a) all property vests in the tribe, not in the individual;
(b) acquired property, once inherited becomes ancestral;
(c) all ancestral property vests in the female members of the tribe; and
(d) all ancestral property is strictly entailed, entrusted in tail female.[30]

All ancestral property belongs to the tribe; it vests in the female members but they hold it as trustees for their tribe rather than as owners. A person may acquire property, and such property is not entailed in the first instance, unless of his own volition he expressly entails it, and he is at liberty to dispose of it during life, but the moment he dies it becomes entailed and he therefore cannot dispose of it by will (*Re Dato Ngiang Kulop Kidal deceased*).[31]

From the basic principle that property is tribal rather than personal and that the man passes into his wife's tribe in marriage, it follows that all property owned by a married pair is joint property and that it belongs to the tribe of the wife so long as the marriage subsists.

Funeral expenses are a matter of grave importance in the *'ādat*. They include not only the actual burial charges but also the expenses of the last illness and the cost of the customary feasts which are held on the third, seventh, fourteenth, fortieth

30. Taylor, "Customary Law of Rembau", p.92.
31. *Ibid.*, p.92.

and hundredth days. Funeral expenses are chargeable:—

(a) in the case of a child or unmarried girl — on the joint property of the parents;

(b) in the case of an unmarried man — on his personal acquired property or, if he had none, on his mother's or sister's ancestral property;

(c) in the case of a married person of either sex — on the joint property of the marriage, primarily on moveable assets or, failing that, on land;

(d) in the case of divorced or widowed persons — on the shares or property acquired before, or during, or after marriage, and, failing that, on the ancestral property of the mother's family.[32]

It is a rule that where any individual leaves acquired property the funeral expenses must, if practicable, be limited to that amount; only in the last resort may recourse be had to the ancestral property. An aged woman, however, may distribute her property among her daughters or nieces, reserving only a portion by way of *kapan*: in such cases her funeral expenses are chargeable on the property so allocated, and a relative who pays them is entitled to the *kapan* in addition to her ordinary share (*Re Miut*).[33]

Funeral expenses are by custom an actual encumbrance on the appropriate property; if it appears that a wrong party has paid them, an order for transmission may be made conditional on the repayment of those expenses.[34]

The *'ādat*[35] lays down certain fundamental rules regarding distribution of property, moveable and immoveable, in the event of death or divorce. Ancestral property devolves on the daughters of the deceased in equal shares. The share of the deceased daughter, if she predeceased her mother, devolves on her female descendants. In the absence of direct female descendants, ancestral property devolves on the female descendants of the nearest common ancestress in equal shares, *per stirpes,* but subject

32. *Ibid.*, p.10.
33. *Ibid.*, p.219.
34. *Ibid.*, p.11.
35. Lokman Yusof, "Islām & 'Ādat — as seen in Land Inheritance", p.17-18.

to the rights, if any, of the sons and brothers of the deceased to statutory life-occupancy.

The various degrees of *kadimship* or relationship among the heirs in the family are termed *sanak ibu* if the mothers were sisters, or *sanak dato'* if the grandmothers were sisters, or *sanak moyang* if the great-grandmothers were sisters. These *kadims* or *wariths* become the indirect heirs to a deceased's customary estate in the event of failure of direct heirs, subject to the rule that the nearer in degree excludes the more distant. In default of both direct and indirect heirs the land will be auctioned, and it will be a condition of the sale that members of the same tribe should have priority to bid at the auction before it is thrown open to members of other tribes. The proceeds of the sale will go to the deceased's son or sons or her maternal brothers or uncles as the case may be.

Life-occupancy is granted to the deceased's male issues or to her maternal brothers in default of direct customary heirs: the rights of the sons prevail over those of their maternal uncles. Life-occupancy permits the occupants to enjoy the produce of the land during their lifetime. Generally the life-occupants are seldom found living on the land or cultivating the *sawah* land or rice-field. Nonetheless the bestowal of life-occupancy is normally insisted upon to serve as an assurance and a safeguard against failure on the part of the female *wariths* to maintain or look after a destitute or a divorced relative.

The fundamental principles of division of property among the members of the tribes are:—

Pembawa, kembali;
Dapatan, tinggal;
Charian, bagi;
Mati laki, tinggal ka-bini;
Mati bini, tinggal ka-laki

that is to say, what is brought by the man to the woman's house at the time of marriage goes back with him on divorce, or to his *wariths* on his death; that which is found in the possession of the wife at the time of the marriage remains with her on divorce or it goes to her customary heirs on her death; that which is acquired during the period of wedlock is to be equally divided between them on divorce and on the death of the husband it

goes to the wife, and *vice-versa,* provided there are no issues between the two.

Harta charian bujang or property acquired by a man while he is still single devolves on the nearest female relatives of the deceased. Property given to a son by his parents ranks as *charian bujang,* and becomes *harta pembawa* on his marriage and this reverts to his *wariths* on his death. Similarly a gift to a married man by his family also ranks as *pembawa* and not a *charian* of the marriage.

Both *harta pembawa* and *harta dapatan* must be declared before the elders at the time of the marriage, and in the event of death, claims for the return of *harta pembawa* must be made on the 100th day funeral feast.

Difficulties often arise with regard to the separate estates of the spouses, that is the *harta pembawa* of the husband and the *harta dapatan* of the wife. These are inherited by the nearest *wariths* or *kadims* of the respective spouse in his or her tribe. Complications may occur if the deceased has been married twice or more and acquired some property during one marriage and some during another. Property acquired in the first marriage may be *harta pembawa* or *harta dapatan* of the second marriage. If *harta pembawa* increases in value during marriage, the increase or *untong* ranks as *charian laki-bini.* Similarly, if *harta dapatan,* say, a buffalo, has a natural increase during the married period, the increase also ranks as *charian laki-bini.* Many complicated and vexed problems may arise regarding devolution and distribution of property following death or divorce, but however difficult or insoluble the problems may appear the basic principles for dealing with them remain unchanged, namely: *pembawa kembali; charian bagi; dapatan tinggal.*

The basic principle is that all the ancestral property of the family is to be divided equally *per stirpes* — the property is therefore distributed equally to direct female descendants *per stirpes* — but due regard must be had to any partial distribution which may already have been made. The rule applies only to the proper share of the proprietor, so that if the deceased was registered as the holder of all land derived from her mother

and left one sister, the sister would be entitled to half, and the daughters of the deceased the other half in equal shares.

Acquired property is divided into two classes according to its origin — *charian bujang* which plainly belongs to one tribe and that acquired by the joint efforts of a married pair *charian laki-bini* in which both the tribes are interested. *Harta pembawa* means the personal estate of a married man, the property brought by him to his wife's tribe into which he passes on marriage; it may include property of three kinds, *viz.*, his own earnings as a bachelor (*charian bujang*), his share of the earnings of any former marriage, and any ancestral property of his own family in which he has an interest. *Harta dapatan* means the separate estate of a married woman and also includes three kinds of property, *viz.*, her own acquisitions as a spinster, divorcee or widow (*charian bujang* or *charian janda*), her share of the earnings of a former marriage and her ancestral property. *Charian bujang* thus becomes *harta pembawa* or *dapatan* on marriage and *charian laki-bini* of the marriage becomes *harta pembawa* or *dapatan* of a subsequent marriage.

The rules for the distribution on death of acquired property are as follows:—

(1) The *harta dapatan* or *pembawa* reverts on death to the deceased, that is the nearest female relative in the tribe of the deceased, (in the case of a man his sister, in the case of a woman her daughter).

(2) The *charian laki-bini* is apportioned:—

  (a) on the death of either spouse without issue of the marriage the whole remains to the survivor;

  (b) on the death of the husband leaving issue — the whole remains to the widow and issue;

  (c) on the death of the wife leaving issue, it is divided between the widower and the issue, but not necessarily equally; the principle of the division, by agreement or otherwise, is to make provision for the issue.[36]

In the non-tribal parts of Negri Sembilan (Seremban and Port Dickson), the tribal organization had ceased to be effective

36. Taylor, "Customary Law of Rembau", p.14f.

by 1874, and it would appear that the practice adopted was the *'ādat temenggong*. In general the distribution follows a family settlement or *pakat* but where there is dispute the distribution tends to follow the rules laid down by the *'ādat temenggong* (which is not as definite as but tends to follow the *'ādat perpateh*), though there appears to be a tendency to follow the rules of Muslim Law.[37]

The Small Estates (Distribution) Ordinance, 1955, provides that in making any distribution order where the deceased is a member of a tribe in respect of land in the districts of Jelebu, Kuala Pilah, Rembau and Tampin in Negri Sembilan, the Collector shall apply the following principles:—

(a) if any land appears to be ancestral customary land, though not registered as such, it will be transmitted to the customary heiress, subject if necessary to life occupancy;

(b) where any property is found as a fact to be *harta pembawa* or *harta dapatan* it may be transmitted to the customary heiress of the deceased subject to the right of any other person to a share or charge over that property according to the principle of *untong*, where applicable, and on registration of the order the Collector may, if necessary add the words "Customary Land" to any title affected, but he shall not be bound to do so;

(c) where any property is found as a fact to be *harta charian bujang* or *harta charian laki-bini* it may be transmitted according to the custom of the *luak*, and on registration of the order the Collector may, if necessary, add the words "Customary Land" to any title affected but he shall not be bound to do so;

(d) the Collector shall give effect to customary adoptions where they are satisfactorily proved;

(e) in all cases regard shall be had to any partial distribution of property made or agreed upon in the lifetime of the deceased and to the existence of any property

37. Taylor, "Inheritance in Negri Sembilan", p.80.

which is affected by such distribution or agreement though not part of the estate;

(f) wherever practicable the Collector shall avoid transmitting undivided shares in any one lot to members of different tribes;

(g) where funeral expenses are by the custom chargeable on specific property and the party on whom the property ought to devolve has not paid them, the Collector may require such party to pay the funeral expenses as a condition of inheriting that property or may by the order charge that property with the amount of the funeral expenses.[38]

WILLS

It is recommended by the *Sunnah* that every person should make a will and appoint testamentary executors to see to the payment of the testator's debts, the payment of legacies and the guardianship of his infant children. The capacity to make a will is accorded by law to everyone without distinction of sex, who is adult, sane and free; and even to a person otherwise incapable by reason of imbecility. Such capacity is not possessed by a madman, by a person in faint nor a minor though according to the *Minhāj aṭ-Ṭālibīn* one jurist maintains that this incapacity does not extend to a minor who has attained the age of discernment. Testamentary dispositions for the public benefit must have some lawful object, while those in favour of one or more individuals are permitted only on condition that the person designated is capable of exercising a right of property. Thus a legacy in favour of a child conceived has effect only upon the double condition, that such child is born alive and that the conception has already taken place at the moment of disposition. Testamentary dispositions in favour of an animal are absolutely void whether an intention was expressed to constitute the animal a proprietor or whether nothing is expressed as to that; but when there is merely a declaration that the legacy is to be used so that the animal may never be in want of necessary nourishment, the traditional doctrine admits its validity. A legacy for the upkeep of a *Masjid* is legal and even a will in favour of a

38. Small Estates (Distribution) Enactment, 1955 (No.34 of 1955), s.20-25.

Masjid without adding anything else; however, in this case the disposition is supposed to have been made not only for the upkeep but also for the embellishment of the building. A legacy may be left to a non-Muslim whether or not the subject of a Muslim sovereign and even to an apostate.[39]

A legacy in favour of a legitimate heir can only take effect with the unanimous consent of the co-heirs pronounced after the succession has been opened. This consent is necessary even if the co-heirs renounce that succession and it cannot be given before the death of the testator, as the disposition is only rendered invalid by the existence of co-heirs at the time of the death and this cannot be known before that event. A testamentary disposition leaving each inheritor his legitimate portion is void but there is no objection to leaving one of the heirs a specific object of the same value as the portion he can legally claim, but the disposition must be approved by the co-heirs.[40]

Testamentary dispositions may not exceed a third of the estate and those made in contravention of this rule of the law may be reduced to the portion which may be disposed of, upon the application of the heir or heirs. If the heir declares his approval of the disposition it is effective whatever its amount may be; but according to one jurist it is then considered as a mere donation upon the part of the heir, the legacy itself remaining void for as much as exceeds the third. The reduction is carried out by forming a lump total of all the property existing on the day of the death of the deceased or according to some jurists on the day the disposition was made. A person who becomes so ill as to be in danger of death may no longer dispose of his property for anything to a greater amount than one third but should he against all hope recover these dispositions cannot be invalidated. A sick person, not in danger, may freely dispose of his property; and even if he unexpectedly dies during this sickness his dispositions take their full legal effect. This is not the case where death is caused by the malady from which he suffered, even though it was not considered of a dangerous nature, for then it is shown to have been really dangerous. The following circumstances are re-

39. Nawawī, *op.cit.*, p.259f.
40. *Ibid.*, p.260.

garded by the *Shāfi'ī* School as analogous to a dangerous malady:— being made a prisoner of war by non-Muslims who do not usually give quarter; being in desperate battle between two armies of equal strength; being condemned to death or to be stoned to death; being in a vessel during a storm or a rough sea; a woman in grievous pangs of child-birth before or after child-birth, so long as the foetus has not severed the membrane.[41]

Testamentary dispositions are expressed thus: "I leave to him such or such a thing", "Remit it to him", "Give it to him after my death", "I make it his", "It will be his after my death", but the mere words "It is his", constitute an admission and not a legacy. On the other hand where one says: "It is his in my succession" this is a valid testamentary disposition. A testamentary disposition can also be expressed in a way which though not explicit still indicates the last wish of the deceased as for example, by giving witnesses a writing that contains it. A legacy in favour of a category of persons as "the poor" does not require acceptance but becomes irrevocable by decease; while on the other hand a legacy in favour of one or more particular persons must be formally accepted by them. The acceptance or renunciation of a legacy cannot take place during the testator's lifetime; and it is not even strictly necessary that the legatee should declare his decision immediately after the decease. Moreover a legacy lapses if the legatee predeceases the testator. If he dies after the testator but before accepting the legacy the right of acceptance passes to his heirs. As to the question at what period the legacy becomes the property of the legatee some jurists consider that the legatee becomes owner from the death of the testator, under the condition that he accepts the legacy; others maintain the contrary, that is that he becomes owner only upon acceptance. The better view as stated in the *Tuḥfah* is that the legacy becomes the property of the legatee only when he accepts it.[42]

A testamentary disposition may be wholly or partly revoked. This may be done verbally or by the fact of having disposed of the object bequeathed by sale, dower, gift or security, or by an

41. *Ibid.*, p.260f.
42. *Ibid.*, p.262f.

injunction to the heir to dispose of the thing bequeathed or by an authorisation to sell the thing bequeathed.[43]

The executor appointed should be a Muslim, adult, sane, free, of irreproachable character and a fit person to perform the duties entrusted to him. The form of words by which an executor may be appointed are: "I name you my testamentary executor", "I entrust my affairs to you" and so on but there is no objection to adding a term or condition. It is necessary to define with precision the duty an executor is charged with; for if one merely says "I name you my executor" the disposition is null and void. The nomination of testamentary executor has no effect until the duty is accepted; and this acceptance cannot take place in the testator's lifetime.[44]

Where the testator has named two executors, neither can do anything without the other's concurrence, unless the power has been formally given to him.[45] This rule is superseded in the States of Malaya by the provisions of the Probate and Administration Ordinance, 1959. Section 6 of the Probate and Administration Ordinance, 1959 provides that where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the others or other to prove, all the powers which are by law conferred on the personal representative may be exercised by the proving executor or executors for the time being and shall be as effectual as if all the persons named as executors had concurred therein.[46]

According to the *Shāfi'ī* School of Law, an executor cannot by his will appoint another executor to replace him after his death unless such power has been given to him by the original testator; but the testator can appoint two executors to succeed one another as for example by the words: "I make you my testamentary executor until the majority of my son". A person cannot appoint an executor to be the guardian of his own children during the lifetime of their father's father, who is the lawful guardian if he is capable of performing his duty. It is forbidden to give power to an executor to conclude a contract of marriage

43. *Ibid.*, p.266f.
44. *Ibid.*, p.267.
45. *Ibid.*, p.268.
46. Probate and Administration Ordinance, 1959 (No.35 of 1959), s.6.

for the deceased's son during his minority or to represent the deceased's daughter as her guardian in a contract of marriage.[47]

In Selangor, Kelantan, Trengganu and Pahang the Court of the *Chief Kathi* and Courts of a *Kathi* and in Perlis the Court of a *Kathi* and *Assistant Kathi* are given power to hear and determine all actions and proceedings in which the parties profess the Muslim religion and which relate to wills or death-bed gifts of a deceased Muslim;[48] but such actions and proceedings can also be heard and determined in the ordinary courts. In the other States of Malaya and in Singapore actions relating to wills and death-bed gifts may be heard and determined in the ordinary courts.

The Wills Ordinance, 1959 of the States of Malaya does not apply to Muslims[49] but in Singapore the Wills Ordinance (Cap. 35) applies to Muslims and the Muslims Ordinance, 1957, provides that the provisions of the Ordinance shall be without prejudice to the Probate and Administration Ordinance and the Wills Ordinance.[50] Thus the capacity of a person to make a will, the form of a will and the effect of marriage on wills are based in Singapore on the English principles embodied in the Wills Ordinance. Thus it has been held in *Re Shaik Abubakar bin Mohammed Lajam*[51] that so far as concerns immovable property in Singapore the will of an Arab Muslim is revoked by his subsequent marriage. This case has however not been followed in *Re Syed Hassan bin Abdullah Aljofri*[52] where it was held that a will of a testator not domiciled in Singapore is not revoked on a subsequent marriage and may be operated even in regard to land in Singapore.

In the Malay States the rule of Muslim Law under which

47. Nawawī, *op. cit.*, p.267-268.
48. Selangor Administration of Muslim Law Enactment, 1952, s.45 (3); Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.48 (1); Trengganu Administration of Islamic Law Enactment, 1955, s.25 (1); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.37 (3); Perlis Administration of Muslim Law Enactment, 1963, s.11 (4).
49. Wills Ordinance (No.38 of 1959), s.2 (2).
50. Singapore Wills Ordinance (Cap. 35 of 1955); Muslims Ordinance (No. 25 of 1957), s. 47; Probation and Administration Ordinance (Cap. 17 of 1955).
51. (1935) 4 *M.L.J.* 137.
52. (1949) 15 *M.L.J.* 198.

a man has the power to dispose by will of not more than one-third of his property belonging to him at the time of death, is followed (*Shaik Abdul Latif* v. *Shaik Elias Bux*).[53]

The will of a Muslim which attempts to prefer one heir by giving him a bigger share of the estate than he is entitled to by Muslim Law is wholly invalid as to such bequest without the consent of the other heirs (*Siti* v. *Mohamed Nor*).[54]

In *Re Ismail bin Rentah deceased*[55] a member of the Malay Public Servants' Co-operative Society Ltd. of Seremban nominated his daughter to receive his share or interest in the Society in the event of his death. It was held that the letter of nomination was not a gift *inter vivos* but at most a gift *mortis causa* which under Muslim Law is treated as a disposition by will and as the other heirs did not consent to the bequest it was inoperative. The nomination therefore did not confer a right on the nominee to take beneficially and the money from the Society fell to be divided among all the beneficiaries according to Muslim Law.

A testator cannot delay the vesting of his estate in his heirs. A direction in the will of a Muslim instructing the executors to deal with his estate for ten years and then distribute it is invalid. (*Saeda* v. *Haji Abdul Rahman*).[56]

The rule of the *'ādat* is stricter than that of Muslim Law. A person cannot dispose of his property by will (*Re Dato Ngiang Kulop Kidal deceased*)[57] and an agreement made during life to vary the succession is void. (*Hassan* v. *Romit*).[58]

In Penang and Melaka (except in regard to Melaka Customary Land) until the coming into force of the Federation Wills Ordinance, 1959, and in Singapore until the coming into force of the Muslims Ordinance, 1957, the law was that a Muslim may by will alienate the whole of his property and such alienation will be good though contrary to Muslim Law (*In the goods of Abdullah*).[59] Melaka Customary Land is not capable of devise by law and the land descends on the death of the mother

53. (1915) 1 *F.M.S.L.R.* 204.
54. (1928) 6 *F.M.S.L.R.* 135.
55. (1940) 9 *M.L.J.* 98.
56. (1918) 1 *F.M.S.L.R.* 352.
57. Taylor, "Customary Law of Rembau", p.92.
58. *Ibid.*, p.63.
59. (1835) 2 *Kyshe* Ecc. 8.

to the mother's heirs according to Muslim Law by virtue of section 11 of the Malacca Lands Customary Rights Ordinance.[60] Any attempt to devise such land is nugatory (*Abdul Wahab bin Abdul Rauf* v. *Haji Wahab*[61]).

Under the provisions of the Muslims Ordinance, 1957, in Singapore, where a Muslim dies domiciled in Singapore leaving a will and leaving any person who under the School of Muslim Law to which the deceased belonged at the time of his death is entitled either to a share in the estate of the testator or to the residue or any part thereof of the estate of the testator, then if the Court on application by or on behalf of any such person finds that the will does not make provision or sufficient provision for that person in accordance with the School of Muslim Law to which the deceased belonged at the date of his death, the Court shall make an order, not inconsistent with such School of Law, varying the will of the testator in order that provision or sufficient provision in accordance with such School of Law shall be made out of the testator's net estate for that person; in determining in what way and as from what date provision for any person ought to be made by such order the Court shall as far as possible, ensure that the order does not necessitate a realization that would be improvident having regard to the nature of the testator's estate and the interest of the heirs as a whole.[62]

The rules of private international law as to the validity of testamentary dispositions are followed in Malaya. Thus in *Re M. Mohamed Haniffa deceased*[63] it was held that as the deceased was domiciled in India, the succession to his estate must be regulated by the law of his domicile, which was Muslim Law and therefore the rules of Muslim Law that a testator could only validly dispose by will of one-third of his property and that a bequest to one heir was invalid unless the other heirs agreed, were followed and applied. In the case of *Re Syed Shaik Alkaff*[64] it was held the general principle that the *lex situs* should govern trusts of immovable property was not displaced by the notional

60. Cap.125 of *Laws of Straits Settlements*, 1936.
61. (1940) 9 *M.L.J.* 263.
62. Muslims Ordinance, 1957, s.41.
63. (1940) 9 *M.L.J.* 286.
64. (1923) 2 Malayan Cases 38; but see *Re Syed Hassan bin Abdullah Aljofri* (1949) *M.L.J.* 198.

conversion directed by the testator and therefore the law applicable in the case of trusts of immovable property in Singapore is the law of Singapore.

CUSTOMARY LAND TENURE[65]

The basic principle of *'ādat perpateh* relating to the tenure of *harta pesaka* is that property vests in the female members of the tribe, entail female. The individual holder of the property at any time, holds it on behalf of the tribe; the right is transmissible but not alienable. Under strict customary law a male cannot acquire any proprietary interest in *harta pesaka* except the interest of beneficial life occupancy in the event of failure of direct customary heirs, but the reversionary interests remain in the nearest female relatives. The introduction of the Torrens System of land registration introduced a revolutionary change in the concept and practice of customary land tenure. The occupant of tribal land has now become the registered proprietor of land held under entries in the *mukim* registers; the area is surveyed by the Survey Department; she possesses a document of title; dealings have to be executed in statutory forms, duly attested, and the instruments have to be presented and registered under the provisions of the Land Code. She is responsible for the payment of the quit rent and for the observances of the conditions in the title either expressed or implied. The result is that registered proprietors are asserting their individual rights of possession to the exclusion of other members of the tribe. This is indeed a departure from the old concept that the land is the property of the tribal community, and that the right of the individual extends only to its use. There is no doubt that land registration gives the registered proprietor a greater sense of security regarding land tenure and a greater incentive to practise good husbandry; but at the same time it tends to weaken the very basis on which the *'ādat* rests, and may in the end lead to the disintegration of the *'ādat*.

Until the passing of the Customary Tenure Enactment 1909, there was no restriction in law to stop dealings in tribal or ancestral lands, although strictly under the *'ādat* dealings outside the tribe were forbidden. The Customary Tenure Enactment,

65. Lokman Yusof, *op.cit.*, p.14.

1909, was enacted with the express object of preventing dealings in tribal lands with those outside the tribes. The Enactment empowered the Collector to inscribe the words "Customary Land" on titles held subject to the custom. Unfortunately, this provision of the law was not systematically complied with, and there are still many titles in the *mukim* registers which are undoubtedly ancestral lands, but which have not been inscribed. Had this provision been generally followed, there would be far less dispute and litigation on transmission. In the *Luak* of Rembau, however, the fact that all titles which are derived from the Old Titles are *ipso facto* customary lands is not disputed. In Kuala Pilah the position is obscure. All titles which are derived from the old Malay grants are *prima facie* ancestral lands, but if the titles are not endorsed "Customary Land" under the provisions of the Customary Land Tenure, there would appear to be nothing to stop the registered proprietors from disposing of the lands under the provisions of the Land Code even though this practice is contrary to the *'ādat*.[66]

The Customary Tenure Enactment, 1909, was repealed and replaced by the Customary Tenure Enactment, 1926. The object of the later Enactment was to consolidate and amend the law relating to customary tenure . . . "Customary Land" is defined to mean land held by an entry in the Mukim Register which has been endorsed under the provisions of that Enactment or under those of the previous Enactment. In spite of this definition, the expression "Customary Land" continued to be ambiguous, and this ambiguity gave rise to misunderstanding and confusion of interpretation and decision. Where the titles are endorsed, no difficulty arises on the question as to whether or not the land is held subject to the custom. The endorsement on the title is in itself conclusive evidence that the land is held subject to the custom, and all dealings and transmission connected with the land are dealt with under the Customary Tenure Enactment. Where the titles are not so endorsed, the procedure regarding the distribution of a deceased's estate was governed by section 184(iii) of the Probate and Administration Ordinance now repealed and replaced by section 12(7) of the Small Estates

66. *Ibid.*, p.15.

(Distribution) Ordinance, 1955,[67] which requires the Collector to ascertain, in such manner as may be most appropriate, the law applicable to the devolution of the estate of the deceased, and to decide who in accordance with such law are the beneficiaries and the proportions of their respective shares and interests.[68]

In trying to find out the law or the custom having the force of law applicable to the deceased, the Collectors are often confronted with two vexed problems; firstly, how are they to find out whether or not a particular piece of land is held subject to the custom; and secondly whether the custom (*'ādat perpateh*) has the force of law applicable to the deceased. It is difficult to get two *lembagas* or *buapaks* or *besars* (who are supposed to be experts on *'ādat*) to be unanimous in their interpretation on any point raised concerning the *'ādat*; nor are members of the tribes unanimous in their preference as to whether any particular estate should be distributed according to *'ādat* or the Muslim Law of inheritance. Their choice would naturally depend on the form of distribution which would benefit them.[69]

In the case of *Re Kulop Kidal*,[70] Acton J. enunciated the principle that the *'ādat* follows the person like his own shadow. He held that a will made by a person subject to the *'ādat Rembau* is inoperative as the custom governs the devolution of estates subject to the *'ādat* to the exclusion of wills. This principle was followed in *Re Haji Pais*,[71] in which Burton J. held that the *'ādat* is a personal custom and affects the land by virtue of its ownership by persons subject to the custom. Burton J. in that case said: "If then the custom is personal and attaches to the person, it follows that there is no place for inheritance according to Mohammedan Law. It is not possible with a personal custom that certain property descends according to the custom and some according to the Mohammedan Law."

As a result of the decision in *Re Haji Pais*, the Customary Tenure Enactment, 1926 was amended in 1930 to provide as follows:—

4. (i) In the case of any land, particulars of which have been

67. No. 34 of 1955.
68. Lokman Yusof, *op. cit.*, p.15.
69. *Ibid.*, p.15.
70. Taylor, "Customary Law of Rembau", p.92.
71. Taylor, "Inheritance in Negri Sembilan", p.61.

or may hereafter be entered in any of the mukim registers of the districts of Kuala Pilah, Jelebu and Tampin in accordance with the provisions of the Land Code, 1926, or of any previous Land Enactment it shall be lawful for the Collector, at the instance of himself or of any interested party, to enquire whether or not such land is occupied subject to the custom. If he be satisfied that such land is occupied subject to the custom and that it is registered in the name of a female member of one of the tribes included in Schedule B the Collector shall add to the entry in the mukim register the words "Customary Land" and authenticate them by his signature; and the addition of such words so authenticated to any entry in the mukim register shall, subject to the result of any appeal to the Resident under section 15, be conclusive proof that the land to which such entry relates is occupied subject to the custom.

(ii) If the Collector is not satisfied that such land is occupied subject to the custom he shall record his decision to that effect and such decision shall, subject to the result of any appeal to the Resident under section 15, be conclusive proof that the land to which the entry relates is not occupied subject to the custom.

It was also provided that nothing in the Enactment shall affect the distribution of the estate, not being customary estate, of any deceased person.

The effect of this Enactment was for a time misunderstood. In *Kutai* v. *Taensah*[72] Mudie J. held the view that under the Customary Tenure Enactment, 1926, as amended in 1930, land in the customary districts must be either customary or non-customary, and that the only land which can descend according to the custom is 'customary land', namely, those which are endorsed. If they are not endorsed, then their devolution has to be according to the Mohammedan Law. This decision was followed by Pedlow J. in *Re Imah deceased*[73] and by Raja Musa J. in *Re Teriah deceased.*[74]

The position was so unsatisfactory that in the case of *Re Haji Mansur bin Duseh*[75] the Collector referred a case for the opinion of a High Court Judge and for a ruling as to what were the rules of distribution of an estate, other than ancestral land, or lands which have their titles endorsed, of deceased proprietors in the customary districts. In a lengthy judgment Cussen J. ruled that

72. (1933-34) *F.M.S.L.R.* p.304; Taylor, *op. cit.*, p.83.
73. Taylor, *op. cit.*, p.86.
74. *Ibid.*, p.90.
75. (1940) 9 *M.L.J.* 110.

the Customary Tenure Enactment, 1926 is not exhaustive of the *'ādat*. If a title has been inscribed Customary Land the *'ādat* governs succession but the converse is not true. The absence of the words "Customary Land" does not prove that the land is not occupied subject to the custom. The only conclusive proof that the land is not so occupied is a recorded finding by the Collector to that effect under section 4 of the Customary Tenure Enactment. As regards land occupied subject to the custom in respect of which the titles are not so inscribed, the customary law of succession applied. In coming to this decision, the learned Judge endorsed the earlier judgment by Burton J. in *Re Haji Pais* and he dissented from the judgment of Mudie J. in *Kutai* v. *Taensah.*

The decision of Cussen J. in *Re Haji Mansur bin Duseh* was followed by Horne J. in *Sali* v. *Achik*[76] and *Haji Hussin* v. *Maheran.*[77] In the earlier case Horne J. held that the absence of the words "Customary Land" (which means ancestral land) does not prevent devolution according to the *'ādat*. The Collector has to consider what are the rules applicable for the distribution of the estate of the deceased person and this is stated in the Distribution Enactment to be the rules of Mohammedan Law as varied by local custom. In the latter case Horne J. considered the effect of section 4 of the Customary Tenure Enactment and said:

> A decision under section 4 that the land is not "occupied subject to custom" means that the land is not at the time the decision is given "ancestral property". Such a decision is therefore "conclusive proof" that the land is "acquired property". It is open to the Collector in proceedings under the Probate and Administration Enactment to transmit the acquired property of the deceased in accordance with the personal law of the deceased. The law is the Mohammedan Law as varied by local custom. Under the Probate and Administration Enactment the Collector is concerned with the law applicable to a person. Under the Customary Tenure Enactment, section 4, he is concerned with the character of a certain kind of property *viz.* land. But under the custom it must be remembered that there is no difference between land and other property. All is property and is either acquired property, *harta charian*, or ancestral property, *harta pesaka.* There is therefore no conflict between the decision under section 4 and the decision under section 129 of the Probate and Administration Enactment.

76. (1941) *M.L.J.* 14.
77. (1946) *M.L.J.* 116.

These decisions were followed in *Anyam* v. *Intan*[78] in which Taylor J. held that under the Probate and Administration Enactment, the Collector has to distribute the estate of the deceased according to the law or custom being the form of law applicable to the deceased. Where a deceased was a member of a tribe that law is almost always the *'ādat*. The absence of words "Customary Land" in the land register does not by itself prove that the land was not occupied "subject to custom" or that it was not ancestral.

When the *'ādat* is relied on it is necessary to prove it. In a recent case dealing with *harta pembawa, Tano* v. *Ujang*[79] Callow J. in his judgment said:

> It seems right to require proof of adat before the Sharia can be set aside. Indeed, it is strange to me to find a desire to set aside the Sharia which is the law of God to every Muslim; and in this case it appears a perverted custom to deprive a widow and the children of the father's property.

In *Re Derai* v. *Ipah*[80] Pretheroe J. propounded the principle that the law of devolution applicable to Malays, who are members of the matrilineal tribes of Negri Sembilan, is the Muslim Law, except in so far as particular holdings can be proved to be subject to customary tenure, as for example if titles are endorsed Customary Land. He took the view that the custom is not law, except in so far as it is law by virtue of the Customary Tenure Enactment, because it is not certain. Therefore according to him, any person claiming to succeed to land not held under endorsed title must prove the custom on which he relies, in relation to the deceased and the tenure of the land in question.

In *Minah* v. *Haji Sali and two others*[81] the appellant, Minah appealed against the Collector's decision in ordering the distribution of her deceased husband's estate according to *Hukom Shara'*. The appellant claimed that the land was *harta charian laki-bini* and this fact was not disputed, but the Collector held that the land was not held subject to the custom because the title was not endorsed "Customary Land". He further held that since the deceased was a Muslim, his estate must devolve according to

78. (1949) 15 *M.L.J.* 72.
79. Seremban Civil Appeal No. 5 of 1949, cited in *Intisari*, Vol I, No. 4, p. 16.
80. Seremban Civil Appeal No. 6 of 1949, *ibid.*
81. Seremban Civil Appeal No. 4 of 1953, *ibid.*

the Muslim Law of inheritance. On appeal it was held by Bellamy J. that the *'ādat* must prevail over Muslim Law, and the appeal was allowed.

In *Teriah* v. *Baiyah and three others*[82] the appellant, Teriah claimed transmission of her deceased son's land to her on the ground that it was *harta pembawa.* The Collector held that the land was not held subject to the custom because the title was not endorsed, and accordingly granted Letters of Administration to the deceased's widow, Baiyah. Teriah appealed against the Collector's decision, but the appeal was dismissed by Abbott J.

In the case of *Maani* v. *Mohamed,*[83] Ismail Khan J. said:

> In the case of non-customary lands the legal position is in my view correctly set out by Cussen J. in *Re Haji Mansur bin Duseh* and followed by Horne J. in *Sali binte Haji Salleh* v. *Achik.* The general effect of these two judgments is that the distribution of such lands is governed by the personal law of the deceased, and if it is proved in a particular case or if it is generally accepted in the district that the Muslim Law of descent is varied by local custom (*'ādat*) effect should be given to such custom (*'ādat*) as the personal law of the deceased. In the case of *Sali binte Haji Salleh* v. *Achik,* it was held that the fact that the title of the land is not endorsed "customary land" does not preclude the Collector from considering the personal law of the deceased which may be the Muslim Law varied by local custom (*'ādat*). In a later case *Haji Hussin* v. *Maheran* it was held that notwithstanding a finding by the Collector under section 4 of the Customary Tenure Enactment that the land was not customary, it was still open to him to distribute the land in accordance with custom (*'ādat*).

WAKAF (WAQF) AND NAZR

Waqf (pl. *awqāf*) according to Imām Abū Yūsuf signifies the appropriation of a particular article in such a manner as subjects it to the rules of Divine property, whence the appropriators' right in it is extinguished and it becomes the property of God by the advantage of it resulting to His creatures.[84]

In order that a *waqf* can be valid the founder (*wāqif*) must be capable of declaring his wishes and must be able to dispose of his property of his own will and pleasure and the subject of

82. Seremban Civil Appeal No. 9 of 1954, *ibid.*
83. (1961) 27 *M.L.J.* 88.
84. Syed 'Āmir 'Alī, *Mohammedan Law,* Vol.I, p.195.

the *waqf* must be such as can be made use of perpetually. The subject of the dedication cannot therefore consist of foodstuffs or odoriferous plants; but with that exception the *waqf* may be of either immovable or movable property or even of things which are capable only of individual possession, but not a slave or a coat unless a particular specified one, nor one's own person nor a trained dog. The *waqf* of property held in joint tenancy is valid as of buildings or plantations upon another person's land held by the owner of the building or plantations under a lease. A *waqf* whether in favour of a certain particular person or of several individuals together, has no legal effect unless the beneficiaries could legally become proprietors of the *waqf* property. A *waqf* therefore cannot be made in favour of an infant *en ventre sa mere* or a slave by personal reference to him. A *waqf* may be made in favour of a non-Muslim subject of a Muslim ruler but not in favour of an apostate nor of a non-Muslim not subject to a Muslim ruler nor to one's self. A *waqf* is valid equally in favour of the poor as of the rich, of the learned, of *masjids,* or of schools. The intention of making a *waqf* must be formulated in explicit terms as for example "I make a *waqf* of such a thing" or "My field shall be a *waqf* in favour of such a person". The expressions "I make a *waqf*" or "I offer it to such charity" are also explicit. The same is the case with the expression "I make a sacred gift of such and such a thing" or "endow it" or "it shall not be sold or given to another person". On the other hand the expression "I give" without any further qualification cannot be considered explicit even if the intention is to make a *waqf;* and it is only in the case of a *waqf* not in favour of one or more individuals but in favour of a class of people or of the public that this expression accompanied by intention is regarded as explicit. The expressions "I make such an object a sacred object" or "I wish that it should remain eternally in that state" are not explicit; but the words "I destine such a property for the purpose of a *masjid*" suffice to make the place consecrated to worship. A *waqf* in favour of a certain and particular person is not complete without his acceptance which acceptance can in no case follow a previous refusal. A *waqf* made in these terms "I constitute this my land *waqf* for the term of the year" is void

but if the words used are "I make a *waqf* in favour of my children or in favour of so and so and after him of his descendants" without adding anything else the *waqf* remains intact even after extinction of the family. The usufruct of the *waqf* then goes to the nearest relative of the founder when the purpose fails and the beneficiaries designated by him have become extinct.[85]

According to the *Shāfi'ī* School a *waqf* made without designating an original beneficiary capable of enjoying it immediately is void, as for example a *waqf* made in the following terms "I make a *waqf* in favour of the child I may have"; on the other hand it recognises the validity of a *waqf* where one of the intermediate beneficiaries does not exist as for example where it is said "I make a *waqf* in favour of my children; and if I have none then in favour of a person not designated, and after that in favour of the poor". A *waqf* that has no object is invalid nor can a *waqf* be made dependent upon a condition which may never occur as for example "I make a *waqf* on condition that Zayd should come". Conditions imposed by the *waqf* must be observed faithfully, as for example, if he has made a condition that the endowed property shall not be let out or that a *masjid* should be specially dedicated to a particular persuasion, such as that of *Shāfi'ī;* in the latter case the members of this School alone shall be entitled to share in the benefit of the *waqf* and this rule applies equally to the founding of a school or of a hostelry. In the case of a *waqf* in favour of two persons and subsequently in favour of the poor at the death of one of these his portion of the usufruct reverts to the other and not to the poor who only profit thereby after the death of both.[86]

Among the *Ḥanafī* jurists Muḥammad ibn al-Ḥasan ash-Shaybānī insisted that even a family *waqf* could not be validly created without an explicit mention of the poor or some other charity of a permanent character, as its ultimate beneficiary. Abū Yūsuf on the other hand made no such stipulation but maintained that the very use of the word *waqf* must be regarded as a sufficient implication of such perpetuity, in the absence of any provision inconsistent with this presumption, and as an adequate

85. Nawawī, *op. cit.*, p.230f; Syed 'Āmir 'Alī. *op. cit.*, p.544f.
86. Nawawī *op. cit.*, p.231f.

indication that the *waqf* income should be devoted to the poor, when all other beneficiaries become extinct, just as in the *Ḥanafī* Law the income of a *waqf* is paid to the poor during any year in which the named beneficiaries are for some reason temporarily lacking.[87] The dominant *Shāfi'ī* view also made no such stipulation and expressly provided how the income of the *waqf* should in fact be expended after the named beneficiaries had become extinct. Ibn Ḥajar al-Haithamī in his *Tuḥfah* says:—

> Should he say "I have made a *waqf* in favour of my children" or "in favour of Zayd and his descendants" or some similar object which lacks perpetuity and should he say no more than this, then the more authentic view is that the *waqf* is valid. This because its purpose is an approach to God and perpetuity; so, if its first beneficiaries are indicated, it can be easily perpetuated in favour of some good purpose. If therefore the named beneficiaries become extinct the more authentic view is that it should continue as a *waqf* since perpetuity is of the nature of *waqf*. The more authentic view, then, is that the income should be paid to the nearest relative (not the nearest heir) of the founder. Regard should be had to the poor, not the rich among them. But should none of his relatives be available or should they all be rich, then the Ruler should expend the income in the interests of the Muslim community. Others again say it should be devoted to the poor or to the poor of the town where the property is situated.[88]

Similarly Zayn ud-Dīn al-Malībārī in his *Fatḥ al-Mu'īn* says:—

> If he says "I have made this *waqf* in favour of my children" and mentions no one to follow them or "in favour of Zayd and then his descendants" or some similar object which lacks perpetuity, the income should be paid to the poor person nearest related to the founder. This is because charity to relatives has priority over other charity, and the best charity of all is to the nearest of kin and the greatest in need. Failing any such, the Ruler should spend the income in the interests of the Muslim community. Many on the other hand say it should be paid to the poor and indigent of the town where the property is situated. But the *waqf* will not in any case be vitiated, but will be maintained.[89]

According to another and less authentic *Shāfi'ī* view a *waqf* which does not include any ultimate dedication to the poor is invalid, because a *waqf* must be in perpetuity, so that if its

87. Anderson, "Waqfs in East Africa", p.153.
88. Ibn Ḥajar, *Tuḥfah*, Vol.VI, p.253.
89. Zayn ud-Dīn al-Malībārī, *Fatḥ al-Mu'īn*, p.91.

beneficiaries fail it becomes a *waqf* for an unknown object; and this is not valid, in just the same way as though the first beneficiary had been unknown.[90]

When a *waqf* is constituted in the following terms "the *waqf* is for my children and my grandchildren" the usufruct must be equally divided among the children and grandchildren who exist at the time of the *waqf* even if the words "who are their descendants" or "generation after generation" is added. When on the other hand the following terms have been used "in favour of my children, then of my grandchildren, then of my great-grandchildren, the one after the other", or "the former first" the successive generations have the enjoyment of the usufruct but the first class takes first. The grandchildren, however, have no right to a *waqf* made only in favour of children. The grandchildren born of the daughter of the founder are included in the expression "posterity", "descent", "progeny" or "grandchildren" unless it has been declared "the grandchildren that bear my name". A description preceding several words together refers to all as for example in this sentence "I make a *waqf* in favour of those who are dear to me, my children, my grandchildren and brothers", it is the children, grandchildren, and brothers who are counted as "dear" by the founder. The same is the case with a description that follows and of the reservation added to the principal clauses provided that these words are united by the conjunction "and". For example, "I make a *waqf* in favour of my children and of my grandchildren and of my brothers who are dear to me" or "provided there are no persons of notoriously bad conduct among them".[91]

The ownership of the *waqf* property is transferred to God, that is to say such property ceases forever to be subject to the rules of private proprietorship and thenceforth it belongs neither to the founder (*wāqif*) nor to the beneficiary. Only the usufruct of the *waqf* belongs to the beneficiary and he may have enjoyment of it either in person or by an intermediary, for example, by lending him the endowed property or letting it to him. The beneficiary of a *waqf* is the proprietor of what is obtained from the letting of the endowed property or of what it produces as

90. Cited in Ibn Qudāma, *Al-Mughnī*, Vol.V, p.567-8.
91. Nawawī, *op. cit.*, p.231f.

fruits, wool and milk or the young of animals. After the death of a dedicated animal the skin belongs to the beneficiary. The *waqf* of a tree does not according to the *Shāfi'ī* School become extinct when the tree dies, as the decay of the tree does not preclude the use of the wood; though according to others the tree must then be sold by auction and the price used in obtaining another. The wornout mats and broken beams of a *masjid* may be sold but only to be used as firewood. The ground in which a *masjid* stands can never be sold, even if the building may have fallen into ruins and it is impossible to reconstruct it.[92]

When the founder has reserved to himself the administration of the *waqf* or if he has empowered the office upon a third person the arrangement must be carried into effect; but if nothing of this kind has been stipulated, the administration must be entrusted to the court, which has the power of appointing a manager. The administrator of a *waqf* should be of good character and qualified for the office both by his physical powers and intellectual faculties. The functions of the administrator are the custody and consolidation of the *waqf* property and the collecting and distributing of rents and profits but he is forbidden to overstep the limits of his power if the administration has only partly been given to him. In every case the founder has the right to remove the administrator and of appointing another, unless the administrator has been appointed in the deed of endowment itself without reservation of such a right.[93]

Nazr or Vow may be of two kinds. Firstly, a vow with a penalty for example "If I speak to him I engage before God to fast". Such a vow need not be kept but if not kept obliges the person formulating it to accomplish the expiation prescribed for perjury or to accomplish the expiatory action promised. Secondly, a vow of gratitude consisting in an engagement towards God to perform some good work in the hope of obtaining from Him some favour or of avoiding some calamity as, for example, "If God heals my sickness I engage to accomplish before Him such and such an act". The accomplishment of such a vow is obligatory even where it is not made dependent upon a condition for

92. *Ibid.*, p.232f.
93. *Ibid.*, p.233.

example if one says "I engage before God to fast". A vow may not have for its object an action that is unjust or that is already obligatory. A person who vows to perform some indifferent (*mubāḥ*) action or to abstain from it need not keep his engagement provided he accomplishes the expiation for perjury. A vow may be to give alms or to give some property to charity.[94]

In Selangor, Kelantan, Trengganu, Pahang, Negri Sembilan, Melaka, Penang, Kedah and Perlis, the Court of the *Chief Kathi* (or *Kathi Besar*) and the Courts of *Kathis* are given power to hear and determine all actions and proceedings in which all the parties profess the Muslim religion and which relate to *wakaf* or *nazr*, but such actions and proceedings can also be heard and determined in the ordinary courts.[95] In Perak and Johore, actions relating to *wakaf* or *nazr* may be dealt with by *Kathis* if so provided for in their *kuasa* or *taulīah;* but such actions may in any case be heard and determined by the ordinary courts. In Singapore such actions can only be heard and determined by the ordinary civil courts.

In Selangor, Negri Sembilan, Kelantan, Trengganu, Pahang, Melaka, Penang and Kedah it is provided that whether or not made by will or death-bed gift, no *wakaf* or *nazr* involving more than one-third of the property of the person making the same shall be valid in respect of the excess beyond such one-third, (unless in Kelantan it is expressly sanctioned and validated in writing by the Ruler, or in Trengganu it is expressly sanctioned and validated by all beneficiaries). *Wakaf* are of two kinds: (a) *wakaf 'ām,* that is a dedication in perpetuity of the capital or income of the property for religious or charitable purposes recognised by Muslim Law; or (b) *wakaf khās,* that is a dedication in perpetuity of the capital or property for religious

94. *Ibid.,* p.495f; The expiation for perjury is to free a slave or feed or cloth ten indigent persons — *Ibid.,* p.487.

