

Part 2: Personal Law

6. Marriage

The Marriage Contract and its Conditions

All the five schools of fiqh concur that marriage is performed by the recital of a marriage contract which contains an offer made by the bride or her deputy (*na'ib*), such as her guardian or agent (*wakil*), and a corresponding acceptance by the groom or his deputy. A mere agreement without the recital of the contract does not amount to marriage.

The schools also agree that a marriage contract is valid when recited by the bride or her deputy by employing the words, *ankahtu* or *zawwajtu* (both meaning. I gave in marriage) and accepted by the groom or his deputy with the words, '*qabiltu*' (I have accepted) or '*raditu*' (I have agreed).

The schools of *fiqh* differ regarding the validity of the contract when not recited in the past tense or recited by using words other than those derived from the roots *al-zawaj* and *al-nikah*, such as, *al-hibah* and *al-bay'*.

The Hanafi's say: A marriage contract is valid if recited by any word conveying the intention of marriage, even if the words belong to the roots *al-tamlik*, *al-hibah*, *al-bay'*, *al-ata*, *al-'ibahah* and *al-'ihlal*, provided these words indicate their being used for the purpose of marriage. But the contract will not conclude if the word used are derived from *al-'ijarah* (hiring) and *al-'i'arah* (lending), because these words do not convey the meaning of perpetuity and continuity.

They have based their argument on this narration from the Sahih al-Bukhari and the Sahih Muslim. A woman came to the Prophet (S) and said: "O Apostle of Allah. I have come to offer myself to you." On

hearing this, the Prophet (S) lowered his head and did not reply. Then one of those present said: "If you do not want her marry her to me." The Prophet (S) asked him: "Have you anything?" He replied, "By God. I have nothing." Again the Prophet asked him. "Have you any knowledge of the Qur'an?" He replied regarding the extent of his knowledge of the Qur'an. Then the Prophet said. "I make her your property in exchange for your knowledge of the Qur'an" (using the word *mallaktul*)¹.

The Maliki's and the Hanbali's say: The contract is valid if recited by using the words *al-nikah* and *al-zawai* or their derivatives and is also valid when the word used is *al-hibah*, with the condition that the amount payable as dower (*mahr* or *sidaq*) is also mentioned. Words other than these cannot be used. They have based their argument for the use of the word *al-hibah* on this verse of the Qur'an (see Abu Zuhrah. *al-Ahwal al-shakhsiyyah* [1948] p. 36):

وَأَمْرًا مُّؤْمِنَةً إِنْ وَهَبَتْ نَفْسَهَا لِلنَّبِيِّ إِنْ أَرَادَ النَّبِيُّ أَنْ يَسْتَنْكِحَهَا

...And a believing woman if she gave (*wahabat*, derived from *al-hibah*) herself to the Prophet, if the Prophet desired to marry her... (33:50)

The Shafi'i scholars consider it *wajib* that the words used in the contract should be either the derivatives of the root *al-zawaj* or that of *al-nikah*.

The Imamiyyah say: It is *wajib* that the offer be made by using the words *ankahtu* and *zawwajtu* in the past tense. The marriage is not concluded if the word used is not in the past tense and does not belong to the roots *al-zawaj* and *al-nikah*, because these two roots conventionally convey the meaning of marriage and the past tense conveys the meaning of certainty and also because the Qur'an testifies their use:

فَلَمَّا قَضَى زَيْدٌ مِنْهَا وَطَرًا زَوَّجْنَاكَهَا

أُرِيدُ أَنْ أُنكِحَكَ

(33:37 ,28:27).

Apart from -this, the absence of consensus invalidates the use of words other than these in such a contract. For acceptance, according to them, the word *qabiltu* or *raitu* can be used.

The Imamiyyah, the Shafi'i and the Hanbali schools mention 'immediacy' as a condition for a marriage contract. By immediacy they mean the acceptance of the offer without any delay. The Malikis consider a minor delay inconsequential, such as a delay caused due to the recital of a short sermon or the like of it. The Hanafi school is of the opinion that immediacy is not necessary.

Even if a man addresses a letter to a woman conveying his proposal of marrying her and the woman gathers witnesses and reads out the letter to them and says, "I marry myself to him," the marriage is performed (*al-Fiqh 'ala al-madhahib al-'arbiah*, vol. 4. the discussion regarding conditions of marriage; *al-'Abwal al-shakhsiyyah* by Muhammad Muhy al-Din 'Abd al-Hamid).

All the schools concur that the contract can be recited in any language when it is impossible to recite it in Arabic but differ as regards the validity of the contract when so recited despite the possibility of its being recited in Arabic. The Hanafi, the Maliki and the Hanbali schools consider this as valid. The Shafi'i and the Imamiyyah Schools consider it as invalid. (Abu Zuhrah. *al-'Ahwal al-shakhsiyyah*. p. 27)

The Imamiyyah, the Hanbali and the Shafi'i schools consider a contract in writing as invalid. The Hanafi school is of the opinion that a written contract is valid provided the bride and the groom are not present together at the place of contract. The schools concur that a dumb person can convey his intention to marry by signs in case he is incapable of expressing it in writing. If he can express it in writing, it is better for him to combine both, writing and signs. in conveying his intention.

According to the Hanbali and the Hanafi schools, if a clause is included in the contract giving a choice to the bride and the groom to annul the contract. The contract is valid but the condition is void. The Maliki school is of the opinion that, if the marriage is not consummated, this condition as well as the contract are both void. But if the marriage has been consummated, the condition is void, not the contract. The Imamiyyah and the Shafi'i schools have declared both the contract and the condition as void irrespective of whether the marriage has been consummated or not.² (*al-Fiqh 'ala al-madhahib al-'arba'ah*, vol. 4; *al-Tadhkirah* by al-'Allamah al-Hilli, vol. 2; and *al-Masalik* by al-Shahid al-Thani, vol. 2J)

As a matter of course, the offer is made by the bride and is accepted by the groom. The bride says, '*zawwa jtuka*' (I have married myself to you) and the groom accepts by saying, '*qabiltu*' (I have accepted). The question which now arises is, is the contract valid when the acceptance precedes the offer and the groom addresses the guardian of the bride saying, '*zawwijnihu*' (marry her to me) and the guardian replies, '*zawwa jtukahu*' (I have married her to you)? The Hanbali school considers it as invalid while the other schools concur on its validity (*al-Tadhkirah* by al-'Allamah al-Hilli, vol. 2). Al-'Allamah al-Hilli, an Imamiyyah scholar, in his book *al-Tadhkirah*, says, "A marriage contract cannot be made contingent on a future event because certainty is one of its conditions. If a condition is included prescribing a certain time or a certain quality, such as, when the offer is made with the condition that the marriage will conclude at the beginning of the forthcoming month and this offer is accepted, the contract is not valid. Al-Shafi'i is of the same opinion."

Abu Zuhrah, a Hanafi scholar, writes in his book *al-'Ahwal al-shakhsiyyah*: "A marriage should be concluded on the recital of the contract, because marriage is a contract and the consequences of the contract cannot be delayed after its conclusion. Therefore it is not possible to postpone the consequences of a contract till the fulfillment of a future condition". In the book *A'lam al-muqilin*, Imam Ahmad has been referred to as validating a conditional contract of marriage.

A Subsidiary Issue

Al-Fiqh 'ala al-madhahib al-'arba'ah, quoting Hanafi and Shafi'i scholars, states: If an illiterate person mispronounces the word '*zawwaitu*' and says instead, "*zawwajtu*," the contract is valid. Al-Sayyid Abu al-Hasan al-'Isfahani, an Imamiyyah scholar, in his *Wasilat al-najat*, gives a similar fatwa.

Witnesses

The Shafi'i, the Hanafi and the Hanbali schools concur that the presence of witnesses is a necessary condition for a valid contract. The Hanafi school considers as sufficient the presence of two men or a man and two women. However, if all the witnesses are women, the contract is not valid. This school does not consider '*adalah*' (justice) as a condition for the acceptability of the witnesses. The Shafi'i and the Hanbali schools consider as necessary the presence of two male Muslim witnesses possessing the quality of '*adallah*'.

According to the Malikis, the presence of witnesses is not necessary at the time of the contract but their presence is necessary at the time when marriage is to be consummated. Therefore, if the contract is recited without the presence of witnesses, it is valid. But, when the groom intends to consummate the marriage it is incumbent upon him to have two witnesses. If the marriage is consummated without the witnesses, the contract becomes void compulsorily, and this is considered as amounting to an irrevocable divorce. (*Bidayat al-mujtahid* by Ibn Rushd: *Maqsad al-nabih* by Ibn Jamii'ah al-Shafi'i)

The Imamiyyah do not consider the presence of witnesses as *wajib* but only *mustababb*.³

¹ The Imamiyyah have narrated this tradition with different words. According to their version: A woman came to the Prophet (S) and said, "Get me married." The Prophet then announced, "Who is ready to marry her?" One of those present stood up and said, "I". The Prophet (S) then asked him, "What can you give her?" He replied, "I have nothing." The Prophet said, "No." The woman repeated her request and the Prophet (S) repeated the announcement but none stood up except the same man. The woman again repeated her request and the Prophet (S) announced again. Then the Prophet (S) asked him, "Do you have any good knowledge of the Qur'an?" He replied, "Yes. I do." The Prophet (S) then said, "I marry her to you (*zawwajtukaha*) in exchange for your teaching her what you know well of the Qur'an." Therefore, the word used was *al-zawaj*, not *al-milk*.

² This is the view of most of the Imamiyyah scholars. But some of them, such as Ibn Idris among the early legists, and al-Sayyid Abu al-Hasan al-'Isfahani among the recent ones are of the opinion that the contract is valid and the condition is void. Accordingly, the Imamiyyah scholars in both their views are on the whole like the scholars of the other schools.

³ Dr. Muhammad Yusuf Musa, in his book *al-Ahwal al-shakhsiyyah* (1958) page 74, states: "The Shi'ah consider the presence of witnesses as necessary for marriage." He considers the Shi'ah and the Hanafi, the Shafi'i and the Hanbali schools to hold a common view. But there is no source of reference for what he states.

Capacity to Enter into a Marriage Contract

All the schools agree that sanity and adulthood (*bulugh*) are necessary qualities for both the parties to the contract, unless the contract is concluded by the guardian of any of them. The contract with the guardian shall be discussed later. The schools also agree that there should be no obstacle to marriage between the man and the woman such as consanguinity or any other disabling factor of a permanent or temporary character. We will discuss the legal obstacles to marriage in a separate chapter.

The schools also consider the ascertainment of both the parties to the contract as necessary. Therefore, when it is said, "I marry you to one of these two daughters." or "I marry myself to one of these two men." the contract will not be valid.

All the school except the Hanafi consider free consent as a *sine qua non* without which the contract does not conclude. The Hanafis are of the opinion that the contract is concluded even if coercion is present (*al-Fiqh 'ala al-madhahib al-'arbdah*). Al-Shaykh Murtada, al-'Ansari, an Imamiyyah scholar, after mentioning free consent as a condition, writes: "That which is commonly held by the Imamiyyah scholars of the latter period is that, when a person coerced consent freely later on, the contract is valid. In the book *al-Hada'iq wa al-riyad* their consensus has been reported on this issue." Al-Sayyid Abu al-Ha'san al-'Isfahani, an Imamiyyah legist, in his *al-Wasilah* in the chapter on marriage, writes: "Free consent of both the parties is a necessary condition for a valid contract. If both of them or any of them is coerced, the contract is invalid. But if the party coerced consents later, the reason in favor of the validity of the contract seems strong." According to the above-mentioned criterion, if the man or the woman pleads coercion and then willingly live together like a married couple and show the happiness of a newly married bride and groom, or if the woman takes the *mahr* or does any other act proving consent, the claim of coercion will be rejected and no other evidence will be accepted contradicting the consent.

According to the four school of fiqh, a contract recited in jest concludes the marriage. Therefore, when a woman says jokingly, "I marry myself to you" and the man accepts it in a similar fashion, the contract is concluded. Divorce and the freeing of a slave also conclude if recited in jest according to the tradition:

ثلاث جدهن جد وهزلهن جد: الزواج والطلاق والعتق

The three whose intentional and jestful (recital) is considered intentional are: marriage, divorce and freeing of a slave.

The Imamiyyah school considers all contracts involving jest as null and void due to the absence of the will to contract and as regards the above-mentioned tradition, they consider the narrators as unreliable.

The Hanafi and the Hanbali schools regard the marriage of an idiot as valid irrespective of whether the

guardian has given permission or not. The permission of the guardian is necessary in the view of the Imamiyyah and the Shafi'i schools.

According to the Imamiyyah and the Hanafi schools, the consent given when the two conditions of sanity and adulthood (*bulugh*) are present concludes the marriage as per the authority of the tradition.

إفراز العقلاء على أنفسهم جائز

The consent of sane persons even if detrimental to their interest, is valid.

Al-Shafi'i, in the latter of his two views, considers the marriage as established when the bride being a sane adult acknowledges the marriage and the husband confirms her acknowledgement, because marriage is the right of both the parties. Malik recognizes a difference here. According to him, when the bride and the groom are in a foreign land their acknowledgement establishes the marriage; but when they are in their hometown they will have to furnish a proof of their marriage because it is convenient for them to do so. This was the former view of al-Shafi'i. (*al-Tadhkirah* by al-Allamah al-Hilli)

Bulugh

There is consensus among the schools that menses and pregnancy are the proofs of female adulthood. Pregnancy is a proof because a child comes into being as a result of the uniting of the sperm with the ovum: and menses, because, like the production of sperm in male, is a mark of female puberty. All schools, except the Hanafi, consider the growth of pubic hair as a sign of adulthood, but the Hanafis consider them no different from other hair of the body. According to the Shafi'i and the Hanbali schools, the adulthood of both the sexes is established on their completing fifteen years. According to the Malikis, it is seventeen years for both the sexes. The Hanafis consider eighteen years for a boy and seventeen years for a girl as the age of maturity (Ibn Qudamah, *al-Mughni, Bab al-Hijr*. vol. 4). The Imamiyyah have mentioned fifteen years for a boy and nine years for a girl as the age of maturity on the authority of the following tradition narrated by Ibn Sinan:

إذا بلغت الجارية تسع سنين دفع إليها مالها وجاز أمرها وأقيمت الحدود التامة لها وعليها

When a girl reaches the age of nine her property will be returned to her and it will be rightful for her to handle her own affairs, and the hudud are applied against her and in her favor.

Experience also proves that a girl can conceive at the age of nine, and the ability to conceive is equivalent to conception in all aspects.

Note: That which the Hanafis have said regarding the age of maturity is the maximum age limit for

maturity. The minimum age limit according to them is twelve years and nine years for a boy and a girl respectively: because at this age it is possible for a boy to ejaculate and to impregnate, and for a girl to have orgasm. to menstruate, and to conceive (Ibn 'Abidin [1326 H.] *Bab al-hijr*, vol. 5, p. 100).

Stipulation of Conditions by the Wife

The Hanbali school is of the opinion that if the husband stipulates at the time of marriage that he will not make her leave her home or city, or will not take her along on journey or that he will not take yet another wife, the condition and the contract are both valid and it is compulsory that they be fulfilled, and in the event of their being violated, she can dissolve the marriage. The Hanafi, the Shafi'i and the Maliki schools regard the conditions as void and the contract as valid, and the Hanafi and the Shafi'i schools consider it compulsory in such a situation that the wife be given a suitable *mahr*, not the *mahr* mentioned (Ibn Qudamah. *al-Mughni*. vol. 6. chapter on marriage).

According to the Hanafi school, when the man puts the condition that the woman would have the right to divorce, such as when he says. "I marry you on the condition that you can divorce yourself," the condition is invalid. But if the woman makes such a condition and says to the man, "I marry myself to you on the condition that I shall have the right to divorce," and the man says in reply. "I accept." the contract and the condition are both valid and the woman can divorce herself whenever she desires.

According to the Imamiyyah school, if at the time of contract, the woman stipulates such conditions as that the man shall not take another wife, or shall not divorce her. or shall not prohibit her from leaving home whenever she wants and wherever she wants to go, or that the right to divorce will be hers, or that he shall not inherit her, or any other such condition which is against the spirit of the contract, the condition will be considered void and the contract will be valid.¹ But if she lays down such conditions as that the man will not make her leave her city, or will keep her in a specific home, or will not take her along on journeys, the contract and the condition are both valid. But if any of these conditions are not met, she does not have the right to dissolve the marriage.

However, if in such a situation the woman refuses to accompany him, she still enjoys all the rights of a wife, such as being provided with maintenance and the like of it.² When the wife pleads of having included a valid condition in the contract and the husband repudiates the inclusion of such a condition, the wife will have to furnish evidence, because she has pleaded this extra condition. On the wife being unable to furnish the evidence, the husband will take an oath regarding the non-inclusion of the condition because he is the one who negates it.

¹. According to the Imamiyyah, an invalid condition in a non-marriage contract results in the contract becoming void. But in a contract of marriage such a condition does not cause the contract nor the mahr to be void unless a choice is given

regarding the voiding of the contract or a condition is laid that none of the consequences of the contract will follow, which is against the spirit of the contract. They have argued on the basis of reliable traditions that there is a difference between a marriage contract and other forms of contract.

Some of the legists have said: "The secret of this difference is that marriage is not an exchange in the true sense of the word as in the case of other forms of contract." The Imamiyyah scholars have extensive discussions on these conditions the like of which are not found in books of other schools. Those who want further information regarding these conditions may refer to al-Makasib of Shaykh Murtada al-'Ansari and Taqirrat al-Na'ini of al-Khwansari, vol. 2, and the third part of Fiqh al-Imam al-Sadiq by this author.

[2](#). In Farq al-zawaj of Ustadh 'Ali al-Khafif. it is stated that the Imamiyyah consider these kind of conditions as void. This is a mistake which has been caused as a result of confusing these kind of conditions with those which negate the spirit of the contract.

Claim of Marriage

If a man claims having married a woman and she repudiates the claim, or the woman claims so and the man repudiates it, the burden of proof will lie on the claimant and the party negating the claim will take an oath.

The schools concur regarding an acceptable proof that it requires the testimony of two just men. The evidence of women alone or along with a man is not acceptable except to the Hanafi school which considers the evidence of a just man and two just women as acceptable. Therefore, the *'adalah* of witnesses is necessary according to the Hanafi school, at the time of establishing the fact of marriage when any of the parties negates or contends it, but not a condition at the time of conclusion of the marriage contract.

The Hanafi and the Imamiyyah schools consider the testimony of a witness as sufficient without his mentioning any conditions and details of the marriage. But the Hanbali school considers it necessary that the witness describe the conditions of marriage because there is a divergence of opinion regarding the conditions and it is possible for a witness to believe in the validity of a marriage whereas it may have been actually invalid.

The Imamiyyah, the Hanafi, the Shafi'i and the Hanbali schools regard a marriage as proved even if a few people have knowledge of it and it is not necessary that it be commonly known.

Does the Living Together of a Couple Prove Marriage?

From time to time claims of marriage are brought before Shari'ah courts and often the claimant brings witnesses to prove their living together and having a common residence in the manner of a husband and wife. The question now is, does this prove marriage or not?

On the face of it, it can be said that marriage is prima facie considered as established unless the contrary is proved. This means that the living together of a man and woman apparently establishes marriage, and this conclusion compels the acceptance of the claimant's contention unless he is proved to lie. Apart from this, to decide the contention of the claimant claiming marriage as a lie is very difficult on the basis of the Imamiyyah view which considers the presence of witnesses as not necessary at the time of marriage. But this prima facie conclusion in favor of the claimant is contrary to the general rule according to which every event—marriage or something else—whose occurrence is doubtful is assumed not to have occurred unless there is evidence to the contrary.

Accordingly, the stand of the respondent, repudiating the claim of marriage, becomes congruent with the general rule. Therefore, the proof of marriage will be demanded from the claimant, and in the event of his failure to do so the respondent will take an oath and the claim will be dismissed.

This way of settling a claim is the right approach which corresponds with the rules of the Shari'ah, because the Imamiyyah scholars accept the rule that, when there is a conflict between a prima facie conclusion and a general rule, the rule will be given precedence and the prima facie conclusion will not be given credence without additional proof in its favor and there is no such proof in this case.

When it is known that a marriage contract has been recited, but there is a doubt regarding its having been carried out correctly, the contract will be undoubtedly considered valid. But when there is a doubt as regards the occurrence of the contract itself, it is not possible to substantiate it on the strength of the social intercourse or co-residence of the two.

A question can be raised here: The principle that the act of a Muslim is to be considered as valid on the face of it, compels the acceptance of the claim of the person claiming marriage by giving precedence to *halal* over *haram* and to good over evil. We are also commanded as regards every act in which there is a possibility of it being valid or invalid, that we rule out the possibility of its invalidity and give credit to the possibility of its validity.

The reply is that, the consideration of the act of the claimant as valid in the present problem does not prove marriage, and that which is proved is that the two have not committed any *haram* by social intercourse and sharing a common residence. The absence of any ground to consider their association as illegitimate may be due to marriage or due to a misconception (*shubhah*) on their part about the legitimacy of marriage, such as when both of them imagine it as *halal* and later on discover it to be *haram* (details of this will come later while discussing doubtful *nikah*). It is obvious that a general premise does not prove a particular one. For Instance, when you say, "There is an animal in the house," it does not prove the presence therein of a horse or a deer. In the same manner, here, when a man has social intercourse with a woman, not knowing the cause we may say, "She is his wife," but we should say that, "They have not committed *haram*," for it is possible that their associating with one another may be the result of marriage or the result of a misconception of marriage.

We shall give another example to further clarify the point. If you hear a passer-by say something without knowing whether that utterance is a curse or a greeting, it is not permissible for you to consider it a curse. Also, in such a situation it is not binding on you to return the greeting, because you are not sure of the greeting. But if you are certain that he greeted you and doubt whether it was meant as a greeting or intended to ridicule, it is binding upon you to return the greeting, considering it to be a genuine greeting and by giving precedence to good over evil. Our problem is also like this. Even if living together be considered valid, it does not prove the presence of a contract. But if we are sure about the occurrence of a contract and doubt only its validity, we will consider the contract as valid without any hesitation.

In any case, the social intercourse by itself does not prove anything, but it supplements and strengthens any other proof available. The decision in such a situation depends upon the view, satisfaction, and assessment of the judge. on the condition that he does not consider their living together as an independent proof in itself for basing his judgement. [1](#)

The above-mentioned conclusion was as regards the establishment of marriage. But as regards children, the rule of considering the act of a Muslim as valid compels the regarding of the children as legitimate at all times, because the living together of the parents is either the result of marriage or the result of a false impression of marriage, and the children born due to such false impression are equal in status to children born of marriage for all legal purposes. Therefore, if a woman has claimed a man as her lawful husband and also of having a child by him, while the man refutes marriage but acknowledges the child is his, his claim will be accepted because it is possible that the child was born due to a false impression of marriage.

To conclude, it needs to be mentioned that this problem is based on the supposition that witnesses are not required for concluding a marriage contract, as is the Imamiyyah view. But according to the other schools, it is for the party claiming marriage that it mentions the name of the witnesses, and if the party pleads its inability to present the witnesses due to their death or absence, it is possible that the above-mentioned criterion be applied.

It is also necessary to point out that the living together does not prove marriage when there is contention and disagreement to that effect; but when there is no such disagreement; we settle the claim of inheritance and it's like by giving credit to the possibility of marriage, and on this issue there is a consensus among the schools.

[1](#). Apart from this, the statements of the legists in al-Bulghah, al-Shara'i, and al-Jawahir (chapter on marriage) regarding the question at hand indicate that living together prima facie shows the presence of marriage, and this is not farfetched.

The Prohibited Degrees of Female Relations (al-Muharramat)

One of the conditions of a valid marriage contract is that the woman be free from all legal obstacles, which means that she be competent to contract marriage. The restrictions are of two kinds: the prohibition due to consanguinity and those due to other causal factors. The first include seven categories which permanently prohibit marriage. Of the second, ten categories prohibit marriage permanently and others only temporarily.

Consanguinity (al-nasab)

The schools concur that the female relatives with whom marriage is prohibited are of seven kinds:

1. Mother, which includes paternal and maternal grandmothers.
2. Daughters, which includes granddaughters how low so ever.
3. Sisters, both full and half.
4. Paternal aunts, which includes fathers' and grandfathers' paternal aunts.
5. Maternal aunts, which includes fathers' and grandfathers' maternal aunts.
6. Brother's daughters how low so ever.
7. Sister's daughters how low so ever.

The above prohibition has, its origin in the following verse of the Qur'an:

حُرِّمَتْ عَلَيْكُمْ أُمَّهَاتُكُمْ وَبَنَاتُكُمْ وَأَخَوَاتُكُمْ وَعَمَّاتُكُمْ وَخَالَاتُكُمْ وَبَنَاتُ الْأَخِ وَبَنَاتُ الْأُخْتِ

Forbidden to you are your mothers and your daughters und your sisters and your paternal aunts and your maternal aunts and brother's daughters and sister's daughters... (4:23)

These were the prohibited degrees of relations as a result of consanguinity. Those which are the result of causal factors (*al-sabab*) are as follows:

Al- Musaharah (Affinity)

Affinity is the relationship between a man and a woman which forbids marriage between them; it includes the following:

1. The schools agree that the father's wife is forbidden for the son and the grandson how low so ever by the sole conclusion of the marriage contract irrespective of the establishment of sexual contact. The origin of this concurrence is this verse of the Qur'an:

وَلَا تَنْكِحُوا مَا نَكَحَ آبَاؤُكُمْ مِنَ النِّسَاءِ

And marry not women whom your fathers married... (4:22)

2. The schools concur that the son's wife is forbidden for the father and grandfather, how high so ever, merely by the conclusion of the contract. This view is based on the following verse of the Qur'an:

وَحَلَائِلُ أَبْنَائِكُمُ الَّذِينَ مِنْ أَصْلَابِكُمْ

...And the wives of your sons who are of your own loins... (4:23)

3. The schools concur that the wife's mother and her grandmother how high so ever, is forbidden on the mere conclusion of the contract, though sexual contact may not have been established as per this verse of the Qur'an:

وَأُمَّهَاتُ نِسَائِكُمْ

... And the mothers of your wives... (4:23)

4. The schools agree that marriage with the wife's daughter is not forbidden merely on the conclusion of the contract, and they consider it permissible for a man, if he divorces that wife before sexual intercourse, or before looking at her or touching her with a sexual intent, to marry her daughter on the authority of this verse of the Qur'an:

وَرَبَائِبُكُمُ اللَّاتِي فِي حُجُورِكُمْ مِنْ نِسَائِكُمُ اللَّاتِي دَخَلْتُمْ بِهِنَّ

... And your step-daughters who are in your guardianship, (born) of your wives to whom you have gone in... (4:23)

The condition **فِي حُجُورِكُمْ** explains the general situation. The schools concur that the daughter is forbidden when a person marries her mother and establishes sexual contact with her. But the schools differ as regards the daughter being forbidden when the marriage has been concluded and sexual contact has not been established but when he has looked at her or touched her with a sexual intent.

The Imamiyyah, the Shafii and the Hanbali schools are of the view that the daughter would be forbidden only on sexual intercourse and looking and touching with or without sexual intent does not have any effect. The Hanafi and the Maliki school consider both, looking and touching with sexual intent, as sufficient causes for prohibition and are like sexual intercourse in all aspects. (Bidayat al-mujtahid vol. 2; *al-Fiqh 'ala al-madhab al-'arba'ah*, vol. 4, the chapter on marriage)

There is a consensus among the schools that the establishment of sexual contact due to a mistake or a false impression is like marriage itself in establishing affinity and creating its related prohibition. The meaning of 'sexual contact due to mistake' is occurrence of sexual contact between a man and a woman under the false impression that they are lawfully wedded followed by the discovery that they are strangers and that the contact was a result of a mistake of fact. As a consequence of this latter knowledge, the two will separate immediately and the woman will observe an obligatory period of *'iddah*¹ and a reasonable *mahr* will become *wajib* on the man. Affinity would be established as a result, but the two will not inherit each other and the woman will not have the privilege of alimony (*nafaqah*).

II. Consanguinity Between Wives

The schools concur that combining two sisters in marriage at the same time is forbidden according to this verse of the Qur'an:

وَأَنْ تَجْمَعُوا بَيْنَ الْأُخْتَيْنِ

...And that you should have two sisters together... (4:23)

The four schools agree that a man cannot combine in marriage neither a woman and her paternal aunt nor a woman and her maternal aunt because they have a general rule that it is not permissible to marry two women of whom if one were to be a male it would be haram for him to marry the other. Therefore, if we suppose the paternal aunt a male, she would become a paternal uncle and it is not permissible for an uncle to marry his niece and if we suppose the niece a male, she would become a nephew and it is not permissible for a nephew to marry his aunt. The same rule applies to a maternal aunt and her sister's daughter.

The Khawarij considered as permissible combining as wives the aunt and her niece, irrespective of whether the aunt has granted permission for marrying her niece or not.

Among the Imamiyyah legists there is a divergence of opinion. Some of them concur with the view of the other four schools, but most of them are of the opinion that if the niece is the first to be married. It is permissible for him to marry her paternal or maternal aunt even if the niece does not grant permission for this marriage. But if the paternal or the maternal aunt has been first married, the marriage with her niece is permissible only by her permission. The proponents of the above view have based their argument on the following verse of the Qur'an:

وَأَجِلَّ لَكُمْ مَا وَرَاءَ ذَلِكَ

...And lawful to you are (all women) besides those... (4:24)

In this verse, after mentioning those women with whom marriage is forbidden, the rest have been permitted, and this permission extends to combining the aunt and the niece together in marriage, and had it been *Haram* the Qur'an would have explicitly mentioned it as it expressly mentions the prohibition regarding combining two sisters in marriage. As regards the general rule which supposes one of the two women to be a male, it is *istihsan*, which is considered unreliable by the Imamiyyah. Apart from this, Abu Hanifah has considered it permissible for a man to marry a woman and her father's wife despite of the fact that if any of these two were supposed a male, his marriage with the other would not be permissible. Obviously, it is not permissible for a man to marry his daughter or step-daughter, in the same way as it is not permissible for him to marry his mother or his father's wife. (*Kitab ikhtilaf Abi Hanifah*: Ibn Abi Layla, the chapter on marriage)

III Fornication (al-Zina)

It comprises the following issues:

1. The Shafi'i and the Maliki schools consider a man's marrying his daughter born of fornication as permissible and so also marrying his sister, his son's daughter, his daughter's daughter, his brother's daughter, and his sister's daughter, because she is legally a stranger to him and because the law of inheritance does not apply between them, nor the law of maintenance. (al-Mughni. vol. 6, the chapter on marriage)

The Hanafi, the Imamiyah and the Hanbali schools regard marriage with a daughter by fornication as haram (prohibited) as one with a lawful daughter, because. they say, the daughter by fornication is born of his seed and is therefore considered his daughter in the literal sense and by the society in general. Her legal disability to inherit does not negate the fact of her being his daughter: it only negates such legal effects as inheritance and maintenance.

2. The Imamiyyah have observed: He who commits fornication with a woman or establishes sexual contact with her by mistake, while that woman is either married or is observing the *'iddah* period as a

result of a revocable divorce, she would become *haram* for him permanently, i.e. it is forbidden for him to marry her even if she separates from her husband as a result of an irrevocable divorce or death. But if he establishes sexual contact with a woman while she is unmarried or is undergoing the *'iddah* period as a result of the death of her husband or as a result of an irrevocable divorce, she would not be forbidden for him.

According to the four schools, fornication or adultery is no obstacle to marriage between the two, regardless of whether the woman is married or unmarried.

3. According to the Hanafi and the Hanbali schools fornication and adultery establish affinity. Therefore, he who establishes illegitimate sexual contact with a woman, the mother and daughter of that woman will become *haram* for him, and that woman will be *haram* for his father and his son. These schools do not make any difference between the establishments of such illegitimate contact before marriage or after it. Therefore, when a person establishes sexual contact with his wife's mother or a son with his father's wife, the wife will become *haram* for her lawful husband permanently; rather, according to the Hanafi book *Multaqa al-'anhur* (volume 1, the chapter on marriage): "If a person intends to wake up his wife for intercourse and his hand reaches her daughter and he caresses her with sexual emotion while she, thinking it to be her mother, entertains it, her mother will become *haram* for him permanently. The same will apply to a woman who intends to wake up her husband and (mistakenly) caresses his son from another wife."

The Shafi'i school is of the opinion that fornication does not establish affinity in the light of this tradition:

الحرام لا يحرم الحلال

A *haram* does not illegitimate a *halal*.

The Malikis have two views on this question.

One of them favors the Shafi'i view, the other, the Hanafi view. The Imamiyyah consider fornication as capable of creating the prohibition pertaining to affinity. Thus, he who fornicates with a woman, makes her *haram* for his father and his son. But as regards adultery after marriage, they observe that it does not illegitimate the lawful conjugal ties. Thus he who commits adultery with his wife's mother or his wife's daughter, his marriage with her stays as it is. The same applies to a father who commits adultery with his son's wife or a son with his father's wife; in both the cases the wife would not be considered *haram* for her lawful husband.

IV. Number of Wives

The legal schools concur that it is permissible for a man to have four wives at a time², but not a fifth as

per the verse:

فَأَنْكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَى وَثُلَاثَ وَرُبَاعَ

... **Then marry such women as seem good to you, two and three and four... (4:3)**

When any one of those wives is released from the bonds of marriage, either due to her death or divorce, it becomes permissible for him to marry another. The Imamiyyah and the Shafi'i schools say: When a man gives one of his wives a revocable divorce, it is not permissible for him to marry another till the expiry of the *'iddah* period. But if it be an irrevocable divorce it is permissible for him to do so. Also, it is permissible that he marry his irrevocably divorced wife's sister during his wife's *'iddah* because an irrevocable divorce prohibits marriage and breaks the marital bond.

According to the other schools, it is not permissible for him to marry a fifth wife or the sister of his divorced wife until the expiry of the *'iddah* period irrespective of whether the divorce is a revocable or an irrevocable one.

V. Li'an

When a man accuses his wife of adultery or denies the paternity of her child, and she denies the charge and he has no proof to offer, it is permissible for him to pronounce the *lian* against her. The method of taking the oath of condemnation is that, first the man swears by Allah four times that he is indeed speaking the truth in accusing her, and the fifth time that the curse of Allah fall on him should he be lying. Then the woman will swear four times by Allah that he is lying, and the fifth time that the wrath of Allah be on her if he be speaking the truth.

If the man refuses to pronounce the *lian*, he is punished with the *hadd* (for *qadhf*); but if he takes the oath of *li'an* and the woman refuses to pronounce the *lian*, she is liable to the *badd* for adultery. If both of them pronounce *lian* against each other, none is liable to *hadd* and the two will separate and the child whose paternity he had denied would not be given to him.

The source of the above discussion is these verses of the *Surat al-Nur*:

وَالَّذِينَ يَرْمُونَ أَزْوَاجَهُمْ وَلَمْ يَكُنْ لَهُمْ شُهَدَاءُ إِلَّا أَنْفُسُهُمْ فَشَهَادَةُ أَحَدِهِمْ أَرْبَعُ شَهَادَاتٍ بِاللَّهِ ۖ إِنَّهُ لَمِنَ الصَّادِقِينَ

وَالْخَامِسَةَ أَنَّ لَعْنَتَ اللَّهِ عَلَيْهِ ۖ إِنْ كَانَ مِنَ الْكَاذِبِينَ

وَيَدْرَأُ عَنْهَا الْعَذَابَ أَنْ تَشْهَدَ أَرْبَعَ شَهَادَاتٍ بِاللَّهِ ۖ إِنَّهُ لَمِنَ الْكَاذِبِينَ

وَالْخَامِسَةَ أَنَّ غَضَبَ اللَّهِ عَلَيْهَا إِنْ كَانَ مِنَ الصَّادِقِينَ

If a man accuses his wife but has no witnesses except himself, he shall swear four times by Allah that his charge is true, calling down upon himself the curse of Allah if he is lying. But if his wife swears four times by Allah that his charge is false and calls down His curse upon herself if it be true, she shall receive no punishment. (24:6-9)

There is consensus among the school that it is *wajib* for the two to separate after the *lian*. But they differ as to whether such a wife is permanently *haram* for her husband so as to make it impermissible for him to remarry her later, even if he denies his own charge, or if she is *haram* only temporarily so as to permit him to marry her after withdrawing his own accusation.

The Shafi'i, the Imamiyyah, the Hanbali and the Mailiki schools forbid her permanently for him even if he denies his own accusation. The Hanafi school considers separation due to the *lian* like divorce; it would not make her *Haram* permanently because the prohibition arises from the *lian* and is removed on the withdrawal of his accusation. (*al-Mughni*, vol. 7; *al-Sha'rani*, *al-Mizan*, the chapter on *mula'ana*)

VI. Number of Divorces

The schools concur that if a man divorces his wife for the third time having resumed conjugal relations twice earlier, she will become *haram* for him and will not become *halal* for him again unless she marries another husband. This requires that she observe the *'iddah* after her third divorce and after the completion of this period consummate a permanent marriage with another man. Then if she separates from the second husband, due to his death or as a result of divorce, and completes the *'iddah*, it becomes permissible for the first to remarry again. After this, if he again repeats the same sequence and divorces her three times, she becomes *haram* for him until she consummates marriage with another man. Similarly, she becomes *haram* for him after every third divorce and becomes *halal* by marrying another, even if she be divorced a hundred times. Accordingly, every third divorce is considered a temporary not a permanent obstacle to marriage.

But the Imamiyyah observe: If a woman is divorced nine times in the *talaq al-'iddah* form she becomes *haram* permanently. By *talaq al-'iddah* they mean that the husband first divorces his wife, then resumes conjugal and sexual relations: then he divorces her again during another period when she is not having menses, then again resumes conjugal and sexual relations; then divorces her in yet another period when she is free from menses. Now she will not be *halal* for him until she consummates a permanent marriage with another man. Now, if this first husband marries her again after her separating from that second husband and divorces her three times in the *talaq al-'iddah* form, she becomes *halal* again by consummating marriage with another. If he then marries her (for the third time) and divorces her in the *talaq al-'iddah* form, the divorces completed, she will become *haram* for him permanently. But when the divorce is not a *talaq al-'iddah*, such as when he returns to her and then divorces her without

establishing sexual relations or marries her by another fresh contract after her completing the *'iddah*, she will not become *haram* for him even if she is divorced a hundred times.

VII. Difference of Religion

The schools agree that it is not permissible for a male Muslim nor for a female Muslim to marry those who do not neither a revealed nor a quasi-revealed scripture, or those who worship idols, fire or the sun, the stars and other forms, or non-believers who do not believe in Allah. The four schools concur that marriage is not permissible with those who a quasi-scripture, such as the Zoroastrians. By 'quasi-scripture' is meant a scripture which is said to have originally existed, as in the case of the Zoroastrians, but was changed, causing it to be lifted from them.

According to the four schools, it is permissible for a Muslim man to marry a woman belonging to the Ahl al-Kitab, which implies Christians and Jews. But it is not permissible for a Muslim woman to marry a man belonging to the Ahl al-Kitab. The Imamiyyah scholars agree with the other four schools that a Muslim woman cannot marry a man belonging to the Ahl al-Kitab, but differ among themselves regarding the marriage of a Muslim man with a female belonging to the Ahl al-Kitab. Some of them hold that intermarriage, either permanent or temporary, is not permissible. They base their argument on these verses of the Qur'an:

وَلَا تُمْسِكُوا بِعِصَمِ الْكَوَافِرِ

...And hold not to the ties of marriage of unbelieving women... (60: 10)

وَلَا تَنْكِحُوا الْمُشْرِكَاتِ حَتَّى يُؤْمِنَ

... And do not marry the idolatresses until they believe... (2:221)

Here they interpret shirk as kufr and not having faith in Islam. According to the Qur'an the Ahl al-Kitab are not *mushrikun*, as this verse shows:

لَمْ يَكُنِ الَّذِينَ كَفَرُوا مِنْ أَهْلِ الْكِتَابِ وَالْمُشْرِكِينَ مُنْفَكِينَ حَتَّى تَأْتِيَهُمُ الْبَيِّنَةُ

The unbelievers among the People of the Book and the pagans did not break off (from the rest of their communities) until the proof came unto them. (98: 1)

Others are of the opinion that such a marriage, both temporary and permanent, is permissible, and as a proof they quote the following verse of the Qur'an:

وَالْمُحْصَنَاتُ مِنَ الْمُؤْمِنَاتِ وَالْمُحْصَنَاتُ مِنَ الَّذِينَ أُوتُوا الْكِتَابَ مِنْ قَبْلِكُمْ

...And the chaste from among the believing women and the chaste from among those who have been given the Book before you (are lawful to you)... (5:5)

This verse, according to them, explicitly permits marriage with women of the Ahl al-Kitab. The third group, seeking to reconcile the texts in favor and against such intermarriage, only permits temporary not permanent marriage. They take those texts which forbid such marriage to imply permanent marriage, and those which permit it are taken to imply temporary marriage. On the whole most of the contemporary Imamiyyah scholars consider permanent marriage with a woman belonging to the Ahl al-Kitab as permissible and the Imami Shari'ah courts in Lebanon marry a Muslim male to a female belonging to the Ahl al-Kitab. They register such a marriage with all the legal effects proceeding therefrom.

All schools, except the Maliki, recognize the marriages of all non-Muslims as valid if performed according to their tenets. The Muslims confer upon such a marriage all the legal effects of a valid marriage without differentiating between the Ahl al-Kitab and others—even if they permit marriage within prohibitive limits of consanguinity. The Malikis consider such a marriage as invalid because, they explain, it would be invalid if performed by a Muslim. Therefore, the same is true of non-Muslims. This stance of the Malikis is not reasonable, because it makes non-Muslims scared of Islam and leads to anarchy and disruption of the social order. Apart from this, the Imamiyyah have recorded these traditions which confirm their stance:

...من دان بدين قوم لزمته أحكامهم

For one who follows the religion of a community, its rules would be binding upon him...

وألزموهم بما ألزموا به أنفسهم

And require them to follow that which they consider binding upon themselves. (al-Jawahir, chapter on divorce)

Litigation Between the Ahl al-Kitab

In the Imamiyyah work, *al-Jawahir* (chapter on *jihad*), there is a useful discussion which is relevant here. Its summary is as follows:

If two non-Muslims litigate before a Muslim judge, should he give his judgment according to the laws of their religion or according to the Islamic law? The answer is: If the litigants are *dhimmis*, the judge has

discretion to either judge according to the Islamic law or to dismiss the case without any hearing. The following verse of the Qur'an gives this discretion:

فَأَحْكُمْ بَيْنَهُمْ أَوْ أَعْرِضْ عَنْهُمْ ۚ وَإِنْ تُعْرِضْ عَنْهُمْ فَلَنْ يَضُرُّوكَ شَيْئًا ۚ وَإِنْ حَكَمْتَ فَأَحْكُمْ بَيْنَهُمْ بِالْقِسْطِ

...Judge between them or turn aside from them, and if you turn aside from them, they shall not harm you in any way; and if you judge, judge between them with fairness... (5:42)

It was asked of al-'Imam al-Sadiq ('a) regarding two men of the Ahl al-Kitab between whom there is a dispute and they take the case before their own judge and when this judge judges between them, the one against whom the judgment was given refuses to comply and asks that the issue be settled before the Muslim judge. The Imam ('a) replied, "The judgment shall be according to the law of Islam."

If the litigants are those who are at war with the Islamic State (*harbi*), the judge is not obliged to settle their dispute and to protect some of them against others, as he is in the case of *dhimmis*.

If one of the litigants is a *dhimmi* or a *harbi* and the other a Muslim, the judge is obliged to accept the suit and to judge between them according to the Islamic law, in accordance with the Divine command:

وَأَنْ أَحْكُمَ بَيْنَهُمْ بِمَا أَنْزَلَ اللَّهُ وَلَا تَتَّبِعْ أَهْوَاءَهُمْ وَاحْذَرْهُمْ أَنْ يَفْتِنُوكَ عَنْ بَعْضِ مَا أَنْزَلَ اللَّهُ إِلَيْكَ

Pronounce judgement between them in accordance with Allah's revelations and do not be led by their desires. Take heed lest they should turn you away from a part of that which Allah has revealed to you... (5:49)

Moreover, if a *dhimmi* woman sues her husband, the judgment will be given according to the Islamic law.

The above discussion makes it clear that Muslims should recognize as valid all those transactions of non-Muslims which are in conformity with their religion, as long as they do not refer it to Muslims for a decision. But if they seek a decision from Muslims, it is *wajib* for them to decide, at all times, according to the Islamic law. As is understandable from the verses of the Qur'an and the traditions, it is also *wajib* to judge between them in accordance with the norms of justice and fairness.

VIII. Fosterage (al-Ridi')

All the schools concur regarding the veracity of the tradition:

يحرم من الرضاع ما يحرم من النسب

(That which becomes *haram* due to consanguinity becomes *haram* due to fosterage). According to this tradition fosterage includes the same limits of relationship prohibitive to marriage as consanguinity. Thus any woman who as a result of breast-feeding becomes a foster-mother or a foster daughter or a sister or an aunt (both maternal and paternal) or a niece, marriage with her is *haram* according to all the schools. But the schools differ regarding the number of breast-feedings which cause the prohibition and the conditions applicable to the foster-mother and the foster-child.

1. The Imamiyyah say: It is necessary that the woman's milk be the result of lawful sexual relations, and if it secretes without marriage or as a result of a pregnancy due to adultery, the prohibition does not come into effect. It is not necessary that the woman remain conjugally bound to the person who is the cause of her turning lactiferous. Even if he divorces her or dies while she is pregnant or lactiferous, the prohibition comes into effect if she breast-feeds a child, even though she marries another and has intercourse with him.

The Hanafi, the Shafi'i and the Maliki schools are of the opinion that there is no difference between the woman being a virgin or a widow and between her being married or unmarried as long as she has milk with which she feeds the child. According to the Hanbali school the legal effects of fosterage will not follow unless the milk is the result of a pregnancy, and they do not set a condition that the pregnancy be due to lawful intercourse (Muhammad Muhyi al-Din 'Abd al-Hamid in *al-'Ahwal al-shakhsiyyah*).

2. The Imamiyyah consider it necessary that the child should have sucked milk from the breast, so if it is dropped in his mouth or he drinks it in a manner other than direct sucking, the prohibitive relationship would not be established. The other four schools consider it sufficient that the milk reach the child's stomach, whatever the manner (*Bidayat al-mujtahid ; Hashiyat al-Bajuri, "Bab al-rida"*). According to *al-Fiqh 'ala al-madhahib al-'arba'ah*, the Hanbalis consider it sufficient that the milk reach the child's stomach, even if through his nose.

3. According to the Imamiyyah, the prohibitive relationship is not realized unless the child is suckled one day and one night in a manner that his exclusive diet during this period be the milk of that woman without any other food, or is breast-fed fully fifteen times uninterrupted by breast-feeding by another woman. In the book *al-Masalik* the giving of food has been considered effect-less. The reason given for the above-mentioned quantity is that it leads to the growth of flesh and hardens the bones.

The Shafi'i and the Hanbali schools regard five breast-feedings as the minimum necessary. The Hanafi and the Maliki schools consider that the prohibitive relationship is established simply by being breast-fed irrespective of the quantity fed. be it more or less or even a drop. (*al-Fiqh 'ala al-madhahib al-'arba'ah*)

4. The Imamiyyah, the Shafi'i, the Maliki and the Hanbali schools have mentioned the period of breast feeding to be up to two years of the age of the child. The Hanafi school considers it to be two and a half years.

5. According to the Hanafi, the Maliki, and the Hanbali schools, it is not necessary that the foster-mother

be alive at the time of feeding. Therefore, if she dies and the child crawls up to her and sucks from her breast, it is sufficient to establish the prohibitive relationship. But the Malikis have gone further and observed that even if there is a doubt as to that which the child has sucked, whether it is milk or not, the prohibitive relationship would be established. (*al-Fiqh 'ala al-madhahib al-'arbaah*)

The Imamiyyah and the Shafi'i schools consider it necessary that the woman be alive at the time of breast-feeding and if she dies before completion of the minimum feedings, the prohibitive relationship would not be established.

The schools concur that the *sahib al-laban*, i.e. the husband of that woman, will become the foster-father of the breast-fed child, and between the two all those things which are *haram* between fathers and sons will be *haram*. His mother will become a grandmother for the breast-fed child, and his sister the child's aunt in the same manner as the woman who breast-feeds the child becomes his mother and her mother his grandmother and her sister his aunt.

IX. Al-'Iddah

There is consensus among the schools that marriage with a woman undergoing *'iddah* is not permissible and she is like a married woman in all aspects, irrespective of whether she is undergoing *'iddah* due to the death of her husband or as a result of divorce, revocable or irrevocable, in accordance with the following verses of the Qur'an:

وَالْمُطَلَّاتُ يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ ثَلَاثَةَ قُرُوءٍ

And the divorced women should keep themselves in waiting for three menstrual courses... (2:228)

وَالَّذِينَ يُتَوَفَّوْنَ مِنْكُمْ وَيَذُرُونَ أَزْوَاجًا يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ أَرْبَعَةَ أَشْهُرٍ وَعَشْرًا

And (as for) those of you who die and leave wives behind, they (the wives) should keep themselves in waiting for four months and ten days... (2:234)

The meaning of *al-tarabbus* is to be patient and to wait.

The schools differ regarding one who marries a woman during her *'iddah*, as to whether she will become *haram* for him. According to the Maliki School she becomes *haram* for him permanently if intercourse takes place, otherwise not. According to the Hanafi and the Shafi'i schools the two should separate, there being no impediment to remarriage on completion of the *'iddah*. (*Bidayat al-mujtahid*)

It is mentioned in the seventh part of al-Mughni, a book of the Hanbali s (chapter on *'iddah*): "If a person

consummates marriage with a woman during her *'iddah* and both know it and know that marriage is *haram* during *'iddah*, both of them would be considered fornicators and liable to punishment." In the sixth part of the same book (chapter on marriage) it is stated: "If a woman fornicates, marriage with her will not be *halal* for one who knows it unless these two conditions are fulfilled: completion of the *'iddah* and penitence for fornicating... If these two conditions are fulfilled, there is no obstacle to her marriage with the fornicator or someone else." This shows that according to the Hanbalis, marriage during *'iddah* does not result in permanent prohibition to marriage.

According to the Imamiyyah, marriage with a woman during *'iddah*, after a revocable or an irrevocable divorce, is not permissible, and if one marries her with the knowledge of the *'iddah* and the related prohibition, the contract is void and she would become *haram* for him permanently, irrespective of sexual contact. But if he has no knowledge of the *'iddah* and of such marriage being *haram*, she would not become *haram* permanently unless he has had intercourse with her. If he has not had intercourse, only the contract would become void, and he may marry her after the completion of the *'iddah* (al-Masalik, vol. 2, chapter on divorce).

X. Al-'Ihram

The Imamiyyah, the Shafi'i, the Maliki and the Hanbali schools say: A *muhrim* for Hajj or 'Umrah, man or woman, cannot marry nor conclude marriage on behalf of another acting as a guardian or an agent. The marriage, if performed, is void in accordance with the tradition:

لا ينكح المحرم ولا ينكح ولا يخطب

A muhrim may not propose, nor marry, nor conclude marriage for another.

The Hanafi school considers *ihram* as no hindrance to marriage. The Imamiyyah hold that if a marriage is performed without the knowledge of the prohibition during the state of *ihram*, it will make the woman temporarily *haram*. When they are relieved of *ihram*—or he, when the woman had not been in the state of *ihram* at all—it is permissible for him to marry her. But if concluded with the knowledge of the prohibition, the two should separate. and she would become permanently *haram* to him. The other schools hold that she would become *haram* only temporarily. (al-'Allamah al-Hilli in *al-Tadhkirah*, vol. 1, chapter on Hajj; *Bidayat al-mujtahid*, chapter on marriage).

¹ 'Iddah is a period of waiting prescribed by the Shari'ah to be observed by a woman on divorce or the death of her husband. The *'iddah* for divorce is three months (three menstrual cycles): for death, four months and ten days. (Tr.)

² It is strange that al-Shaykh Abu Zuhrah, in al-'Ahwal al-shakhsiyyah, page 83, ascribes it to some Shi'ahs that they consider it valid to have nine wives at a time on the basis that *mathna*, *thulath*, and *ruba'* (in the Qur'anic verse about the permissible number of wives) i.e. two, three and four, adds up to a total of nine! Firstly, there is no source for this statement. Al-'Allamah al-Hilli, in *al-Tadhkirah*, says, "This view is attributed to some Zaydiyyah, but they categorically deny it, and I have not seen anyone expressing this view."

Matrimonial Guardianship

Wilayah in marriage implies the legal authority granted to a competent guardian to be exercised over one under a legal disability for his or her advantage. This discussion comprises the following issues:

Wilayah over a Mature and Sane Girl

The Shafi'i, the Maliki and the Hanbali schools are of the opinion that the *wali* (guardian) has the sole authority with respect to the marriage of his sane and major female ward if she is a maiden. But if she is a *thayyib* (that is, a girl who has had sexual intercourse), his authority is contingent on her consent. Neither he can exercise his authority without her consent, nor she can contract marriage without his permission. It is *wajib* that the *wali* take the responsibility of concluding the contract, which would not conclude if the woman recites it, though it is essential that she consent.

The Hanafis regard a sane, grown-up female as competent to choose her husband and to contract marriage, irrespective of her being a maiden or a *thayyib*. No one has any authority over her, nor any right to object, provided she chooses one her equal and does not stipulate less than a proper dower (*mahr al-mithl*) for the marriage. If she marries someone who is not her equal, the *wali* has the right to object and demand the annulment of the contract by the *qadi*, and if she marries her equal but for less than the proper dower, the *wali* has the right to demand annulment if the husband does not agree to a proper dower. (Abu Zuhrah, *al-'Ahwal al-shakhsiyyah*)

Most of the Imamiyyah scholars are of the view that a sane girl of full age, on maturing, is fully competent to decide her contractual as well as non-contractual affairs and this includes marriage, regardless of her being a maiden or *thayyib*. Therefore, it is valid for her to contract for herself or on behalf of others, directly or by appointing a deputy, by making an offer or giving her acceptance, and irrespective of her having or not having a father, a grandfather, or other relatives. It is of no consequence whether the father agrees or not. The social status of the girl, higher or lower, and whether she marries a respectable or an abject person, is of no consequence. No one has a right of objection in this regard. Thus, she is in all respects on a par with a male, without any difference whatsoever. The scholars support this argument by quoting the following verse of the Qur'an:

فَلَا تَعْضُلُوهُنَّ أَنْ يَنْكَحْنَ أَزْوَاجَهُنَّ

... ***Then do not prevent them from marrying their husbands...*** (2:232)

The following tradition of the Prophet(S) narrated by Ibn al-'Abbas also supports their view:

An aym has more authority over him/herself than his/her guardian.

'Aym' is one who is without a mate, man or woman; a maiden or *thayyib*.

The scholars have also put forth a rational argument and observed that reason dictates that every human being has total liberty regarding his own affairs and no other person, regardless of his being a near or distant relative, has any authority over him. Ibn al-Qayyim has well observed when he says: "How can it be legitimate for a father to marry his daughter without her consent to anyone of his choice, while she disapproves such a marriage and regards him as the most detestable person in the world, and yet he should forcefully marry her and hand her over as a captive to him!..."

Wilayah in Cases of Minority, Insanity and Idiocy

The legal schools concur that the guardian is authorized to contract marriage on behalf of his minor or insane ward (male or female). But the Shafi'i and the Hanbali schools have limited this authority to the case of a minor maiden, and as regards a ward who is minor *thayyib*, they do not recognize any such authority for the guardian. (al-Mughni, vol. 6, Chapter on Marriage)

The Imamiyyah and the Shafi'i schools consider only the father and the paternal grandfather as competent to contract marriage on behalf of a minor ward. The Malikis and the Hanbalis further limit it to the father. The Hanafi School extends it to other relatives, even if it be a brother or an uncle.

The Hanafi, the Imamiyyah, and the Shafi'i schools regard a contract of marriage with an idiot as invalid without the consent of his guardian. The Maliki and the Hanbali schools consider it valid, and the consent of the guardian is not required. (*al-Tadhkirah*, vol. 2; *al-Mughni*, vol. 2, chapter on *hijr*)

The Order of Priority in Guardianship

The Hanafis give priority to the son as regards *wilayah* over his mother, even if he be an illegitimate one. After the son, his son is given the right to *wilayah* and then follow: the father, the paternal grandfather, the full brother, the half-brother (paternal), the full brother's son, the half-brother's son, the paternal uncle, the paternal uncle's son, and so on.

From this it is clear that the executor of the ward's father's will does not have matrimonial guardianship even if he has been explicitly given this authority.

The Malikis give priority to the father and after him the *wilayah* goes to the executor of his will. Then comes the turn of the son, even if he be an illegitimate one. Thereafter come the brother, the brother's son, the paternal grandfather, the paternal uncle... and so on. On this order being exhausted the *wilayah*

will finally lie with the *hakim*.

The Shafi'i scholars give the father priority in exercising *wilayah*. After him, the paternal grandfather, the full brother, the half-brother (paternal), the brother's son, the paternal uncle, the paternal uncle's son, and so on, will exercise *wilayah* in the descending order till it finally reaches the *hakim*.

The Hanbalis regard the father, and after him the executor of his will, as those competent to exercise *wilayah*. After these two, the order follows the pattern of inheritance till it finally reaches the *hakim*.

According to the Imamiyyah, only the father and the paternal grandfather—and on some occasion, the *hakim*—are those authorized to exercise *wilayah* with respect to marriage. Both the father and the grandfather are independent in the exercise of their *wilayah* over a minor (girl or boy) or over an adult whose lunacy or idiocy precedes his adulthood. That is, when he/she has been a lunatic or an idiot when a minor and this state has continued into adulthood. But if lunacy or idiocy has resulted after maturity, the father and the grandfather have no authority for contracting marriage on behalf of such an adult. In this case the *hakim* will exercise his *wilayah* despite the presence of the father and the grandfather.

When the father chooses one mate and the grandfather another, the latter's choice shall prevail.

The marriage contracted by the *wali*—be it the father, the grandfather or the *hakim*—comes into effect if it is not against the interests of the ward. If it is, the ward has the option of dissolving the marriage on attaining maturity.

The Hanafis have observed; When the father or the grandfather of a minor girl marries her to a person who is not her equal or for less than *mahr al-mithl*, the marriage will be valid unless it is evident that there has been a misuse of authority. But if such a marriage is concluded on behalf of a minor girl by her *wali* who is neither her father nor her grandfather, the marriage will be considered void *ab initio*.

The Hanbali and the Maliki schools have said: The father may give his daughter in marriage for less than *mahr al-mithl*. The Shafi'i school says that he may not, and if he does so, the daughter has the right to claim *mahr al-mithl*.

The Imamiyyah have said; If the *wali* gives his minor female ward in marriage for less than *mahr al-mithl* or contracts marriage on behalf of his minor male ward for more than such *mahr*, the contract and the *mahr* will both be valid on there being a good reason for doing so. In the absence of such a reason, only the contract will be valid and the validity of the *mahr* will depend upon the ward's agreeing to it after maturity. If the ward does not agree the *mahr* will be reduced to the *mahr al-mithl*.

There is consensus among the schools that a just ruler (*hakim*) can contract marriage on behalf of a lunatic, male or female, if he/she has no wait from among their relatives. This consensus is based on the following tradition:

السلطان ولي من لا ولي له.

The ruler is the wali of him who has no wali.

The Imamiyyah and the Shafi'i schools do not consider the *hakim* competent to exercise *wilayah* over a minor girl. The Hanafi School gives this authority to the *hakim*, but does not consider the contract so concluded as binding. Therefore, the girl can set it aside on maturity. Thus the position of the Hanafis is in fact similar to that of the Imamiyyah and the Shafi'i schools because the *hakim* becomes redundant in this matter. According to the *Maliki* school, the *hakim* is competent to contract marriage on behalf of a minor or a lunatic (male or female) with their equals on their not having any relative to act as *wali*. The *hakim* is also given competence to conclude marriage on behalf of a sane grown-up girl, with her consent.

The schools concur that it is necessary for a *wali*: that he be an adult Muslim male. As to the condition of *'adalah* (justice), it is required in the *hakim* who is acting as *wali*, not for a relative acting as such, except by the Hanbali school which considers *'adalah* as necessary for every *wali* regardless of his being a relative or a *hakim*.

Al-Kafa'ah (Equality)

The meaning of "*al-Kafa'ah*", according to those who consider it as consequential in marriage, is that the man be an 'equal' of the woman in certain things. Moreover, they require *kafa'ah* of men only, because it is not something dis-approvable for a man to marry a woman lower in status as against a woman doing the same.

The Hanafi, the Shafi'i and the Hanbali schools concur in requiring *kafa'ah* in religion (Islam), freedom¹ (i.e. in his not being a slave), profession and lineage. These schools differ regarding *kafa'ah* in prosperity and wealth. The Hanafi and the Hanbali schools recognize it, while the Shafi'i school does not.

The Imamiyyah and the Maliki schools do not accept the notion of *kafa'ah* except in religion, in accordance with the following tradition:

إذا جاءكم من ترضون دينه وخلقه فزوجوه إلا تفعلوه تكن فتنة في الأرض وفساد كبير

When someone, whose faith and conduct is acceptable to you, comes to you with a proposal, then marry him. If you don't, it will result in corruption upon the earth and great discord.

In any case, the condition of *kafaah* in marriage does not harmonize with the following verse of the Qur'an:

إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَاكُمْ

**...Surely the most honorable amongst you in God's sight is the most pious amongst you...
(49: 13)**

The condition of *kafa'ah* contradicts a basic principle of Islam which says:

لا فضل لعربي على عجمي إلا بالتقوى

There is no superiority for an Arab over a non-Arab except on the basis of taqwa (piety).

Also, it is opposed to the practice (sunnah) of the Prophet (S), who ordered Fatimah bint Qays to marry Zayd ibn Usamah and ordered Banu Bayadah to marry Abu Hind, who was a cupper. That is why we see a group of eminent scholars, such as Sufyan al-Thawri, al-Hasan al-Basri, 'al-Karkhi among the Hanafis and Abu Bakr al-Jassas and the followers of these two among the scholars of Iraq' (Ibn 'Abidin, vol. 2, chapter on marriage) disregarding *kafa'ah* as a condition in marriage.

1. By including freedom¹ as one of the conditions of al-kafa'ah, the Hanafi school contradicts one of its own fundamental principles. This school allows the death penalty of a freeman for murdering a slave and that of a slave for murdering a freeman, whereas the other schools, including the Imamiyyah, have said: A freeman may not be killed for killing a slave, but a slave will be killed for killing a freeman. Apart from this, the Hanafis do not consider it necessary that a guardian, in a contract of marriage, be a freeman, and this is contrary to the opinion of some other schools.

Al-'Uyub (Defects)

Is it possible for one of the spouses to dissolve the marriage on finding a certain defect in the other? The schools have differed regarding the defects which justify the dissolution of the marriage and also regarding the rules that apply in these circumstances.

Al-'Anan (Impotence)

Al-'anan is a disease which renders a man incapable of sexual intercourse. All the five schools give the wife the right to dissolve the marriage in such a situation. But in a situation where the husband's inability is limited to his wife and he is capable of intercourse with any other, the schools have different views

regarding the wife's right of dissolving the marriage.

The Imamiyyah have said: The wife's right to dissolve the marriage is not ascertained unless the husband is incapable of having intercourse with any woman whatsoever. Therefore, on his inability being limited to his wife and not others, the right of dissolving the marriage does not accrue,¹ because the source of this right is a rule which gives the power of dissolving marriage to the wife of an impotent man; one who is capable of having intercourse with other women is not considered impotent in the true sense of the word. This is so because impotence is a bodily defect which renders a man incapable of intercourse with any woman, exactly like a blind man who cannot see anything.

In a case where a person is incapable of intercourse, with his wife and not others, then the reason is necessarily an external cause apart from an innate physical defect. The reason could be shyness or fear or a quality of the wife which makes her detestable, or something else. It has also been observed that there are such criminals whose dislike of legitimate (sexual) relations has reached such a degree that they are unable to perform it. On the contrary, their inclination towards *haram* is such that it gives them the required strength and the pleasure of performing it.

According to the Shafi'i, the Hanbali and the Hanafi schools, a person's inability to copulate with his wife gives her the right to dissolve the marriage despite his being capable of it with other women, because in such a case he will be considered impotent with respect to her. Besides, they point out, of what benefit is to the wife if he is capable of having intercourse with other women!

However, there is consensus among the schools that when a woman pleads the impotence of her husband and he denies the charge, the burden of proof will rest on her to prove that he is impotent. On no proof being offered² it will be seen whether she was a maiden prior to marriage or not. If she had been one, she will be referred to female specialists to determine her present condition, and their opinion will be acted upon. In a case where the wife is not a maiden, the husband will be made to take an oath because it is he who denies the charge made by the wife claiming the presence of a defect sufficient for dissolving the marriage. If he takes the oath, the wife's claim will be dismissed. But on his abstaining from taking the oath, the wife will take the oath and then the *qadi* will give him a lunar years' time.

When this period also does not yield any benefit for the wife, the *qadi* will grant her the option of remaining with him or of dissolving the marriage. If she elects to remain with him, the choice is hers and if she desires dissolution, she will herself annul the marriage or the *hakim* on her request. According to the Imamiyyah, the Shafi'i and the Hanbali schools, she does not require a divorce for the separation. The Malikis have said: She will divorce herself by the order of the *qadi*. This observation of the Malikis does in fact mean annulment. The Hanafi school is of the opinion that the *qadi* will order the husband to pronounce the divorce and on his refusal the *qadi* will pronounce the divorce.

The Hanafis, in such a case, regard the payment of the full *mahr* as necessary: the Imamiyyah consider the payment of half the *mahr* as sufficient. The Maliki, the Shafi'i and the Hanbali schools are of the

opinion that she will not be entitled to receive any *mahr*.

If the husband's impotence is subsequent to the consummation (*al-'aqd wa al-dukhl*) of marriage, the wife will not have the choice of dissolving the marriage. However, if impotence occurs after the contract but before the consummation of marriage, she will have the choice of annulment in the same manner as when impotence precedes the contract.³

Al-Jabb and al-Khisa'

Al-jabb means; the state of mutilation of the male organ and by *al-khisa'* is meant castration, either by the removal or by the crushing of both testicles. Both, *al-jabb* and *al-khisa'*, if present before the consummation of marriage, give the wife the immediate right to annul the contract. But if these two defects occur after the consummation of marriage, the right to annul the marriage will not result.

The Hanafis have observed that if the castrated person has the capacity of erection, the right to annul the marriage does not arise, even though ejaculation be absent. The other schools regard ejaculation as a necessary condition regardless of erection, because the inability to ejaculate is a defect similar to impotence.

Al-Shahid al-Thani, in the chapter on marriage of his book *al-Masalik*, volume 1, has narrated that a castrated person can penetrate and have orgasm, and his condition during the act is more intense than a normal male, although he does not ejaculate. This inability is sufficient for rescinding the contract, because the traditions prove the right of the wife of a castrated person to opt for separation.

The Hanafi have said: When the contract is rescinded as a result of any of these two defects, the wife shall be entitled to full *mahr*. The other schools have observed that. if the contract is annulled as a consequence of *al-jabb*, no *mahr* need be paid because marriage has not been consummated. But if *al-khisa'* be the cause for rescinding the contract, she will receive *mahr* only when consummation has occurred.

The Hanafi School does not recognize any ground on which the husband may annul the contract, even though there may be tens of defects in the wife. On the contrary, the wife has the right of annulling the marriage on the basis of any of the three above-mentioned defects, i.e. *al-'anan*, *al-jabb* and *al-khisa'*. Therefore, the Hanafis have nothing to say about the forthcoming defects.

Insanity

The Maliki, the Shafi'i and the Hanbali schools concur that the insanity of one spouse gives the other the right to annul the marriage. But these schools differ regarding the details. The Shafi'i and the Hanbali schools have granted the right of annulment irrespective of whether madness results before or after marriage, and even after consummation. There is no period of waiting before annulment, as required in

the case of impotence.

According to the Malikis, if the insanity occurs before marriage, the right to annul the contract results for the sane spouse, on the condition that he or she suffers harm in living with the other. But if the insanity results after marriage, only the wife has the right to annul the marriage after a probationary period of a year granted by the judge. The husband cannot annul the marriage if his wife loses sanity after marriage.

According to the Imamiyyah, the husband will not annul the marriage where the wife has become insane after marriage, because he has the option of divorce. The wife, on the contrary, can annul the marriage on the husband's insanity, regardless of its preceding the marriage or occurring afterwards, and even after consummation.

The Imamiyyah, the Hanbali, the Shafii and the Maliki schools concur that the wife is entitled to receive full *mahr* if the marriage has been consummated, and nothing if not.

Leprosy and Leukoderma

According to the Imamiyyah, leprosy and leukoderma are among defects that give the husband, not the wife, the right to annul the marriage on condition that such disease be antecedent to the marriage without the husband's knowledge. The right to annul the marriage does not exist for the wife if her husband suffers from any of these two diseases.

The Shafi'i, the Maliki and the Hanbali schools regard these two diseases among the causes that give both the man and the woman an equal right to annul marriage. On one of the spouses suffering from any of these two diseases, the other acquires the right to annul the contract. According to the Shafi'i and the Hanbali schools, the rule that applies in the case of insanity applies here as well.

The Malikis are of the opinion that the wife has the right of annulment equally whether the husband's leprosy antedates the marriage or follows it. As regard the husband's right. he can do so on the wife's being leprous before marriage or at the time of marriage. Regarding leukoderma, both the spouses have the choice of annulment if the disease precedes marriage, and if it occurs after marriage. Only the wife can exercise her choice and not the husband. The milder forms of leukoderma, on their appearance after marriage, do not give rise to any right. The judge gives a probationary period of one lunar year for those suffering from these two diseases for there is a possibility of cure.

Al-Ratq, al-Qarn, al-'Afal & al-'Ijda

...These four defects,⁴ which occur only among women give the husband according to the Malikis and the Hanbalis the right to annul the marriage contract. According to the Shafi'is, only in case of either *al-ratq* or *al-qarn* the husband has such a right; not when the wife suffers from *al-'ifda* or *al-'afal*.

According to the Imamiyyah, such a legal effect follows only in the case of *al-qarn* or *al-'ifda'*¹, not in the case of *al-rarq* or *al-'afal*. They also state that the husband, if he wishes, can annul the marriage contract when he finds blindness or visible lameness in the wife after the conclusion of the contract if he had no knowledge of it before. But either of the defects when found in the husband does not give such a right to the wife.

In our opinion, any disease, regardless of its being peculiar to one of the sexes or its being common to both of them, that is capable of being diagnosed and cured without leaving behind any deformity or defect, does not give rise to any legal right and its occurrence, like its non-occurrence, is legally without any effect. The reason behind this opinion is that, when a disease becomes curable, it becomes similar to any other ordinary disease that may affect any person. The time-honored significance attached by the legists to the above-mentioned defects is because they could not be treated surgically during the past.

Immediacy (al-Fawriyyah)

According to the Imamiyyah School, the choice of annulling the marriage exists so long as it is exercised immediately. Therefore, if the man or the woman, on knowing the defect, does not initiate the proceedings for annulling the marriage, the contract will become binding. The same rule applies for annulling the marriage in a case of deception

The author of *al-Jawahir* has said that ignorance regarding the right to annul the marriage, and even immediacy, is a good excuse, considering that this right has been given without imposing any conditions. He has also observed that the annulment of marriage, in all its forms does not depend on the judge. He has only the power to grant a probationary period in the case of impotence.

¹. Al-Shahid al-Thani, in *al-Masalik*, quotes al-Shaykh al-Mufid: The criterion regarding the annulment of marriage by a woman is that her husband be incapable of intercourse with her irrespective of his ability regarding other women. The general notion supports this view.

². A case of similar nature was brought before me and I referred the respondent for medical check-up. The reply given was: Medical science has not yet devised any method for diagnosing impotence and the inability to have sexual intercourse is the only method of proving it.

³. After this, in the original Arabic text, the author in a note discusses the opinion of the Imami author of *al-Jawahir* relating to a case of allegation of impotence against the husband. This note, which extends over a page of the book, has been deleted in this translation. (Trans.)

⁴. Al-ratq means the presence of obstruction in the vaginal opening making intercourse difficult. al-qarn (lit. horn) means the presence of a horn-like protrusion inside the vaginal passage: Al-'afal means a fleshy obstruction in it. Al-'ifda' means the condition of merging of anal and vaginal passages. (Trans.)

The Option to Include Conditions (Khayar al-Shari)

The difference between *shart al-khayar* and *khayar al-shari* is that in the first the option to annul the marriage be included in the contract. For example, when the bride making the offer says, "I marry myself to you on the condition that I shall have the choice of annulling the marriage within three days," and the groom accepts with a *qabiltu*, or when the bride says, "I marry myself to you." and the groom, while accepting. says, "I accept on the condition that I shall have the choice to annul the marriage within such and such a time;" we see that in both the cases the option to annul the marriage is mentioned in the contract itself, and this, as has been mentioned earlier, results in the contract becoming null and void, according to all the five schools.

But in *khayar al-shari*(the option to annul the marriage is not mentioned as a condition *per se* in the contract. That which is mentioned as a condition in this case, is a particular quality—such as the bride's virginity or the groom's possessing a university degree—in a manner that if the said quality is not found to exist the other shall have the right to annul the contract. The schools have a difference of opinion in this regard.

The Hanafi's have said: If a spouse mentions a negative condition in the contract, such as the absence of blindness or a disease, or a positive condition, such as presence of beauty, virginity, etc., and then the opposite of it comes to light, the contract will be valid. Regarding the condition, it will not apply except when the wife lays down a condition related to *al-kafa'ah*; such as a condition regarding lineage, profession or wealth. Here she has the right to annul the contract. But as regards the husband, any similar condition laid down by him will not be considered applicable because *al-kafa'ah*, as mentioned earlier, is a condition with reference to the husband, not the wife.

The Maliki, the Shafi'i, the Imamiyyah and the Hanbali schools have said: The condition is valid and if not satisfied results in the spouse laying the condition acquiring the option of either upholding or annulling the contract. The following tradition is cited in support of this view:

المسلمون عند شروطهمز

The Muslims are bound to (fulfil) their conditions.

Furthermore, they state, therefore said conditions are not against the spirit of the contract and do not contradict the Qur'an or the Prophet's Sunnah; neither they amount to changing *halal* into *haram* nor vice versa.

Deceit (Tadlis)

The Imamiyyah have discussed under this head the deception of the groom by the bride by either hiding a defect or by claiming a merit which is absent. In the first case, i.e., her hiding a defect and not mentioning it. The right to annul the contract will not accrue if he has not mentioned the absence of such a condition specifically in some way or another. A tradition is narrated from al-'Imam al-Sadiq ('a) which says:

في الرجل يتزوج إلى قوم فإذا امرأته عوراء ولم يبينوا له قال: لا ترد

About a person who marries in a family and finds his wife to be one-eyed while they have not revealed it to him. The Imam said: The contract will not be withdrawn.

This is the opinion of all the schools.

As regards the second form of deceit i.e., where she claims a merit which in fact she does not possess—if the claimed merit has been mentioned as a condition in the contract, as said earlier, the condition will hold good according to all except the Hanafis. But if the claimed merit has not been mentioned in the contract as a condition—i.e., it has either been mentioned simply as a quality in the contract, or has been mentioned before the contract and the contract has been recited on that basis—then two different situations arise:

1. The merit has been mentioned in the contract as a quality, such as when the bride's attorney says, "I marry this maiden to you." or, "I marry this girl who is free from any defect to you." The Imamiyyah state that when it is known that she does not possess the mentioned merit, the husband has the choice to annul the contract.
2. The merit has neither been mentioned as a condition nor as a quality in the contract, but has been mentioned during the course of the marriage negotiations, such as when she herself or her attorney says that she is a virgin and has no defect, and then the contract is recited on the basis of this statement, so that it is understood that the contract has been recited on the girl's possessing this particular quality. In the legal sources that I have referred to, I have not come across anyone who has discussed this particular aspect except the Imamiyyah, among whom there is a difference of opinion as to whether in such a case the husband has an option of annulment. Some of them, including al-Sayyid Abu al-Hasan al-Ishfahani, in al-Wasilah, uphold the husband's option, because they point out, the negotiations of the contracting parties regarding a particular quality followed by the conclusion of the contract on their basis, makes this quality similar to an implicit condition. Others, who oppose this view, have said that it will have no effect unless the quality is mentioned in the contract or its presence in the contract established in some way or another. Al-Shahid al-Thani, in *al-Masalik*, holds the same opinion, on the basis that a contract is binding unless there is categorical proof of its invalidity and such a proof is not present in this

case.

To summarize, if the quality has been recognized in the contract in one of the three ways (i.e., as a condition, as a quality mentioned in the contract. or when mentioned during pre-contract negotiations), the husband has the option to annul or retain the contract. If he retains it, he will not have any right of reducing her *mahr*, whatever the defect except when the condition was virginity. According to the Imamiyyah, in this case, the husband may reduce the *mahr* by an amount equal to the difference between a maiden's *mahr* and that of a woman who is not a maiden.

If he chooses to annul the contract, she will not be entitled to receive any *mahr* if marriage has not been consummated according to the Imamiyyah and those of the four schools who permit the option of annulment in case of deceit. On the marriage being annulled after consummation, she will receive the *mahr al-mithl*, and, according to the Shafi'i school. The husband paying such *mahr* will not claim it from the person responsible for the deceit.

The Imamiyyah observe: It depends upon who is responsible for the fraud. If it is the bride, she will not be entitled to any *mahr*, even after consummation. If someone else, then she will receive her full *mahr*, and the husband will claim this amount from the deceiver in accordance with the rule, 'the deceived will level his claim against the deceiver.'

Supplementary Issue

1. If after marriage, one of the spouses finds a defect in the other and claims that the contract was concluded after freedom from such defect was understood through one of the three above-mentioned modes, the other refuting, the burden of proof will lie with the claimant. If the claimant furnishes the proof, the judge will grant him/her the right to dissolve the marriage. If the claimant is unable to prove his/her claim, the respondent will take an oath and the case will be dismissed by the judge.

2. When a person marries a woman after it has been understood, through one of the three mentioned ways, that she is a virgin, and then finds her to be otherwise, he will not be entitled to dissolve the marriage, unless it is proved that her loss of virginity preceded the contract. This can be proved, either by her confession, or through evidence, or any such circumstantial evidence a may lead to certain knowledge—such as when after the marriage, intercourse takes place within a period during which the chances of her losing her virginity (due to other causes) do not exist.

If the issue stays unsettled and it cannot be proved in any of the said ways, whether she lost her virginity before the marriage or after it the right to dissolve the marriage will not accrue to the husband, because the presumption is that her loss of virginity does not precede the marriage, and also because the possibility of her having lost it due to an unknown reason—such as riding or jumping— also exists (*al-Masalik* of al-Shahid al-Thani. vol. 2, Chapter on Marriage in Imamiyyah Fiqh).