95. Selangor Administration of Muslim Law Enactment, 1952, s.45 (3); Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.48 (1); Trengganu Administration of Islamic Law Enactment, 1955, s.25 (1); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.37 (3); Malacca Administration of Muslim Law Enactment, 1959, s.40 (3); Penang Administration of Muslim Law Enactment, 1959, s.40 (3); Kedah Administration of Muslim Law Enactment, 1962, s.41 (3); Perlis Administration of Muslim Law Enactment, 1963, s.11 (4).

purposes prescribed in the *wakaf*. *Nazr* means an expressed vow to do any act or to dedicate property for any purpose allowed by Muslim Law and *nazr 'ām* means a *nazr* intended fully or in part for the benefit of the Muslim community generally or part thereof as opposed to an individual or individuals. It is provided in Selangor, Kelantan, Pahang, Negri Sembilan, Melaka, Penang and Kedah that every *wakaf khās* or *nazr* after the commencement of the Enactment, shall be void unless: (a) the Ruler in Council (or in the case of Melaka and Penang, the Yang di-Pertuan Agong) shall have expressly sanctioned or validated it, or (b) it was made during a serious illness from which the maker subsequently died and was made in writing by an instrument executed by him and witnessed in Selangor and in Pahang by two adult Muslims being in the same village as the maker; or in Kelantan witnessed by one of the *pegawai masjid* and by either the *penggawa* of the *daerah* or the *penghulu* of the *kampong* in which the maker resided; or in Negri Sembilan, Melaka and Penang by two adult Muslims one of whom shall be the *Penghulu, Pegawai Masjid* or *Ketua Kampong* living in the same *Mukim* as the maker, provided that if no *Penghulu, Pegawai Masjid* or *Ketua Kampong* is available any other adult Muslim who would not have been entitled to any beneficial interests in the maker's estate had the maker died intestate shall be a competent witness. A *wakaf* or *nazr* shall also be invalid if it is otherwise invalid under Muslim Law. Notwithstanding any provision to the contrary contained in any instrument or a declaration creating, governing or effecting the same, the *Majlis* or in Trengganu the Commissioner for Religious Affairs, shall be the sole trustee of all *wakaf* whether *wakaf 'ām* or *wakaf khās*, of all *nazr 'ām* and of all trusts of any description creating any charitable trust for the support and promotion of the Muslim religion or for the benefit of Muslims in accordance with Muslim Law, to the extent of any property affected thereby and situate in the State and where the settlor or the person creating the trust, *wakaf* or *nazr 'ām* was domiciled in the State to the extent of all property affected thereby wherever situated. All property affected by such trust, *wakaf* or *nazr 'ām* shall be vested in the *Majlis*, (or in Trengganu in the Commissioner for Religious Affairs). The income of

wakaf khās if received by the *Majlis* (or in Trengganu the Commissioner for Religious Affairs), shall be applied by it in accordance with the lawful provisions of such *wakaf khās;* the income of every other *wakaf* and of every *nazr 'ām* shall be paid to and form part of the General Endowment Fund or *Bayt ul-Māl,* (or in Trengganu the General Endowment Fund of the Commissioner for Religious Affairs), which is vested in and administered by the *Majlis* (or in Trengganu the Commissioner for Religious Affairs). The capital property and assets affected by any lawful *wakaf* or *nazr 'ām* shall not generally form part of the *Bayt ul-Māl,* (or the General Endowment Fund) but shall be applied in pursuance of such *wakaf* or *nazr 'ām* and held as segregated funds. If however from lapse of time or change of circumstances it is no longer possible beneficially to carry out the exact provisions of any *wakaf* or *nazr 'ām* the *Majlis* (or in Trengganu the Commissioner for Religious Affairs) shall prepare a scheme for the application of the property and assets affected thereby in a manner as closely as may be analogous to that required by the terms of such *wakaf* or *nazr 'ām* and shall apply the same accordingly; or the *Majlis,* (or in Trengganu the Commissioner for Religious Affairs), may in such case, with the approval of the Ruler (or in Melaka and Penang of the Yang di-Pertuan Agong), decide that such property and assets shall be added to and form part of the *Bayt ul-Māl,* (or the General Endowment Fund). Again, if the terms of any *wakaf* or *nazr 'ām* are such that no method of application of the capital property and assets affected thereby is specified or it is uncertain in what manner they should be applied, the *Majlis,* (or in Trengganu the Commissioner for Religious Affairs) may direct that such capital property and assets shall be added to and form part of the *Bayt ul-Māl,* or the General Endowment Fund.[96]

96. Selangor Administration of Muslim Law Enactment, 1952, s.95-99; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.100-105; Trengganu Administration of Islamic Law Enactment, 1955, s.59-64; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.89-93; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.90-94; Malacca Administration of Muslim Law Enactment, 1959, s.89-93; Penang Administration of Muslim Law Enactment, 1959, s.89-93; Kedah Administration of Muslim Law Enactment, 1962, s.92-94.

In Perlis it is provided that no will made by a person professing the Muslim religion shall bequeath to any beneficiary or *wakaf* property in excess of one-third of the whole of the property of the said person. Notwithstanding anything contained in any instrument of trust creating a *wakaf* (whether *wakaf 'ām, wakaf khās* or other trusts for the support and promotion of the Muslim religion or for the benefit of Muslims) the *Majlis* shall be the sole trustee of that *wakaf*. The capital of the *wakaf* or *nazr 'ām* shall not form part of the General Endowment Fund of the *Majlis* but shall be applied in accordance with the terms of such *wakaf* or *nazr 'ām* and held as segregated funds. If from lapse of time or change of circumstances it is no longer possible beneficially to carry out the exact provisions of any *wakaf* or *nazr 'ām*, the *Majlis* shall prepare a scheme for the application of the property and assets of the said *wakaf* or *nazr 'ām* for a purpose similar to that for which the said *wakaf* or *nazr 'ām* was originally created and such property and assets shall be applied accordingly; in exceptional cases the *Majlis* may with the approval in writing of the Ruler direct that such property and assets be added to and form part of the General Endowment Fund. The *Majlis* may in any case where the manner of application of the capital of a *wakaf* or *nazr 'ām* is not specified or if specified is specified so vaguely or inadequately as to make it impossible to give it any effect, direct such capital to be added to and form part of the General Endowment Fund.[97]

In Selangor, Kelantan, Negri Sembilan, Melaka, Penang and Kedah it is provided that if in the opinion of the *Majlis* the meaning or effect of any instrument or declaration creating or effecting any *wakaf* or *nazr* is obscure or uncertain the *Majlis* may refer the matter to the Legal Committee of the *Majlis* (or in Kedah the Fetua Committee of the *Majlis*) for its opinion as to the meaning or effect thereof and the *Majlis* shall act in accordance with the opinion of such Committee or a majority thereof unless the Ruler (or in Melaka and Penang the Yang di-Pertuan

97. Perlis Administration of Muslim Law Enactment, 1963, s.64-66.

Agong) shall otherwise direct.[98]

In Pahang it is provided that if it appears to the *Majlis* that the meaning or effect of any instrument or declaration creating or affecting any *wakaf* or *nazr* is obscure or uncertain the *Majlis* may consider the matter and shall act according to its determination of the meaning or effect thereof unless the Ruler shall otherwise direct.[99]

In Trengganu it is provided that if in the opinion of the *Majlis* or the Commissioner for Religious Affairs the meaning or effect of any instrument or declaration creating or affecting any *wakaf* or *nazr* is obscure or uncertain, the matter may be referred to the Committee of 'Ulamās' appointed under the Administration of Islamic Law Enactment for its opinion as to the meaning or effect thereof and the Commissioner for Religious Affairs shall on the approval in writing of the Ruler act on any opinion so given by the Committee or a majority thereof.[100]

In Perlis it is provided that the *Majlis* may refer to the Appeal Committee any instrument creating any *wakaf* or *nazr 'ām* for its opinion on questions relating to the construction and meaning of any of the provisions of the said instrument. Any opinion given by the Appeal Committee shall be acted upon by the *Majlis*, unless the Ruler otherwise directs.[101]

In Johore the Wakaf Enactment (No. 5) makes every attempt after the commencement of the Enactment to deal with land, whether by declaring it to be *tanah wakaf* or otherwise, whereby the right of alienating the land is sought to be in any manner permanently restricted or destroyed, null and void and of none effect. If any land has been prior to the commencement of the Enactment declared to be *tanah wakaf*, that is land subjected to *wakaf* other than for some public or

98. Selangor Administration of Muslim Law Enactment, 1952, s.100; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.106; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.95; Malacca Administration of Muslim Law Enactment, 1959, s.94; Penang Administration of Muslim Law Enactment, 1959, s.94; Kedah Administration of Muslim Law Enactment, 1962, s.95.
99. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.94.
100. Trengganu Administration of Islamic Law Enactment, 1955, s.65.
101. Perlis Administration of Muslim Law Enactment, 1963, s.67.

charitable purpose, the usufruct thereof shall be deemed to rest exclusively in the person or persons beneficially entitled to the rent or profit thereof; and every such person shall to an extent proportionate to his interest in such rents or profits be deemed to have a permanent transmissible and transferable right in such land. Any such person may apply for an order that any register of land be rectified or that any entry therein shall be cancelled.[102]

In Perak, the Control of Wakaf Enactment, 1951, provides that the State Executive Council may on representation by the *Majlis Ugama Islām dan 'Ādat Melayu* in order to safeguard any *wakaf* existing in the State or to insure full and proper discharge of the trust thereof, remove any trustee, appoint a new trustee or new trustees, or appoint the *Majlis* to administer the trust of such *wakaf*. *Wakaf* is defined as including *wakaf 'ām* (that is a dedication in perpetuity of the capital and income of property for religious or charitable purposes recognised by Muslim Law and the property so dedicated) and *wakaf khās* (that is a dedication in perpetuity of the capital of property for religious or charitable purposes recognised by Muslim Law and the property so dedicated, the income of the property being paid to persons or for purposes prescribed in the *wakaf*). Where an order has been made removing any trustee and appointing a new trustee or trustees the movable property of the *wakaf* shall vest without any conveyance assignment or transfer in the new trustee, trustees or the *Majlis* as the case may be, upon the trusts and for the same purposes as the original *wakaf;* where the property of the *wakaf* consists of immovable property the appropriate registering authority shall register the order of removal and new appointment against the appropriate document of title and after such registration such immovable property shall vest in the new trustee, trustees or the *Majlis* for the like title estate or interest and on the like trusts as the property was vested or held before the operation of the order. The provisions of the Enactment are made applicable to the accumulated and future income from Muslim burial grounds as if the person in possession or control of such funds were a trustee in possession or control of such funds pursuant to the terms of the *wakaf*. The State Executive

102. Johore Wakaf Enactment (E. No.5).

Council may make rules after consultation with the *Majlis* for carrying out the purposes of the Enactment and may in particular provide for the powers to be given to the *Majlis* to investigate any *wakaf* and to call for the accounts of any *wakaf* and to provide for the offences for failure to supply accounts and deliver up possession of the assets of any *wakaf*.[103]

In Melaka and Penang it is provided that all property, movable and immovable which immediately before the commencement of the Administration of Muslim Law Enactment was vested in the Muslim and Hindu Endowments Board established under the Muslim and Hindu Endowments Ordinance for purposes relating to the Muslim religion or on trust for religious or charitable purposes for the benefit of persons professing the Muslim religion shall upon the commencement of the respective Enactment vest in the *Majlis* for the like title, estate or interest and in the like tenure and for the like purposes as the property was vested or held. All rights, powers, duties and liabilities of the Muslim and Hindu Endowments Board in respect of endowments in land or money given or to be given for the support of any Muslim mosque, school or other Muslim pious, religious, charitable or beneficial purposes, shall be vested in or imposed on the *Majlis*, save in so far as they may be repugnant to the provisions of the enactments.[104]

In Singapore there is a Muslim and Hindu Endowments Board constituted under the Muslim and Hindu Endowments Ordinance to administer certain Muslim religious endowments. "Endowment" as far as it is applicable to Muslim endowment, is defined as any endowment in land or money given or to be given for the support of any Muslim mosque or Muslim Shrine or school or other Muslim religious, charitable or beneficial purposes. The Minister may order any endowment to be administered by the Board where it appears to the Minister that: (a) any endowment has been mismanaged; or (b) there are no trustees appointed to the management of any endowment; (c) it would otherwise be to the advantage of any endowment that it should be administered by the Board. From the date of

103. Perak Control of Wakaf Enactment, 1951 (No.8 of 1951).
104. Malacca Administration of Muslim Law Enactment, 1959, s.9; Penang Administration of Muslim Law Enactment, 1959, s.9.

such order, all the property, both movable and immovable, of the endowment is vested in the Board upon the trusts and for the intents and purposes to which such endowment is applicable. The Board has all the powers of a trustee and may appoint or remove any officer of the Endowment, receive and collect the income of the endowment, and expend such income in defraying the expenses of the management of the endowment and in carrying out the purposes of the endowment. For the purposes of the management of each endowment the Board may appoint a committee of management to act under the control of the Board; every such Committee (in the case of a Muslim endowment) shall consist of at least one officer of the Government being a member of the Board, and one or more persons professing the Muslim religion. The Board has power to sanction improvements to any endowment administered by it and may, wherever it appears to it to be desirable that a scheme should be formed and approved for the application or management or change in the management of any endowment, whether administered by it or not, or for the closing or winding up of any such endowment, frame a scheme and submit it for the approval of the High Court. The Board is also given power to require the production of accounts from the trustees of or any other person in charge of endowments or any person who has possession, custody or control of the funds, money or property of any endowment, and has power to require such trustee or persons to attend before it and be examined on oath or otherwise. Notice of all legal proceedings concerning an endowment must be given to the Board and such proceedings may only normally be brought if authorised or directed by the Board.[105]

In *Re Shrine of Habib Noh*[106] the Court was asked to approve a scheme for the disposal of funds which had been accumulated from the contributions and votive gifts at the shrine built over the grave of a Muslim saint. It was contended that the funds should be used for purposes beneficial to the Muslim community and in particular for education, but it was held that this contention was based on erroneous reasoning, as to par-

105. Singapore Muslim and Hindu Endowments Ordinance (Cap.271) (No. 17 of 1905) s.4-13.
106. (1957) 23 *M.L.J.* 139.

ticularise the general intention of the charity in that way would infringe the principle of carrying out the general intention as nearly as is practicable. The learned Judge said:

> We have a fluctuating body of persons, of many races and religions, who make spontaneous gifts. It is clear that they have one intention in common; they all wish the shrine to be preserved for the future. Beyond that it is difficult to attribute to them any specific intention. They do not pause to enquire whether collections exceed the cost of maintenance. They do not weigh pros and cons. It is highly unlikely that many of them give even a passing thought to the question of what will become of any surplus which may result. If that idea occurs to them they probably dismiss it with the reflection that the money will be given to charitable objects. They are deemed to have a general intention of charity and this must be carried out *cypres*. The surplus should be applied in the manner of spontaneous, rather than organized, charity for the benefit of needy persons of the class of persons to whom the donors belong.

BAYT UL-MĀL

The term *Bayt ul-Māl* is an abbreviation of *Bayt ul-Māl-ul-Muslimīn* which means literally "The Treasury of the Muslims". The revenues of the *Bayt ul-Māl* are derived from the proceeds of *waqfs* and the properties left by persons dying without heirs.

In Selangor the *Bayt ul-Māl* is established under the Administration of Muslim Law Enactment, 1952, and in Negri Sembilan it is established under the Administration of Muslim Law Enactment, 1960. It is provided that the *Bayt ul-Māl* shall consist of all money and property, movable or immovable, which by Muslim Law or under the provisions of the Enactment or rules made thereunder accrues or is contributed by any person to it. The *Bayt ul-Māl* is administered by the *Majlis Ugama Islām dan 'Ādat Istiadat Melayu* and the *Majlis* is given power, with the approval of the Ruler, to make rules for the collection, administration and distribution of all the property of the *Bayt ul-Māl*. It is provided that the income of every *wakaf 'ām* and *nazr* shall be paid to and form part of the *Bayt ul-Māl;* and in some cases the property and assets of a *wakaf* or *nazr 'ām* may be directed to be added to and form part of the *Bayt ul-Māl*.[107]

107. Selangor Administration of Muslim Law Enactment, 1952, s.94; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.89.

In Perak the Bait ul-Mal, Zakat and Fitrah Enactment, 1951 defines *Bayt ul-Māl* as such share of the estate of any Muslim dying in the State, comprising both movable and immovable property, as shall fall into residue, such share of the estate of any Muslim domiciled in the State but dying elsewhere as is movable property and falls into residue and such share of the estate of any Muslim as shall be comprised of immovable property situate in the State and fall into residue, as would by Muslim Law have become the property of the Ruler as *Bayt ul-Māl*. It is provided that the *Bayt ul-Māl* shall be under the management and control of the *Majlis Ugama Islām dan 'Ādat Melayu*. All property, movable and immovable of the *Bayt ul-Māl* shall vest in the *Majlis* for the purposes and the trust prescribed therefore by Muslim Law; and any money or other property, movable or immovable, to which the *Bayt ul-Māl* may become entitled according to Muslim Law, shall be paid, transferred, delivered or awarded as the case may be, to the *Majlis* and where registration is necessary to perfect the title of the *Majlis* thereto, shall be registered in the name of the *Majlis*. Power is given to the State Executive Council after consultation with the *Majlis* to make rules to provide for the collection, administration and application of the funds and property of the *Bayt ul-Māl*.[108]

In Kelantan by the Council of Malay Religion and Custom and Kathis Courts Enactment, 1953, and in Trengganu by the Administration of Islamic Law Enactment, 1955, it is provided that all the property, investments or funds of the *Bayt ul-Māl* shall form the General Endowment Fund of the *Majlis Ugama Islām dan 'Ādat Istiadat Melayu* or in Trengganu of the Commissioner for Religious Affairs and shall be held by the *Majlis* or the Commissioner in trust for such charitable purposes for the support and promotion of the religion of Islām and for the benefit of Muslims in the State in accordance with. Muslim Law, as to the Ruler on the advice of the *Majlis* may from time to time seem proper. The Ruler may give directions not in conflict with Muslim Law or the provisions of the Enactment for the collection or expenditure of the Fund and may forbid any

108. Perak Bait ul-Mal, Zakat and Fitrah Enactment, 1951 (No.7 of 1951).

proposed expenditure thereof. The income of every *wakaf 'ām* or *nazr 'ām* shall be payable to and shall form part of the Fund, and in certain cases the capital property and assets of a *wakaf* or *nazr 'ām* may be directed to be added to and form part of the Fund. In Kelantan it is provided that where any Muslim dies in such circumstances that under the provisions of Muslim Law his property would have vested in and been payable to the *Bayt ul-Māl* the property of such persons shall in pursuance of such provisions of Muslim Law vest in and be payable to the Ruler and form part of the General Endowment Fund. In Trengganu it is provided that where a Muslim dies in such circumstances that, under the provisions of Muslim Law any share of his estate is due to the *Bayt ul-Māl* the said share shall vest in and form part of the General Endowment Fund. Every executor of the will of a deceased Muslim and every administrator of the estate of a deceased Muslim shall, if there be any share of the deceased's estate due to the *Bayt ul-Māl,* report the same to the Commissioner of Religious Affairs and furnish him with a true and full account of the value and nature of the estate within one month of obtaining probate or letters of administration, as the case may be, or such further time as the Commissioner may in writing allow. Every executor or administrator shall pay to the Commissioner for Religious Affairs the equivalent cash value of the share due to the *Bayt ul-Māl* and no executor or administrator shall apply to any court for his discharge until he shall have produced a certificate from the Commissioner of Religious Affairs that no share of his estate is due to the *Bayt ul-Māl* or that the share so due has been paid. Every executor or administrator of an estate part of which is due to the *Bayt ul-Māl* who fails to make the report or to pay the amounts to the Commissioner of Religious Affairs in the manner and within the time prescribed shall be liable to a fine not exceeding one hundred dollars and in the case of a continuing failure to a further fine not exceeding fifty dollars for every month or part of a month during which the failure continues.[109]

In Pahang the Administration of the Law of the Religion

109. Kelantan Council of Religion and Malay Custom and Kathi's Courts Enactment, 1953 s.97-99; Trengganu Administration of Islamic Law Enactment, 1955, s.57-58.

of Islam Enactment, 1956 establishes a General Endowment Fund to consist of all money and property, movable and immovable which by the Muslim Law or under the provisions of the Enactment or rules made thereunder accrues or is contributed by any person or payable to the Fund All money and property in the Fund is vested in the *Majlis* who shall administer all such money and property in accordance with the rules made under the Enactment. The *Majlis* may with the approval of the Ruler make rules for the collection, administration and distribution of all property of the Fund. The income of every *wakaf* and of every *nazr* shall be paid to and form part of the General Endowment Fund and in certain cases the capital property and assets of a *wakaf* or *nazr* may be directed to be added to and form part of the Fund. It is also provided that the Fund known as the Muslim Religious Fund shall on the commencement of the Enactment be transferred to the *Majlis* and form part of the General Endowment Fund.[110]

In Melaka and Penang the Administration of Muslim Law Enactments, 1959, establish General Endowment Funds to consist of all money and property, movable or immovable which by Muslim Law or under the provisions of the Enactments or the rules made thereunder accrues or is contributed by any person or is payable to the Fund. All money and property in the General Endowment Fund shall be vested in the *Majlis* who shall administer all such money and property in accordance with the rules made under the Enactments. Power is given to the *Majlis,* with the approval of the Yang di-Pertuan Agong, to make rules for the collection, administration and distribution of all property of the General Endowment Fund. The income of every *wakaf 'ām* and every *nazr* shall be paid to and form part of the Fund and in certain cases the capital property and assets of a *wakaf* or *nazr 'ām* may be directed to be added to and form part of the Fund. It is provided that where after the commencement of the Enactments any Muslim dies in such circumstances that, under the provisions of the Muslim Law, his property would vest in and become payable to the *Bayt ul-Māl,* the property of such

110. Pahang Administration of the Law of the Religion of Islam Enactment, 1956 (as amended by the Administration of the Law of the Religion of Islam (Amendment) Enactment, 1960), s.86-88.

person in pursuance of such provisions shall vest in and become payable to the *Majlis* and form part of the General Endowment Fund.[111]

In Kedah the Administration of Muslim Law Enactment, 1962, establishes a General Endowment Fund to consist of all money and property, movable or immovable, which by Muslim Law or under the provisions of the Enactment or the rules made thereunder accrues or is contributed by any person or is payable to the Fund. All money and property in the Fund shall be vested in the *Majlis* who shall administer it in accordance with the rules made under the Enactment. The *Majlis* may with the approval of the Ruler make rules for the collection, administration and distribution of all property of the Fund. It is provided that all *Bayt ul-Māl* money collected in accordance with the Enactment and all money already collected shall be paid into the Fund but shall be accounted for in a separate account of the Fund known as the *Bayt ul-Māl* account. It is provided that where after the commencement of the Enactment any Muslim dies in such circumstances that under the provisions of Muslim Law his property would vest in or become payable to the *Bayt ul-Māl* the property of such person in pursuance of such provisions shall vest in and become payable to the *Majlis* and form part of the General Endowment Fund, but shall be accounted in the *Bayt ul-Māl* account. It is also provided that the income of every *wakaf 'ām* and *nazr 'ām* shall be paid to and form part of the General Endowment Fund and in certain cases the capital property of the *wakaf* or *nazr 'ām* may be directed to be added to and form part of the Fund. Power is given to the *Majlis* to make rules for and regulate all matters in connection with the collection, administration and disposal of property or money belonging to the *Bayt ul-Māl.* Such rules may provide for the method by which property or money of a deceased Muslim shall be paid to the *Bayt ul-Māl,* for the appointment of agents for the collection of property or money due to the *Bayt ul-Māl* and for penalties for any person who commits a breach of any of the rules.[112]

111. Malacca Administration of Muslim Law Enactment, 1959, s.88-89; Penang Administration of Muslim Law Enactment, 1959, s.88-90.
112. Kedah Administration of Muslim Law Enactment, 1962, s.89-91 and 102.

In Johore the Bait ul-Mal Enactment (Enactment No. 136) provides for the establishment and administration of the *Bayt ul-Māl*. The Enactment applies to the estates of Muslims dying domiciled in the State and to any immovable property within the State forming part of the estate of a deceased Muslim. The Enactment provides for the appointment of a Controller (*Nāthir*) of the *Bayt ul-Māl* and a Treasurer (*Amīn*) of the *Bayt ul-Māl*. Any share of the estate of a deceased Muslim which according to Muslim Law is due to the *Bayt ul-Māl* shall be paid to the Treasurer of the *Bayt ul-Māl* and shall be credited by him to the *Bayt ul-Māl*. Every executor of the will of a deceased Muslim and every administrator of the estate of a deceased Muslim shall, if there be any share of the deceased's estate due to the *Bayt ul-Māl*, report the fact to the Treasurer of the *Bayt ul-Māl* and furnish him with a true and full account of the value and nature of the estate within one month of obtaining probate or letters of administration as the case may be, or within such further time as the Treasurer of the *Bayt ul-Māl* may in writing allow; any person who fails to comply with this provision is liable to a fine not exceeding $100/- or in the case of a continuing failure to a further fine not exceeding $50/- for each month or part of a month during which the failure continues and it is provided that the fact that the executor or administrator was unaware that any share of the estate was due to the *Bayt ul-Māl* shall be no defence to such a charge. Every executor or administrator is required to pay the equivalent cash value of the share of the estate due to the *Bayt ul-Māl* within one month of the demand of the share by the Treasurer of the *Bayt ul-Māl* or within such further time as the Treasurer may in writing allow; and any person who fails to comply with this provision shall be liable to a fine not exceeding $100/- or in the case of a continuing failure a further fine not exceeding $50/- for every month or part of a month during which the failure continues. The Treasurer of the *Bayt ul-Māl* is given power to summon persons and to call for documents. The provisions of the Enactment relating to executors and administrators do not apply to the Official Administrator or Assistant Official Administrator but such administrators shall be bound to pay to the *Bayt ul-Māl* the equivalent money value of

any share of the estate in their hands which may be due to the State. No executor of the will of a deceased Muslim or administrator of the estate of a deceased Muslim shall apply to the Court for his discharge until he shall have produced a certificate from the Treasurer of the *Bayt ul-Māl* that no share of the estate is due to the *Bayt ul-Māl* or that the share so due has been paid. It is provided that before a Collector of Land Revenue may make an order to register a person as the owner of any land which forms part of the estate of a deceased person he must be satisfied that any share of the estate which may be due to the *Bayt ul-Māl* has been paid or that the Treasurer of the *Bayt ul-Māl* has allowed the payment of such share to be postponed. The funds of the *Bayt ul-Māl* shall be devoted to such objects consonant with Muslim Law as the Ruler in Council shall approve; and the administration of the *Bayt ul-Māl* shall be under the direction of the Ruler in Council which may be given specially in particular cases or generally by rule made under the Enactment. It is provided that a certificate signed by the Treasurer of the *Bayt ul-Māl* shall be admissible in any court as *prima facie* evidence that a share of the estate is due to the *Bayt ul-Māl* and of the amount thereof.[113]

In Perlis a General Endowment Fund is established and it is provided that it shall be administered by the *Majlis Ugama Islām dan 'Ādat Istiadat Melayu.* The Fund shall consist of all *Bayt ul-Māl* money collected under the Administration of Estates Enactment, the income of every *wakaf* (including *wakaf khās*), and of every *nazr 'ām,* the property of a person who dies in such circumstances as to make such property vest or be payable to the *Bayt ul-Māl* and such other property as under the provisions of the Administration of Muslim Law Enactment shall form part of the Fund. The *Majlis* is given power with the approval of the Ruler to make rules for the collection, administration and distribution of the property of the Fund. The *Majlis* may also make rules for and regulate all matters in connection with the collection, administration and disposal of property or money belonging to the *Bayt ul-Māl.* Such rules may *inter alia* provide

113. Johore Bait ul-Mal Enactment (E. No. 136 as amended by No. 14 of 1959).

for the method by which the property or money of a deceased person shall be paid to the *Bayt ul-Māl*.[114]

GIFTS

A gift is a gratuitous transfer of property. When such a transfer is made with the intention of obtaining a recompence in the other world it is a *ṣadaqāh;* when made with the object of manifesting one's love or respect to the donee, it is a *hadīah* or present. It is an essential condition for the validity of a *hiba* or gift, properly so called, that offer and acceptance be made in explicit terms; but in the case of a *hadīah* or present neither offer nor acceptance are strictly necessary and it is enough that the object is brought by the donor and taken possession of by the donee. A gift may be constituted by the use of the following expressions: "I wish you to live in this house of mine and after your death it will go to your heirs" or "I wish you to live in it" (at least according to the doctrine adopted by Imām Shāfi'ī in his second period) or by saying "After your death it will return to me". Imām Shāfi'ī in his first period adopted an opinion different from that adopted in his second as to the validity of a gift made in the following terms: "I present you a life interest in this house" or "I make you a gift of it for life"; that is if you predecease me it will return to me but otherwise it will be yours irrevocably. Both opinions of Imām Shāfi'ī are followed in the *Shāfi'ī* School. Some regard such gifts as valid, some hold them invalid but the former opinion is preferable.[115]

Anything that may be sold may be given; anything that may not be sold as for example an unknown or usurped thing or an escaped animal cannot be made the subject of a gift. But in the case of things of little value as for example two grains of corn a gift is permissible but not a sale. The gift of a debt due to one implies the remission of the debt if made to the debtor, if it is made to a third person it is null and void. The ownership of a thing given is only transferred upon the donee taking possession with the consent of the donor or if one of the parties dies between

114. Perlis Administration of Muslim Law Enactment, 1963, s.63 and 68.
115. Nawawī, *op. cit.*, p.234.

the giving and the taking possession by the agreement of the heirs. Some jurists however consider that under these circumstances the gift is *ipso facto* revoked.[116]

A practice has been introduced by the *Sunnah* by which parents at any rate when not of notorious misconduct may by gift *inter vivos* distribute their property equally amongst their children without distinction of sex; others however maintain that the provisions of the law of the distribution of property upon succession cannot be set aside in this way.[117]

A father or any ancestor may revoke a gift made in favour of a child or other descendant provided that the donee has not irrevocably disposed of the thing received as for example by selling or dedicating it. A revocation is made in the following words: "I revoke my gift" or "I claim back the object" or "I wish the thing to become my property again" or "I wish to put an end to my donation", but it cannot be effected by mere implication by a subsequent disposition affecting the thing given, such as a sale, *waqf*, or gift to another person.[118]

If a gift is made with the express stipulation that there should be no consideration, the right of revocation does not according to the *Shāfi'ī* School exist except in the case of ascendants. A gift with no such stipulation is supposed to have been made without hope of consideration if the donee is in any way inferior in social position to the donor and even if he is superior; and the same principle is accepted in the case of a gift between persons of equal position. Where a consideration is obligatory but none has been specified it consists in the value of the thing given; and the donor has in these circumstances the right to revoke the gift if the donee neglects to pay the consideration. A donation is admitted as valid when made with the reservation of a known consideration; the gift is then considered as a sale. According to the *Shāfi'ī* School, a gift made on the express condition of an unknown consideration is null and void. The gift of an unknown share in any property (*mushā'a*) is valid

116. *Ibid.*, p.234.
117. *Ibid.*, p.234-235.
118. *Ibid.*, p.235.

according to the *Shāfi'ī* School whether or not the thing is capable of partition.[119]

In Selangor, Kelantan and Trengganu the Court of the *Chief Kathi* and the Courts of a *Kathi* and in Perlis the Court of a *Kathi* and the Court of an *Assistant Kathi* are given power to hear and determine all actions and proceedings relating to gifts *inter vivos* or settlements made without consideration in money or money's worth by a person professing the Muslim religion; but such actions and proceedings can also be heard and determined in the ordinary courts.[120] In Perak, and Johore actions relating to gifts may be heard by *Kathis* if so provided for in their *kuasa* or *taulīah;* but such actions may in any case be heard and determined by the ordinary civil courts. In Negri Sembilan, Pahang, Kedah, Penang, Melaka and Singapore such actions may only be heard and determined by the ordinary civil courts.

In Singapore the law applicable to gifts is the English Law in force in the State. It is provided that nothing in the Muslims Ordinance shall be held to affect the operation of English Law in the State relating to voluntary settlements. All settlements and dealings with property between a Muslim husband and wife shall be governed by the rules of English Law in force in the State. Where there is not adequate consideration on either side such settlements and dealings shall be held to be voluntary between the husband and wife or either of them and his or her creditors.[121]

In the case of *Kiah* v. *Som*[122] the facts were that a deceased Muslim in Kedah erected a wooden house of the Malay type on stilts on land belonging to his grand-daughter and when it was completed gave it in the presence of witnesses to his grand-daughter. On his death the grand-daughter entered into possession of the house and subsequently when asked to do so refused to give up possession of the house. The Court held that the house was movable property and that the formal presentation in

119. *Ibid.*, p.235.
120. Selangor Administration of Muslim Law Enactment, 1952, s.45 (3); Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.48 (1); Trengganu Administration of Islamic Law Enactment, 1955, s.25 (1); Perlis Administration of Muslim Law Enactment, 1963, s.11 (4).
121. Singapore Muslims Ordinance, 1957, s.56.
122. (1953) 19 *M.L.J.* 82.

the presence of witnesses was a complete gift; there was a constructive delivery and possession at the formal presentation and although the deceased remained in the house for the rest of his life, this was not a condition attached to the gift but merely an arrangement made subsequently.

INTERPRETATION OF WILLS AND SETTLEMENTS IN SINGAPORE

In Singapore section 101 of the Evidence Ordinance provides in effect that wills shall be construed according to the rules of construction which would be applicable thereto if they were being construed in a court of justice in England; deeds including settlements of property are however construed according to the local English Law. Wills and trusts made by Muslims are therefore construed according to the principles of English Law and not according to Muslim Law. This is not wholly satisfactory from the Muslim point of view and there has been a proposal to provide for the application of the Muslim Law in the interpretation and administration of Muslim wills and trusts but until the law is changed the English Law will continue to apply.

Thus the word "male issue" was construed to mean male descendants of males only (*Re Alkaff's Settlements*).[123] In the case of *Re the Estate of Haji Abdul Lateef bin Haji Tamby*[124] the trustees were directed after twenty-one years from the testator's death to convert all the property of the deceased into money and "to divide the money so realised among my heirs as then ascertained according to Mohammedan Law". The words "heirs as then ascertained according to Mohammedan Law" were construed according to the English rules of construction to mean those persons who would be the testator's heirs according to Muslim Law if he had died at the expiration of twenty-one years from the actual date of death. It has been held that the English rule against perpetuities (which provides that no contingent or executory interest in property can be validly created unless it must necessarily vest within the maximum period of one or more lives in being and twenty-one years afterwards) applies in the case of Muslim wills and settlements. Thus in *Re Estate of*

123. (1928) *S.S.L.R.* 188.
124. (1932) 3 *M.L.J.* 46.

Hadjee Haroun bin Tamby Kechik[125] the testator devised some lands and houses "as a *wakaff* for the benefit of my wife and my sons and daughters to be shared equally between them. In the event of all of them shall die, the benefit of the *wakaff* shall descend to all my male and female grandchildren in the male line to be shared equally between them. After them the benefit of the *wakaff* shall pass to the most learned and pious man in this country. This shall go on for ever"; it was held that the gift over after the deaths of the widow, children and grandchildren offended against the Rule prohibiting perpetuities and was void. In *Re Sheikh Salman bin Abdul Shaikh bin Mohamed Shamee*[126] it was held that a trust in a settlement providing for distribution of the corpus after the expiration of the period of twenty-one years from the date when the youngest of the settlor's children (construed to include unborn children) shall live to attain the age of twenty-one years was invalid as it infringed the rule against perpetuities. In that case again the settlor had directed his trustee to divide the residuary income of the settled property annually "amongst such of the settlor's next of kin as would from time to time be entitled thereto according to Mohammedan Law had the settlor died intestate and in the shares and proportions in which according to the same law such persons (if more than one) would be so entitled". It was again held that this was a gift to some kind of fluctuating class and as such it did not comply with the essential requirements of vesting and therefore infringed the rule against perpetuities. In *Re The Settlement of Shaik Salleh bin Obeid Abdat*[127] the settlor by a settlement gave property upon trust to a beneficiary for his life and until he shall (a) change his religion or (b) without the consent of the trustees depart from, reside outside or continue to reside outside Hadramaut or (c) attempt to set aside the provisions of any of the provisions of the settlement or (d) do or suffer any act or thing whereby he would be deprived of the right to receive the income of the property; it was held that the conditions as to change of religion or residence or attempting to set aside the provisions

125. (1949) 15 *M.L.J.* 143.
126. (1953) 19 *M.L.J.* 200.
127. (1954) 20 *M.L.J.* 8.

of the settlement are conditions subsequent and being in *terrorem* and uncertain are void.

In the case of *Re Ena Mohamed Tamby deceased*[128] a marriage agreement was made by an entry in the register of the *Imām* celebrating the marriage to the following effect: "... I married Meida binte Achee. I direct my executors to pay a sum of $300 as a gift to the aforesaid person after my death and also to buy an attap house for her at the cost of $150/-. I also direct them to pay her $5/- and half a picul of rice monthly for her maintenance (as long as she remains unmarried). In the event of her remarrying my executors shall not pay her the said maintenance. She has no more interest in my property". It was held applying the principles of English Law that the agreement was a valid agreement in contemplation of marriage; there was valuable consideration for the wife's accepting her exclusion from her widow's one-eighth share as by the agreement the husband deprived himself of his freedom to dispose of his whole estate by will to the total exclusion of the wife; and therefore the wife was not entitled to a widow's one-sixth share in the estate of the deceased. In an earlier application the Court had held that the agreement in this case was not a testamentary disposition but a gift in *praesenti* in lieu of dower and giving an immediate and irrevocable right to receive something in the future (*Re Ena Mohamed Tamby deceased*).[129]

One striking effect of the disregard of the Muslim Law in this respect is seen in the case of charitable trusts. The law as to what purposes are charitable is based on the principles of English Law. In the Penang case of *Re Abdul Guny Abdullasa*[130] these principles were summarised as follows:—

> Although there may be no definition of the word "charity" in its popular sense, yet in its legal sense it comprises four specific divisions, namely:—
>
> (a) trusts for the relief of poverty;
> (b) trusts for the advancement of education;
> (c) trusts for the advancement of religion; and

128. (1937) 6 *M.L.J.* 49.
129. (1931) *S.S.L.R.* 3.
130. (1936) 5 *M.L.J.* 174.

(d) trusts for other purposes beneficial to the community not falling under any of the preceding heads.

Trusts under the last heading are no less charitable in the eyes of the law because incidentally they benefit the rich as well as the poor, and indeed every charity that deserves the name must do so either directly or indirectly. *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1891) A.C. 531. Further one might add that where there is an expressed charitable intention to be found in a will, courts will construe the will as liberally as possible to give effect to such intention and if necessary will apply the *cypres* doctrine.

According to the principles of the English Law of charities, a purpose is not charitable unless for the public benefit, with a minor exception in the case of relief of poverty, in that a gift for the donor's poor relatives is charitable. These principles also provide that where a trustee has a discretion as to the distribution of the property and some of the possible objects are non-charitable, the rules of private trusts must be complied with; in particular the rule that objects must be so closely defined that it is possible to tell whether any payment would be a breach of trust or not and the rule against perpetuities. Thus a gift of property to "charitable or benevolent objects" has been held to be void on the basis that (a) there are some benevolent objects which are not charitable and (b) it is impossible to tell of all objects whether they are benevolent or not.

It has been held in the case of *re Hadjee Haroun bin Tamby Kechik*[131] that the mere creation of a *wakaf* does not necessarily imply that the objects intended to be benefited thereby are charitable objects. In the case of *Re Syed Shaik Alkaff*[132] the testator executed a will which directed his executors to purchase land and houses in Singapore or Batavia or Surabaya and make a *wakaf* of the land and houses so purchased and distribute the rents and profits thereof, after payment of necessary expenses in "good works" (*amūr al-khayrāt*) in the following manner: (1) to distribute among such of the blood relatives of the testator, his father, Syed Abdulrahman and his brother Syed Abdullah as were in indigent circumstances; (2) to distribute the usual meal of rice to the poor on the eve of Friday; and (3) to spend the

131. (1949) 15 *M.L.J.* 143.
132. (1923) 2 *Malayan Cases* 38.

balance in "good works" at the discretion of the executors at Terim and its districts and Saion and Makka and Madīna. It was held that purposes which are regarded by a devout Muslim as religious are not *prima facie* charitable in the eyes of English Law and the use of the word *wakaf* or *amūr al-khaira* does not necessarily indicate any general charitable intention In that case the court held that the validity of the trusts affecting the testator's immovable property in Singapore must be determined by the law of Singapore and that while the first and second objects of the trust were *prima facie* charitable, the third object was invalid. Whitley J. in that case said:

> With regard to *wakaf* the definition given by Syed Ameer Ali in his Mohammedan Law Vol. II (4th Edition, p.194) is undoubtedly of the highest authority. It is in these words: "*wakaf* . . . signifies the dedication or consecration of property, either in express terms or by implication, for any charitable or religious objects or to secure any benefit to human beings". From this definition it is clear that *wakaf* is not limited to charitable objects. I do not think it is necessary to consider any other authority on this point.
>
> The main argument in this part of the case revolved on the meaning of the word *amūr al-khaira.* During the trial two Mohammedan witnesses gave evidence as to this word which is rendered literally as "good works" but in the opinion of the witnesses would in the will of a Mohammedan mean "works such as the Kuran would approve".
>
> Referring again to Syed Ameer Ali's work, on page 194 is this paragraph:
>
> "The terms *birr,* and *khair* include all good and pious acts and objects — to make provision for one's self is regarded by *Ḥanafi* lawyers as an act of *khair.*"
>
> The following quotation is from page 273: "The words 'piety' and 'charity' have a much wider significance in Mohammedan Law and religion than in any other system."
>
> *Khair, birr, ihsan,* etc., include every purpose which is recognised as good or pious under the Mussulman religion and the Mussulman Law and the test of what is "good" or "pious" or "charitable" is the approval of the "Almighty". That the testator expected to obtain the approval of the Almighty is evident from the disposition which he makes in the trust deed "of all the spiritual benefit and Divine Blessings" to be derived from his good works.
>
> Founding upon these and similar authorities [it is argued] that *amūr-al-khaira* represent to the mind of a Mohammedan works of a religious purpose which are therefore *prima facie* charitable and

must be held to be charitable, unless they can be proved to be immoral or contrary to public policy.

Now, as it seems to me, the fallacy in this argument lies in the assumption that a purpose which is religious in the eyes of a devout Mohammedan is for that reason religious in the sense in which that word is used in the proposition "religious purposes are *prima facie* charitable". The word as used in the proposition has no very exact meaning, but its sense is sufficiently restricted to exclude the ideas associated with such words as "benevolent", "philanthropic", and "altruistic". To be "religious" in the true sense, a purpose must tend to the promotion of religion not merely secure "the approval of the Almighty". Whereas in the eyes of the Mohammedan such approval is the only test. One illustration is sufficient to point the difference: to make provision for one's children is an act which has the approval of the Almighty and is therefore to a Mohammedan, a religious act, but it is not even *prima facie* charitable in the legal sense. For these reasons I have no hesitation in holding that a purpose is not *prima facie* charitable merely because it is regarded by a devout Mohammedan as religious.[133]

In *Re Syed Abdul Rahman bin Shaikh bin Abdul Rahman Alkaff*[134] the testator directed his trustee: (a) to pay a part of the income from his property "for schools in Tarim, Seiyun and Doa wholly or partly, temporarily or permanently, religious or general knowledges and every welfare according to their condition; and (b) to pay the proceeds of the corpus of his property in such charities or other public purposes in Arabia as they shall think proper". It was held that the dispositions were void for uncertainty.

If a trust includes objects which are not charitable they are not made so by the donor's belief in their charity. Thus in *Re Hadjee Esmail bin Kassim*[135] the testator directed that one-third share in his property be held upon trust "as a wakaf or property set apart for charitable purposes according to Mohammedan Law" and then went on to discuss how the income should

133. Muslim Law makes no distinction between what are now termed "charitable trusts" on the one hand and "family *waqfs*" on the other. Both alike were regarded as perfectly valid. Indeed the bestowal of gifts upon a relative is regarded as the best of alms. The dominant view of the *Shāfi'ī* School is that a *waqf* to the children or family of the deceased is valid even though there is no explicit mention of the poor, and in such case if the beneficiaries become extinct, the income of the *waqf* will be expended in the interests of the Muslim community or paid to the indigent and the poor in the country.

134. (1953) 19 *M.L.J.* 68.

135. (1911) 12 *S.S.L.R.* 74.

be applied, for certain purposes, some of which were not charitable; it was held that the general words purporting to express a charitable intention, did not make charitable such gifts as were in fact "mistaken charities".

In the Penang case of *Fatimah* v. *Logan*[136] it was held that a gift of clothes to the poor was a good charitable gift. In *Re Alsagoff's Trusts*[137] the following trusts were held to be charitable:— (a) for *sadikah* (gifts) to be given to poor persons on the 27th day of Ramadhan in every year at the mosque of Hadjee Fatimah; (b) for providing for the burial of poor Mohammedan strangers in Singapore; (c) for assisting poor Mohammedan persons who are strangers to the territory (formerly) known as the Straits Settlements going to their places of residence who may not have the money for the same or otherwise be in difficulties; (d) for renting houses in Mecca for the occupation of the poor; and (e) for maintenance and provision of oil and other means of illumination for the Rubad Sadayat Medina (held to be an institution for the relief of poverty); but a gift for poor persons to read the *Qur'ān* at the testator's grave was held not charitable, the learned judge saying that it cannot be treated as a gift for the relief of poverty.

Gifts for poor relations have been held to be charitable. In *Re Hadjee Esmail bin Kassim*[138] a trust for the maintenance of the testator's children and their descendants and other relatives, who might be in indigent circumstances, was held to be charitable. In *Re Shaik Salleh bin Obeid Abdat*[139] a trust for the "maintenance and support of and for giving pecuniary or other aid or assistance to all such members of the kin or kindred and/or all such persons in any wise related to the settlor or to his family as reside or shall reside in Alghurfah or elsewhere in the Hydramaut and shall or may be in needy circumstances" was held to be charitable. In *Re Sheikh Salman bin Abdul Shaikh bin Mohamed Shamee*[140] a trust for payment of annual sums to such of the settlor's family as are from time to time in Arabia and are in distressed circumstances was held to be charitable.

136. (1871) 1 *Kyshe* 255.
137. (1956) 22 *M.L.J.* 244.
138. (1911) 12 *S.S.L.R.* 74.
139. (1954) 20 *M.L.J.* 8.
140. (1953) 19 *M.L.J.* 200.

In *Re Alsagoff's Trusts*[141] it was held that gifts for poor relatives were charitable. Again in *Re Syed Shaik Alkaff*[142] it was held that a trust to distribute income among such of the blood relatives of the testator, his father and his brother as were in indigent circumstances was charitable.

In the Penang cases of *Fatimah* v. *Logan*,[143] *Mustan Bee* v. *Shina Tomby*[144] and *Ashabee* v. *Mohammed Hashim*[145] it was held that a trust for *kandoories* was not charitable and void as tending to a perpetuity. In *Fatimah* v. *Logan* the trust was "to expend for the yearly performance of *kandoories* and entertainments for me and in my name to commence on the anniversary of my decease according to the Mohammedan religion or custom, such *kandoories* to continue for ten successive days every year". The learned Judge said:

> No evidence was given to show the nature and object of these feasts and *kandoories*, and whether they are enjoined by the Mohammedan religion and I am therefore left to form my opinion from the words of the will itself and I confess that looking at the description of the objects of the testator's bounty in the most liberal manner, it does not appear to me that they can in any sense of the word be called charitable. I do not see how it can be of any public utility to give feasts even when these feasts are to be enjoyed by the poor. For although it would be good charity to give alms to a poor, a feast can scarcely be regarded in the same light.