3. Al-Sayyid Abu al-Hasan al-Isfahani. in al-Wasilah. the chapter on marriage. writes: If a man marries a girl without virginity being mentioned in the negotiations previous to the marriage without the contract being based on it. and without it being included as a condition or a quality in the contract, but only believing her to be so because of her not having married anyone before him. He will not have the right to dissolve the marriage if it is later proved that she was not a virgin. But he has the right to partly reduce her *mahr*. This reduction will be proportional to the difference between the *mahr* of her like if a virgin and if not a virgin. Therefore, if her *mahr* be fixed at 100 and the *mahr* of a virgin like her is 80 and a non-maiden like her is 60, he will reduce from 100 a fourth part, i.e. 25, with 75 remaining as *mahr*.

Accordingly, al-Sayyid al-Isfahani envisages four possible conditions regarding virginity:

- i. Where virginity is mentioned in the contract as a condition:
- ii. Where it is mentioned in the contract as a quality:
- iii. Where it is mentioned during settlement of marriage and the contract is based upon it;
- iv. Where he marries her believing her to be a virgin and does not mention it, neither before the contract nor in the contract.

In the first three conditions, the husband has the choice to annul the marriage; in the fourth, he has no such choice, but can reduce a part of the *mahr* in the above-mentioned manner.

Al- Mahr

Mahr is one of the (pecuniary) rights of a wife established in the Qur'an and the Sunnah, and on which there is consensus (*ijma'*) among Muslims.

There are two kinds of *mahr*: *al-musamma* and *mahr al-mithl*.

1. Al-Mahr al-Musamma:

Al-mahr al-musamma is the *mahr* agreed by the couple and specified by them in the contract. This *mahr* does not have any upper limit, by consensus of all the schools, in accordance with the following verse of the Qur'an:

وَإِنْ أَرَدْتُمْ اسْتِبْدَالَ زَوْجٍ مَكَانَ زَوْجٍ وَآتَيْتُمْ إِحْدَاهُنَّ قِنطَارًا فَلَا تَأْخُذُوا مِنْهُ شَيْئًا

And if you wish to take a wife in place of another and have given one of them a heap of gold, then take not from it a thing. (4:20)

But the schools differ regarding the lower limit. The Shafi'i, the Hanafi and the Imamiyyah schools observe: Everything which is valid as price in a contract of sale is valid as *mahr* in a marriage contract, though it be a single morsel.

The minimum *mahr* according to the Hanafi is ten dirhams, and a contract concluded for a lesser amount is valid and the minimum—i.e. ten dirhams—shall be payable.

The Malikis have said: The minimum is three dirhams. Therefore, if something less is specified and later the marriage is consummated, the husband will pay her three dirhams; if it has not been consummated, he has a choice between giving her three dirhams or dissolving the contract by paying her half the specified *mahr*.

Conditions of Mahr

It is valid that *mahr* be specified in terms of currency, jewelry, farmland, cattle, profit, trade commodities and other things of value. It is necessary that the value of the *mahr* be known, either exactly (e.g. a thousand Lira) or approximately (e.g. a particular piece of gold or a particular stock of wheat). If the *mahr* is totally vague, so that its value is unascertainable in any manner, according to all the schools except the Maliki, the contract is valid and the *mahr* void. The Malikis observe: The contract is invalid and will be considered void before consummation but if consummation has occurred it will be valid on the basis of *mahr al-mithl*.

Among the conditions is the being *halal* of the *mahr* and its being valued in terms of a commodity whose transaction is considered legal by the Islamic Shari'ah. Therefore, if it is mentioned in terms of liquor, swine or *m'aytah* or anything else whose ownership is invalid, according to the Malikis the contract shall be invalid if it has not been consummated, and if consummated, shall be valid and the *mahr al-mithl* shall be payable.

The Shafi'i, the Hanafi, the Hanbali and most of the Imamiyyah legists have said: The contract is valid and she shall be entitled to the *mahr al-mithl*. Some Imamiyyah legists have entitled her to the *mahr al-mithl* only if the marriage has been consummated, while others amongst them lay no such condition and are in consonance with the other four schools.

If the *mahr* is usurped property, such as when she is married for a farm as her *mahr* and later it is known to belong to the groom's father or someone else, the Malikis have said: If the farm is known to the two and both happen to be sane, the contract shall be invalid if not consummated and if consummated shall be considered valid on the basis of *mahr al-mithl*. The Shafi'i and the Hanbali schools regard the contract as valid and entitle her to the *mahr al-mithl*. The Imamiyyah and the Hanafi schools are of the

opinion that the contract is unconditionally valid; but regarding the *mahr* they observe: If the owner agrees, she shall receive the farm itself; if the owner refuses, she shall be entitled to receive a similar farm or its price because the stipulated *mahr* in this case is capable of being validly owned though ownership does not materialize, in contrast with liquor or swine which cannot be owned at all.

Mahr al-Mithl

The concept of *mahr al-mithl* is relevant in the following cases:

1. There is consensus among the schools that *mahr* is not an essential ingredient (*rukn*) of a marriage contract, as price is in a contract of sale. On the contrary, *mahr* is only one of the effects of a marriage contract, and even without its stipulation the contract is valid. Thus, *mahr al-mithl* shall be payable on consummation (when *mahr* was not specified) and if he divorces her before the consummation of marriage, she shall not be entitled to any *mahr*, but will receive *al-muat'ah*, which is a gift given by the husband to his wife (at the time of divorce) in accordance with his status, such as a ring or a dress, etc. If they both agree on this gift it will suffice: otherwise it will be fixed by the judge. The issue whether the couple's retiring to seclusion (*khalwah*) is tantamount to consummation or not, will be discussed later.

The Hanafi and the Hanbali schools observe: If the husband or the wife dies before consummation, full *mahr al-mithl* shall be payable as if the marriage had been consummated (*Majma' al-'anhur* and *al-Mughni*, chapters on marriage).

According to the Malikis and the Imamiyyah, no *mahr* is payable if any of the two dies before consummation (*al-Mughni* and *al-Wasilah*).

The Shafi'is have two views: (a) That the *mahr* shall be payable; (b) no *mahr* shall be paid (*Maqсад al-nabih*).

2. If the marriage contract is concluded with specification of *mahr* in terms of a commodity which cannot be owned, e.g. liquor or swine, as mentioned earlier.

3. All the schools agree that *mahr al-mithl* becomes *wajib* as a result of intercourse-by-mistake. Intercourse-by-mistake is intercourse with someone with whom it is not legally permissible, though without the knowledge of it being so; such as a person marrying a woman without the knowledge of her being his foster sister and coming to know of it later, or his having intercourse with her after both have appointed their deputies for reciting the contract, thinking it to be sufficient for establishing sexual contact. In other words, intercourse-by-mistake is intercourse without proper marriage, though the presence of a legal excuse precludes penal action. On this account the Imamiyyah include under this head intercourse by a person who is either insane or intoxicated or in sleep.

4. The Imamiyyah, the Shafi'i and the Hanbali schools have said: One who coerces a woman to fornicate shall have to pay *mahr al-mithl*; but if she had yielded voluntarily she shall not be entitled to anything.

5. A marriage concluded on the condition that no *mahr* shall be paid is valid according to all except the Malikis who say: The contract shall be invalid if not consummated and valid if consummated due to the obligation to pay *mahr al-mithl*. A large number of Imamiyyah legists have said: He shall give her something, be it much or little. Traditions from the Ahl al-Bayt ('a) support this view.

According to the Imamiyyah and the Hanafi schools, if an invalid marriage contract is recited with a certain *mahr* and the marriage is consummated, she shall be entitled to receive the *mahr* stipulated even though it was less than the *mahr al-mithl* because of her prior consent. But if the stipulated *mahr* is more, she shall receive only the *mahr al-mithl*, because she is not entitled to receive more than *mahr al-mithl*.

Mahr al-mithl is computed by the Hanafis by taking into account the *mahr* of her equals from the paternal, not the maternal side. According to the Malikis, her *mahr* shall be commensurate with her physical and mental qualities. The Shafi'is, take the *mahr al-mithl* of the wives of her paternal relatives as reference, i.e. the wife of her brother, that of her paternal uncle, then her sister etc. For the Hanbalis, the judges shall compute the *mahr al-mithl* by taking into account the *mahr* of her female relations, such as the mother or maternal aunt.

The Imamiyyah have said: There is no fixed way of determining *mahr al-mithl* in the Shari'ah. It is estimated by those who know her status, descent, and all those aspects which influence the increase or decrease of *mahr*. But this *mahr* shall not exceed the *mahr al-sunnah*, which is equal to five hundred dirhams.

Immediate and Deferred Payment of Mahr

All the schools concur regarding the validity of deferred payment of *mahr*, fully or partly, provided that the period be known, either exactly (such as when it is said, "I marry you for a hundred, of which fifty shall be paid immediately and the rest after one year") or in an indeterminate manner (such as when it is said, "The *mahr* is deferred till death or divorce"). The Shafi'i school disapproves the latter form of deferment.

But if the period is so mentioned that it is totally vague, such as when it is stated that the payment of *mahr* shall be made on the return of a certain traveler, the time clause shall be void. [1](#)

The Imamiyyah and the Hanbali schools have said: If the *mahr* has been mentioned without specifying whether its payment is immediate or deferred, the entire *mahr* shall be immediately payable.

According to the Hanafis, the local practice shall be observed; i.e. the portions to be immediately paid and deferred will follow the local custom.

The Hanafis have also said: If the *mahr* is deferred without mentioning the period of deferment (such as when it is said, "Half of it is immediately payable and the rest deferred"), the full *mahr* shall be

immediately payable.

The Hanbalis observe: The *mahr* can be deferred until death or divorce.

The Malikis are of the opinion that such a marriage is invalid; it is voidable before consummation, though valid after it on the basis of *mahr al-mithl*.

The Shafi'is state: If the period is known not exactly but in an indeterminate manner (such as until death or divorce) the *mahr* stipulated shall become invalid and the *mahr al-mithl* will be payable (*al-Fiqh 'ala al-madhahib al-'arba'ah*).

The Hanafi and the Hanbali schools have said: If the bride's father apportions for himself, as a condition. A part of her *mahr*, the *mahr* is valid and the condition shall have to be complied with.

The Shafi'is say: The *mahr* stipulated shall become invalid and *mahr al-mithl* shall be payable.

According to the Malikis, if this condition is included at the time of marriage, the bride shall receive the entire *mahr*, including her father's share; and if the condition is laid after the marriage, the bride's father shall receive his share (*al-Mughni and Bidayat al-mujtahid*).

The Imamiyyah observe: If her *mahr* has been specified with a fixed portion of it mentioned for her father, she shall get her full stipulated *mahr* and her father will not get his share.

The Wife's Right to Refuse Her Conjugal Society

There is consensus among the schools that the wife, simply after the recital of the contract, has the right to demand her full specified *mahr* immediately and to refuse her conjugal society until the *mahr* is paid. But, if she surrenders once willingly without demanding the *mahr*, she loses her right of refusal; all concur on this issue except Abu Hanifah. He observes: She has the right to refuse even after surrender. Abu Hanifah's disciples, Muhammad and Abu Yusuf oppose his view.

The wife is entitled to receive maintenance if she refuses her conjugal society until the payment of *mahr*; because her refusal in such a case is legally valid. But if she refuses to fulfill her conjugal duties after receiving *mahr* or after voluntary surrender, she shall not be entitled to maintenance except according to Abu Hanifah.

If the wife be a minor unfit for marital relations and the husband a major, it is up to her *wali* to demand the *mahr*; it is not necessary that he wait until her maturity. Similarly, if the wife be a major and the husband a minor, the wife has the right to demand the *mahr*, from his *wali*, and it is not necessary for her to wait until his maturity.

The Imamiyyah and the Shafi schools state: If a dispute arises between the couple, with the wife refusing to surrender until payment of *mahr* and the husband refusing payment until her surrender, the

husband shall be compelled to deposit the *mahr* with a trustee and the wife will be asked to surrender. Then if she surrenders, she shall receive her *mahr* and be entitled to maintenance. But if she refuses, she shall not receive the *mahr* and will not be entitled to any maintenance. If the husband refuses to deposit the *mahr*, he will be ordered to pay her maintenance on her demanding it.

The Hanafi and the Maliki schools state: The payment of *mahr* has precedence over the woman's surrender, and the man may not say, "I will not pay the *mahr* until she surrenders". If he insists on this, he shall be ordered to pay her maintenance, and if she after receiving the *mahr*, refuses her conjugal society, the husband is not entitled to claim the return of *mahr*.

According to the Hanbali School, the husband shall be first compelled to pay the *mahr*.

This opinion concurs with the Hanafi view except that according to the Hanbalis, if she refuses her conjugal society after receiving the *mahr*, he has the right to demand the return of the *mahr*. (*Maqsad al-nabih, M'ajma' al-'anhur and al-Fiqh 'ala al-madhahib al-'arba'ah*)

Inability of the Husband to Pay the Mahr

The Imamiyyah and the Hanafi schools observe: If the husband is unable to pay the *mahr*, the wife is not entitled to dissolve the marriage, and the judge, too, cannot pronounce her divorce. But she has the right to deny her conjugal society.

The Malikis state: If his inability is proved before the consummation of marriage, the judge will grant him time according to his own discretion.

If, after the expiry of such period his inability continues, the judge will pronounce divorce, or the wife will divorce herself and the judge shall endorse its validity. But if he has consummated the marriage, she can in no way dissolve it.

The Shafi'i school is of the opinion that if his inability is proved while the marriage has not been consummated, she can dissolve it. But if it has been, she cannot dissolve it.

The Hanbalis state: She may dissolve the marriage even after its consummation, provided she had no knowledge of his inability before the marriage. Therefore, if she had the knowledge the question of dissolving the marriage does not arise. Even when the marriage is dissolvable, only the judge has the authority to do so.

The Father and His Daughter-in-Law's Mahr

The Shafi'i the Maliki and the Hanbali schools hold that if a father concludes the marriage of his pauper son, he shall be liable for payment of *mahr* even if the son be a major and the father acts as his *wali* for the marriage as his son's deputy. If the father dies before *mahr* is paid, which was *wajib* upon him, it

shall be paid out of his legacy.

The Hanafi school observes: The payment of *mahr* is not wajib upon the father, regardless of whether the son is a well-to-do person or a pauper, a major or a minor (*al-'Ahwal al-shakhiyyah* by Abu Zuhrah).

The Imamiyyah state: If the minor son possesses property and his father gets him married the *mahr* shall be paid from the son's assets and the father shall not be liable at all. But if the minor has no property at the time of marriage, the father shall be liable to pay the *mahr*; the husband (son) shall not be liable even if he becomes a man of means later. Also, the father is not required to pay the *mahr* of his major son's wife unless he guarantees it on the conclusion of the contract.

Consummation and Mahr

Sex relations with a woman fall within these three categories:

1. Fornication (*zina*) to which she surrenders with the knowledge of its being *haram*. In this instance, she will not get any *mahr*; rather shall be liable to penal action.
2. As a result of a misunderstanding on her behalf of its being legal, followed by later knowledge that it was *haram*. Here, her act has no penal consequences and she is entitled to receive *mahr al-mithl*, irrespective of the man's knowledge of the act being *haram*.
3. As a result of a valid marriage. In this case she is entitled to receive the specified *mahr* if it has been validly stipulated, and the *mahr al-mithl* if no *mahr* was specified in the contract or was specified in an invalid form (e.g. in terms of liquor or swine).

If one of the spouses dies before consummation, then, according to the four schools, she is entitled to receive the entire specified *mahr*. The Imamiyyah jurists differ. Some of them, in consonance with the four Sunni schools entitle her to the entire specified *mahr*, while others (including al-Sayyid Abu al-Hasan al-Isfahani in his *al-Wasilah* and Shaykh Ahmad Kashif al-Ghita' in *Safinat al-najat*) to half the specified mahr on a par with a divorcee.

Wife's Crime Against Husband

The Shafi, the Maliki and the Hanhali schools have observed: If a wife kills her husband before the consummation of marriage she shall not be entitled to any *mahr* According to the Hanafi and the Imamiyyah schools. she shall not be deprived of her right to *mahr*, though she loses her right to inherit him.

Al-Khalwah

According to the Shafi'i school and the majority of Imamiyyah jurists, the mere enjoyment of privacy or retirement by the couple has no effect on *mahr* nor any other consequence. Only the consummation of marriage is consequential in this regard.

The Hanafi and the Hanbali schools have observed: 'Valid seclusion' confirms *mahr*, establishes descent, and requires observance of *'iddah* in case of divorce, even though such seclusion does not result in consummation. The Hanbalis also consider gazing and touching with a sexual intent and kissing on a par with consummation and therefore sufficient for confirming *mahr*. By 'valid seclusion' is meant the seclusion of the couple in a place where they are secure from observation by others and where there is no impediment to intercourse.

The Malikis state: If the period of seclusion is prolonged, *mahr* is established even without consummation. Some of them have fixed the period of 'prolonged seclusion' at one complete year (*al-Ahwal al-shakhsiyyah* of Abu Zuhrah: *Rahmat al-'ummah* of al-Dimashqi).

Half the Mahr

There is consensus among the school that if *mahr* is specified at the time of the contract and then the husband pronounces divorce without consummation, or seclusion—for those who consider the latter to be consequential—half the *mahr* shall be payable. But if the contract is recited without specifying *mahr*, she shall get nothing except *al-mut'ah*, as mentioned earlier in accordance with the following verse:

لَا جُنَاحَ عَلَيْكُمْ إِنْ طَلَقْتُمُ النِّسَاءَ مَا لَمْ تَمْسُوهُنَّ أَوْ تَفْرِضُوا لَهُنَّ فَرِيضَةً ۚ وَمَتَّعُوهُنَّ عَلَى الْمَوْسِعِ قَدَرُهُ وَعَلَى الْمُقْتِرِ قَدَرُهُ مَتَاعًا بِالْمَعْرُوفِ ۚ حَقًّا عَلَى الْمُحْسِنِينَ

وَإِنْ طَلَقْتُمُوهُنَّ مِنْ قَبْلِ أَنْ تَمْسُوهُنَّ وَقَدْ فَرَضْتُمْ لَهُنَّ فَرِيضَةً فَنِصْفُ مَا فَرَضْتُمْ

There is no blame on you if you divorce women when you have not touched them or appointed for them a portion: yet make provision for them, the wealthy man according to his means and the needy man according to his means, a provision according to honorable usage: (this is) a duty on the good -doers. And if you divorce them before you have touched them and you have appointed for them a portion, then (pay them) half of what you have appointed... (2:236--37)

Therefore, if the husband, not having paid anything to the wife whose *mahr* has been specified, divorces her before consummating the marriage, he shall pay her half the *mahr*. But if he has paid the entire *mahr*, half of it shall be returned if it still exists and the equivalent of it in cash or kind if it has perished.

If the husband and wife do not specify *mahr* in the contract but later agree upon it and then the husband divorces her before consummation, in this case, shall she be entitled to receive half of the *mahr* agreed upon if the *mahr* had been specified in the contract, or shall she get nothing except the *mut'ah*, as if they had not agreed upon *mahr* later?

The Shafi'i, the Imamiyyah [2](#) and the Maliki schools are of the opinion that she is entitled to half the *mahr* agreed upon, and according to the Hanbali book *al-Mughni* (vol. 6, chapter on marriage), she is entitled to half the *mahr* agreed upon after the contract. but not *mut'ah*.

This discussion was related to the right to full *mahr* and the right to half *mahr*. Instances of annulment of the right to full *mahr* can be found in our above discussion on 'defects'.

An Exceptional Case

If the husband (by his finger or something else) causes the wife's loss of virginity, will it be considered consummation for the sake of confirming *mahr*?

There is no doubt that such an act followed by intercourse has all the legal consequences such as *mahr*, 'iddah, establishment of parenthood and so on.

But the question is, if he, without intercourse, divorces her after causing her loss of virginity in this manner, does it confirm only half the specified *mahr* because the marriage has not been consummated, or will the full *mahr* be payable on account of her loss of virginity?

I put this question to Ayatullah al-Sayyid Abu al-Qasim al-Khu'i. This was his reply: "The husband is liable to pay the full *mahr* because of the loss of virginity, on the basis of the tradition narrated by 'Ali ibn Ri'ab in which the Imam ('a) has stated: If they (wives) are as they were when they joined the husband, then she will get half the specified *mahr*. That which is understood from this conditional clause is that after divorce only half the *mahr* is to be paid if the wife's condition at the time of divorce is the same as it was when she joined him. Therefore, due to the general meaning connoted, it indicates that the wife, if she is not what she was, the husband is liable to pay the entire *mahr*, and it shall not be reduced to half irrespective of whether the change and loss of virginity occurs as a result of intercourse or some other factor."[3](#)

[1](#). I had stated in my book *al-Fusal al-Shariyyah* that the deferring of *mahr* till death or divorce is not correct due to the need to avoid vagueness; is not the period of deferment. Later on, it occurred to me that it is correct. because *mahr* can stand vaguely to a greater extent than price in a transaction of sale, and also because it is not a compensation ('*nwad*) in the real sense of the term. Thus, it is sufficient for *mahr* that it be determinable by sight (i.e. without being weighed or measured) or receivable or that it be teaching the wife of that which the husband knows of the Qur'an. Apart from this, one of the two terms (death or divorce) is in fact known, though not to the parties to the contract. Thus one of these two events, death or divorce, will inevitably occur. Moreover, it is also valid that a marriage be concluded without mentioning the *mahr*, as well as when a third person is delegated to determine the *mahr*.

[2](#). The author of *al-Jawahir* has observed about the third problem relating to the issue of *al-tafwid* : whenever there is an

agreement on a thing, that thing shall be the mahr and shall in fact become the property of the wife, either by itself or in the form of a debt, immediately or in a deferred form, and all those rules which apply to mahr specified in the contract, shall apply to it.

3. It has been observed in a tradition on the authority of Yunus ibn Ya'qub that:

لا يوجب الصداق إلا الوقاع في الفرج

(Nothing makes mahr wajib except vaginal intercourse).

– This tradition is an explanation of the one narrated by Ibn Ri'ab, and on this basis the Imam's words:

فإن كن كما دخلن عليه

(If they are as they were when they joined him'), would appear to include only the natural form of copulation, not those instances where virginity is lost as a result of unnatural means, and the tradition narrated by Ibn Ri'ab fails to provide a valid basis for argument. Whatever be the case, the fatwa of al-Sayyid al-Khu'i concurs with those of al-Sayyid al-Hakim in Minhaj al-salihin (where he states: "If he causes her to lose her virginity by using his finger without her consent, the mahr shall be payable") and al-Shaykh Ahmad Kashif al-Ghita' in Safinat al-najat (chapter on hud'ud).

Disagreement between the Spouses

The spouses may at times differ regarding the consummation of marriage and sometimes regarding the specification of *mahr*, its value, its receipt by the wife or as to whether that which was received was given as a present or as *mahr*. Here we have the following issues:

1. Where the husband and wife differ regarding the consummation, the Hanafi school has two opinions, the more preferable of which is: If the wife claims the occurrence of consummation or seclusion, which the husband refutes. the wife's word shall be accepted and the burden of proof will rest on the husband, because it is she who actually contests the reduction of half her *mahr* (*al-Fiqh 'ala al-madhahib al-'arbah*).

The Malikis say: If the wife visits the husband at his home and then claims consummation while he denies it, her word shall be accepted on oath. If the husband visits her at her place and then she claims consummation while he denies it. his word shall be accepted on oath. And similarly, if they both go to see someone else at his place and she then claims consummation while he denies it, his word shall be accepted.

According to the Shafi'is, in case of dispute regarding consummation, the husband's word shall be accepted (*Maqsad al-nabih*).

The Imamiyyah observe: If the spouses differ regarding consummation and the wife denies its taking place in order to preserve her right to deny him her conjugal society until payment of her *mahr*, agreed to be paid promptly, and he claims consummation in order to establish his claim that her refusal is without

legal justification, or if he denies consummation seeking to reduce his liability to half the *mahr* and she claims consummation to have occurred, seeking to establish her right to full *mahr* and maintenance during the *'iddah*, in both these instances the word of the party denying consummation shall be accepted irrespective of whether it is the husband or the wife; and, as said earlier, seclusion has no effect.

This may lead a question to arise in one's mind: how do the Imamiyyah jurists accept in this case the word of the party denying consummation, while, as mentioned earlier, they accept the word of even an impotent man claiming consummation?

The answer is that the issue here is the act of consummation, which is an occurrence and an event claimed to have happened.

The presumption is that an event claimed to have happened has not occurred, and therefore the burden of proof rests on the party claiming its occurrence. That which was in dispute in the issue regarding impotence is the presence of this defect, which justifies dissolution of marriage. Therefore, the wife's denial of consummation implies that she is claiming the presence of that defect, and thereby becoming the claimant. The husband's statement that consummation has occurred implies that he refutes the claim of the presence of the said defect, thereby challenging the claim.

2. If they differ regarding the fact of stipulation of *mahr*, with one of them claiming that valid *mahr* was stipulated prior to the contract, while the other refutes it, saying that the contract was recited without *mahr* stipulation, the Imamiyyah and the Hanafi schools observe: The burden of proof rests on the party claiming stipulation and the party refuting it shall take an oath. But if the wife claims that the *mahr* has been specified and the husband refutes it, and takes an oath after her failure to prove the stipulation, she shall receive *mahr al-mithl* if the marriage has been consummated, on condition that *mahr al-mithl* does not exceed the amount she claims as having been specified. Thus, if she claims that the contract was concluded with a *mahr* of ten units while he denies it and the *mahr al-mithl* happens to be twenty units, she shall receive only ten, in view of her own admission that she is not entitled to more.

The Shafi'is are of the opinion that both the parties are claimants, i.e. each one of them is a claimant as well as a refuter. Therefore, if one of them furnishes proof while the other fails to do so, the judgement shall be given in favor of the party furnishing proof, and if both furnish proof or both fail to do so, they shall both take oath and *mahr al-mithl* shall be confirmed.

3. If both agree that *mahr* has been specified, but disagree regarding its amount, here the Hanafi and the Hanbali schools are of the opinion that the word of the party claiming an amount equal to the *mahr al-mithl* shall be accepted. Therefore, if she claims the *mahr al-mithl* or something else, her claim shall be accepted. If the husband's claim amounts to the *mahr al-mithl* or more, his word shall be accepted. (*al-Mughni* and *Ibn 'Abidin*).

The Shafi'is state: Both are claimants, and if both are unable to furnish proof, *mahr al-mithl* shall be confirmed after their oath.

According to the Imamiyyah and the Maliki schools, the wife is the claimant and the burden of proof shall rest on her. The husband challenging the claim shall take an oath.

4. Where the spouses disagree regarding the actual payment of *mahr*, with the wife denying that she received it and the husband claiming to have paid it, the Imamiyyah, the Shafi'i and the Hanbali school have observed: The wife's word shall be accepted because she challenges the husband's claim who shall have to furnish proof. The Hanafi and the Maliki schools observe: The wife's word shall be accepted if the dispute arises before consummation and the husband's word if consummation has occurred.

5. When both admit that she has received something and the wife claims that it was a present, while the husband claims it to have been *mahr*, the Imamiyyah and the Hanafi schools observe: The husband's word shall be accepted because he knows his own intention. Therefore, he shall take an oath and it is for the wife to furnish proof that it was a present (*al-Jawahir* and *Ibn 'Abidin*).

Such is the case when there is no circumstantial evidence such a local custom or a particular circumstance of the husband showing that it was a present, such as when it is something eatable or a gift of dress, or what the Lebanese call *al-'alomah* (mark or token) and the Egyptians *al-shabakah* (net), which is a ring or something similar given as a gift to the fiancée by the fiancé so that she may decline other proposals. Therefore, if the thing is something of this kind, the word of the wife shall be accepted.

If the fiancée changes her mind about the marriage after having accepted the ring but before the contract, she is liable to return the ring on his demanding it, and if the fiancé changes his mind, the custom gives him no right to claim it back. But the rules of the Shariah do not recognize any difference between his or her changing his/her mind and therefore she is liable to return the gift as long as it is with her and she has not sold it or gifted it or changed its form.

Dowry (*al-Jihaz*)

The Imamiyyah and the Hanafi schools concur that *mahr* is the sole property of the wife and one of her rights. She can use it according to her own will, bequeathing it or buying her dowry with it, or saving it for her own use at her pleasure, and no one has the right to question or oppose her. The responsibility of furnishing their home lies solely on the husband and she is in no way responsible for anything, because maintenance, in all its different forms, is required only of the husband.

The Malikis observe: It is incumbent upon the wife to buy from the *mahr* she has received all those things which women of her status buy as their dowry, and if she has not received any *mahr* then it is not *wajib* for her to bring dowry except in the two cases: (1) if the local custom considers it compulsory for

the wife to bring dowry even though she has not received anything; (2) if the husband sets the condition that she furnish their home with her own means.

If the husband and wife dispute regarding the ownership of any household item, it will be seen whether the item is used only by men or women or by both. Thus three different situations arise:

(1) Where the item is used by men only, such as his clothes, his books, his measuring instruments if he is an engineer or his medical apparatus if a doctor. The ownership of this kind of items shall be determined by accepting the word of the husband under oath, except when the wife furnishes proof that she is the owner. This is the opinion of the Imamiyyah and the Hanafi schools.

(2) Where the item is used only by women, such as her clothes, jewelry, sewing machine, cosmetics, etc., the ownership of these shall be determined by accepting her word under oath, except when the husband furnishes proof to the contrary.

(3) Where the item is used by both of them, such as carpets, curtains, etc. It shall be given to the party furnishing proof of its ownership. But if both are unable to furnish proof, each of them shall testify under oath that the said item belongs to him/her; then the items will be equally divided between them. If one of the parties takes an oath while the other abstains, the party taking oath shall be given the item. This is the opinion of the Imamiyyah.

Abu Hanifah and his pupil Muhammad are of the view that the husband's word shall be accepted regarding items of common use.

The Shafi'is say: If the husband and wife dispute regarding the ownership of household goods, these shall be divided between them irrespective of their being of individual or common use. (*Mulhaqat al-Sayyid Kazim*. chapter on *qada'*; *al-Ahwal al-shakhsiyyah*: Abu Zuhrah)

Lineage (Al-Nasab)

Introduction

Every man is free within the limits of law and morality to say whatever he wants, and no one is entitled to stop him from doing so. But it is also not incumbent upon anyone to heed his statements or to consider them with respect. This is true irrespective of the speaker's station, whether high or low, venerable or otherwise, when his speech pertains to something outside the area of his specialty. Therefore, if an authority on law gives an opinion on a question of medicine or agriculture, it is not correct for a plaintiff to cite that opinion in support of his case, nor is it correct for a judge to base his judgment upon it.

Similarly, in the case of apostles, prophets, Imams and authorities on law, it is not obligatory upon anyone to believe their statements about issues concerning physical nature, such as the creation of the earth and the heavens, the distances between them, their origin and end, the elements of which they are composed and the forces therein. Sacred personalities at times explained a certain phenomenon in their capacity as a sacred authority; at other times they spoke about things in their personal capacity, like all other human beings who say what they conjecture or hear from others. Therefore, when they speak in their religious capacity, it is *wajib* upon us to listen to them and to obey them, as long as their religious decree does not exceed the limits of their specialty. But when they speak in their personal capacity, it is not *wajib* to follow them, because, here, their word is not regarding religion or things related to it. [1](#)

Thus a legislating authority, religious or secular, should limit itself to framing and expounding laws and regulations, with the aim of encouraging some acts and discouraging others, and explaining their causes and effects, approving one contract as binding together with its terms and conditions and invalidating another as not binding, and issues of this kind which safeguard the social order and ensure the common good.

But as regards natural phenomenon—such as the minimum or the maximum period of pregnancy—it is not within the domain of a lawgiver to either affirm or deny them or to make amendments. This is because the realities of nature and their causes are not alterable; they do not change due to the change of conditions and passage of time in contrast with social laws, which are laid down, abrogated and modified by the lawgiver's will.

It is obvious that a lawgiver does make external realities of nature the subject of his laws, for instance, when he lays down that a child in the womb has the right to inherit from the father, that the birth of a child leads to an increase in the statutory allowance of the mother, or that when the wheat produce exceeds the consumption of farmers, the surplus should be taken into government custody, etc. But the explanation of natural phenomena relating to the subject of laws is the task of specialists. If there is anything in the statements of legal authorities explaining or defining such phenomena, it is nothing but an attestation of what specialists have reported. Therefore, when a judge refers an issue for specialist opinion and the fact is known showing the error of its description by legists, it is not *wajib* that their observations be followed, because we know with certainty that the legists have spoken regarding a phenomenon which pre-existed legislation; the intent of their remarks was to explain this pre-existing fact. Thus, when the opposite is proved, to follow their word would be equivalent to acting against their purpose and intention. The legists themselves name this kind of mistake "mistake in application"; it is similar to the mistake of a person who asks for a cup while pointing towards a stone resembling it.

After this introduction, we move on to our actual subject. As the child is the subject of many Islamic laws—such as its right to inherit from the father; the illegitimacy of its marriage with its sibling, the father's right to act as a guardian of its person and property until maturity; the *wajib* of its maintenance, and such other legal and moral rights—the legists are forced to determine the minimum and the maximum period of

gestation. It is obvious that this issue pertains to the specialty of doctors of medicine not of law, and, therefore, it is not necessary that the word of legists be acted upon if it contradicts actual fact and reality. Because, in such circumstances, the logic of reality is stronger than their logic, and its proof prevails over their evidence. When the opinions of natural philosophers and physical scientists collapse before reality, it is more in order that the observations of those who are in no way connected with a particular field of specialization should collapse before facts. We mention here the views of different schools of Islamic law regarding the minimum and maximum period of gestation, on the assumption that one is not obliged to follow these views when they are not in consonance with facts.

The Minimum Period of Gestation

The opinion of all the legal schools of Islam, both Sunni and Shi'i, is that the minimum gestation period is six months because the 15th verse of the Surat al-'Ahqaf expressly states that the gestation period (*muddat al-haml*) along with the period of suckling (*rida'ah*) is thirty months

وَحَمْلُهُ وَفِصَالُهُ ثَلَاثُونَ شَهْرًا

and the 14th verse of the *Swat Luqman* states that the period of suckling is to be two complete years

وَفِصَالُهُ فِي عَامَيْنِ.

When two years are subtracted from thirty months, the remainder is six months, which is the minimum period of gestation. Modern medicine supports this view and the French legislature has also adopted it.

The following rules are derived from the above observations:

1. When within six months of her marriage a woman gives birth to a child, the child will not be attributed to her husband. Al-Shaykh al-Mufid and al-Shaykh al-Tusi—both Imami—and al-Shaykh Muhyi al-Din 'Abd al-Hamid of the Hanafi School have said that the choice of denying or accepting the child's parentage lies with the husband. If he accepts the child as his, the child shall be considered his legitimate offspring, and shall enjoy all the rights of a legitimate child. Similarly, the father shall have all those powers over it as over the other legitimate children.[2](#)

When the couple differs regarding the period of their conjugal relationship (she claiming that they existed since six months or more, and he denying it, claiming the period to be shorter than six months and denying the child to be his), Abu Hanifah is of the opinion that the wife's word shall be considered true and acted upon without her taking an oath.[3](#)

The Imamiyyah have said: If circumstantial evidence favors his or her contention, it will be acted upon,

and if no such evidence exists, the judge shall accept the wife's word after her taking an oath that sex relations with the husband had existed since six months; then the child shall be attributed to the husband.⁴

2. When a husband divorces his wife after intercourse and she, after observing the *'iddah*, marries another and gives birth to a child within six months of her second marriage, if six months or more—but not exceeding the maximum period of gestation—have elapsed since her intercourse with the first husband, the child shall be attributed to the former husband. But if more than six months have elapsed after her second marriage, the child is attributed to the second husband.

3. When a woman contracts a second marriage after divorce and then gives birth to a child within six months of intercourse with the second husband, if more than the maximum period of gestation has elapsed since intercourse with the former husband, the child shall not be attributed to any of them. For example, if eight months after divorce a woman marries another person and after living with him for five months gives birth to a child, supposing the maximum period of gestation to be a year, it is not possible to attribute the child to the former husband, because more than a year has elapsed since they had intercourse. It is neither possible to attribute the child to her present husband because six months have not yet passed since their marriage.

The Maximum Period of Gestation According to Ahl al-Sunnah

Abu Hanifah ha' said: The maximum gestation period is two years on account of a tradition narrated by 'A'ishah that a woman does not carry a child in her womb for more than two years. Malik, al-Shafi'i and Ibn Hanbal state the period to be four years, on the basis that the wife of 'Ajlan carried her child for four years before delivery. It is strange that the wife of his son, Muhammad, had a similar gestation period. In fact all women of Bani 'Ajlan have a gestation period of four years,⁵ which indicates God's power over His creation.

This argument, if it proves anything, shows the piousness of these legists and their good intentions, and how often the logic of piety prevails over the logic of reality.

'Abbad ibn 'Awwam puts the maximum period of gestation at 5 years. al-Zuhari at 7 years, and according to Abii 'Ubayd there is no maximum period of gestation.⁶

It follows from these conflicting opinions, that if a person divorces his wife or dies and she, without marrying again after him, bears a child, the child shall be attributed to him if born after: two years, according to Abu Hanifah; four years, according to Shafi'is, Malikis and Hanbalis; five years, according to Ibn 'Awwam; seven years according to al-Zuhari; and twenty years according to Abu 'Ubayd.

Legislation in Egypt relieves us from a critical examination of these varied opinions. The Egyptian Shari'ah courts followed the Hanafi code until the passing of Act 25 of 1929. Section 15 of this Act

categorically mentions that the maximum period of gestation is one year.⁷

The Maximum Gestation Period According to the Shi'ah

There is a difference of opinion among Imami scholars regarding the maximum period of gestation. Most of them have stated it to be nine months, some of them ten months, and some others a year. Thus there is a consensus that the period does not exceed a year, even by an hour. Therefore, if a woman, divorced or widowed, gives birth to a child after one year, the child shall not be attributed to the husband, because there is a tradition from al-'Imam al-Sadiq (a):

إذا طلق الرجل زوجته وقالت أنا حبلى وجاءت به لأكثر من سنة ولو ساعة واحدة لم تصدق في دعواها

If a man divorces his wife and she claims to be pregnant, and then gives birth to a child after more than a year has passed , even though by an hour, her claim shall not be accepted.⁸

Walad al- Shubhah

Shubhah –that is a mistake which leads a man to have intercourse with a woman *haram* to him, as a result of his ignorance of her being such–is of two kinds: subhat 'aqd(mistake of contract) and sublat fil (mistake of act).

1. 'Mistake of contract' occurs where a man concludes a marriage contract with a woman in a manner in which legal contracts of marriage are concluded and later it is known that the contract was invalid due to the presence of a cause sufficient to invalidate the contract.
2. 'Mistake of act' occurs where a person copulates with a woman without there being between them any contract, valid or invalid, and he does so either without conscious attention or thinking that she is fulfill to him, and later the opposite is discovered.

Sexual intercourse by a lunatic, or an intoxicated person, or a person in sleep, or a man under the false impression that the woman is his wife, comes under this category. Abu Hanifah has extended the meaning of this form of 'mistake' to its utmost limits where he has observed: Where a man hires a woman for some work and then fornicates with her, or hires her for fornication and does so, the two will not be penalized for fornication. because of his ignorance that his hiring her does not include this act.⁹

Accordingly, if she is working in a business establishment or a factory and the proprietor of such establishment copulates with her believing this to be one of the benefits which accrue to him as a result of his hiring her, this act will not be termed fornication, but will be considered 'a mistake' and shall be a valid excuse for the proprietor in Abu Hanifah's opinion.