In *Mustan Bee* v. *Shina Tamby* a devise of a shop as a *wakaf* which was not to be sold, but its rents to go for repairs and the balance thereof for *kandoories* for the testator's benefit, was held to be void, following *Fatimah* v. *Logan*. In *Ashabee* v. *Mohammed Hashim* a bequest of $400/- for maintenance of the testator's wife and to be spent in *"kandoories"* without showing how much of it was for maintenance and how much for *kandoories* was held to be void for uncertainty and tending to a perpetuity. In the Singapore case of *Re Hadjee Esmail bin Kassim*[146] it was held that the trust of income to be spent in payment of the monthly, yearly and other ceremonies in the

141. (1956) 22 *M.L.J.* 244.
142. (1923) 2 *Malayan Cases* 38.
143. (1871) 1 *Kyshe* 255.
144. (1882) 1 *Kyshe* 580.
145. (1887) 4 *Kyshe* 212.
146. (1911) 12 *S.S.L.R.* 74.

testator's memory was not charitable. The learned Judge said: "Ceremonies *prima facie* intended in honour of an individual could in no sense be charitable, the observance of them leading to no public advantage or usefulness". The Singapore Court of Appeal has however in *Re Hadjee Daeing Tahira binte Daeing Tedlellah*[147] held that a trust "to provide yearly at the date of my death in memory of my parents and my sisters and myself a feast for poor persons of the Mohammedan religion in accordance with Mohammedan custom" was charitable, overruling *Fatimah* v. *Logan*. Murray-Aynsley C.J., in that case said: "In the present case the proposed expenditure is substantially in nourishment and as it is limited to the poor it is a charitable expenditure if it can be considered as a form of relief of poverty". After referring to *Fatimah* v. *Logan* the learned Judge said:

> While the relief of poverty constitutes one of the types of charity recognised by the law it does not follow that every form of expenditure on the poor is charitable e.g. a fund to pay for admission to dog races would not be charitable and we can imagine meals of a type that would not be charitable. In other words the relief of poverty means the provision of the more ordinary necessities of life. However I do not consider that the mere use of the word "feast" suggests that the type of meal contemplated is of necessity one that brings it outside the scope of charity. While this sort of relief is not an ideal or even a satisfactory method of relieving the poor in the absence of any regular system of poor relief, it cannot be said that it lacks that element of public utility which is a necessary part of charity in the legal sense. On this point I am prepared to overrule the case of *Fatimah* v. *Logan*. In the other cases where *kandoories* were considered they were not restricted to the poor and therefore not charitable.

A gift for the recital of prayers in honour of Muslim saints has been held to be charitable (*Re Abdul Guny Abdullasa*).[148]

In *Re Alsagoff's Trusts*[149] a trust for the purpose of providing for the burial of poor Muslim strangers dying in Singapore was held to be charitable. But a trust of land as "a *wakaff* for the burial of the donor or family and relatives" was held not to be a public charity as it was not to the benefit of the

147. (1948) 14 *M.L.J.* 62.
148. (1936) 5 *M.L.J.* 174.
149. (1956) 22 *M.L.J.* 244.

public and was therefore void (*Shaik Lebby* v. *Fateemah*).[150] In *Aisha* v. *Udmanshah*[151] there was a settlement of land "for the sole use and benefit of a burial ground or cemetery to bury me after my death and them [that is the settlor's children] and my grand-children and great grand-children and also any person or persons who may wish to be buried in the said land [the said children] are not to prevent them from being buried in it"; it was held that this was not a dedication to the public of a public cemetery and that there was therefore no paramount general charitable intention, which would enable the *cypres* doctrine to be applied if the trust failed on the closing of the burial ground.

A trust to pay "$20/- a month to the managing body of a school" was held to be charitable in *Fatimah* v. *Logan*.[152] In *Re Shaik Salleh bin Obeid Abdat*[153] a trust for the "establishment, endowment and carrying out in the assisting in the establishment, endowment and carrying on (including the building and repair or rebuilding) of mosques, madrasahs and schools and other places of instruction or education religious or otherwise in Alhool and Alghurfah or elsewhere in Hydramout and for the remuneration of persons employed or to be employed in any such institution" was held to be charitable.

In *Haji Salleh* v. *Haji Abdullah*[154] a gift for a mosque was held charitable. A gift for keeping a lamp burning in a mosque was held to be charitable in *Re Abdul Guny Abdullasa*.[155] In *Re Alsagoff's Trusts* (*Supra*) a gift for the maintenance and provision of mats and *Zamzam* water for the use of persons visiting the mosque at Mecca was held to be charitable. Pilgrimages to Mecca have however been held not to be a charitable object as there was no evidence or suggestion that "these pilgrimages do anything more than merely solace the pilgrim and his family" (*Re Hadjee Esmail bin Kassim*).[156] Unaccountably a trust "to such persons as shall read the Qur'ān in my name" has been held to be not charitable and a gift to "such poor persons

150. (1872) 1 *Kyshe* 324.
151. (1928) *S.S.L.R.* 37.
152. (1871) 1 *Kyshe* 255.
153. (1954) 20 *M.L.J.* 8.
154. (1935) 4 *M.L.J.* 26.
155. (1936) 5 *M.L.J.* 174.
156. (1911) 12 *S.S.L.R.* 74.

as shall undertake with the consent and approval of my trustees to read the Qur'ān at my grave according to the Mohammedan custom" has also been held to be not charitable. (*Re Alsagoff's Trusts*)[157]. In *Re Abdul Guny Abdullasa* (*Supra*) the testator provided as follows:—

> Out of the one share of my charity expenses 12 gantangs of boiled rice shall be purchased for the ceremony of reciting prayers in the name of the saint Mohamed on the night of the 17th *Rabialawal* and 11 gantangs of boiled rice for the ceremony of reciting prayers in the name of Katabul Aktabu Saidena Mohaideen Abdul Kader Jailanee on the night of the 17th *Rabial-Akhir* and 10 gantangs of boiled rice for the ceremony of reciting prayers in the name of Nagor Syed Sagool Hamid on the night of the 17th of *Jamadil-Akhir*. The rice is to be cooked with ghee, flower, sandalwood paste, rosewater, Indian joss sticks, etc., shall be purchased and prayers shall be recited through *Lebays*, after this each *lebay* shall be made to recite a prayer in the name of each of the souls of the dead person and Katam in the name of each of the saints. In the end alms in money shall be given to the *Lebays* and to the poor and rice shall be distributed to everyone present including the *Lebays*.

It was held that this trust was valid "as it was a trust created for the holding of a religious ceremony in honour of and in the name of certain Mohamedan Saints, that it is valid as a whole and that it creates a trust for a charitable object namely the advancement of religion". The Judge said in that case:

> There is, I think, a clear distinction between the ceremony enjoined and *kandoories* which are feasts in honour of a deceased attended by his relations and are held on the anniversary of the testator's death. Moreover the deceased in the present case was not a Malay. The ceremonies envisaged are not in perpetuation of the name of the deceased nor are his relatives enjoined to attend, but although food is to be distributed at the conclusion it does not appear to me that the main object is of a festive nature.

With respect to the direction "to recite a prayer in the name of each of the souls of the dead persons and *katam* in the name of each of the Saints" the learned Judge said:

> I regard this as merely an incidental part of the ceremony and I must confess that I am not sufficiently versed in Mohamedan religious observances to say exactly what it does mean. Anyhow

157. (1956) 22 *M.L.J.* 244, following *Gilmour* v. *Coats* (1949) A.C. 426 but see Sheridan, "Reading the Qur'ān" (1956) *M.L.J.* xl.

I do not think that it is sufficient to avoid the whole clause and intention of the testator.

A gift to be applied in making yearly sacrifice for the testator's soul is not a valid charitable trust (*Re Alsagoff's Trusts*);[158] nor is a trust for the payment of the monthly, yearly and other ceremonies to the testator's memory as "they lead to no public advantage and usefulness" (*Re Hadjee Esmail bin Kassim*).[159]

In *Re Shrine of Habib Noh*[160] the Court was asked to approve a scheme for the disposal of funds which had been accumulated from the contributions and votive gifts given at the shrine built over the grave of a Muslim Saint. It was contended that the funds should be used for purposes beneficial to the Muslim community and in particular for education, but it was held that this contention was based on erroneous reasoning, as to particularise the general intention of charity in that way would infringe the principle of carrying out the general intention as nearly as practicable.

MORTGAGE BY CONDITIONAL SALE

The taking of interest is forbidden in Islām but numerous devices have been sanctioned by the *Ḥanafī* and *Shāfi'ī* Schools of Law to evade the prohibition. The best known of this is the *bay' bil-wafā'* which is a sale on condition that when the vendor returns the purchase money the buyer will return the property.[161] This is the usual form of mortgage under Muslim Law. The mortgagee is put in possession of the property and, by agreement, enjoys the profits and fruits of the property. In Malaya there is a similar transaction in the form of *jual janji* or conditional sale. It is usual to embody the transaction of *bay' bil-wafā'* in two separate contracts — one of sale and the other a collateral or nominally subsequent promise to reconvey. Originally on the expiry of the time stipulated for repayment in the *bay' bil-wafā'* the sale became absolute, but British Courts in India and Africa have applied the English principle that there must be no clog on the equity of redemption and have held that even after that date the transaction continues in force as a mortgage. In Malaya

158. (1956) 22 *M.L.J.* 244.
159. (1911) 12 *S.S.L.R.* 74.
160. (1957) 23 *M.L.J.* 139.
161. 'Abdur Rahim, *The Principles of Muhammadan Jurisprudence*, p.296.

however the trend of the cases appears to be that where there is a sale and an agreement for return of the property when the purchase price is returned by the vendor, the agreement for return of the property is merely a contract between the parties and the English doctrines concerning mortgages, in particular those dealing with clogs on the equity of redemption, are inapplicable.

Jual janji or conditional transfer with a right of repurchase is recognised in Kelantan by section 108A of the Land Enactment (No. 26 of 1938). The special form of transfer is set out in Schedule 24A to the Code. The amount is stated to be advanced to the transferor by the transferee and the transfer contains an undertaking by the transferee that he will, if such amount is repaid by the transferor after the expiration of two years from the date of transfer but before the stated date, re-transfer the said land to the transferor, his heirs, executors or assigns free from all liability in respect of the transfer. The transfer is subject to the provisions of the Jual Janji Rules, 1938. In lieu of interest the transferee is entitled to the rents and profits of the land. At the end of two years the transferor's right of redemption is barred by rule 9 of the Jual Janji Rules, 1938, and thereafter the transferee becomes the proprietor free from any obligation under the *jual janji* transfer and all the interest of the transferor in such land ceases. In Perak under the General Land Regulations of 1879 and 1885 a mortgage or charge over a lease of State land (which was the only form of title then issued) could be effected by *jual janji*. The principal loan was made payable on a stated date, no interest could be charged but the lender described as the lessee was entitled to enjoy the usufruct of the land during the period of the lease or until the money was repaid; in default of payment of principal the lessee was entitled to proceed to sell the land after giving notice to the lessor and after having obtained authority from the District Officer. Similar provisions to that in Kelantan were included in sections 39 and 40 of the Land Enactment, 1344 (1926) in Trengganu but all reference to conditional transfers was omitted from the Land Enactment of 1357 (1939) and there is now no statutory provision for them in Trengganu. In those States where *jual janji* transactions have not received statutory recognition, and where therefore it is not

possible to modify the statutory form of transfer so as to include an agreement to re-transfer the land upon stated conditions capable of registration, the parties have to resort to a collateral agreement, which can be defeated, in the absence of a covenant, by the registration of a *bona fide* purchaser's title though acquired with notice of the transferor's equitable right.[162]

In the Privy Council case of *Haji Abdul Rahman* v. *Mohammed Hassan*[163] an agreement in writing made in 1895 provided that as a security for a debt, land in Selangor of which the debtor was registered as owner should be transferred to the creditor and that it should be a condition of the agreement that if the debtor repaid the debt within six months the land should be reconveyed to him, otherwise the agreement should be void. A transfer of land in the statutory form was executed upon the execution of the agreement and was duly registered. In 1913 the debtor who had not repaid the debt brought an action to redeem the land. The suit was barred by the Limitations Enactment, 1896 unless the agreement was a mortgage to which Article 115 under the Enactment applied. It was held that the Agreement conferred upon the debtor no real right in the land but merely a contractual right; that Article 115 applied only where the relationship of mortgagor and mortgagee was created by a charge made and registered in the statutory manner; and that consequently even if the agreement should be construed as a continuing security for the debt, the suit was barred by limitation. In referring to the passages dealing with the right to the equity of redemption in the judgments in the Lower Courts, the Privy Council said:

> It seems to their Lordships that the learned Judges in these observations have been too much swayed by the doctrines of English equity and, have not paid sufficient attention to the fact that they are here dealing with a totally different land law, namely, a system of registration of title contained in a codifying Enactment. The very phrase "equity of redemption" is quite inapplicable in the circumstances.

In the case of *Yaacob* v. *Hamisah*[164] the facts were that the plaintiff sold a piece of land in Kedah to the defendant on

162. Das, *The Torrens System in Malaya*, p.8-9 and 473-475.
163. (1915) 1 *F.M.S.L.R.* 290.
164. (1950) 16 *M.L.J.* 255.

28th October, 1944 and the defendant paid therefor the sum of $2,000/- in Japanese currency. On 30th November, 1945 the defendant entered into a written agreement to resell the land to the plaintiff after a period of three years commencing on 1st February 1945 the agreement to become null and void if the plaintiff failed to re-purchase at the end of three years. The plaintiff remained in possession of the land. The plaintiff gave evidence that it was orally agreed between the parties that the transfer was to be merely by way of security. The transaction was said to be the familiar one of *jual janji*. The Court of Appeal held that the agreement formed part of a transaction which was in essence a mortgage of the land for $2,000/- and that the plaintiff had a right to redeem the property irrespective of whether or not the period within which it was specified the loan should be repaid had expired or not.

The case of *Yaacob* v. *Hamisah* (*Supra*) was however not followed in the latter case of *Wong See Leng* v. *Saraswathy Ammal*.[165] In that case the defendant in reply to a claim for certain lands brought in 1953 alleged that the lands were transferred to him as security with the option to repurchase on or before the 31st December, 1950. The plaintiffs adopted the facts alleged in the defence and asked for judgment for an order for the re-transfer of the said lands on the ground that the principle "once a mortgage always a mortgage" should be applied. The Court of Appeal held that the English principle dealing with clogs on the equity of redemption did not apply to a system of registration of titles to land. Buhagiar J. in that case said:

> The option given to the respondent to repurchase the land did not confer on the respondent any interest in the land; she only acquired a contractual right . . . The respondent's right is governed by the law relating to contracts and the parties have chosen to make time of the essence of the contract; a term not prohibited by law. After the 31st December, 1950 the respondent's rights became extinct.

165. (1954) 20 *M.L.J.* 141.

OFFENCES - EVIDENCE - PROCEDURE

Allāh has no mercy on him who is not merciful to men.

Muḥammad
Bukhārī, *Ṣaḥīḥ, XXIV : 15*

OFFENCES-EVIDENCE-PROCEDURE

MUSLIM OFFENCES

THE Muslim jurists divide laws having regard to the question of their enforceability into three classes: (1) those which concern men in their social and individual existence in this world, their object being to regulate men's relations to and dealings among one another; (2) laws which solely concern the spiritual aspect of individual life, though some of them may relate to worldly transactions; and (3) laws which mainly concern the spiritual aspect of individual life, but also affect the Muslim communal life in its religious aspect. The first class includes laws relating to contracts, transfer of property, succession, domestic relations, wrongs, crimes and the like; since observance of laws of this kind is necessary to the preservation of humanity, their enforcement has been delegated to and is made incumbent on the community. The second class includes laws enjoining commendable acts, such as alms, superogatory prayers and fasting; these are enforced by God alone by means of spiritual rewards and punishments. The third class includes laws enjoining the duties of saying the five daily prayers and the *Jumā'ah* prayer, paying the *zakāt* and fasting during *Ramaḍān;* the enforcement of these is not incumbent on the State, but is left to the discretion of the State, which may enforce them by disciplinary measures.[1]

Punishments for criminal offences are divided into two classes: (a) *ḥadd* that is a punishment the measure of which has been definitely fixed; and (b) *ta'zīr,* where the court is allowed discretion both as to the form in which such punishment is to be inflicted and its measure. *Ḥadd* used to be prevalent in Arabia at the time of the preaching of Islām and the Muslim Law while confirming it as the extreme punishment for certain crimes has laid down conditions of a stringent nature under which such punishments may be inflicted. These rules are so strict and

1. 'Abdur Rahim, *op. cit.,* p.62.

inflexible that only in rare cases can the infliction of *ḥadd* be possible. Punishments by way of *ḥadd* are of the following forms: Death by stoning, amputation of limb or limbs, flogging by hundred or eighty strokes. These are prescribed for the following offences: Fornication, theft, highway robbery, drunkenness and slander imputing inchasity.[2] The law of *ḥadd* has merely a historical interest and is not enforceable in Malaysia.

Ta'zīr may be inflicted for offences against human life and body, property, public peace and tranquility, decency, morals and religion and the nature of the sentence to be inflicted by way of *ta'zīr* for particular kinds of offences may be regulated by the Head of the State, who has absolute discretion in the matter.[3]

Muslims in Malaysia are subject to the ordinary criminal law of the land, the main part of which is contained in the Penal Code. The special offences relating to Muslims may be divided into six groups: (a) matrimonial offences; (b) laws dealing with unlawful sexual intercourse; (c) laws concerning the consumption of intoxicating liquor; (d) laws concerning the spiritual aspect of individual life, which also affect the Muslim communal life; (e) laws relating to conversion and adoption; and (f) miscellaneous laws relating to the teaching of Muslim doctrines and conversion.

Muslim offences are dealt with in Selangor by the Administration of Muslim Law Enactment, 1952 (No. 3 of 1952); in Perak by the Muhammadan (Offences) Enactment, 1939 (No. 5 of 1939); in Negri Sembilan by the Muslim Offences Order in Council, 1938 (No. 1 of 1938) and the Administration of Muslim Law Enactment, 1960 (No. 15 of 1960); in Pahang by the Administration of the Law of the Religion of Islam Enactment, 1956, (No. 5 of 1956); in Kelantan by the Council of Religion and Malay Custom and Kathis Courts Enactment, 1953 (No. 1 of 1953); in Trengganu by the Administration of Islamic Law Enactment, 1955 (No. 4 of 1955); in Kedah by the Administration of Muslim Law Enactment, 1962 (No. 9 of 1962); in Perlis by the Administration of Muslim Law Enactment, 1963 (No. 3 of 1964); in Johore by

2. *Ibid.*, p.361f.
3. *Ibid.*, p.363.

the Offences (by Muhammadans) Enactment, 1935 (Enactment No. 47 of 1935); in Melaka by the Administration of Muslim Law Enactment, 1959 (No. 1 of 1959); and in Penang by the Administration of Muslim Law Enactment, 1959 (No. 3 of 1959).

Matrimonial Offences.

In Selangor, Kelantan, Trengganu, Negri Sembilan, Melaka, Penang and Kedah a Muslim who ceases to cohabit with his wife in the manner required by Muslim Law and, having been ordered by the Court of the *Chief Kathi* or of a *Kathi* to resume cohabitation, wilfully fails or neglects to comply with such order is punishable with imprisonment for a term not exceeding fourteen days or with fine not exceeding fifty dollars or with both such imprisonment and fine.[4]

In Selangor, Kelantan, Trengganu, Pahang, Negri Sembilan, Melaka and Penang, any Muslim who ill-treats his wife is punishable with imprisonment for a term not exceeding fourteen days or with fine not exceeding fifty dollars or with both such imprisonment and fine.[5] In Selangor, Kelantan, Trengganu, Pahang, Negri Sembilan and Melaka, any Muslim woman who wilfully disobeys any order lawfully given by her husband in accordance with Muslim Law is punishable with a fine not exceeding ten dollars or in the case of a second or subsequent offence with imprisonment for a term not exceeding seven days or with fine not exceeding fifty dollars; but it shall be a sufficient defence to a prosecution that the husband has been guilty on more than one

4. Selangor Administration of Muslim Law Enactment, 1952, s.155 (1); Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.175 (1); Trengganu Administration of Islamic Law Enactment, 1955, s.133 (1); Negri Sembilan Administration of Muslim Law Enactment, 1960, s.147 (1); Malacca Administration of Muslim Law Enactment, 1959, s.146 (1); Penang Administration of Muslim Law Enactment, 1959, s.148 (1); Kedah Administration of Muslim Law Enactment, 1962, s.148.

5. Selangor Administration of Muslim Law Enactment, 1952, 155 (2); Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.175 (2); Trengganu Administration of Islamic Law Enactment, 1955, s.133 (2); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.153; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.147 (2); Malacca Administration of Muslim Law Enactment, 1959, s.146 (2); Penang Administration of Muslim Law Enactment, 1959, s.148 (2).

occasion during the preceding year of abusing or ill-treating the accused.[6]

In Selangor, Kelantan, Trengganu and Perlis it is provided that any Muslim who having lawfully divorced his wife resumes cohabitation with her without having pronounced a lawful *rojok* is punishable with imprisonment for a term not exceeding fourteen days (in Perlis four days) or with fine not exceeding fifty dollars or, if his wife was not at the time of such resumption of cohabitation aware of the occurrence of the divorce with imprisonment for a term not exceeding one month or with fine not exceeding one hundred dollars or (in Trengganu only) with both; any woman who abets such an offence is punishable with imprisonment for a term not exceeding seven days or with fine not exceeding twenty five dollars or (in Trengganu only) with both.[7] In Pahang, Negri Sembilan, Melaka, Penang and Kedah, the punishment provided for such an offence is imprisonment for a term not exceeding one month or a fine not exceeding one hundred dollars or if the wife was not aware of the occurrence of the divorce imprisonment for a term not exceeding two months or a fine not exceeding two hundred dollars; and for the woman who abets the offence imprisonment for seven days or a fine not exceeding five dollars.[8]

In Selangor, Kelantan, Trengganu, Pahang, Negri Sembilan, Melaka, Penang, Kedah and Perlis, it is provided that a person who solemnises or purports to solemnise any marriage between

6. Selangor Administration of Muslim Law Enactment, 1952, s.156; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.176; Trengganu Administration of Islamic Law Enactment, 1955, s.134; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.154; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.148; Malacca Administration of Muslim Law Enactment, 1959, s.147.
7. Selangor Administration of Muslim Law Enactment, 1952, s.158; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.178; Trengganu Administration of Islamic Law Enactment, 1955, s.136; Perlis Administration of Muslim Law Enactment, 1963, s.116.
8. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.156; Negri Sembilan Administration of Muslim Law Enactment, 1960; s.152; Malacca Administration of Muslim Law Enactment, 1959, s.149; Penang Administration of Muslim Law Enactment, 1959, s.150; Kedah Administration of Muslim Law Enactment, 1962, s.150.

persons professing the Muslim religion in contravention of the requirements of the relevant Enactment or knowingly purports to solemnise any marriage which is void under the provisions of the relevant Enactment, shall be punishable with imprisonment for a term not exceeding one month or with a fine not exceeding one hundred dollars (in Pahang and Perlis with imprisonment for a term not exceeding six months or with a fine not exceeding five hundred dollars). A person who being under a duty to report to a Registrar any marriage or divorce wilfully neglects or fails to do so shall be punishable with a fine not exceeding twenty-five dollars (in Perlis alternatively to imprisonment for a term not exceeding seven days and in Kedah to a fine not exceeding fifty dollars or to imprisonment for a term not exceeding one month); a person who wilfully neglects or fails to comply with any requirement of a Registrar to furnish information or to execute or sign a document lawfully necessary for the purpose of effecting registration of a marriage or divorce, shall be punishable with a fine not exceeding twenty-five dollars (in Perlis alternatively to imprisonment for a term not exceeding seven days and in Kedah to a fine not exceeding fifty dollars or to imprisonment for a term not exceeding one month); and any person who makes a false statement or declaration to a Registrar relating to a matter required to be recorded or registered by such Registrar shall be punishable with imprisonment for a term not exceeding one month or with a fine not exceeding one hundred dollars (in Perlis to imprisonment for a term not exceeding three months or to a fine not exceeding three hundred dollars).[9]

In Perak it is provided that any person failing to comply with the duty to report a marriage or divorce shall be liable to a fine of twenty-five dollars.[10] It is also provided that where the

9. Selangor Administration of Muslim Law Enactment, 1952, s.159 and 160; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.179 and 180; Trengganu Administration of Islamic Law Enactment, 1955, s.137 and 138; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.158 and 159; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.153 and 154; Malacca Administration of Muslim Law Enactment, 1959, s.150 and 151; Penang Administration of Muslim Law Enactment, 1959, s.151 and 152; Kedah Administration of Muslim Law Enactment, 1962, s.153 and 154; Perlis Administration of Muslim Law Enactment, 1963, s.119 and 120.

10. Muslim Marriage and Divorce Registration Enactment, (No. 2 of 1954), s.6.

marriage of two persons has been irrevocably dissolved by the pronouncement of three divorces by the man against the woman it shall be unlawful for such persons to cohabit as man and wife unless the woman shall first have been lawfully married to some person other than her divorced husband and such marriage shall have been dissolved; any person who acts in contravention of this provision shall be liable on conviction to a fine not exceeding two hundred and fifty dollars and for any subsequent offence of the same nature to a fine not exceeding five hundred dollars or to imprisonment not exceeding a term of six months.[11]

In Johore it is provided that any person whose duty is to effect the registration of a marriage, divorce or revocation of divorce and who omits to effect such registration shall be liable to a fine not exceeding fifty dollars; any person who fails to comply with the summons of a *Kathi* making an enquiry into a marriage, divorce or revocation of divorce shall be liable to a fine not exceeding ten dollars. Where the marriage of two Muslims has been irrevocably dissolved by the pronouncement of three divorces by the man against the woman, it shall be unlawful for such persons to cohabit as man and wife unless the woman shall first have been lawfully married to some person other than her divorced husband and such marriage has been dissolved and the period of *'iddah* has elapsed; any person who acts in contravention of this provision shall be guilty of an offence and for each first such offence shall be liable on conviction to a fine not exceeding two hundred and fifty dollars; and for each subsequent such offence to a fine not exceeding five hundred dollars or to imprisonment not exceeding six months.[12]

In Singapore penalties are provided for omission to register a marriage, divorce or revocation of divorce within the prescribed time and for failure to comply with the summons of a *Kathi*. Any person other than a Registrar or a *Kathi* who keeps any book being or purporting to be a register of Muslim marriages, divorces or revocations of divorces or issues to any person any document being or purporting to be a certificate of marriage, divorce or revocation of divorce shall be liable to a fine not

11. Muhammadan (Offences) Enactment, 1939, s.11.
12. Muhammadan Marriage and Divorce Registration Enactment, 1935, s.7; Offences by Muhammadans Enactment 1935, s.5-7.

exceeding two hundred dollars and for every subsequent offence to a fine not exceeding one thousand dollars and to imprisonment not exceeding six months. Any person who (a) solemnizes any marriage between Muslims in contravention of the provisions of the Muslims Ordinance; or (b) registers any marriage, divorce or revocation of divorce effected between Muslims in contravention of the provisions of the Ordinance shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding six months or to both such fine and imprisonment.[13]

Unlawful Sexual Intercourse.

The Penal Code punishes the offence of rape, incest, unnatural offences, gross indecency, kidnapping from lawful guardianship, and enticing a married woman; and such provisions apply to Muslims. So too the provisions relating to offences against women and girls in the Women's Charter, 1961, and in the Women and Girls Protection Enactments apply to Muslims. The Penal Code does not, as it does in India, punish the offence of adultery.[14]

It has been held that a Muslim married woman is not exempt from a prosecution for bigamy (*Reg.* v. *Rabia*)[15a]; and that a Muslim convert may be guilty of bigamy if he marries while his Christian wife is still alive (*P.P.* v. *White*).[15b] In the case of *Ghouse* v. *Rex*[16] it was held that a Muslim girl when she reaches puberty is free from lawful guardianship and therefore cannot be kidnapped from lawful guardianship even though she is under sixteen years old but this case has not been followed in *D.P.P.* v. *Abdul Rahman*[17] where it was held that a man can be guilty of the offence of taking or enticing a Muslim female under the age of sixteen years even though she has reached the age of puberty, as her father is still her lawful guardian under the Guardianship of Infants Ordinance.

In Selangor, Kelantan, Melaka, and Penang it is provided

13. Muslims Ordinance, 1957, s.60 and 60A.
14. Penal Codes: F.M.S. Cap. 45 of 1935, Singapore Cap. 119 of 1871 (No. 4); Women's Charter, 1961 (No. 18); Women and Girls Protection Enactments: F.M.S. Cap. 156 of 1935, Singapore Cap. 33 of 1955.
15. a. (1889) 4 *Ky.* 513; b. (1940) 9 *M.L.J.* 214. A contrary opinion has been given in the Privy Council case of *Attorney-General of Ceylon* v. *Reid* (1965) 2 *W.L.R.* 671.
16. (1946) 12 *M.L.J.* 36.
17. (1963) 29 *M.L.J.* 213.

that any Muslim who shall be guilty of illicit intercourse, that is, sexual intercourse not amounting to rape between any male and any female who is not his wife or whom he is forbidden by Muslim Law to marry, shall be guilty of an offence, whether or not the other party to such illicit intercourse professes the Muslim religion, and shall be punishable with imprisonment for a term not exceeding six months or with a fine not exceeding five hundred dollars. There are similar provisions in Pahang but "illicit intercourse" is not there defined. It is further provided that whoever has sexual intercourse with a person who is or whom he knows or has reason to believe that he is forbidden by the Muslim Law to marry commits incest. Whoever commits incest, whether male or female, shall, if by reason of consanguinity or fosterage, be punishable with imprisonment for a term not exceeding six months; or if by reason of affinity be punishable with a term of imprisonment not exceeding six months or with a fine not exceeding two hundred and fifty dollars.[18]

In Negri Sembilan and Kedah it is provided that any male Muslim who has sexual intercourse with a woman professing Islām who is or whom he knows or has reason to believe to be, the wife of another man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of fornication and shall be liable on conviction to imprisonment for a term not exceeding six months or to a fine not exceeding five hundred dollars (in Kedah to imprisonment for a term not exceeding one year or to a fine not exceeding one thousand dollars); a woman convicted of being a participant in such an offence shall be liable to a term of imprisonment not exceeding three months or to a fine not exceeding two hundred and fifty dollars (in Kedah to imprisonment for a term not exceeding six months or to a fine not exceeding five hundred dollars). A male Muslim who has sexual intercourse with a woman who is not the wife of some other man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of fornication and on conviction

18. Selangor Administration of Muslim Law Enactment, 1952, s.158 (3); Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.178 (3); Malacca Administration of Muslim Law Enactment, 1959, s.149 (3); Penang Administration of Muslim Law Enactment, 1959, s.150 (3); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.156 (3) and 157.

shall be liable to imprisonment not exceeding three months or to a fine not exceeding two hundred and fifty dollars (in Kedah five hundred dollars); any woman who is found guilty of being a participator in such offence shall be liable to a term of imprisonment not exceeding three months or to a fine not exceeding one hundred dollars (in Kedah two hundred and fifty dollars).[19]

In Negri Sembilan it is provided that any person who has sexual intercourse with a person whom he is forbidden to marry under the Muslim Law by reason of affinity is guilty of the offence of incest. A male person who is convicted of such an offence shall be liable to imprisonment for a term not exceeding six months or to a fine not exceeding two hundred and fifty dollars; any woman who is convicted of being a participant in such an offence shall be liable to the same punishment.[20]

In Kedah it is provided that any person who has sexual intercourse with a person whom he is forbidden to marry under the Muslim Law is guilty of the offence of incest. A male person who is guilty of such an offence shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding one thousand dollars or to both; any woman who is convicted of being a participator in such an offence shall be liable to the same punishment.[21]

In Selangor, Kelantan, Pahang, Negri Sembilan, Melaka, Penang and Kedah it is provided that any male Muslim who is found in retirement with and in suspicious proximity to any woman, whether or not professing the Muslim religion, other than a woman whom by reason of consanguinity, affinity or fosterage he is forbidden by Muslim Law to marry, shall be guilty of *kheluat* (or in Kedah *bersunyi sunyian*). In Selangor, Negri Sembilan, Melaka, Penang and Kedah, a person guilty of *kheluat* (in Kedah *bersunyi sunyian*) is punishable with imprisonment for a term not exceeding two months or with a fine not exceeding two hundred dollars or in the case of a second or subsequent offence, with imprisonment for a term not exceeding three months or with a fine not exceeding three hundred dollars; any female Muslim who

19. Negri Sembilan Administration of Muslim Law Enactment, 1960, s.150; Kedah Administration of Muslim Law Enactment, 1962, s.151.
20. Negri Sembilan Administration of Muslim Law Enactment, 1960, s.151.
21. Kedah Administration of Muslim Law Enactment, 1962, s.152.

abets the offence of *kheluat* (in Kedah *bersunyi sunyian*) and any female Muslim who is found in retirement and in suspicious proximity to any person who does not profess the Muslim religion shall be punishable with the like penalty as is provided for the offence of *kheluat* (or *bersunyi sunyian*).[22] Power is given in Selangor, Negri Sembilan, Melaka, Penang and Kedah to the President of the *Majlis* to order any female found guilty of such an offence to be committed to a home approved by the *Majlis* for such term not exceeding six months as the President shall consider appropriate.[23]

In Kelantan the punishment for *kheluat* is imprisonment for a term not exceeding one month or a fine not exceeding one hundred dollars or for the second or subsequent offence, imprisonment for a term not exceeding two months or a fine not exceeding two hundred dollars. Any female Muslim who abets such an offence or who is found in retirement with and close proximity to any man who does not profess the religion of Islām shall be punished with imprisonment for a term not exceeding fourteen days or with a fine not exceeding fifty dollars or in the case of a second or subsequent offence with imprisonment for a term not exceeding one month or with a fine not exceeding one hundred dollars.[24]

In Trengganu it is provided that any male Muslim who is found in retirement with and close proximity to any woman or is found in any place in suspicious proximity to any woman, whether or not professing the Muslim religion, other than his wife or a

22. Selangor Administration of Muslim Law Enactment, 1952, s.157 (as amended by the Administration of Muslim Law (Amendment) Enactment, 1962); Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.177; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.155; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.149; Malacca Administration of Muslim Law Enactment, 1959, s.148; Penang Administration of Muslim Law Enactment, 1959, s.149; Kedah Administration of Muslim Law Enactment, 1962, s.149.
23. Selangor Administration of Muslim Law Enactment, 1952, s.157 (4); Negri Sembilan Administration of Muslim Law Enactment, 1960, s.149 (4); Malacca Administration of Muslim Law Enactment, 1959, s.148 (4); Penang Administration of Muslim Law Enactment, 1959, s.149 (4); Kedah Administration of Muslim Law Enactment, 1962, s.149 (4).
24. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.177.

woman who by reason of consanguinity, affinity or fosterage he is forbidden by Muslim Law to marry shall be guilty of *kheluat* and shall be liable to be punished with imprisonment for a term not exceeding one month or with a fine not exceeding one hundred dollars or in the case of a second or subsequent offence, with imprisonment for a term not exceeding two months or with a fine not exceeding two hundred dollars or with both such imprisonment and fine. Any female person who is found in retirement with and suspicious proximity to any man or is found in any place in suspicious proximity to any man, whether or not professing the Muslim religion, other than her own husband or a male person whom by reason of consanguinity, affinity or fosterage she is forbidden by the Muslim Law to marry, shall be guilty of *kheluat* and shall be liable to be punished with imprisonment for a term not exceeding one month or with a fine not exceeding one hundred dollars or in the case of a second or subsequent offence, with imprisonment for a term not exceeding two months or with a fine not exceeding two hundred dollars or with both such imprisonment and fine. The Court may in lieu of or in addition to any other such punishment order that any female found guilty of the offence of *kheluat* be committed to a home approved by the Department of Religious Affairs for such time, not exceeding six months, as to the Court may seem fit.[25]

In Kelantan it is provided that any person not professing the Muslim religion who abets any person who to his knowledge professes the Muslim religion in the offence of *kheluat* shall be guilty of abetment of the offence.[26]

In Perak it is provided that any Muslim who shall take or entice any Muslim girl as yet unmarried out of the keeping of her parents or guardians or of any person having the care of her on their behalf, shall on conviction be liable to imprisonment for a term not exceeding one year and shall also be liable to a fine which may extend to twice the amount of the *mas-kahwin* normally paid on the marriage of a girl of her class. Any Muslim girl as yet unmarried who shall abscond from lawful guardianship in

25. Trengganu Administration of Islamic Law Enactment, 1955, s.135.
26. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.197; See on the constitutionality of this provision a Note in 1962 *M. L. J.* at p. cliv.

order to lead an immoral life shall for the first offence be liable on conviction to imprisonment for a term not exceeding three months and for any subsequent offence to imprisonment for a term not exceeding six months. The Enactment also deals with the offences of adultery, incest and *kheluat*. Any Muslim who has sexual intercourse with a Muslim woman who is or whom he knows or has reason to believe to be the wife of another man, such sexual intercourse not amounting to rape, is guilty of the offence of adultery and shall be liable on conviction to imprisonment for a term not exceeding one year and shall also be liable to a fine not exceeding five hundred dollars; any woman convicted of being a participator in such an offence shall be liable to imprisonment for a term not exceeding six months or to a fine not exceeding two hundred and fifty dollars. Any Muslim who has sexual intercourse with a person whom he is and whom he knows or has reason to believe that he is forbidden by Muslim Law to marry by reason of consanguinity, fosterage or affinity, is guilty of the offence of incest; if the act is incest by reason of consanguinity or of fosterage, the male person shall be liable on conviction to imprisonment for a term not exceeding five years and any woman convicted of being a participator in such act shall be liable to the like penalty; where the act is incest by reason of affinity, the male person shall be liable to imprisonment for a term not exceeding six months or a fine not exceeding two hundred and fifty dollars and any woman convicted of being a participator in such act shall be liable to the like penalty. Any Muslim male who is found in retirement alone with and in suspicious proximity to any Muslim woman whom he knows he is not forbidden by Muslim Law to marry by reason of consanguinity or of fosterage or of affinity or with any woman not being a Muslim is guilty of the offence of *kheluat* and shall be liable on conviction to imprisonment for a term not exceeding three months or to a fine not exceeding one hundred dollars. Any Muslim woman convicted of being a participator in the offence of *kheluat* shall be liable to imprisonment for a term not exceeding one month or a fine not exceeding fifty dollars; and any Muslim woman who is found in retirement alone with and in suspicious proximity to any male not being a Muslim shall be liable on

conviction to imprisonment for a term not exceeding six months or to a fine not exceeding fifty dollars.[27]

In Perlis it is provided that any Muslim who has illicit intercourse with another person not lawfully married to him (whether or not such other person professes the Muslim religion) shall be liable to imprisonment for a term not exceeding one year and shall also be liable to a fine not exceeding one thousand dollars or to both. Any Muslim who has sexual intercourse with a person whom he is or knows or has reason to believe that he is either absolutely or conditionally forbidden by the Muslim Law to marry commits incest; if a person commits incest with another person whom he is and knows or has reason to believe that he is absolutely forbidden to marry under Muslim Law he shall be liable on conviction to imprisonment for a term not exceeding five years and a woman convicted of being a participator in such act shall be liable to imprisonment for a term not exceeding one year; if a person commits incest with another person whom he is and knows or has reason to believe that he is conditionally forbidden to marry under Muslim Law he or she shall be liable to imprisonment for a term not exceeding six months or to a fine not exceeding two hundred and fifty dollars. Any Muslim male person who is found in retirement with and in suspicious proximity to any woman (whether or not professing the Muslim religion) other than his wife or a woman whom by reason of consanguinity or affinity or fosterage he is forbidden by Muslim Law to marry, shall be guilty of *khalwat* and shall be liable to imprisonment for a term not exceeding four months or to a fine not exceeding two hundred dollars or in the case of a second or subsequent offence to imprisonment for a term not exceeding six months or to a fine not exceeding four hundred dollars. Any Muslim female person who is found in retirement with and in suspicious proximity to any man (whether or not professing the Muslim religion) other than her husband or a man whom by reason of consanguinity, affinity or fosterage she is forbidden by Muslim Law to marry, shall be guilty of an offence and be liable to imprisonment for a term not exceeding four months or to a fine not exceeding two hundred dollars or in the case of a second

27. Perak Muhammadan (Offences) Enactment, 1939, s.6 – 9.

or subsequent offence to imprisonment for a term not exceeding six months or to a fine not exceeding four hundred dollars. The President of the *Majlis* may order any female person guilty of such an offence to be committed to a home approved by the *Majlis* for such period not exceeding six months as the President may consider appropriate.[28]

In Johore it is provided that any Muslim who has sexual intercourse with a person whom he is and whom he knows or has reason to believe that he is forbidden by the Muslim Law to marry by reason of consanguinity or fosterage or affinity is guilty of the offence of incest; if the act is incest by reason of consanguinity or fosterage, the person shall be liable on conviction to imprisonment for a term not exceeding five years and any woman convicted of being a participator in such act shall be liable to imprisonment for a term not exceeding one year; if the act is incest by reason of affinity, the person shall be liable on conviction to imprisonment for a term not exceeding six months or to a fine not exceeding two hundred and fifty dollars and any woman convicted of being a participator in such act shall be liable to the like penalty. Any Muslim who has sexual intercourse with a Muslim woman who is or whom he knows or has reason to believe to be the wife of another man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery and shall be liable on conviction to imprisonment for a term not exceeding one year and shall also be liable to a fine not exceeding two hundred and fifty dollars; any Muslim woman convicted of being a participator in such an offence shall be liable to imprisonment for a term not exceeding six months. Any Muslim woman who leads an immoral life by becoming a prostitute or cohabiting with a man to whom she is not married, shall be guilty of an offence and on conviction shall be liable for a first offence to imprisonment for a term not exceeding one month and for each subsequent offence to imprisonment for a term not exceeding three months.[29] In the case of

28. Perlis Administration of Muslim Law Enactment, 1963, s.115, 117 and 118.
29. Johore Offences by Muhammadans Enactment, s.4, 6 and 7.

Anchom binte Lampong v. *P.P.*[30] the Court of Appeal in Johore rejected an argument that the Muslim Offences Enactment was *ultra vires* the Constitution of Johore as it purported to revise or amend the Muslim Law, which was declared by that Constitution to be an immutable part of the law of the State.

There are no special provisions for the punishment of offences relating to unlawful sexual intercourse committed by Muslims in Singapore.

Consumption of Intoxicating Liquor.

In Selangor, Kelantan, Pahang, Negri Sembilan, Melaka, Penang and Kedah it is provided that any Muslim who in any shop or other public place purchases or sells or consumes any intoxicating liquor shall be punishable with a fine not exceeding twenty-five dollars; and any Muslim who consumes any intoxicat- offence to a fine not exceeding fifty dollars. In Trengganu it is provided that any Muslim who sells or purchases any intoxicating liquor shall be liable to be punished with a fine not exceeding twenty-five dollars; and any Muslim who consumes any intoxicating liquor shall be liable to be punished with a fine of not less than eighty dollars or for a second or subsequent offence to a fine not less than one hundred dollars. In Perlis it is provided that any Muslim who purchases, sells, keeps or consumes any intoxicating liquor shall be liable to a fine not exceeding twenty-five dollars or in the case of a second or subsequent offence to a fine not exceeding fifty dollars. In all the States it is provided that where any person has sold any intoxicating liquor in his capacity as employee of another person, his employer shall be presumed to have abetted such offence and to have caused its commission by such abetment unless he proves that such offence was committed without his authority, knowledge or consent and that he had taken all reasonable steps to prevent its commission. The punishment for abetment of an offence relating to the purchase, sale or consumption of intoxicating liquor is the same as for the offence. In Selangor it is provided that it shall not be an offence for any person to purchase or sell intoxicating liquor as agent for

30. (1940) *M.L.J.* 22.

a principal who does not profess the Muslim religion.[31]

In Johore the Excise Enactment provides that no person holding a licence to sell by retail any intoxicating liquor for consumption on the premises shall permit any Muslim other than a public servant in the *bona fide* exercise of his duty to enter upon the premises so licensed; and it is further provided that every Muslim found upon premises so licensed shall be presumed to have entered thereon with the permission of the holder of the licence until the contrary is proved.[32]

In Perak, Selangor, Negri Sembilan, Pahang and Kedah under the provisions of the Excise Rules, 1923, licences for the sale by retail of liquor are issued subject to the special condition that no liquor the sale whereof would but for the licence be an offence under the Excise Enactment shall be sold to any Malay or person known to be a Muslim except with the previous consent of the officer empowered under the Excise Enactment to issue licences; and public house licence or licences for the sale of intoxicating liquors for consumption on the premises are issued subject to the special condition that no liquor the sale whereof would but for the licence be an offence under the Excise Enactment shall be sold to any Malay or person known to be a Muslim. It is further provided that no female shall be employed in any capacity in any part which is open to the public of any licensed public house.[33]

Spiritual Aspects of Individual Life also Affecting Muslim Communal Life.

(i) *Friday Prayers.*

31. Selangor Administration of Muslim Law Enactment, 1952, s.151 and 154; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.172 and 174; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.149 and 151; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.143 and 146; Malacca Administration of Muslim Law Enactment, 1959, s.142 and 145; Penang Administration of Muslim Law Enactment, 1959, s.144 and 147; Kedah Administration of Muslim Law Enactment, 1962, s.144 and 146; Trengganu Administration of Islamic Law Enactment, 1955, s.130 and 132; Perlis Administration of Muslim Law Enactment, 1963, s.112.
32. Johore Excise Enactment, 1935 (E. No. 102), s.39.
33. Excise Rules, 1923. See the Excise (Application to Kedah and Amendment) Ordinance, 1955 (No. 40 of 1955).

In Selangor and Pahang it is provided that any male of the age of fifteen years or over who fails to attend prayers on Friday at a mosque shall unless his absence is excusable under Muslim Law be punishable with a fine not exceeding twenty-five dollars.[34]

In Kelantan it is provided that any male of the age of fifteen years or over who fails to attend prayers on Friday at the mosque of the *mukim* where he resides, unless he has been given permission to attend another mosque shall be punishable with a fine not exceeding ten dollars. It is provided that no offence shall be committed if (a) his attendance is prevented by rain or (b) his place of residence is more than three miles by the nearest route from a mosque or (c) less than forty male Muslims aged fifteen years or over or such lesser number as the Ruler may prescribe as the number in whose presence Friday prayers may be performed, reside in the *mukim* where he is then; or (d) he has been excused attendance by the *pegawai masjid* of the *mukim* in which he ordinarily resides or then is, on the grounds of sickness or absence from his ordinary place of residence.[35]

In Trengganu it is provided that every *mukallaf* (that is every male Muslim who has attained the age of majority and who is not mentally defective or deaf or blind) who fails to attend prayers at a mosque on Friday shall be liable to be punished with a fine not exceeding twenty-five dollars. It is provided that no offence shall be committed by such person if (a) his attendance is prevented by rain; (b) his place of residence is more than three miles by the nearest route from a mosque; (c) less than forty *mukallaf* or such lesser number as the Ruler may prescribe as the number in whose presence Friday prayers may be performed, reside in the *mukim* in which he then is; or (d) he is absent on grounds of sickness, absence from his ordinary place of residence or other lawful grounds.[36]

In Negri Sembilan it is provided that any male who has attained the age of fifteen years who fails to attend mid-day prayers on Friday in the mosque of a *kariah* in which he ordinarily

34. Selangor Administration of Muslim Law Enactment, 1952, s.150; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.148.
35. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.171.
36. Trengganu Administration of Islamic Law Enactment, 1955, s.129.

resides shall be guilty of an offence punishable with a fine not exceeding twenty-five dollars. No offence shall however be committed by any such person if (a) his attendance is prevented by rain; (b) his place of residence is more than three miles by the nearest route from a mosque; and (c) he is sick, absent from his ordinary place of residence or prevented from attending by other grounds lawful according to Muslim Law.[37]

In Melaka, Penang and Kedah it is provided that any male who has attained the age of fifteen years who fails to attend midday prayers on Friday at a mosque of a *kariah* in which he ordinarily resides shall be guilty of an offence punishable with a fine not exceeding twenty-five dollars. No offence shall however be committed by any such person if (a) his attendance is prevented by rain; (b) his place of residence is more than three miles by the nearest route from the mosque; (c) less than forty male Muslims aged fifteen or over or such lesser number as the Yang di-Pertuan Agong (or in Kedah the Ruler) may prescribe as the number in whose presence Friday prayers may be performed reside in the *kariah* in which he then is; or (d) he is sick, absent from his ordinary place of residence or prevented from attending by other grounds lawful according to Muslim Law.[38]

In Perak, it is provided that any male person over the age of fifteen years residing within three miles of a mosque, who without reasonable excuse to be communicated at the earliest possible moment to the nearest mosque official, shall fail to attend prayers at such mosque on every Friday or who shall fail, except with the permission of a Mosque Official, to remain in the mosque to hear the teaching of the *Imām* or *'Ulamā'* whether such teaching is imparted before or after *salām* shall be liable on conviction to a fine not exceeding five dollars.[39]

In Perlis it is provided that any male person of the age of eighteen years or over who fails to attend prayers on Friday at a mosque shall be punished with a fine not exceeding twenty-five dollars, but no offence shall be committed by any such person

37. Negri Sembilan Administration of Muslim Law Enactment, 1960, s.142.
38. Malacca Administration of Muslim Law Enactment, 1959, s.141; Penang Administration of Muslim Law Enactment, 1959, s.143; Kedah Administration of Muslim Law Enactment, 1962, s.143.
39. Perak Muhammadan (Offences) Enactment, 1939, s.3.

if his failure to attend such prayers is excusable under Muslim Law.[40]

(ii) *Fasting in Ramaḍān.*

In Selangor, Kelantan, Trengganu, Melaka and Penang, it is provided that any Muslim who shall during the hours of daylight in the month of *Ramaḍān* purchase for immediate consumption or sell to a person professing the Muslim religion for immediate consumption or consume any food, drink or tobacco, shall be punishable with a fine not exceeding twenty-five dollars or in the case of a second or subsequent offence to a fine not exceeding fifty dollars. Where any person has in contravention of such statutory provision sold any article in his capacity as employee of another person, his employer shall be presumed to have abetted such offence and to have caused its commission by such abetment unless he proves that such offence was committed without his authority, knowledge or consent and that he had taken all reasonable steps to prevent its commission; and the employer shall be liable for such abetment to the same punishment as the principal offender.[41]

In Pahang it is provided that any Muslim not being permitted to break fast who shall during the hours of daylight in the month of *Ramaḍān* purchase for immediate consumption or sell to a person professing the Muslim religion for immediate consumption or consume in any shop or other public place any food, drink, tobacco or other thing shall be punishable with a fine not exceeding twenty-five dollars or in the case of a second or subsequent offence with a fine not exceeding fifty dollars. Where any person has in contravention of such statutory provision sold any article in his capacity as employee of any other person, his employer shall be presumed to have abetted such offence and to have caused its commission unless he proves that such offence was committed without his authority, knowledge or consent and

40. Perlis Administration of Muslim Law Enactment, 1963, s.111.
41. Selangor Administration of Muslim Law Enactment, 1952, s.152 and 154; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, 173 and 174; Trengganu Administration of Islamic Law Enactment, 1955, s.131 and 132; Malacca Administration of Muslim Law Enactment, 1959, s.143 and 145; Penang Administration of Muslim Law Enactment, 1959, s.145 and 147.

that he had taken all reasonable steps to prevent its commission.[42]

In Negri Sembilan it is provided that any Muslim who shall during the hours of daylight in the month of *Ramaḍān* consume any food, drink or tobacco shall be guilty of an offence punishable with a fine not exceeding twenty-five dollars or in the case of a second or subsequent offence with a fine not exceeding fifty dollars.[43]

In Kedah it is provided that any Muslim who shall during the hours of daylight in the month of *Ramaḍān* sell any food, drink or tobacco to a person professing the Muslim religion for immediate consumption or who being obliged under the Muslim Law to fast during the hours of daylight in the month of *Ramaḍān* shall openly in any public place consume any food, drink or tobacco shall be guilty of an offence and shall be liable to a fine not exceeding twenty-five dollars or in the case of a second or subsequent offence, to a fine not exceeding fifty dollars. Where any person has in contravention of the statutory provisions sold any article in his capacity as employee of another person, his employer shall be presumed to have abetted such offence and to have caused its commission by such abetment unless he proves that such offence was committed without his authority, knowledge or consent and that he has taken all reasonable steps to prevent its commission.[44]

In Perak it is provided that no Muslim shop-keeper or retail trader shall during the month of *Ramaḍān* between half an hour before sunrise (*pajar siddik*) and the hour of sunset supply to any Muslim any article of cooked food or any article of drink or any tobacco or cigarettes for immediate consumption; a person contravening such provisions shall be liable on first conviction to a fine not exceeding two dollars and on a second or subsequent conviction to a fine not exceeding ten dollars unless in either case he proves that the purchaser obtained the food, drink, tobacco or cigarettes under false pretences. Whenever it is proved that any person employed by a Muslim shop-keeper or retail trader

42. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.150 and 151.
43. Negri Sembilan Administration of Muslim Law Enactment, 1960, s.144. S.146 refers to the abetment of sale but s.144 does not make the sale of any article to a Muslim during *Ramaḍān* an offence.
44. Kedah Administration of Muslim Law Enactment, 1962, s.145 and 146.

has during the month and between the hours specified sold to any Muslim any such article for immediate consumption, such shop-keeper or retail trader shall be deemed to have committed the offence unless he proves that the sale was effected without his knowledge or consent and that he had taken all reasonable steps to ensure due compliance with the provisions of the Enactment. It is also provided that any Muslim who in the month of *Ramaḍān* between half an hour before sunrise and the hour of sunset does in any public place or in any place to which the public or any class of the public has access any act which contravenes the provisions of Muslim Law relating to fast in the month of *Ramaḍān* shall be liable on first conviction to a fine not exceeding two dollars and on a second or subsequent conviction to a fine not exceeding ten dollars.[45]

In Perlis it is provided that any Muslim who not being permitted to break fast during the hours of daylight in the month of *Ramaḍān* consumes during those hours any food or drink or smokes tobacco shall be liable to a fine not exceeding twenty-five dollars or in the case of a second or subsequent offence to a fine not exceeding fifty dollars.[46]

(iii) *Non-payment of Zakāt and Fiṭrah.*

The payment of *zakāt* is one of the five fundamental principles of Islām. According to the *Shāfi'ī* School only Muslims are liable to pay *zakāt* and *zakāt* is payable on the following kinds of property: (a) crops of the field which are planted for food; (b) fruits, as for example, grapes and dates; (c) camels, cattle, sheep and goats; (d) silver, and (e) merchandise. On the first two classes the *zakāt* is to be paid at once on the harvest, on the last three after one year's uninterrupted possession; a condition for liability to *zakāt* is the possession of a certain minimum (*niṣāb*). *Zakāt ul-fiṭr* or *fiṭrah* is the obligatory gift of provisions at the end of the month of *Ramaḍān,* which is payable according to the tradition of the Prophet. It is obligatory and has to be given by every free Muslim for himself and all persons whom he is legally bound to support; a man is exempted only if he does not possess more than the bare necessities of

45. Perak Muhammadan (Offences) Enactment, 1939, s.13 and 15.
46. Perlis Administration of Muslim Law Enactment, 1963, s.113.

life for himself and his family. It is permitted according to the *Shāfi'ī* School to hand the *zakāt* and *fiṭrah* direct to the persons who have claims to it; it is however preferable to hand it to the Muslim authorities for regulated distribution. If the *zakāt* is collected by the Government, a person is bound to pay it to the collector (*'āmil*), even if there is no guarantee of its proper distribution. According to the *Shāfi'ī* School the right of the Government to demand the *zakāt* is however limited to the so-called *ẓāhir* properties that is the openly visible articles of the first three categories, in the case of which the collector (*'āmil*) can fix the amount of the *zakāt* from his own observation; the so-called *bāṭin* properties, on the other hand, that is the hidden articles of the last two categories, are expressly withdrawn from this control and the *zakāt* from them is left entirely to the conscience of the individual. Some authorities regard *fiṭrah* as similar to *zakāt* from hidden articles; while others regard *fiṭrah* as similar to *zakāt* from visible articles and hold that *fiṭrah* should be paid to the authorities of the State; and even if such *zakāt* is distributed by the person himself, he should pay it to the State authorities when it is demanded by them. According to the later view of Imām Shāfi'ī such *zakāt* can be distributed by the person who is bound to pay it. It is generally accepted that *zakāt* or *fiṭrah* should be paid when payment is demanded by the Ruler and it is lawful to punish a person who refuses to pay such *zakāt* or *fiṭrah*.[47]

The States of Malaya are among the few Muslim States which have regulated the collection of *zakāt* and *fiṭrah*. Collection of *zakāt* by the States of Malaya commenced about fifty years ago. The first State to bring it under State control was Trengganu when the Department of Religious Affairs under the direct command of the Mentri Besar organized the collection and disbursement of these funds. In 1915 Kelantan adopted this system, followed by Perlis in 1930, Johore in 1934 and Kedah in 1936. Collection by the States which comprised the then Federated Malay States was regulated more recently, the latest being Negri Sembilan as recently as 1957.

In Selangor it is provided that the *Majlis Ugama Islām dan*

47. Nawawī, *op.cit.*, p.80f.; Sh. 'Aṭā'-Allāh, *Revival of Zakāt*.

'Ādat Istiadat Melayu shall have the power and shall be under the duty to collect on behalf of the Ruler all *zakāt* and *fiṭrah* payable in the State in accordance with Muslim Law and to dispose of such *zakāt* and *fiṭrah* as it may, with the approval of the Ruler, direct. *Zakāt* is defined as the tithe of certain property payable annually in accordance with the Muslim Law. *Fiṭrah* is defined as the amount of rice payable under Muslim Law annually by a Muslim at the end of the month of *Ramaḍān* to be used for religious or charitable purposes recognised by Muslim Law. The *Majlis* is given power with the approval of the Ruler to make rules for the collection, administration and distribution of *zakāt* and *fiṭrah*. Such rules may prescribe the amount of *zakāt* and *fiṭrah* to be paid, the method of collection and the appointment of collectors and prescribe penalties for the collection or payment of *zakāt* and *fiṭrah* by or to unauthorised persons. Any person may make an objection to the *Majlis* against any demand for payment by him of *zakāt* or *fiṭrah;* the *Majlis* shall consider such objection and may order that such person shall pay the amount of *zakāt* and *fiṭrah* demanded or such lesser sum as to the *Majlis* shall seem proper or may order that such person shall not be liable in one or more years to pay *zakāt* or *fiṭrah* or either. The decision of the *Majlis* on such objection shall be final and shall not be called in question in any court. Any Muslim who being liable to pay any *zakāt* or *fiṭrah* and having failed to procure the cancellation or modification by the *Majlis* of such liability, refuses or wilfully fails to pay the same and any Muslim who incites or persuades any person professing the Muslim religion to refrain from paying *zakāt* or *fiṭrah* shall be punishable with imprisonment for a term not exceeding seven days or with a fine not exceeding one hundred dollars. A conviction for non-payment of *zakāt* or *fiṭrah* shall not operate to extinguish the debt and any *zakāt* or *fiṭrah* due by any person or the value of the same may be recovered as if the rice, padi, animals or money in question had been ordered to be paid to the *Majlis* by a lawful order of the Court or as if the value thereof were recoverable as a fine.[48]

48. Selangor Administration of Muslim Law Enactment, 1952, s.107 – 109 and 173, as amended by the Administration of Muslim Law (Amendment) Enactment, 1961, (No. 7 of 1961).

In Perak the Bait ul-Mal, Zakat and Fitrah Enactment, 1951, provides that the *Majlis Ugama Islām dan 'Ādat Melayu* shall collect *zakāt* and *fiṭrah* from all persons in the State liable under Muslim Law to pay the same and from all persons liable to pay *zakāt* in respect of property within the State. *Zakāt* is defined as a gift required to be made by a Muslim out of his property and income in accordance with Muslim Law. *Fiṭrah* is defined to mean the amount of rice payable under Muslim Law annually by every Muslim at any time during the month of *Ramaḍān* and until the *Hari Raya Fiṭrah* Sermon in the month of *Shawal*. No person shall collect, receive or accept *zakāt* or *fiṭrah* from any person, save on behalf and with the authority of the *Majlis*, but it is provided that no person shall commit an offence if the giver of the *fiṭrah* shall have already paid the *fiṭrah* payable to an authorized collector. No person shall pay *zakāt* or *fiṭrah* to any person other than a person authorized by the *Majlis*. It is provided that the collection of *zakāt* and *fiṭrah* by the *Majlis* shall in all respects be in accordance with the provisions of Muslim Law as administered in the State or as declared by the State Executive Council after receiving the advice of the *Majlis* thereon; and the *Majlis* shall hold all property collected as *zakāt* and *fiṭrah* and deal with the same according to the Muslim Law or any rules made under the Enactment. Power is given to the State Executive Council after consultation with the *Majlis*, to make rules for the calculation, collection, division and distribution of *zakāt* and *fiṭrah* and to provide penalties for non-payment of *zakāt* and *fiṭrah* and for unauthorized receipt or payment of *zakāt* and *fiṭrah*.[49]

In Negri Sembilan it is provided that the *Majlis Ugama Islām* shall have power to collect on behalf of the Ruler *zakāt* and *fiṭrah* payable in the State in accordance with Muslim Law but no such power shall be exercised by the *Majlis* until a resolution to that effect has been passed by the *Majlis* and approved by the Ruler. The definition of *zakāt* follows that in Selangor but *fiṭrah* is defined as the amount of rice or its equivalent value in money payable under the law of the Muslim religion annually by a Muslim at the end of the month of *Ramaḍān* to be used for

49. Perak Bait-ul-Mal, Zakat and Fitrah Enactment, 1951, (No. 7 of 1951).

religious or charitable purposes recognised by Muslim Law. Power is given to the *Majlis* with the approval of the Ruler to dispose of any *zakāt* or *fiṭrah* collected in accordance with Muslim Law. The *Majlis* may make rules for the collection, administration and distribution of *zakāt* and *fiṭrah*. Such rules may prescribe the amount of *zakāt* and *fiṭrah* to be paid, the method of collection, and the appointment of agents for their collection and prescribe penalties for the collection or payment of *zakāt* and *fiṭrah* by or to unauthorized persons. Any person may make objection to the *Majlis* against any demand for payment by him of *zakāt* or *fiṭrah*. The *Majlis* shall consider such objection and may order that such person shall pay the *zakāt* or *fiṭrah* demanded or such lesser sum as to the *Majlis* shall seem proper or may order that such person shall not be liable in one year or more years to pay *zakāt* and *fiṭrah* or either. The decision of the *Majlis* on such objection shall be final and shall not be called in question in any court. Any Muslim who being liable to pay any *zakāt* or *fiṭrah* and having failed to procure the cancellation or modification by the *Majlis* of such liability refuses or wilfully fails to pay the same shall be guilty of an offence and shall be liable to be punished with imprisonment for a term not exceeding seven days or with a fine not exceeding one hundred dollars. A conviction for non-payment of *zakāt* or *fiṭrah* shall not operate to extinguish the debt and any *zakāt* or *fiṭrah* due by any person or the value of the same may be recovered as if the rice, padi, animals or money in question had been ordered to be delivered to the *Majlis* by a lawful order of a court or as if the value thereof were recoverable as a fine.[50]

In Pahang it is similarly provided that the *Majlis Ugama Islām dan 'Ādat Istiadat Melayu* shall have the power and shall be under the duty to collect on behalf of the Ruler all *zakāt* and *fiṭrah* payable in the State in accordance with Muslim Law and to dispose of such *zakāt* and *fiṭrah* as it may, with the approval of the Ruler, direct. *Zakāt* is defined as the tithe of the crop payable by a person annually under the Muslim Law in respect of padi planted by him. *Fiṭrah* is defined as the amount of rice payable under the Muslim Law annually by any Muslim at the

50. Negri Sembilan Administration of Muslim Law Enactment, 1960, s.102 – 104 and 166.

end of the month of *Ramaḍān* and the first day of *Shawwāl*. The *Majlis* is given power with the approval of the Ruler to make rules for the collection, administration and distribution of *zakāt* and *fiṭrah*. Such rules may prescribe the amount of *zakāt* and *fiṭrah* to be paid, the method of collection and the appointment of agents for the collection of *zakāt* and *fiṭrah* and prescribe penalties for the collection or giving of *zakāt* and *fiṭrah* by or to unauthorized persons. Any person may make objection to the *Majlis* against any demand for payment by him of *zakāt* or *fiṭrah*. The *Majlis* shall consider such objection and may order that such person shall pay the amount of *zakāt* or *fiṭrah* demanded or such lesser sum as to the *Majlis* shall seem proper or may order that such person shall not be liable in any one or more years to pay *zakāt* or *fiṭrah* or either. The decision of the *Majlis* on such objection shall be final and shall not be called in question in any court. Any Muslim who being liable to pay any *zakāt* or *fiṭrah* and having failed to procure the cancellation or modification by the *Majlis* of such liability, refuses or wilfully fails to pay the same and any Muslim who incites or persuades any person professing the Muslim religion to refrain from paying *zakāt* or *fiṭrah* shall be punishable with imprisonment for a term not exceeding one month or with a fine not exceeding one hundred dollars. A conviction for non-payment of *zakāt* or *fiṭrah* shall not operate to extinguish the debt and any *zakāt* or *fiṭrah* due by any person or the value of the same may be recovered as if the rice or padi in question had been ordered to be delivered to the *Majlis* by a lawful order of a court or as if the value thereof were recoverable as a fine.[51]

In Kelantan it is provided that the *Majlis Ugama Islām dan 'Ādat Istiadat Melayu* shall have the power and shall be under the duty to collect on behalf of the Ruler all *zakāt* and *fiṭrah* payable in the State in accordance with Muslim Law and to dispose of such *zakāt* and *fiṭrah* as the Ruler may direct. *Zakāt* is defined as the tithe of crop payable annually under Muslim Law in respect of padi land, subject to the prescribed exemptions. *Fiṭrah* is defined as the amount of rice payable under Muslim Law annually by every Muslim at the end of the month

51. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.102 – 104 and 172 – 173.

of *Ramaḍān* to be used for religious or charitable purposes recognised by Muslim Law. It is provided that *zakāt* shall be payable by every Muslim producer of padi whose production is not less than four hundred *gantangs* in any one year and shall be at the rate of five per centum of the amount produced, but in calculating such amount fractions of a hundred *gantangs* produced shall be ignored. *Fiṭrah* shall be payable by all Muslim households in the State and shall be at the rate of one *gantang* of rice for every two members of the household, but where a household consists of an odd number of members, payment shall be made as if it consisted of the next higher even number of members; payment of *fiṭrah* may be excused on the ground of poverty, power being given to the *Imām* with the approval of the other *pegawai masjid* (or mosque officials) to omit from the assessment list prepared by him the name of any person considered too poor to pay the *fiṭrah*. *Zakāt* assessment lists are prepared by the *Majlis* or by the *Imām* as agent for and on behalf of the *Majlis*. The *Majlis* or the *Imām* shall complete the *zakāt* assessment lists by entering the amounts produced and the amounts payable as soon as the harvest is complete; *zakāt* shall be paid in padi but the person paying may be permitted to repurchase such padi at such price per *gantang* as the *Majlis* may from time to time fix. *Fiṭrah* assessment lists shall be completed not later than the 15th of *Sha'abān* in each year and the *fiṭrah* shall be paid to the *Majlis* or to the *Imām* not later than the 1st day of *Shawal* next ensuing. *Fiṭrah* shall be paid in rice and provision is made for rice to be sold by the *pegawai masjid* to persons liable to pay *fiṭrah* at rates to be fixed by the *Majlis*, such rates not to be lower than the current minimum market price for the cheapest grade of rice. Receipts are required to be given for payment of *zakāt* or *fiṭrah*. The *Imām* shall account to the *Majlis* for all *zakāt* and *fiṭrah* received by him and shall hold, store and dispose of the same or any proceeds of sale thereof in such manner as the *Majlis* may direct. Except in the areas where the *Majlis* directly effects assessment the *pegawai masjid* shall be entitled to receive as *habuan* (commission and remuneration) one fifth of all *zakāt* and *fiṭrah* received by the *Majlis*, whether directly or through the

Imām, in respect of their *mukim masjid.* Such *habuan* is divisible among the *pegawai masjid.* After complying with the directions of the Ruler as to the disposal of any *zakāt* or *fiṭrah,* the *Majlis* is required to sell and realize any portion thereof undisposed of as do not consist of money and such portion and the proceeds of sale thereof shall be added to and form part of the General Endowment Fund. Any person may make an objection to the *Majlis* against the inclusion of his name in any assessment list or against the amount or quantity in respect of which he is assessed; the *Majlis* shall consider every such objection and may make such decision thereon as may be just and an appeal from such decision lies to the Ruler in Council, if the subject matter is of a value not less than one hundred dollars. Any Muslim, who having been lawfully assessed as liable to pay *zakāt* or *fiṭrah* and having failed to procure, by appeal or otherwise, the cancellation or modification of such assessment, refuses or wilfully fails to pay the same shall be punishable with imprisonment not exceeding seven days or with a fine not exceeding one hundred dollars. A conviction for non-payment of *zakāt* or *fiṭrah* shall not operate to extinguish the debt and any *zakāt* or *fiṭrah* due by any person or the value of the same may be recovered as if the rice or padi in question had been ordered to be delivered to the *Majlis* by a lawful order of a Court or as if the value thereof were recoverable as a fine. Subject to any appeal lawfully brought, the Court shall not inquire into the propriety of any assessment to *zakāt* or *fiṭrah.* Any Muslim who incites or persuades any Muslim to refrain from paying any *zakāt* or *fiṭrah* shall be punishable with imprisonment for a term not exceeding six months or with a fine not exceeding five hundred dollars.[52]

In Trengganu it is provided that the Department of Religious Affairs shall have the power and be under the duty to collect on behalf of the Ruler all *zakāt* and *fiṭrah* payable in the State according to Muslim Law and to dispose of such *zakāt* and *fiṭrah* as the Ruler with the aid and advice of the *Majlis Ugama Islām dan 'Ādat Istiadat Melayu* may direct. *Zakāt* is defined as a levy of property made payable by a Muslim in accordance with the provisions of the Administration of Muslim Law Enactment.

52. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.114 – 122 and 193 – 194.

Fiṭrah is defined as the amount of rice or its value payable under the Muslim Law annually by a Muslim at the end of the month of *Ramaḍān* to be used in accordance with Muslim Law. It is provided that *zakāt* shall be payable by every Muslim producer of padi whose production is not less than 375 *gantangs* in any one year, according to Muslim Law, at the rate of not more than ten per centum of the amount produced.

Zakāt on cattle shall be payable at the following rate:—

On 30 to 39 head	—	one calf of one year old.
On 40 to 59 head	—	one calf of two years old.
On 60 to 69 head	—	two calves of one year old.
On 69 head or over	—	according to the number of times the total shall be divisible by thirty or forty or both and thereupon for each completed thirty head the rate shall be one calf of one year and for each completed 40 head the rate shall be one calf of two years old.

Zakāt on goats or sheep shall be payable at the following rate:—

On 40 to 120 head	—	one sheep of one year old or one goat of two years old.
On 121 to 200 head	—	two sheep of one year old or two goats of two years old.
On 201 to 399 head	—	three heads of sheep or goats.
On 400	—	four heads of sheep or goats.
And thereafter	—	one head of sheep or goats for each complete 100.

Zakāt shall be payable on property other than those mentioned as follows:—

(a) Upon gold, when the amount liable to *zakāt* is 20 *mithqāl*[53] or more, at the rate of 2½ per cent of the total value of the gold held;

(b) Upon silver, when the amount liable to *zakāt* is 200 *drahms*, or more, at the rate of 2½ per cent of the total value of the silver held;

53. *Mithqāl* is defined as a weight of which 20 *mithqāl* is equivalent to 2.125 *tahils*.

(c) Upon merchandise when the amount liable to *zakāt* is of the value of $25.73 or more, at the rate of 2½ per cent of the total value of the merchandise held;

(d) Upon gold or silver found as treasure trove at the rate of 20 per cent of the total value of the treasure found, provided that amounts less than 20 *mithqāl* of gold, or 200 *drahms* of silver shall not be liable to *zakāt*.

Fiṭrah shall be payable by all Muslim householders in the State and shall be calculated at the rate of one *gantang Baghdād* (that is 3 *katties* and 12 *tahils*) for every person. Payment of *fiṭrah* may be excused on grounds of poverty and the Collector may with the approval of the *pegawai masjid* (mosque official) or *ketua kampong* (village chief) concerned note in the assessment list prepared by him the name of any person considered too poor to pay *fiṭrah*.

The Commissioner of Religious Affairs shall be the Controller of *zakāt* and *fiṭrah* and may appoint Deputy Collectors, Collectors and Assistant Collectors in each *mukim masjid* as he thinks necessary. The assessment lists shall be compiled by the collectors and assistant collectors in respect of their *mukims* and forwarded through the Deputy Controllers to the Commissioner. Any person may make an objection to the Commissioner against the inclusion of his name in any assessment list or against the amount or quantity in respect of which he is assessed; the Commissioner shall consider every such objection and may make such decision thereon as may be just and an appeal from any such decision lies to the Ruler if the subject matter is of a value not less than one hundred dollars. The *zakāt* assessment lists shall be completed by entering the amounts produced and the amounts payable as soon as the harvest is complete; *zakāt* shall be paid in padi but the person paying may be permitted to repurchase such padi at such price per *gantang* as the Commissioner may from time to time fix. *Fiṭrah* assessment lists shall be completed not later than the 15th day of *Sha'abān* in each year and the *fiṭrah* shall be paid to the Commissioner not later than the 1st day of *Shawwāl* next ensuing. *Fiṭrah* shall be paid in rice or cash as directed from time to time and provision is

made for rice to be sold by the Collector or Assistant Collector to persons liable to pay *fiṭrah* at rates to be fixed by the Commissioner, with the approval of the Ruler, such rates not to be lower than the current minimum market price. Receipts are required to be given for payments of *zakāt* and *fiṭrah*. Power is given to the Ruler with the aid and advice of the *Majlis* to make rules regulating further the collection, administration and distribution of *zakāt* and *fiṭrah*. Any Muslim who, having been lawfully assessed as liable to pay any *zakāt* or *fiṭrah* and having failed to procure by appeal or otherwise the cancellation or modification of such assessment, shall refuse or wilfully fail to pay the same shall be liable to be punished with imprisonment for a term not exceeding seven days or with a fine not exceeding one hundred dollars or with both such imprisonment and fine. A conviction for non-payment of *zakāt* or *fiṭrah* shall not operate to extinguish the debt; and any *zakāt* or *fiṭrah* due by any person or the value of the same may be recovered as if the rice or padi or livestock in question had been ordered to be delivered to the Department of Religious Affairs by a lawful order of a Court or as if the value thereof were recoverable as a fine. Subject to any appeal lawfully brought, the Court shall in no case enquire into the propriety of any assessment of *zakāt* or *fiṭrah*. Any Muslim who incites or persuades any Muslim to refrain from paying *zakāt* or *fiṭrah* shall be liable to be punished with imprisonment not exceeding fourteen days or with a fine not exceeding fifty dollars or with both such imprisonment and fine.[54]

In Kedah the Zakat Enactment, 1955, establishes a Zakat Committee consisting of a Chairman, a Secretary, a Treasurer and not less than eight other members and it is provided that half of the members present shall be Muslims who are well versed in the *Zakāt* Law. It is the duty of the Zakāt Committee to collect and control *zakāt* and to provide for the due administration and payment thereof in accordance with Muslim Law. *Zakāt* is defined for the purpose of the Enactment as "a gift required to be made by a Muslim in accordance with Muslim Law". The Zakāt Committee may with the approval of the Ruler create a reserve fund out of the proceeds from the collec-

54. Trengganu Administration of Islamic Law Enactment, 1955, s.72 – 80 and 152 – 153.

tion and sale of *zakāt* property and may use the fund at any time for any purpose permissible under Muslim Law. The Committee is also given power to make rules for the collection, division and payment of *zakāt* and for the uses to which it is considered necessary the proceeds shall be put in accordance with Muslim Law and for regulating the collection of full *zakāt* under the Enactment and allowing remission, rebate or deferment of payment of such amounts. In making such rules the Committee may prescribe a fine not exceeding one hundred dollars for the breach of any such rule and for a continuing breach thereof a further fine not exceeding five dollars for any day or part of a day after the first day during which the breach continues or a period of imprisonment not exceeding six months.[55]

In Perlis the Zakat and Fitrah Enactment, 1949, incorporates a Zakāt and Fiṭrah Committee which is entrusted with the duty of collecting and controlling *zakāt* and *fiṭrah* and providing for the due administration and payment thereof in accordance with Muslim Law. The Committee is given power, with the approval of the Ruler, to make rules and is empowered to create with the approval of the Ruler a reserve fund out of the proceeds from the collection and sale of *zakāt* and *fiṭrah* property and to use the fund for any purpose permissible under Muslim Law. Any person who works a *bendang* or *huma* and gets padi in each season of an amount not less than three *kunchas* (480 *gantangs*) shall pay his *zakāt* at the rate of 10% of the total amount of padi he gets. Every person shall give *fiṭrah* for himself and each of his dependants at the rate of one *gantang* of rice or its substitute in accordance with Muslim Law every year in the month of *Ramaḍān* not later than the *Eid ul-Fiṭri* prayers. The *zakāt* and *fiṭrah* are payable to *'āmils* or collectors appointed by the Zakāt and Fiṭrah Committee residing in the locality. Every *'āmil* is required to take in each year a census of the names of persons residing in his locality who have to pay *fiṭrah* and shall submit a copy of his census to the Secretary of the Zakāt and Fiṭrah Committee not later than the 15th of *Ramaḍān;* every *'āmil* is also required to take during each season a census of the amounts of padi in the

55. Kedah Zakat Enactment, 1374 (1955) (No. 4 of 1374) as amended by the Zakat (Amendment) Enactment, 1961.

bendangs and *humas* situated within his locality in respect of those who shall have to pay *zakāt* and a copy of such census is required to be sent to the Secretary of the Zakāt and Fiṭrah Committee before harvesting of the padi takes place. Every *'āmil* is also required to take in the month of *Rajab* in each year a census of the names of persons residing in his locality who are entitled to receive support from the *zakāt* and *fiṭrah* and to submit the census to the Secretary of the Zakāt and Fiṭrah Committee. Any *'āmil* who wilfully (a) omits from his census persons residing in his locality who have to pay *zakāt* and *fiṭrah;* or (b) makes an improper census; or (c) does not issue a receipt for the full amount of the *zakāt* and *fiṭrah* collected by him shall be guilty of an offence and shall be liable on conviction before the Sharī'ah Court to a fine not exceeding one hundred dollars or in the case of a continuing offence to a fine not exceeding five dollars for any day during which such offence is continued or a term of imprisonment not exceeding six months if the fine remains unpaid for one month.[56]

In Johore the Zakat and Fitrah Enactment, 1957, incorporates a Zakat and Fitrah Committee consisting of the President of the Religious Affairs Department as Chairman, the Secretary, Religious Affairs, as Secretary and Treasurer, the *Muftī* and the *Chief Kathi* as *ex-officio* members and not less than five other members of the Muslim Religion. The Committee is entrusted with the duty of collecting *zakāt* from all persons liable under Muslim Law to pay *zakāt* in respect of their property within the State and of collecting *fiṭrah* from all persons in the State liable under Muslim Law to pay *fiṭrah. Zakāt* is defined as a tithe upon his property to be paid by a Muslim in accordance with Muslim Law. *Fiṭrah* means the amount of rice or other food which is fixed from time to time as payable annually by a Muslim in accordance with Muslim Law or its value in money. The collection of *zakāt* and *fiṭrah* is required to be in all respects in accordance with the provisions of Muslim Law and the Committee is required to hold all property collected as *zakāt* and *fiṭrah* and to deal with such property according to Muslim Law. It is provided that no person shall, save on behalf of or with the

56. Perlis Zakat and Fitrah Enactment, 1949 (No. 2 of 1949).

authority of the Committee, collect, receive or accept *zakāt* or *fiṭrah* and no person shall pay *zakāt* or *fiṭrah* except to a person authorized by the Committee to collect, receive or accept it; any person who acts in contravention of such provisions shall be guilty of an offence and shall on conviction by the Court of a *Kathi* be liable to a fine not exceeding ten dollars. The Committee may with the approval of the Ruler create a fund to be called the Zakāt Fund out of the collection of *zakāt* and *fiṭrah* and the sale of *zakāt* property and may use the fund at any time for any purpose permissible under Muslim Law. The Committee may appoint such officers and employ such persons on such terms as it thinks fit and is required to take such other steps as it thinks necessary or expedient for properly carrying out its duties. All persons liable under Muslim Law to pay *zakāt* and *fiṭrah* shall make such payment as and when it falls to be made according to Muslim Law and any person who fails to do so shall be guilty of an offence and shall on conviction by the Court of a *Kathi* be liable to a fine not exceeding ten dollars. The Committee may with the approval of the Ruler make rules for the calculation, collection, recovery, division and distribution of *zakāt* and *fiṭrah*, for regulating the proceedings of the Committee and generally for the carrying into effect of the provisions of the Enactment and may prescribe penalties for the breach of any such rules.[57]

In Melaka and Penang it is provided that the *Majlis* shall have power to collect on behalf of the Yang di-Pertuan Agong *zakāt* and *fiṭrah* payable in the States in accordance with Muslim Law. The *Majlis* is given power with the approval of the Yang di-Pertuan Agong to dispose of the *zakāt* and *fiṭrah* so collected in accordance with Muslim Law. *Zakāt* is defined as the tithe of certain property payable annually in accordance with Muslim Law. *Fiṭrah* is defined as the amount of rice or its equivalent value in money payable under the Muslim Law annually by a Muslim at the end of the month of *Ramaḍān* to be used for religious or charitable purposes recognised by Muslim

57. Johore Zakat and Fitrah Enactment, 1957 (No. 5 of 1957).

Law. The *Majlis* is given power with the approval of the Yang di-Pertuan Agong to make rules for the collection, administration and distribution of *zakāt* and *fiṭrah*. Such rules may prescribe the amount of *zakāt* and *fiṭrah* to be paid, the method of collection and the appointment of collectors and prescribe penalties for the collection of *zakāt* and *fiṭrah* by or to unauthorised persons. Any person may make an objection to the *Majlis* against any demand for the payment by him of *zakāt* or *fiṭrah;* the *Majlis* shall consider such objection and may order that such person shall pay the amount of *zakāt* or *fiṭrah* demanded or such lesser sum as the *Majlis* shall deem proper or may order that such person shall not be liable in any one or more years to pay *zakāt* or *fiṭrah*. The decision of the *Majlis* on such objection shall be final and shall not be called in question in any court. Any Muslim, who being liable to pay any *zakāt* or *fiṭrah* and, having failed to procure the cancellation or modification by the *Majlis* of such liability, shall refuse or wilfully fail to pay the same shall be punishable with imprisonment for a term not exceeding seven days or with a fine not exceeding one hundred dollars. A conviction for non-payment of *zakāt* or *fiṭrah* shall not operate to extinguish the debt and any *zakāt* or *fiṭrah* due by any person or the value of the same may be recovered as if the rice, padi, animals or money in question had been ordered to be paid to the *Majlis* by a lawful order of a court or as if the value thereof were recoverable as a fine imposed under the provisions of the Enactment.[58]

(iv) *Commencement of Ramaḍān (Fasting) and the Eid ('Id).*

In Selangor, Pahang, Negri Sembilan, Melaka, Penang, Kedah and Perlis it is provided that any person who disobeys the lawful order of the Ruler (or in the case of Melaka and Penang the Yang di-Pertuan Agong) in respect of the commencement of *Ramaḍān* or *Hari Raya Haji* or *Hari Raya Fiṭrah*

58. Malacca Administration of Muslim Law Enactment, 1959, s.101-103 and 163; Penang Administration of Muslim Law Enactment, 1959, s.101-103 and 164.

shall be punishable with a fine not exceeding twenty-five dollars.[59]

In Kelantan and Trengganu it is provided that it shall be the duty of the *Chief Kathi* to make enquiry and to certify the dates on which the new moons are seen and such certificate shall be transmitted to the *Muftī*. It shall be an irrebuttable presumption of the Law that the new moon in question was first seen on the date so certified by the *Chief Kathi*.[60]

Conversion and Adoption.

(i) *Conversion.*

The Federal Constitution provides that State law may control or restrict the propagation of any religious doctrine or belief among persons professing the Muslim religion and some States have enacted such laws.[61]

There is provision in some of the State enactments regulating the conversion of persons to the Muslim faith.

In Selangor, Pahang, Negri Sembilan, Melaka, Penang and Kedah it is provided that no person shall be converted to the Muslim religion otherwise than in accordance with the provisions of the relevant Enactment providing for the administration of the Muslim Law or any rules made thereunder. A Muslim who converts any person to the Muslim religion is required to report such conversion to the *Majlis* with all necessary particulars; and if he wilfully neglects or fails to do so he is liable to a fine not exceeding twenty-five dollars. A register of converts is required

59. Selangor Administration of Muslim Law Ordinance, 1952, s.153; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.152; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.145; Malacca Administration of Muslim Law Enactment, 1959, s.144; Penang Administration of Muslim Law Enactment, 1959, s.146; Kedah Administration of Muslim Law Enactment, 1962, s.147; Perlis Administration of Muslim Law Enactment, 1963, s.114.

60. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.199; Trengganu Administration of Islamic Law Enactment, 1955, s.157.

61. Federal Constitution, s.11 (4); Malacca Administration of Muslim Law Enactment, 1959, s.156 (2); Penang Administration of Muslim Law Enactment, 1959, s.157 (2); Negri Sembilan Administration of Muslim Law Enactment, 1960, s.159 (2); Kedah Administration of Muslim Law Enactment, 1962, s.160 (2).

to be kept by the *Majlis*.[62]

In Selangor it is provided that no person who has not attained the age of puberty shall be converted to the Muslim religion. In Perlis it is provided that no person under the age of eighteen years who has a parent or guardian shall be converted to the Muslim religion without the consent of the parent or guardian. The Federal Constitution provides in effect that the religion of a person under the age of eighteen years shall be decided by his parent or guardian.[63]

In Kelantan it is provided that no person shall be registered as a convert to the Muslim religion otherwise than in accordance with the provisions of the Council of Religion and Malay Custom and Kathis Courts Enactment, 1953 or any rules made thereunder. No person under the age of fourteen years and seven months shall be registered as a convert to the Muslim religion. If any person wishes to be admitted to the Muslim religion, he shall repeat the confession of the Faith (*Dua Kalimah Shahādah*) before any Muslim and shall thereafter appear before the *Kathi* of the district in which he ordinarily resides; the *Kathi* shall make enquiry as to the age of such person and if satisfied that he is more than fourteen years and seven months of age and desires to be admitted to the Muslim religion, shall send him to the custody of the *Majlis*. The *Majlis* is required to take the person into its custody for a period of three months and to defray the cost of his board, lodging, instruction and incidental expenses; at the expiration of the said period the convert shall cease to be in the custody of the *Majlis* and, if the convert so requests, the

62. Selangor Administration of Muslim Law Enactment, 1952, s.145-148 and 161; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.144-146; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.138-140 and 155; Malacca Administration of Muslim Law Enactment, 1959, s.137-139 and 152; Penang Administration of Muslim Law Enactment, 1959, s.139-141 and 153; Kedah Administration of Muslim Law Enactment, 1962, s.139-141 and 155; Perlis Administration of Muslim Law Enactment, 1963, s.109. There is no specific punishment for failure to report a conversion in Pahang and Perlis but the person will be liable under the general provision for neglect of statutory duty – See Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.162 and Perlis Administration of Muslim Law Enactment, 1963, s.123.

63. Selangor Administration of Muslim Law Enactment, 1952, s.147; Perlis Administration of Muslim Law Enactment, 1963, s.109 (2); Federal Constitution, Article 12 (4).

Majlis shall defray the cost of his return to the custody of his lawful guardian. If the *Kathi* is of opinion that the applicant for conversion is under the age of fourteen years and seven months, he shall cause him to be returned to his lawful guardian and he shall be deemed not to have been converted to the Muslim religion. The *Kathi* is required to report any action taken by him to the State Secretary; in every such report the *Kathi* shall state whether in his opinion the convert made the confession of the Muslim faith willingly or against his will.

It is provided that the provisions of the Enactment relating to conversion shall not operate to permit any minor to be taken from the custody of his natural or lawful guardian. A person who affects a conversion shall forthwith report the same to the *Majlis* with all necessary particulars; and any person who in contravention of the provisions of the Enactment converts or purports to convert any person to the Muslim religion or having lawfully converted any person to the Muslim religion wilfully neglects or fails to report such conversion to the *Majlis,* shall be punishable with imprisonment for a term not exceeding one month or with a fine not exceeding one hundred dollars. The *Majlis* is required to maintain a register of names and particulars of all persons converted to the Muslim religion within the State.[64]

In Trengganu it is provided that no person shall be registered as a convert to the Muslim religion otherwise than in accordance with the provisions of the Administration of Islamic Law Enactment or any rules made thereunder. No person under the age of fourteen years and seven months shall be registered as a convert to the Muslim religion. If any person wishes to be admitted to the Muslim religion he shall repeat the Confession of Faith (*Dua Kalimah Shahādah*) before any Muslim and shall thereafter appear before the *Kathi* of the district in which he ordinarily resides; the *Kathi* shall make enquiry as to the age of such person and his understanding of the articles of the Faith and shall if satisfied register such person as a convert. If such person is less than eighteen years he shall remain in the custody of the Department of Religious Affairs for so long as is consi-

64. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.165-169.

dered desirable by the *Kathi* at the cost of the Department defrayed out of the fund for Muslim converts, but it is provided that no female under the age of sixteen years shall be kept in the custody of the Department without the consent of the lawful guardian; at the expiration of the said period the convert shall cease to be in the custody of the Department and, if he so requests, the Department shall defray the cost of his return to the custody of his lawful guardian. The *Kathi* is required to report any action taken by him to the State Secretary. Any person who effects a conversion shall forthwith report the conversion to the *Kathi* with all necessary particulars relating thereto; and the *Kathi* shall issue to any person lawfully converted according to the provisions of the Enactment a certificate of conversion. Any person who refuses, or wilfully neglects, or fails, to make a report of a conversion is guilty of a wilful breach of statutory duty and is liable to be punished with imprisonment for a term not exceeding three months or with a fine not exceeding two hundred and fifty dollars or with both such fine and imprisonment. The Department of Religious Affairs is required to maintain a register of the names and particulars of all persons converted to the Muslim religion within the State.[65]

(ii) *Adoption of Muslim Children.*

In Trengganu it is provided that notwithstanding any written law to the contrary any Muslim who shall permit the adoption of any Muslim child under the age of fourteen years and seven months by a non-Muslim without the permission in writing of the Religious Department shall be liable to be punished with a fine not exceeding fifty dollars or imprisonment for a term not exceeding one month or with both such imprisonment and fine and such child shall be returned to its parent or lawful guardian.[66]

In Selangor it is proposed that no adoption of a minor Muslim, that is a Muslim who has not attained his majority in accordance with the Age of Majority Act, 1961, by a person who does not profess the Muslim religion shall be valid; and any person who is the parent or guardian of a Muslim minor and purports to consent to or suffers such minor to be adopted

65. Trengganu Administration of Islamic Law Enactment, 1955, s.123-127.
66. *Ibid.*, s.154.

de facto by a person who does not profess the Muslim religion shall be punishable with imprisonment for three months or with a fine of one hundred dollars.[67]

Miscellaneous Offences.

In Selangor it is provided that any Muslim who, save in his own residence and in the presence only of members of his own household teaches or professes to teach any doctrine of the Muslim religion without the written permission in that behalf of the *Kathi* shall be punishable with imprisonment for a term not exceeding one month or with a fine not exceeding one hundred dollars.[68]

In Kelantan it is provided that any Muslim who, save in his own residence and in the presence only of members of his own household, teaches or professes to teach any doctrine of the Muslim religion without the written permission in that behalf of the *Majlis* shall be punishable with imprisonment for a term not exceeding one month or with a fine not exceeding one hundred dollars.[69]

In Trengganu it is provided that no Muslim person shall in a *madrasah* or *raayat* school teach or purport to teach any doctrine of the religion of Islām without the written permission of the Department of Religious Affairs, Trengganu; and no person other than a native of the State shall engage in the teaching of the religion of Islām without the permission of the Department; and any person contravening these provisions shall be liable to be punished with imprisonment for a term not exceeding one month or with a fine not exceeding one hundred dollars or with both such imprisonment and fine. It is further provided in Trengganu that any Muslim who delivers any lecture other than upon the religion of Islām in any mosque without first obtaining permission in writing of the *Kadzi* or, if the *Kadzi* be not available, of the senior official in charge of that mosque, shall be liable to be punished with a fine not exceeding two hundred and fifty dollars or with imprisonment for a term not exceeding three months or with both such imprisonment and fine.[70]

67. Selangor Administration of Muslim Law Bill, 1964.
68. Selangor Administration of Muslim Law Enactment, 1952, s.166.
69. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.186.
70. Trengganu Administration of Islamic Law Enactment, 1955, s.143 and 144.

In Pahang, Negri Sembilan, Melaka, Penang, Kedah and Perlis it is provided that any Muslim who save in his own residence and in the presence only of members of his own household, teaches or professes to teach any doctrine of the Muslim religion without the written permission of the *Majlis* (in Kedah of the Ruler and in Perlis of the President of the *Majlis*) shall be guilty of an offence punishable with imprisonment for a term not exceeding one month or with a fine not exceeding one hundred dollars.[71]

In Selangor it is provided that any person who shall teach or expound any doctrine or shall perform any ceremony or act relating to the Muslim religion in any manner contrary to Muslim Law shall be punishable with imprisonment for three months or with a fine of two hundred and fifty dollars. Any person other than a person or body acting under powers conferred by the Administration of Muslim Law Enactment who issues or purports to issue any *fetua* or ruling on any question of Muslim Law or doctrine or Malay customary law shall be punishable with imprisonment for a term not exceeding three months or with a fine not exceeding two hundred and fifty dollars.[72]

In Negri Sembilan, Melaka, Penang and Kedah it is provided that any person, whether or not he professes the Muslim religion, who propagates any religious doctrine or belief other than the religious doctrine or belief of the Muslim religion, among persons professing the Muslim religion shall be guilty of an offence cognisable by a civil court and punishable with imprisonment for a term not exceeding one year or a fine not exceeding three thousand dollars.[73]

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71. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.165; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.159 (1); Malacca Administration of Muslim Law Enactment, 1959, s.156 (1); Penang Administration of Muslim Law Enactment, 1959, s.157 (1); Kedah Administration of Muslim Law Enactment, 1962, s.160 (1); Perlis Administration of Muslim Law Enactment, 1963, s.125. The punishment provided in Perlis is a fine not exceeding one hundred dollars.
72. Selangor Administration of Muslim Law Enactment, 1952, s.167 and 168.
73. Negri Sembilan Administration of Muslim Law Enactment, 1960, s.159 (2); Malacca Administration of Muslim Law Enactment, 1959, s.156 (2); Penang Administration of Muslim Law Enactment, 1959, s.157 (2); Kedah Administration of Muslim Law Enactment, 1962, s.160 (2).