It follows from the above discussion that a child born as a result of 'intercourse by mistake' is a legitimate

offspring and is equal in all respects to a child born out of a valid wedlock, irrespective of whether the mistake is a 'mistake of contract' or a 'mistake of act'. Therefore, he who has intercourse with a woman while in a state of intoxication, or in sleep, or in a state of lunacy or under coercion, or before reaching the age of maturity, or under an impression that she is his wife, with the opposite being discovered later—in all such cases if she gives birth to a child, it shall be attributed to him.

The Imamiyyah have said: In all such cases of mistake, the legality of lineage is established and if the man refuses to recognize the child as his, his refusal shall not be accepted and the child will be compulsorily attributed to him. [10](#)

Muammad Muhyi al-Din, in *al-Ahwal al-shakhsiyyah*, p. 480, observes that lineage is not established in any form of 'copulation by mistake' unless the person acting mistakenly claims the child to be his and acknowledges it, because he knows himself better. But this view is incorrect when applied to a lunatic, to one in sleep, or to an intoxicated person, because they do not act with conscious intent. It is also inapplicable in the case of mistake of contract because there is no difference between a valid contract and an invalid contract except that the couple shall separate when the invalidity of the contract becomes known, and there is a consensus among the Sunni and Shi'i schools that whenever a mistake, in any one of its different forms is proved, it is *wajib* for the woman to observe *'iddah*, as observed by a divorcee; she is also entitled to receive the full *mahr*. Therefore, the rules which apply to a wife will apply to her as regards *'iddah*, *mahr* and child's lineage. [11](#)

The mistake may be from the side of the man as well as the woman so that both are ignorant and inattentive. It may be from only one side, such as when the woman knows that she has a lawful husband but hides it from the man, or when he is aware while she is a lunatic or in a state of intoxication. When the mistake is from both sides the child shall be attributed to both of them, and if the mistake is from only one side the child shall be attributed to the parent acting under mistake and not to the parent who was aware.

If a person copulates with a woman and then claims ignorance regarding its being *haram*, his word shall be accepted without proof and oath. [12](#)

In any case, the legal principles, according to Sunni and Shi'i schools, do not permit any ruling ascribing illegitimate birth to a child born of a father when there is a possibility of ascribing its *qadi* to a mistake. Therefore, if a *qadi* has evidence before him to suggest 99% probability of the child's illegitimate birth and only 1% probability suggesting it is 'a child by mistake', it is incumbent upon him to accept the latter evidence and disregard the former, giving preference to *halal* over *haram* and legitimacy over illegitimacy, in consonance with the Divine injunctions:

وَقُولُوا لِلنَّاسِ حُسْنًا

And speak good to the people (2:83)

اجْتَنِبُوا كَثِيرًا مِّنَ الظَّنِّ إِنَّ بَعْضَ الظَّنِّ إِثْمٌ

Eschew much suspicion, for surely some suspicion is a sin. (49: 12)

Commentators of the Holy Qur'an have narrated that one day when the Prophet (S) was delivering a sermon, a man who was taunted by people regarding his lineage, stood up and asked, "O Prophet, who is my father?" The Prophet (S) replied, "Your father is Hudhayfah ibn Qays." Another person asked him (S), "O Prophet, where is my father?" The Prophet (S) replied, "Your father is in hell." Here verse 101 of the Swat al-Maidah was revealed:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَسْأَلُوا عَنَ أَشْيَاءَ إِن تَبَدَّ لَكُمْ تَسْوِئَةٌ

O believers, question not concerning things which, if they were revealed to you, would vex you [13](#)

Traditions of the Prophet (S) recorded by Sunni and Shi'i sources state:

الحدود تدرأ بالشبهات

Penal consequences are repelled by doubts.

دع ما يريك إلى ما لا يريك

Leave that which puts you into doubt for that which does not. [14](#)

Imam 'Ali ibn Abi Talib ('a) has said:

ضع أمر أخيك على أحسنه

Give the best interpretation to your brother's act.

Al-'Imam al-Sadiq ('a) has said:

كذب سمعك وبصرك عن أخيك

Reject the evidence of your ear and eye regarding your brother. [15](#)

The above-mentioned verses of the Qur'an and the reliable and unambiguous traditions quoted, as well as many other verses and traditions of the kind, make it incumbent upon every person to abstain from testifying and judging anyone as an illegitimate offspring unless there exists certainty that he is not in reality a child of mistake in any of its forms.

Child Born of al-Mut'ah

There is something in this regard of which most people are not aware, and I thank the person who wrote me a letter inquiring about this issue. Now, with the present opportunity to explain this legal and historical issue, I intend to be brief to the best of my ability. I shall be a narrator, not a partisan or critic, and shall leave the reader to judge for himself, keeping the matter open for him to affirm or reject.

There is a consensus amongst the Sunni and Shi'i schools that *mutah* (temporary marriage) was *halal* by the order of the Prophet (S) and that Muslims performed *mut'ah* during his time. But they differ regarding its revocation. The Sunnis say: *M ut'ah* has been revoked and made *haram* after being *halal* earlier. [16](#)

The Shi'ah state: Revocation has not been proved: it was *halal* and shall remain so until the Day of Judgment. The Shi'ah cite verse 24 of the *Surat al-Nisa'* as evidence:

فَمَا اسْتَمْتَعْتُمْ بِهِ مِنْهُنَّ فَآتُوهُنَّ أُجُورَهُنَّ فَرِيضَةً

...Give them their dowry for the mut'ah you have had with them as a duty... (4:24)

And that which Muslim has narrated in his *al-Sahih* as a proof:

إِسْتَمْتَعَ الْأَصْحَابُ فِي عَهْدِ رَسُولِ اللَّهِ وَأَبِي بَكْرٍ وَعُمَرَ

The Companions of the Prophet (S) performed *mut'ah* during his lifetime and during the reigns of Abu Bakr and 'Umar.

The *mut'ah* form of marriage is a marriage for a fixed period of time, and according to the Shi'ah it is similar to the permanent marriage as regards the recital of a contract proving express intention of marriage.

Consequently, any form of sexual contact between a man and woman without a contract will not be considered *mut'ah* even if it is by mutual consent and inclination. When the contract is recited it becomes binding and its observance becomes obligatory.

It is compulsory that *mahr* be mentioned in the contract of *mut'ah*. This *mahr* is similar to the *mahr* of a permanent wife, there being no prescribed minimum or maximum limit. and half of it subsides when the

stipulated period is gift ed or expires without consummation, in consonance with the rule applied in the *mahr* of a permanent wife divorced before consummation.

It is incumbent upon the woman with whom *mut'ah* has been contracted to undergo the *'iddah* after the completion of the stipulated time, with the difference that a divorcee observes an *'iddah* of three months or three menstrual cycles, while in *mut'ah* she observes an *'iddah* of two menstrual cycles or forty-five days. But as to the *'iddah* observed on the death of the husband, the wife in *mut'ah* observes it for four months and ten days, which is the same as observed by a permanent wife, irrespective of consummation.

The child born of this form of marriage is legitimate and enjoys all the rights of a legitimate child without the exception of a single legal or moral right.

It is compulsory that *mut'ah* be contracted for a fixed period of time and it is necessary that this stipulated time be mentioned in the contract. The wife in *mutah* does not inherit from her husband and her maintenance is also not obligatory upon him. in contrast with the permanent wife, who both inherits and is entitled to maintenance. But a wife in *mut'ah* can stipulate at the time of the contract that she shall inherit and be entitled to maintenance, and if the contract is concluded on these terms, the wife in *mut'ah* becomes similar to a permanent wife. [17](#)

In spite of their belief in the validity of *mut'ah*, the Shi'is of Syria, Iraq and Lebanon do not practice it, and the Ja'fari Shariah Courts in Lebanon, since their inception, have neither applied this form of marriage nor authorized it.

The Illegitimate Child (Walad al-Zina)

One who studies the verses of the Qur'an, the traditions of the Prophet (S) and the statements of Muslim legists, finds that Islam leaves no room for anyone to accuse others of fornication. Islam has framed the related rules of furnishing proof and giving judgment in a manner that makes this task difficult or even impossible. Whereas Islam considers two just (*'adil*) witnesses sufficient for proving homicide, in the case of fornication it requires four just witnesses to testify that they have witnessed the act of penetration itself. It is not sufficient for them to say that so and so fornicated with so and so, or that they saw the two naked hugging each other in a bed under a single cover. If three witnesses bear witness while the fourth abstains, each of the three shall be liable to a punishment of eighty lashes. Similarly a person who accuses a man or a woman of fornication shall be liable to eighty lashes. [18](#)

The purpose behind all this is to cover the deed' of people, to protect their honor, to protect the family from the fear of ruined descent and the children from homelessness.

Fornication is the committing of the act by a mature and sane person with the knowledge of its being *haram*. Therefore fornication cannot be committed by a person who has not attained maturity or is

insane or is ignorant or has been coerced or is in a state of intoxication. The act committed by these people will be considered 'intercourse by mistake', and we have discussed earlier the rules which apply to it. From the above discussion, it becomes clear that the Islamic Law gives a very restricted interpretation to fornication; firstly, by limiting its application to an act committed with knowledge and intention, wherein there is no scope for attributing it to a mistake or fault in any manner. Secondly, it has restricted the manner of proving it in court by requiring four just witnesses who have seen it with their own eyes, whereas, generally, such an act is not observable. It is possible for a single witness to have seen it, while it is almost impossible for three or four persons to do so. All this clearly indicates that Islam has firmly closed the door in the face of those who seek to raise this thorny issue, because God does not like the spread of indecency among His creatures.

There is a consensus among legists of all the legal schools that when fornication is proved in its above-mentioned meaning and manner, the child born of it shall not inherit from the father because no legal lineal bond is established between them.

But the legists have landed themselves in a legal difficulty by giving the fatwa that an illegitimate issue cannot inherit, and are puzzled in finding a way out of this difficulty: If an illegitimate child is not attributable legally to its male 'parent', then, accordingly, in such a situation, it cannot be impermissible for a man to marry his illegitimate daughter and for an illegitimate son to marry his sister or paternal aunt as long as he is considered a stranger to the male 'parent'.

Therefore, an illegitimate son is either a legally recognized issue and thereby entitled to everything to which legally recognized children are entitled, including the right of inheritance and maintenance, or he is not a legally recognized issue and thereby entitled to all those things which are established as regards those who are legally unrelated, including the marriage with a daughter or a sister. To differentiate between the effects of a single undivided cause is to claim something without requisite proof: it amounts to inclining towards something without any reason for doing so. Therefore, we see the legists differ on this question after having concurred earlier (i.e. in excluding him from inheritance). Maliki and al-Shafi' have said: It is permissible (in such a case) for the person to marry his daughter, his sister, his son's daughter, his daughter's daughter, his brother's daughter and his sister's daughter when these relations have been established as a result of fornication, because they are 'strangers' to him and no legal lineal bond exists between them.¹⁹ But this manner of solving the problem reminds one of the saying: "The cure is worse than the disease."

Imamiyyah legists, Abu Hanifah and Ibn Hanbal have observed: We ought to differentiate between the two situations. We must disqualify the child from inheriting, while at the same time prohibiting matrimonial relationship between the child or its father within the prohibited degrees of relationship. Apart from marriage, to touch and to look at each other is also *haram* for both of them. Therefore, a father cannot look at or touch his illegitimate daughter despite her inability to inherit from him and his of inheriting from her.²⁰

They argue that the establishment of matrimonial relationship is *haram* by pointing out that an illegitimate child is after all an offspring, both literally and by general acceptance. Consequently, whatever is *haram* between fathers and children is also *haram* for the illegitimate child and its father. Their argument about the child's disqualification from inheriting is based upon the fact that the child is not acknowledged by the Shari'ah as its father's offspring and this is expressly stated by the verses of the Qur'iin and traditions.

Al-Laqit

Al-laqit is a child found by a person in a state in which it is incapable of fending for itself, whom he takes and brings it up along with the rest of his family. All the legal schools concur that the *laqit* if and its guardian do not inherit from each other, because the act of giving shelter to an abandoned child is purely an act of kindness done in the spirit of cooperating in the performance of good and righteous deeds. It resembles the gif ting of a fortune to someone making him prosperous after earlier indigence and distress with the hope of acquiring God's grace. As this act of kindness is no cause for inheritance, similarly the giving of shelter to an abandoned child.

Adoption (al-Tabanni)

Adoption is the taking by a person of a child of known parentage and attributing it to himself. The Islamic Shari'ah does not consider adoption as a cause of inheritance, for it does not change the actual fact from what it is; the lineage of the child is both known and established and lineage can neither be abrogated nor eliminated. This has been clearly mentioned in this verse of the *Surat al-Ahzab*:

مَا جَعَلَ اللَّهُ لِرَجُلٍ مِنْ قَلْبَيْنِ فِي جَوْفِهِ ۚ وَمَا جَعَلَ أَزْوَاجَكُمْ اللَّائِي تَظَاهَرُونَ مِنْهُنَّ أُمَّهَاتِكُمْ ۚ وَمَا جَعَلَ أَدْعِيَاءَكُمْ
أَبْنَاءَكُمْ ۚ ذَلِكُمْ قَوْلُكُمْ بِأَفْوَاهِكُمْ ۚ وَاللَّهُ يَقُولُ الْحَقَّ وَهُوَ يَهْدِي السَّبِيلَ

ادْعُوهُمْ لِآبَائِهِمْ هُوَ أَقْسَطُ عِنْدَ اللَّهِ

...Neither has He made your adopted sons your sons (in fact). That is your own saying, the words of your mouths; but God speaks the truth, and guides on the way. Call them after their true fathers; that is more equitable in the sight of God... (33:4,5)

The exegetes have mentioned an interesting episode in relation to the revelation of this verse. Zayd ibn Harithah was made captive during the *jahiliyyah* and the Prophet (S) bought him. After the advent of Islam Harithah came to Makkah and asked the Prophet (S) to sell his son to him or to free him. The Prophet (S) said: "He is free; he can go wherever he wants." But Zayd refused to leave the Prophet(S). His father, Harithah, became angry and said: "O people of Quraysh; bear witness that Zayd is not my son." The Prophet (S) then said: "O people of Quraysh, bear witness that Zayd is my son."²¹

The legists have mentioned many other subsidiary issues under this head, and of these are some which are neither acceptable to human reason nor in harmony with the Shari'ah. One of them is the one quoted by the author of *al-Mughni* (vol.7, p.439) from Abu Hanifah, who holds: If a man marries a woman in a gathering and then divorces her in the same gathering before leaving it, or marries her while he is in the east and she in the west, either way if she gives birth to a child six months after the marriage, the child shall be attributed to the husband.

Other opinions are such as whose validity seems questionable from the viewpoint of medical science. The author of *al-Mughni*, in the same volume and on the same page, says: "If the husband is a child of 10 years and his wife becomes pregnant, the child shall be attributed to him."

Similar is the one quoted by the Shi'i author of *al-Masalik* (vol.2, Fasi *ahkaim al-'awlad*): "If penetration occurs without discharge taking place, the child shall be attributed to the husband."

1. The Editors' Note: The late author's statement about prophets and Imams does not seem to be in accordance with the Shi'i belief in their 'ismah. To say that prophets and Imams, like ordinary human beings, make statements about things unknown to them on the basis of conjecture and hearsay, goes against the doctrine of 'ismah, i.e. the belief that they, as God's representatives and the trustees of His doctrines and laws, are saved by God from falling not only in minor sins but even errors and omissions.

An important question relevant here is that pertaining to the relationship between religion and nature.

From the viewpoint of Islam, religion, as a system of doctrines and laws, is closely associated with nature and reality. While the doctrines of the faith, in order to be true, must reflect the reality, the entire philosophy of law in Islam is based on the close association between law and nature. The lawgiver, in order to be able to legislate beneficial laws, must know thoroughly the facts and realities which are relevant to his laws.

Hence God's prerogative to legislate is based, in addition to His Sovereignty and Beneficence, upon His Omniscience: that His knowledge encompasses all things. Now if God authorizes prophets and Imams to legislate about certain matters and to lay down rules and regulations, it cannot be without His putting at their disposal the knowledge of the realities related to those rules and regulations.

Furthermore, we know from the Qur'an that it is a Divine command that one should not go beyond the limits of one's knowledge to make statements based on conjecture and hearsay:

وَلَا تَقْفُ مَا لَيْسَ لَكَ بِهِ عِلْمٌ ۗ إِنَّ السَّمْعَ وَالْبَصَرَ وَالْفُؤَادَ كُلُّ أُولَٰئِكَ كَانَ عَنْهُ مَسْئُولًا

And pursue not that thou hast no knowledge of the hearing, the sight and the heart--all of these shall be questioned. (17:36)

Therefore, it is not possible for prophets and Imams, who are most obedient to God in all matters and hence are models for other human beings to emulate, to make statements about things of which they are ignorant.

Nevertheless, the author is right in rejecting tradition as a source of knowledge in a field which lies well within the scope and range of scientific inquiry, for it is not possible to ascertain the authenticity of traditions with certainty.

2. The Shi'i work *al-Jawahir*, Bab *al-zawaj*, *ahkam al-'awlad* and *al-Ahwal al-shakhsiyyah* of Muhammad Muhyi al-Din, p.476.

3. *Al-Durar fi sharh al-Ghurar*, vol.1. p.307.

4. *Al-Mughni* of Ibn Qudamah, 3rd edition, vol.7, p.477, and *al-Fiqh ala al-madhahib al-'arba'ah*, 1st ed. vol.4, p.523,

mention the maximum period of gestation according to the Malikis to be five years.

[5.](#) Al-Mughni, 3rd ed. vol.7, p.477.

[6.](#) Al- Ahwal al-shakhsiyyah, p.474.

[7.](#) See al-Jawahir, al-Masalik, al-Hada'iq and other Shi'i books.

[8.](#) Al-Mughni, 3rd. ed. vol.8, p.211.

[9.](#) Al-Jawahir, al-Hada'iq and other Shi'i works.

[10.](#) Al-Mughni, vol.7, p.483; vol.6, p.534; and the Shi'i works al-Jawahir and al-Masalik.

[11.](#) Al-Mughni, vol.8, p. 185.

[12.](#) See Majma al-Baylm fi tafsir al-Qur'an.

[13.](#) Al-Rasa'il, al-Shaykh al-'Ansari , chapter on al-Bara'ah.

[14.](#) Ibid, chapter on Asl al-sihhah.

[15.](#) Al-Mughni, 3rd. ed., vol.6, p.644

[16.](#) Al-Jawahir

[17.](#) The Shi'i work al-Lum'ah, vol.2, the chapter on hudud; the Sunni work al-Mughni, vol.8, p. 198 ff.

[18.](#) Al-Mughni, 3rd. ed., vol.6, p.578.

[19.](#) Al-Mughni, vol.6, p.577, and the Shi'i work al-Masalik, vol.1, chapter on marriage, fasi al-musaharah.

[20.](#) Majma al-Bayan fi tafsir al-Qur'an.

[21.](#) Al-Jawahir and al-Masalik, chapters on hudud.

Artificial Insemination

A hot debate is going on in the West regarding the answer to this question: If a barren husband agrees with his wife that she be artificially inseminated with a stranger's sperm, is this legally permissible?

This question was raised before the House of Commons in England and a committee of the House was set up to deliberate on the issue. In Italy the Pope declared it illegal. In France, the doctors observed: It is permissible if done by the couple's consent. In Austria, the government recognizes the child as a legitimate issue of the couple unless the husband makes a formal objection.

As to Islamic legists, I doubt whether they have dealt with this question, since it is a problem of recent origin. The Imamiyyah scholars have narrated a tradition under the head of *hudud*. Al-Hasan ibn 'Ali ('a) was asked regarding a woman who after intercourse with her husband engages in Lesbian intercourse with a virgin transferring his sperm to her, consequently making the latter pregnant. The Imam ('a) replied: The *mahr* of the virgin shall be exacted from the married woman because the child would not be delivered without the virgin losing her virginity. Then, the other woman shall be stoned to death because of her marital status. Regarding the pregnant woman, they shall wait until she delivers and the child shall be given to the father, i.e. the person of whose sperm it was born. After this, she shall be flogged. [1](#)

Four rules can be deduced from this tradition:

(1) Stoning of the married woman, (2) Liability of the married woman to pay the *mahr* of the other woman

as a compensation for her lost virginity. (3) Flogging of the other woman, (4) Attribution of the child to the person of whose sperm the child was born.

The Imamiyyah legists differ regarding application of this tradition. Of those who have applied this tradition in totality are al-Shaykh al-Tusi and his followers. Others, who accept the last three rules without accepting the first one, include the author of *al-Sharai*, who holds the punishment of the married woman to be flogging instead of stoning.² Ibn Idris has rejected the tradition totally, objecting to the statement about the stoning of the married woman, because the sentence for Lesbian intercourse is flogging, not stoning. He also objects to the attribution of the child to the person of whose sperm it was born, because it was not born as a result of intercourse through valid marriage or by mistake. He even objects to the rule which compels the married woman to pay the *mahr* of the pregnant woman, because, according to him, the woman made pregnant was not coerced, and Lesbian intercourse with consent is similar to fornication, which does not result in liability to pay *mahr*.

This is what I have found in the legal books closely or distantly relating to the question at hand. In any case, we have two questions at hand: (1) Is artificial insemination permissible or not in the Islamic Shariah? (2) If, as a result of artificial insemination, a child is born, what shall be its legal status and to whom shall it be attributed?

Artificial Insemination is Prohibited

Regarding the first question, there is no doubt that such insemination is prohibited due to following reasons: (1) Our knowledge of the Shariah, and its warning and emphasis concerning sexual matters, tell us that permissibility of anything in this regard rests upon permission of the Shari'ah. Therefore, the mere possibility of its being impermissible is sufficient for making restraint and caution obligatory. (2) In the thirty-first verse of Surat al-Nur:

وَقُلْ لِلْمُؤْمِنَاتِ يَغْضُضْنَ مِنْ أَبْصَارِهِنَّ وَيَحْفَظْنَ فُرُوجَهُنَّ

And say to the believing women that they cast down their looks and guard their private parts...
(24:31)

God has commanded women that they 'safeguard' their organs of reproduction; but He has not mentioned from what they are supposed to be safeguarded. Neither has He specified that they safeguard them from intercourse or some other thing. The jurists as well as linguists of the Arabic language concur that any proposition devoid of any particular specification implies the generality of inclusion. Similarly the inclusion of a specification in a proposition limits the proposition to that extent. For example, if it is said, "Safeguard your wealth from thieves", it denotes that wealth must be protected only from being robbed. But if it is said, "Safeguard your wealth," without specifying any specific thing, it implies that wealth is to be protected from being robbed, from damage, from waste, etc. Accordingly, the

verse of the Qur'an connotes that the organs of reproduction be safeguarded from everything including insemination. This verse is reinforced by verses 5–7 of the Surat al-Mu'minun:

وَالَّذِينَ هُمْ لِفُرُوجِهِمْ حَافِظُونَ

إِلَّا عَلَىٰ أَزْوَاجِهِمْ أَوْ مَا مَلَكَتْ أَيْمَانُهُمْ فَإِنَّهُمْ غَيْرُ مَلُومِينَ

فَمَنْ ابْتَغَىٰ وَرَاءَ ذَلِكَ فَأُولَٰئِكَ هُمُ الْعَادُونَ

And who guard their private parts. Save from their wives or those whom their right hands own, for then they surely are not blameworthy. But whoever seeks to go beyond that, those are the transgressors. (23:5–7)

The phrase

لِكَ فَأُولَٰئِكَ هُمُ الْعَادُونَ

indicates that any act contrary to the guarding of the parts amounts to transgression of the lawful limits, except that which occurs through marriage or ownership.

Though the verses speak specifically of men, it does not hinder their application to women, because there is consensus that there is no difference between men and women in rules of this kind.

Some may say that the phrase

يَحْفَظْنَ فُرُوجَهُنَّ

does not prove that this kind of insemination is *haram*. It only indicates the impermissibility of (extra-marital) sexual relations, and this is the meaning that comes to mind and is understood from the verse. In other word, this verse may imply a wider meaning which includes artificial insemination or something else; but that which is apparent from its word is fornication, and it is a known fact that it is the generally understood meanings of dicta that are accepted for deriving the rules of the *Shari'ah*, not their literal meaning.

The answer is that this apparent meaning of the verse is not inherent in it; rather, this meaning has come to be associated with the verse because of its frequent usage in that context (i.e. to mean fornication). This is similar to the use of the word 'water' in Baghdad to mean the water of the Tigris and in Cairo to

mean the water of the Nile, but this apparent meaning is of no consequence at all, for it fades on a little amount of reflection. No one can claim that the word 'water' in Baghdad was coined to mean only the water of the Tigris and in Cairo to mean only that of the Nile. Moreover, if artificial insemination were considered permissible on this ground, so would be the licking of dogs..., because both these notions are far removed from the meaning which immediately comes to the mind.

The Offspring by Artificial Insemination

Now a child is born as a result of artificial insemination: shall it be a legitimate child, and to whom shall it be attributed?

The answer is: As regards the sterile husband, the child cannot be attributed to him under any circumstances, and adoption is not valid in Islam:

وَمَا جَعَلَ أَدْعِيَاءَكُمْ أَبْنَاءَكُمْ

And He has not made those whom you call your sons, your sons. (33:4)

As to the woman who bears it, some legal schools attribute the child to her, because an illegitimate child inherits from its mother and from its relatives through her and they inherit from it.³ Therefore, if an illegitimate child can be attributed to its mother, a child born by artificial insemination is better entitled to be similarly attributed.

The Imamiyyah, who do not attribute an illegitimate child to the fornicator or the fornicatress, observe: The child born by artificial insemination does not inherit from its father or mother, and neither do they inherit from it. Ayatullah al-Sayyid Muhsin al-Hakim al-Tabatab'i has differentiated between an illegitimate child and a child born by insemination. He observes: A child born by insemination shall be attributed to its mother, because there is no valid reason to negate its status, and the grounds which prohibit an illegitimate child from attribution to its mother do not apply here.

But as regards the man whose sperm is inseminated, al-Sayyid al-Hakim says: The child shall not be attributed to him, because in order for a child to be attributed to a person it requires that he should have had intercourse irrespective of whether he performs it, or is unable to perform it but has his sperm reach her reproductive organ during his effort, or is transferred to another woman as a result of Lesbian intercourse as mentioned in the tradition from al-'Imam al-Hasan ('a). Apart from these cases, a child shall not be attributed to the person of whose sperm it was conceived, even if he is the husband."

Whatever the case, artificial insemination is *haram* and no Muslim may pronounce it *halal*. But the impermissibility of artificial insemination does not necessarily imply that the child born of it is an illegitimate issue, for at times intercourse may be prohibited but the child born of it is considered

legitimate—as in the case of the person who has intercourse with his wife during her menses or during the fast of Ramadan, in both of which cases it is a prohibited act; but nevertheless the lineal bond between the child and the parents shall be established.

Accordingly, if a person has artificial insemination performed despite its impermissibility, the child born shall not be attributable to the husband because it was not born of his sperm, nor shall it be attributable to the man whose sperm was inseminated, because he has not had sexual intercourse, neither by marriage nor by mistake. But the child shall be attributed to its mother because it is her actual offspring and her legal child, and every actual offspring is a legally recognized issue unless the opposite is proved.

[1.](#) As mentioned in al-Jawahir, most Shi'i legists observe that the sentence for Lesbian intercourse is 100 lashes for a married as well as an unmarried woman, irrespective of the passive or active roles of the participants. In Ibn Qudamah's al-Mughni, 3rd. ed. vol.8, p. 189, it has been observed: There is no hadd for Lesbian intercourse because there is no penetration involved, and it is for the judge to award a suitable punishment (tazir) to the two culprits.

[2.](#) Al-Mirath fi al-Shari'at al-Islamiyyah of al-'Ustadh 'Ali Hasb Allah, 2nd. ed. p.94; Ibn 'Abidin, and Ibn Qudamah in al-Mughni, chapter on inheritance. fasi al-'asabat (male relatives).

[3.](#) The letter of al-Sayyid al-Hakim, dated 7th Ramadan 1377, in reply to a question regarding this issue.

Custody (Al-Hidanah)

Custody has no connection with guardianship (*wilayah*) over the ward with respect to marriage; it is limited to the care of a child for its upbringing and protection for a period of time during which it requires the care of women. Custody is the right of the mother by consensus, though there is a difference of opinion regarding: the period after which it expires, the person who is entitled to custody after the mother, the qualification for a woman to act as a custodian, her right to receive a fee for it, and other aspects which we shall discuss subsequently.

The Right to Act as a Custodian

If it is not possible for a mother to act as the custodian of her child, to whom will this right belong?

The Hanafis observe: It is transferred from the mother to the mother's mother, then to the father's mother, then to the full sister's, then to the uterine sister's, then to the paternal sister's, then to the full sister's daughter, and so on till it reaches the maternal and paternal aunts.

The Malikis say: The right is transferred from the mother to her mother, how high so ever; then to the full maternal aunt; then the uterine maternal aunt, then the mother's maternal aunt, then the mother's paternal aunt, then the father's paternal aunt, then his (father's) mother's mother. then his father's mother

and so on.

The Shafi'i's say: The mother, then the mother's mother, how high so ever, on condition that she inherits; then the father, then his mother, how high so ever, on condition that she inherits; then the nearest among the female relatives, and then the nearest among the male relatives.

According to the Hanbali, the mother is followed by her mother, then her mother's mother, then the father, followed by his mother: then the grandfather followed by his mother; then the full sister; then the uterine sister; then the paternal sister; then the full maternal aunt; then the uterine maternal aunt, and so on.

The Imamiyyah observe: The mother, and then the father. and if the father dies or becomes insane after he has taken the child's custody, the right to custody will revert to the mother on her being alive, because she is better entitled than others—including the paternal grandfather—even if she has married a stranger. If the parents are not there, the custody of the child will lie with the paternal grandfather, and if he isn't there nor has an executor, the child's custody will lie with its relatives in order of inheritance, the nearer taking precedence over the remote. If there is more than one relative of the same class, such as the maternal and paternal grandmothers or maternal and paternal aunts, the matter will be decided by drawing lots in the event of contention and dispute. The person in whose name the lot is drawn becomes entitled to act as the custodian till his death or till he forgoes his right.¹ This is also the view of the Hanbalis (*al-Mughni*, vol. 9, *bab al-hidanah*).

The Qualifications for Custody

The scholars concur regarding the qualifications required for a female custodian, which are: her being sane, chaste and trustworthy, her not being an adulteress, a dancer, an imbibor of wine, or oblivious to child care. The purpose of these requirements is to ensure the proper care of the child from the viewpoint of physical and mental health. These conditions also apply if the custodian is a man.

The schools differ as to whether being Muslim is a condition for custodianship. The Imamiyyah and the Shafi'i schools say: A non-Muslim has no right to the custody of a Muslim.

The other schools do not consider Islam as a requirement for a custodian, except that the Hanafis say: The apostasy of a custodian, male or female, terminates his/her right to custody.

The Imamiyyah state: It is compulsory that the female custodian be free from any contagious disease.

The Hanbali school says: It is compulsory that she should not suffer from leprosy and leukoderma, and that which is important is that the child should not face any harm.

The four schools have said: If the mother is divorced and marries a person who is unrelated to the child, her right to custody shall terminate. But if the husband is of the child's kin, the right to custody remains

with the mother.

The Imamiyyah observe: The right to custody terminates with her marriage irrespective of whether the husband is related to the child or not.

The Hanafi, the Shafi'i, the Imamiyyah and the Hanbali schools have said: If the mother is divorced by the second husband, the disability is removed and her right to custody reverts after its earlier termination due to her marriage.

According to the Maliki school, her right to custody does not revert.

The Period of Custody

The Hanafis say: The period of custody for a boy is 7 years, and for a girl 9 years.

The Shafi'i school observes: There is no definite period of custody; the child shall remain with its mother until it is able to choose between the two parents; and when it has reached the discriminating age it will choose between the two. If a boy chooses to stay with his mother, he will stay with her during the night and spend the day with his father, so that the father can arrange for his instruction. If a girl chooses to stay with her mother, she will continue to stay with her during the day as well as in the night. If the child chooses both the parents together, lots will be drawn between them, and if the child keeps quiet and does not choose any one of them, the custody shall lie with the mother.

The Malikis consider the period of custody for a boy to be from birth until puberty and for a girl until her marriage.

According to the Hanbali school, it is 7 years irrespective of the child's sex, and, after that, the child can choose to live with one of the parents.

The Imamiyyah have said: The period of custody for a boy is 2 years, and for a girl 7 years. After this, the custody shall lie with the father until the girl reaches the age of 9, and the boy the age of 15; there after they can choose to live with one of the parents.²

Fee for Custody

The Shafi'i and the Hanbali schools state: A female custodian has the right to claim a fee for her services irrespective of whether she is the mother or someone else. The Shafi'i's clarify that this fee shall be paid from the child assets if any; otherwise it is incumbent upon the father, or upon whoever is responsible for the child's maintenance.

The Malikis and the Imamiyyah³ observe: The female custodian is not entitled to any fee for her services. But the Imamiyyah add: She is entitled to be paid for breast-feeding. Therefore, if the child has

any assets she shall be paid out of that: otherwise, the father shall pay it if he is capable of doing so (*al-Fiqh 'ala al-madhahib al-'arbdah*, vol.4: *al-Masalik*; vol.2).

The Hanafi school has said: The payment of fee for custody is *wajib* if: there does not exist any marital relationship between the female custodian and the child's father: if she is not in the course of observing the *'iddah* of a revocable divorce given by the child's father: if she is observing the *'iddah* of an irrevocable divorce of an invalid marriage, in which case she is entitled to receive maintenance from the child's father. If the child has any property, the payment shall be made from it: otherwise the payment shall be made by the one responsible for the child's maintenance (*al-'Ahwal al-shakhsiyyah* by Abu Zuhrah).

Travelling With the Child

In case the mother takes the child under her custody, and the father intends to travel with his child to settle down in another town, the Imamis and the Hanafis say: He cannot do so. The Shafi'i, the Maliki and the Hanbali schools observe: He can do so.

But if it is the mother who intends to travel with the child, the Hanafi school gives her the right to do so if the two following conditions are met: (1) That she be migrating to her own town; (2) that the marriage contract should have been recited in the town to which she is migrating. If any of these two conditions is not met, she is forbidden to travel except to a place so near that it is possible to return before it gets dark.

The Shafi'i and the Maliki schools, and Ahmad in one of the two traditions narrated from him, observe: The father has greater right over the child irrespective of whether he is moving or she (*Rahmat al-'ummah fi ikhtilaf al-'a'imah*).

The Imamiyyah state: A divorced mother is not permitted to travel with the child under her custody to a far-off place without the consent of the child's father. The father, too, is not permitted to travel with the child to any town which is not the mother's hometown while the child is in her custody.

Voluntary Breast-Feeding and Custody

The difference between custody and breast-feeding (*al-ridad*) is that by 'custody' is meant only the upbringing and care of the child: it excludes breast-feeding, which involves the infant's nourishment. Because of this difference, it is valid for a mother to forgo her right to breast-feed while her right to custody remains intact. The Imamiyyah and the Hanafi schools concur that if a woman volunteers to breast-feed a child gratuitously while the mother refuses to breast-feed without recompense. the woman volunteering shall be given precedence over the mother, whose right to suckle her child is lost. But her right to the custody of her child shall remain as it is, and the child shall be under her care while the nurse comes to feed it or it is taken to the nurse to be fed.

If a woman volunteers to act as a child's custodian, the child shall not be separated from the mother, according to the Imamiyyah and the other schools which do not require compensation for a custodian's services.

But the Hanafis, who consider the payment of compensation for custody as *wajib*, observe: Where the mother refuses to act as a custodian unless she is paid and another woman volunteers to act as a custodian, the mother is better entitled to custody if the compensation is to be paid by the father, or if the woman is an outsider and there are no women custodians among the child's relatives. But if the woman volunteering is related to the child and the compensation lies upon an indigent father, or is to be paid from the child's property, the other woman shall be preferred, because, in such a situation, the child is saved from payment of fee out of its assets by the woman volunteering. Therefore, she shall be given preference over the mother in the child's interest (*al-Ahwal al-shakhsiyyah* by Abu Zuhrah).

Surrendering of the Right to Custody

Is the right to custody specifically the right of a female custodian that terminates on her surrendering it—similar to the right of pre-emption which can be surrendered— or is it a right of the child that binds the female custodian precluding her right to surrender it, as in the case of a mother's right which cannot be surrendered?

The Imamiyyah, the Shafi'i and the Hanbali schools observe: Custody is the specific right of a female custodian, and she can surrender it whenever she pleases and she shall not be compelled to act as a custodian on her refusing to do so. There is a tradition from Malik regarding this. and the author of *al-Jawahir* has argued on its authority that the legists have not concurred that a female custodian can be compelled to act as a custodian, and the Shari'ah does not expressly mention such compulsion; on the contrary, the texts of the Shari'ah apparently consider custody similar to breast-feeding, and, consequently, she has the right to surrender her custody at will.

The same principle applies where a child's mother seeks a divorce from her husband by surrendering in his favor her right to custody of the child, or when the husband surrenders to her his right to take away the child after the expiry of her period of custody. This form of divorce is valid and neither of the two can refrain from discharging their agreement after it is concluded, except by mutual consent. Similarly, if the two compromise and she surrenders her right to custody or he surrenders his right to take away the child, the compromise is binding and its fulfillment is *wajib*.

Ibn 'Abidin has reported a difference of opinion amongst the Hanafis on this issue. He has pointed out that it is better that custody be considered as a right of the child, so that the mother does not have the right to surrender her responsibility to act as a custodian to make compromise over it, or to exchange it for securing a divorce.

The Sunni Shari'ah courts in Lebanon consider a divorce of this kind as valid, but consider as invalid the

condition that she would surrender her right to custody; any compromise which includes the surrendering of her right to custody is considered void *ab initio*. But the Ja'fari Shariah courts consider the divorce, the condition and the compromise as valid.

1. Al-Jawahir and al-Masalik, bab al-zawaj: al-hidanah.

2. The child's right to choose to live with the father or the mother on reaching this age is not in conflict with the (Lebanese) law according to which the age of majority is 18 years; because this age has been considered by the law as a condition for marriage and not for choosing between the parents.

3. The author of al-Masalik has inclined towards the absence of any compensation for custody, and the author of al-Jawahir has inclined towards its presence. Considering that there is no explicit reference in the Shari'ah about compensation being wajib, and considering that it is not customary to pay compensation for custody, the opinion expressed by the author of al-Masalik is correct.

The Right to Maintenance

There is consensus among all Muslims that marriage is one of the causes that make maintenance wajib. A similar consensus exists regarding kinship (*al-qarabah*). The Holy Qur'an has explicitly mentioned the wife's maintenance in the following verse:

وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ

...And on the child "s father (the husband) is their food and clothing... (2:233)

By the pronoun *هُنَّ* are meant wives and the *الْمَوْلُودِ لَهُ* is the husband. There is also a tradition which says:

حق الزوجة على زوجها أن يشبع بطنها ويكسو جثتها وإن جهلت غفر لها

The right of a woman over her husband is that he feed her, clothe her, and if she acts out of ignorance, to forgive her.

The Qur'an has referred to the maintenance of relatives in the phrase *إحسانا* وبالوالدين إحسانا, and the Prophet (S) has said (You and your property are for your father).

Our discussion comprises two issues: first, the maintenance of a wife and her maintenance during the *'iddah* period; second, the maintenance of relatives.

The Maintenance of a Wife and a Divorcee During 'Iddah

The legal schools concur that the wife's maintenance is *wajib* if the requisite conditions, to be mentioned subsequently, are fulfilled, and that the maintenance of a divorcee is *wajib* during the *'iddah* of a revocable divorce. The schools also concur that a woman observing the *'iddah* following her husband's death is not entitled to maintenance, whether she is pregnant or not, except that the Shafi'i and the Maliki schools state: If the husband dies, she is entitled to maintenance only to the extent of housing.