In Kelantan, Trengganu, Negri Sembilan, Melaka, Penang, Kedah and Perlis any Muslim who teaches or publicly expounds any doctrine or performs any ceremony or act relating to the Muslim religion in any manner contrary to Muslim Law is liable to be punished with imprisonment for a term not exceeding three months or with a fine not exceeding two hundred and fifty dollars (or in Trengganu only with both).[74]

In Pahang it is provided that any Muslim who teaches or publicly expounds any doctrine or performs any ceremony or act relating to the Muslim religion in any manner contrary to the Muslim Law shall be punishable with imprisonment for a term not exceeding six months or with a fine not exceeding five hundred dollars. If during the trial of any charge under this provision any question shall arise as to whether any such doctrine, ceremony or act is contrary to the Muslim Law, the court shall refer such question in writing to the *Majlis* for its determination which when given shall be final and binding on such court and in respect of any appeal in connection with such charge.[75]

In Kelantan and Trengganu it is provided that if any Muslim person other than the *Muftī* or a person acting under powers conferred by the relevant Enactment, issues, or purports to issue any *fetua* or ruling on any question of Muslim Law or doctrine or Malay customary law he shall be punishable with imprisonment for a term not exceeding three months or with a fine not exceeding two hundred and fifty dollars (or in Trengganu only with both).[76]

In Pahang it is provided that any Muslim person who issues or purports to issue any *fetua* or ruling on any question of law

74. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.187; Trengganu Administration of Islamic Law Enactment, 1955, s.145; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.160; Malacca Administration of Muslim Law Enactment, 1959, s.157; Penang Administration of Muslim Law Enactment, 1959, s.158; Kedah Administration of Muslim Law Enactment, 1962, s.161; Perlis Administration of Muslim Law Enactment, 1963, s.126. The alternative maximum fine provided in Perlis is three hundred dollars.

75. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.166.

76. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.188; Trengganu Administration of Islamic Law Enactment, 1955, s.146.

or doctrine of the Muslim Law or Malay customary law, other than the *Majlis*, the *Muftī* or whoever is authorized to do so, shall be punishable with imprisonment for a term not exceeding three months or with a fine not exceeding two hundred and fifty dollars.[77]

In Negri Sembilan, Melaka, Penang and Kedah it is provided that any Muslim person other than *Muftī* (or in Kedah the Chairman of the Fetua Committee) or a person acting under powers conferred by the relevant Enactment who issues or purports to issue any official *fetua* or ruling on any question of the Muslim Law shall be guilty of an offence punishable with imprisonment for a term not exceeding three months or with a fine not exceeding two hundred and fifty dollars.[78]

In Perlis it is provided that if any person other than the *Majlis* or a person acting under powers conferred by the Administration of Muslim Law Enactment issues or purports to issue any official *fetua* on any question of law of the Muslim religion shall be liable to imprisonment for a term not exceeding three months or to a fine not exceeding three hundred dollars or to both. The provisions do not apply to the mere expression by any person of opinion on any question relating to Muslim Law or Malay custom.[79]

In Selangor it is provided that any Muslim who shall print or publish for sale or free distribution or sell or display or have in his possession for sale any book or document giving or purporting to give instruction or rulings on any matter of Muslim Law or doctrine or Malay customary law shall, if such book or document contains any matter contrary to Muslim Law or doctrine or to any lawfully issued *fetua*, be punishable with imprisonment for a term not exceeding six months or with a fine not exceeding five hundred dollars.[80]

In Kelantan and Trengganu it is provided that whoever shall print or publish or sell or import into the State for sale any

77. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.167.

78. Negri Sembilan Administration of Muslim Law Enactment, 1960, s.161; Malacca Administration of Muslim Law Enactment, 1959, s.158; Penang Administration of Muslim Law Enactment, 1959, s.159, Kedah Administration of Muslim Law Enactment, 1962, s.162.

79. Perlis Administration of Muslim Law Enactment, 1963, s.127.

80. Selangor Administration of Muslim Law Enactment, 1952, s.169.

book or document giving or purporting to give instruction or rulings on any matter of Islāmic doctrine or Muslim Law or Malay customary law shall, if such book or document contains any matter contrary to Muslim Law or doctrine or to any lawfully issued *fetua,* be punishable with imprisonment for a term not exceeding five hundred dollars and such book or document shall be forfeited.[81]

In Pahang it is provided that any Muslim person who prints, publishes, sells, distributes, circulates or imports into the State any book or document purporting to give instruction or rulings on any matter of law or doctrine of the religion of Islām or Malay customary law shall, if such book or document contains any matter contrary to the law or doctrine of the religion of Islām or to any lawfully issued *fetua* or to Malay customary law, be punishable with imprisonment for a term not exceeding six months or with a fine not exceeding five hundred dollars and any such book or document shall be forfeited.[82]

In Negri Sembilan, Melaka and Penang it is provided that any Muslim person who prints, publishes or distributes for sale or otherwise or has in his possession any book or document giving or purporting to give instruction or rulings on any matter under the Muslim Law shall, if such book or document contains any matter contrary or repugnant to the tenets of the *Shāfi'ī, Ḥanafī, Mālikī* or *Ḥanbalī* Schools or to any lawfully issued *fetua,* be guilty of an offence punishable with imprisonment for a term not exceeding six months or with a fine not exceeding five hundred dollars. In case of conviction the book or document shall be forfeited and destroyed or otherwise disposed of as the court directs.[83]

In Kedah it is provided that any Muslim person who prints, publishes or distributes for sale or otherwise or has in his possession any book or document giving or purporting to give instruc-

81. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.189; Trengganu Administration of Islamic Law Enactment, 1955, s.147.
82. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.168.
83. Negri Sembilan Administration of Muslim Law Enactment, 1960, s.162; Malacca Administration of Muslim Law Enactment, 1959, s.159; Penang Administration of Muslim Law Enactment, 1959, s.160.

tion or rulings on any matter under Muslim Law, shall if such book or document contains any matter contrary or repugnant to the belief of *Ahlu 'l-Sunnah Wa 'l-Jamā'ah* or to the tenets of the *Shāfi'ī, Ḥanafī, Mālikī,* or *Ḥanbalī* Schools or to any lawfully issued *fetua* shall be guilty of an offence punishable with imprisonment for a term not exceeding six months or with a fine not exceeding five hundred dollars. In case of conviction the book or document shall be forfeited and destroyed or disposed of as the court directs.[84]

In Perlis it is provided that whoever prints, publishes, sells, distributes, circulates or imports into the State any book or document giving or purporting to give instruction or rulings on any matter relating to the Muslim Law or Malay custom shall, if such book or document contains any matter contrary to Muslim Law or Malay custom or to any *fetua* issued under the Administration of Muslim Law Enactment, be liable to a fine not exceeding five hundred dollars and any such book or document shall be forfeited.[85]

In Selangor, Kelantan, Trengganu, Pahang, Negri Sembilan, Melaka, Penang, Kedah and Perlis it is provided that no person may erect any mosque or dedicate or otherwise apply an existing building as or for the purpose of a mosque, without the permission in writing of the *Majlis* which may only be given if the site of the proposed mosque has been or will prior to the erection or dedicating thereof, be made a *wakaf;* any Muslim so erecting or dedicating a mosque without the permission of the *Majlis* shall be punishable with a fine not exceeding one thousand dollars and the court may, subject to any rights of any third party, order the person convicted to demolish the building.[86]

84. Kedah Administration of Muslim Law Enactment, 1962, s.163.
85. Perlis Administration of Muslim Law Enactment, 1963, s.128.
86. Selangor Administration of Muslim Law Enactment, 1952, s.165; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.185; Trengganu Administration of Islamic Law Enactment, 1955, s.142; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.164; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.158; Malacca Administration of Muslim Law Enactment, 1959, s.155; Penang Administration of Muslim Law Enactment, 1959, s.156; Kedah Administration of Muslim Law Enactment, 1962, s.159; Perlis Administration of Muslim Law Enactment, 1963, s.124.

In Selangor, Kelantan, Trengganu, Pahang, Negri Sembilan, Melaka, Penang, Kedah and Perlis it is provided that any Muslim who in any theatrical performance or in any place of public entertainment or amusement uses any passage from the *Koran* or any words having a sacred implication to Muslims or derides or copies in a derisive manner any act or ceremony relating to the Muslim religion shall be punishable with imprisonment for a term not exceeding one month or with a fine not exceeding one hundred dollars (or in Trengganu only with both). Any Muslim who by words spoken or written or by visible representation insults or brings into contempt or attempts to insult or bring into contempt the Muslim religion or the tenets of any school thereof or the teaching of any lawfully authorised religious teacher or any *fetua* lawfully issued shall be punishable with imprisonment for a term not exceeding six months or with a fine not exceeding five hundred dollars (or in Trengganu and Perlis only with both). Any Muslim who shall be guilty of contempt of the lawful authority of the Ruler in his capacity as the Head of the Religion of the State or of the *Majlis* or any committee or member or officer thereof or of any court of a *Kathi* or of a *Kathi Besar* or Appeal Committee or the presiding officer thereof or of any *pegawai masjid* shall be punishable with imprisonment for a term not exceeding one month or with a fine not exceeding one hundred dollars (or in Trengganu only, with both).[87]

In Selangor, Kelantan and Trengganu it is provided that any Muslim who incites or persuades any person to refrain from attending any mosque or from attending Muslim religious instruction shall be punishable with imprisonment not exceeding fourteen

87. Selangor Administration of Muslim Law Enactment, 1952, s.170-172; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.190-192; Trengganu Administration of Islamic Law Enactment, 1955, s.148-150; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.169-171; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.163-165; Malacca Administration of Muslim Law Enactment, 1959, s.160-162; Penang Administration of Muslim Law Enactment, 1959, s.161-163; Kedah Administration of Muslim Law Enactment, 1962, s.164-166; Perlis Administration of Muslim Law Enactment, 1963, s.129-131. The punishment provided for contempt of religious authorities or courts in Perlis is imprisonment for a term not exceeding three months or a fine not exceeding three hundred dollars.

days or with a fine not exceeding fifty dollars (or in Trengganu only, with both).[88]

In Pahang, Negri Sembilan, Melaka, Penang, Kedah and Perlis it is provided that any Muslim who incites or persuades any person professing the religion of Islām to refrain from attending any mosque or from attending Islāmic religious instruction shall be punishable with imprisonment not exceeding one month or with a fine not exceeding one hundred dollars.[89]

In Perak it is provided that no Muslim shall except in his own house and in the presence of members of his own family only, teach any religious doctrine, unless he shall previously have obtained written permission to do so from the Ruler; a person who teaches any religious doctrine without having obtained such permission or who having obtained such permission teaches any false doctrine shall be liable on conviction to a fine not exceeding one hundred dollars; power is given to the Ruler to revoke any permission given by him. If any question shall arise at a trial as to whether any doctrine taught was a false doctrine such question shall be referred in writing to the State Council and the decision of the State Council shall be final and binding. Any Muslim who prints or publishes any book or document concerning the Muslim religion, whether such book is an original composition or a compilation from existing documents or both, without the written permission of the Ruler and any Muslim who sells, offers for sale, distributes or circulates any book which in the opinion

88. Selangor Administration of Muslim Law Enactment, 1952, s.174; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment 1953, s.194; Trengganu Administration of Islamic Law Enactment, 1955, s.153. In Kelantan and Trengganu the provision also covers the incitement or persuasion of any person to refrain from paying *zakāt* or *fiṭrah* or paying or doing whatever he is liable to pay or do under the Enactment.

89. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.173; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.167; Malacca Administration of Muslim Law Enactment, 1959, s.164; Penang Administration of Muslim Law Enactment, 1959, s.165; Kedah Administration of Muslim Law Enactment, 1962, s.167; Perlis Administration of Muslim Law Enactment, 1963, s.132; The punishment provided in Perlis is imprisonment for a term not exceeding three months or a fine not exceeding three hundred dollars. In Pahang and Perlis the provision also covers the incitement or persuasion of any person to refrain from paying or doing whatever he is liable to pay or do under the Enactment.

of the Religious Committee appointed by the Ruler in that behalf contains precepts of the Muslim religion which are contrary to the recognised principles thereof shall be guilty of an offence and shall be liable on conviction to a fine not exceeding two hundred dollars or to imprisonment of either description for not more than one year and such book or document shall be liable to forfeiture.

The parent or person having the actual custody of a male child between the ages of seven and fourteen years is responsible for the regular attendance of such child at a *Koran* school and any person, who is lawfully responsible for the attendance at the *Koran* school of any child shall on proof that such child has not attended such school on at least fifty per centum of the school days in any calendar year and in the absence of any reasonable excuse for such non-attendance be liable to a fine not exceeding five dollars; it is provided however that no child shall be compelled to attend any school which shall be distant more than two miles from his usual place of residence measured according to the nearest road or path.

The *Majlis* may prohibit the use of all or any mosques and *madrasahs* for any purpose or purposes it may deem fit.[90]

In Johore it is provided that no Muslim shall except in his own house and in the presence of members of his own family teach any religious doctrine unless he shall have previously obtained permission to do so from the Ruler in Council; and any Muslim who teaches any religious doctrine without having obtained such permission or who having obtained such permission teaches any false doctrine shall be liable on conviction to a fine not exceeding one hundred dollars. Any permission granted by the Ruler in Council may be revoked at his discretion.[91]

Jurisdiction.

In Selangor, Pahang, Johore and Perlis only persons professing the Muslim religion are subject to the provisions relating to Muslim offences; in Trengganu such provisions are made applicable to persons professing the Muslim religion and to persons who within six months prior to the trial of the offence shall have

90. Perak Muhammadan (Offences) Enactment, 1939, s.4, 12A and 14 as amended by the Muslims (Offences) (Perak Amendment) Enactment, 1955, (No. 2 of 1955).

91. Johore Offences by Muhammadans Enactment, 1935, s.3.

professed the Muslim religion; while in Perlis it is provided that all persons professing the Muslim religion shall be subject to such provisions.[92]

In Negri Sembilan, Melaka, Penang and Kedah it is provided that the provisions relating to Muslim offences apply only to persons professing the Muslim religion except that in regard to the propagation of any religious doctrine or belief other than the Muslim religion among persons professing the Muslim religion, a non-Muslim can be charged for the commission of the offence or the abetment thereof in a civil court.[93]

In Kelantan it is provided that the provisions relating to Muslim offences shall apply only to persons professing the Muslim religion; but any person not professing the Muslim religion who abets any person who to his knowledge professes the Muslim religion in the commission of any such offence, other than the offences relating to the sale, purchase or consumption of intoxicating liquor, to the sale or consumption of any food, drink or tobacco in the month of *Ramadhan* and to illicit intercourse, shall be guilty of an offence, punishable as an abetment under the provisions of the Penal Code.[94]

In Perak it is provided that all persons professing the Muslim religion shall be subject to the provisions relating to Muslim offences, and no other person shall be subject thereto; but any person not professing the Muslim religion who instigates any person to commit any such offence shall be liable to a fine of one hundred dollars although no prosecution may be commenced without the previous sanction in writing of the Public Prosecutor.[95]

In Selangor, Negri Sembilan, Melaka, Penang and Kedah

92. Selangor Administration of Muslim Law Enactment, 1952, s.149; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.147; Johore Offences by Muhammadans Enactment, s. 2; Trengganu Administration of Islamic Law Enactment, 1955, s.128; Perlis Administration of Muslim Law Enactment, 1963, s.110.

93. Negri Sembilan Administration of Muslim Law Enactment, 1960, s.141, 159 and 169; Malacca Administration of Muslim Law Enactment, 1959, s.140, 156 and 166; Penang Administration of Muslim Law Enactment, 1959, s.142, 157 and 167; Kedah Administration of Muslim Law Enactment, 1962, s.142, 160 and 169.

94. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.170 and 197. See (1962) *M. L. J.* at p. cliv on the constitutionality of this provision.

95. Perak Muhammadans (Offences) Enactment, 1939, s.2.

it is provided that no prosecution for any offence against the Administration of Muslim Law Enactment shall be heard in any Court other than the Court of the *Kathi Besar* or a Court of a *Kathi;* the Court of a *Kathi* having power to try any such offence where the maximum punishment provided by law does not exceed imprisonment for two months or a fine of two hundred dollars or both (in Selangor imprisonment for one month or a fine of one hundred dollars or both). No prosecution in relation to unlawful mosques, false doctrines, unauthorized *fetuas,* unauthorized religious books or contempts of religion shall be instituted save with the written sanction of the *Majlis.*[96]

In Kelantan it is provided that no prosecution for any offence against the Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, shall be heard in any Court other than the Court of the *Chief Kathi* or a Court of a *Kathi;* the Court of a *Kathi* having power to try any such offence where the maximum punishment provided by law does not exceed imprisonment for one month or a fine of one hundred dollars or both. A person charged for abetment of a person professing the Muslim religion in the commission of any offence against the Enactment, is however triable by a Magistrate's Court. No prosecution in relation to unlawful mosques, false doctrines, unauthorized *fetuas,* unauthorized religious books or contempts of religion shall be instituted except with the written sanction of the *Majlis.*[97]

In Trengganu it is provided that no prosecution for any offence which is an offence against the Administration of Islamic Law Enactment, 1955 only, shall be heard in a Court other than the Court of the *Chief Kadzi* or a Court of a *Kadzi;* the Court of a *Kadzi* having power to try any such offence where the maximum punishment provided by law does not exceed imprisonment for one month or a fine of one hundred dollars or both. No prosecution as regards unlawful mosques or unauthorized relig-

96. Selangor Administration of Muslim Law Enactment, 1952, s.149 (2), 45 (4) and 58; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.141 (2), 41 (4) and 55; Malacca Administration of Muslim Law Enactment, 1959, s.140 (2), 40 (4) and 54; Penang Administration of Muslim Law Enactment, 1959, s.142 (2), 40 (4) and 54; Kedah Administration of Muslim Law Enactment, 1962, s.142 (2), 41 (4) and 55.

97. Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.170 (2), 48 (2) and 62.

ious books shall be instituted except with the written sanction of the *Majlis* and no prosecution for false doctrines, unauthorized *fetuas* and contempts of religion shall be instituted without the written permission of the Commissioner.[98]

In Pahang it is provided that no prosecution for any offence against the Administration of the Law of the Religion of Islam Enactment, 1956, shall be had in any Court other than the Court of the *Chief Kathi* or a *Kathi;* the Court of a *Kathi* having power to try any such offence where the maximum punishment provided by law does not exceed imprisonment for two months or a fine of two hundred dollars or both. No prosecutions as regards false religious teaching, false doctrine, illegal *fetuas* and contempts of religious authorities shall be brought without the sanction of the *Majlis.*[99]

In Perlis it is provided that the Court of a *Kathi* may try any offence under the Administration of Muslim Law Enactment committed by a person professing the Muslim religion with the exception of the offence of incest which is triable in the Sessions Court. The Court of an *Assistant Kathi* can try any such offence the maximum punishment of which is imprisonment for a term not exceeding six months or to a fine not exceeding six hundred dollars. No prosecutions as regards wilful neglect of statutory duty, teaching of Muslim religion, expounding of doctrines and performances contrary to Muslim Law, unlawful issue of *fetua,* contempts of religious authorities or courts or contempts of religion shall be brought without the sanction of the *Majlis.*[100]

In Perak the offences of adultery, *kheluat* and incest (by reason of consanguinity or fosterage) are triable by the High Court; while the offence of enticing away an unmarried girl, the offence committed by an unmarried girl leaving her lawful guardians, the offence of incest (by reason of affinity), the offence against the prohibition upon divorce, the offences relating to religious teaching and publications concerning the Muslim religion are triable by the Court of a Magistrate of the First Class. In such

98. Trengganu Administration of Islamic Law Enactment, 1955, s.128 (2), 25 (2) and 38.
99. Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.147 (2), 37 (4) and 51.
100. Perlis Administration of Muslim Law Enactment, 1963, s.11, 27 and 118 (4).

trials the Court shall be assisted by two Muslim assessors. Other offences under the Muslim (Offences) Enactment are triable by the Court of a *Penghulu* or if there be no such court having jurisdiction, by the Court of a *Kathi* or if there be no court of either of the above descriptions having jurisdiction, by the Court of a Magistrate. Non-Muslims who are charged with instigating any Muslim to commit an offence against the Muslim (Offences) Enactment are triable in the Court of a Magistrate of the First Class.[101]

In Johore the offence of incest (by reason of consanguinity or of fosterage) is triable by the High Court; while the other offences under the Muslim Offences Enactment are triable by the Court of a Magistrate of the First or Second Class. In such trials the Court shall be assisted by two Muslim assessors.[102]

Administration.

In Perlis express provision is made by the Inspector of Religious Affairs and Visiting Teacher of Religion Rules, 1955, for the appointment of Inspectors to investigate into all matters concerning breaches of the Muslim faith in the State and to take proceedings against offenders of the Muslim Law as enacted by the State and against persons who commit any breach of the Sharaiah Courts Enactment. The Inspector shall investigate into any belief which is alleged to be contrary to the precepts of Islām and shall prosecute any person who promotes any teachings based on religious books banned by the Religious Department. The Inspector shall prosecute any person for failure to attend during congregational prayers on a Friday or to fast during every month of *Ramaḍān* or to give *zakāt* and *fiṭrah* every year; but no prosecution shall be commenced if it is proved to the satisfaction of the Inspector that the person has a reasonable excuse for such non-observance as laid down by the Muslim Law. The Inspector shall inspect the registration books of *Imāms* with regard to marriages, divorces and revocation of divorces pending certification by the *Kathi*. The Inspector is required to visit places of worship and give talks on matters relating to religion.

101. Perak Muhammadan (Offences) Enactment, 1939, s.16.
102. Johore Offences by Muhammadans Enactment, 1935, s.8 and 9.

He is also required to make frequent visits to elders of the *mukims* in the State and to submit a general report to the President of the Council of Religion and Malay Custom of his observations in the course of his visits on matters pertaining to: (a) the welfare of the people; (b) the state of matrimonial relationship; (c) the performance of religious duties; (d) the state of religious knowledge of the people; (e) the conditions of the places of worship; and (f) the activities of the religious leaders in the area.[103]

In Selangor, Kelantan, Trengganu, Pahang, Negri Sembilan, Melaka, Penang, Kedah and Perlis there is provision for the appointment of persons to effect arrests of persons and to prosecute offences before the Court of the *Chief Kathi* and Courts of the *Kathis*. Such persons may be appointed by the Ruler (in Melaka and Penang by the Yang di-Pertuan Agong) or by the *Majlis*.[104]

EVIDENCE AND PROCEDURE

In Selangor, Kelantan, Trengganu, Pahang, Negri Sembilan, Melaka, Penang, Kedah and Perlis it is provided that the Court of the *Chief Kathi* and the Court of a *Kathi* shall observe all the provisions of Muslim Law relating to the number, status, or quality of witnesses or evidence required to prove any fact; save as aforesaid the Court shall have regard to the law of evidence for the time being in force in the State and shall be guided by the principles thereof, but shall not be obliged to apply such law

103. Perlis Inspector of Religious Affairs and Visiting Teacher of Religion Rules, 1955 (L. N. No. 12 of 1955).

104. Selangor Administration of Muslim Law Enactment, 1952, s.61 and 64; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.65 and 68; Trengganu Administration of Islamic Law Enactment, 1955, s.41 and 44; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.54 and 57; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.58 and 60; Malacca Administration of Muslim Law Enactment, 1959, s.57 and 59; Penang Administration of Muslim Law Enactment, 1959, s.57 and 59; Kedah Administration of Muslim Law Enactment, 1962, s.58 and 60; Perlis Administration of Muslim Law Enactment, 1963, s.30 and 32.

strictly.[105]

In Singapore the Muslims Ordinance, 1957, similarly provides that the Shariah Court shall observe all the provisions of the Muslim law relating to the number, status or quality of witnesses or evidence required to prove any fact; save as aforesaid the Court shall have regard to the law of evidence for the time being in force in Singapore and shall be guided by the principles thereof, but shall not be obliged to apply the same strictly.[106]

Number of Witnesses.

The testimony of a single individual is not enough to prove any fact, except the appearance of the new moon in the month of *Ramaḍān*. In order to prove the crime of *zinā'* (fornication) four male witnesses must be produced and two witnesses are required to prove the culprit's confession, though in this latter case too, one jurist considers that four witnesses are necessary. Real property claims and contracts having consequences that are purely pecuniary, such as sale, cancellation by consent, transfer of debts due to a person and security, as well as the rights resulting from these contracts, such as the right of option or the term for payment, may all be proved by the testimony of two male witnesses or of one male witness and two women. Two male witnesses are required in all other contested cases, whether it be a matter of non-remissible (*ḥadd*) penalties except that for *zinā'* (fornication), or of remissible ones, or of such disputes as to an act of private life ordinarily effected before men and in their sight, such as marriage, repudiation, return to conjugal union, death, appointment of agents of testamentary dispositions. On the other hand, what is specially liable to come under the

105. Selangor Administration of Muslim Law Enactment, 1952, s.53; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.57; Trengganu Administration of Islamic Law Enactment, 1955, s.33; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.46; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.50; Malacca Administration of Muslim Law Enactment, 1959, s.49; Penang Administration of Muslim Law Enactment, 1959, s.49; Kedah Administration of Muslim Law Enactment, 1962, s.50; Perlis Administration of Muslim Law Enactment, 1963, s.23.

106. Singapore Muslims Ordinance, 1957, s.27.

observation of women and, in general, facts which do not usually take place in the presence and sight of men, such as the existence of virginity, accouchement, menstruation, suckling, redhibitory defects in women and defects in parts of the body usually covered, are proved as well by the evidence of two men or by that of four women.[107]

Status of Witnesses.

Witnesses must be free from bias and prejudice. Interested witnesses can always be challenged. A person cannot depose in favour of his ancestors or descendants, though he may legally do so against them. The deposition of an enemy is not admissible, *i.e.*, of a person who hates the adversary to such a degree as to wish to see him fall into misery, to envy his prosperity and rejoice in his misfortune; but the favourable deposition of such an enemy is admissible. According to Nawawī, husband and wife may give evidence in favour of each other, and a person may even depose in favour of his brother or of his friend. It is permitted to challenge the testimony of persons who are too eager to give evidence, or so indifferently careless that one can put no trust in their word, but the evidence of police agents or other persons as to the accomplishment of a person's obligations towards God and the actions of private life that confer an inviolable right to a third party, as for example the existence or expiration of a period of legal retirement or penalties of a non-remissible character, ought generally to be accepted.[108]

A person cannot give evidence in favour of his own case, but the parties may take oaths. The parties before a Muslim Court are called the *mudda'ī* or the party on whom the burden of proof rests, not necessarily the plaintiff, and the *mudda'a 'alaih* that is the opposite party. Elaborate rules exist determining presumptions. The *mudda'ī* must bring evidence. If he does not, then the *mudda'a 'alaih* is obliged to clear himself with an oath. If the *mudda'ī* has failed to produce evidence and the *mudda'a 'alaih* has refused to take the oath the *mudda'ī* gets still another chance. He may now take the oath and his oath will be conclusive. The

107. Nawawī, *op. cit.*, p.517-518.
108. *Ibid.*, p.516-517.

rule of Muslim Law regarding the giving of evidence by the parties is, however, not followed in Malaysia.[109]

The procedure for a trial laid down in, for example, the Islamic Religious Courts (Civil Procedure) Rules, 1955, of Trengganu provides that if at the time appointed for the hearing the plaintiff does not appear, the proceedings may be struck out; if the plaintiff appears, but the defendant does not appear, the plaintiff may prove his case and the Court may give judgment with the proviso that in any such case the Court may in its discretion order an adjournment. If the defendant appears and admits the plaintiff's claim, the Court may give judgment without hearing evidence. If the defendant desires to defend, the party against whom judgment would be given on the pleadings and admissions made, if no evidence were taken, shall have the right to begin. Each party may address the Court and then give evidence and call his witnesses who shall be examined and may be cross-examined, re-examined, questioned by the Court and recalled for examination. After the conclusion of the evidence each party may sum up his case, but so that the party who began shall address the Court last. The Court may call any evidence which it considers necessary, but no party shall be obliged to give evidence against his will.[110]

Quality of Witnesses.

No one can be accepted as a witness except a free, adult, sane Muslim of irreproachable and serious character, not liable to suspicion. It is necessary, to constitute irreproachable character, that the witness should have abstained entirely from committing capital sins, and shall not be in the habit of committing sins of a less serious nature. By a man of serious character is meant one who models his conduct upon the respectable among his contemporaries and fellow-countrymen. Certain actions are considered as incompatible with a serious character. Thus in the *Minhāj aṭ-Ṭālibīn* we read:

> One should regard, for example, as wanting in seriousness, a person who eats in public places and walks there bare-headed; who embraces his wife in the presence of other persons; who is always

109. 'Abdur Rahim, *op. cit.*, p.364f.
110. Trengganu Islamic Religious Courts (Civil Procedure) Rules, 1955, 2nd Schedule to the Administration of Islamic Law Enactment, 1955.

telling funny stories; who habitually plays chess or sings or listens to singing, or who dances for an excessively long time. It is well, however, so far as these acts are concerned, to take into consideration the individual circumstances and places.

By 'liable to suspicion' is meant a person who allows himself to be influenced by the idea of procuring some advantage or protecting himself against some damage.[111]

Direct and Hearsay Testimony.

Witnesses called to prove a material fact, such as fornication, destruction of property or accouchement, should have actually seen the fact themselves; on the other hand, witnesses called to prove that the adverse party spoke certain words as, for example, that he has made a bargain, made an admission or repudiated a wife, should not only have seen the individual in question, but also heard the words in dispute. A belief in his own evidence is an essential part of a witness's evidence, and therefore ordinarily he must testify to his own observation. A witness may, however, prove in Court someone's name and origin according to what he has heard as to the names of the father or the tribe. The *Shāfi'ī* School also permits to be established in the same way upon the ground of public notoriety, the decease of any person, without it being necessary for a person to have seen the dead body himself. There is a dispute, however, as to whether hearsay evidence is admissible in the cases of marriage or ownership. The majority of authorities allow the acceptance of evidence of public notoriety in such cases. Public notoriety consists in the fact of hearing an occurrence related in the same manner by several persons whose words can be trusted; though according to some authorities it is enough to have heard it told by two persons of irreproachable conduct.[112]

Acknowledgment or Iqrār.

A transaction may be proved by the formal acknowledgment in Court of the person who is to be bound; it may also be proved by the evidence of two irreproachable witnesses who testify to an acknowledgment or admission by such person. It is a maxim of Muslim Law that once a party to a suit has deliberately

111. Nawawī, *op. cit.*, p.515f.
112. *Ibid.*, p.519f.

and intentionally made a declaration or an admission he cannot afterwards retract it and profit by it.[113]

Procedure in Criminal Cases in Kathi's Courts.

In Selangor, Kelantan, Trengganu, Pahang, Negri Sembilan, Melaka, Penang and Kedah it is provided that information with a view to prosecution of an offence may be made in writing or orally to the *Chief Kathi* or a *Kathi,* who may thereupon issue a summons against the accused person. Any Police Officer, and, if no Police Officer is known to be available, any *Penghulu* or *Imām* may arrest without warrant any person who has committed or attempted to commit in his presence an offence involving a breach of the peace or any person who has committed in his presence any offence and who refuses or fails to give on request his full and true name and address. Prosecutions may be conducted by: (a) any person appointed in writing by the Ruler (or in Melaka and Penang, the Yang di-Pertuan Agong) to prosecute or (b) any person appointed by the *Majlis* (in Trengganu by the Commissioner of the Department of Religious Affairs) or (c) by the Public Prosecutor or his Deputy or (d) by a Police Officer, or in Selangor by a *Penghulu* or (e) by the *Imām* of the *Kariah* within which the offence was committed (in Kelantan by the *Imām Tua* and in Trengganu by the *Chief Imām* of the *mukim* within which the offence was committed) or (f) by the complainant; none of such persons shall be entitled to prosecute if any person mentioned before him in the list is available and willing to do so.

At the trial, the accused shall be charged. If he pleads guilty he may be sentenced on such plea. If the accused claims trial, or refuses to plead, the prosecutor shall outline the facts to be proved and the relevant law and shall then call the witnesses. Such witnesses shall be examined by the party calling them and may then be cross-examined by the opposing party. Cross-examination may be directed to credibility. The party who called the witness may then re-examine him in matters arising from the cross-examination. The Court may put any question to any witness at any time. Any further question may be put or the witness may be recalled by leave of the Court. After hearing the wit-

113. *Ibid.*, p.188f.

nesses for the prosecution the Court shall either dismiss the case or call on the accused for his defence. If called on for his defence, the accused may address the Court and may then either give evidence or make a statement without being sworn or affirmed, in which case he will not be liable to be cross-examined or may stand silent. If the accused gives evidence, he may be cross-examined, but not as to character or as to other offences not charged. The accused may then call his witnesses. The accused may then sum up on the case, the prosecutor may reply generally, and the Court shall then either convict or acquit the accused. The Court shall at all times satisfy itself that the accused understands the nature and effect of the proceedings and has a proper opportunity to defend himself.[114]

Procedure in Civil Cases.

It is provided in Selangor, Kelantan, Trengganu, Pahang, Negri Sembilan, Melaka, Penang, Kedah and Perlis that all civil proceedings in the *Kathi's Courts* shall be brought by filing a plaint or by making oral complaint to the presiding officer of the Court; in case of oral complaint the Court shall draft a plaint for the plaintiff. The plaint shall contain the names, addresses and descriptions of the parties, a concise statement of the cause of action and a statement of the relief claimed or judgment prayed. Provision is made for joinder and consolidation, for the service of process and for the representation of deceased person or persons under disability. The defendant may file a written defence but if he has not done so at the time of his first appearance and does not desire to do so, the Court shall ascertain orally the grounds of his defence and he shall not thereafter raise other grounds of defence without leave of the Court. If the defendant wishes to raise matters by way of counterclaim the Court may either permit him to do so or direct him to file separate proceed-

114. Selangor Administration of Muslim Law Enactment, 1952, s.59-66; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.63-70; Trengganu Administration of Islamic Law Enactment, 1955, s.39-46; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.52-59; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.56-62; Malacca Administration of Muslim Law Enactment, 1959, s.55-61; Penang Administration of Muslim Law Enactment, 1959, s.55-61; Kedah Administration of Muslim Law Enactment, 1962, s.56-62; Perlis Administration of Muslim Law Enactment, 1963, s.28-36.

ings. Provision is made for interlocutory proceedings and for the withdrawal and settlement of the proceedings. If at the time appointed for the hearing the plaintiff does not appear the proceedings may be struck out; if the plaintiff appears but the defendant does not appear the plaintiff may prove his case and the Court may give judgment, but the Court may in such a case in its discretion order an adjournment. If the defendant appears and admits the plaintiff's claim the Court may give judgment without hearing evidence. If the defendant desires to defend, the party against whom judgment would be given on the pleadings and admission made, if no evidence were taken, shall have the right to begin. Each party may address the Court and may then give evidence and call his witnesses, who shall be examined and may be cross-examined, re-examined and questioned by the Court. After the conclusion of the evidence each party may sum up his case, but so that the party who began shall address the Court last. The Court may call any evidence which it considers necessary but no party shall be obliged to give evidence against his will. Thereafter the Court shall give judgement in open court either at once or at a latter time of which notice shall be given to the parties. Provision is made for the award of costs and the execution of judgments.[115]

Similar procedure is also prescribed in the Shariah Court in Singapore except that actions and proceedings are commenced by summons instead of by plaint. It is also provided that in matters of practice and procedure not expressly provided in the rules, the court may adopt the practice and procedure in civil proceedings for the time being in force in the Civil District Courts.[116]

115. Selangor Administration of Muslim Law Enactment, 1952, s.76-86; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, s.80-90; Trengganu Islamic Religious Courts (Civil Procedure) Rules, 1955, 2nd Schedule to the Administration of Islamic Law Enactment, 1955; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, s.69-79; Negri Sembilan Administration of Muslim Law Enactment, 1960, s.71-81; Malacca Administration of Muslim Law Enactment, 1959, s.70-80; Penang Administration of Muslim Law Enactment, 1959, s.70-80; Kedah Administration of Muslim Law Enactment, 1962, s.71-81; Perlis Administration of Muslim Law Enactment, 1963, s.47-57.

116. Muslim Marriage and Divorce Rules, 1959. See *Re Maria Menado* (1964) *M.L.J.* 266 where it was held that the Shariah Court has no power to effect substituted service of a summons outside the State.

APPENDIX A.

ARABIC TEXT OF QUOTATIONS FROM THE QUR'ĀN

(Page 10, note 20)
Sūra V : 4

اَلْيَوْمَ اَكْمَلْتُ لَكُمْ دِيْنَكُمْ

(Page 13, note 25)
Sūra IV : 80

٨٠- مَنْ يُّطِعِ الرَّسُوْلَ فَقَدْ اَطَاعَ اللّٰهَ ۚ
وَمَنْ تَوَلّٰى
فَمَآ اَرْسَلْنٰكَ عَلَيْهِمْ حَفِيْظًا ۝

Sūra LIII : 3-4

٣-وَمَا يَنْطِقُ عَنِ الْهَوٰى ۝

٤-اِنْ هُوَ اِلَّا وَحْيٌ يُّوْحٰى ۝

Sūra LIX : 7

وَمَآ اٰتٰىكُمُ الرَّسُوْلُ فَخُذُوْهُ ۗ
وَمَا نَهٰىكُمْ عَنْهُ فَانْتَهُوْا ۚ

Sūra II : 129

١٢٩- رَبَّنَا وَابْعَثْ فِيْهِمْ رَسُوْلًا مِّنْهُمْ
يَتْلُوْا عَلَيْهِمْ اٰيٰتِكَ
وَيُعَلِّمُهُمُ الْكِتٰبَ وَالْحِكْمَةَ وَيُزَكِّيْهِمْ ۗ
اِنَّكَ اَنْتَ الْعَزِيْزُ الْحَكِيْمُ ۝

Sūra II : 151

١٥١- كَمَآ اَرْسَلْنَا فِيْكُمْ رَسُوْلًا مِّنْكُمْ
يَتْلُوْا عَلَيْكُمْ اٰيٰتِنَا
وَيُزَكِّيْكُمْ وَيُعَلِّمُكُمُ الْكِتٰبَ وَالْحِكْمَةَ
وَيُعَلِّمُكُمْ مَّا لَمْ تَكُوْنُوْا تَعْلَمُوْنَ ۝

Sūra III : 164

١٦٤- لَقَدْ مَنَّ اللهُ
عَلَى الْمُؤْمِنِينَ إِذْ بَعَثَ فِيهِمْ
رَسُولًا مِنْ أَنْفُسِهِمْ
يَتْلُوا عَلَيْهِمْ آيَاتِهِ
وَيُزَكِّيهِمْ وَيُعَلِّمُهُمُ الْكِتَابَ وَالْحِكْمَةَ
وَإِنْ كَانُوا مِنْ قَبْلُ
لَفِي ضَلَالٍ مُبِينٍ ○

Sūra LXII : 2

٢- هُوَ الَّذِي بَعَثَ فِي الْأُمِّيِّينَ رَسُولًا مِنْهُمْ
يَتْلُوا عَلَيْهِمْ آيَاتِهِ
وَيُزَكِّيهِمْ وَيُعَلِّمُهُمُ الْكِتَابَ
وَالْحِكْمَةَ ۚ وَإِنْ
كَانُوا مِنْ قَبْلُ لَفِي ضَلَالٍ مُبِينٍ ۙ

Sūra II : 231

٢٣١- وَإِذَا طَلَّقْتُمُ النِّسَآءَ فَبَلَغْنَ
أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ
أَوْ سَرِّحُوهُنَّ بِمَعْرُوفٍ ۪
وَلَا تُمْسِكُوهُنَّ ضِرَارًا لِّتَعْتَدُوا ۚ
وَمَنْ يَفْعَلْ ذٰلِكَ
فَقَدْ ظَلَمَ نَفْسَهُ ۗ
وَلَا تَتَّخِذُوٓا اٰيٰتِ اللّٰهِ هُزُوًا ۗ
وَاذْكُرُوا نِعْمَتَ اللّٰهِ عَلَيْكُمْ
وَمَآ أَنْزَلَ عَلَيْكُمْ
مِّنَ الْكِتٰبِ وَالْحِكْمَةِ
يَعِظُكُمْ بِهٖ ۚ وَاتَّقُوا اللّٰهَ
وَاعْلَمُوٓا
أَنَّ اللّٰهَ بِكُلِّ شَيْءٍ عَلِيمٌ ۝

Sūra IV : 113

١١٣- وَلَوْلَا فَضْلُ اللّٰهِ عَلَيْكَ
وَرَحْمَتُهُ
لَهَمَّتْ طَّآئِفَةٌ مِّنْهُمْ اَنْ يُّضِلُّوْكَ ؕ
وَمَا يُضِلُّوْنَ اِلَّآ اَنْفُسَهُمْ
وَمَا يَضُرُّوْنَكَ مِنْ شَىْءٍ ؕ
وَاَنْزَلَ اللّٰهُ عَلَيْكَ الْكِتٰبَ وَالْحِكْمَةَ
وَعَلَّمَكَ مَا لَمْ تَكُنْ تَعْلَمُ ؕ
وَكَانَ فَضْلُ اللّٰهِ عَلَيْكَ عَظِيْمًا ۝

(*Page* 27)
Sūra II : 150

١٥٠- وَمِنْ حَيْثُ خَرَجْتَ فَوَلِّ
وَجْهَكَ شَطْرَ الْمَسْجِدِ الْحَرَامِ ؕ
وَحَيْثُ مَا كُنْتُمْ
فَوَلُّوْا وُجُوْهَكُمْ شَطْرَهٗ ۙ
لِئَلَّا يَكُوْنَ لِلنَّاسِ عَلَيْكُمْ حُجَّةٌ ۢ
اِلَّا الَّذِيْنَ ظَلَمُوْا مِنْهُمْ
فَلَا تَخْشَوْهُمْ وَاخْشَوْنِىْ
وَلِاُتِمَّ نِعْمَتِىْ عَلَيْكُمْ وَلَعَلَّكُمْ تَهْتَدُوْنَ ۝

Sūra XVI : 16

١٦-وَعَلٰمٰتٍ ۚ وَبِالنَّجْمِ
هُمْ يَهْتَدُوْنَ ○

(*Page 45, note 2*)
Sūra LIII : 3-4

٣-وَمَا يَنْطِقُ عَنِ الْهَوٰى ○ ط

٤-اِنْ هُوَ اِلَّا وَحْيٌ يُّوْحٰى ○ لا

(*Page 47, note 5*)
Sūra IX : 60

وَالْمُؤَلَّفَةِ قُلُوْبُهُمْ

(*Page 48, note 8*)
Sūra V : 4

اَلْيَوْمَ اَكْمَلْتُ لَكُمْ دِيْنَكُمْ

(*Page 88, note 50*)
Sūra II : 233

٢٣٣- وَ الْوَالِدٰتُ يُرْضِعْنَ اَوْلَادَهُنَّ
حَوْلَيْنِ كَامِلَيْنِ
لِمَنْ اَرَادَ اَنْ يُّتِمَّ الرَّضَاعَةَ ؕ
وَعَلَى الْمَوْلُوْدِ لَهٗ رِزْقُهُنَّ
وَكِسْوَتُهُنَّ بِالْمَعْرُوْفِ ؕ
لَا تُكَلَّفُ نَفْسٌ اِلَّا وُسْعَهَا ۚ
لَا تُضَآرَّ وَالِدَةٌ ۢ بِوَلَدِهَا
وَلَا مَوْلُوْدٌ لَّهٗ بِوَلَدِهٖ ۚ
وَعَلَى الْوَارِثِ مِثْلُ ذٰلِكَ ۚ

(*Page 116, note 89*)
Sūra IV : 59

٥٩- يٰۤاَيُّهَا الَّذِيْنَ اٰمَنُوْۤا
اَطِيْعُوا اللّٰهَ وَ اَطِيْعُوا الرَّسُوْلَ وَاُولِى الْاَمْرِ
مِنْكُمْ ۚ فَاِنْ تَنَازَعْتُمْ فِىْ شَىْءٍ
فَرُدُّوْهُ اِلَى اللّٰهِ وَالرَّسُوْلِ
اِنْ كُنْتُمْ تُؤْمِنُوْنَ بِاللّٰهِ وَالْيَوْمِ الْاٰخِرِ ؕ
ذٰلِكَ خَيْرٌ وَّ اَحْسَنُ تَاْوِيْلًا ۝

(*Divider Page, FAMILY LAW*)
Sūra XXX : 21

٢١- وَمِنْ اٰيٰتِهٖٓ اَنْ خَلَقَ
لَكُمْ مِّنْ اَنْفُسِكُمْ اَزْوَاجًا
لِّتَسْكُنُوْٓا اِلَيْهَا
وَجَعَلَ بَيْنَكُمْ مَّوَدَّةً وَّرَحْمَةً ؕ
اِنَّ فِيْ ذٰلِكَ لَاٰيٰتٍ لِّقَوْمٍ يَّتَفَكَّرُوْنَ ○

(*Page 218, note 155*)
Sūra IV : 35

٣٥- وَاِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا
فَابْعَثُوْا حَكَمًا مِّنْ اَهْلِهٖ
وَحَكَمًا مِّنْ اَهْلِهَا ۚ
اِنْ يُّرِيْدَآ اِصْلَاحًا
يُّوَفِّقِ اللّٰهُ بَيْنَهُمَا ؕ
اِنَّ اللّٰهَ كَانَ عَلِيْمًا خَبِيْرًا ○

(*Page 223, note 166*)
Sūra II : 236

٢٣٦- لَا جُنَاحَ عَلَيْكُمْ
اِنْ طَلَّقْتُمُ النِّسَآءَ
مَا لَمْ تَمَسُّوْهُنَّ
اَوْ تَفْرِضُوْا لَهُنَّ فَرِيْضَةً ۖ وَّمَتِّعُوْهُنَّ ۚ
عَلَى الْمُوْسِعِ قَدَرُهٗ وَعَلَى الْمُقْتِرِ قَدَرُهٗ ۚ
مَتَاعًا بِالْمَعْرُوْفِ ۚ حَقًّا عَلَى الْمُحْسِنِيْنَ ○

APPENDIX B

LIST OF ABBREVIATIONS

A.C.	Appeal Cases
A.I.R.	All India Reporter
A.J.R.	Australian Jurist Reports, Victoria
All.	Allahabad
B.L.R.	Bengal Law Reports
Ecc.	Ecclesiastical
F.M.S.L.R.	Federated Malay States Law Reports
I.L.R.	Indian Law Reports
J.M.B.R.A.S.	Journal of the Malayan Branch Royal Asiatic Society
Ky.	Kyshee
Leic.	Straits Law Reports by Leicester
M.C.	Malayan Cases
M.L.J.	Malayan Law Journal
P.C.	Privy Council
P.L.D.	All Pakistan Legal Decisions
S.L.R.	Singapore Law Reports
S.S.L.R.	Straits Settlements Law Reports
W.L.R.	Weekly Law Reports
W.O.C.	Wood's Oriental Cases
W.P.	West Pakistan

GLOSSARY OF LEGAL TERMS

(See note on page 399)

MALAY	VARIATION	ARABIC	DEFINITION
		adā'	performance of obligation at prescribed time.
'ādat		*'ada*	custom.
'ādat kampong			custom of the *kampong* i.e. village.
'ādat perpateh			matrilineal custom.
'ādat Rembau			custom of Rembau
'ādat temenggong			patrilineal custom
'Ādat Istiadat Melayu			Malay Custom
		'adhāb	penalty awarded in next world.
		adhān	"announcement", a technical term for the call to the Divine service of Friday and the five daily *ṣalāts*.
		adillat ash-Sharī'a	*Sharī'a* evidences.
Agong, Yang di-Pertuan			The King
		āḥād Ḥadīth	isolated *Ḥadīth*.
		aḥkām	judgments.
		Ahl al-Bayt	'People of the House' consisting of the Prophet's son-in-law 'Alī, his daughter and 'Alī's wife Fāṭimah, and their descendants.
		Ahl al-Ḥadīth	'People of *Ḥadīth*'
		Ahl al-Kitāb	'People of the Book' (People who possess a scripture).
		Ahlu'l-Sunna Wa'l-Jumā'a	'the People of the Sunna and of the Community', are those who refrain from deviating from dogma and practice.
		ajwiba	opinions.
		Allāh	God.
		'alāmat	sign.