The Shafi'is have said: If he separates from her while she is pregnant and then dies, her maintenance shall not cease.

The Hanafis observe: If she is a revocable divorcee and the husband dies during the *'iddah*, her *'iddah* of divorce shall change into an *'iddah* of death, and her maintenance shall cease, except where she had been asked (by count) to borrow her maintenance and she had actually done so. In this case, the maintenance shall not cease.

There is consensus that a woman observing *'iddah* as a result of 'intercourse by mistake' is not entitled to maintenance.

The schools differ regarding the maintenance of a divorcee during the *'iddah* of an irrevocable divorce. The Hanafis observe: She is entitled to maintenance even if she has been divorced thrice, whether she is pregnant or not, on condition that she does not leave the house provided by the divorcee (husband) for her to spend the period of *'iddah*. According to the Hanafi school, the rules which apply to a woman in an *'iddah* following the dissolution of a valid contract are the same as those which apply to a divorcee in an irrevocable divorce.

According to the Maliki school, if the divorcee is not pregnant, she shall not be entitled to any maintenance except residence, and if she is pregnant she is entitled to her full maintenance; it shall not subside even if she leaves the house provided for spending the *'iddah*, because the maintenance is intended for the child in the womb and not for the divorcee.

The Shafi'i, the Imamiyyah and the Hanbali schools state: If she is not pregnant she is not entitled to maintenance, and if pregnant, she is entitled to it. But the Shafi'is add: If she leaves the house of her *'iddah* without any necessity, her maintenance shall cease.

The Imamiyyah do not consider the dissolution of a valid contract similar to an irrevocable divorce; they observe: A divorcee undergoing the *'iddah* of a dissolved contract is not entitled to any maintenance whether she is pregnant or not.

A Disobedient Wife (al-Nashizah)

The schools concur that a disobedient wife is not entitled to maintenance. But they differ regarding the extent of disobedience which causes the maintenance to subside. According to the Hanafⁱs, when a wife confines herself to her husband's house and does not leave it except with his permission, she shall be regarded as 'obedient' even if she denies him her sexual company without any valid reason.

Therefore, though such an act is Haram for her, it shall not cause her maintenance to cease. Thus, the cause which entitles her to maintenance, according to the Hanafis, is her confining herself to her husband's home, and her denial of her sexual company has no effect at all. This view of the Hanafi school is contrary to the view of all the other schools who concur that if a wife does not allow her husband free access to her person without any legal and reasonable excuse, she shall be considered 'disobedient' and shall not be entitled to any maintenance. The Shafi^{'i}s further add: Her allowing him free access is not enough unless she comes forth and says expressly to him: 'I surrender myself to you'.

In fact, the criterion for ascertaining 'obedience' and 'submission' is the general custom and there is no doubt that the people consider a wife obedient if she does not deny him access when he demands it, and they do not consider it necessary that she offer herself to him morning and evening. Whatever be the case, we have here the following questions concerning 'obedience' and 'disobedience'.

(1) If the wife is a minor, unfit for intercourse, and the husband a major capable of it, shall maintenance be *wajib*?

The Hanafis say: There are three types of female minors:

(i) A minor wife who is neither of any use for service nor for sociability, shall not be entitled to maintenance.

(ii) A minor wife with whom intercourse is possible enjoys the rights of a major wife.

(iii) A minor wife who is of use for service or for sociability alone, but not for intercourse, shall not be entitled to maintenance.

The remaining schools state: A minor wife is not entitled to maintenance even if the husband is a major.

(2) If the wife is a major capable of intercourse while the husband is a minor and incapable of it, the Hanafi, the Shafi^{'i} and the Hanbali schools observe: Her maintenance is *wajib* because the hindrance is from his side, not her.

The Malikis and some scholars of the Imamiyyah have said: Maintenance is not *wajib* because the sole granting of access from her side has no effect while there exists a natural disability in the husband, and a minor husband is free of obligations (*ghayr mukallaf*), and as to the duty of his guardian, there is no proof (that he is responsible for his ward's wife's maintenance).

(3) If the wife is sick or suffers from *al-ratq* or *al-qarn*,¹ her maintenance does not cease according to the Imamiyyah, the Hanbali and the Hanafi schools,² and it does according to the Maliki school if she is suffering from a serious disease or if the husband himself is similarly ill.

(4) If the wife apostatizes, her maintenance ceases according to all the schools. The maintenance of a wife belonging to the *Ahl al-Kitab* is *wajib*, and there is no difference between her and a Muslim wife from the viewpoint of maintenance.

(5) If a wife leaves her husband's home without his permission or refuses to reside in a house which fit her status, she shall be considered 'disobedient' and shall not be entitled to maintenance according to all the schools. The Shafi'i and the Hanbali schools further add: If she goes out with his permission for his need she shall be entitled to maintenance, and if she goes out not for his need, her maintenance shall cease even if he had granted her permission to do so.

(6) If she goes out for performing the obligatory Hajj pilgrimage, her maintenance shall cease according to the Shafi'i and the Hanafi schools, and according to the Imamiyyah and the Hanbali, it shall not.

(7) If the wife is obedient to the husband in granting him access and resides with him wherever he wants. but uses harsh language while talking to him, frowns in his face and opposes him in many matters, as is the case with many women, shall this be a cause for the maintenance to cease or not?

I have not come across the views of the schools on this question, but in my opinion if the wife has a hot-tempered disposition by nature and this is her way of behavior with everyone including her parents, she shall not be considered disobedient. But if she is not so by nature and is well-disposed towards everyone except her husband, she should be considered disobedient and not entitled to maintenance.

(8) If the wife refuses to obey her husband unless she is paid her *mahr*, agreed to be paid immediately, shall she be considered disobedient? The schools have divided the question—as mentioned in the chapter on *mahr*—between her refusing him before granting him access to her person and her refusal after granting him access willingly before taking the *mahr*.

In the first case, her refusal is due to a legally valid excuse and therefore she shall not be considered disobedient. In the second case, her refusal is without any valid excuse and. therefore, she shall be considered disobedient.

(9) I have come across an opinion expressed by the Hanbali's that if a wife imprisons her husband, demanding her maintenance or *mahr*, her maintenance shall cease if he is indigent and unable to meet her monetary rights, and if he has the means to pay but delays doing so it shall not.

This opinion is both good and firm because if she has imprisoned him while he is an indigent man unable to pay, she is oppressing him; and if she has imprisoned a husband who has the means to pay her but delays doing it, he is oppressing her. A verse of the Qur'an says:

وَإِنْ كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَىٰ مَيْسَرَةٍ

And if the debtor is in straitness, let there be postponement till the lime of ease... (2:280)

And there is a tradition which says:

الواجد تحل عقوبته وعرضه

It is permissible to punish and dishonor a person who possesses (but does not pay his liabilities).

It has also been narrated that 'Ali (A) used to detain one who delayed his creditors and release him if his penury was ascertained. Accordingly, a judge, after having ascertained that the circumstances of the husband are straitened and that the wife is entitled to maintenance, will order it to be considered a debt payable by the husband until further notification. If the judge determines the maintenance without mentioning the period during which it is to be paid, and the wife then imprisons the husband despite indigence and poverty, the husband is entitled to approach the judge to have her maintenance annulled from the date of his imprisonment, and the judge is bound to respond to his plea.

(10) If a wife is divorced while she is disobedient. she will not be entitled to maintenance; and if she is undergoing the *'iddah* of a revocable divorce and turns disobedient during this period, her maintenance shall cease; but on her reverting to obedience, it shall resume from the date of his knowledge of her becoming obedient.

(11) If the wife remains at her father's home after –the recital of the marriage contract for a period of time and then claims maintenance for that period, shall she be entitled to it?

The Hanafis observe: She is entitled to maintenance even if she hasn't shifted to her husband's home, either because the husband hasn't asked her to do so, or has but she has refused to come until she is given her *mahr* (Ibn 'Abidin).

According to the Maliki and the Shafi'i schools, she is entitled to maintenance if the marriage has been consummated or she has offered herself to him.

The Hanbali school states: If she doesn't offer herself, she is not entitled to maintenance even if she remains in such a state for years.

The Imamiyyah consider her entitled to maintenance from the date of the consummation of marriage–even if such consummation should occur while she is with her family–and from the date of her asking him to take her along with him.

From the above–mentioned views, it follows that all the schools entitle her to maintenance if she has

offered herself and showed her readiness to comply, and also if the marriage has been consummated, except that the Hanafis do not suffice with consummation but consider her willingness to confine herself also necessary. Apart from this, it has been pointed in the answer to the eighth question of this section that the wife has the right to refuse obedience till she is paid her prompt *mahr*, and her doing so is legally valid and does not cause her maintenance to cease.

(12) The Maliki, the Shafi'i and the Hanbali school state: An absent husband is similar to a husband present in regard to the rules of maintenance. Therefore, if an absent husband has any known assets, the judge shall order her maintenance to be paid from them, and if he does not possess such property, the judge shall pass an order of maintenance against him and the wife will borrow against his name. This is the procedure followed in Egypt (*al-'Ahwal al-shakhsiyyah*, Abu Zuhrah).

In *al-'Ahwal al-shakhsiyyah* (1942, pp. 269. 272) of Muhammad Muhyi al-Din 'Abd al-Hamid it is stated: The Hanafi school presumes that the absent husband has left in his property a share for his wife... and if he has not left any property, the judge shall consider him liable to pay the maintenance and will order the wife to borrow against his name. If she complains of not having found a person ready to lend her in her husband's name, the judge shall order the person on whom her maintenance is *wajib* to lend her on the supposition that she has no husband, and if this person refuses to lend her maintenance. The judge will imprison him.

The Imamiyyah observe: If the husband disappears after her surrendering herself to him, her maintenance is *wajib* upon him on the supposition that her obedience still persists from the time he left her; and if he disappears before consummation, she shall appear before the court and declare her obedience and willingness to live with him. The judge will then order the husband to present himself to inform him of her willingness. If the husband presents himself, or sends for her, or sends her, her maintenance, it suffices. But if he does not fulfill any of these alternatives, the judge shall allow a period of time sufficient for the issuance of a notification and the reception of his reply or for his sending of her maintenance; he will not issue any order during this period. After the expiry of this period he shall issue orders. If, for instance, such a period is two months, he shall order the payment of maintenance beginning from the date of expiry of the two months. Or if the wife informs the husband of her state without the mediacy of the judge and proves it, it shall also suffice. Then she shall be entitled to maintenance from that date.

(13) If the wife pleads before a judge to pass an order against the husband for the payment of her maintenance without mentioning the date from which she is entitled to receive it, the judge shall order payment from the date of her demanding maintenance, after ascertaining that the conditions have been fulfilled. If the wife mentions a date which is prior to the date of demand, shall the judge order payment of her maintenance for the period prior to the date of demand?

The Hanafis have said: Past maintenance may not be demanded from the husband; it is annulled by the passage of time except when the period is less than a month or if the judge has ordered its payment,

because maintenance ordered to be paid by court remains a debt for the husband irrespective of the passage of time.

The Malikis observe: If the wife demands her past maintenance, and the husband possessed the means to pay her during that time, she has the right to such a claim against him even if it had not been ordered by the court. But if the husband was indigent and unable to pay during that period, she cannot claim her maintenance from him, because, according to this school, indigence annuls maintenance; and if his indigence is subsequent to his affluence, the maintenance for the period of indigence shall be void and he shall be liable for the payment of the maintenance pertaining to his period of affluence.

The Imamiyyah, the Shafi'i and the Hanbali schools state: The wife's maintenance remains his liability, if the conditions entitling the wife to maintenance are fulfilled, no matter how much time has passed and irrespective of whether he was affluent or indigent during that time and regardless of whether the judge had ordered such payment or not.

1. The Hanafis state: If she falls sick at her husband's home, she is entitled to maintenance; and if she falls sick before consummation and it is not possible to shift her to his home, she will not be entitled to maintenance. This opinion of the Hanafis is in accordance with their basic principle that maintenance is a compensation for her confining herself to her husband's home.

2. The Malikis state: The wife's maintenance ceases during the husband's indigence, irrespective of consummation. If he becomes well-off later on, she does not have the right to claim maintenance for the period during which he was indigent.

Determination of Maintenance

The schools concur that a wife's maintenance is *wajib* in all its three forms: food, clothing and housing. They also concur that maintenance will be determined in accordance with the financial status of the two if both are of equal status. Here, by the financial status of the wife is meant the financial status of her family and its standard of living.

But when one of them is well-off and the other indigent, the schools differ whether maintenance should be in accordance with the husband's financial status (commensurable with his means if he is well-off and the wife indigent, and commensurable with his indigence if he is indigent and she is well-off), or whether the financial status of both should be considered and a median maintenance be fixed for her.

The Maliki and the Hanbali schools state: If the couple differ in financial status, a median course will be followed.

The Shafi'i school observes: Maintenance will be determined in accordance with the financial status of the husband, and the status of the wife will not be considered: this is regarding food and clothing. But as regards housing, it should be according to her status, not his (al-Bajuri, 1343 H., vol.2, p.197).

The Hanafi's have two views. According to the first, the status of both will be considered, and according to the second only the status of the husband.

Most Imamiyyah legists; observe that maintenance will be fixed in accordance with her requirements of food, clothing, housing, servants and cosmetics used by women of her standing among her townspeople. Some Imamiyyah legists consider the husband's not the wife's financial status as the criterion for fixing maintenance.

Whatever the case, it is necessary that the financial condition of the husband be taken into consideration as the Qur'an has expressly stated:

أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ وَلَا تُضَارُوهُنَّ لِتُضَيِّقُوا عَلَيْهِنَّ ۗ وَإِنْ كُنَّ أُولَاتٍ حَمْلًا فَأَنْفِقُوا عَلَيْهِنَّ حَتَّىٰ يَضَعْنَ حَمْلَهُنَّ ۚ فَإِنْ أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أُجُورَهُنَّ ۚ وَاتَّمَرُوا بَيْنَكُمْ بِمَعْرُوفٍ ۚ وَإِنْ تَعَاسَرْتُمْ فَسْتَزْضِعْ لَهُ أُخْرَىٰ

لِيُنْفِقَ ذُو سَعَةٍ مِنْ سَعَتِهِ ۚ وَمَنْ قُدِرَ عَلَيْهِ رِزْقُهُ فَلْيُنْفِقْ مِمَّا آتَاهُ اللَّهُ ۚ لَا يَكْلِفُ اللَّهُ نَفْسًا إِلَّا مَا آتَاهَا

Lodge them where you are lodging, according to your means ..Let the man of plenty expend out of his plenty... . As for him who has his means of subsistence straitened, let him expend of what God has given him. God does not burden anyone ercep1 to the extent of what He has granted him... (65:6,7)

Under Egyptian law (act 25. 1929), the wife's maintenance, to be paid by the husband, is fixed in accordance with his financial condition, irrespective of the condition of the wife.

Here it becomes clear that providing a servant and expenses of tobacco, cosmetics, tailoring, etc., requires that two things be taken into consideration; the husband's condition and the custom prevailing among her likes. Therefore, if she demands more than that the husband is not obliged to comply, irrespective of his financial condition; and if she demands what her likes generally require, it is compulsory that the husband meet her demands if he is well-off , but not if his means are straitened. Here, the following questions are also pertinent:

Medical Expenses

If the wife needs medicines or surgery, will the husband be compelled to pay her medical and surgical expenses?

The answer to this question leads us to another one: Is medical care part of maintenance or something apart from it? When we refer to the canonical sources, we find that the Qur'an makes the wife's food and clothing *wajib*. The ahadith say: It is for the husband to satiate her hunger and to clothe her. There is no

mention of medicine and medical treatment in the Qur'an and the traditions. The legists have limited maintenance to the providing of food, clothing and housing, and have not touched the matter of medical care. On the contrary, some of them have explicitly said that it is not *wajib* for the husband. In *al-Fiqh 'ala al-madhahib al-'arba'ah*, it has been narrated from the Hanafis that medicines and fruits are not *wajib* on the husband during the period of dispute between the couple. In the Imami work *al-Jawahir* (vol. 5) it is stated: The wife is not entitled to claim from the husband medicine during illness, or the expenses of cupping and bathing except during winter. Al-Sayyid Abu al-Hasan observes in *al-Wasilah*: If the medicines are of common use and needed for common ailments, such medicines are included in maintenance and are *wajib* upon the husband; but if the medicines are for difficult cures and uncommon ailments, which require expensive treatment, they are not included in maintenance and it is not the husband's duty to provide them.

This was a summary of the opinions of the legists which I have come across. It is also said that the treatment of simple diseases, such as malaria and ophthalmia, is included in maintenance, as observed by the author of *al-Wasilah*. But regarding surgeries, which require large sums of money, if the husband is poor and the wife is financially well-off she will bear the expenditure; and if he is a man of means while she is poor, he will meet the expenses – for of all people the husband, being her life partner, is most entitled to be kind to her. If, both of them are indigent, they will share in meeting the expenses.

In any case, it is certain that the Shari'ah has not explicitly defined the limits of maintenance, but has only made it *wajib* on the husband, leaving it to be determined in accordance with *'urf* (usage). Therefore, we should refer to *'urf* and not make anything *wajib* for the husband except after ascertaining that it is considered part of maintenance by *'urf*. And there is no doubt that *'urf* disapproves the conduct of a husband who while possessing the means neglects his wife who needs medical attention, exactly as it considers a father blameworthy if he neglects his ailing children while having the means to buy medicines and pay the doctor's fee.

Expenses of Child-birth

The essential expenses of child-birth and the obstetrician's fee will be paid by the husband when called upon by need.

Adjustment of Maintenance

If a judge determines a certain sum of money, or the spouses mutually settle it in lieu of maintenance, it is valid to adjust it by increasing or decreasing it in accordance with changes in prices or changes in the financial condition of the husband.

The Wife's Housing

The Imamiyyah, the Hanafi and the Hanbali schools state: It is necessary that the house provided to the wife befit the couple's status, and that the husband's family and children not reside in it except by her consent.

Marriage

The Malikis observe: If the wife is of a humble status, she may not refuse to stay with the husband's relatives, and if of a high social status she can refuse to stay with them except if it had been mentioned as a condition in the contract. If so, it is *wajib* for her to reside with his family on being provided a room; where she can enjoy privacy whenever she desires and does not suffer from mistreatment by his family.

According to the Shafi'i school, it is *wajib* that the housing suit her and not his status, even if he is poor.

The truth is that it is necessary to consider the condition of the husband in everything concerning maintenance, without there being any difference between food, clothing and housing in this regard, because the Qur'an says,

أَسْكِنُوهُنَّ مِمَّنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ

Lodge them where you lodge, according to your means, (65:6)

on condition that she have an independent home and does not suffer by staying in it.

A Working Wife

The Hanafis are explicit that a woman if she works and does not stay at home is not entitled to maintenance if the husband demands her to stay at home and she does not concede to his demand. This view is in concurrence with what the other schools hold regarding the impermissibility of her leaving her home without his permission. The Shafi'i and the Hanbali schools further state, as mentioned earlier, that if she leaves home with his permission for meeting her own requirements, her maintenance ceases.

But a correct view would be to differentiate between a husband who knows at the time of marriage that she is employed and her employment prevents her staying at home, and a husband who is ignorant about her employment at the time of marriage. Therefore, if he knew and remained silent and did not include a condition that she leave her job, he has no right in this case to ask her to forgo her job; and if he demands and she refuses to comply, her maintenance shall not cease, because he has concluded the contract with the knowledge that she works. And many men marry working women with an intention of exploiting them, and when they are unable to do so they ask the wives to stop working with the

purpose of harming them (financially).

But if the husband does not know that she works at the time of marriage, he can demand that she stop working, and if she does not comply, she shall not be entitled to maintenance.

Surety for Maintenance

Is the wife entitled to claim from her husband a surety to secure her future maintenance if the husband intends to travel alone without leaving anything for her?

The Hanafi, the Maliki and the Hanbali schools observe: She is entitled to do so, and he is bound to arrange a surety for maintenance, and on his refusal she can ask that he be prevented from making the journey. The Malikis further add: She is entitled to claim from him advance payment of maintenance if he intends to go for a usual journey, and if the wife accuses him of planning to go for an unusual journey she has the right to claim immediate payment of maintenance for the period of a usual journey and to provide her a surety for the period which exceeds the period of a usual journey.

The Imamiyyah and the Shafi'i schools state: She is not entitled to claim a surety for her future maintenance because its payment hasn't become due, and in the future the possibility of its ceasing due to her disobedience or divorce or death is always present.

My opinion is that she has the right to claim a surety because the cause on whose basis a surety is demanded is present, and this is her present obedience. Therefore, al-Shaykh Ahmad Kashif al-Ghita' has observed in his *Safinat al-najat (bab al-daman)*: But the opinion (that she can claim a surety) is not farfetched if not opposed by consensus (*ijma'*), so that her future maintenance is insured like her past and present maintenance.

No the matter leads to consensus, it lacks strength from the Imami viewpoint, because, according to their principles of jurisprudence, every consensus reached after the period of the Imams (A) faces the possibility of being refuted. Thus if there is a possibility that the consensus of the concurring legists is based on their belief that future maintenance does not become payable presently because it is not correct to provide surety for something which has not become payable, the argument on the basis of consensus fails due to the presence of this possibility. Now it should be seen whether the rule (that everything which has not yet become payable does not require a surety) on which the legists have based their argument is correct and whether it can be applied here or not. Here, as already explained, the cause (the wife's obedience) is present, which is sufficient to justify surety. Accordingly, the wife is entitled to claim a surety for her maintenance if the husband intends to travel, especially when he cannot be relied upon and is known to be irresponsible.

Dispute between Spouses

If after the husband accepts the wife's right to maintenance, the two differ about the actual payment of maintenance (she denying that he has paid, and he claiming to have paid it) the Hanafi, the Shafi'i and the Hanbali schools observe: The wife's word shall be accepted because she ' the refuter and the burden of proof is not on her.

The Imamiyyah and the Maliki schools state: If the husband resides with her in the same house, his word will be accepted, otherwise her word.

If the husband concedes that he has not paid maintenance on the excuse that she is not entitled to it due to her not surrendering herself to him, his word will be accepted according to all the schools. The consensus on this issue is a corollary to the consensus of the schools on the issue that *mahr* becomes payable on the conclusion of the contract and becomes fully payable on consummation: but maintenance does not become payable solely on the conclusion of the contract, it is necessary for her to surrender herself to the husband. It is the practice of the Shari'ah courts of Lebanon, both Sunni and Shii, when the spouses differ regarding disobedience (*nushuz*) (he claiming that she is disobedient and she charging him with disobedience), to order the husband to provide a suitable house and to order the wife to reside in it. If the husband refuses to provide a house, he will be considered disobedient; and if he provides a house which fulfils all the conditions and she refuses to reside in it and to obey him, she will be considered disobedient.

The Wife's Claim of Expulsion

If the wife leaves her husband's home claiming that she has been expelled, and he denies this, the burden of proof will rest on her and he will be made to take an oath; because it is not valid for her to leave home without an acceptable excuse, and as she claims the presence of such an excuse, she is burdened with proving it.

Loss of Maintenance

When the husband provides his wife with maintenance for the future, and then it is stolen or destroyed while in her possession, it is not *wajib* upon the husband to replenish it, irrespective of whether such loss occurs due to an unavoidable cause or on account of her negligence.

Husband's Debt Claim against Wife

If a wife owes a debt to her husband, can he adjust this debt against her present or future maintenance?

The Imamiyyah legists have dealt with this issue; they observe: If she is financially well-off and yet refuses to repay the debt, it is permissible for him to adjust it from her day-to-day maintenance, which

means that he consider her debt to him as her maintenance for each day, separately. But if she is financially straitened, he cannot do so; because any payment towards debt should be from what exceeds her daily expenditures.

Maintenance of Relatives

Who are the relatives entitled to maintenance and who amongst them is liable to provide maintenance? What are the conditions which make such maintenance *wajib*?

Definition of a Relative's Maintenance

According to the Hanafi's, the criterion for the responsibility of the relative to provide maintenance of another is the prohibited degree of marriage, so that if one of them is supposed a male and the other a female, marriage between them would be considered *haram*.

Therefore, this responsibility includes fathers—how high so ever—and sons—how low so ever—and also includes brothers, sisters, uncles and aunts, both paternal and maternal, because marriage between any two of them is prohibited.

The nearest relative shall be liable to provide maintenance, and affinity here has nothing to do with the title to inheritance. Therefore, if there is someone in the two classes of lineal ascendants and descendants, maintenance will be *wajib* on him, even if he is not entitled to inherit (from the person he is liable to maintain). One not belonging to these two classes will not be liable to provide maintenance, though he should be entitled to inherit. For example, if a person has a daughter's son and a brother, his maintenance will be *wajib* upon the former and not the latter, though the latter alone be entitled to the entire legacy to the exclusion of the former (*al-Durar fi sharh al-Gharar*, vol. 1, *bab al-nafaqat*).

Similarly, between two relatives of the same class, the nearer one will be responsible, even if he isn't entitled to any share in the legacy. Therefore, if a child has a paternal great grandfather and a maternal grandfather, his maintenance will be *wajib* upon the latter not the former, though the former should be an heir to the exclusion of the other. The secret here is that the maternal grandfather is nearer though he does not inherit, while the paternal great grandfather is comparatively distant, though he is an heir.

The Hanafis also state: The well-to-do son is responsible for the maintenance of his indigent father's wife, and he is also liable to get his indigent father married if he needs a wife.

The Malikis observe: Maintenance is *wajib* only on parents and children, not on other relatives. Thus, a grandson is not responsible to maintain his paternal or maternal grandfathers or grandmothers, and,

reciprocally, a grandfather is not liable to maintain his grandsons and granddaughters. On the whole, the responsibility for maintenance is limited to parents and children, to the exclusion of grandparents and grandchildren.

They also state: It is *wajib* upon a well-to-do son to maintain the servant of his indigent parents, even if they don't need him; but it is not *wajib* for a father to maintain his son's servant. A son is also liable to maintain his father's wife and her servant and have his father married to one or more wives, if one wife does not suffice.

The Hanbalis state: It is *wajib* that fathers, how high so ever, provide and receive maintenance. Similarly, it is *wajib* that sons, how low so ever, provide and receive maintenance, irrespective of their title to inheritance. Maintenance of relatives not belonging to the two classes is also *wajib* if the person liable to provide maintenance inherits from the person being maintained either by *fard*¹ or by *ta'sib*²; but if excluded from inheritance, he will not be responsible for maintenance. Thus, if a person has an indigent son and a well-to-do brother, neither may be compelled to maintain him, because the son's indigence relieves him of the responsibility, and the brother by being excluded from inheritance due to the son's presence (*al-Mughni*, vol. 7, *bab al-nafaqat*).

They also state: It is *wajib* on the son to arrange for his father's marriage and to maintain his wife, in the same way as it is *wajib* on the father to have his son married if he is in need of marriage.

According to the Imamiyyah and the Shafi'i schools, it is *wajib* for sons to maintain their fathers and mothers, how high so ever, and it is *wajib* for fathers to maintain sons and daughters, how low so ever. The obligation of maintenance does not transcend these two main lineal classes to include others, such as brothers and paternal and maternal uncles.

But the Shafi'is are of the view that a well-to-do father is liable to have his indigent son married if in need of marriage: and a son is likewise bound to arrange for his indigent father's marriage if in need of marriage. Moreover, the liability for a person's maintenance includes the maintenance of his wife (*Maqсад al-nabih*, *bab nafaqat al-'aqarib*).

Most Imamiyyah legists state: It is not *wajib* to arrange for the marriage of a person whose maintenance is *wajib*, irrespective of whether he is father or son. Similarly, it is not *wajiiib* for a son to maintain his father's wife if she is not his mother, or for a father to maintain his son's wife, because the canonical proofs (*adillah*) which make maintenance *wajiiib* include neither the father's wife nor the son's, and an obligation is assumed to be non-existent until proved.

Conditions for the Wujub of Maintenance

The following conditions are necessary for making the maintenance of one relative *wajib* upon another.

1. The person to be maintained must be in need of maintenance. Therefore, maintaining a person who is

not needy is not *wajib*. The schools differ regarding a person who is needy and can earn his livelihood but does not do so, as to whether it is *wajib* to maintain him or not.

The Hanafi and the Shafi'i school state: The inability to earn is not a necessary condition for the *wajib* of the maintenance of fathers and grandfathers. Therefore, their maintenance is *wajib* on sons even if they have the ability to work but neglect to do so. Regarding other relatives who are able to make a living for themselves, their maintenance is not *wajib*; rather, they will be compelled to make a living, and a one who neglects to work or is sluggish commits only a crime against himself. But the *Shafi'is* say regarding a daughter: Her maintenance is *wajib* on the father until she is married.

The Imamiyyah, the Maliki and the Hanbali schools state: If one who was earlier making his livelihood by engaging in a trade that suited his condition and status later neglects to do so, his maintenance is not *wajib* upon anyone, irrespective of whether it is the father or the mother or the son. The Malikis agree with the Shafi'is' position regarding a daughter and the reason for this is that formerly women were considered generally incapable of earning their own livelihood.

2. That the maintainer be well-off, according to all the schools, except the Hanafi's who say: Being well-to-do of the maintainer is a condition only for the maintenance of those who are neither ascendants nor descendants; but financial capacity is not a condition in the maintenance of the scion by one of the parents or the maintenance of the parents by the scion. The only condition here is the presence of the actual ability to maintain or the presence of the ability to earn. Therefore, a father who is capable of work will be ordered to maintain his child, and similarly a son with respect to his father, except where one of them is indigent and incapable of making an earning, such as due to blindness. etc.

The schools differ regarding the degree of financial ease necessary to cause the liability for providing maintenance to a relative. According to the Shafi'i school, it is the surplus over the daily expenditure of his own, his wife's and his children's.

The Malikis add to this the expenditure incurred upon servants and domestic animals.

According to the Imamiyyah and the Hanbali schools: It is the surplus over the daily expenditure of oneself and one's wife, as the maintenance of descendants and ascendant belongs to the same category.

Hanafi legists differ in defining the state of financial ease. According to some of them, it is possession of an amount of wealth which gives rise to the incidence of *zakat* (*nisab*); according to others, it should be enough to prohibit his taking of *zakat*. The third opinion differentiates between the farmer and the worker, allowing the farmer his and his family's expenditure for a period of one month and the worker a day's expenditure as deduction

3. According to the Hanbalis, their belonging to the same religion is necessary: thus, if one of them is a Muslim and the other a non-Muslim, maintenance will not be *wajib* (*al-Mughni* , vol. 7).

The Maliki, the Shafi'i and the Imamiyyah schools state: Their belonging to the same religion is not necessary. Therefore, a Muslim can maintain a relative who is not a Muslim, as is the case when maintenance is provided by a Muslim husband to his wife belonging to Ahl al-Kitab.

The Hanafis observe: Belonging to the same religion is not required between ascendants and descendants, but necessary between other relatives. Therefore, a Muslim will not maintain his non-Muslim brother and vice versa (Ab Zuhrah).

Determination of Relative's Maintenance

It is necessary that maintenance paid to a relative be sufficient to cover his/her essential needs, such as food, clothing and housing, because maintenance has been made *wajib* to protect life and to provide its needs. Thus it is to be determined in accordance with the needs (*al-Mughni*, vol. 7. *al-Tawahir*, vol. 5).

It should be noted that if a relative entitled to maintenance receives the maintenance of a day or more through litigation, through gift, *zakat* or some other manner, the maintenance due to him will be deducted to the extent of what he received through these means, even if the judge has ordered the payment of maintenance.

The Order of Relatives on Whom Maintenance is Wajib

The Hanafis observe: If there is only one person responsible for maintenance, he will pay it; if two or more belonging to the same category and capacity are responsible—such as two sons or two daughters—they will share equally in providing maintenance, even if they differ in wealth, after their financial capacity has been proved.³

But where they are of different categories of relationship or of varying capacities, there is confusion in the views of Hanafi legists in providing the order of those responsible for maintenance (*al-Ahwat al-shakhsiyyah*, Abu Zuhrah).

The Shafilis state: If a person in need has a father and a grandfather who are both well-off, his maintenance will be provided solely by the father. If he has a mother and a grandmother, the maintenance will be solely provided by the mother. If both the parents are there, the father will provide the maintenance. If he has a grandfather and a mother, the grandfather will provide the maintenance. If he has a paternal grandmother and a maternal grandmother according to one opinion, both are equally responsible according to another opinion. the paternal grandmother will be solely liable (*Maqsad al-nabih*, *nafaqat al-aqarib*).

The Hanbalis state: If a child does not have a father, his maintenance will be on his heirs; and if he has two heirs, they will contribute in proportion to each's share in legacy. If there are three or more heirs, they will contribute in proportion to their share in legacy. Tut if he has a mother and a grandfather, the

mother will contribute one-third of maintenance and the grandfather the remainder, as they inherit in the same proportion (*al-Mughni*. vol. 7).

The Imamiyyah state: The child's maintenance is *wajib* on the father, If the father is dead or indigent, its maintenance will lie upon the paternal grandfather; and if the grandfather is dead or indigent, the mother will be liable for maintenance. After him, her father and mother along with the child's paternal grandmother will share equally in the maintenance of the grandchild if they are financially capable. But if only some of them are well-off, the maintenance will lie only on those who are such.

If an indigent person has father and a son, or father and a daughter, they will contribute to his maintenance equally. Similarly, if he has many children, it will be shouldered equally by them without any distinction between sons and daughters. On the whole, the Imamiyyah consider the nearness of relationship a criterion while determining the order of relatives who are liable to provide maintenance; on their belonging to the same class, they are compelled to contribute equally without any distinction between males and females or between ascendants and descendants, except that the father and the paternal grandfather are given priority over the mother.

1. By fard is meant the specific share of inheritance decreed for an heir by the Qur'an.

2. Al-Tasib is a doctrine accepted by the Sunni schools. It applies in situations where the total shares of the decreed sharers fall short of the total legacy. Here, the Sunni schools assign the balance to be inherited by distant relatives, as the nearer relative have already received their decreed shares and are not entitled to anything in addition to their decreed shares. For example, if a person dies leaving behind a daughter and an uncle, the decreed share of the daughter being half, the other half will be inherited by the uncle and the daughter will not be entitled to inherit more than her decreed share.

The Imamiyyah do not accept this doctrine and in the above example entitle the daughter to inherit the whole heritable interest to the exclusion of the father's uncle. They apply the rule: the nearer in degree excludes the remote.

3. Some judges distribute the maintenance of a relative between those on whom his maintenance is *wajib* in accordance with the financial capacity of each. Therefore, if an indigent father has two sons, one of them very rich, and the other merely well-off, the first will contribute more than the second to the father's maintenance.

The Hanafis give no weightage to this difference in financial capacity and consider the two equally liable after their capacity has been proved. This is a right required by the legal bases, and the statements of the author of *al-Jawahir* also bear this out where he says: If he has a son who is presently well-off and another son who is in the course of becoming such, the two will contribute equally because the applicable *adillah* are unconditional.

7. Divorce

Divorce

The Divorcer (al-Mutalliq)

A divorcer should possess the following characteristics:

1. Adulthood: Divorce by a child is not valid, even if of a discerning age (*mumayyiz*), according to all the schools except the Hanbali, which observes: Divorce by a discerning child is valid even if his age is below ten years.
2. Sanity: Divorce by an insane person is not valid, irrespective of the insanity being permanent or recurring, when the divorce is pronounced during the state of insanity. Divorce by an unconscious person and one in a state of delirium due to high fever is also not valid. The schools differ regarding the state of intoxication. The Imamiyah observe: Such a divorce is not valid under any circumstance. The other four schools¹ remark: The divorce is valid if the divorcer has voluntarily consumed an unlawful intoxicant. But if he drinks something permissible and is stupefied, or is coerced to drink, the divorce does not materialize.

Divorce by a person in a fit of anger is valid if the intention to divorce exists. But if he loses his senses completely, the rule which applies to an insane person will apply to him.

3. Free volition: All the schools except the Hanafi concur that divorce by a person under duress does not take place in view of the tradition:

رُفِعَ عَنْ أُمَّتِي الْخَطَأَ وَالنَّسْيَانَ وَمَا اسْتَكْرَهُوا عَلَيْهِ

My ummah have been exculpated of genuine mistakes, forgetfulness, and that which they are coerced to do.

The Hanafis say: Divorce by a person under duress is valid.

The practice of the Egyptian courts has been not to recognize the divorce by a person under duress or intoxication.

4. Intention: According to the Imamiyyah, divorce pronounced unintentionally or by mistake or in jest is not valid.

Abu Zuhrah says (page 283): The Hanafi school considers divorce by all persons except minors, lunatics and idiots as valid. Thus divorce pronounced by a person in jest or under intoxication by an unlawful intoxicant, or under duress, is valid. On page 286 he writes: It is the accepted view of the Hanafi school

that a divorce by mistake or in a state of forgetfulness is valid. On page 284 he observes: Malik and al-Shafi'i concur with Abu Hanifah and his followers regarding a divorce pronounced in jest, while Ahmad differs and regards such a divorce as invalid.

Ibn Rushd states (*Bidayat al-mujtahid*, vol. 2, p. 74): Al-Shafi'i and Abu Hanifah have said, "Intention (*niyyah*) is not required in divorce".

The Imamiyyah have narrated from the Imams of the Ahl al-Bayt (A):

لا طلاق إلا لمن أراد الطلاق ، لا طلاق إلا بنية

No divorce (takes effect) except by one who intends divorce. Divorce does not take place except by intention.

The author of *al-Jawahir* says: If one pronounces divorce and subsequently denies intention, his word shall be accepted as long as the divorcee is undergoing her *'iddah*, because the fact of his intention cannot be known except from him.

Divorce by the Guardian (Talaq al-Wali)

The Imamiyyah, the Hanafi and the Shafi'i schools state: A father may not divorce on behalf of his minor son, because of the tradition:

الطلاق لمن أخذ بالساق

The Malikis state: A father may divorce his minor son's wife in the *khul'* form of divorce. Two opinions are ascribed to Ahmad.

The Imamiyyah observe: When a child of an unsound mind matures, his father or paternal grandfather may pronounce divorce on his behalf if it is beneficial for him. If the father and the paternal grandfather do not exist, the judge may pronounce the divorce on his behalf. As mentioned earlier, the Imamiyyah allow the wife of a lunatic to annul the marriage.

The Hanafis state: If a lunatic's wife suffers harm by living with him, she may raise the issue before a judge and demand separation. The judge is empowered to pronounce divorce to rescue her from the harm and the husband's father has no say in this affair.

All the schools concur that divorce by a stupid husband (*safih*) and his agreeing to *khul'* are both valid.[2](#)

The Divorcee (al-Mutallaqah)

There is consensus that the divorcee is the wife. For the validity of the divorce of a wife with whom intercourse has occurred, the Imamiyyah require that she should not have undergone menopause nor she should be pregnant, that she be free from menses at the time of divorce, and that intercourse should not have occurred during the period of purity. Thus, if she is divorced during her menses or *nifas*,³ or in a period of purity in which she has been copulated with, the divorce will be invalid.

Al-Razi in his exegesis of the first verse of *Surat al-Talaq*:

يَا أَيُّهَا النَّبِيُّ إِذَا طَلَّقْتُمُ النِّسَاءَ فَطَلِّقُوهُنَّ لِعَدَّتِهِنَّ

has said, "By *'iddah* is meant the period of purity from menses, by consensus of all Muslims. A group of exegetes has observed that by divorce at the time of *'iddah* is meant that the wife may be divorced only during the period of purity in which intercourse has not occurred. In brief, it is compulsory that divorce occur during the period of purity, otherwise it will not be according to the Sunnah, and divorce according to the Sunnah is conceivable only in the case of an adult wife with whom marriage has been consummated, and one who is neither pregnant nor menopausal."

For there is no *sunnah* concerning the divorce of a minor wife, a wife who has not been copulated with, or a wife in menopause or pregnancy. This is exactly what the Imamiyyah hold.

In *al-Mughni* (vol.7, p.98, 3rd.ed.) the author states: "The meaning of a *sunnah* divorce (*talaq al-sunnah*) is a divorce in consonance with the command of God and His Prophet (S); it is divorce given during a period of purity in which intercourse with her has not occurred." He continues (p. 99): "A divorce contrary to the *sunnah* (*talaq al-bid'ah*) is a divorce given during menses or during a period of purity in which she has been copulated with. But if a person pronounces such a divorce, he sins, though the divorce is valid according to the view generally held by the scholars. Ibn al-Mundhir and Ibn 'Abd al-Birr have said: None oppose the validity of this form of divorce except the heretics (*ahl al-bida' wa al-dalalah*)"! If to follow the command of Allah and the Sunnah of His prophet (S) is heresy and misguidance, then it is of course proper that following Satan be called '*sunnah*' and 'guidance'.

Whatever the case, the Sunnis and the Shi'ah concur that Islam has prohibited the divorcing of an adult, non-pregnant wife with whom marriage has been consummated, who is either undergoing periods or has been copulated with during her period of purity. But the Sunni schools add that the Shari'ah's prohibition makes the divorce *haram* (unlawful) but not invalid, and one who pronounces divorce in the absence of these conditions sins and is liable to punishment, but the divorce will be valid. The Shi'ah state: The Shari'ah's prohibition is for invalidating such a divorce, not for making it *haram*, for the mere pronouncing of divorce is not *haram* and the sole purpose is to nullify the divorce as if it had not taken place at all, exactly like the prohibition of sale of liquor and swine, where the mere recital of the contract

of sale is not *haram*, only the transfer of ownership fails to take effect.

The Imamiyyah permit the divorce of the following five classes of wives, regardless of their state of menstruation or purity:

1. A minor wife under the age of nine.
2. A wife whose marriage has not been consummated, regardless of whether she was a virgin or not, and irrespective of his having enjoyed privacy with her.
3. A menopausal wife; menopause is taken to set in at fifty for ordinary women and at sixty for Qurayshi women.
4. A wife who is pregnant.
5. A wife whose husband has been away from her for a whole month and the divorce is given during his absence from her, since it is not possible for him to determine her condition (whether she is in her menses or not). A prisoner husband is similar to a husband who has been away.

The Imamiyyah state: The divorce of a wife who has reached the age of menstruation but does not have menses due to some defect or disease or childbirth, is not valid unless the husband abstains from intercourse with her for three months. Such a woman is called *al-mustarabah* (a term derived from *rayb*, doubt).

The Pronouncement of Divorce (al-Sighah)

The Imamiyyah observe: Divorce requires the pronouncement of a specific formula without which it does not take place. This formula is:

أنتِ طالق (you are divorced), or فلانة طالق ('so and so' is divorced), or هي طالق (she is divorced).

Thus if the husband uses the words: الطالق or المطلقة or طُلقَت, or الطلاق or المطلقات etc., it will have no effect even if he intends a divorce because the form طالق is absent despite the presence of its root (*t-l-q*). It is necessary that the formula be properly recited without any error in pronunciation and that it be unconditional. Even a condition of certain occurrence such as, 'at sunrise', etc. is not adequate.

If the husband gives the wife the option of divorcing herself and she does so, divorce will not take place according to Imami scholars. Similarly, divorce will not take place if the husband is questioned. "Have you divorced your wife", and he answers affirmatively with the intention of effecting a divorce. If the husband says, "You are divorced, three times", or repeats the words, "You are divorced", thrice, only a single divorce takes place if the other conditions are fulfilled. Divorce does not take place through writing or by gesticulation, unless the divorcer is dumb, incapable of speech. It is necessary that the divorce be recited in Arabic when possible. It is better for a non-Arab and a dumb person to appoint an attorney, if possible, to recite the divorce on his behalf. Similarly, according to the Imamiyyah, divorce will not take place by an oath, a vow, a pledge or any other thing except by the word طالق, on fulfillment of all the limitations and conditions.

The author of *al-Jawahir*, citing a statement from *al-Kafi*, says: "There can be no divorce except (in the form) as narrated by Bukayr ibn A'yan, and it is this: The husband says to his wife (while she is free from menses and has not been copulated with during that period of purity): **أنت طالق** (You are divorced), and (his pronouncement is witnessed by two just ('*adil*) witnesses. Every other form except this one is void". Then the author of *al-Jawahir* quotes *al-Intisar* to the effect that there exists consensus on this issue among the Imamiyyah.

Consequently, the Imamiyyah have restricted the scope of divorce to its extreme limits and impose severe conditions regarding the divorcer, the divorcee, the formula of divorce, and the witnesses to divorce. All this is because marriage is a bond of love and mercy, a covenant with God. The Qur'an says:

و كيف تأخذونه و قد أفضى بعضكم إلى بعض وأخذن منكم ميثاقاً غليظاً

How can you take it back after one of you hath gone in into the other, and they (the wives) have taken a strong pledge from you? (4:21)

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً

And one of His signs is that He created mates for you from yourselves that you may find tranquility in them, and He ordained between you love and compassion. (30:21)

وَلَا تُمْسِكُوا بِعِصَمِ الْكَوَافِرِ

...And hold not to the ties of marriage of unbelieving women.... (60: 10)

Therefore, it is not permissible in any manner that one break this bond of love and compassion, this pledge and covenant, except with a knowledge that leaves no doubt that the Shari'ah has surely dissolved the marriage and has broken the tie which it had earlier established and confirmed.

But the other schools allow divorce in any manner in which there is an indication of it, either by oral word or in writing, explicitly or implicitly (such as when the husband says: "You are *haram* for me", or "You are separated" or "Go, get married", or "You are free to go wherever you want," or "Join your family," and so on). Similarly, these schools allow an unconditional as well as a conditional divorce (such as when the husband says: "If you leave the house, you are divorced," or "If you speak to your father you are divorced," or "If I do this, you are divorced," or "Any woman I marry, she is divorced:" in the last case the divorce takes place as soon as the contract of marriage is concluded!). There are various other pronouncements through which divorce is effected, but our discussion does not warrant such detail.

These schools also permit a divorce in which the wife or someone else has been authorized to initiate it. They also allow a triple divorce by the use of a single pronouncement. The legists of these schools have filled many a long page with no result except undermining the foundation of the family and letting it hang in the air.⁴

The Egyptian government has done well in following the Imamiyyah in most aspects of divorce. Apart from this, the four schools do not consider the presence of witnesses a condition for the validity of divorce, whereas the Imamiyyah consider it an essential condition. We hand over the discussion to al-Shaykh Abu Zuhrah regarding this issue.

Divorce and Witnesses

In *al-Ahwal al-shakhsiyyah* (p. 365), al-Shaykh Abu Zuhrah has observed: "The Twelve-Imami Shi'i legists and the Isma'iliyah state: A divorce does not materialize if not witnessed by two just (*'adil*) witnesses, in accordance with the Divine utterance regarding the rules of divorce and its pronouncement:

فَإِذَا بَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ وَأَشْهَدُوا ذَوَى عَدْلٍ مِنْكُمْ وَأَقِيمُوا الشَّهَادَةَ لِلَّهِ ذَلِكَ يُوعِظُ بِهِ مَنْ كَانَ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَمَنْ يَتَّقِ اللَّهَ يَجْعَلْ لَهُ مَخْرَجًا * وَيَرْزُقْهُ مِنْ حَيْثُ لَا يَحْتَسِبُ

Then when they (the wives) have reached their 'iddah retain them honourably, or part from them honourably. And have two just men from among yourselves bear witness, and give testimony for Allah's sake. By this then is admonished he who believes in Allah and the Last Day. And whoever is careful of (his duty to) Allah, He will provide for him an outlet and give him sustenance from whence he never reckoned (65:2-3)

This command about the witnesses in the Qur'an follows the mention of divorce and the validity of revoking it. Therefore, it is appropriate that the calling in of witnesses should be related to divorce. Moreover, the reason given for calling in the witnesses, that God seeks thereby to admonish those who believe in God and the Last Day, confirms this interpretation, because the presence of just witnesses is not without the good advice which they would offer to the couple; and this could bring about for them an escape from divorce, which is the most hated of lawful things in the eyes of God. If it were for us to choose the law to be acted upon in Egypt, we would choose this opinion, which requires the presence of two just witnesses for effecting a divorce".

Together with the restrictions that the Imamiyyah have laid down for the divorcer, the divorcee, and the pronouncement of divorce, they have also laid down an additional limitation regarding the witnesses by demanding that if all conditions are fulfilled except that the two just witnesses do not hear the pronouncement of the divorce, the divorce will not take place. Therefore, a single witness will not suffice even if he is a good substitute, not even if he is an infallible (*ma'sum*) person.⁵

Further, the witnessing of the pronouncement by one of them by listening and of the other by testifying to their admission (of having concluded the divorce) is not sufficient. The testimony of a group of people will also not suffice, even if it is big enough to make the divorce a known public fact. The testimony of women, with or without the testimony of men, is not sufficient. Similarly, if the husband pronounces the divorce and then brings in the witnesses, it will have no effect.

The Case of a Sunni Husband and a Shi'i Wife

If a Sunni husband divorces his Shi'i wife, either through a conditional divorce contingent upon something, or in a period of purity during which sexual intercourse has occurred, or during menses or *nifas*, or without two just witnesses being present or by an oath of divorce, or by saying, **حبلك على غارك** ; "Go wherever you want," or in any other form which is valid in accordance with Sunni law and invalid according to Shi'i law, is such a divorce considered valid by the Shi'ah, so that the woman may remarry after completing her *'iddah*?

The answer is that there is consensus among the Imami jurists that every sect is bound by its own precepts,⁶ and that the transactions of its followers, as well as their affairs pertaining to inheritance, marriage and divorce, are valid if performed according to rules of their *shari'ah*. A tradition has been narrated from the Imams of Ahl al-Bayt (A):

أَلْزَمُوهُمْ مِنْ ذَلِكَ مَا أَلْزَمُوا أَنْفُسَهُمْ

Bind them with the laws with which they have bound themselves.

In another tradition, al-Imam al-Sadiq (A) was questioned regarding a woman who had been divorced by a Sunni husband against the principles of the Sunnah, whose compliance is necessary for the validity of a divorce according to the Shi'ah. The Imam (A) replied:

تَتَزَوَّجُ، وَلَا تُتْرَكُ الْمَرْأَةُ مِنْ غَيْرِ زَوْجٍ

She will marry, and a woman shall not be left without a husband.

In a third tradition it is stated:

يَجُوزُ عَلَى أَهْلِ كُلِّ دِينٍ مَا يَسْتَحِلُّونَ

For the followers of every religion, that which they consider lawful is permissible for them.

A fourth tradition says:

من دان بدين قوم لزمته أحكامهم

One who follows the religion of a particular sect, is bound by its rules, (*al-Jawahir*, vol. 5, the discussion regarding *sighat al-talaq*).

Consequently, if a Shi'i husband divorces his Sunni wife according to the principles of her school and not his, the divorce is invalid, and if a Sunni divorces his Shi'i wife according to the principles of his own school, the divorce is valid.

Revocable and Irrevocable Divorce

A divorce is either revocable or irrevocable. The schools concur that a revocable divorce is one in which the husband is empowered to revoke the divorce during the *'iddah*, irrespective of the divorcee's consent. One of the conditions of a revocable divorce is that the marriage should have been consummated, because a wife divorced before consummation does not have to observe the *'iddah* in accordance with verse 49 of *Surat al-Ahzab*:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا نَكَحْتُمُ الْمُؤْمِنَاتِ ثُمَّ طَلَقْتُمُوهُنَّ مِنْ قَبْلِ أَنْ تَمْسُوهُنَّ فَمَا لَكُمْ عَلَيْهِنَّ مِنْ عِدَّةٍ تَعْتَدُونَهَا

O believers! When you marry the believing women and then divorce them before you touch them, you are not entitled to reckon for them an 'iddah....

Among the other conditions of a revocable divorce are that the divorce should not have been given on the payment of a consideration and that it should not be one which completes three divorces.

The divorcee in a revocable divorce enjoys the rights of a wife, and the divorcer has all the rights of a husband. Therefore, both will inherit from each other in the event of death of one of them during the *'iddah*. The deferred *mahr* payable on the occurrence of any of the two events, death or divorce, will become payable only after the expiry of the *'iddah* if the husband does not revoke the divorce during that period. On the whole, a revocable divorce does not give rise to a new situation except its being accountable for ascertaining whether the number of divorces has reached three.

In an irrevocable divorce, the divorcer may not return to the divorced wife, who belongs to one of the following categories:

1. A wife divorced before consummation, by consensus of all the schools.
2. A wife who has been divorced thrice. There is consensus here as well.
3. A divorcee through *khul'*. Some legists consider this form of divorce void and say that it is not a divorce at all.

4. A menopausal divorcee, in the Imami school, which observes: She has no *'iddah* and the rules applicable to a divorcee before consummation apply to her as well. According to it, in verse 4 of *Surat al-Talaq*:

وَاللَّائِي يَأْسَنَ مِنَ الْمَحِيضِ مِنْ نِسَائِكُمْ إِنْ أَرْتَبْتُمْ فَعِدَّتُهُنَّ ثَلَاثَةُ أَشْهُرٍ وَاللَّائِي لَمْ يَحِضْنَ

If you are in doubt concerning those of your wives who have ceased menstruating, know that their waiting period is three months, and (the same is the waiting period of) those who have not yet menstruated ...

the phrase: *وَاللَّائِي يَأْسَنَ* does not imply those women who are known to have reached menopause but those whose menses have stopped and it is not known whether the reason is disease or age; consequently, their *'iddah* is three months. There is no question of doubt regarding those whose menopause is certain. The doubt arises in cases of uncertainty, as indicated by the words: *إِنْ أَرْتَبْتُمْ* (if you are in doubt) of the verse, because it is not the Lawgiver's wont when explaining a law to say: "If you are in doubt regarding the law regarding something, the law is that...". This confirms that the doubt mentioned in the verse relates to the fact of menopause, in which case she is to observe an *'iddah* of three months. As to the phrase: *وَاللَّائِي لَمْ يَحِضْنَ* it refers to women who despite attaining the age of menses do not have them due to some congenital or contingent factor. Many traditions have been narrated from the Imams of the Ahl al-Bayt (A) with this interpretation of this verse.

5. The Hanafis say: Valid seclusion (*khalwah*) with the wife, even without consummation, requires the observance of *'iddah*. But the divorcer is not entitled to return to her during the *'iddah*, because here the divorce is irrevocable.

The Hanbalis state: Seclusion is similar to consummation in all respects so far as the necessity of *'iddah* and the right of revocation is concerned. As mentioned earlier, seclusion has no effect according to the Imamiyyah and the Shafi'i schools.

The Hanafis observe: If a husband says to his wife: "You are divorced irrevocably" or "divorced firmly," "(with a divorce as firm) as a mountain," and such similar strong words, the divorce will be irrevocable and the divorcer will not be entitled to return during the *'iddah*. Similarly, a divorce pronounced by using words which connote a break of relationship (such as, "She is separated," "cut off," "disassociated").

The Triple Divorcee

The schools concur that a husband who divorces his wife thrice cannot remarry her unless she marries another person through a valid *nikah*, and this second person consummates the marriage, in accordance with verse 230 of *Surat al-Baqarah*:

فَإِنْ طَلَّقَهَا فَلَا تَحِلُّ لَهُ مِنْ بَعْدُ حَتَّى تَنْكِحَ زَوْجًا غَيْرَهُ

So if he divorces her, she shall not be lawful to him afterwards, until she marries another husband (2:230)

The Imami and the Maliki schools consider it necessary that the person who marries her (*muhallil*) be an adult. The Hanafi, the Shafi'i and the Hanbali schools consider his capacity for intercourse as sufficient, even if he is not an adult. The Imami and the Hanbali schools state: If in a marriage contract *tahlil* (causing the woman to become permissible for her former husband to remarry) is included as a condition (such as when the second husband says, "I am marrying you to make you *halal* for your divorcer), the condition is void and the contract valid. But the Hanafis add: If the woman fears that the *muhallil* may not divorce her after the *tahlil*, it is permissible for her to say, "I marry you on the condition that the power to divorce be in my hands," and for the *muhallil* to say, "I accept this condition." Then the contract will be valid and she will be entitled to divorce herself whenever she desires. But if the *muhallil* says to her: "I marry you on the condition that your affair (of divorce) be in your own hands," the contract is valid and the condition void.

The Maliki, the Shafi'i and the Hanbali schools state: The contract is void *ab initio* if *tahlil* is included as a condition. The Maliki and Hanbali schools further add: Even if *tahlil* is intended and not expressed the contract is void.

The Maliki and some Imami legists consider it necessary that the second husband (*muhallil*) have intercourse with her in a lawful manner (such as when she is not menstruating or having *nifas*, and while both are not fasting a Ramadan fast). But most Imami legists give no credence to this condition and regard mere intercourse, even if unlawful, to be sufficient for *tahlil*.

Whatever be the case, when a divorcee marries another husband and is separated from him, either due to his death or by divorce, and completes the *'iddah*, it becomes permissible for the first husband to contract a new marriage with her. Then, if he again divorces her thrice, she will become *haram* for him until she marries another. This is how she will become *haram* for him after every third divorce, and will again become *halal* by marrying a *muhallil*, even if she is divorced a hundred times.

But the Imamiyyah state: If a wife is divorced nine times in the *talaq al-'iddah* form, and is married twice (i.e. following *tahlil* after every third divorce), she will become permanently *haram*. The meaning of *talaq al-'iddah*, according to the Imamiyyah, is a divorce in which the husband after divorcing returns to her during the *'iddah* and has intercourse with her, and then divorces her again in another period of purity, then returns to her and has intercourse, then divorces her for a third time and remarries her, after a *muhallil* does the *tahlil*, by concluding a fresh contract, and divorces her thrice in the same manner, with a *muhallil* doing the second *tahlil*, and remarries her again. Now if he divorces her thrice again, the ninth *talaq al-'iddah* completed, she will become *haram* for him permanently. But if the divorce is not a *talaq al-'iddah* (such as when he divorces her, then returns to her and then divorces her again before having

intercourse), she will not become *haram* perpetually, and will become *halal* through a *muhallil*, even if the number of divorces is countless.

Doubt in the Number of Divorces

The schools (except the Maliki) concur that he who has doubt regarding the number of divorces (whether a single divorce has taken place or more) will base his count on the lower number. The Malikis observe: The aspect of divorce shall preponderate and the count will be based on the higher number.

Divorcee's Claim of Tahlil

The Imami, the Shafi'i and the Hanafi schools state: If the husband divorces his wife thrice, and he or she knows nothing about the other for some time and thereafter she claims having married a second husband and separated from him and having completed the *'iddah*, her word will be accepted without an oath if this period is sufficient for her undergoing all this, and her first husband is entitled to marry her if he is satisfied regarding her veracity, and it is not necessary for him to inquire further. (*al-Jawahir*, Ibn 'Abidin, and *Maqsad al-nabih*)

1. The Hanafi and the Maliki schools are explicit regarding the validity of a divorce by an intoxicated person. Two opinions have been narrated from al-Shafi'i and Ahmad, the preponderant among them is that the divorce does take place.

2. Al-Ustadh al-Khafif writes in his book *Farq al-zawaj* (p.57): "The Imamiyah accept the validity of a divorce by a safih, if effected by the permission of his guardian, as expressly mentioned in *Sharh Shara'i' al-Islam*." There is no mention of this statement in the said book. Rather, such a statement is not present in any Imami book, and that which is mentioned in *Sharh Shara'i' al-Islam* is that the safih husband is entitled to divorce without the permission of his guardian. See *al-Jawahir*, vol.4, "Bab al-hijr".

3. Nifas means the vaginal discharge of blood at the time of birth or thereafter, for a maximum period of: ten days according to the Imamiyah, forty days according to the Hanbalis and the Hanafis, and sixty days according to the Shafi'is and Malikis.

4. The author of *Ta'sis al-nazar* (1st ed. p.49) has narrated from Imam Malik that he has observed: If a person resolves to divorce his wife, the divorce takes place by mere resolution, even if he does not pronounce it.

5. The use of the expression 'infallible' (*ma'sum*) here belongs to the author of *al-Jawahir*.

6. In *Ta'sis al-nazar* of Abu Zayd al-Dabusi al-Hanafi it is stated: "According to Abu Hanifah the presumption ab initio is that non-Muslims living under the protection of an Islamic state will be left to follow their beliefs and precepts. But his two disciples, Abu Yusuf and Muhammad, say that they will not be left to themselves."

Al-Khul'

Khul' is a form of divorce in which the wife releases herself (from the marriage tie) by paying consideration to the husband. Here we have the following issues.

The Condition of the Wife's Destestation

When they both agree to *khul'* and she pays him the consideration to divorce her, though they are well settled and their conduct towards each other is agreeable, is their mutual agreement to *khul'* valid?

The four schools state: The *khul'* is valid and the rules applicable to it and their effects will follow. But it is *makruh*¹ (detestable though lawful).

According to the Imamiyyah, such a *khul'* is not valid and the divorcer will not own the consideration. But the divorce (so pronounced) will be valid and revocable if all the conditions for revocability are present.

The proof they offer are traditions of the Imams of the Ahl al-Bayt (A) and verse 229 of *Surat al-Baqarah*:

فَإِنْ خِفْتُمْ أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهِ

...Then if you fear that they cannot maintain the limits set by Allah, there is no blame on the two for what she gives to release herself ..

wherein the verse has made the validity of consideration contingent upon the fear of sinning in case the marital relationship were to continue.

Mutual Agreement to Khul' for a Consideration Greater than Mahr

The schools concur that the consideration should have material value and that its value may be equal to, lesser, or greater than the *mahr*.

Conditions for Consideration Payable in Khul'

According to the four schools, it is also valid to conclude a *khul'* agreement with anyone apart from the wife. Therefore, if a stranger asks the husband to divorce his wife for a sum which he undertakes to pay and the husband divorces her, the divorce is valid even if the wife is unaware of it and on coming to know does not consent. The stranger will have to pay the ransom to the divorcer. (*Rahmat al-ummah* and *Farq al-zawaj* of al-Ustadh al-Khafif)

The Imamiyyah observe: Such a *khul'* is invalid and it is not binding upon the stranger to pay anything. But it is valid for a stranger to act as a guarantor of the consideration by the wife's permission and ask the husband, after the wife's permission, to divorce her for such a consideration guaranteed by him. Thus, if the husband divorces her on this condition, it is binding on the guarantor to pay him that amount and then claim it from the divorcee.

All that which is validly payable as *mahr* is also valid as consideration in *khul'*, by consensus of all the five schools. It is also not necessary that the amount of consideration be known in detail beforehand if it can be known eventually (such as when she says: "Grant me *khul'* for that which is at home", or "in the locker", or "my share of inheritance from my father", or "the fruits of my garden").

If *khul'* is given in return for that which cannot be owned, such as liquor or swine, the Hanafi, the Maliki and the Hanbali schools observe: If both knew that such ownership is *haram*, the *khul'* is valid and the divorcer is not entitled to anything, making it a *khul'* without consideration. The Shafi'i's say: The *khul'* is valid and she is entitled to the *mahr al-mithl* (*al-Mughni*, vol. 7).

Most Imami legists state: The *khul'* shall be void and the divorce will be considered revocable if it is an instance of revocable divorce; otherwise, it will be irrevocable. In all the cases, the divorcer shall not be entitled to anything.

If the husband grants her *khul'* for a consideration that he believes to be *halal* and it later turns out to be *haram* (such as when she says: "Grant me *khul'* for this jar of vinegar," which turns out to be wine) the Imami and the Hanbali schools observe: He shall claim from her a similar quantity of vinegar. The Hanafis state: He shall claim from her the stipulated *mahr*. According to the Shafi'i school, he shall claim from her the *mahr al-mithl*.

If she seeks *khul'* for a consideration she considers to be her property and it turns out to be someone else's, the Hanafi school and most Imami legists observe: If the owner allows it, the *khul'* will be valid and the husband will take it, but if he disallows, the husband is entitled to a similar consideration either in cash or kind. The Shafi'i school states: The husband is entitled to *mahr al-mithl*. This is in accordance with the Shafi'i principle that when a consideration becomes invalid, it becomes void and *mahr al-mithl* becomes payable (*Maqsad al-nabih*). According to the Malikis, the divorce becomes irrevocable, the consideration becomes void, and the divorcer gets nothing even if the owner permits (*al-Fiqh 'ala al-madhahib al-'arba'ah*, vol. 4).

If the wife seeks *khul'* by undertaking to nurse and maintain his child for a certain period, the *khul'* will be valid and she will be bound to nurse and maintain the child, as per consensus. The Hanafi the Maliki and the Hanbali schools further clarify that it is valid for a pregnant wife to seek *khul'* from her husband in return for maintaining the child in her womb on the same grounds on which it is valid for her to seek *khul'* by undertaking the maintenance of a born child. I have not come across in the Imami and Shafi'i sources accessible to me anyone who has dealt with this issue, although the principles of the Shari'ah do not prohibit it, because the cause, which is the child in the womb, is present, and the wife's pledge is a condition by which she binds herself to the effect that in the event of the child being born alive she will be responsible for its nursing and maintenance for a specific period, and Muslims are bound by the conditions they lay down, provided this does not result in a *halal* becoming *haram* or vice versa. Hence this condition is valid in itself, for it does not suggest anything legally void; therefore its fulfillment is compulsory because it is part of a binding contract. The uncertainty concerning the child being born alive

or dead, and its dying after birth before the stipulated period, is overlooked in a *khul'*.

The furthest one can go in asserting its impermissibility and invalidity is by likening a pledge to maintain with a discharge from maintenance. Therefore, when a discharge from maintenance is invalid because it is an annulment of something not binding, similarly a pledge to maintain is not valid because it is not presently *wajib*. But there is a great difference between a pledge and a discharge, because it is necessary that a discharge be from something present and actual, while a pledge need not be so. Apart from this, we have already discussed in the chapter on marriage regarding *khul'* in return for foregoing the right to custody of a child by the father or the mother.

A Related Issue

If a husband grants *khul'* to his wife in return for her maintaining the child, she is entitled to claim the child's maintenance from its father on her not being able to maintain it, and he will be compelled to pay the maintenance. But he can reclaim this maintenance from the mother if she comes to possess the means. If the child dies during the stipulated period, the divorcer is entitled to claim a compensation for the remaining period in accordance with the words of the verse (2:229) **فِيْمَا اَفْتَدَتْ بِهٖ** . It is better for a woman to undertake the nursing and maintenance of the child for a certain period so long as it is alive. Then the divorcer will not have the right to a claim against her if the child dies.

Conditions for a Wife Seeking Khul'

There is consensus among the schools that a wife seeking *khul'* should be a sane adult. They also concur that the *khul'* of a stupid (*safih*) wife is not valid without the permission of her *wali* (guardian). The schools differ regarding the validity of *khul'* where the guardian has granted her the permission to seek *khul'*. The Hanafis observe: If the guardian undertakes to pay the consideration from his own personal assets, the *khul'* is valid; otherwise, the consideration is void, while the divorce takes place according to the more authentic of two traditions (Abu Zuhrah).

The Imami and the Maliki schools state: With the guardian's permission to her to pay the consideration, the *khul'* is valid by payment from her wealth not his. (*al-Jawahir* and *al-Fiqh 'ala' al-madhahib al-'arba'ah*)

The Shafi'i and the Hanbali schools consider the *khul'* of a stupid wife as invalid irrespective of the guardian's permission. The Shafi'i school allows one exception to the above opinion, wherein the guardian fears the husband's squandering her wealth and grants her permission to seek a *khul'* from him for the protection of her property. The Shafi'is then add: Such a *khul'* is invalid and the divorce is revocable. The Hanbalis say: Neither the *khul'* nor the divorce will take place except when the husband intends a divorce through *khul'* or if the *khul'* takes place in the words of a divorce.

If a woman seeks *khul'* during her last illness, it is considered valid by all schools. But they differ where

she pays as consideration more than a third of her wealth or more than the husband's share to be inherited from her on assumption of her death during the *'iddah*. As said above, they inherit from each other in this situation.

The Imami and the Shafi'i schools state: If she seeks *khul'* for *mahr al-mithl*, it is valid and the consideration is payable from her undivided legacy. But if it exceeds *mahr al-mithl*, the excess will be deducted from one-third of her legacy.

The Hanafis observe: Such a *khul'* is valid and the divorcer is entitled to the consideration if it does not exceed either one-third of her wealth or his share of inheritance from her were she to die during the *'iddah*. This means that he will take the least of the three amounts: the consideration of the *khul'*, his share of inheritance from her, or a third of her legacy. (Therefore, if the consideration for the *khul'* is 5, his share of inheritance 4, and a third of her legacy 3, he shall be entitled to 3).

According to the Hanbali school, if she seeks *khul'* in return for a consideration equaling his share of inheritance from her or something lesser, the *khul'* and the consideration are valid. But if she seeks *khul'* for a higher consideration, only the excess will be void (*al-Mughni*, vol. 7).

The Imamiyyah moreover require the wife seeking *khul'* to fulfil all the requirements in a divorcee (such as her purity from menses, non-occurrence of intercourse in the period of purity if her marriage has been consummated, her being neither menopausal nor pregnant, her not being a minor below the age of nine). Similarly, they require the presence of two just witnesses for the *khul'* to be valid. But the other schools validate a *khul'* irrespective of the state of the wife seeking it, exactly like a divorce.

Conditions for a Husband Granting Khul'

Excepting the Hanbali, all the other schools concur that a husband granting *khul'* requires to be a sane adult. The Hanbalis state: *Khul'* granted by a discerning minor (*mumayyiz*) is valid, as is a divorce given by him. As mentioned at the beginning of this chapter on divorce, the Hanafis permit a divorce pronounced in jest, under duress, or in a state of intoxication, and the Shafi'i and the Maliki schools concur with them concerning divorce pronounced in jest. A *khul'* granted in a state of rage is valid if the rage does not eliminate the element of intention.

There is consensus among the schools concerning the validity of a *khul'* granted by a stupid (*safih*) husband. But the consideration will be given to his guardian, and its being given to him is not valid.

Regarding a *khul'* granted by a sick husband on his death bed, it is undoubtedly valid, because when his divorcing without receiving any consideration is valid, a divorce along with consideration would be more so.

The Pronouncement of Khul'

The four schools permit the use of explicit words – such as derivatives of *al-khul'* and *al-faskh* (dissolution) – in the pronouncement, as well as implicit words (such as "*bara'tuki*" [I relinquish you] and "*abantuki*" [I separate myself from you]). The Hanafis have said: The use of the words *al-bay'* (to sell) and *al-shira'* (to purchase) is valid (for instance, when the husband says to the wife: "I sell you to yourself for so much", and the wife replies: "I purchase", or when he says: "Buy your divorce for so much", and she replies: "I accept"). Similarly the Shafi'i school accepts the validity of a *khul'* pronounced with the word *al-bay'*.

The Hanafis allow the conditional *khul'*, the *khul'* by exercise of an option, and the *khul'* in which the pronouncement and the payment of consideration is separated by an extended time interval (such as, where a husband is away from his wife and it reaches him that she has said, "I seek a *khul'* for so much," and he accepts it). Similarly the Malikis also do not consider the time factor an impediment.

Khul' is valid according to the Hanbali school even without an intention if the word used is explicit (such as *al-khul'*, *al-faskh* and *al-mufadat*); but it requires that the pronouncement and payment take place simultaneously and unconditionally.

The Imamiyyah have said: *Khul'* does not take place by using implicit words or even explicit words other than *al-khul'* and *al-talaq*. If desired, they can be used together or singly (thus, she may say: "I pay you this much for divorcing me", and he will reply: "I grant you *khul'* for it, and therefore you are divorced". This form of pronouncement is the safest and most suitable in the view of all Imami legists. It also suffices if he says: "You are divorced in return for it," or "I grant you *khul'* in return for it"). The Imamiyyah require that *khul'* should be unconditional, exactly as in divorce, and consider necessary the absence of any time gap between its pronouncement and payment of consideration.

[1.](#) Al-Ustadh al-Khafif, *Farq al-zawaj* (1958), p. 159.

Al-'Iddah

There is consensus among Muslims about the general necessity of *'iddah*. Its basis is the Qur'an and the Sunnah. As to the Qur'an, we have the following verse:

وَالْمُطَلَّقاتُ يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ ثَلَاثَةَ قُرُوءٍ

Women who are divorced shall wait, keeping themselves apart, three (monthly) courses.. (2:228)

As to the Sunnah, there is the Prophet's tradition commanding Fatimah bint Qays:

اعتدِّي في بيت ابن أم مكتوم

Observe *'iddah* in the house of Ibn Umm Maktum.

They differ, however, regarding: the *'iddah* of a wife separated from her husband due to divorce or annulment of marriage; the *'iddah* of a widow; the *'iddah* of a woman copulated by mistake; the relief of an adulteress (from menses); and the *'iddah* of a wife whose husband has disappeared.

Divorcee's 'Iddah

The five schools concur that a woman divorced before consummation and before the occurrence of valid seclusion has no *'iddah* to observe. The Hanafi, the Maliki and the Hanbali schools state: If the husband secludes with her without consummating the marriage and then divorces her, she will have to observe *'iddah*, exactly as if consummation had occurred.

The Imamiyyah and the Shafi'i's observe: Seclusion has no effect. As mentioned earlier in relation with the distinction between revocable and irrevocable divorce, the Imamiyyah do not require a menopausal wife with whom coitus has taken place to observe *'iddah*. The reasons given by the Imamiyyah for this opinion were also mentioned earlier.

The *'iddah* for every kind of separation between husband and wife, except the one by death is the *'iddah* of divorce irrespective of its being due to: *khul'*, *li'an*, annulment due to a defect, dissolution arising from *rida'* (breast-feeding), or as a result of difference of religion. [1](#)

Moreover, the schools concur that the *'iddah* is *wajib* on a wife divorced after consummation and that the *'iddah* will be one of the following kinds:

I. The five schools concur that a pregnant divorcee will observe *'iddah* till childbirth in accordance with the verse:

وَأُولَاتُ الْأَحْمَالِ أَجَلُهُنَّ أَنْ يَضَعْنَ حَمْلَهُنَّ

And as for pregnant women, their term shall end with delivery. (65:4)

If she is pregnant with more than one child, her *'iddah* will not terminate until she gives birth to the last of them, as per consensus. The schools differ concerning a miscarriage if the foetus is not completely formed: the Hanafi, the Shafi'i and the Hanbali schools observe: Her *'iddah* will not terminate by its detachment. The Imami and the Maliki schools state: It will, even if it is a lump of flesh, so far as it is a

foetus.

The maximum period of gestation is two years according to the Hanafis, four years according to the Shafi'is and the Hanbalis, and five years according to the Malikis, as mentioned by *al-Fiqh 'ala al-madhahib al-'arba'ah*. In *al-Mughni*, it is narrated from Malik to be four years. Details of this were mentioned in the chapter on marriage.

A pregnant woman cannot menstruate according to the Hanafi and the Hanbali schools. The Imami, the Shafi'i and the Maliki schools allow the possibility of its occurrence.

She will observe an *'iddah* of three lunar months if she is: an adult divorcee who has not yet menstruated or a divorcee who has reached the age of menopause.² This age is seventy years according to the Malikis, fifty years according to the Hanbalis, fifty-five years according to the Hanafis, sixty-two years according to the Shafi'is, and according to the Imamiyyah fifty for ordinary women and sixty for those of Qurayshi descent.

Regarding a wife copulated with before her completing nine years, the Hanafis observe: *'iddah* is *wajib* on her even if she is a child. The Maliki and the Shafi'i schools state: *'iddah* is not *wajib* on a minor incapable of intercourse, but *wajib* on one who is capable even if she is under nine. The Imami and the Hanbali schools do not consider *'iddah* *wajib* on a minor under nine years even if she has the capacity for intercourse. (*al-Fiqh 'ala al-madhahib al-'arba'ah*, vol. 4, discussion on the *'iddah* of a menopausal divorcee).

A divorcee over nine who has had monthlies and is neither pregnant nor menopausal has an *'iddah* of three *quru'*, as per consensus. The Imami, the Maliki and the Shafi'i schools have interpreted the word *qara'* to mean purity from menses. Thus, if she is divorced at the last moment of her present period of purity, it will be counted as a part of *'iddah*, which will be completed after two more of such terms of purity. The Hanafis and the Hanbalis interpret the term to mean menstruation. Thus, it is necessary that there be three monthlies after the divorce, and the monthly during which she is divorced is disregarded. (*Majma' al-anhur*)

If a divorcee undergoing this kind of *'iddah* claims having completed the period, her word will be accepted if the period is sufficient for the completion of *'iddah*. According to the Imamiyyah, the minimum period required for accepting such a claim is twenty-six days and two 'moments', by supposing that she is divorced at the last moment of her first purity, followed by three days of menses (which is the minimum period) followed by a ten-day purity period (which is the minimum period of purity according to the Imamiyyah) followed again by three days of menses, then a second ten-day purity followed by menses. The period of *'iddah* comes to an end with the sole recommencement of menses, and the first moment of the third monthly is to make certain the completion of the third period of purity.

Nifas is similar to menses, in the opinion of the Imamiyyah. Accordingly, it is possible for an *'iddah* to be completed in twenty-three days, if the wife is divorced immediately after childbirth but before the

commencement of *nifas* (in which case the *'iddah* is 23 days, considering a moment of *nifas* followed by ten days of the first purity, followed by three days of menses – which is the minimum period for it – followed by a second ten-day purity).

The minimum period for accepting such a claim by a divorcee is thirty-nine days according to the Hanafi school, by supposing his divorcing her at the end of her purity, and supposing again the minimum three-day period of menstruation, followed by a 15-day purity (which is the minimum in the opinion of the Hanafis). Thus, three menses, covering nine days, separated by two periods of purity, making up thirty days, make up a total of thirty-nine.

Maximum Period of 'Iddah

As mentioned earlier, a mature divorcee who has not yet menstruated will observe a three-month *'iddah*, as per consensus. But if she menstruates and then ceases to do so – as a result of her nursing a child or due to some disease – the Hanbali and the Maliki schools observe: She will observe *'iddah* for one complete year. In the later of his two opinions, al-Shafi'i has said: Her *'iddah* will continue until she menstruates or reaches menopause; after this, she will observe an *'iddah* of three months. (*al-Mughni*, vol. 7. "bab al-'idad")

The Hanafi school is of the opinion that if she menstruates once and then ceases perpetually due to disease or breast-feeding a child, her *'iddah* will not terminate before menopause. Accordingly, the period of *'iddah* can extend for more than forty years in the opinion of the Hanafi and the Shafi'i schools. (*al-Fiqh 'ala al-madhahib al-'arba'ah*, vol. 4. the discussion on *'iddat al-mutallaqah idha kanat min dhawat al-hayd*).