MALAY	VARIATION	ARABIC	DEFINITION
		'ālim (pl. *'ulamā'*)	a learned man, particularly in the Muslim sciences of the traditions and the sacred law.
		'amal	practice, precedent.
		'amaliyyāt	conduct.
		'āmils	collectors, in this instance of *zakāt* and *fiṭrah*, literally: worker.
Amīn			treasurer, trustee.
amūr al-khayrāt	*amūr al-khaira*	*umūr al-khayrāt*	good works.
anak dara			female who has never been married or had sexual intercourse.
		'aql	intellect, reason.
		arkān	essential elements.
		'aṣaba (pl. *'aṣabāt*)	agnatic relatives, relationship traced through males.
		Aṣḥāb	Companions of the Prophet.
		āṣl	original cause.
		athar	effect.
		āwṣāf khārijiyya	outward qualities.
		'azīma	ideal.
		bāṭil	null, void.
		bay'	sale, transaction.
jual janji		*bay' bil-wafā'*	a mortgage by conditional sale.
	Bait al-Māl	*Bayt ul-Māl*	public treasury.
		Bayt ul-Māl ul-Muslimīn	"The Treasury of the Muslims".
belanja hangus			personal ceremonial expenses, gifts in cash or kind given on engagement by the man to the woman, which are not reclaimable.
bendang			wet rice field.
bersuarang			arbitration or settlement, in *'ādat perpateh*.
besar			big.
Besar, Mentri			here in sense of 'Chief' Minister.
		bid'a	innovation.
		birr	good and pious acts.
buapak	*ibu-bapa*		elder of a *perut* or family.
		buṭlān	nullity.

MALAY	VARIATION	ARABIC	DEFINITION
chari bahagi			increase or earnings are divided.
charian bujang			property given son by parents becomes *harta pembawa* on marriage; property which clearly belongs to one tribe.
charian laki-bini			property acquired by joint efforts of married couple, this includes any increase in value on the *harta pembawa* and *dapatan* during the marriage; where a divorce occurs as a result of the 'breaking of a condition' (*ta'alīk*) the wife retains the whole.
cherai ta'alīk			divorce by the breaking of a condition.
cherai tebus ṭalāk			divorce by redemption.
"China Buta"			'Blind Chinese', i.e. the one who carries out the legal fiction of marrying a woman divorced from her husband by three *ṭalāq* for the expressed purpose of divorcing her and thereby making it possible for her husband to remarry with her.
chinchin tanya			'seeker ring'.
chinchin, menghulur			'sending the ring ceremony'.
daerah			area.
		ḍa'īf Ḥadīth	*Ḥadīth* which are transmitted by persons of questionable authority.
		Dā'i 'l-Muṭlaq	the present religious head of the *Dāwūdī Bohōras*.
		dā'īs	literally, he who summons (men to the good or to the Faith), initiates.
dapatan tinggal			wife's separate estate, remains with her.
		ḍarūra	necessity.
		dīn	religion.
		dirham	the silver unit of coinage derived from the Greek *drachma*.
Doa		*Du'ā'*	blessing, prayer, in sense of Hebrew *berākā*, not to be confused with *ṣalāt* often translated as prayer, but actually whole service.
Dua Kalīmah Shahāda			Confession of the Faith.

MALAY	VARIATION	ARABIC	DEFINITION
		faqīh (pl. *fuqahā*)	jurist.
		far' (pl. *furu'*)	subsidiary, branch of the law.
		farā'iḍ	Islāmic law of Inheritance.
		farḍ (pl. *furūḍ*)	obligatory.
		farḍ al-'ayn	individual obligation.
		farḍ kifāya	collective obligation.
	fāsid	*fasād*	irregular, invalid.
fasah		*faskh*	revocation, annulment.
		fāsiq	impious.
fetua	*petua*	*fatwā* (pl. *fatāwā*)	formal legal opinion.
		fi'l (pl. *af'āl*)	act, practice.
		fiqh	jurisprudence.
		fisq	impiety.
fiṭrah		*fiṭr*	religious tithe payable once a year during fasting month, not proportionate to income but so much per head in a family.
		furū' al-fiqh	branches of the law.
gantang			6 *katties*.
gantang baghdād			3 *katties* and 12 *tahils*.
		ghā'ib	he who has vanished.
habuan			commission; remuneration.
		ḥadd (pl. *ḥudūd*)	unalterable punishment for criminal offence.
	hadiyya	*hadīa*	gift.
		ḥadīth	tradition.
		ḥāfiẓ	reciters of the Qur'ān by heart.
		Ḥafṣah	wife of Prophet Muḥammad.
		ḥajj	pilgrimage to Makka.
		ḥakam (pl. *ḥakamān*)	arbitrator.
		ḥākim (pl. *ḥākimān*)	judge.
		ḥalāl	lawful.
hantaran			obligatory cash payment due to be paid under local custom by bridegroom to bride at time of marriage.
		Ḥanafis	followers of the largest of four schools of law mutually considered 'orthodox', derives name from Abū Ḥanifā, Shaybānī and

MALAY	VARIATION	ARABIC	DEFINITION
			Yūsuf outstanding jurists, represents ancient 'Irāqī school, adopted as official school by Ottoman Turks and accordingly followed by courts of Sūdān, Egypt, Palestine, Syria, 'Iraq; dominant in Central Asia, India.
		Ḥanbalīs	followers of smallest 'orthodox' school, Wahhābis of Arabia repudiate many *Ḥanbalī* tenets but adhere to teachings of *Ḥanbalī* reformers, Ibn Taymiyya and Ibn Qayyim.
		ḥarām	prohibited, forbidden.
Hari Raya Fiṭrah		*'Īd al-Fiṭr* *'Īd aṣ-Ṣaghīr*	the 'minor festival' or 'festival of the breaking of the fast', celebrated on the 1st *Shawwāl* and following days; if a Muslim has not paid *zakāt al-fiṭr* before end of fasting month, he is legally bound to do so on the 1st *Shawwāl* latest; as festival marks end of difficult period of fasting, although 'minor', it is celebrated with more enthusiasm than the 'major festival'.
Hari Raya Haji		*'Īd al-Aḍhā*	the 'major festival', 'sacrificial festival' celebrated on the 10th *Dhu'l-Ḥijja,* the day pilgrims sacrifice in the valley of Minā and three following days; an old 'Arab custom adopted by Islām as *Sunna;* it is *wājib* (a necessary duty) only by reason of a *nadhr* (vow); obligatory on every free Muslim who can afford to buy a sacrificial victim; sheep, camels or cattle, free from defects and of a fixed age are so used.
harta			property.
harta dapatan			personal estate of wife.
harta dapatan tinggal			personal property of wife 'remains' on divorce.
harta janda			property of widow, divorcee.
harta laki-bini			jointly acquired property of married pair, see *charian laki-bini.*
harta pembawa			personal estate of husband, on death reverts to his *wariths.*

MALAY	VARIATION	ARABIC	DEFINITION
harta pembawa kembali			personal estate of husband which 'returns' with him on divorce.
harta pesaka			inherited property.
harta sapencharian			jointly acquired property; concept that work creates joint ownership rights; on divorce or death the wife has a right to this share outside of any other settlement provided by Islāmic law or otherwise. See also *charian laki bini.*
harta sharikat			partnership property.
		ḥasan Ḥadīth	*Ḥadīth* which are transmitted by narrators not of moral excellence as narrators of *ṣaḥīḥ* tradition.
		hiba	ordinary gift in contrast to *ṣadaqa.*
		hijrah	migration of the Prophet Muḥammad to Madīnah in A.D. 622; the beginning of the Islāmic era.
		ḥikma	propriety of judgment, equated with *Sunna.*
		ḥikmat	policy.
		ḥiyal	legal devices, casuistry.
		ḥukm (pl. *aḥkām*)	command, rule of law.
hukom Shara'		*ḥukm Sharī'a*	a *Sharī'a* value, i.e. the quality determined as a result of divine revelation.
		ḥukm taklīfī	mandatory law.
		ḥukm waḍa'ī	declaratory laws.
huma			dry rice field.
		ḥuqūq (sing, *ḥaqq*)	rights.
		ḥuqūq Allāh	rights of God, or crimes against the community.
		ḥuqūq 'ibād	rights of Man, torts, contractual rights.
		ḥurma	prohibited.
		ḥusn	beauty, good.
hutang			deferred.
		i'āda	second performance of obligation at prescribed time, first performance having been not valid.
		'ibādāt	devotional duties.
		'ibāḥa	permission.

MALAY	VARIATION	ARABIC	DEFINITION
Hari Raya		*'Īd*	festival; word derived from root *'-w -d* and explained as '(periodically) returning'; actually Aramic loanword, numerous in religion; term occurs in *Sūra* V:114 where 'Īsā prays that a table may come down from heaven; see also *Hari Raya Fiṭrah ('Īd al-Fiṭr)* and *Hari Raya Haji (Īd al Aḍhā).*
		'idda	period of retirement specified for termination of the legal effects of marriage.
		ijāb	proposal, offer.
		ijmā'	consensus, agreement.
		ijmālī	general (in the sense of general evidences).
		ijtihād	independent judgement, reasoning, 'striving with full exertion'.
		ikhtilāf	legal controversy, differences, among jurists on matters of law.
		ikhtiyār	will power.
		'illa	effective cause.
		Imām	leader of people, used for a prayer leader or founder or leading jurist of different schools.
		Imāmat	Spiritual lordship of Muslim Empire.
		īmān	faith.
		'iqāb	awards in this world.
		iqrār	acknowledgement, admission, confession; in Islāmic law, admission testified by two competent witnesses is irrevocable in matters of human rights: *ḥuqūq ādamiy ya* (from Ādam, man).
		Islām	literally means submission to the will of God.
		isnād	chain of reporters, authorities 'backing' a *ḥadīth* (tradition).
		istiḥsān	*Ḥanafī* principle of juristic preference, equity.
		istiṣḥāb	principle most extensively used by Shāfi'īs of 'seeking a link', technical term for the principle whereby a state of affairs known to have once existed is regarde

MALAY	VARIATION	ARABIC	DEFINITION
			as having persisted unless the contrary can be shown.
		istiṣḥāb al-ḥāl	if the presumption is that what is proved in the past still continues.
		istiṣḥāb al-māḍī	if the converse is the case.
		istiṣlāḥ	*Mālikī* principle of prefering what is in the public interest.
		i'tiqādiyyāt	matters of belief.
		jā'iz	or *mubāḥ*, permitted.
		jamā'a	community.
janda		*thayyib*	female who is neither *anak dara* (unmarried and virgin) nor a married woman.
jual janji		*bay' bil-wafā'*	conditional sale.
	Ka'aba	*Ka'ba*	sacred shrine in the centre of the sacred *Masjid* at Makka in which direction the Muslims face in prayer.
kadim			relations, adoption, see also *warith*
		kafā'a	suitability, competence, see *kufū*.
		kalām	dialectics, theology.
kandoorie			feast.
kapan			literally, shroud, burial expenses.
kariah masjid			prescribed mosque area, mosque district.
katam		*khatm*	technical name for recitation of whole Qur'ān from beginning to end; infinitive from *'khatama* derived with meaning 'to end to conclude' from non-Arabic *khātam* 'seal, seal-ring', because the 'seal' was affixed at the end of the document; the complete recitation especially if accomplished in a short time, is meritorious achievement.
Kathi	*Kadzi*	*Qāḍī (Cadis)*	judge.
Kathi Besar			Chief Kathi.
Kathi, Naib			Assistant Kathi.
kattie			1½ lb., 16 tahils.
ketua kampong			head of a *kampong* or village.
		Khalīfa	Chief of State.

MALAY	VARIATION	ARABIC	DEFINITION
kheluat	*bersunyi sunyian*	*khalwāt*	to be with a man or woman alone (close proximity), (an impropriety).
		khiṭāb	communication from God.
		khiyār	option.
kholo'	*khula*	*khul'*	divestiture or redemption of herself by a wife, special form of divorce by which the wife purchases her freedom, the name comes originally from the symbolical act of 'taking off' and throwing away a piece of clothing, but already in the pre-Islāmic period it had become an expression for the dissolution of legal relations in general.
		kināya	vague.
		kitāb	the *Qur'ān*, scripture, book.
		Kitābiyya	'People of the Book' i.e. of Scriptuaries. Christians, Jews, Sabians, Zoroastrians.
kuasa		*taulīah*	letter of authority.
		kufr	unbelief.
kufū		*kifāya*	marriage equality i.e. the man must be of the same status as the woman.
kuncha			480 *gantangs*.
lebai	*lebay*		'lower grade' village priest, pious leader.
lembaga			tribal headman.
luak			district, area.
		ma'ānī	prevent.
		madhhab	school of law, doctrine.
		madrasah	(religious) Arabic school.
		mafqūd al-khabar	missing person.
mas-kahwin		*mahr*	bride-price, dower given to the wife by the husband.
		majlis	council, sitting, assembly.
Majlis Ugama Islām dan 'Adat Istiadat Melayu			Council of Religion (Islām) and Malay Custom.
		makrūh	objectionable.

MALAY	VARIATION	ARABIC	DEFINITION
		makrūh at-tanzīh karāhat	considered improper and to be avoided for purposes of keeping pure; i.e., nearer to *mubāḥ* than the *ḥarām*.
		makrūh karāhat at-taḥrīm	improper to the degree of prohibition, i.e., nearer *ḥarām*.
		māl	property.
		Mālikīs	followers of 'orthodox' school of Ḥijāz, Mālik ibn Anas nominal founder; found in Sūdān, Upper Egypt, throughout North and West Africa.
		mandūb	commended act.
		maqbūl	an *āḥād* tradition (*Ḥadīth*) acceptable as a basis of legal doctrine.
		ma'rūfāt	virtues.
		masāfat al-qaṣr	journey long enough to justify shortening of prayers.
		mashhūr	predominant, widespread.
		masjid	place of worship, a mosque.
		maṣlaḥaḥ	public interest.
		mastūr	unknown; hidden.
menghulur chinchin			'sending the ring', see also under *chinchin*.
Menteri Besar			Chief Minister.
		mithqāl	Goldsmith's weight, 4.2 grams, 20 *mithqāl* is equivalent to 2.125 *tahils*.
		mu'allā	based on a cause that can be extended to other causes.
		mu'āmalāt	civil transactions.
		mu'āraḍa	preference.
		mu'āraḍa ma' at-tarjīḥ	conflict with preference.
		mu'arrif	makes known.
		mu'aththir	brings into existence; authoritative.
		mu'aththir fīh	effective cause.
		mubāḥ	permitted.
		mudda'ī	party on whom burden of proof rests, plaintiff.
		mudda'a 'alaih	opposite party, defendant.

MALAY	VARIATION	ARABIC	DEFINITION
Mufti Kerajaan		*Muftī*	jurisconsult; qualified to issue *fatwā*, (religious) legal opinion.
		mujtahid	one who exercises *ijtihād*, or independent reasoning.
		mujtahidūn	expounders of the law.
		mukallaf	person of full capacity, subject of the law.
mukim			district.
		mulā'im	appropriate.
		munākaḥāt	domestic relations.
		munāsib	proper.
		munkarāt	vices.
		muntaẓar	he who is awaited.
		muqallidin (pl) *muqallid* (sing)	jurists who are followers of jurists of the past and who do not themselves exercise independent judgment.
		murajjihīn	jurists who followed views of original founders of schools of law.
		mursal	disconnected.
		mushā'a	unknown share in any property.
		musnad	collection where *ḥadith* transmitted by the same companion are classed together without respect to their content.
		mustaḥabb	or *mandūb*, commendable.
mut'ah	*matta'ah*		*NOTE:* in Arabic, temporary marriage (permitted today only by Ithnā 'Asharī); in Malay, consolatory gift given to a divorced woman. *Mut'at al-ṭalāq* in Arabic means a gift given where no dower is stipulated and a woman is divorced before consummation of the marriage.
		mutawātir ḥadīth	continuous *ḥadīth*.
		muṭlaq	absolute.
		nafl	or *Sunna*, i.e. acts not obligatory to extent of *farḍ* or *wājib*, commission still rewarded, preferable to omission, although no punishment for omission; acts which the Prophet performed at one time and omitted at another.

MALAY	VARIATION	ARABIC	DEFINITION
Naib		*nā'ib*	assistant.
		naskh	abrogation.
		nāsikh	abrogating (legislation).
		naṣṣ	text of scripture or the *Sharī'a*.
Nāthir		*Nāẓir*	controller.
		nawāzil	precedents.
nazr		*nadhr*	an expressed vow to do any act or to dedicate property for any purpose allowed by Muslim Law.
nazr 'ām			a *nazr* intended fully or in part for benefit of Muslim community generally or part thereof as opposed to an individual or individuals.
		niṣāb	minimum.
nusus		*nushūz*	wife unreasonably refuses to obey lawful wishes or commands of husband.
pajar siddik			before sunrise.
pakat			settlement.
pegawai masjid			masjid official.
pembawa kembali			personal estate of man, returns to him on divorce or death of wife.
pemberian			optional marriage settlement in cash or in kind made by husband to wife at time of marriage.
penghulu			village headman.
penggawa			headman.
kabul		*qabūl*	acceptance.
		qaḍā'	performance of obligation after prescribed time; sentence or judgment.
Kathi	*Kadzi*	*Qāḍī, Cadis* *Ḥākim*	judge, in 'Irāq.
		qawlī	expressed in words.
		qirā'āt	readings of the Qur'ān.
		qiyās	analogy, analogical deduction.
		qubḥ	ugliness, bad.
		qurbat	nearness to God.

MALAY	VARIATION	ARABIC	DEFINITION
		Quraysh	tribe to which the Prophet Muḥammad belonged.
raayat school			*raayat* literally mass or people – government school.
		radd	doctrine of return.
Puasa	*Ramadhan*	*Ramaḍān*	fasting month of the Islāmic year.
		ra'y	legal opinion.
		riba'	usury.
rojok			revocation of divorce.
		rukhṣa	permissible; conceded.
		rukn	formal cause.
		sabab	cause.
sadikah		*ṣadaqa*	gift given with intention of obtaining recompense in other world, charitable alms.
		ṣaḥīḥ	authentic (tradition).
		ṣāḥīḥ ḥadīth	*Ḥadīth* transmitted by truly pious persons.
		ṣalāt	see *doa, du'ā'*.
		sanad	chain of authorities.
sanak dato'			heirs, if grandmothers were sisters.
sanak ibu			heirs, if mothers were sisters.
sanak moyang			heirs, if great-grandmothers were sisters.
sawah			padi or rice land.
Shaaban		*Sha'bān*	name of the eighth month of the lunar year.
		shādhdh	anomalous opinion.
		Shāfi'īs	adherents of school founded by Shāfi'ī, 'orthodox'; predominant in Lower Egypt, East Africa, much of Arabia, Red Sea Littoral, throughout Southeast Asia.
		shahāda	profession of the faith; testimony.
		sharā'iṭ	conditions.
		Sharī'a	sacred law.
		sharṭ	condition.
Shawal		*Shawwāl*	name of the tenth month of the lunar year.
		Shī'a 'Alī	party which attached itself to 'Alī after death of the Prophet.

MALAY	VARIATION	ARABIC	DEFINITION
	Shī'as	*Shī'ī's*	the general name given for a large group of very different Muslim sects, who recognize 'Alī as the legitimate Khalīf after the death of the Prophet.
		ṣiḥḥa	validity.
		siyāsa	policy, politics.
		Ṣūfī	Muslim mystic.
		Sunna	custom; a precedent based on the Prophet's acts or sayings.
		Sunna mu'akkada	omission evil or improper.
		Sunna az-zawā'id	omission not improper.
		Sunnī	Orthodox Muslim.
		sūra	a portion or chapter of the Qur'ān.
surat ta'alīk			'certificate of condition' attached to a marriage which if broken entitles the woman to divorce.
		sureeh	explicit.
		ta'alīk	condition.
		ta'alluq	connection (between one fact and another).
		ta'diya	to extend.
		tābi'un	successors.
		tafriq al-dhimma	freedom from an obligation.
		tafṣīlī	particular (evidences).
		tafsīr	commentary; exegesis.
		tahil	1⅓ ounces.
		taḥkīm	arbitration.
		taḥlīl	the making of something or someone lawful, particularly used of a marriage which serves to make a triply divorced woman lawful once more to her former husband, see also *China Buta*.
		taklīfī	mandatory.
ṭalāk		*ṭalāq*	divorce.
		ṭalāq raj'ī	revocable divorce.
		ṭalāq bā'in	irrevocable divorce.
		ta'līl	reasoning.
		talfīq	'patching up' legal rules.
tanah wakaf			*wakaf* land.

MALAY	VARIATION	ARABIC	DEFINITION
		taqlīd	act of following; adherence; imitation; conformism, originally conformity to the opinion of a leading jurist; later, conformity to one of the four schools of law.
		taulīah	see *kuasa*.
		ta'zīr	corrective punishment, less than a *ḥadd*.
		thawāb	religious merit; rewards.
tua			old.
tunai			prompt.
		'ulamā' (sing. *'ālim*)	see *'ālim*.
untong			increase.
upah			compensation.
		'uqūba (pl. *'uqūbāt*)	penalty.
		uṣūl	roots or sources (of the law).
		uṣūl al-fiqh	the science of the principle whereby one reaches *fiqh* in the true way.
		Uṣūlī	School of law of the Ithnā 'Asharīs.
		waḍa'ī	declaratory.
		wājib	obligatory.
		wakīl	plenipotentiary and agent.
wakaf		*waqf* (pl. *awqāf*)	is an Arabic *maṣdar* meaning 'to prevent, restrain', means to 'protect a thing, prevent from becoming property of a third person *(tamlīk)*'; commonly a pious foundation; a thing that while retaining its substance yields a usufruct and of which the owner has surrendered his power of disposal with stipulation that the yield be used for particular purposes for which the *waqf* established or for permitted good purposes generally, i.e. according to Islāmic Law.
wakaf 'ām			a dedication in perpetuity of the capital or income of property for religious or charitable purposes recognised by Islāmic Law.
wakaf khās			a dedication in perpetuity of the capital or property for religious

MALAY	VARIATION	ARABIC	DEFINITION
			or charitable purposes prescribed in the *wakaf*.
wakaf, tanah			*wakaf* lands.
		wāqif	founder of a *waqf*.
wala		*walā*	patronage; 'to be near'.
		walī	guardian for marriage.
		walī mujbir	the guardian for marriage who can under Shāfi'ī law give a virgin girl in marriage without her consent, that is the father or the paternal grandfather.
walī rāja	*walī ḥākim*		may act instead of *walī* or guardian when the *walī* has refused his consent to the marriage without sufficient reason or where the woman to be wedded has no *walī*; in such instance the woman's consent is essential.
walī taḥkīm			*Kathi* appointed by the authorities to act as *walī* where there is no *walī mujbir* or agnatic relatives to act as *walī* and where there is no Muslim ruler in the State; in such instance the woman must consent to the marriage.
		walīma	marriage feast.
warith	*waris, kadim*		relations, heirs.
		wijdāniyyāt	matters of ethics.
		wujūb	obligations.
Yang di-Pertuan Agong			King of Federation of Malaysia.
Yang di-Pertuan Negara			Head of State in Singapore.
		yaqīn	positive knowledge.
		ẓāhir	literal meaning.
zakāt			legal alms.
zakāt ul-fiṭrah		*zakāt ul-fiṭr*	tithe payable in fasting month.
		zinā'	fornication, adultery.

Note — Words are cited under 'Malay' or 'Arabic' according to their usage in text itself. This should not be taken to mean that where the 'Malay' is blank it would necessarily be identical to the Arabic, or vice versa.

GLOSSARY OF MINORITY SECTS AND MOVEMENTS CITED

'Alids — descendants of 'Alī b. Abī Ṭālib, son-in-law of the Prophet, who had 14 sons and 17 daughters; the 'misfortunes' of his descendants fill the pages of Muslim history. At present the descendants of the Prophet are distinguished by the titles: *Syed, Sharīf,* or *Sharīfa,* such descent being certificated by a genealogical tree (*silsilah*).

Bohōra — (from Gujrātī *vohorvum,* to trade), name of 200,000 Indian Ismā'īlīs, Musta'lian branch. Originally they were converts from Hinduism. The community is almost exclusively traders. Their High Priest (*Dā'ī Muṭlāq*) is in Bombay.

Dāwūdīs — on the death in 1591 of the 24th *dā'ī,* Dāwūd b. 'Ajab Shāh, the *Musta'lian* split apart: the Indians supported Dāwūd (therefore *Dāwūdīs*) while the majority of the Yamanites (*Sulaymānis*) sided with Sulaymān b. Ḥasan.

Druzes — live in Lebanon and Anti-Lebanon. They held a special position in the Ottoman administration. Their name is probably derived from Darazī. It is likely that they were ethnically distinct before the founding of their own religion, perhaps a people who fled to the mountains in time of invasion, and never quite converted to Islam. Their religion is a learned system known to the *'uqqāl* (learned), not to the *juhhāl* (ignorant) of the people. The most meritorious of *'uqqāl* (1 out of 50) become *adjāwid* (perfect); these are the religious chiefs.

Farā'iḍī — founded in Eastern Bengal about 1804 by Ḥājjī Sharī'at Allāh who was born in the district of Farīdpūr. His is an incredible story of a man who went to Makka to study and after 20 years started homewards only to be robbed; being without anything he joined his attackers who later, by persuasion of his character, became his first followers! His innovation was the non-observance of Friday prayers and the two Ids, on the ground that British India was *dār al-ḥarb* or the 'world of war' rather than *dār al-Islām* or the 'world of Islām'. He ordered that the term *ustāz* or 'teacher' be used rather than *pīr* or master and *shāqird* or 'pupil' rather than *murīd* or 'disciple' as these terms would not imply complete submission. He required *tawba* or 'repentance for sins' from every disciple. It was however the dogma that the husband and not a midwife should cut the navel cord which alienated many. Further, the Zamīndār or Land-

lord class were alarmed by the unification of the peasantry under the leadership of Sharī'at Allāh. It was his son, Dūdhū Mīyān who justified the fear of the landlord class, as well as the European estate owners, as he taught the equality of man, fought the illegal levying of cesses by the landlords, and finally taught that the earth belongs to God and no one had a right to occupy it as an inheritance or to levy taxes upon it. Peasants were encouraged to settle on *Khāṣṣ Maḥall* lands, managed directly by the Government, and thus pay only land revenue to the State. Understandably many false suits were brought against him. Dūdhū Mīyān died in 1860 and none of his sons proved his equal — thus the sect diminished in numbers.

Ibāḍīs — a sect regarded by the *Sunnīs* (the 'Orthodox') as heterodox. They are the only surviving representatives of the *Khārijī* seceders of early Islām. Their actual differences with the *Sunnīs* are trivial. The Berbers of North Africa are *Ibādīs*, which may be partly ascribed to their will to remain separate from the 'Arab people. The *Ibādīs* established an *Imāmate* in 'Umān. They are found in Zanzibar and parts of the mainland of East Africa.

Ismā'īlīs — branch of *Shī'ī*, on death of Ismā'īl, son of Imām Ja'far aṣ-Ṣādiq (765 A.D.) they recognized Muḥammad, son of Ismā'īl, rather than his brother Mūsā al-Kāẓim as their *Imām*. The Ismā'īlīs are subdivided into several subsects, some differing widely in tenets.

Ithnā 'Asharīs — 'the Twelvers', a name given in contrast to the Sab'iyya, partisans of the seven *imāms*, to those *Shī'īs* who allow the series of twelve *imāms* and say that the *imāmate* passed from 'Alī ar-Riḍā to his son Muḥammad al-Taqī, to the latter's son 'Alī al-Naqī, then to his son al-Ḥasan al-'Askarī al-Zakī, and finally to Muḥammad al-Mahdī, who disappeared and will come again at the end of time to announce the last judgment and to fill the earth with justice. The series of twelve *Imāms* is made up as follows: 'Alī al-Murtaḍā; al-Ḥasan al-Mujtabā; al-Ḥusayn al-Shahīd; 'Alī Zain al-'Abidīn al-Sajjād; Muḥammad al-Bāqir; Ja'far aṣ-Ṣādiq; Mūsā al-Kāẓim; 'Alī al-Riḍā; Muḥammad al-Taqī; 'Alī al-Ṇaqī; al-Ḥasan al-'Askarī al-Zakī; Muḥammad al-Mahdī al-Ḥujja.

Khārajīs — members of the earliest sect of Islām, their importance lies in the formulation of questions relative to the theory of the Khalīfate and to justification by faith or by works. They carried out continual insurrections, often controling whole provinces. By this action, under 'Alī and the Umayyads, they inadvertently contributed to Mu'āwiya's triumph over 'Alī and then to that of the 'Abbāsids over the Umayyads.

Khōja — name of an Indian Muslim caste, originally Lohana caste of Hindus, converted in 14th century by Persian Ismā'īlī

missionary. The Persian word *khāja* replaced the Hindu *thakur, thakkar,* or lord, master, which is still used in addressing Lohanas and Khojas among themselves. Lohanas are regarded as Kshatrias.

Muḥammadiyya reformist, largely middle-class Muslim organization in Indonesia founded in 1912 by Kyahi Haji Aḥmad Dahlan, similar to reform movement in Egypt and India (see Afghānī and 'Abdu). Although non-political, it contributed towards the formation of a conscious base for the nationalist movement.

Sab'iyya 'Seveners', the name of various *Shī'a* groups who restrict the number of visible *Imāms* to seven.

Sulaymānis see *Dāwūdīs.*

Wahhābī community founded by Muḥammad b. 'Abd al-Wahhāb (*d.* 1201 A.H. — 1787 A.D.). The members call themselves *Muwaḥḥidūn* 'unitarians' and their system (*ṭarīqa*) 'Muḥammadan'. They regard themselves as *Sunnī* of the *Ḥanbalī* school as interpreted by Ibn Taimiyya who strongly attacked the cult of saints. The general aim of 'Abd al-Wahhāb was to do away with all innovations (*bida'*) which were later than the third century of Islām, thus the community are able to recognize the authority of the four *Sunnī* ('orthodox') law schools, and the six books of tradition.

Zaidīs the 'practical' group of the *Shī'a,* distinguished from *Ithnā 'Asharīs* and *Sab'iyya* by recognition of Zayd b. 'Alī.

TABLE OF CASES

Abdul Ghani *v.* Taleh Bibi, P.L.D. (1962) W.P. Lahore 531 ... 234
Abdul Guny Abdullasa, *Re* (1936) 5 M.L.J. 174; (1936) S.S.L.R. 107 ..... 302-3, 308, 310
Abdul Wahab bin Abdul Rauf & another *v.* Haji Wahab bin Haji Mohamed & another (1940) 9 M.L.J. 263 269
Abdullah, In the Goods of (1835) 2 Ky. Ecc. 8; Leic. 16; W.O.C. 1 268
Ainan bin Mahmud *v.* Syed Abu Bakar bin Habib Yusoff & others (1939) 8 M.L.J. 209 234
Aisha *v.* Udmanshah (1928) S.S.L.R. 37 309
Alkaff's Settlements, *Re* (1928) S.S.L.R. 188 .....251, 300
Alsagoff Trusts, *Re* (1956) 22 M.L.J. 244; (1955) S.L.R. 27 ..... 306—311
Alus *v.* Mahmood (1937) 15/1 J.M.B.R.A.S. 67 237
Amun & Somah, *Re* (1929) 7/1 J.M.B.R.A.S. 69 205
Anchom binte Lampong *v.* Public Prosecutor (1940) 9 M.L.J. 22 329
Anyam *v.* Intan (1949) 15 M.L.J. 72 275
Ashabee *v.* Mohammed Hashim (1887) 4 Ky. 212 307
Att.-Gen. of Ceylon *v.* Reid (1965) 2 W.L.R. 671 ..... 188, 321

Badaranissa Bibi *v.* Mafittallah (1871) 7 B.L.R. 422 178
Balqis Fatima *v.* Qureshi P.L.D. (1959) W.P. Lahore 566 211

Commissioners for Special Purposes of Income Tax *v.* Pemsel (1891) A.C. 531 303

Dato Ngiang Kulop Kidal, Decd., *Re* (1929) Taylor (Customary Law of Rembau) 92 ..... 257, 268, 272
Deputy Public Prosecutor *v.* Abdul Rahman (1963) 29 M.L.J. 213 321
Derai *v.* Ipah, *Re* Seremban Civil Appeal No. 6 of 1949 (1963) 1/4 Intisari 16 275

Elang, *Re*, (1937) Taylor (Malay Family Law) 41-4 .... 230, 255
Ena Mohamed Tamby, Decd., *Re* (1937) 6 M.L.J. 49; (1931) S.S.L.R. 3 302

Fatimah *v.* Logan (1871) 1 Ky. 255 ..... 306 — 309

Ghouse *v.* Rex (1946) 12 M.L.J. 36 321
Gilmour *v.* Coats (1949) A.C. 426 310

Habib Noh, *Re* Shrine of (1957) 23 M.L.J. 139; (1956) S.L.R. 131 ..... 289, 311
Habsah binte Mat *v.* Abdullah bin Jusoh (1950) 16 M.L.J. 60 .. 232
Hadjee Daeing Tahira binte Daeing Tedlellah, Decd. (1948) 14 M.L.J. 62 308
Hadjee Esmail bin Kassim, *Re* (1911) 12 S.S.L.R. 74 ..... 305-7, 309, 311
Hadjee Haroun bin Tamby Kechik, in the matter of the Trusts of the Will of (1949) 15 M.L.J. 143 ..... 301 — 303
Haji Abdul Lateef bin Haji Tamby, *Re* Estate of (1932) 3 M.L.J. 46 300
Haji Abdul Rahman *v.* Mohammed Hassan (1915) 1 F.M.S.L.R. 290 P.C.; (1917) A.C. 209 313
Haji Hussin *v.* Maheran (1946) 12 M.L.J. 116 ..... 274, 276
Haji Mansur bin Duseh alias Matso bin Duseh, Decd., *In re* (1940) 9 M.L.J. 110 ..... 273-4, 276
Haji Pais, *Re* (1948) Taylor (Inheritance in Negri Sembilan) 57-61 ..... 272, 274
Haji Ramah *v.* Alpha (1924) 4 F.M.S.L.R. 179 ..... 231, 254
Haji Saemah *v.* Haji Sulaiman (1942) 11 M.L.J. 17; (1948) 14 M.L.J. 108 231
Haji Salleh bin Haji Ismail *v.* Haji Abdullah bin Haji Mohamed Salleh (1935) S.S.L.R. 5; (1935) 4 M.L.J. 26 .. 309
Hasmah binte Omar *v.* Abdul Jalil (1958) 24 M.L.J. 10 234
Hassan *v.* Romit (1929) Taylor (Customary Law of Rembau) 63 268
Hujah Lijah binte Jamal *v.* Fatimah binte Mat Diah (1950) 16 M.L.J. 63 254
Husseinah Banoo, *Re* (Shariah Court Case No. 2 of 1963) 180

Imah, Decd., *Re* (1948) Taylor (Inheritance in Negri Sembilan) 86 273
Ismail bin Rentah Decd., *Re* (1940) 9 M.L.J. 98 268

Janat *v.* Sheikh Khuda Buksh (1911) 2 F.M.S.L.R. 61 193
Jasin *v.* Tiawan (1941) 10 M.L.J. 247 233
Jemiah binte Awang *v.* Abdul Rashid bin Haji Ibrahim (1941) 10 M.L.J. 16 240
John Jiban Chandra Dutta *v.* Abinash Chandra Sen (1939) I.L.R. 2 Cal. 12 188

Ketuna Bibi, *Re* (1955) 21 M.L.J. 166 240
Kiah *v.* Som (1953) 19 M.L.J. 82 ..... 299 — 300
Kulop Degor, Decd., *Re*, (1937) Taylor (Malay Family Law) 48 230
Kulop Kidal, *Re*, see Dato Ngiang Kulop Kidal
Kutai bin Haji Lateh, Dato Bagindarajah Redek bin Keneh, Lanjong bin Lehel *v.* Taensah binti Haji Enah (1933-4) F.M.S.L.R. 304 ..... 273 — 274

Laton *v.* Ramah (1926) 6 F.M.S.L.R. 116, 128, C.A.; (1937) 15/1 J.M.B.R.A.S. 35 231
Lebar *v.* Niat, (1937) Taylor (Malay Family Law) 55 230

Maani *v.* Mohamed (1961) 27 M.L.J. 88 276
Mahmooda binte Ismail, *Re* (1961) 27 M.L.J. 195 244
Maria Huberdina Hertogh, *In re* (1951) 17 M.L.J. 164 195
Martin *v.* Umi Kelsom (1963) 29 M.L.J. 1 195
Mazhar Ali *v.* Budh Singh (1884) I.L.R. 7 All. 297 218
Minah *v.* Haji Sali & two others, Seremban Civil Appeal No. 4 of 1953 (1963) 1/4 Intisari 16 275
Miut, Decd., *Re* (1929) 7/1 J.M.B.R.A.S. 219 258
Mohamed Haniffa, Decd., *Re* M. (1940) 9 M.L.J. 286 269
Mohamed Saad bin Mohamed Nor *v.* Hasnah binte Adam (1949) M.L.J. 97, Supp. 31 ..... 223, 228
Mong binte Haji Abdullah *v.* Daing Mokkah bin Daing Palamai (1935) 4 M.L.J. 147; (1935) S.S.L.R. 123 175
Mustan Bee *v.* Shina Tomby (1882) 1 Ky. 580 307
Mutchilim, *Re* (1960) 26 M.L.J. 25 256

Noordin *v.* Shaik Mohamed Meah Noordin Shah (1908) 10 S.S.L.R. 72 180
Noorijah, Decd., *Re* (1937) 15/1 J.M.B.R.A.S. 59 231
Nuruddin *v.* Siti Aminah (1929) S.S.L.R. 146 240

Omar bin Shaik Salleh & another, *In re* (1948) 14 M.L.J. 186 .. 237

Public Prosecutor *v.* John David White alias Abdul Rahman (1940) 9 M.L.J. 214 ..... 188, 321

Rahim *v.* Sintah & another (1929) 7/1 J.M.B.R.A.S. 114 233
Rashida Begum *v.* Shahab Din P.L.D. (1960) W.P. Lahore 1142 237
Rasinah *v.* Said (1937) Taylor (Malay Family Law) 29 229
Reg. *v.* Rabia (1889) 4 Ky. 513 ..... 188, 321
Rokiah *v.* Abu Bakar (1948) 21/2 J.M.B.R.A.S. 10 211

Saeda *v.* Haji Abdul Rahman (1918) 1 F.M.S.L.R. 352 268
Sali binte Haji Salleh *v.* Achik alias Bachik bin Enot (1941) 10 M.L.J. 14 ..... 274, 276
Salmah *v.* Soolong (1878) 1 Ky. 421 ..... 180, 196
Shafi *v.* Lijah (1948-9) M.L.J. Supp. 49 246
Shaik Abubakar bin Mohammed Lajam, Decd., *Re* (1935) 4 M.L.J. 137 267
Shaik Abdul Latif *v.* Shaik Elias Bux (1915) 1 F.M.S.L.R. 204 268
Shaik Lebby *v.* Fateemah (1872) 1 Ky. 324 309
Shaik Salleh Obeid bin Abdat, *Re* the Settlement of, (1954) 20 M.L.J. 8 ..... 301, 306, 309
Sheikh Salman bin Abdul Shaikh bin Mohamed Shamee, Decd., *Re* (1953) 19 M.L.J. 200 ..... 301, 306
Siti *v.* Mohamed Nor (1928) 6 F.M.S.L.R. 135 268
Sibt Muhammad *v.* Muhammad Hameed A.I.R. (1926) All. 589 234
Syed Abdul Rahman bin Shaikh bin Abdul Rahman Alkaff, Decd., *Re* (1953) 19 M.L.J. 68 305
Syed Abdullah Al-Shatiri *v.* Shariffa Salmah (1959) 25 M.L.J. 137 ..... 178, 187
Syed Ahmad *v.* Fatimah (1948) 21/2 J.M.B.R.A.S. 14 211
Syed Hassan bin Abdullah Aljofri, *Re* (1949) 15 M.L.J. 198 267,269
Syed Ibrahim Alsagoff & another *v.* Att.-Gen. (1948) 14 M.L.J. 155 256
Syed Mohamed Yassin *v.* Syed Abdul Rahman (1921) 15 S.S.L.R. 199 C.A. 199
Syed Shaik Alkaff, *Re* (1923) 2 M.C. 38 ..... 269, 303, 307

Tano *v.* Ujang, *Re* Seremban Civil Appeal No. 5 of 1949 (1963) 1/4 Intisari 16 275
Teh binte Chik *v.* Kelsom binte Haji Abas (1939) 8 M.L.J. 289 ..... 231, 232
Teh Rasim *v.* Neman (1937) 15/1 J.M.B.R.A.S. 18 230
Teriah v. Baiyah & three others, *Re* Seremban Civil Appeal Suit No. 9 of 1954 (1963) 1/4 Intisari 17 276
Teriah, Decd., *Re* (1948) Taylor (Inheritance in Negri Sembilan) 90 273
Timah binti Abdullah, Decd., *Re* (1941) 10 M.L.J. 51 246

Umar Bibi *v.* Mohammad Din, A.I.R. (1945) Lahore 51 211

Wan Mahatan *v.* Haji Abdul Samat (1937) Taylor (Malay Family Law) 25 ..... 230, 231

Wan Nab *v.* Jasin (1950) 21 M.L.J. 60; (1937) 15/1 J.M.B.R.A.S. 20 232
Wong See Leng *v.* Saraswathy Ammal (1954) 20 M.L.J. 141 C.A. 314

Yaacob *v.* Hamisah (1950) 16 M.L.J. 255 ..... 313, 314

NOTE:
For full references to all works by Taylor see Bibliography herein.

TABLE OF ACTS, ORDINANCES, ENACTMENTS AND RULES

ACTS OF INDIA

1872 Indian Evidence Act (No. 1) 218

ORDINANCES OF THE STRAITS SETTLEMENTS

1936 Malacca Lands and Customary Rights Ordinance, Cap. 125 269

ENACTMENTS AND RULES OF THE FEDERATED MALAY STATES

1923 Excise Rules 330
1926 Land Code, Cap. 138 273
1935 Courts Enactment, Cap. 2 148
1935 Penal Code, Cap. 45 ..... 181, 321, 363
1935 Women and Girls Protection Enactment, Cap. 156 321
1935 Muslim Law and Malay Custom (Determination) Enactment, Cap. 196 148
1935 Muhammadan Marriage and Divorce Registration Enactment, Cap. 197 ..... 147, 185, 190, 193, 206

FEDERATION OF MALAYA ORDINANCES

1950 Evidence Ordinance (No. 11) 218, 234, 300
1950 Married Women & Children (Maintenance) Ordinance (No. 36) 225-6, 227-8, 239
1952 Adoption Ordinance (No. 41) 240
1952 Civil Marriage Ordinance (No. 44) 195
1955 Small Estates (Distribution) Ordinance (No. 34) 247-9, 262-3, 271-2
1955 Excise (Application to Kedah & Amendment) Ordinance (No. 40) 330
1956 Civil Law Ordinance (No. 5) 243, 249
1956 Christian Marriage Ordinance (No. 33) 195
1957 Married Women Ordinance (No. 36) 241
1958 Distribution Ordinance (No. 1) 249

1959 Bankruptcy Ordinance (No. 20) 242, 244
1959 Probate and Administration Ordinance (No. 35) 246, 266-7, 271
1959 Wills Ordinance (No. 38) 267

FEDERATION OF MALAYA ACTS OF PARLIAMENT

1961 Age of Majority Act (No. 9) 234-5, 353
1961 Guardianship of Infants Act (No. 13) 235-6

JOHORE

1935 Muhammadan Marriage and Divorce Registration Enactment (No. 17) 156-8, 185, 206
1935 Offences by Muhammadans Enactment (No. 47) 190, 316-7, 320, 328-9, 362-3, 366
1935 Muhammadan Law Determination Enactment (No. 48) 157-8
1935 Johore Excise Enactment (No. 102) 330
1949 Council of Religion Enactment (No. 2) 156
1949 Muhammadan Law Determination (Amendment) Enactment (No. 3) 157
1949 Courts Enactment (No. 54) 157
1949 Courts (Amendment) Enactment (No. 4) 157
1957 Zakat and Fitrah Enactment (No. 5) 347-8
Bait ul-Mal Enactment (No. 136) as amended by No. 14 of 1959 295-6
Wakaf Enactment (No. 5) 286-7

KEDAH[1]

1374 Zakat Enactment (No. 4) 345-6
as amended by the Zakat (Amendment) Enactment 1961
1962 Administration of Muslim Law Enactment (No. 9) .. 158-61, 174, 185, 189-90, 192-3, 204-5, 209, 212-3, 215-7, 220, 224, 226-7, 239, 249-50, 282-6, 294, 316-9, 322-4, 329-30, 332, 334, 350, 355-61, 363-4, 367-8, 372-4.

KELANTAN

1938 Kelantan Jual Janji Rules 312
1938 Land Enactment (No. 26) 312
1953 Council of Religion and Malay Custom and Kathis Courts Enactment (No. 1) 163-6, 174-5, 178, 182-3, 189, 192-3, 202-3, 209-12, 215-7, 219-20, 222-5, 232-3, 238,

1. Kedah Enactments from Muslim Year 1353 (A.D. 1933-34) to 1376 (1956) use the Muslim date in the short title.

249-50, 253, 267, 282-6, 291-2, 299, 316-9, 322-5, 329-31, 333, 340-2, 350-2, 354, 356-61, 363-4, 367-8, 372-4.

MELAKA (MALACCA)

1959 Administration of Muslim Law Enactment (No. 1) .. 169-72, 174, 184-5, 190, 192-3, 204-5, 209, 215-7, 222-4, 226-7, 232-3, 239, 249-50, 282-6, 288, 293-4, 317-9, 322-4, 329-30, 332-3, 348-50, 355-61, 363-4, 367-8, 372-4.