The Imamiyyah observe: If menstruation ceases due to some accidental cause the divorcee will observe an *'iddah* of three months, similar to a divorcee who has never menstruated. If menses resume after the divorce, she will observe *'iddah* for the shorter of the two terms. i.e. three months or three *quru'*. This means that if three *quru'* are completed before three months, the *'iddah* will be over on their completion, and if three months are completed before three *quru'*, then again the *'iddah* will terminate. If she menstruates even a moment before the completion of three months, she will have to wait for nine months, and it will not benefit her if she is later free from menses for a period of three months. After the completion of nine months, if she gives birth before the completion of a year, her *'iddah* will terminate, and similarly if she menstruates and completes the periods of purity. But if she neither gives birth nor completes the periods of purity before the end of the year, she will observe an additional *'iddah* of three months after completing the nine months. This adds up to a year, which is the maximum period of *'iddah* according to the Imamiyyah.^{[3](#)}

The Widow's 'Iddah:

There is consensus among the schools that the *'iddah* of a widow who is not pregnant is four months and ten days, irrespective of her being a major or a minor, her being menopausal or otherwise, and regardless of the consummation of her marriage, in accordance with the verse:

وَالَّذِينَ يَتُوقُونَ مِنْكُمْ وَيَذُرُونَ أَزْوَاجًا يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ أَرْبَعَةَ أَشْهُرٍ وَعَشْرًا

And those among you who die and leave behind wives, (these wives) should keep themselves waiting for four months and ten days. (2:234)

This is the case when she is sure of not being pregnant. But if she has a doubt she is bound to wait until delivery or attainment of certainty that she is not pregnant. This is the opinion of many legists belonging to different schools.

The four Sunni schools state: The *'iddah* of a pregnant widow will terminate on delivery, even if it occurs a moment after the husband's death. This permits her to remarrying immediately after giving birth, even if the husband has not yet been buried, as per the verse:

وَأُولَاتُ الْأَحْمَالِ أَجَلُهُنَّ أَنْ يَضَعْنَ حَمْلَهُنَّ

And as for pregnant women, their term shall end with delivery. (65:4)

The Imamiyyah state: Her *'iddah* will be whichever is longer of the two terms, i.e. delivery or four months and ten days. Thus if four months and ten days pass without her giving birth, her *'iddah* will continue until childbirth; and if she delivers before the completion of four months and ten days, her *'iddah* will be four months and ten days. The Imamiyyah argue that it is necessary to combine the verse 2:234:

يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ أَرْبَعَةَ أَشْهُرٍ وَعَشْرًا

with the verse 65:4:

أَجَلُهُنَّ أَنْ يَضَعْنَ حَمْلَهُنَّ

The former verse has fixed the *'iddah* at four months and ten days, and it includes both a pregnant and a non-pregnant wife. The latter verse has stipulated the *'iddah* of a pregnant wife to last until childbirth, and it includes both a divorcee and a widow. Thus an incompatibility emerges between the apparent import of the two verses regarding a pregnant widow who delivers before the completion of four months

and ten days. In accordance with the latter verse her *'iddah* terminates on delivery, and in accordance with the former the *'iddah* will not terminate until four months and ten days have been completed. An incompatibility also appears if she does not deliver after the completion of four months and ten days; according to the former verse her *'iddah* terminates when four months and ten days are over, and in accordance with the latter the *'iddah* will not terminate because she has not yet delivered. The word of the Qur'an is unequivocal, and it is necessary that parts of it harmonize with one another. Now, if we join the two verses like this:

وَالَّذِينَ يُتَوَفَّوْنَ مِنْكُمْ وَيَذَرُونَ أَزْوَاجًا يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ أَرْبَعَةَ أَشْهُرٍ وَعَشْرًا، وَأُولَاتُ الْأَحْمَالِ أَجَلُهُنَّ أَنْ يَضَعْنَ
حَمْلَهُنَّ

the meaning will be that the *'iddah* of a widow who is not pregnant, or is pregnant but delivers within four months and ten days, is four months and ten days; and that of a widow who delivers after four months and ten days is until the time of her delivery.

If someone questions how the Imamiyyah specify the *'iddah* of a pregnant widow to be the longer of the two terms (delivery or four months and ten days) while the verse *وَأُولَاتُ الْأَحْمَالِ* is explicit that the *'iddah* of a pregnant woman terminates on her giving birth, the Imamiyyah say: How have the four schools said that the *'iddah* of a pregnant widow is two years, if the gestation period so extends, in spite of the verse:

وَالَّذِينَ يُتَوَفَّوْنَ مِنْكُمْ وَيَذَرُونَ أَزْوَاجًا يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ أَرْبَعَةَ أَشْهُرٍ وَعَشْرًا

which is explicit that it is four months and ten days? If the questioner replies: The four schools have done so acting in accordance with the verse *وَأُولَاتُ الْأَحْمَالِ*, the Imamiyyah reply: We have acted in accordance with the verse: *وَالَّذِينَ يُتَوَفَّوْنَ* .

Therefore it is not possible to apply both the verses except by stipulating the longer of the two terms as *'iddah*.

The schools excepting the Hanafi, concur that *al-hidad* is *wajib* on the widow, irrespective of her being major or minor, Muslim or non-Muslim. The Hanafis do not consider it *wajib* for a non-Muslim and a minor widow because they are not *mukallaf* (responsible for religious duties).

The meaning of *al-hidad* is that the woman mourning her husband's death refrain from every adornment that makes her attractive. Its determination depends on prevailing customs and usage.

The Imamiyyah observe: The *'iddah* of divorce will commence on the recital of the divorce, irrespective of the husband's presence or absence. The *'iddah* of a widow commences on the news of his death reaching her, if he is away. But if the husband is present and she comes to know of his death after some time, her *'iddah* will commence from the time of his death, as per the predominant opinion among

Imamiyyah legists.

The schools concur that if the husband of a revocable divorcee dies while she is undergoing *'iddah*, she is bound to start anew with a widow's *'iddah* from the time of his death, irrespective of the divorce taking place during the husband's mortal illness or health, because the marital bond between her and the husband has not yet broken. But if the divorce is irrevocable, it will depend. If he divorces her while healthy, she will complete the *'iddah* of divorce and will not have to observe any *'iddah* due to the husband's death, as per consensus, even if the divorce was without her consent. Similar is the case if he divorces her during his mortal illness on her demand. But what if he divorces her during his mortal illness without her demanding it, and then dies before the termination of her *'iddah*? Shall she start the widow's *'iddah*, like a revocable divorcee, or shall she continue to observe the *'iddah* of divorce?

The Imami, the Maliki and Shafi'i schools state: She shall continue to observe the *'iddah* of divorce without changing over to the *'iddah* of widowhood.

According to the Hanafi and the Hanbali schools, she shall change over to the *'iddah* of widowhood.

In short, a revocable divorcee will start observing the *'iddah* of widowhood if the divorcer dies before the termination of her *'iddah* of divorce, and an irrevocable divorcee will continue to observe the *'iddah* of divorce, as per the concurrence of all the schools except the Hanafi and the Hanbali, who exclude an irrevocable divorcee if the divorce takes place during the divorcer's mortal illness without her consent.

'Iddah for Intercourse by Mistake

According to the Imamiyyah, the *'iddah* of 'intercourse by mistake' is similar to the *'iddah* of a divorcee. Therefore, if the woman is pregnant, she will observe *'iddah* until childbirth; if she has menstruated, her *'iddah* will be three *quru'*, otherwise three months. An 'intercourse by mistake' is, according to the Imamiyyah, one in which the man involved is not liable to penal consequences, irrespective of the woman being one with whom marriage is unlawful (such a wife's sister or a married woman) or lawful (such as any unmarried woman outside the prohibited degrees of marriage). The view held by the Hanbalis is nearly similar to this view, where they observe that every form of sex relations necessitate the observance of *'iddah*. They do not differ from the Imamiyyah except in some details, as indicated below on the discussion of the *'iddah* of a fornicatress.

The Hanafis state: *'Iddah* is *wajib* both as a result of intercourse by mistake or an invalid marriage. *'Iddah* is not *wajib* if the marriage is void. An example of the 'mistake' is a man's having relations with a sleeping woman thinking her to be his wife. An invalid (*fasid*) marriage is one with a woman with whom marriage is lawful but in which some essential conditions remain unfulfilled (such as where a contract has been recited without the presence of witnesses). A void (*batil*) marriage is a contract with a woman belonging to the prohibited degrees of relatives (e.g. sister or aunt). The *'iddah* for intercourse by mistake according to them is three menstruations if she menstruates, or three months if she is not pregnant. If she is pregnant, the *'iddah* will continue until childbirth.

The Malikis state: She will release herself after three *quru'*; if she does not menstruate, by three months; if pregnant, on childbirth.

Whatever be the case, if a man who has had intercourse by mistake dies, the woman will not observe the *'iddah* of widowhood, because her *'iddah* is due to intercourse, not marriage.

The 'Iddah of a Fornicatress

The Hanafi and the Shafi'i schools, as well as the majority of Imamiyyah legists, remark: *'iddah* is not required for fornication, because the relations have no sanctity. Thus, marriage and intercourse with a fornicatress is lawful, even if she is pregnant. But the Hanafis permit marriage with a woman pregnant through fornication without allowing intercourse with her before her delivery.

The Malikis state: Fornication is similar to intercourse by mistake. Thus she will release herself in a period equal to the period of *'iddah* except when she is to undergo the punishment, in which case she will release herself after a single menstruation.

The Hanbalis observe: *'iddah* is as *wajib* on a fornicatress as on a divorcee (*al-Mughni*, vol.6 and *Majma' al-anhur*).

The 'Iddah of a Kitabiyyah

The schools concur that a *kitabiyyah* (a non-Muslim female adherent of a religion having a scripture) wife of a Muslim will be governed by the laws applicable to a Muslim wife concerning the necessity of *'iddah*, and *al-hidad* in an *'iddah* of widowhood. But if she is a wife of a non-Muslim *kitabi*, the Imami,⁴ the Shafi'i, the Maliki and the Hanbali schools consider *'iddah wajib* upon her. But the Shafi'i, the Maliki and the Hanbali schools do not consider *al-hidad wajib* for her while observing the *'iddah* of widowhood.

The Hanafis state: A non-Muslim woman married to a non-Muslim does not have an *'iddah*. (*al-Shi'rani*, *Mizan*, bab al-'idad wa al-'istibra')

Wife of a Missing Husband

A missing person can be in one of these two situations: First, where his absence is continuous but his whereabouts are known and news about him is received. Here, according to consensus, his wife is not entitled to remarry. The second situation arises where there is no more any news of him and his whereabouts. The imams of the various schools differ regarding the law applicable to his wife.

Abu Hanifah, al-Shafi'i according to his later and preferred opinion, and Ahmad according to one of his two traditions, observe: Marriage is impermissible for the wife of a missing husband as long as he may be considered alive on the basis of a usual life-span. Abu Hanifah has fixed this period at 120 years; al-

Shafi'i and Ahmad at 90 years.

Malik states: She shall wait for 4 years and then observe an *'iddah* of four months and ten days, after which she may remarry.

Abu Hanifah and al-Shafi'i in the more reliable of his two opinions state: If the first husband returns after she marries another, the second marriage shall become void and she will become the first's wife.

Malik observes: If the first husband returns before the consummation of the second marriage, she will belong to the first husband, but if he returns after consummation she will remain the second's wife. It will be *wajib* however, for the second husband to pay *mahr* to the first.

According to Ahmad, if the second husband has not consummated the marriage she belongs to the first; but if he has, the choice lies with the first husband: he may either reclaim her from the second husband and give him the *mahr* or allow her to remain with him by taking the *mahr*. (*al-Mughni*, vol. 7 and *Rahmat al-ummah*) [5](#)

The Imamiyyah state: The case of a missing person who is not known to be living or dead will be studied. If he has any assets by which the wife can be maintained, or has a guardian willing to maintain her, or someone volunteering to do it, it is *wajib* for her to patiently wait for him; it is not permissible for her to marry in any circumstance until she learns of his death or his divorcing her. But if the missing husband has neither any property nor someone willing to maintain her, if the wife bears it patiently, well and good; but if she wants to remarry, she will raise the issue before the judge. The judge will order a four-year waiting period for her from the time the issue was brought to him, and then start a search for the husband during that time.

If nothing is known, and the missing husband has a guardian or an attorney in charge of his affairs, the judge will order him to divorce her. But if the husband has neither a guardian nor an attorney, or has, but has prohibited him from divorcing, and it is not possible to compel him, the judge will himself pronounce the divorce by using the authority granted to him by the *Shari'ah*. After this divorce the wife will observe an *'iddah* of four months and ten days after which she may remarry.

The method of search is that the judge will question about his presence and seek information from those coming from the place where there is a possibility of his being present. The best way of it is to depute a reliable person from among the people of the place where the search is being conducted to supervise the search on his behalf and report to him the result. A search of an ordinary extent is sufficient, and it is neither necessary that his whereabouts be inquired in every place which can possibly be reached, nor that the inquiry be conducted continually. When the search is completed in a period of less than four years in a manner that it becomes certain that further inquiry is fruitless, the search is no longer *wajib*. Yet it is necessary that the wife wait for four years; this is in compliance with an explicit tradition and the demand of precaution in marital ties, as well as the possibility of the husband returning during these four years.

After the completion of this period the divorce will take place and she will observe an *'iddah* of four months and ten days without *hidad*. She is entitled to maintenance during this period, and the spouses inherit from each other as long as she is in *'iddah*. If the husband comes back during the *'iddah*, he may return to her if he wants or let her remain as she is. But if he comes back after the completion of the *'iddah* but before her marrying another, the preferable opinion is that he has no right over her; and more so if he finds her married.⁶

The Rules Governing 'Iddah

We said in the chapter on maintenance that there is consensus regarding a revocable divorcee's right to maintenance during her *'iddah*. We also said that there is a difference of opinion regarding an irrevocable divorcee during her *'iddah*. Here we shall discuss the following issues:

Inheritance between a Divorcer and a Divorcee

There is consensus that when a husband revocably divorces his wife, their right of inheriting from each other does not disappear as long as she is in *'iddah*, irrespective of the divorce being given in mortal illness or in condition of health. The right to mutual inheritance is annulled on the completion of the *'iddah*. There is a consensus again regarding the absence of mutual inheritance if the husband divorces his wife irrevocably in health.

Divorce by a Sick Person

The schools differ when a sick person divorces his wife irrevocably and then dies in the same sickness.

The Hanfis entitle her to inherit as long as she is in *'iddah*, provided the husband is considered attempting to bar her from inheriting from him and the divorce takes place without her consent. In the absence of any of these two conditions she will not be entitled to inherit.

The Hanbalis state: She will inherit from him as long as she does not remarry, even if her *'iddah* terminates.

The Malikis state: She inherits from him even after her remarriage.

Three opinions of al-Shafi'i have been reported, and one of them is that she will not inherit even if he dies while she is observing *'iddah*.

It is notable that apart from the Imamiyyah the other schools speak of a divorce by a sick person only when it is irrevocable. But the Imamiyyah have observed: If he divorces her while sick, she will inherit from him irrespective of the divorce being revocable or irrevocable, on the realization of the following four conditions:

1. That the husband's death occurs before the completion of one year from the date of divorce. Thus, if he dies one year after the divorce, even if by an hour, she will not inherit from him.
2. That she does not remarry before his death. If she does and he dies within a year (of the divorce), she will not inherit.
3. That he does not recover from the illness in which he divorced her. Thus, if he recovers and then dies within a year, she will not be entitled to inherit.
4. That the divorce does not take place on her demand.

Iddah and Location

The schools concur that a revocable divorcee will observe *'iddah* at the husband's home. Therefore, it is not permissible for him to expel her. Similarly, it is not permissible for her to leave it. The schools differ regarding an irrevocable divorcee. The four schools are of the opinion that she will observe *'iddah* like a revocable divorcee, without there being any difference, in accordance with the verse:

وَلَا تُخْرِجُوهُنَّ مِنْ بُيُوتِهِنَّ وَلَا يَخْرُجْنَ إِلَّا أَنْ يَأْتِيَنَّ بِفَاحِشَةٍ مُبَيِّنَةٍ

Do not expel them from their homes, and neither should they themselves go forth, unless they commit an obvious indecency. (65: 1)

The Imamiyyah state: An irrevocable divorcee is free to decide about her own affairs and may observe *'iddah* wherever she wants, because the marital bond between her and the husband has snapped; neither do they inherit from each other, nor is she entitled to maintenance, unless pregnant. Accordingly, the husband is not entitled to confine her. As to the above verse, they say that it relates specifically to revocable divorcees, and there are many traditions from the Imams of the Ahl al-Bayt (A) to this effect.

Marriage with a Divorcee's Sister in 'Iddah

If a person marries a woman, it is *haram* for him to marry her sister. However, if she dies or is divorced and her period of *'iddah* terminates, it becomes *halal* for him to marry her sister. But is it *halal* for him to marry her sister before her *'iddah* comes to an end? The schools concur that it is *haram* to marry the sister of a divorcee in *'iddah* if the divorce is revocable, and differ where the divorce is irrevocable. The Hanafi and Hanbali schools observe: Neither marriage with her sister is permissible nor the marrying of a fifth wife (if he had four, one of whom he has divorced) until the completion of her *'iddah*, irrespective of the divorce being revocable or irrevocable.

The Imami, the Maliki and the Shafi'i schools state: It is permissible to marry the sister of a divorcee and a fifth wife before the completion of *'iddah* if the divorce is irrevocable.

Can a Divorcee in 'Iddah be Redivorced?

The four schools state: In revocable divorce, he is entitled to divorce her again while she is observing *'iddah*, without returning to her, but not if the divorce is irrevocable (*al-Mughni*, vol.7, chapters on *khul'* and *raj'ah*; *al-Fiqh 'als al-madhahib al-'arba'ah*, the discussion on conditions of divorce).

The Imamiyyah observe: Divorce of a divorcee, revocable or irrevocable, does not take place unless he returns to her, because it is meaningless to divorce a divorcee.

1. The Imamiyah state: When the husband, a born Muslim, apostatizes, his wife will observe the 'iddah of widowhood, and if he apostatizes by returning to his former faith, she will observe a divorcee's 'iddah.
2. As mentioned earlier, the Imamiyah do not consider 'iddah wajib for a menopausal woman. But they say: If he divorces her, and she menstruates once before reaching menopause, she will complete her 'iddah after two more months. The four Sunni schools observe: She will start observing 'iddah anew, for three months, and her menstruation will not be included in the 'iddah.
3. The authors of *al-Jawahir* and *al-Masalik* have mentioned the prevalent opinion (mashhur) in this regard, acting in accordance with the tradition narrated by Sawdah ibn Kulayb. Both have discussed this issue at length and narrated other views which are not mashhur and which most Imamiyyah legists have deliberately ignored.
4. The following observation has been made in *al-Jawahir*, (vol.5, bab al-'idad). The 'iddah of a non-Muslim woman is exactly like that of a free Muslim woman in regard to both divorce and death. I have not come across any difference of opinion because of the generality of the proofs and an explicit tradition from al-Sadiq (A) from al-Sarraj, who asked him (A): "What is the 'iddah of a Christian woman whose husband, a Christian, has died." He replied: "Her 'iddah is four months and ten days."
5. This is when she does not raise the issue before a judge. But if she suffers as a result of his absence and files a complaint in court demanding separation, both Ahmad and Malik allow her to be divorced in such a situation. Details follow under the section on divorce by a judge.
6. See *al-Jawahir*, appendices to *al-'Urwah* of al-Sayyid Kazim, *al-Wasilah* of al-Sayyid Abu al-Hasan, and other books on Imamiyyah fiqh. But the greater part of our discussion is based on *al-Wasilah*, because it is both comprehensive and lucid.

Return To The Divorcee (Al-Raj'ah)

Al-raj'ah in the terminology of legists is restoration of the divorcee and her marital status. It is valid by consensus and does not require a guardian, or *mahr*, or the divorcee's consent, or any action on her part, in accordance with the verses:

وَبَعُولَتُهُنَّ أَحَقُّ بِرَدِّهِنَّ

Their husbands are better entitled to restore them.. (2:228)

إِذَا بَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ

So when they have reached their prescribed term retain them honourably or separate from them honourably... (65:2)

The schools concur that it is necessary that the divorcee being restored be in the *'iddah* of a revocable divorce. Thus there is no *raj'ah* for: an irrevocable divorcee of an unconsummated marriage, because there is no *'iddah* for her; for a triple divorcee, because she requires a *muhallil*; and for the divorcee of *khul'* against a consideration, because the marital bond between the two has been dissolved.

There is consensus among the schools that the return is effected by oral word, and they consider it necessary that the pronouncement be complete and unconditional. Thus if the *raj'ah* is made contingent upon something (such as when he says: "I return to you if you so desire"), it will not be valid.¹ Accordingly, if neither an act nor a satisfactory declaration proving *raj'ah* takes place on his part after the unsatisfactory pronouncement and the period of *'iddah* expires eventually, the divorcee will become a stranger for him.

The schools differ regarding the possibility of *raj'ah* being effected by an act, such as sexual intercourse or its preliminaries, without any pronouncement preceding it. The Shafi'is observe: It is necessary that *raj'ah* be either by spoken word or in writing. Thus it is not valid by intercourse even if he intends *raj'ah* through it, and such intercourse with her during *'iddah* is *haram*, making him liable to *mahr al-mithl* because it is an 'intercourse by mistake.'

The Malikis state: *Raj'ah* is valid by an act if it is with the intention of *raj'ah*. Thus, if he has intercourse without this intention, the divorcee will not return to him. But such intercourse does not make him liable to any penal consequences nor *mahr*, and if she becomes pregnant consequently, the child will be attributed to him; and if she does not become pregnant she will release herself after a single menstrual course.

The Hanbalis are of the opinion that *raj'ah* is valid by an act only if he has intercourse. Thus, where he has intercourse, she will be considered restored even if he does not intend it. Any act apart from intercourse, such as caressing and kissing, etc., does not result in *raj'ah*

According to the Hanafis, *raj'ah* is effected by intercourse, as well as caressing, kissing, etc., by the divorcer and the divorcee, provided it is with a sexual intent. Also, *raj'ah* by an act of one in sleep, or by an act performed absent-mindedly or under coercion, or in a state of insanity (as when the husband divorces his wife, turns insane, and has intercourse with her before the termination of her *'iddah*) is valid. (*Majma' al-anhur*, bab al-raj'ah)

The Imamiyyah state: *Raj'ah* is effected through intercourse, kissing and caressing, with and without a sexual intent, as well as by any other act which is not permissible except between a married couple. It is

not necessary that *raj'ah* be preceded by an oral pronouncement, because the divorcee is a wife as long as she is observing *'iddah*, and all it requires is an intention of *raj'ah*. The author of *al-Jawahir* goes a step further, observing: "Perhaps the unconditional nature of the canonical texts (*al-nass*) and the fatwas requires that *raj'ah* take place by an act even if he does not intend to restore her by it." Sayyid Abu al-Hasan writes in *al-Wasilah*: "It is highly probable that it (the act) be considered *raj'ah* even if the intent is absent."

The Imamiyyah attach no significance to an act of a person in sleep or something done absent-mindedly, or under a false impression (such as his having intercourse under the impression that she is not his divorcee).

Raj'ah and Witnesses

The Imami, the Hanafi and the Maliki schools state: *Raj'ah* does not require witnessing, though it is desirable (*mustahabb*). A tradition narrated from Ahmad conveys the same, and so does the more reliable opinion of al-Shafi'i. Accordingly, it is possible to claim a consensus of all the schools regarding the non-necessity of witnesses in *raj'ah*.

Raj'ah of an Irrevocable Divorcee

The restoration of an irrevocable divorcee during *'iddah* is possible only in the case of a divorcee who has been granted *khul'* in return for a consideration, provided that the marriage has been consummated and the divorce is not one which completes three divorces. The four schools concur that the law applicable here is the one which applies to a stranger and requires a new marriage contract, along with *mahr*, her consent and the permission of the guardian (if necessary), with the exception that she is not required to complete *the 'iddah*. (*Bidayat al-mujtahid*, vol. 2)

The Imamiyyah observe: A divorcee of *khul'* is entitled to reclaim what she has paid as a consideration as long as she is in *'iddah*, provided the husband is aware of her reclaiming the consideration and has not married her sister or a fourth wife. Thus, when he is aware of it and there is no impediment, he is entitled to recant the divorce. By his recanting she becomes his lawful wife and there is no need for a new contract or *mahr*. If he becomes aware of her reclaiming the consideration but does not recant the divorce, the divorce which was irrevocable becomes revocable and all the rules applicable to it and its consequences will follow, and the divorcer will be compelled to restore what the divorcee had given him for divorcing her.

Disagreement During the 'Iddah

If there is a disagreement between the divorcer and a revocable divorcee, such as when he claims: "I have returned to her," and she denies it, the divorcer will be considered to have made the return if it

takes place during the *'iddah*, and similarly if he denies having divorced her at all, because his saying this guarantees his connection with the wife.

The burden of proof rests on the divorcer to prove *raj'ah* if the two differ regarding it after the expiry of the *'iddah*. On his failing to do so, she will take an oath that he has not returned to her, if he claims having returned to her by an act (such as sexual intercourse, etc.). If the divorcer claims *raj'ah* by oral word and not by an act, she will take an oath that she knows nothing about it. According to Abu Hanifah, her word will be accepted without an oath. (Ibn 'Abidin)

If they differ regarding the expiry of *'iddah*, such as when she claims its expiry by menstruation in a period sufficient for creating the possibility of her claim being veracious, her word will be accepted, as per consensus, though the Imami, the Shafi'i and the Hanbali schools also require her to take an oath. The author of *al-Mughni* (vol.7, bab al-raj'ah) has narrated from al-Shafi'i and al-Khiraqi: "In all cases where we said that her word will be accepted, she will have to take an oath if the husband denies her claim."

If she claims the expiry of *'iddah* by the completion of three months, the author of *al-Mughni*, a Hanbali, and the author of *al-Shara'i*, an Imami, observe: The husband's word will be accepted. Both argue that the difference is in reality regarding the time of divorce and not the *'iddah*, and divorce being his act, his word will be accepted.

But the author of *al-Jawahir* observes that the acceptance of the divorcer's word is in accordance with the principle of presumption regarding the continuation of *'iddah* (unless the opposite is proved) and the presumption that any new situation is a latter development; but it contradicts the literal import of the canonical texts and the prevalent opinion among the legists, which place the affair of *'iddah* in the woman's hand. He further adds: The sole possibility of her veracity in a matter concerning *'iddah* is sufficient for its acceptance. This preference in accepting her word is in accordance with the tradition:

فَوَضَّ اللَّهُ إِلَى النِّسَاءِ ثَلَاثَةَ أَشْيَاءَ: الْحَيْضَ وَالطَّهْرَ وَالْحَمْلَ

God has placed three things in the hands of women: menstruation, purity, and pregnancy.

In another tradition, menstruation and *'iddah* are mentioned instead of the above three.

¹. The author of *al-Jawahir* and *al-Masalik* state that the mashhur opinion among the Imamiyyah legists is that a conditional *raj'ah* is not valid. The author of *al-Masalik* (vol.2, bab al-talaq) says: The more mashhur opinion is that *raj'ah* will not take place, and even those who consider contingent divorce valid hold this opinion by placing *raj'ah* alongside *nikah*.

The Acceptance of a Claim without Proof

We have referred above to the acceptance of the woman's word in matters concerning *'iddah*. Here it is appropriate to explain an important rule of the Shari'ah closely related to our present discussion that has often been referred to in the works of the legists, especially those of the Imami and the Hanafi schools. However, these legists have discussed it as a side issue, in the context of other related issues. I have not come across in the sources I know of anyone who has written a separate section on this problem except my brother, the late al-Shaykh 'Abd al-Karim Maghniyyah,¹ in his work *Kitab al-qada'*.

It is a known fact that both in the ancient and modern system of law the burden of proof lies on the claimant and the negator is burdened with an oath. The rule under discussion is just the opposite of it. According to it, it is binding to accept the claimant's word where it concerns his intention and cannot be known except from him, and which cannot possibly be witnessed. Examples of it abound in law, both in matters related to rituals (*'ibadat*) and transactions (*mu'amalat*). Some of them are the following:

1. If something is entrusted to a person and he claims having returned it, or claims its destruction without any negligence or misuse on his part, his word will be accepted on oath despite his being the claimant.
2. When a marriage contract is concluded between two minors by an officious third party, if one of them, on maturing, agrees and gives his/her consent to the contract and then dies before the other's majority, a part of his/her estate, equal to the minor's share will be set apart, and on his/her majority and agreement to the contract, he/she would also be required to take an oath that his/her consent is not motivated by greed for the legacy. On his/her taking the oath, he/she will take his/her share of the deceased's estate. This is so because the intention of a person can be known only from him.
3. If a person pronounces the divorce of his wife and then claims that he did not intend it, his claim will be accepted as long as she is undergoing *'iddah*.
4. The claim of a person to have paid *zakat* or *khums* will be accepted.
5. The claim of a woman concerning her state of menstruation, purity, pregnancy and *'iddah* will be accepted.
6. The claim of indigence and need.
7. The claim by a woman that she is free of all impediments to marriage.
8. The claim of a youth that he has attained puberty (*ihtilam*).
9. The husband's claim that he has had intercourse with his wife, after she claims that he is impotent and the judge grants him a year's time. Details of it were mentioned while discussing impotence (in the

chapter on marriage).

10. The claim of a working partner in a *mudarabah* partnership (where one partner contributes capital while the other contributes his skill, labour and know-how) that he has purchased a particular commodity for himself, which the partner contributing capital denies. Here the purchaser's word is accepted because he knows his intention better. There are other such examples.

Al-Shaykh 'Abd al-Karim has mentioned three proofs in his *Kitab al-qada'*:

The first proof is confirmed consensus, both in theory and practice. I have seen legists invoking this principle in all instances of its application, issuing *fatwas* on its basis in different branches of law, considering it as one of the most incontrovertible of principles. All this points towards a definite proof and a consensus regarding its being a general premise referred to in instances of doubt. The legists invoke this principle as a cause while accepting the word of an insolvent person, because if his word is not accepted, it will result in a sentence of perpetual imprisonment due to his inability to prove it...

The second proof is that which has been explicitly reported in some traditions. A certain narrator says. "I asked al-Imam al-Rida (A), '(What is to be done) if a man marries a woman and then a doubt arises in his mind that she has a husband?' The Imam (A) replied, 'He is not required to do anything; don't you see that if he asks her for a proof, she will not be able to find anyone who can bear witness that she has no husband?' "

Thus, the impossibility of producing witnesses is common to all these instances where another person's testimony is not possible due to the act being a private fact between the person and his Lord, which cannot be known except from the person himself. This is in addition to what has been narrated in the tradition regarding the acceptability of women's claim concerning menses, purity, *'iddah* and pregnancy.

The third proof is that in the event of not accepting the claimant's word in matters that cannot be known except from him, the dispute would of necessity remain unresolved and there would be no means in the Shari'ah for deciding disputes, and this is contradictory to the basic principle that says that there is a solution for everything in the Shari'ah. Therefore, in such circumstances the claimant's claim will be accepted after his taking an oath, because apart from this there is no other way to settle the dispute.

As to the need for an oath, it is in line with the consensus that in every claim in which the claimant's word is given precedence, he is bound to take an oath, because disputes are solved either by evidence or oath, and when it is not possible to produce a proof, the claimant's oath is the only alternative. Here it is not possible to burden the negator with an oath, because among the requirements of an oath is certain knowledge of the fact for which the oath is being taken, and there is no way a negator can have knowledge of the claimant's intention. It is necessary to point out that the need to make such a claimant take an oath arises in the case of a dispute that cannot be settled except by his oath. But if there is no such dispute, his word will be accepted without an oath (e.g. his claim of having paid *zakat* and *khums*, or his claim of their not being *wajib* upon him because he does not fulfil the conditions for their

incidence).

Also necessary for accepting the claim of such a claimant is the absence of circumstantial evidence refuting the veracity of his claim. Thus if an act of his proves his intention – such as when he buys or sells and then claims that it was unintentional – it would result in his proving his own falsity because the apparent circumstances establish his intention. As to the acceptance of a claimant that he did not intend divorce, it is limited, as mentioned earlier, to a revocable divorce as long as the divorcee is undergoing *'iddah*, and this claim of his is considered his reclaiming her. Hence his word will not be given credence and his claim will not be heard if the divorce is irrevocable or if he makes the claim after the completion of *'iddah*.

1. He died in 1936 and left behind many compilations, all of them related to law and jurisprudence, and none of which have appeared in print. Among them is a good and useful treatise on 'adalah. The best of these works is a big book on qada', and there exists only a single copy of this work written in his own hand. It is a unique work and no other book like it has been compiled on this issue. My first reliance in writing this section has been on that book, then on al-Jawahir and the appendices of al-'Urwah.

Court Divorce (Talaq Al-Qadi)

Is a judge entitled to divorce someone's wife against his will? Abu Hanifah says: A judge is not entitled to divorce someone's wife, whatever the cause, except when the husband is *majbub*, *khasi* or *'anin*,¹ as mentioned earlier in the section on defects. Thus, failure to provide maintenance, intermittent absence, life imprisonment, etc., do not validate a woman's divorce without the husband's consent, because divorce is the husband's prerogative.

Malik, al-Shafi'i and Ibn Hanbal allow a woman to demand separation before a judge on certain grounds, of which some are the following:

1. Non-provision of maintenance: These three legists concur that when the incapability of a husband to provide essential maintenance is proved, it is valid for his wife to demand separation. But if his inability is not proved and he refuses to provide maintenance, al-Shafi'i observes: The two may not be separated; Malik and Ahmad remark: Separation may take place, because the failure to provide his maintenance is similar to insolvency. The law in Egypt explicitly validates the right to claim separation on the failure to provide maintenance.

2. Causing harm to the wife with word or deed: Abu Zuhrah, in *al-Ahwal al-shakhsiyyah* (page 358). says: It is stated in Egyptian law, Act 25 of 1929, that if a wife pleads harm being caused to her by the husband, so that the like of her cannot continue living with him, the judge will divorce her irrevocably on her proving her claim and after the judge's failing to reform the husband. If the wife fails to prove her

claim but repeats her complaint, the judge will appoint two just arbitrators related to the couple to find out the reasons for the dispute and to make an effort to resolve it. On their failing to do so, they will identify the party at fault, and if it is the husband or both of them, they will cause their separation through an irrevocable divorce on the judge's order. This law is based on the opinion of Malik and Ahmad.

The Sunni Shari'ah courts in Lebanon rule separation if a dispute arises between them and two arbitrators specify the necessity of separation.

3. On harm being caused to a wife by the husband's absence, according to Malik and Ahmad, even if he leaves behind what she requires as maintenance for the period of his absence. The minimum period after which a wife can claim separation is six months according to Ahmad, and three years according to Malik, though a period of one year has also been narrated from the latter. The Egyptian law specifies a year. Whatever the case, she will not be divorced unless he refuses both to come to her or to take her to the place of his residence. Moreover, Malik does not differentiate between a husband having an excuse for his absence and one who has none with regard to the application of this rule. Thus both the situations necessitate separation. But the Hanbalis state: Separation is not valid unless his absence is without an excuse. (*al-Ahwal al-shakhsiyyah* of Abu Zuhrah and *Farq al-zawaj* of al-Khafif)

4. On harm being caused to a wife as a result of the husband's imprisonment. Ibn Taymiyyah, a Hanbali, has explicitly mentioned it and it has also been incorporated in Egyptian law that if a person is imprisoned for a period of three years or more, his wife is entitled to demand separation pleading damage after a year of his imprisonment, and the judge will order her divorce.

Most Imamiyyah legists do not empower the judge to affect a divorce, regardless of the circumstances except in the case of the wife of a missing husband, after the fulfillment of the conditions mentioned earlier. This stand of the Imamiyyah is in consonance with the literal meaning of the tradition:

الطلاق بيد مَنْ أَخَذَ بِالسَّاقِ.

But a group of grand legal authorities (*al-maraji' al-kibar*) have permitted divorce by a judge, with a difference of opinion regarding its conditions and limitations. We cite their observations here.

Al-Sayyid Kazim al-Yazdi, in the appendices to *al-'Urwah (bab al-'iddah)*, has said: The validity of a wife's divorce by a judge is not remote if it comes to his knowledge that the husband is imprisoned in a place from where he will never return, and similarly where the husband though present is indigent and incapable of providing maintenance, along with the wife's refusal to bear it patiently.

Al-Sayyid Abu al-Hasan al-Isfahani, in the *bab al-zawaj* of *al-Wasilah* (under the caption, *al-qawl fi al-kufr*), writes: If a husband refuses to provide maintenance while possessing the means to do so and the wife raises the issue before a judge, the judge will order him to provide her maintenance or to divorce her. On his refusing to do either, and it not being possible to maintain her from his wealth or to compel

him to divorce, the obvious thing which comes to the mind is that the judge will divorce her, if she so desires. Al-Sayyid Muhsin al-Hakim has given a similar fatwa in *Minhaj al-Salihin (bab al-nafaqat)*.

The author of *al-Mukhtalif* has narrated from Ibn Junayd that the wife has the option to dissolve marriage on the husband's inability to provide maintenance. The author of *al-Masalik*, while discussing the divorce of a missing person's wife, observes: As per an opinion, the wife is entitled to break off marriage on the basis of non-provision of maintenance due to pennilessness. The author of *Rawdat al-jannat* (vol.4), in the biographical account of Ibn Aqa Mubammad Baqir al-Behbahani, one of the great scholars says: He wrote a treatise (*risalah*) on the rules of marriage concerning indigence, entitled *Muzhir al-mukhtar*. In it, he has upheld the validity of wife's annulling marriage in event of husband's refusing, despite his presence, to maintain or divorce her, even if his refusal is a result of poverty and indigence.

The Imams of the Ahl al-Bayt (A) are on record as having said: "If a husband fails to provide his wife clothes to cover her body (*'awrah*) and food to fill her stomach, the *imam* is entitled to separate them." This, along with other reliable traditions, especially the tradition:

الطلاق لمن أخذ بالساق,

bestows upon the Imami legist the authority to grant divorce on the fulfilment of the requisite conditions and no one may object to him for it as long as his act is in accordance with the principles of Islam and those of the legal schools.

There is no doubt that the scholars who have refrained from granting divorces have done so on account of caution and the fear lest this power should be misused by persons devoid of the necessary learning and commitment to the faith, resulting in divorces being granted without the fulfilment of the conditions of the Shari'ah. This is the sole reason which has caused me to refrain despite the knowledge that if I do so I would be justified before God. I consider that a sensible solution to this problem and one which would prevent every unfit person from exercising this authority is the appointment by the *maraji'* of reliable representatives in Iraq or Iran bound by certain conditions and limitations within which they may affect a divorce – as was done by al-Sayyid Abu al-Hasan al-Isfahani.

¹. For the meaning of these terms, see "Marriage according to Five Schools of Islamic Fiqh", Part 2, under "al-'Uyub (defects)", al-Tawhid, vol. IV, No.4, pp.39-41.

Al-Zihar

Zihar means a husband telling his wife: "You are to me like the back of my mother." The schools concur that if a husband utters these words to his wife, it is not permissible for him to have sex with her unless he atones by freeing a slave. If he is unable to do so, he should fast for two successive months. If even this is not possible, he is required to feed sixty poor persons.

The schools also concur in considering a husband who has intercourse before the atonement a sinner, and the Imamiyyah also require him to make a double atonement.

The Imamiyyah consider *zihar* valid if it takes place before two just male witnesses hearing the husband's pronouncement to the wife in a period of purity in which she has not been copulated with, exactly as in the case of divorce. Similarly, researchers among them also require her marriage to have been consummated, otherwise *zihar* will not take place.

The reason for opening a separate chapter for *zihar* in Islamic law are the opening verses of the *Surat al-Mujadilah*. The exegetes describe that Aws ibn Samit, one of the Prophet's (S) Companions, had a wife with a shapely body. Once he saw her prostrating in prayer. When she had finished, he desired her. She declined. On this he became angry and said: "You are to me like the back of my mother". Later he repented having said so. *Zihar* was a form of divorce amongst the pagan Arabs, and so he said to her: "I presume that you have become *haram* for me. She replied: "Don't say so, but go to the Prophet (S) and ask him". He told her that he felt ashamed to question the Prophet (S) about such a matter. She asked him to permit her to question the Prophet (S), which he did. When she went to the Prophet (S), 'A'ishah was washing his (S) head. She said: "O Apostle of God! My husband Aws married me when I was a young girl with wealth and had a family. Now when he has eaten up my wealth and destroyed my youth, and when my family has scattered and I have become old, he has pronounced *zihar*, repenting subsequently. Is there a way for our coming together, by which you could restore our relationship?"