NEGRI SEMBILAN

1938 Muslim Offences Order in Council (No. 1) 316
1960 Administration of Muslim Law Enactment (No. 15) .. 148-51, 174, 184, 190, 192-3, 204-5, 209, 215-7, 222-4, 226-7, 232-3, 239, 249-50, 282-6, 290, 316--9, 322-4, 329-32, 334, 338-9, 350, 355-61, 363-4, 367-8, 372-4.
1963 Negri Sembilan Marriage, Divorce and Reconciliation (*Rujo*) Rules (N.S.L.N. No. 3) 184, 187, 205, 209

PAHANG

1956 Administration of the Law of the Religion of Islam Enactment (No. 5) ..... 154-6, 175, 183-4, 189-90, 192-3, 203-4, 210, 212, 215-7, 220, 222-4, 226, 232, 238-9, 249-50, 253, 267, 282-4, 286, 292-3, 316-9, 322-4, 329-31, 333-4, 350, 355-61, 363, 365, 367-8, 372-4 as amended by the Administration of the Law of the Religion of Islam (Amendment) Enactment No. 2 of 1960; 14 of 1960; 12 of 1963 293

PERAK

Ninety-Nine Laws of Perak .... 194, 196, 200, 211, 225, 229, 237.
1879 Perak General Land Regulations 312
1885 Perak General Land Regulations 312
1907 (18 Jan.) Perak State Council Minute 229-30, 254-5
1939 Muhammadan (Offences) Enactment (No. 5) 190, 206, 316, 319-20, 325-7, 332, 334-5, 361-3, 365-6
1951 Majlis Ugama Islam dan Adat Melayu Enactment (No. 6) 147
1951 Bait-ul-Mal, Zakat and Fitrah Enactment (No. 7) 147, 291, 338
1951 Control of Wakaf Enactment (No. 8) 287-8
1954 Muslim Marriage and Divorce Registration Enactment (No. 2) 319

1955 Muslim (Offences) (Perak Amendment) Enactment (No. 2) 148

PENANG

1959 Administration of Muslim Law Enactment (No. 3) .. 169-72, 174, 185, 190, 192-3, 204-5, 209, 212-3, 215-7, 220, 224, 226-7, 232-3, 239, 249-50, 282-6, 288, 293-4, 317-9, 322, 323-4, 329-30, 332-3, 339-40, 348-9, 350, 355-6, 358-61, 363-4, 367-8, 372-4.

PERLIS[2]

1338 Administration of Estates Enactment (No. 1) 296
1340 Shariah Court Enactment (No. 5) 366
1949 Council of Religion and Malay Custom Enactment (No. 1) as amended by No. 7 of 1951; No. 5 of 1952 161
1949 Zakat and Fitrah Enactment (No. 2) 346-7
1955 Inspector of Religion Affairs and Visiting Teacher of Religion Rules (L.N. No. 12) 366-7
1964 Administration of Muslim Law Enactment 1963 (No. 3) .. 161-3, 175, 185-6, 190, 192-3, 206-7, 213, 216-7, 220-1, 224, 227, 233, 267, 282, 286, 296-7, 299, 316, 318-9, 327-30, 332-3, 335, 350, 355-7, 359-61, 363, 365, 367-8, 372-4.

SELANGOR

1952 Administration of Muslim Law Enactment (No. 3) .. 151-3, 173-4, 181-2, 189, 191, 193, 201-2, 209, 215-7, 222-5, 231, 238, 249-50, 253, 267, 282-6, 290, 299, 316-9, 322-4, 329-31, 333, 337, 350-1, 354-5, 357, 359-61, 363-4, 367-8, 372-4.
as amended by the Administration of Muslim Law (Amendment) Enactment, 1961 (No. 7 of 1961)
1962 Selangor Administrative Rules issued by Religious Department 182, 187
1962 Rules relating to Marriage, Divorce and Revocation of Divorce 201, 208
1964 Administration of Muslim Law Bill (Change of Title of Majlis and Amendment) 353-4

SINGAPORE

1871 Penal Code, Cap. 119 (No. 4) 181, 321

2. Perlis Enactments prior to 1953 (Muslim Year 1372) have the Muslim year in the short title.

1905 Muslim and Hindu Endowments Ordinance, Cap. 271 (No. 17) 288-9
1936 Muslims Ordinance, Cap. 57 ..... 246, 255
1939 Adoption of Children Ordinance (No. 18) .....
1955 Evidence Ordinance, Cap. 4 ..... 218, 234
1955 Bankruptcy Ordinance, Cap. 11 244
1955 Guardianship of Infants Ordinance, Cap. 16 .....236, 321
1955 Probate and Administration Ordinance, Cap. 17 ..... 250, 267, 274-5
1955 Settled Estates Ordinance, Cap. 20 250-1
1955 Civil Law Ordinance, Cap. 24 243-4
1955 Women and Girls Protection Enactment Cap. 33 ....
1955 Trustees Ordinance, Cap. 34 250-1
1955 Wills Ordinance, Cap. 35 267
1957 Muslims Ordinance (No. 25) .... 172-3, 175, 186-7, 190-1, 207, 210, 213, 216, 221-4, 228, 243-4, 246, 251, 256-7, 269, 299, 320-21, 368.
1959 Muslim Marriage & Divorce Rules (Rule 8C) 187, 193, 374
1960 Muslims (Amendment) Ordinance (No. 40) 187, 221-2, 224, 228, 246, 256
1961 Women's Charter (No. 18) 195, 228, 239, 242, 321

TRENGGANU[3]

1344 Land Enactment 312
1357 Land Enactment (No. 3) 312
1955 Trengganu Islamic Religious Courts (Civil Procedure) Rules, 2nd Schedule to the 1955 Administration of Islamic Law Enactment (No. 4) 370, 374
1955 Administration of Islamic Law Enactment (No. 4) .. 166-9, 175, 178, 182-3, 189, 192-3, 202-3, 209-12, 215-7, 219-20, 222-5, 232-3, 238, 250, 253, 267, 282-4, 286, 291-2, 299, 316-9, 324-5, 329-31, 333, 342-5, 350-2, 354, 356-61, 363-5, 367-8, 372-3.
1956 Muslim Religious Affairs (Forms and Fees) Rules (G.N. No. 526) Form N 208
1963 Administration of Islamic Law (Amendment) Enactment 168

3. Trengganu Enactments prior to 1950 (Muslim Year 1370) have the Muslim year in the short title.

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Ibrahim, Dr. Ahmad, "Legal Position of Muslims in Singapore", p.40-49.

Suffian, Mr. Justice M-, bin Hashim, "Islam and the State in Malaya", p.7-21.

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Davies, Idrus Taloq, "Malay — as defined in the States Malay Reservation Enactments", p.26-8.

Gordon, Shirle, "Contradictions in the Malay Economic Structure — Riba, Zakat, Malay Land Reservation", p.29-40.

Mahmud, Dato Sir —, bin Mat, "Land Subdivision and Fragmentation — proceeding from the Islamic Law of Inheritance", p.11-17.

Majid, Abdul, "Co-operative Movement Among the Malays — and the question of Riba", p.42-49.

Mohar, Raja-, bin Badio Zaman, "Malay Land Reservation and Alienation", p.19-25.

Rasli, Mohd.-, bin Mohd. Nawi, "Economic View of Puasa (Ramaḍān)", p.51-57.

Vol. I No. 3: (Theme: Islām and 'Ādat — part one)

Din, Haji Mohd.-, bin Ali, "Two Forces in Malay Society", p.15-36.

Hussein, Tunku-, bin Tunku Yahya, "Uncracked by the Sun", p.45-52.
Mahathir, Dr-, bin Mohamad, "Interaction — Integration", p.37-44.

Vol. I No. 4: (Theme: Islām and 'Ādat — part two)
Din, Haji Mohd-, bin Ali, "Surrounding Puasa (Ramaḍān)", p.21-25.
Hasmah, Dr. S-, binte M. Ali, "Effect on a Basic Attitude — Health", p.27-36.
Yusof, Dato-, Lokman, "As Seen in Land Inheritance", p.11-19.
Wira, Tunku Pekirma, "In Trengganu", p.37-48.

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Gordon, Shirle, "Pondok and our Peasantry", p.32-33.
Mat Noor bin Hashim, "A Malay Child in a Religious School", p.12-13.
Rauf, Dr. M. A., "Islamic Education in Malaya", p.14-31.
Skinner, C., "Influence of Arabic Upon Modern Malay", p.34-42.

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Din, Haji Mohd-, bin Ali, "Malay Customary Law/Family", p.34-45.
Gordon, Shirle, "Malay Marriage—Divorce—in the States of Malaya and Singapore", p.23-32.
Ibrahim, Dr. Ahmad bin Mohamed, "Islam Customary Law/ Malaysia", p.47-74.
Siraj, Mrs. M., "Status Muslim Woman/Family Law Singapore", p.9-17.
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STATE INDEX

JOHORE

appeals, 157.
Bayt ul-Māl, 295-6.
divorce, 157-8.
  cherai ta'alīk, 210.
  khul', 213.
  registration of, 157-8.
fasah, 216.
fetua, 157.
gifts, 299.
kathis (appointment of, courts, jurisdiction), 156-8, 299.
maintenance, wife, 228.
marriage, 157-8, 185.
offences,
  jurisdiction, 362, 366.
  liquor, consumption of, 330.
  matrimonial, 320.
  miscellaneous, 361-2.
  zakāt and *fiṭrah*, non-payment, 336, 347-8.
Ruler, powers, duties, 156-7, 296.
structure of religious authority, *Majlis*, 156-8.
wakaf, nazr, 286-7.

KEDAH

appeals, 160.
Bayt ul-Māl, 294.
betrothal, 160, 174.
custody and guardianship, 160.
divorce, 160, 203.
  cherai ta'alīk, 209.
  khul', 212-3.
  registration of, 161.
evidence, 367.
fetua, 159.
  gazetting, 160.
  issuing authority, 159.
  tenets controlling, 159.
gifts, 299.
ḥakam, 220.
harta sapencharian, 232.
kathis (appointment of, courts, jurisdiction), 160.
legitimacy, 160.
maintenance, dependents, 160, 239.
  wife, 226.
marriage, 160, 185, 189.
mas-kahwin, 192-3.
mut'ah, 224.
offences,
  administration, 367.
  conversion, 350.
  jurisdiction, 363-4.
  liquor, consumption of, 329-30.
  matrimonial, 317-9.
  miscellaneous, 355-61.
  prayers, Friday, 332.
  Ramadhan, 334, 349.
  sexual intercourse, unlawful, 322-4.
  zakāt and *fiṭrah*, non-payment, 336, 345-6.
presumption of death, 216, 218.
procedure, civil cases, 373-4.
  criminal cases, 372.
property, 160, 249.
Ruler, powers, duties, 158-60, 294.
structure of religious authority.
  Majlis, 158-61, 294, 350.
wakaf, nazr, 282-3, 285, 294.

KELANTAN

Bayt ul-Māl, 291-2.
betrothal, 165, 174-5.
custody and guardianship, 165, 238.
divorce, 165, 202,
  cherai ta'alīk, 209.
  khul', 211-2.
  registration of, 166.
evidence, 367.
fasah, 215.
fetua, 164.
  gazetting, 165.
  issuing authority, 164.
  tenets controlling, 164-5.
gifts, 299.
  inter-vivos, 165, 299.
ḥakam, 219-20.
harta sapencharian, 165, 232.
inheritance, 253-4.

jual janji, 312.
kathis, (appointment of, courts, jurisdiction), 165-6, 299.
legitimacy, 165.
maintenance, dependents, 165.
wife, 225.
marriage, 165, 178, 182-3.
mas-kahwin, 192.
nusus, 222.
offences,
administration, 367.
conversion, 351-2.
jurisdiction, 363-4.
liquor, consumption of, 329.
matrimonial, 317-8.
miscellaneous, 354, 356-61.
prayers, Friday, 331.
Ramadhan, 333, 350.
sexual intercourse, unlawful, 321-5.
zakāt and *fiṭrah*, non-payment, 336, 340-2.
presumption of death, 216, 218.
procedure, civil cases, 373-4.
criminal cases, 372.
property, 165, 249-50.
Ruler, powers, duties, 163-6, 291-2, 340, 342.
structure of religious authority, *Majlis*, 163-6, 291, 340-1, 351-2.
wakaf, nazr, 282-3, 285, 292.
wills, 165, 267.

MELAKA (MALACCA)

appeals, 171-2.
Bayt ul-Māl, 293-4.
betrothal, 171, 174.
custody and guardianship, 171.
divorce, 171, 203.
cherai ta'alīk, 209.
khul', 213.
registration of, 172.
evidence, 367.
fasah, 215.
fetua, 171.
gazetting, 171.
issuing authority, 170.
tenets controlling, 170.
gifts, 299.
inter-vivos, 171.
harta sapencharian, 171, 229, 232.
inheritance, 255.
kathis (appointment of, courts, jurisdiction), 150.
legitimacy, 171.
maintenance, dependents, 171, 239-40.
wife, 226.
marriage, 171, 184-5.
mas-kahwin, 192-3.
mut'ah, 224.
nusus, 222.
offences,
administration, 367.
conversion, 350.
jurisdiction, 363-4.
liquor, consumption of, 329.
matrimonial, 317-8.
miscellaneous, 355-61.
prayers, Friday, 332.
Ramadhan, 333, 349.
sexual intercourse, unlawful, 321-4.
zakāt and *fiṭrah*, non-payment, 348-9.
presumption of death, 216, 218.
procedure, civil cases, 373-4.
criminal cases, 372.
property, 171, 249.
structure of religious authority, *Majlis*, 169-71, 348-50.
wakaf, nazr, 282-3, 285, 293.
wills, 269, 288.
Yang di-Pertuan Agong, 169-71, 293, 348-9.

NEGRI SEMBILAN

appeals, 150-1.
betrothal, 150, 174-6.
custody and guardianship, 150.
divorce, 150, 203, 205-6.
cherai ta'alīk, 209.
khul', 213.
registration of, 150.
evidence, 367.
fasah, 215.
fetua, 149.
gazetting, 150.
issuing authority, 149.
tenets controlling, 149.
gifts, 299.
inter-vivos, 150.
harta sapencharian, 150, 229, 232.
inheritance, 256, 261-2.
kathis (appointment of, courts, jurisdication), 150.
legitimacy, 150.
maintenance, dependents, 150, 239-40.
wife, 226.
marriage, 150, 187-8.
mas-kahwin, 191-3.
mut'ah, 224.
nusus, 222.

offences,
administration, 367.
conversion, 350.
jurisdiction, 363-4.
liquor, consumption of, 329-30.
matrimonial, 317-8.
miscellaneous, 355-61.
prayers, Friday, 331-2.
Ramadhan, 334, 349.
sexual intercourse, unlawful 322-4.
zakāt and *fiṭrah*, non-payment, 336, 338-9.
presumption of death, 216, 218.
procedure, civil cases, 373-4.
criminal cases, 372.
property, 150, 249.
Ruler, powers duties, 148-9, 187, 338-9.
structure of religious authority, *Majlis*, 148-9, 338-9, 350.
wakaf, nazr. 282-3, 285.

PAHANG

appeals, 156.
Bayt ul-Māl, 292-3.
betrothal, 155, 175.
custody and guardianship, 155, 238-9.
divorce, 155, 203.
cherai ta'alik, 210.
khul', 212.
registration of, 156.
evidence, 367.
fasah, 215.
fetua, 154.
gazetting, 155.
tenets controlling, 155.
gifts, 299.
inter-vivos, 155.
ḥakam, 220.
harta sapencharian, 155, 231-2.
inheritance, 253-5.
kathis (appointment of, courts, jurisdiction), 155-6.
maintenance, dependents, 155.
wife, 226.
marriage, 155, 183-4.
mas-kahwin, 192-3.
mut'ah, 224.
nusus, 222.
offences,
administration, 367.
conversion, 350.
jurisdiction, 362, 365.
liquor, consumption of, 329-30.
matrimonial, 317-9.
miscellaneous, 355-61.
prayers, Friday, 331.
Ramadhan, 333-4, 349.
sexual intercourse, unlawful, 323.
zakāt and *fiṭrah*, non-payment, 339-40.
presumption of death, 216-218.
procedure, civil cases, 373-4.
criminal cases, 372.
property, 155, 246, 249.
Ruler, duties, powers, 154-5, 339.
structure of religious authority, *Majlis*, 154-6, 339-40, 350.
wakaf, nazr, 282-3, 286, 293.
wills, 155, 267.

PENANG

appeals, 171-2.
Bayt ul-Mal, 293-4.
betrothal, 171, 174.
custody and guardianship, 171.
divorce, 171, 203.
cherai ta'alik, 209.
khul', 212-3.
registration of, 172.
evidence, 367.
fetua, 171.
gazetting, 171.
issuing authority, 170.
tenets controlling, 170.
gifts, 299.
inter-vivos, 171.
ḥakam, 220.
harta sapencharian, 171, 229, 232.
inheritance, 255.
kathis, (appointment of, courts, jurisdiction), 171.
legitimacy, 171.
maintenance, dependents, 171, 239.
wife, 226.
marriage, 170, 185.
mas-kahwin, 192.
mut'ah, 224.
offences,
administration, 367.
conversion, 350.
jurisdiction, 363-4.
liquor, consumption of, 329.
matrimonial, 317-8.
miscellaneous, 355-61.
prayers, Friday, 321-2.
Ramadhan, 333, 349.
sexual intercourse, unlawful, 323-4.
zakāt and *fiṭrah*, non-payment, 348-9.

presumption of death, 216, 218.
procedure, civil cases, 373-4.
criminal cases, 372.
property, 171, 249.
structure of religious authority, *Majlis*, 169-71, 348-50.
wakaf, nazr. 282-3, 285, 288, 293.
Yang di-Pertuan Agong, 169-71, 293, 348-9.

PERAK

appeals, 148.
Bayt ul-Mal, 291.
divorce, 206.
cherai ta'alīk, 210.
khul', 213.
registration of, 147.
fasah, 216.
fetua, 148.
gifts, 299.
harta sapencharian, 229-30.
inheritance, 254-5.
jual janji, 312.
kathis (appointment of, courts, jurisdiction), 147-8, 299.
maintenance, wife, 228.
mas-kahwin, 325.
offences,
jurisdiction, 363, 365-6.
liquor, consumption of, 330.
matrimonial, 319-20.
miscellaneous, 361-2.
prayers, Friday, 332.
Ramadhan, 334-5.
sexual intercourse, unlawful, 325-7.
zakāt and *fiṭrah*, non-payment, 338.
Ruler, powers, duties, 291.
structure of religious authority, *Majlis*, 147, 291, 338.
wakaf, nazr, 287.

PERLIS

appeals, 163.
Bayt ul-Māl, 296-7.
betrothal, 162, 175.
custody and guardianship, 162.
divorce, 162, 206-7.
cherai ta'alīk, 210.
khul, 213.
registration of, 163.
evidence, 367.
fasah, 216.
fetua,
issuing authority, 161.
tenets controlling, 162.
gifts, *inter-vivos*, 162.
ḥakam, 220-1.
harta sapencharian, 162, 233.
kathis (appointment of, courts, jurisdiction), 162-3.
legitimacy, 162.
maintenance, dependents, 162.
wife, 207, 227.
marriage, 162, 185-6.
mas-kahwin, 192.
mut'ah, 224.
offences,
administration, 366-7.
jurisdiction, 362, 365.
liquor, consumption of, 329.
matrimonial, 318-9.
miscellaneous, 355-7, 359-61.
prayers, Friday, 332-3.
Ramadhan, 335, 349.
sexual intercourse, unlawful, 327-8.
zakāt and *fiṭrah*, 336, 347-8.
presumption of death, 217-8.
procedure, civil cases, 373-4.
property, 162, 206-7.
Ruler, power, duties, 161-3, 285-6, 296.
structure of religious authority, *Majlis*, 161-3, 296.
wakaf, nazr, 285-6, 296.
wills, 162, 267, 285.

SELANGOR

appeals, 153.
Bayt ul-Mal, 290.
betrothal, 153, 174.
custody and guardianship, 153, 238.
divorce, 153, 201.
cherai ta'alīk, 208-9.
evidence, 367.
fasah, 215.
fetua, 152.
gazetting, 153.
tenets controlling, 152.
gifts, 299.
inter-vivos, 153, 299.
harta sapencharian, 153 231.
inheritance, 253-4.
jual janji, 313.
kathis, (appointment of, courts, jurisdiction), 153, 299.
legitimacy, 153.
maintenance, dependents, 153.
wife, 225.
marriage, 153, 181-2, 187.
mas-kahwin, 192.
mut'ah, 224.

nusus, 222.
offences,
administration, 367.
adoption of Muslim children, 353-4.
conversion, 350-1.
jurisdiction, 362-3.
liquor, consumption of, 329-30.
matrimonial, 317-8.
miscellaneous, 354-5, 357, 359-61.
prayers, Friday, 331.
Ramadhan, 333, 349.
sexual intercourse, unlawful, 321-4.
zakāt and *fiṭrah*, non-payment, 336-7.
presumption of death, 216, 218.
procedure, civil cases, 373-4.
criminal cases, 372.
property, 153, 249.
Ruler, powers, duties, 151-3, 290.
structure of religious authority, *Majlis*, 151-3, 290, 336-7, 350-1.
wakaf, nazr, 282-3, 285, 290.
wills 162, 267.

SINGAPORE

appeals, 172-3.
betrothal, 172, 175.
custody and guardianship, 236-7.
divorce, 172, 207.
cherai ta'alīk, 210.
khul', 172, 213.
evidence, 368.
fasah, 172, 216.
gifts, 299.
ḥakam, 221-2.
harta sapencharian, 229.
inheritance, 255-6.
kathis, (appointment of, courts, jurisdiction), 172-3.
maintenance, dependents, 173.
wife, 228.
marriage, 172, 186.
mas-kahwin, 173, 193.
mut'ah, 224.
nusus, 223.
offences,
matrimonial, 320-1.
presumption of death, 216, 218.
probate and letters of administration, 250-1.
property, 250.
ṭalāk, 172.
waqf, nazr, 288-9.
wills and settlements, 267, 270, 300-11.

TRENGGANU

appeals, 168-9.
Bayt ul-Mal, 291-2.
betrothal, 168, 175.
custody and guardianship, 238.
divorce, 168, 202-3.
cherai ta'alīk, 208-9.
khul', 211-2.
registration of, 164.
evidence, 367.
fasah, 215.
fetua,
gazetting, 168.
issuing authority, 167.
tenets controlling, 167.
gifts, 299.
inter-vivos, 168, 299.
ḥakam, 219-20.
harta sapencharian, 168, 232.
inheritance, 253.
kathis, (appointment of, courts, jurisdiction), 168, 299.
legitimacy, 168.
maintenance dependents, 168.
wife, 225.
marriage, 168, 178, 182-3.
mas-kahwin, 192.
mut'ah, 224.
nusus, 222.
offences,
administration, 367.
adoption of Muslim children, 353.
conversion, 352-3.
jurisdiction, 364-5.
liquor, consumption of, 329.
matrimonial, 317-8.
miscellaneous, 354, 356-61.
prayers, Friday, 331.
Ramadhan, 333, 350.
sexual intercourse, unlawful, 324-5.
zakāt and *fiṭrah*, non-payment, 342-5.
presumption of death, 216, 218.
procedure, civil cases, 373-4.
criminal cases, 372.
property, 168, 250.
Ruler, powers, duties, 167-8, 286, 291-2, 342, 344-5.
structure of religious authority, *Majlis*, 166-8, 291, 342.
wakaf, nazr, 282-4, 286, 292.
wills, 168, 267.

GENERAL INDEX

'Abbādī, al-, Abū Bakr bin 'Alī al-Ḥaddādī (*d.* 800 A.H.), biographical data and works, 124.
'Abbās, 'Abd Allāh ibn, 51-2, 59.
'Abbāsids, 61-2, 76, 90.
'Abd ur-Raḥmān bin Shaykh Muḥammad (*d.* 1078 A.H.), biographical data and works, 125.
'Abduh, Shaykh Muḥammad (1849-1905), 94-7, 101, 107-8.
Abhārī, al-, Abū Bakr Muḥammad bin 'Abd Allāh (*d.* 395 A.H.), biographical data and works, 127.
'Ābidīn, al-, 'Alī Zayn, 53.
'Ābidīn, Muḥammad Amīn bin (*d.* 1252 A.H. — 1836 A.D.), 90, biographical data and works, 125.
abrogation, 36.
Abū Bakr, 11, 48-51, 53.
Abū Shujā', 84, see also Iṣfahānī.
Abū Yūsuf Ya'qūb, (*d.* 182 A.H.-798 A.D.), 38, 61, 67, 78, 131, 276, 278-9, biographical data and works, 120.
acknowledgement (*iqrār*), 371-2.
'ādat, 109-10, *kampong*, 246, on adoption, 240, on betrothal, 175-6, 187, on custody, 237, on divorce, 205-6, on inheritance, 253-63, on laws of property, 245-6, on maintenance of wife, 239-40, on marriage 177, 196-7, on *mas-kahwin*, 191, *perpateh*, 197, 245, 253, *temenggong*, 245, 253, 262.
'Ādat Istiadat Melayu see *'ādat*.
'Adawī, al-, 'Alī (*d.* 1189 A.H.), biographical data and works, 130.
administration: of family law, 147-173; offences, 366-7, see also State index.
adoption of Muslim children, 353-4, see also State index.
affinity, 375-8, see also prohibited marriages.
Afghānī, Jamāl ud-Dīn (1839 — 1897), 94-5, 98.
Africa, East, 77, Muslim States in, 101, North, 77, West, 77.
Aga Khān, 81-2.
Agong, Yang di-Pertuan, 169-71, 283-86, 293, 332, 348-9, 367, 372.
āḥād Ḥadīth, 16.
aḥkām, 38.
Ahl al-Bayt, 53.
Ahl al-Ḥadīth, 97.
Ahlu 'l-Sunnah Wa 'l-Jamā'ah, 161, 163.
Akhbārī, 81.
A'lām al-Muwaffaqīn, p. 30, 56.
Algeria, 54, 77, 101.
'Alī, 29, 48, 60, 82, 217.
Aligarh, movement, University, 97-8.
'Alīsh, 'Abd Allāh Muḥammad bin Aḥmad (*d.* 1299 A.H.), biographical data and works, 130.
'amal, 38, 58, 109.
Amidī, al-, 24.
'āmils, 336, 346-7.
'Āmir, Syed-, 'Alī, 98-9, 304.
analogy, 34, analogical deduction, 66, 75. See also *qiyās*.
Andalusī, al-, Abū Bakr al-Muithy (*d.* 367 A.H.), biographical data and works, 127.
Andalusī, al-, Ibrāhīm bin 'Ālī bin Farḥūn (*d.* 799 A.H.), biographical data and works, 129.
Andulusī, al-, Muḥammad bin Yaḥyā bin Lubābah (*d.* 336 A.H.), biographical data and works, 127.
Andalusia, 38.
annulment, see *fasah*.
Anṣārī, al-, Abū Yaḥyā Zakarīyā bin Muḥammad (*d.* 926 A.H. — 1520 A.D.), 90, biographical data and works, 138-9.
Anṣārī, al-, see Abū Yūsuf Ya'qūb.
appeals, 148, 150-1, 153, 156-7, 160,

163, 168-9, 171-3, see also State index.
'aql, 10, 48, 100.
'Arab, 46, 52, 99, 111, countries, 198-9, Muslims, 267-70.
'Arābī, al-, Abū Bakr Muḥammad ibn 'Abd Allāh ibn (*d.* 543 A.H.), biographical data and works, 128.
'Arabia, 77, 305, Central, 77, 93, Eastern, 93, Sa'ūdī, 77, 93.
arbitrators, see *ḥakam*.
Āṣ, al-, 'Abd Allāh ibn 'Amr ibn, 14, 46, 52.
Asadabadī, 'Abd al-Jabbār bin Aḥmad (*d.* 415 A.H.), biographical data and works, 133.
Ash'arī, Abū Mūsa, 28, 36, 51.
'Āṣim, Abū Bakr Muḥammad bin Muḥammad bin (*d.* 829 A.H.), 38, biographical data and works, 129.
Asnā'l-Maṭālib, 90.
Asnawi, al-, Jamāl ud-Dīn bin Ḥasan (*d.* 772 A.H.), biographical data and works, 137.
'Asqalānī, al-, Aḥmad bin 'Alī bin Ḥajar, (*d.* 852 A.H. — 1448 A.D.), 19, biographical data and works, 137.
Aufy, al-, Ismā'īl bin Makky (*d.* 581 A.H.), biographical data and works, 128.
Ausy, al-, Abū Isḥāq Muḥammad bin al-Qāsim bin Shībān (*d.* 355 A.H.), biographical data and works, 127.
authorities, religious, see derision, also State index, and Ruler, Khalīfa; and Muftī.
Averroes, see Rushd.
Awwal, al-, Burhān ud-Dīn Maḥmūd bin Ṣadr ash-Sharī'ah (*d.* about 680 A.H.), 1, 31, biographical data and works, 123.
Awzā'ī, the Syrian (*d.* 157 A.H.), 56, 63, 75, 78.
'Aynī, al-, Abū Muḥammad Maḥmūd bin Aḥmad (*d.* 855 A.H.), biographical data and works, 124.
Azhar, al-, 95-6, 100.
'azīmah, 6, 9, 35.
'Azīz, al-, 'Abd, 93.
Bābartī, al-, Akmal ud-Dīn Muḥammad bin Maḥmūd (*d.* 786 A.H. — 1384 A.D.), 90, biographical data and works, 123.
'backing', 59, 78-9.
Badr, battle of, 29.
Baghdād, 62.
Baghdādī, al-, Muẓaffar ud-Dīn Aḥmad bin 'Alī bin as-Sā'atī (*d.* 696 A.H.), biographical data and works, 123.
Baḥrānī, Abū Muslim, 36.
Bājī, al-, Abū 'l-Walīd Sulaymān bin Khalaf (*d.* 494 A.H.), biographical data and works, 128.
Bājirmī, al-, Sulaymān bin 'Umar (*d.* 1221 A.H. — 1806 A.D.), biographical data and works, 139.
Bājūrī, al-, Ibrāhīm bin Muḥammad (*d.* 1277 A.H. — 1861 A.D.), 91, biographical data and works, 140.
Bakr, Abū-, Aḥmad bin Muḥammad (*d.* 260 A.H. — 873 A.D.), biographical data and works, 141.
Bannānī, al-, Muḥammad bin al-Ḥasan (*d.* 1173 A.H.), biographical data and works, 130.
Bāqir, al-, Imām Muḥammad, 53.
Barādhi'ī, al-, Abū Sa'īd, biographical data and works, 128.
Barr, al-, Yūsuf bin 'Umar ibn 'Abd (*d.* 463 A.H.), biographical data and works, 127.
Barrī, al-, 'Abd Allāh (*d.* 399 A.H.), biographical data and works, 127.
Basīt, 84.
Baṣra, 49, centre of intellectual activity, 52, 55-6.
Baṣrī, al-, Abū'l Ḥusayn Muḥammad bin 'Alī (*d.* 436 A.H.), biographical data and works, 133.
Baṣrī, al-, Ḥasan, 52.
Bayḍāwī, Fakhr al-Islām 'Alī bin Muḥammad (*d.* 482 A.H.), biographical data and works, 121.
Bayḍāwī, al-, Nāṣir ud-Dīn Abū Sa'īd 'Abd Allāh bin 'Umar (*d.* 683 or 685 A.H.), 11, biographical data and works, 136.
Bayhaqī, al-, Abū Bakr Aḥmad bin al- Ḥusayn bin 'Alī (*d.* 458 A.H.), 19, biographical data and works, 133.
Bayt ul-Māl, 248, 284-5, 289-297.
behaviour, conditioning of, 47-8.
beneficiaries, 268-9, agreements between, 248-9, see also wills.

Berbers, 52.
bersunyi sunyian, 323-4. See also *kheluat*.
betrothal, 150, 153, 155, 160, 162, 165, 168, 171-6.
bid'a, 92, 100, 197-8.
bigamy, 321.
Bohōras (Western Ismā'īlīs), 82.
books, restrictions on, 357-9.
breach of contract, marriage, 174-75. See also betrothal.
Bukhārī, al-, Abū 'Abd Allāh Muḥammad bin Ismā'īl (*d.* 256 A.H. — 870 A.D.), 15, 18, 79, 80.
Bukhsh, Ṣalāḥ ud-Dīn Khudā, 99.
Bulūgh al-Māram, 89.
Buwayṭī, al-, Abū Ya'qūb Yūsuf bin Yaḥyā (*d.* 231 A.H. — 845 A.D.), 71, 131, biographical data and works, 132.
cancellation of registry entries or certificates. See rectification, cancellation of registry entries or certificates.
capacity, divorce, 199-200, property, 247-249, *waqf*, *nazr*, 276-8, wills, 263-5, 267, see also *mukallaf*.
charian laki-bini. See *harta*.
charity, 302-6, 309, 311. See also *zakāt*, non-payment of.
cherai ta'alīk, 208-10, 220, 233.
cherai tebus ṭalāk, see *Khul'*.
China Buta, see prohibited marriages.
civil cases, 373-4, see also State index.
classical theory, Muslim Law, jurisprudence, 70, 72, 76.
Code of Personal Status & Inheritance, see *Mudawwanah*.
Collections of traditions, see under *Jami'*, *Ṣaḥīḥ*, *Sunan*.
collectors, 247-8, 262-3, 296, 344, re Customary Land, 272-5, see also *'āmil*.
commandment of God, 1, 3, 7, 37.
Companions of the Prophet (*Aṣḥāb*), 48-50, 52, 57, 59, 62, 78, differences among, 52, on *ijmā'*, 52.
competency, see capacity.
condition, see *ta'alīk*, *cherai ta'alīk*.
conquered territories, influence on law, 56.
consanguinity, 325-8. See also prohibited marriages.
consensus, 75-6. See also *ijmā'*.
consent, mutual, 207, see also *walī* and marriage.
consolatory gift, see *mut'ah*.
conversion, 350-3, see also State index.
Copts, 52.
Cordova 38.
Coromandel Coast, 77.
criminal cases, procedure, 372-3, see also State index.
custody and guardianship, 150, 153, 155, 160, 162, 165, 171, 236-9, see *walī* and minor.
custom, social usage, 37, 67, of Madīnah, 68, pre-Islāmic, 9, 38, 48, see also *'ādat*, and *'amal*.
'Customary Land', 262, 271, 273-5, nature of, 274.
Customary Land Tenure, 270-6.
Customary Tenure Enactments, 270-3.
Da'ā'im al-Islām, 81.
da'īf, 17.
Dā'i'l-Muṭlaq, 82.
dā'īs, 82.
Dalīl aṭ-, Ṭālib, 91.
Damascus, 49, 61.
Damīrī, al-, Tāj ud-Dīn Bahrām bin 'Abd Allāh (*d.* 805 A.H.), biographical data and works, 129.
dapatan tinggal, *harta dapatan*, see *harta*.
Daqiqil, 'Id, al-, Abū 'l-Fatah Taqī ud-Dīn Muḥammad ibn 'Alī ibn, (*d.* 702 A.H.), biographical data and works, 137.
Dāraquṭnī, ud-, 'Alī bin 'Umar (*d.* 385 A.H.), 19.
Dardīr al-, Aḥmad bin Muḥammad (*d.* 1201 A.H.), biographical data and works, 130.
Dārimī, 'Abd Allāh bin Abū ar-Raḥmān (*d.* 255 A.H.), 19.
Dāsūqī al-, Muḥammad bin 'Arafah (*d.* 1230 A.H.), biographical data and works, 130.
Da'ūd, Abū (*d.* 275 A.H. — 888 A.D.), 18, 80.
Da'ūdī, 81.
Dāwūdī, 82.
Day of Judgment, 48.
death-illness, 42.
deceased persons property, see wills, *Kathis* Courts, jurisdiction of.
democratic process, 73, 79.
Department of Religious Affairs.

See structure of religious authority.
derision, religious authorities, Qur-'ān, 360.
Dimishqī, al-, 'Abd al-Qādir bin 'Umar (*d.* 1035 A.H. — 1625-6 A.D.), biographical data and works, 142.
Dimyāṭī, ad-, Syed Bekri Abū Bakr bin Muḥammad, biographical data and works, 140.
Distribution Enactment, 274.
distribution of estates, see estates, wills, beneficiaries, *'ādat*, inheritance.
distribution of property and divorce under 'Ādat Perpateh, 233-234.
district, see *mukim*.
diversification of schools, 63.
divestiture, see *khul'*.
divorce, 150, 153, 155, 157-8, 160, 162, 165, 168, 171-2, 197-207, certificate of, 199, 201-6, registration of, 147, 150, 156-8, 161, 163-4, 166, 172, 202-3, 206-7. See also *mas-kahwin*, *ṭalāq* (*ṭalāk*), *cherai ta'alīk*, *fasah* and *khul'*.
documents, 357-9.
Durar al- Ḥukkām, 90.
Durr al-Mukhtār, 2, 90.
Egypt, 19, 52, 77, 80, 93, 100-1, 106, 217, Turko-Egyptian rule, 94.
endowment, pious, see *wakaf*, and *waqf*.
English laws and principles, 243-4, charity, 303-4, clogs, 311-2, 314, gifts, 299, 300-2, property, 251, mortgages, 312, wills and trusts, 267, 300.
enticing, 321.
equality for marriage, see *kufū*, *kafā'a*, prohibited marriages.
equity, 66, 112.
estates, see distribution of estates.
evidence and procedure, 367-74, see also State index.
executors, of *Bayt ul-Māl*, 292, 295-6, of gifts, 303, of wills and settlements, 266.
family law, administration of, 147-173.
Farā'iḍī, 97.
farḍ, 3, 7, 9, 86-7, *al-'ayn*, 7, *kifāyah*, 7.
Farukī, 1.
fasād, *fāsid*, 5.
fasah, *faskh*, 172, 210, 213-6, 221, 225, defect in husband, 214, insolvency, 214-5, option, *khiyar*, 213-4.
Fatāwā Qāḍī Khān, 83.
Fāṭimids, 80-1.
fatwā (pl. *fatāwā*), 43, 52, 89, 90, 103, 106. See also *fetua*.
feasts, see *kandoorie*.
fetua (*fatwā*), 148-155, 157, 159-168, 170-1, restrictions on issuing, gazetting, 150, 153, 162, tenets controlling, 149, unauthorized issuing of, 356-7. See also *fatwā*.
fetua, authorised issuing of, 356-7, see State index.
fiqh, 1-3, 42, 117.
Fiqh ar-Riḍā, 85.
Firqāḥ, al-, Muḥammad Ibrāhīm al-Fazari (*d.* 690 A.H.), biographical data and works, 136.
fisq, 7.
fiṭrah, see *zakāt* and *fiṭrah*, and State index.
fornication, see *zinā'*.
fosterage, 325-8, see prohibited marriages.
freedom, 47, 62-3, 77, to change school of law, 77.
Friday prayers, 330-3, see State index.
funeral expenses, 257-8.
furū', 22.
Gazette, see *fetua*.
General Endowment Fund, 285, 292-4, 296, see *Bayt ul-Māl*.
geographic centres, 76.
ghā'ib, 82.
Ghaznawī, al-, Jamāl ud-Dīn Aḥmad bin Muḥammad (*d.* 600 A.H.), biographical data and works, 122.
Ghazzī, al-, Muḥammad bin al-Qāsim (*d.* 918 A.H. — 1512 A.D.), 91, biographical data and works, 137.
Ghazzālī, al-, Abū Ḥāmid Muḥammad bin Muḥammad, (*d.* 505 A.H. — 1111 A.D.), 25, 33, 35, 84, biographical data and works, 134-135.
gifts, 297-300, *inter-vivos*, 150, 153, 155, 162, 165, 168, 171, 299, proper subjects of, 297-8, terminology constituting, 297-8, see also revocation, and *mut'ah*.
Greek philosophy, 62.

guardianship, 325, 352, see custody, *walī*.
ḥadd, 315-6, 368.
ḥadīth, 4, 13-7, 19-21, 28-30, 45, 47, 49, 80, 87, 100, acceptance of, 50-1, *āḥād*, 16, 37, corpus, 78, *da'īf*, 17, differences among Companions, 52, diversity of, 79, *ḥasan*, 17-8, *mashhūr*, 16-7, 36-7, movement, 77-8, *mursal*, 16, 28, *musnad*, 19, *mutawātir*, 7, 16-7, 36, paucity of, 62, prophetic, 78, *ṣaḥīḥ*, 5, 17-8, transmitters, 62; see also *Sunnah* and Muḥammad.
ḥāfiẓ, 49, 131.
Haithamī, al-, Aḥmad bin Muḥammad bin 'Alī ibn Ḥajar (*d.* 974 A.H. — 1567 A.D.), 91, 279, biographical data and works, 138.
Ḥaiyyān, at-Tamīmī-, Nu'mān bin Muḥammad bin Manṣūr bin Aḥmad, (*d.* 363 A.H. — 973 A.D.), 81, biographical data and works, 144.
Ḥājib, al-, 'Umr 'Uthmān bin 'Umar bin (*d.* 646 A.H.), biographical data and works, 129.
Ḥajjāj, see Muslim.
ḥakam, 203, 206, 212, 218-22, *ḥakamān* arbitrators, 219, *ḥākim* judge, 219, *ḥākimān* judges, 219.
Ḥakam, al-, Muḥammad bin 'Abd Allāh ibn 'Abd (*d.* 268 A.H.), biographical data and works, 127.
Ḥākim, Khalīfa, 81.
Ḥākim, al-, Muḥammad bin Muḥammad al-Marwazī (*d.* 334 A.H.), biographical data and works, 120-1.
Ḥalabī, al-, Ibrāhīm bin Muḥammad (*d.* 956 A.H.), biographical data and works, 125.
Ḥalabī, al-, Muḥammad bin Maḥmūd bin 'Āmir al-Ḥaj (*d.* 879 A.H.), biographical data and works, 124.
ḥalāl, 86, 87.
Ḥalwānī, al-, Shams al-A'immah 'Abd al-'Azīz bin Aḥmad (*d.* 448 A.H.), biographical data and works, 121.
Ḥammād ibn Abī Sulaymān (*d.* 120 A.H. — 737 A.D.), 59, 64, 119.
Ḥanafī, al-, Badr ud-Dīn Abū Muḥammad Maḥmūd bin Aḥmad al-'Aynī (*d.* 855 A.H.), 19.
Ḥanafī School, on divorce 104-5, on equality (*kafā'a*) in marriage 195-6, *Fatāwā al-'Alamgīriyyah*, 103, on guardianship for marriage, 180-1, on *ḥakam*, arbitration, 218, on *ḥiyal*, legal devices, 38-9, 311, on *ijmā'*, 23-4, 65-6, on *istiṣḥāb*, *istiḥsān*, 69-70, jurists of and works, 83, 90, on legitimacy, 106, on *qiyās* (analogy), 31-2, 65-8, 33-4, on *Sunnah*, 8, 80, on *ṭalāq*, 197-8, in Tunisia, harmonising with *Mālikī*, 110-3, in various countries, 72, on *waqf*, 278-9, see also Kūfa.
Ḥanbal, Imām Aḥmad bin Muḥammad bin (*d.* 241 A.H. — 855 A.D.), 19, 74, 131, biographical data and works, 140-41.
Ḥanbalī School of law, 31, 75, 92-3, 113, jurists of, 84, 91, on abrogation, 36, on analogical deduction, 34, on individual opinion, 31, on second wife, 105.
Ḥanīfah, Abū, an-Nu'mān ibn Thābit (*d.* 150 A.H. — 767 A.D.), 21, 24, 30, 65-66, 69, 71, biographical data and works, 119, code, 67, disciples of, 67, Ibn Khaldūn's contention regarding 65, methodology of, 67, on *ḥadīth*, 80, on *ijmā'*, 65, on systematic reasoning, 64.
ḥarām, 3, 9, 86-7.
Ḥaramayn, al- Imām, see Juwaynī.
Harawī, al-, Mu'īn ud-Dīn Muḥammad bin Ibrāhīm Mullā Miskīn, biographical data and works, 124.
harta
bujang, 260-2, *dapatan*, 233, 259, 260-62, *chari bahagi*, 254, *janda*, 260-2, — *laki-bini*, 229, 233, 260-2, 275, — *pembawa*, 260-2, 276, *pembawa kembali*, 233, 259, — *sapencharian*, 150, 153, 155, 162, 165, 168, 171, 228-253, 253-5, *sharikat*, 254.
hartaran, 174, 192-3.
Hārūn ar-Rashīd, 31, 61, 131.
ḥasan, 17-8, 197.
Ḥasan, Shaykh Abū, biographical data and works, 145.
Ḥaṣkafī, al-, 'Alā' ud-Dīn Muḥammad bin 'Alī (*d.* 1088 A.H. —

1677 A.D.), 2, 90, biographical data and works, 125.
Ḥazm, ibn-, Abū Muḥammad 'Alī bin Aḥmad bin Sa'īd (*d.* 456 A.H. — 1065 A.D.), 21, 28, 75, 84-5, 87-9, biographical data and works, 143.
Hidāyah, 83, 103, 200.
Ḥijāz, 19, 55-6, 61, 93.
Hijrah, 14, 19-20, 38, 45.
ḥikmat, 32.
Ḥillī, al-, Abū 'l-Makārim Muḥammad ibn Idrīs, biographical data and works, 145.
Ḥillī, al-, Shaykh 'Allāmah Jamāl ud-Dīn Ḥasan ibn Yūsuf ibn al-Murtaḍā, biographical data and works, 145.
Himi, al-, Sharaf ud-Dīn al-Ḥusayn ibn Aḥmad (*d.* 1221 A.H. — 1806 A.D.), biographical data and works, 145.
ḥiyal, 38-9, 105, 311, see devices.
Hudhayl, al-, Zufar ibn (*d.* 158 A.H.), biographical data, 120.
ḥukm (pl. *aḥkām*), 1, 3, 7, 37, *Sharī'ah*, 2, *taklīfī*, 4, *waḍa'ī*, 4.
Hukom Shara', 151, 164.
Humān, al-, Kamāl ud-Dīn Muḥammad bin 'Abd al-Wāhīd (*d.* 861 A.H. — 1457 A.D.), 90, biographical data and works, 124.
human acts, nature, classification of, 7, conditioning of behaviour, 47-8, principles of action, 39-40.
ḥuqūq, Allāh, *'ibād*, 40-1.
Hurmuz, 'Abd ar-Raḥmān ibn, freedman of Abū Hurayrah, 53.
'ibādāt, 2, 5, 42.
Ibāḍiyyah School, 54.
ibāḥah, 4, 9.
Ibn 'Abbās, 210.
Ibn 'Āṣim, see 'Āṣim.
Ibn Bābūyah, see Bābūyah.
Ibn Ḥazm, see Ḥazm.
Ibn Muqaffa' (*d.* 140 A.H.), 19.
Ibn Qayyim al-Jawziyyah, see Qayyim.
Ibn Taymiyyah, see Taymiyyah.
Ibn 'Umar, see 'Umar.
'idda, 173, 188-191, 197, 200, 202, 205, 217, 224-5, 320.
ideal, see *'azīmah*.
ijmā', 2, 15, 20-5, 32, 37, 52, 58, 66, 72, 74, 78-9, 92, 114, as an ongoing democratic process, 73, of the Companions, 52, validity of, 22, see consensus.
ijtihād, 19-21, 25, 28, 51, 73, 78-9, 89, 101, 114-5, denial of, 88.
'Ikrimah, freedman of 'Abd Allāh ibn 'Abbās, 53.
'illah, 4, 26, 31.
Imām, Imāms, 43, 53, 65, 79-82, 97, 302, 332, 342, 366, rights, duties, 181, *tua*, 372.
Imāmah, 85.
Imāmat, 53.
Imāmiyyah School, 53.
īmān, 7, 10.
impotency, 214.
impurity, see purity.
'Ināyah, 90.
incest, 321-3, 326-8.
India, 77, 81, 100, 112-3, 188, 321, Islam in, 98, Muslims, 100, mutiny, 94, reform movement, 96, subcontinent, 101, 112, 114.
Indonesia, 77, 100-1, 199, 208, 303.
inheritance, 246, 251-63, 300, inheritors, determination of, 249-50, right of succession, 251-3, 258, see also wills.
innovation, see *bid'a*.
insanity, 41, 214.
insobriety, 200.
insolvency, 214-5.
intellect, see *'aql*.
interest, *riba'*, 251.
intermarriage, see prohibited marriage.
interpretations, 148-9, 152, 154, 157, 159, 164, 171, see also *fetua*, *tafsīr*.
inter-vivos, see gifts *inter-vivos*.
intestate, 251, 255-6.
Intiṣār, 85.
Iqbāl, Sir Muḥammad, 63, 100, 114-5.
Iqnā', 91.
iqrār, acknowledgement, 371-2.
Irān, 81.
'Irāq, 19-20, 52, 55-6, 59, 61, 64, 81, 93, 101, 'Irāqī, 60, 68, 78-9.
Isfahānī, al-, Abū Shujā' Aḥmad bin al-Ḥasan (*d.* before 500 A.H. — 1106 A.D.), 84, biographical data and works, 135.
Islām, 1, 48, 91, 95-6, 98-9, 101-2, 115, 216, 263, intention, 47-8, Islāmize, 57, 60-1, 63-4, 71, 115, non-Islāmic elements, 115, Pan-Islāmic movement, 94, social policy, 92, spirit, 115, see Af-

ghānī, 'Abduh, and Muslim law.
Ismā'īlīs, 80, Eastern (Khōjas), 81-2, Western (Bohōras), 82.
isnād, 13, 16, 78, see *sanad*.
Istibṣār fī ma Ikhtilāf min al-Akhbār, 18, 85.
istiḥsān, 34, 57, 66-7.
istiṣḥāb, 35, *al-ḥāl*, 69, *al-māḍī*, 69.
istiṣlāḥ, 34, 68, see *maṣlaḥah*, *siyāsah*.
Ithnā 'Asharī, 80-2.
Itqān, al-, 36.
Itqānī, al-, 'Āmir Khaṭīb bin 'Āmir 'Umar (*d.* 758 A.H.), biographical data and works, 123.
Ja'far, 'Abd al-'Azīz bin (*d.* 363 A.H. — 974 A.D.), 84, biographical data and works, 141.
Ja'īṭ, Muḥammad bin, 110.
Jāmi', al-Jawāmi', 26, 85, *al-Kabīr*, 68, *Masānīd al-Imām*, 65, *aṣ-Ṣaghīr*, 67, *aṣ-Ṣaḥīḥ al-Bukhārī*, 11, 19, 80, *aṣ-Ṣaḥīḥ al-Muslim*, 11, 19, 29, 80, *ash-Shatāt*, 145, *at-Tirmidhī*, 11.
janda, 189-191, 217.
Jārūt, al-, Abū Muḥammad 'Abd Allāh bin 'Alī ibn (*d.* 307 A.H.), 19.
Jīlī, al-, 'Abd al-Qādir (*d.* 561 A.H. — 1166 A.D.), biographical data and works, 141.
Johore, see State index.
Jordan, 105, 107.
Jordanian Law of Personal Status, (1951), 107.
jual janji, 311-4.
judges, see *Kathis*, and *Qāḍī*.
jurisconsult, see *Muftī*.
jurisdiction, 362-6, see also State index and *fiqh*.
Juwaynī, al-, Abū 'l-Mā'ālī 'Abd al-Mālik bin Muḥammad 'Abd Allāh (Imām al-Ḥaramayn) (*d.* 478 A.H. — 1085 A.D.), 83, biographical data and works, 134.
Ka'ba, *Ka'aba*, 26-7, 31.
kadimship (relationship), *kadims* or *wariths*, 259-60, *sanak ibu*, 259, *sanak dato'*, 259, *sanak moyang*, 259.
kafā'a, 195, *kifāyah*, 42-3, 113, see *kufū*, and prohibited marriages.
Kāfi, Al-, 18, 68, 81.
Kākī, al-, Qiyām ud-Dīn Muḥammad bin Muḥammad al-Bukhārī (*d.* 749 A.H.), biographical data and works, 123.
kandoories, 307-8, 310.
Kanz al- Daqā'iq, 90.
kapan, see funeral expenses.
Karābīsī, al-, Abū 'Alī Ḥusayn bin 'Alī (*d.* 245 A.H. — 859 A.D.), 71, 131, biographical data and works, 132-33.
Karbalā', 93.
kariah, 181-2, 184, 331-2, *kariah masjid*, 182, 184.
Karkhī, al-, Abū 'l-Ḥasan 'Ubayd Allāh bin al-Ḥasan (*d.* 340 A.H.), biographical data and works, 121.
Kārlānī, al-, Jalāl ud-Dīn bin Shams ud-Dīn al-Khawārizmī, (*d. circa* 747 A.H. — 1346 A.D.), 90, biographical data and works, 123-4.
Kasanī, al-, Muḥammad ibn Ḥārith (*d.* 361 A.H.), biographical data and works, 127.
Kāshānī, al-, 'Alā' ud-Dīn Abū Bakr bin Mas'ūd (*d.* 587 A.H. — 1191 A.D.), biographical data and works, 122.
Kashf al-Fawā'id, 91.
Kathis (appointment of, courts, jurisdiction), 42-3, 113, 147-8, 150, 153, 155-8, 160, 162-3, 165-6, 168, 171-3, 299, 317, 320, 348, 336, courts, 253-4, 299, *Kadzi* in Trengganu, 354, see also *Qāḍī*.
Kazwīnī, al-, 'Abd Allāh bin Ṣa'd Allāh bin Muḥammad bin 'Uthmān (*d.* 780 A.H. — 1378 A.D.), biographical data and works, 137.
Kedah, see State index.
Kelantan, see State index.
ketua kampong, 283, 344.
Khalaf, Dawūd ibn (*d.* 270 A.H.), 75.
Khaldūn, Ibn (*d.* 808 A.H. — 1405 A.D.), 65
Khalīfah, 11, 19, 21, 29, 31, 48, 51, 61-2, 81, 88, 101, 103, see also ruler.
Khalīl, bin Isḥāq-, Ḍiyā ud-Dīn Abū aṣ-Ṣafā (*d.* 767 A.H. — 1365 A.D.), 91, biographical data and works, 129.
Khallāl, al-, Abū Bakr (*d.* 311 A.H. — 923-4 A.D.), biographical data and works, 141.
khalwat, 327, see *kheluat*.

Khān, Sir Sayyid Aḥmad (1817-98), 97-8.
Kharaqī, al-, Abū 'l-Qāsim 'Umar (*d.* 334 A.H. — 945-6 A.D.), biographical data and works, 141.
Khārijīs, 54, 93.
Khaṣṣāf, al-, Abū Bakr Aḥmad bin 'Umar (*d.* 261 A.H.), biographical data and works, 120.
Khaṭṭāb, al-, 'Umar ibn, 51-2.
Khawāharzāde, Shaykh al-Islām Abū Bakr (*d.* 482 A.H.), biographical data and works, 121.
kheluat, 323-6, *khalwat*, 327.
Khirshī, al-, 'Abd Allāh Muḥammad (*d.* 1101 A.H.), biographical data and works, 130.
khiyar, 213-4.
Khōjas, (Eastern Ismā'īlīs), 81-2.
kholo', see *khul'*.
khul', *khula*, *kholo*, or *cherai tebus ṭalāk*, 172, 210-13, 218-9, 221.
khula, see *khul'*.
Khulāṣah, 84.
Khusraw, Mullā-, Muḥammad bin Farāmurz bin 'Alī (*d.* 885 A.H. — 1480 A.D.), 90, biographical data and works, 124.
Khuzaymah, Abū Bakr Muḥammad bin Isḥāq ibn (*d.* 311 A.H.), 19, 33.
Kitāb, Qurān, 13, *Kitāb al-Ḥujjah*, 70, *Kitāb al-Umm*, 30, 70.
Koran, misuse, 360; Koran School, attendance, 362; see also Qur'ān.
kuasa, 148, 299, see *taulīah*.
Kūfa, 49, 52, 55-6, 58-60, 62, 68, 76.
kufr, 17.
kufū, 179-180, 214, see *kafā'a*, prohibited marriages.
Kūhistānī, al-, Shams ud-Dīn Muḥammad (*d.* 950 A.H.), biographical data and works, 125.
Kulainī, al-, Muḥammad ibn Ya'qūb (*d.* 328 A.H.), 18.
Kulīnī, ar-Rāzī-, Muḥammad bin Ya'qūb ibn Isḥāq (*d.* 328 A.H. — 939 A.D.), 81, biographical data and works, 143-44.
Lakhmī al-, Abū 'l-Ḥasan bin 'Abd Allāh (*d.* 478 A.H.), biographical data and works, 128.
land, see customary land.
Land Code of 1858, 103.
law, rule of, command, see *ḥukm*.
lawful, see *ḥalāl* and *mubāḥ*, unlawful, see *ḥarām*.
lawyers, 62, 68, 74, 79.
Layla, ibn Abī (*d.* 148 A.H.), 64, 71, 75.
Lebanon, 107.
legal capacity, 41-2, see also capacity.
legal devices, 38-9, 311, see also *ḥiyal*.
legitimacy, 106, 113, 150, 153, 160, 162, 165, 168, 171.
leprosy, 214.
Libya, 101.
liquor, consumption of, 329-30, see State index.
literary period (150 A.H.), 63.
local practices, regional differences, 55-6, 58, 62-3, 67.
Lubidī, al-, Abū 'l-Qāsim Muḥammad (*d.* 440 A.H.), biographical data and works, 128.
lunacy, see insani y.
Mabsūṭ, 68.
Madīnah, 11, 20-1, 29, 49, 51, 55-6, 59-60, 63, 68, 76, 78, 131, 304, 306.
Maḥallī, al-, Jalāl ud-Dīn Muḥammad bin Aḥmad (*d.* 864 A.H. — 1459 A.D.), 11, biographical data and works, 137.
Maḥbūbī, al-, 'Ubayd Allāh bin Mas'ūd Ṣadr ash-Sharī'ah ath-Thānī (*d.* 747 A.H.), biographical data and works, 124.
Mahdiyyah, 94.
Maḥmaṣānī, Ṣubḥī, 34.
mahr, see *mas-kahwin*.
maintenance, dependants, 150, 153, 155, 160, 162, 165, 168, 171, 173, 237-40, wife, 207, 224-8.
Mājah, Abū 'Abd Allāh Muḥammad ibn (*d.* 273 A.H. — 886 A.D.), 18, 80.
Majallah, 35, 103-4.
Majallat-i Ahkami Adliye, see *Majallah*.
Majma' al-Bayān, 85.
Majlis, see structure of religious authority, also State index.
Majmū', 84.
Majmū al-Fiqh, 53.
majority, see minor.
Makka, 52, 55-6, 59, 93, 100, 131, 304, 306, 309, Sharīfs of, 93.
Makkī, al-, 66.
makrūh, 3, 8-9, 87, *karāhat at-tanzīh*, 8, *at-taḥrīm*, 9.

Malabar, 77.
Malacca, see State index.
Malay customary law, 147-8, 151-2, 154-5, 161-8, see *'ādat*.
Malaya, 100-1.
Malays, 77.
Malaysia, 77, 101, 113-4.
Malībārī, al-, Zayn ud-Dīn *(d.* 982 A.H. — 1574 A.D.), 91, 279, biographical data and works, 139.
Mālik, Abū 'Abd Allāh-, ibn Anas *(d.* 179 A.H. — 795 A.D.), 14, 18, 46, 68-9, 71, 116 biographical data and works, 125-6, *ḥadīth*, 78, *istiṣlāh*, 68, *Sunnah*, 68, 78, reasoning of, 63, see *Muwaṭṭa', al-*.
Mālikī School of law, 76, 111, 113, abrogation, 36, deduction, 33, divorce, 104, 112, Grand Muftī of Tunisia, 110, *ḥakam*, 218, *ijmā'*, 21, 23-4, individual opinion, 30-1, *istiḥsān*, 34, *istiṣlāh*, 34, jurists of, 84, 91, pre-Islāmic custom, 38, presumption of death, 217.
Mālikī, al-, 'Abd al-Wahhāb ibn Nashr al-Baghdādī *(d.* 422 A.H.), biographical data and works, 128.
Man la Yaḥḍuruhu' 'l-Faqīh, 18, 84.
Manār, al-, 89, 96, 100.
mandūb, 3, 8, 9, 87.
Manhaj aṭ- Ṭullāb, 90.
Manṣūr, al-, Ja'far, 103.
Maqdisī al-, Abū Muḥammad 'Abd al-Ghanī *(d.* 600 A.H.), biographical data and works, 135.
Maqdisī, al-, Shams ud-Dīn ibn Qudāmah *(d.* 682 A.H. — 1183-4 A.D.), biographical data and works, 141.
Marghīnānī, al-, Burhān ud-Dīn 'Alī bin Abū Bakr *(d.* 593 A.H. — 1197 A.D.), 83, biographical data and works, 122.
Mar'ī bin Yūsof *(d.* 1030 A.H. — 1621 A.D.), 91, biographical data and works, 142.
marriage, solemnization of, 150, 153, 155, 157-8, 160, 162, 165, 168, 170-2, 176-189, 302, of widows, 188-91, see also betrothal.
married women's property, 240-4.
Marwazī, al-Muḥammad bin Muḥammad-, al-Ḥākim *(d.* 334 A.H.), biographical data and works, 120-1.
mashhūr, 16-7, 36, 109, predominant opinion, 38.
mas-kahwin, 173-4, 177, 191-4, 197, 325, on divorce, 200-1.
maṣlaḥah, common interest, 32-3, 35, 114, see *istiṣlāḥ, siyāsah*.
mastūr, 17, 82.
Mas'ūd, 'Abd Allāh ibn, 51-2, 59.
Mawṣilī, al-, Abū' l-Faḍl Majd ud-Dīn 'Abd Allāh bin Maḥmūd bin Maudūd *(d.* 683 A.H.), biographical data and works, 123.
Mauwāq, al-, Abū 'Abd Allāh Muḥammad bin Yūsuf *(d.* 897 A.H.), biographical data and works, 129.
Māwardī, al-, Abū 'l-Ḥasan 'Alī bin Muḥammad *(d.* 450 A.H. — 1058 A.D.), biographical data and works, 133.
Mawāz, al-, Muḥammad bin Ibrāhīm bin *(d.* 281 A.H.), biographical data and works, 127.
Māzah, bin-, Burhān ud-Dīn Maḥmūd bin Aḥmad aṣ-Ṣadr ash-Shahīd al-Bukhārī *(d.* 570 A.H.), biographical data and works, 122.
Mazirī, al-, Abū 'Abd Allāh Muḥammad bin 'Alī *(d.* 536 A.H.), biographical data and works, 128.
Mecca, see Makka.
Melaka, Malacca, see State index.
menstruation, 222, see puberty.
Middle East, 102, 106, 109, 111-2, 114.
Minangkabau, 94.
Minhāj aṭ-Ṭālibīn, 43, 84, 178, 263, 370, see Nawawī.
minor, 235, 247, 249, see marriage, *walī*, conversion, adoption Muslim children.
misalliance, 179-80.
Miṣrī, al-, 'Abd Allāh 'Abd al-Ḥakam *(d.* 214 A.H.), biographical data and works 126.
Miṣrī, al-, Zayn al-'Ābidīn bin Ibrāhīm Nujaym *(d.* 970 A.H.), biographical data and works, 125.
modernism, 95, 98-100, 102, 111.
Mohammedan Law, 300-1, 304-5.
Mongols, 92.
monogamy, 187, see also *'ādat*.
mortgage by conditional sale, 311-14.
Morocco, 77, 101, 108-10.

Moroccan Code of Personal Status, (1958), 108.
mosque, erecting, 359.
Mū'ādh ibn Jabal, 28.
Mu'afirī, Abū Ḥaṣan 'Alī bin Muḥammad bin Khalaf *(d.* 403 A.H.), biographical data and works, 127.
mu'āmalāt 2, 5, 42, 116.
mu'aththir, 32-3.
mu'aththir fīh, 4.
Mu'āwīyah, Khalīfa, 53.
mubāḥ, 3, 8-9, 87, 282.
Mudawwanah, or Islāmic Code of Personal Status and Inheritance, 110.
Mufīd, al-Shaykh ibn Muḥammad bin Muḥammad an-Nu'mān ibn 'Abd Allāh *(d.* 413 A.H. — 1022 A.D.), 84-5, biographical data and works, 144.
Muftī, 43, 89-90, 112, 131.
Mughal Sulṭānate, 94, 103.
Muhadhdhab, 84.
Muḥallā, 84-5, 89.
Muḥammad, 10, 29, 33, 45, 47, 85, 99, 210. See also *Ḥadīth* and *Sunnah*.
Muḥammad 'Alī 93.
Muḥammadiyyah, movement, 100.
Muḥarrar, 84.
mujtahid, 22-3, 33, 100.
mukallaf, 4, 42, 331.
Mukhtalaf ash-Shī'a, 91.
Mukhtaṣar, of Qudūrī 83, of Khalīl, 91.
mukim, 183, 270-1, 273, 331, 334.
Munabbih, Ḥammām ibn, 14, 46.
Mundhir, al-, al-Hubbāb ibn, 29.
Muntaqā, 19.
muntaẓar, 82.
Muqaffa', al-, Ibn, *(d.* 140 A.H.), 19, 103.
Muqhni'a fī'l Fiqh, 85.
Muqhnī al-Muḥtāj, 91.
Muqri', al-, Sharaf ud-Dīn Ismā'īl bin Abū Bakr *(d.* 837 A.H. — 1433 A.D.), biographical data and works, 137.
Murādī, al-, ar-Rabī' bin Sulaymān bin 'Abd al- Jabbār *(d.* 270 A.H. — 883 A.D.), 71, 131, biographical data and works, 133.
mursal, 16.
Murtaḍā, Muḥammad ibn, biographical data and works, 145.
Murtaḍā, al- Sharīf, Abū 'l-Qāsim 'Alī Abī Aḥmad al-Ḥusayn *(d.* 436 A.H. — 1070 A.D.), biographical data and works, 144.
Murtaḍā Shaykh Syed, biographical data and works, 145.
Musaylimah, the impostor, 49.
Musayyib, Sa'īd ibn *(d.* 93 or 94 A.H.), 59.
Muslim ibn al-, Ḥajjāj Naīsābūrī *(d.* 261 A.H. — 875 A.D.), 15, 18, 29, 80.
Muslim and Hindu Endowments Board, 288.
Muslim law, 112, *Bayt ul-Māl*, 291, 295, Customary Land, 272-6, division of laws as to enforceability, 315, gifts and settlements, 302, inheritance, 253, 255, marriage, 323, 325-6, property, 247-9, property of married women, 240-244, *waqf*, *nazr*, 283, wills and trusts 267-70, 300.
Muslims, non-Malay, 151, 165.
Musnad, 19.
mustaḥabb, 8.
Musta'lī, 81.
Mustanṣir, 81.
Mustaṣfah fī Uṣūl al-Fiqh, 25.
mut'ah (*matta'ah*) consolatory gift, 109, 201, 223-4.
Muṭahhar, Ibn al-, 91.
mutawātir ḥadīth, 7, 16-7, 36.
mutual consent, 207.
Muwaṭṭa', al-, 18, 31, 69, 103, 126, 131.
Muzāhim, ibn-, Sahl, 66.
Muzanī, al-, Abū Ibrāhīm Ismā'īl bin Yaḥyā *(d.* 264 A.H. — 877 A.D.), 71, 131, 200, biographical data and works, 132.
Nāfi', freedman of 'Abd Allāh bin 'Umar, 53.
nafl, 8.
Nahj al-Mustarshidīn, 91.
Najafī, an-, Shaykh Muḥammad Ḥasan, biographical data and works, 145.
Najd, 93.
Nakha'ī, Ibrāhīm (*d.* 95 or 96 A.H. — 713 or 714 A.D.), 58-9, 64, 119.
Nasafī, an-, Ḥāfiẓ ud-Dīn Abū 'l-Barakāt 'Abd Allāh bin Aḥmad (*d.* 710 A.H. — 1310 A.D.), 90, biographical data and works, 123.
Nasā'ī, an-, 'Abd ar-Raḥmān *(d.* 303

A.H. — 915 A.D.), 18, 80.
naskh, 36.
nāsikh, 36.
naṣṣ, 34, 85-6.
Nawādir, 68, 84, 103.
Nawawī, an-, Muḥyī ud-Dīn Abū Zakarīyā Yaḥyā al-Qizāmī ad-Dimashqī, (*d.* 676 A.H. — 1277 A.D.), 19, 43, 84, 255-6, 369, biographical data and works, 136, see *Minhāj, Rawḍah, Majmū*.
Nayl al-Awṭār, 89.
nazr, 150 153, 155, 160, 162, 165, 168, 171, 281-4, see *waqaf* and *nazr*, also State index.
necharī, 98-9.
Negri Sembilan, see State index.
Nigeria, 101.
Nihāyat, 100, *al-Maṭlab*, 83, *al-Muḥtāj*, 91.
Nisṭar, *Nisṭarī*, *Nizārī*, 81.
Nizām, Shaykh, 103.
non-Muslim, inheritance, 255, property, 246, *waqf*, *nazr*, 277, wills, 264-5.
nusus (*nushūz*), 221-3.
offences, miscellaneous, 354-62, Muslim, 315-67, on attendance of child at Koran school, 362, on books, documents, 357-9, 361-2, on encouraging non-attendance of mosque, 360-1, on erecting mosques, 359, on misuse of Koran or derision of religion or religious authorities, 360, teaching of Religion without authorization, 354-5, 361-2, 366, unauthorized issuing of *fetua*, 356-7, see also State index under offences.
opinion, see *fetua*, *fatwā*, *Muftī* and *ra'y*.
Ottoman, 103, Ottoman Law of Family Rights, (1917), 105.
Ouzara, 110.
overruling texts, 47.
pacificism, political, 54.
Paderi War (1803-1838), 94.
Pahang, see State index.
Pahang Committee of Chiefs and Kathis, (1930), 254-5.
Pakistan, 77, 100-1, 113, 199, Muslim Family Laws Ordinance, (1961), of Pakistan, 113.
Pan-Islāmic movement, 94.
pegawai masjid, 283, 331, 341-2, 344.
pembawa kembali, see *harta pembawa*.
pemberian, 191-4, definition of in different states, 191.
Penang, see State index.
Perak, see State index.
Perlis, see State index.
permitted, permissible, see *mubāḥ*.
perpetuities, 300-1, 303, see also English Law, wills and settlements.
Persians, 52, 100, see Irān.
personal law, custom, 272, 274-6.
policy of Muslim Community, 49.
polygamy, 105, 107, 109, 111, 113-4, 187, 'ādat on, 196, see State index, Singapore, marriage.
prayers, Friday, see Friday prayers, State index under offenses.
preference, juristic, see *istiḥsān*.
presumption of death, 216-8.
principle of actions, 39-40.
private international law, 269.
probate and letters of administration, 250-1, 255.
procedures, criminal and civil cases, 372-4, see State index.
prohibited marriages, 194-197, see *kafā'a*, *kufū*.
property, laws, 150, 153, 155, 160, 162, 165, 168, 171, 206-7, 244-151, married women's 240-4, see also *Bayt ul-Māl*, and *harta*.
Prophet, see Muḥammad.
proposal, see betrothal, *qabūl*.
proximity, close, see *kheluat*.
puasa, see *Ramadhan*.
puberty, 181, 351.
public interest, good, see *istiṣlāḥ*, *maṣlaḥah*, *siyāsah*.
punishment, see *ḥadd*.
purity, 198, see *'idda*.
qāḍī, 38, 42-3, 54, 57, 60-1, 77, 83, 90, 105-7, 109, *cadis'* 110, see also *Kathis*.
Qāḍī Khān, Fakhr ud-Dīn al-Ḥasan bin Manṣūr al-Uzjandī, (*d.* 592 A.H. — 1196 A.D.), 83, biographical data and works, 122.
Qāḍlī al-, Ismā'īl ibn Isḥāq (*d.* 282 A.H.) biographical data and works, 127.
Qairawānī, al-, 'Ubayd Allāh bin 'Abd ur-Raḥmān bin Abū Zayd (*d.* 386 A.H. — 996 A.D.), 84, biographical data and works, 127.
Qāsim, Abū 'Abd Allāh 'Abd ur-

Raḥmān ibn (*d.* 191 A.H.), biographical data, 126.
Qāsim bin Ibrāhīm (*d.* 246 A.H.), 81.
Qasṭallānī, al-, Shihāb ud-Dīn Aḥmad bin Muḥammad al-Khaṭīb (*d.* 923 A.H. — 1517 A.D.), 19, biographical data and works, 138.
Qayyim ibn-, al-Jawziyyah (*d.* 751 A.H. — 1350 A.D.), 29-31, 89, 92, biographical data and works, 142.
Qāzim, Imām Mūsā, 80.
Qazuīnī, al-, Abū'l-Qāsim 'Abd al-Karīm bin Muḥammad ar-Rāfi'ī (*d.* 623 A.H. — 1226 A.D.), 84, biographical data and works, 135.
Qazwīnī al-, (*d.* 655 A.H.), biographical data and works, 136.
qiyās, 2, 20-2, 25, 31, 34-7, 51, 57, 66-7, 72-5, 85-6, 92.
Qudāmah, Muwaffaq ud-Dīn (*d.* 620 A.H. — 1223 A.D.), 84, biographical data and works, 141.
Qudūrī, al-, Abū Ḥusayn Aḥmad bin Muḥammad (*d.* 428 A.H. — 1036 A.D.), biographical data and works, 121.
Qummī, al-, Muḥammad ibn al-Ḥasan ibn Farūq ash-Shaffār ibn Ja'far (*d.* 290 A.H. — 902 A.D.), biographical data and works, 143.
Qur'ān, 10-1, 13, 18, 25-6, 36-7, 45-8, 50, 52, 57, 86-7, 91-2, 95, 99, 101, 103, 107-8, 114-7, authoritative edition, 49, heirs, 252-3, misuse of, 360, Koran School, 362.
Qurrat al-'Ayn, 91.
Qurṭubī, al-, Muḥammad bin Aḥmad al-'Utbī (*d.* 255 A.H.), biographical data and works, 127.
Qurṭubī, al-, Muḥammad bin Aḥmad bin Rushd (*d.* 520 A.H.), biographical data and works, 128.
Qusharī, al-, Abū Bakr (*d.* 349 A.H.), biographical data and works, 127.
Rabī'a ibn Abī 'Abd ur-Raḥmān (*d. circa* 136 A.H.), 59.
Radd al-Mukhtār, 90.
Raḥmān, S. 'Abdur, 99.
Rajab, Abū'l-Faraj 'Abd ur-Raḥmān bin (*d.* 795 A.H. — 1392-3 A.D.), biographical data and works, 142.
Ramaḍan, Sa'īd, 114.
Ramadhan (*Ramaḍān*), 24, 100, 315, 333-5, 349-50, see State index.
Ramlī, ar-, Shams ud-Dīn Muḥammad bin Aḥmad (*d.* 1004 A.H. — 1596 A.D.), biographical data and works, 139.
Ramlī, Shihāb ud-Dīn Abū'l-Abbās Aḥmad bin Aḥmad (*d.* 957 A.H. — 1550 A.D.), biographical data and works, 139.
rape, 181, 321-2, 326, 328.
Rashidī, ar-, Aḥmad bin Muḥammad 'Abd al-Razzāq, biographical data and works, 139.
Rawḍah, 84.
ra'y, 19-20, 54, 57, 85-6, *Ahl ar-Ra'y* (upholders of private opinion), 65.
Rāzī, ar-, Fakhr ud-Dīn Abū 'Abd Allāh Muḥammad bin 'Umar b. al-Ḥusayn (*d.* 606 A.H.), 11, biographical data and works, 135.
reasoning, 60-1, 74, systematic, 63-4, 72, analogical, 66, 75, see also *qiyās*, and *ijtihād*.
recalcitrancy, see *nusus*.
recohabitation, 200-4.
reconciliation, see *ḥakam*.
redemption, of wife, see *khul'*.
refusal of sexual intercourse, see *nusus*.
registration, registrar, registry of marriages and divorces, 202, 206-7, registered proprietors of Customary Land, 270, see divorce, registration of.
religious authority, see administration, Agong, derision, *Kathis*, *Mufti*, Ruler and structure of religious authority, States index.
repudiation, see *ṭalāk* and divorce.
retirement, waiting period, see *'idda*.
revocation, of divorce, *rojok*, 200, 202-7, of gifts, 298, of wills, 265-6, of marriage, see *fasah*.
rewards, (*thawāb*), 42.
Riḍā, Shaykh Muḥammad Rashīd (1865 A.H. — 1935 A.D.), 89, 96.
right, rights 63, God, Man, 40-1, see also *ḥuqūq*.
Risālah, 21, 26, 70, 84.
rojok, see revocation.
rukhṣah, 6, 9, 35.
Ruler, powers, duties, 148-168, 180, 187, 196, 285-6, 290-2, 294, 296,

332, 338-40, 342, 344-5, 367, see also Khalīfah.
rulings on religious and customary matters, see interpretations, *fetuas, fatwā, Muftī.*
Rushd, al-Qurṭubi, ibn-, Muḥammad bin Aḥmad (Averroes) (*d.* 595 A.H. — 1189 A.D.), 84, biographical data and works, 128-9.
Sa'd, ibn-, al-Layth (*d.* 175 A.H.), 75.
Ṣadafī, aṣ-, Yūnus bin 'Abd al-A'lā (*d.* 264 A.H. — 877 A.D.), 71, 132, biographical data and works, 133.
Ṣādiq, aṣ-, Ja'far bin Muḥammad (*d.* 148 A.H. — 765 A.D.), 53, 64, 80, biographical data and works, 143.
Ṣāduq, aṣ-, Abū Ja'far, works, 145.
Sa'dy, as-, Abū Muḥammad 'Abd Allāh ibn (*d.* 610 A.H.), works, 128.
ṣaḥiḥ, 5, 17-8.
Ṣaḥiḥ, of Khuzaymah, Abū Bakr Muḥammad bin Isḥāq ibn, 19.
saints, 289-90, 310-1.
Sajāwandī, as-, Sirāj ud-Dīn Muḥammad bin Muḥammad (*d.* towards the end of 6th century A.H.), biographical data and works, 122.
Salafiyyah School, 15, 96.
sale, conditional, see *jual janji.*
Samarqandī, as-, Abū'l-Layth Naṣr bin Muḥammad (*d.* 375 A.H.), biographical data and works, 121.
Samarqandī, as-, 'Alā' ud-Dīn Muḥammad bin Aḥmad, biographical data and works, 122.
sanad, 14, see *isnād.*
Sanhūrī, as-, Dr. 'Abd al-Razzāq, 111.
Santillana, D. (*d.* 1931), 110.
Sanūsī, as-, Muḥammad ibn 'Alī, 94.
sapencharian property, see *harta sapencharian.*
Ṣaqalī, aṣ-, Abū Bakr Muḥammad bin 'Abd Allāh bin Yūnus (*d.* 451 A.H.), biographical data and works, 128.
Sarakhsī, as-, Abū Bakr bin Muḥammad bin Muḥammad (*d.* 544 A.H.), biographical data and works, 121.
Sarakhsī, as-, Shams al-A'immah Abū Bakr Muḥammad bin Aḥmad, (*d.* 483 A.H. — 1090 A.D.), 34, 83, biographical data and works, 121.
Sa'ūd, ibn, Sa'ūdī Emirate, 93.
Saudara, 101.
Ṣāwī, aṣ-, Aḥmad bin Muḥammad (*d.* 1241 A.H.), biographical data and works, 130.
Sayyid Aḥmad of Bareilly, 94, 97.
Schools of law, ancient, 55, 57-60, 73, 76, personal 76, 114.
Selangor, see State index.
sexual intercourse, unlawful, 321-9, see State index and *zinā';* refusal of sexual intercourse, see *nusus.*
Shabramalesi, ash-, Abū'l-Ḍīyā Nūr ud-Dīn 'Alī bin 'Alī (*d.* 1087 A.H. — 1676 A.D.), biographical data and works, 139.
shadhdh, 38, 109.
Shāfī, ash-, 85.
Shāfi'ī, ash-, Abū 'Abd Allāh Muḥammad bin Idrīs (*d.* 204 A.H. — 820 A.D.), 14, 74, 76, analogy, 72, authority of Prophet, 71-2, biographical data and works, 130-2, creator of classical theory of Muslim jurisprudence, 70, 72, critical sifting, 79, dependence on formal traditions, 71, *ḥadīth,* 73, 79, harmonizing schools of Abū Ḥanīfah and Mālik, 69, *ijmā',* 69, *ijtihād,* 73, *istiḥsān,* 69 *istiṣḥāb,* 69, preserving spirit of traditions, 70, Prophetic *Sunnah,* 73, severance of organic relationship between *ijtihād* and *ijmā',* 73, see *Kitāb al-Ḥujjah, Kitāb al-Umm, Risālah, nusus,* 222, pre-Islāmic Custom, 38, presumption of death, 217, *qiyās,* 26-8, *Qur'ān,* 17, *Sunnah,* 8, 13-4, testimony, direct and hearsay, 371, tradition, 17, *waqf, nazr,* 278-9, wills, 265-6, with regard to performance of prescriptions of *Sharī'ah,* 9, *zakāt fiṭrah,* 335-6.
Shāfi'ī School of Law, abrogation, 36, anological deduction, 34, custody, 235, devices, *ḥiyal,* 39, 311, divorce, 198-200, effective cause, 32, *farḍ* and *wājib,* 8, *fasah,* 213, gifts, 297-9, *ḥadīth,* 17, *ḥakam,* 218, *ijmā',* 20-1, 23-5, *ijtihād,* 21, 26-8, individual opinion, 30-1, inheritance, 252, *istiḥsān,* 34, *istiṣḥāb,* 35, 69, jurists of, 83-4, 90, juristic acts, 5-6,

kafā'a, 196, *khul'*, 211, legitimacy, 234, maintenance of wife, 224-5, marriage, 176-8, 180-1, *mut'ah*, 223.
Shāfi'īs, 77, see *Shāfi'ī* School of law.
Sharā'ī al- Islām, 85.
Sharbīnī, ash-, Muḥammad bin al-Khaṭīb, (*d.* 977 A.H. — 1569 A.D.), 91, 219, biographical data and works, 139.
shares, 301, divided, undivided, 247, undivided, 263.
Sharī'ah, 1, 7, 9, 36, 39, 42-3, 46, 61, 86-9, 92, 101-4, 107, 112, 114, 116-7.
Shariah Courts, 113, 196, see State index, Singapore.
Sharī'at Allāh, 94, 97.
Sharqāwī, ash-, 'Abd Allāh (*d.* 1227 A.H. — 1812 A.D.), biographical data and works, 140.
Shawkānī, ash-, Muḥammad bin 'Alī bin Muḥammad bin 'Abd Allāh (*d.* 1250 A.H. — 1834 A.D.), 30, 89, biographical data and works, 142.
Shaybānī, ash-, Muḥammad ibn al-Ḥasan (*d.* 189 A.H. — 804 A.D.), 67-8, 278, biographical data and works, 120.
Shī'a 'Alī, 53.
Shiblī, ash-, Badr ud-Dīn Muḥammad bin 'Abd Allāh (*d.* 769 A.H.), biographical data and works, 124.
Shibrīmah, ibn (*d.* 144 A.H.), 75.
Shī'īs (*Shī'a's*), 18, 54, 80, 84, 98, *Ahl al-Bayt*, 53, 'Alī, 53, appointment to *Imāmat*, 53, 81, authority of *Jamā'at*, authority of *Qur'ān*, 53, canonical collections of traditions, 81, differences with *Sunnīs*, 53, *ijmā'*, 21, 24, *Shī'a 'Alī* 53, sixth *Imām*, 64, 80, spiritual *Imāms*, 24, 53, traditions, 53.
Shīrāzī, ash-, Abū Isḥāq Ibrāhīm bin 'Alī (*d.* 476 A.H. — 1083 A.D.), 84, biographical data and works, 135.
Shirwānī, ash-, 'Abd al-Ḥamīd (*d.* 1289 A.H. — 1872 A.D.), biographical data and works, 140.
shrines, 289-90.
sifting, critical, 79.
Sighnāqī, as-, Hisām ud-Dīn Ḥusayn bin 'Alī (*d.* 710 A.H.) biographical data and works, 123.
Sijistānī, as-, Abū Dā'ūd (*d.* 275 A.H. — 888 A.D.), 18.
Sikhs, 94.
Singapore, 101, see State index.
Sīrīn, Muḥammad bin, freedman of Anas bin Mālik, 53.
Siyar al Kabīr, 68.
Siyar aṣ-Ṣaghīr, 68.
siyāsah, 104, see *istiṣlāḥ*, *maṣlaḥah*.
slaves, 256.
solemnisation of marriage, see marriage, solemnization of.
solvency, 42, see insolvency.
Spirit of Islam, 98.
structure, religious authority, *Majlis*, constitution and powers, 147-9, 151-71, 290-1, 294, 296, 336-42, 348-52, see also Agong, derision, Kathis, Muftī, and Ruler.
Subkī, as-, Tāj ud-Dīn 'Abd al-Wahhāb bin (*d.* 772 A.H. — 1370 A.D.), 26, biographical data and works, 137.
succession, 111.
successors (*Tabi'ūn*), 48, 62.
suckling, 87.
Sūdān, 94, Anglo-Egyptian, 107.
Ṣūfī, 93, Ṣūfism, 91, 97, 100.
Sulamī, as-, Marwān 'Abd al-Mālik bin Ḥabīb (*d.* 238 A.H.), biographical data and works, 126.
Sulaymān I, 'Uthmāniyyah Sulṭān, 106.
Sulaymānī, 81-2.
Sulṭān, 105-6, see Khalīfa, and Ruler.
Sunnah, 2, 9, 10, 12-5, 17, 19-20, 25-6, 36-7, 45-8, 50-1, 58, 62, 70, 73, 76, 86-7, 92, 103, 115-7, commentaries, 19, on gifts, 298, *ijmā'*, 20, *ijtihād*, 15, 78, marriage, 177, normative, 58, Shāh Walī Allāh, 12, *mu'akkadah*, 8, of the Prophet, 10, 13, 21, 50, 57, 59, 72, 79, 115, *az-zawā'id*, 8, see also *Ḥadīth* and Muḥammad.
Sunan, Abū Dā'ūd, 18, *Nasā'i*, 18, *Ibn Mājah*, 18, of Dārīmī, 19, of Dāraquṭnī, 19, of Bayhaqī, 19.
Sunbawī, as-, Muḥammad bin Muḥammad (*d.* 1232 A.H.), biographical data and works, 130.
Sunnī, Muslim, 76, 101, 199.
Sunnī Schools of law, 105, deduc-

tion, 77, equally orthodox, 33, *ijmā'*, 22-3.
surat ta'alīk, 208-10, see *ta'alīk*.
Su'ūd, Abū'l, Shaykh al-Islām, 106.
Suyūṭī, as-, Jalāl ud-Dīn 'Abd ur-Raḥmān bin Abū Bakr (*d.* 811 A.H.), 11, 36.
Syria, Syrians, 52, 55-6, 59, 89, 105, 107, Syrian Civil Code (1949), 112, Syrian Law of Personal Status, (1953), 107-8.
ta'alīk, 178, 221, *surat*, 178, in Singapore, 172, see *cherai ta'alīk*.
Ṭabarī, aṭ-, Abū Ja'far Muḥammad bin Jarīr (*d.* 310 A.H. — 923 A.D.), 11, 75, biographical data and works, 143.
Ṭabarsī, aṭ-, Abū 'Alī al-Faḍl (*d.* 548), 85.
Tabi'ūn, 48, 52.
tafsīr, 11.
Taftāzānī, 42.
Ṭaḥāwī, aṭ-, Ja'far Aḥmad bin Muḥammad (*d.* 321 A.H.), biographical data and works, 120.
Tahdhīb al Aḥkām, 18, 85.
Ṭāhir, Shaykh Muḥammad-, bin Jalāl ud-Dīn (1861-1957), 101.
taḥlīl, 92.
Taḥrīr at-Tanqīh, 90.
ṭalāk (*ṭalāq*), 107-8, 113-4, 189-91, 194, 197-8, 210, 218, 221, 224, see divorce.
talfīq, 'patching up' legal rules, 105.
Ṭālib, 'Alī bin Abī, 50, 52.
ta'līl, 32, 85.
Talwīḥ, 42.
Tanbīh, 84.
Tanūkhhī, at-, Saḥnūn 'Abd as-Salām bin Sa'īd bin Ḥabīb (*d.* 240 A.H.), biographical data and works, 126.
taqlīd, 88-9, 92, 95-7, *taqlīd buta*, 101.
Taqrīb, 84.
Tatā'ī, at-, Muḥammad bin Ibrāhīm (*d.* 942 A.H.), biographical data and works, 129.
taulīah, see *kuasa*.
Tawḍīh, 1, 31.
Ṭaymiyyah, Taqī ud-Dīn Aḥmad ibn, (*d.* 728 A.H. — 1321 A.D.), 75, 77, 89, 92-3, 96, biographical data and works, 141-2.
ta'zīr, 315-6.
technical legal thought, 63.
tenets, schools of law, see *Shāfi'ī* school, *Ḥanafī* school, *Ḥanbalī* school, *Mālikī* school, see *fetua*, tenets controling.
terminology, constituting, gifts, 297-8, *waqf*, *nazr*, 278-80, wills, 265-6, 301.
testator, 300-1, 305.
testimony, direct and hearsay, 371, see State index, evidences, testimony.
thawāb, 6, 7, 9, 42.
Thawrī, ath-, (*d.* 161 A.H.), 31, 75.
Tīmurtashī, at-, Shams ud-Dīn Muḥammad 'Abd Allāh al-Ghazzī (*d.* 1004 A.H.).
Tirmidhī, at-, Abū 'Īsā Muḥammad (*d.* 279 A.H. — 892 A.D.), 18, 80:
tithe, religious, see *zakāt*, *fiṭrah*, also State index.
traditions, 61, 63, 74-5, 80, 86, 92, 116, see references under 'collections', and *Ḥadith*.
transactions, secular, 6.
treasury, Muslim, see *Bayt ul-Māl*, also State index.
Trengganu, see State index.
tribal property, 257, 259-61.
Tripoli, 54.
trust, see *waqaf*.
trustee, 283, 285, 287, 300-1, 305.
trustees and settled estates ordinances, 250-1, 274-5.
Ṭufi, at-, (*d.* 716 A.H.), 35.
Tuḥfah, 38, 100, 265, 279.
Tuḥfat al-Muḥtāj, 91.
Ṭujaybī, at-, Ḥarmalah bin Yaḥyā bin 'Abd Allāh (*d.* 243 A.H. — 857 A.D.), 71, biographical data and works, 133.
Tunisia, 77, 110, Tunisian Civil and Commercial Code 1899, 110, Tunisian Law of Personal Status, 1956, 108.
Turkey, 77, 93-4, 101, 105, 107.
Ṭūsī, aṭ-, Abū Ja'far Muḥammad bin Ḥasan (*d.* 458-460 A.H. — 1065-1068 A.D.), 18, 85, biographical data and works, 144.
Twelvers, 80.
'ulamā' (sing. *'ālim*), 24-5, 95, 98, 101, 158, 332.
'Umar, 'Abd Allāh ibn, 51-2.
'Umar ibn 'Abd al-'Azīz, Umayyad Khalīfa, 28-30, 36, 42, 47-51, 53, 59, 102, 217.
Umayyad, 54, 57, administrative

practice, 55-6, 58, 61.
universality of application of Sharī'ah, 46.
unnatural offences, 321.
'Urwa al-Wuthqā, 95.
uṣūl, 22, *al-fiqh*, 2, 3, *Uṣūlī*, 81.
usury, 24.
'Uthmān, 11, 48-9, 53.
'Uthmāniyyah Sulṭāns, 93-4, 96, 106.
'Uyūn Akhbār ar-Riḍā, 84.
virgin, see *anak dara*, non-virgin, see *janda*.
vow, see *nazr* and *waqaf* and *nazr*, also State index.
waḍa'ī, 3.
Wahb, al-, Abū Muḥammad 'Abd Allāh ibn (*d.* 197 A.H.), biographical data and works, 126.
Wahhāb, al-, Muḥammad 'Abd (1201 A.H. — 1787 A.D.), 92-3, 96, biographical data and works, 142-3.
Wahhābī, 77, 92-4, 97.
wājib, 7-8.
Wajīz, 84.
wakaf, waqf, 'ām, khās, 102, 150, 153, 155, 159, 160-2, 164-5, 168, 171, 282-4, 301, 303, 305, 308.
wakaf (*waqf*) and *nazr*, 276-90, 292-4, 296, acceptance, 277, definition of, 276, ownership transferred to God, 280, purposes, 277-9, 283-4, rightful subjects of, 277, 281, two-thirds property only, 282, 285, see terminology constituting, by death-bed gift, 282, administration, administrator, 281-4, 288-9, see also *wakaf, nazr*.
wakīl, 185, see *walī*.
walī, 172, 177, 179, 181-4, *Ṭaḥkīm*, 179, *rāja*, 183, *Ḥakīm*, 183, *mujbir*, 183, see also custody, guardianship and minor.
Walī Allāh, Shāh-, of Delhi (1703-1763), 12, 46, 96-7.
Walīmah, 177.
Wānqūlī, al-, Maḥmud bin Muṣtafā (*d.* 1000 A.H.), biographical data and works, 125.
Wansharīsī, al-, Aḥmad bin Yaḥyā (*d.* 914 A.H.), biographical data and works, 129.
wāqif, 276, 280.
Warqamī, al-, Muḥammad bin Muḥammad al-Ṭunisī bin 'Arafah (*d.* 803 A.H.), biographical data and works, 129.
Wasī, 84.
widows, inheritance, 254-5, 302, marriage, 188-91.
wills, 263-270, 285, settlements in Singapore, interpretation of, 300-311, see also beneficiaries, executors, and inheritance.
witnesses, 199, 283, see State index, evidences, witnesses.
Yaman, 28, 81.
Yamānī, al-, Muḥammad bin Ismā'īl bin Ṣalāh al-Amīr al-Kaḥlānī aṣ-Ṣan'ānī (*d.* 1182 A.H.), 89, biographical data and works, 139.
Yang di-Pertuan Agong, see Agong.
Yang di-Pertuan Negara, 172.
yaqīn, 16-7, 23-4.
Zafarānī, az-, al-Ḥasan bin Muḥammad aṣ-Ṣabāh (*d.* 260 A.H. — 873 A.D.), 71, 131, biographical data and works, 132.
Zahidī, az-, Najm ud-Dīn Mukhtār bin Maḥmūd (*d.* 658 A.H.), biographical data and works, 123.
Zāhirāt ar-Rawiyyah, 68, 103.
Ẓāhirī School of law, 36, 75, 84.
Zahrah, Abū-, 21-2, 65.
zakāt, 5, 15, 24, 92, and *fiṭrah*, non-payment of, 335-49, see State index.
Zamakhsharī, az-, Abū'l-Qāsim Maḥmūd bin 'Umar (*d.* 538 A.H.), 11.
Zanzibar, 54.
Zarkashī, al-, Badr ud-Dīn Muḥammad bin Bahadar (*d.* 794 A.H.), biographical data and works, 137.
Zayd bin 'Alī (*d.* 122 A.H. — 739 A.D.), 53, biographical data and works, 143.
Zayd, Ḥasan bin, 81.
Zayd bin Thābit, 11, 29, 49, 52.
Zaydī School, 53, 81-2.
Zayla'ī, az-, Fakhr ud-Dīn 'Uthmān bin 'Alī (*d.* 743 A.H.), biographical data and works, 124.
zinā', 24, 190, 234, 368, see fornication.
Zīyad, Ḥasan bin (*d.* 204 A.H.), biographical data, 120.
Ziyādat, 68.
Zubayr, 51.
Zuhrī (*d.* 124 A.H.), 59.
Zurkānī, az-, 'Abd al-Bāqī bin Yūsuf (*d.* 1090 A.H.), biographical data and works, 130.

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