The Prophet (S) replied, "I see that you have become *haram* for him." She said, "O Prophet of God! By Him Who has given you the Book, my husband did not divorce me. He is the father of my child and the most beloved of all people to me." The Prophet (S) replied, "I have not been commanded regarding your affair." The woman kept coming back to the Prophet (S) and once when the Prophet (S) turned back she cried out and said: "I complain to God regarding my indigence, my need and my plight! O God, send upon Thy Prophet (S) that which would end my suffering". She then returned to the Prophet and implored his mercy saying, "May I be your ransom, O Prophet of God, look into my affair." 'A'ishah then said to her: "Curtail your speech and your quarrel. Don't you see the face of the Apostle of God?" Whenever the Prophet (S) received revelation a form of trance would overtake him.

The Prophet (S) then turned towards her and said: "Call your husband." When he came, the Prophet (S)

recited to him the verses:

قَدْ سَمِعَ اللَّهُ قَوْلَ الَّتِي تُجَادِلُكَ فِي زَوْجِهَا وَتَشْتَكِي إِلَى اللَّهِ وَاللَّهُ يَسْمَعُ تَحَاوُرَكُمَا إِنَّ اللَّهَ سَمِيعٌ بَصِيرٌ * الَّذِينَ يُظَاهِرُونَ مِنْكُمْ مِنْ نِسَائِهِمْ مَا هُنَّ أُمَّهَاتِهِمْ إِنْ أُمَّهَاتُهُمْ إِلَّا اللَّائِي وَلَدْنَهُمْ وَإِنَّهُمْ لَيَقُولُونَ مُنْكَرًا مِنَ الْقَوْلِ وَزُورًا وَإِنَّ اللَّهَ لَعَفُوفٌ غَفُورٌ * وَالَّذِينَ يُظَاهِرُونَ مِنْ نِسَائِهِمْ ثُمَّ يَعُودُونَ لِمَا قَالُوا فَتَحْرِيرُ رَقَبَةٍ مِنْ قَبْلِ أَنْ يَتَمَاسَا ذَلِكَ تُوَعِّظُونَ بِهِ وَاللَّهُ بِمَا تَعْمَلُونَ خَبِيرٌ * فَمَنْ لَمْ يَجِدْ فَصِيَامُ شَهْرَيْنِ مُتَتَابِعَيْنِ مِنْ قَبْلِ أَنْ يَتَمَاسَا فَمَنْ لَمْ يَسْتَطِعْ فَاِطْعَامُ سِتِّينَ مِسْكِينًا ذَلِكَ لِتُؤْمِنُوا بِاللَّهِ وَرَسُولِهِ وَتِلْكَ حُدُودُ اللَّهِ وَلِلْكَافِرِينَ عَذَابٌ أَلِيمٌ .

God has heard the speech of her who disputes with you concerning her husband and complains to God. And God hears your colloquy. Surely God is the Hearer, the Seer. Those among you who pronounce zihar to their wives, they (the wives) are not their mothers. Their mothers are only those who gave them birth; and they indeed utter an ill word and a lie, and indeed God is Pardoning, Forgiving. And those who pronounce zihar to their wives and then recant their words, should free a slave before they touch each other. Unto this you are exhorted; and God is aware of your actions. And he who does not possess the means, should fast for two successive months before they touch each other. And he who is unable to do so, should feed sixty needy ones. This, that you may put trust in God and His Apostle. These are the limits set by God; and for unbelievers is a painful chastisement. (58: 1-4)

After reciting these verses the Prophet (S) said to the husband: "Can you afford to free a slave?" The husband replied: "That will take up all my means." The Prophet (S) then asked him, "Are you capable of fasting for two successive months?" He replied: "By God, if I do not eat three times a day my eyesight becomes dim and I fear that my eyes may go blind." Then the Prophet (S) asked him, "Can you afford to feed sixty needy persons?" He replied: "Only if you aid me, O Apostle of God." The Prophet (S) said, "Surely I will aid you with fifteen Sa' (a cubic measure) and pray for blessings upon you." Aws, taking what the Prophet (S) had ordered for him, fed the needy and ate along with them and thus his affair with his wife was settled.

Al-Ila'

Ila' is an oath taken by a husband in God's name to refrain from having sex with his wife. The Qur'anic basis of this concept is verse 226 of the *Surat al-Baqarah*:

لَّذِينَ يُؤْلُونَ مِنْ نِسَائِهِمْ تَرِيصٌ أَرْبَعَةَ أَشْهُرٍ فَإِنْ فَاءُوا فَإِنَّ اللَّهَ غَفُورٌ رَحِيمٌ * وَإِنْ عَزَمُوا الطَّلَاقَ فَإِنَّ اللَّهَ سَمِيعٌ عَلِيمٌ

Those who forswear their wives (by pronouncing *ila'*) must wait for four months; then if they change their mind, lo! God is Forgiving, Merciful. And if they decide upon divorce, then God is surely Hearing, Knowing. (2:226--227)

The Imamiyyah require that marriage should have been consummated in order for *ila'* to be valid, otherwise *ila'* will not take place.

The schools concur that *ila'* takes place where the husband swears not to have sex with his wife for the rest of her life or for a period exceeding four months.¹ The schools differ if the period is four months; the Hanafis assert that it takes place and the other schools maintain that it doesn't.

There is consensus that if the husband has sex within four months, he must atone (for breaking his oath), but the hindrance to the continuation of marital relations will be removed. The schools differ where four months pass without sex. The Hanafis observe: She will divorce herself irrevocably without raising the issue before the judge, or the husband will divorce her. (*Bidayat al-mujtahid*)

The Maliki, the Shafi'i and the Hanbali schools state: If more than four months pass without his having sex, the wife will raise the issue before the judge so that he may order the husband to resume sexual relations. If the husband declines, the judge will order him to divorce her. If the husband declines again, the judge will pronounce her divorce, and in all situations the divorce will be revocable. (*Farq al-zawaj* of al-Khafif)

The Imamiyyah state: If more than four months pass without sex, and the wife is patient and willing, it is up to her and no one is entitled to object. But if she loses patience, she may raise the issue before the judge, who, on the completion of four months,² will compel the husband to resume conjugal relations, or to divorce her. If he refrains from doing either, the judge will press him and imprison him until he agrees to do either of the two things, and the judge is not entitled to pronounce divorce forcibly on behalf of the husband.

All the schools concur that the atonement for an oath is that the person taking the oath should perform one of these alternatives: feed ten needy persons, provide clothing to ten needy persons, free a slave. If he has no means for performing any of these, he should fast for three days.

Furthermore, according to the Imamiyyah, only those oaths which are sworn in the name of the sacred Essence of God will be binding. The oath of a child and a wife is not binding if the father and the husband prohibit it, except when the oath is taken for performing a *wajib* or for refraining from a *haram*. Similarly, an oath will not be binding upon anyone if it is taken to perform an act refraining from which is better than performing it, or is taken to refrain from an act whose performance is better than refraining from it, except, of course, the oath of *ila'*, which is binding despite the fact that it is better to refrain from it.

¹ The secret of stipulating this period is that a wife has the right to sex at least once every four months. It has been said

that the difference goes back to the interpretation of the verse *لِلَّذِينَ يُؤْتُونَ*. Here there are those who say that the verse has not stipulated any period for *ila'*, and others who consider it necessary that four months pass before the judge may warn the husband either to restore conjugal ties or to divorce here, and this obviously requires a period of more than four months, even though by a moment.

2. Most Imamiyyah legists state: The judge will allow the husband four months' time from the day the matter was brought to his notice, and not from the day of the oath.

8. Wasaya, Will and Endowments

Will and Bequest (Wasaya)

The five schools concur regarding the legality of making a will (*wasiyyah*) and its permissibility in the Islamic Shari'ah. *Wasiyyah* is a gift of property or its benefit subject to the death of the testator. A will is valid irrespective of its being made in a state of health or during the last illness, and in both cases the rules applicable are the same according to all the schools.

A will requires a testator (*musi*), a legatee (*musa lahu*), the bequeathed property (*musa bihi*), and the pronouncement (*sighah*) of bequest.

The Pronouncement

No specific wording is essential for making a will. Hence any statement conveying the intention of gratuitous transfer (of property or its benefit) after the death of the testator is valid. Thus if a testator says: "I make a will in favour of so and so," the words indicate testamentary intention, without needing the condition 'after death' to be specified. But if he says (addressing the executor): "Give it" or "Hand it over to so and so", or when he says, "I make so and so the owner of such and such a thing" it is necessary to specify the condition, 'after death', because without this consideration his words do not prove the intention of making a will.

The Imami, the Shafi'i and the Maliki schools observe: It is valid for a sick person who cannot speak to make a will by comprehensible gestures. Al-Shi'rani, in *al-Mizan*, narrates from Abu Hanifah and Ahmad the invalidity of making a will in this condition. In *al-Fiqh 'ala al-madhahib al-'arba'ah* (vol. 3, 'bab al-wasiyyah') this opinion is ascribed to Hanafis and Hanbalis: If a person suffers loss of speech due to illness, it is not valid for him to make a will (by gestures), unless it continues for a long period of time and he becomes dumb, settling down to communicating in familiar gestures. In that case, his gestures and writing will be considered equivalent to his speech.

Al-Shi'rani ascribes this opinion to Abu Hanifah, al-Shafi'i and Malik: If a person writes his own will and it is known that it is in his hand, it will not be acted upon unless he has it attested. This implies that if a will

written in his hand is found which he neither got attested nor made known its contents to people, the will will not be probated even if it is known to have been made by him.

Ahmad says: It will be acted upon, unless he is known to have revoked it. Researchers among the Imami legists observe: Writing proves a will, because the apparent import of a person's acts is similar to the import of his spoken statements, and writing is the sister of speech in the sense that both make known his intent; rather, writing is the superior of the two in this regard, and is preferable to all other evidence that proves intent. [1](#)

The Testator

There is consensus among all the schools that the will of a lunatic in the state of insanity and the will of an undiscerning child (*ghayr mumayyiz*) are not valid.

The schools differ regarding the will of a discerning child; the Malikis, the Hanbalis, and al-Shafi'i in one of his two opinions, observe: The will of a child of ten complete years is valid because the Caliph 'Umar probated it. The Hanafis say: It is not valid except where the will concerns his funeral arrangements and burial. And it is well-known that these things do not require a will. The Imamiyyah are of the opinion that the will of a discerning child is valid if it is for a good and benevolent cause and not otherwise, because al-Imam al-Sadiq considered it executable only in such cases. (*al-Jawahir* and Abu Zuhrah's *al-Ahwal al-shakhsiyyah*)

According to the Hanafis, if a sane adult makes a will and then turns insane, his will is void if his insanity is complete and continues for six months; otherwise, it is valid. If he makes a will in sound mind and then develops a condition of delusion leading to mental derangement lasting until death, his will will be void (*al-Fiqh 'ala al-madhahib al-'arba'ah*, vol.3, 'bab al-wasiyyah'). The Imami, the Maliki and the Hanbali schools are of the opinion that subsequent insanity does not nullify a will even if it continues till death, because subsequent factors do not nullify preceding decisions.

The Hanafis, the Shafi'is and the Malikis consider the will of an idiot as valid. The Hanbalis observe: It is valid in regard to his property and invalid regarding his children. Therefore, if he appoints an executor over them, his will will not be acted upon (*al-Ahwal al-shakhsiyyah* of Abu Zuhrah and *al-Fiqh 'ala al-madhahib al-'arba'ah*). The Imamiyyah state: The will of an idiot is not valid concerning his property and valid in other matters. Thus if he appoints an executor over his children, his will is valid, but if he wills the bequest of something from his property, it is void.

The Imamiyyah are unique in their opinion that if a person inflicts injury upon himself with an intention of suicide and then makes a will and dies, his will is void. But if he first makes a will and then commits suicide, his will is valid.

The Maliki and the Hanbali schools regard the will of an intoxicated person as invalid. The Shafi'is say:

The will of a person in a swoon is not valid. But the will of a person who has intoxicated himself voluntarily is valid.

The Hanafi school is of the opinion that a will made in jest or by mistake or under coercion is not valid (*al-Fiqh 'ala al-madhahib al-'arba'ah*, vol. 3, 'bab al-wasiyyah')

The Imamiyyah observe: A will is not valid if made in a state of intoxication or stupor, in jest, by mistake, or under coercion.

The Legatee

The four Sunni schools concur that a will in favour of an heir is not valid unless permitted by other heirs.

The Imamiyyah observe: It is valid in favour of an heir as well as a non-heir, and its validity does not depend upon the permission of the heirs as long as it does not exceed a third of the estate. The courts in Egypt earlier used to apply the opinion of the Sunni schools, but then switched over to the Imami view. The Lebanese Sunni Shari'ah courts continue to consider a will in favour of an heir as invalid. But since some years their judges have inclined towards the other view and have brought a bill to the government authorizing wills in favour of heirs.

All the schools concur that it is valid for a *dhimmi* (a non-Muslim living under the protection of an Islamic State) to make a will in favour of another *dhimmi* or a Muslim, and for a Muslim to make a will in favour of a *dhimmi* or another Muslim, in consonance with the verse:

لَا يَنْهَاكُمُ اللَّهُ عَنِ الَّذِينَ لَمْ يُقَاتِلُوكُمْ فِي الدِّينِ وَلَمْ يُخْرِجُوكُمْ مِنْ دِيَارِكُمْ أَنْ تَبَرُّوهُمْ وَتُقْسِطُوا إِلَيْهِمْ إِنَّ اللَّهَ يُحِبُّ
الْمُقْسِطِينَ * إِنَّمَا يَنْهَاكُمُ اللَّهُ عَنِ الَّذِينَ قَاتَلُوكُمْ فِي الدِّينِ وَأَخْرَجُوكُمْ مِنْ دِيَارِكُمْ وَظَاهَرُوا عَلَىٰ إِخْرَاجِكُمْ أَنْ تَوَلَّوهُمْ
وَمَنْ يَتَوَلَّهُمْ فَأُولَٰئِكَ هُمُ الظَّالِمُونَ

God does not forbid you respecting those who have not made war against you on account of your religion, and have not expelled you from your homes, that you show kindness to them and deal with them justly; surely God loves the just. God only forbids you respecting those who made war with you on account of your religion, and expelled you from your homes and assisted in your expulsion, that you befriend them. And whosoever takes them for friends - they are the evildoers. (60: 8--9)

The schools differ regarding the validity of a will made by a Muslim in favour of a *harbi*.² The Malikis, the Hanbalis and most of the Shafi'is consider it valid.

According to the Hanafi and most Imami legists, it is not valid. (*al-Mughni*, vol.6, *al-Jawahir*, vol. 5, 'bab al-wasiyyah')

The schools concur regarding the validity of a will made in favour of a foetus, provided it is born alive. Bequest is similar to inheritance, and there is *ijma'* that afterborn children inherit; hence their capacity to own bequests as well.

The schools differ as to whether it is necessary for the foetus to exist at the time of making the will. The Imami, the Hanafi and the Hanbali schools, as well as al-Shafi'i in the more authentic of his two opinions, say: It is necessary, and a foetus will not inherit unless it is known to exist at the time of making the will. The knowledge of its existence is acquired if its mother has a husband capable of intercourse with her and it is born alive within a period of less than six months from the date of the bequest. But if it is born after six months or more it will not receive anything from the legacy, because of the possibility of its being conceived after the time of the bequest. This opinion is based on the invalidity of a bequest in favour of one not in existence.

The Malikis state that bequest in favour of existing foetus as well as one to be conceived in the future is valid, for that they regard a bequest in favour of someone non-existent as valid.³ (al-'Allamah al-Hilli's *Tadhkirah; al-Fiqh 'ala al-madhahib al-'arba'ah; al-'Uddah fi fiqh al-Hanabilah*, 'bab al-wasiyyah')

If a person makes a will in favour of a foetus and then twins, a boy and a girl, are born, the legacy will be distributed among them equally because a bequest is a gift, not an inheritance: thus it resembles his giving them a gift after their birth.

The schools concur that it is valid to make a will for public benefit, such as for the poor and destitute, for students, for mosques and schools. Abu Hanifah excludes bequest in favour of a mosque or something of the kind because a mosque does not have the capacity to transfer ownership. Muhammad ibn al-Hasan, his pupil, considers it valid, the income of the legacy being spent for the mosque. This has been the custom among the Muslims in the east and the west, in the past and at the present.⁴

The schools differ where the legatee is a specific person, as to whether his acceptance is necessary or if the absence of rejection on his part is sufficient.

The Imami and the Hanafi schools observe: His not rejecting the bequest is sufficient. Therefore, if the legatee is silent and does not decline the bequest, he will become the owner of the legacy after the testator's death.

The Imamiyah are of the opinion that if a legatee accepts the bequest during the life of the testator, he is entitled to decline it after his death; also if he refuses the bequest during the testator's life, he is entitled to accept it after his death, because his acceptance and refusal have no effect during the life of the testator, for ownership does not materialize during such time. According to the Hanafi school, if he refuses during the testator's life, he is entitled to accept after his death; but if he accepts during his life, he cannot reject it thereafter.

The Shafi'i and the Maliki schools state: It is necessary that the legatee accept the bequest after the

death of the testator, and his silence and non-refusal do not suffice. (al-'Allamah al-Hilli's *Tadhkirah, al-Fiqh 'ala al-madhahib al-'arba'ah*)

The four Sunni schools observe: If the legatee dies before the testator, the will becomes void because the bequest then becomes a gift to a dead person, and this causes it to become void. (*al-Mughni*, vol.6, 'bab al-wasiyyah')

The Imamiyyah say: If the legatee dies before the testator and the testator does not revoke the will, the heirs of the legatee will take his place and play his role in accepting or rejecting the bequest. Thus if they do not reject the bequest, the legacy will be solely their property, which they will distribute between themselves in the form of an inheritance, without it being incumbent upon them to pay from this bequest the debts of the decedent or to comply with his will in regard to the bequest. They argue that acceptance of the bequest was the decedent's right, which is transferred to his heirs, like the option to reject (*khayar al-radd*). They also cite the traditions of the Ahl al-Bayt⁵ as another basis for their argument.

According to Malik, and al-Shafi'i in one of his two opinions, a bequest in favour of the murderer (of the testator) is valid regardless of its being an intentional or unintentional homicide. The Hanafis validate the bequest if permitted by the testator's heirs.

The Hanbalis observe: The bequest is valid if it is made after the injury causing death, and is void if murder takes place after the bequest. (Abu Zuhrah's *al-Ahwal al-shakhsiyyah*, 'bab al-wasiyyah')

The Imamiyyah say: A bequest is valid in favour of a murderer, because the proofs regarding the validity of a will are general. The verse:

مِنْ بَعْدِ وَصِيَّةٍ يُوصَىٰ بِهَا أَوْ دَيْنٍ

includes a murderer as well as others, and to limit it to a non-murderer requires proof.

The Legacy

The schools concur that it is necessary that the bequest be capable of being owned, such as property, house and the benefits ensuing from them. Therefore, the bequest of a thing which cannot be owned customarily (e.g. insects) or legally (e.g. wine, where the testator is a Muslim) is not valid, because transfer of ownership is implicit in the concept of bequest and when it is not present there remains no subject for the bequest.

There is consensus among the schools regarding the validity of the bequest of the produce of a garden, perpetually or for a specific number of years.

The Imamiyyah extend the meaning of bequest to its utmost limit, permitting therein that which they don't

permit in a sale and other transactions. They consider as valid a bequest of something non-existent with a probability of future existence, or something which the testator is incapable of delivering (e.g. a bird in the sky or a straying animal), or something which is indeterminate (e.g. the bequest of a dress or animal without mentioning what dress and which animal). They further observe: It is valid for the testator to be vague to the utmost extent (he may say: 'I promise to give something', 'a little', or 'a large quantity', 'a part', or 'a share', or 'a portion',⁶ to a certain person).

None of these forms is valid in a transaction of sale, though valid in a bequest. The author of *al-Jawahir* says: "Perhaps the validity of all these forms is due to the general nature of the proofs validating wills, which include all these forms and all interests that are capable of being transferred.... Perhaps the rule in bequests is that all things can be bequeathed except those that are known to be nonbequeathable, "i.e. those which have been excluded by a canonical proof (e.g. wine, swine, *waqf*, the right to *qisas*, the punishment for *qadhf*, etc.). Some of them have stated that it is not valid to sell an elephant, though it can be validly bequeathed.

Al-Shaykh Muhammad Abu Zuhrah, in *al-Ahwal al-shakhsiyyah*, 'bab al-wasiyyah', says: The fuqaha' have extended the scope of the rules of bequest and have permitted in it that which they don't permit in other forms of transfer, e.g. the bequest of something indeterminate. Thus if you make a will using the words, 'a share', 'a piece', 'something', 'a little', etc., the will will be valid and the heirs will have to give any quantity they desire from among the probable quantities understood from that word.

This observation is in concurrence with the view of the Imamiyyah, and, accordingly, there is an agreement concerning this issue.

The Extent of Testamentary Rights

A gratuitous bequest is operative only up to one-third of the testator's estate in the event of having heir, irrespective of the bequest being made in illness or good health. As per consensus, any excess over one-third requires the permission of the heirs. Therefore, if all of them permit it, the will is valid, and if they refuse permission, it becomes void. If some heirs give permission and others refuse, the will will be executed by disposition of the excess over one-third from the share of the willing heirs. The permission of an heir will not be effective unless he be a sane and mature adult.

The Imamiyyah observe: Once the heirs give permission, they are not entitled to withdraw it, regardless of whether the permission was given during the life of the testator or later.

The Hanafi, the Shafi'i and the Hanbali schools say: The permission given by the heirs or their refusal to do so will have no consequences except after the testator's death. Thus if they give permission during his lifetime and then change their minds and decline permission after his death, it is valid, irrespective of the permission having been given during the health of the testator or during his illness. (*al-Mughni*)

The Malikis are of the opinion that if the heirs give permission during the illness of the testator, they are entitled to withdraw it, and if they permit while he is healthy, the will will be executed from their share of the legacy, without their having a right to revoke the permission.

The Imami, the Hanafi and the Maliki schools state: When permission is granted by the heir for that which exceeds one-third of the legacy, it is considered approval of the testator's act and the operability of the bequest, not as a gift from the heir to the legatee. Accordingly, it neither requires possession, nor other rules applicable to a gift apply to it.

The schools differ concerning a testator who has bequeathed all his wealth and does not have any specific heir. Malik observes: The bequest is only valid up to one-third of the legacy. Abu Hanifah states: It is permissible for the whole legacy. Al-Shafi'i and Ahmad have two opinions, and so do the Imamiyyah, the more reliable of them being the one declaring its validity. (*al-Bidayah wa al-nihayah*; *al-Tadhkirah*, 'bab al-wasiyyah')

There is consensus among the schools that inheritance and bequest are operational only after the payment of the debt of the decedent or his release from it. Therefore, the one-third from which the will is executed is a third of what remains after the payment of debt. They differ concerning the time at which the one-third will be determined: Is it a third at the time of death or at the time of the distribution of the estate?

The Hanafis say: The one-third will be determined at the time of distributing the estate. Any increase or decrease in the estate will be shared by the heirs and the legatees. Some Hanbali and Maliki legists concur with this opinion.

The Shafi'is observe: The one-third will be determined at the time of the testator's death. (Abu Zuhrah)

The Imamiyyah state: That which the decedent comes to own after his death will be included in his estate (e.g. the reparation for unintentional homicide and for intentional murder, where the heirs compromise over reparation, and as when the decedent had during his life set up a net and birds or fish are trapped in it after his death; all these will be included in the estate and from it a third will be excluded). This observation of the Imamiyyah is close to the Hanafi view.

The Imami, the Shafi'i and the Hanbali schools state: If the decedent is liable for payment of *zakat* or any *wajib* expiation (*kaffarah*) or to perform the compulsory *hajj* or other *wajib* duties of monetary nature, these will be taken from his whole estate, not from a third of it, irrespective of his having willed to this effect or not, because these duties are related directly to God (*haqq Allah*), and as mentioned in the traditions have a greater right to be fulfilled. If the decedent has made a provision for their fulfilment in his will and has determined their expenses from a third of his estate, his word will be acted upon, in consideration of the heirs.

The Hanafis and the Malikis observe: If he has provided for his unfulfilled duties in the will, their

expenses will be taken from a third of his estate and not the whole, and if he makes no provision for them in his will they will annul on his death (*al-Mughni, al-Tadhkirah, al-Bidayah wa al-nihayah*)

The schools concur that a will for performing *mustahabb* acts of worship will be executed from a third of the estate.

Clashing Wills

If the bequeathable third is insufficient for meeting all the provisions of a will (such as where the testator has made a bequest of one thousand for Zayd, two thousand for the poor, and three thousand for a mosque, while his bequeathable third is five thousand, and the heirs do not permit the excess to be met from their share), what is the rule here?

The Maliki, the Hanbali and the Shafi'i schools say: The bequeathable third will be distributed among them in proportion to their amounts; i.e. the deficit will affect every legatee in proportion to his share in the will. (*al-Mughni*)

The Imamiyyah state: If the testator makes many wills exceeding his bequeathable third, and the heirs do not permit the excess on the wills being conflicting to one another (such as when he says: "One-third of my estate is for Zayd," and says later, "One-third is for Khalid") the later will will be acted upon, and the former ignored. And if the wills include *wajib* and non-*wajib* provisions, the *wajib* provisions will be given precedence. If the wills are of equal weight, then if the testator has included them in a single statement and said: "Give Jamal and Ahmad 1000," while his bequeathable third is 500, this amount will be distributed among the two, each receiving 250. But if the testator gives precedence to one of them and says: "Give Jamal 500. and Ahmad 500", the whole amount will be given to the first and the second will will be considered void because the first will has completely exhausted the bequeathable third and no subject remains for the second.

The four Sunni schools observe: If a testator bequeaths a specific thing in favour of a person, and then bequeaths the same thing in favour of another, that thing will be equally distributed between them (thus, if he says: "Give this car to Zayd after my death," and says later: "Give it to Khalid," it will become the joint property of both).

The Imamiyyah say: It belongs to the second, because the second will implies abandonment of the earlier one.

According to the Imamiyyah, if a testator bequeaths a specific thing to every heir equal to each heir's share of the legacy, the will is valid (e.g. if he says: "The garden is for my son Ibrahim, and the house is for his brother, Hasan"), and the will will be executed if there is no favouritism involved, because there is no clash of interests of the heirs. Some Shafi'i legists and some Hanbalis concur with this view.

There is consensus among the schools that the thing bequeathed, regardless of its being an

undifferentiated part (e.g. one-third or one-fourth of the whole estate) or something specific, the legatee will become its owner on the testator's death, regardless of the legacy's presence. Thus he takes his share along with the heirs if the subject of legacy is present, and similarly when the subject of legacy, not present earlier, appears.

When the subject of legacy is something distinct, independent and determinate, the Imami and the Hanafi schools say: The legatee will not become its owner unless the heirs possess twice its value (as their share of the testator's estate). But if the testator has assets not present or debts (receivable), and the subject of bequest is more than one-third in value of what the heirs possess, the heirs are entitled to resist the legatee and stop him from taking more than a third of the total estate into possession, especially where the assets not present are in danger of perishing or when it is infeasible to reclaim them. When the thing not present earlier turns up, the legatee is entitled to the remaining part of the bequest to the extent of a third of the entire present assets. But if nothing turns up, the rest of the legacy is for the heirs.

Revocation of Will

There is consensus among the schools that a will is not binding on the testator or the legatee. Thus it is valid for the former to revoke it, regardless of its being the bequest of an asset, or benefit (*manfa'ah*) or guardianship (*wilayah*). Discussion regarding the second point will follow shortly.

A revocation by the testator may take place by word or deed (e.g. his bequeathing an article and then consuming, gifting or selling it). The Hanafis are said to hold that selling is not considered a revocation, and the legatee is entitled to receive its price.

Bequest of Benefits

The schools concur regarding the validity of a bequest of benefit (e.g. the lease of a house, the right to reside in it, an orchard's produce, a goat's milk, and other such benefits which accrue in course of time) irrespective of the testator's restricting the benefit to a specific period or his bequeathing it perpetually.

The schools differ concerning the method of deriving the benefit from the bequeathable third. The Hanafis observe: The value of the bequeathed benefit will be estimated from the subject of the benefit, irrespective of whether the bequest of the benefit is temporary or perpetual. Thus, if a testator bequeaths the right to reside in a house for a year or more, the value of the whole house will be estimated, and if its value covers a third of the legacy, the will will be operational; otherwise it will be inoperational and void.

The Shafi'i and the Hanbali schools say: The value of the benefits will be estimated in separation from the property. If a third of the property covers the value of the benefit, the bequest will be fully operational, if not, to the extent covered by a third of the property. (Abu Zuhrah)

Researchers among the Imamiyyah state: If the bequest of the benefit is not perpetual, the calculation of

its value is easy because the article or property will retain its own value after subtracting the value of the benefit. Therefore, if a testator bequeaths the benefit of an orchard for a period of five years, the value of the whole orchard will be initially estimated. Supposing its estimate is 10,000, it will be re-estimated after deducting from it the benefit of five years. Supposing the re-estimated value is 5000, the difference of 5000 will be deducted from a third of the estate if it can bear it; otherwise, the legatee will be entitled to the benefit to the extent of a third of the legacy, be it the benefit of a year or more.

But if the bequest of the benefit is perpetual, the value of the orchard along with its benefit will be estimated initially, and then the procedure followed in a temporary bequest will follow. If one asks: "How and in what way can we estimate the value of a property devoid of benefit, for that which has no benefit has no value?" The reply is that there are some benefits that have value even if little. Thus, in an orchard, the broken branches and dry wood can be utilized by the heir; if a tree dries up due to some reason, the land it covered can be of use; if a house falls into ruins and the legatee undertakes no repairs, the heirs may benefit from its stones and land; the meat and hide of a goat can be used after it is slaughtered; and in all situations a property is not devoid of benefits apart from the bequeathed benefit.

The Dispositional Rights of an Ailing Person

Here, by an 'ailing person' is meant one whose death follows his illness, in a manner that the illness creates apprehensions in the minds of people that his life is at an end. Therefore, a toothache, eye pain, a slight headache, and the like are not considered alarming forms of illness. Thus, gifts made by a person suffering from an alarming sickness, who may recover from it and die after his recovery, will be considered valid.

Powers of Disposition of a Healthy Person

There is no doubt nor disagreement between the schools that when a healthy person disposes of his wealth, completely and unconditionally – i.e. without making it contingent upon his death – his disposition is operative from his property, irrespective of the disposition being *wajib* (e.g. the payment of a debt) or an act of favour (e.g. giving a gift, or creating a *waqf*).

But if a healthy person makes the disposition of his property contingent upon his death, it becomes a bequest, as mentioned. Therefore, if it is a non-monetary *wajib* (e.g. prayer, Hajj, etc.), it will be executed from a third of his legacy, and if it is a debt, it will be paid from the undivided estate, according to the Imami, the Shafi'i and the Hanbali schools, and from a third, according to the Hanafi and the Maliki schools.

The Powers of Disposition of an Ill Person

Those dispositions of an ill person that are contingent upon his death are bequests, and the rules

applicable to them are those mentioned above concerning valid wills, because there is no difference between a will made during a state of health or illness, provided the ill person is mentally sound and completely conscious and aware.

If an ill person disposes his wealth without making it contingent upon his death, it will be seen whether his disposition is for his own use, such as his buying an expensive dress, enjoying food and drink, spending on medicine and for improving his health, travelling for comfort and enjoyment, etc. All these dispositions are valid and no one, including heirs, may object.

And if he disposes it impartially, such as when he sells, rents or exchanges his possessions for a real consideration, these transactions of his are enforceable from his estate and the heirs are not entitled to dispute it, because they don't lose anything as its consequence.

If he disposes in a complete form without making it contingent upon his death, and his dispositions include acts of favour (such as when he gives a gift or alms, or relinquishes a debt, or pardons a crime entailing damages, or sells for less than its actual price or buys at a higher price, or makes other such dispositions which entail a financial loss for the heirs), such dispositions will be operational from a third of his estate.⁷ The meaning of its being from a third of his estate is that its enforcement is delayed until his death. Thus if he dies in his illness and a third of his estate covers his completed gratuitous acts, it is clear that they are enforceable from the very beginning, and if the third falls short of them, such dispositions in excess of the third are invalid without the heirs' permission.

Wills and 'Completed Dispositions' During Illness

The difference between a will and dispositions (*munjazat*) during illness is that the will is made contingent upon death, whereas dispositions during illness are not made contingent upon death, irrespective of their being incontinent perpetually or being contingent upon some event capable of conditionality (such as when he makes a vow during illness to sacrifice a particular ram if he is granted a son and then a son is born to him posthumously; such an act will be considered among dispositions during disease).

According to *al-Mughni* (a Hanbali legal text) and *al-Tadhkirah* (a book on Imami fiqh), there are five similarities and six differences between dispositions during illness and a will, and the similar wording of the two texts shows that al-'Allamah al-Hilli, the author of *al-Tadhkirah* (d.726/1326), has taken it from Ibn Qudamah, the author of *al-Mughni* (d.620/1223).⁸ It is useful to give a summary here of their views.

The five similarities between dispositions during illness and a will are the following:

1. Both depend for their execution on a third of the estate, or the consent of the heirs.
2. Dispositions during illness are valid in favour of an heir, exactly like a will, according to the Imamiyyah; according to the other four schools, they are not valid in favour of an heir, as in the case of a will.
3. Both of them have a lesser reward with God compared to charity given during health.

4. Dispositions contest with wills, within the one-third of the estate (from which both are to be enforced).
5. Both will be enforced from the one-third of the estate only at the time of death, neither before nor after it.

The six differences between a will and dispositions during illness are:

1. It is valid for a testator to revoke his will, while it is not valid for a donor during ailment to revoke his gift after its acceptance by the donee and his taking its possession. The secret here is that a will is a bequest conditional to death, and, consequently, as long as the condition is not fulfilled, it is valid to recant it, whereas a gift during illness is unrestricted and unconditional.
2. Dispositions are required to be accepted or rejected immediately and during the life of the donor, whereas a will is not required to be accepted or rejected until the death of the testator.
3. Dispositions require the fulfilment of certain conditions, such as knowledge of the gift and absence of harm: a will is not bound by these conditions.
4. Dispositions enjoy precedence over a will if one-third of the estate falls short of meeting both of them together, except when the will involves the setting free of a slave, in which case a will takes precedence over completed gifts. This is the view of the Imami, the Hanafi and the Shafi'i schools (*al-Tadhkirah*, 'bab al-wasiyyah').
5. If one-third of the estate is not sufficient to enforce all the dispositions, then, according to the Shafi'is and Hanbalis, the first among them will be enforced first, and so on. But if the one-third is not sufficient to fulfil several wills, the deficit will affect all of them, as pointed out while discussing clashing wills. The Imamiyyah enforce both wills and dispositions on a first-come-first basis.
6. If a donor during his last illness dies before the donee has taken possession of the gift, the option lies with the heirs: if they desire they may grant it. But a will has to be compulsorily accepted after the death of the testator, without requiring the consent of the heirs.

The sixth difference has been mentioned by the author of *al-Mughni*, while the author of *al-Tadhkirah* does not mention it. It is better not to mention this difference, as done by al-'Allamah al-Hilli, because dispositions during sickness have many forms such as gift (*hibah*), the relinquishing of a debt, favouritism in sale or purchase, etc. Hence, when dispositions are not limited to gifts, it is not appropriate, firstly, to say "If a donor during his last illness dies before the donee has taken possession".

Secondly, if a donor during his last illness makes a gift and dies before the donee has taken its possession, according to the Hanbali, the Shafi'i, the Imami and the Hanafi schools, the gift is void because taking possession is a condition for its completion, and if the donee takes possession before the death of the donor the gift is concluded and will be accounted for in the third of the estate, like a will,

and will not depend for its execution on the consent of the heirs, provided it does not exceed a third of the estate.

Hence it is not in fact a disposition without taking possession and after the death of the donor, for it to be said that it differs from or is similar to a will. After taking possession, the rules concerning wills will apply to it. From this it is clear that the mention of the sixth difference is out of place.

Acknowledgment during Sickness

The four Sunni schools concur that if during last illness a person acknowledges the debt of a non-heir, his acknowledgment is enforceable from the undivided estate, exactly like his acknowledgment during health. They differ where he acknowledges the debt of an heir; the Hanafi and the Hanbali schools observe: The other heirs are not bound by this acknowledgment and it will be considered void unless that heir brings a valid proof to establish his claim.

The Malikis say: The acknowledgment is valid if the decedent is not accused of partiality, and is void if so accused (e.g. when a person having a daughter and a cousin brother acknowledges a debt of his daughter, it will not be accepted, and if he acknowledges in favour of his cousin, it will be accepted, because he cannot be accused here of depriving his daughter and transferring the wealth to his cousin). The reason for rejecting the acknowledgment is accusation, and therefore it is limited to those instances where there is an accusation. (*al-Mughni*, vol.5, 'bab al-iqar')

The Imamiyyah state: If he makes an acknowledgment during last illness (*marad al-mawt*) for an heir or a stranger, concerning a property or a debt claim, it will be seen: If there are any indications raising the suspicion that he is not sincere in his acknowledgment, so that it seems, going by ordinary factors, far-fetched that the thing acknowledged should belong to the person to whom it has been acknowledged to belong and that the sick person intends to impress this on others for some reason, the rule applicable to such an acknowledgment is the one applicable to a will: It will be executed from a third. But if the ill person is secure from suspicion in his acknowledgment, so that there is no indication to prove that he has lied (such as when there has been between him and the person in whose favour he has made the acknowledgment, earlier dealings which ordinarily explain such an acknowledgment), the acknowledgment will be enforced from the original estate, whatever its value.

This is when the condition of the person acknowledging is known; what if it is not known?

If the heir says that the decedent was not honest in his acknowledgment, then the burden of proof rests on the person in whose favour the acknowledgment has been made, to prove that he owns the thing which the decedent acknowledged as his during his last illness. If he proves this by bringing two just witnesses (*al-bayyinah*), the acknowledgment will be enforced from the original estate; otherwise, the heir will take an oath that he does not know that the thing acknowledged by the decedent belongs to that person; then the acknowledgment will be enforced from a third of the estate. The Imamiyyah have based

their argument on traditions narrated from the Ahl al-Bayt ('a) such as the tradition narrated by Abu Basir:

إذا كان مصدقاً يجوز

(When his verity is established, it is valid) and other traditions; and as إذا is used in a conditional clause, it implies that the enforcement is made conditional to his trustworthiness and the establishment of his verity. [9](#)

Appointment of Executor (al-Wisayah)

Al-wisayah is an undertaking by a person to execute the will of another after his death, such as clearing his debts, pursuing his debtors, the care and maintenance of his children, and other such functions. Responsibility for these functions is called *al-wilayah* or *al-wasiyyat al-ahdiyyah*, and the person charged with performing it called *al-wasi al-mukhtar* (an authorized executor).

Requirements for a Wasi

1. He should be a *mukallaf*, i.e. a sane adult, because a lunatic and a minor do not have authority over themselves; so there is no question of their exercising authority over the affairs of others. However, the Imamiyyah observe in this regard: It is not valid for a child to act as an executor individually, though valid if he acts together with an adult. Then the adult will execute the will individually till the minor attains majority, and then he will join him in its execution.

The Hanafis state: If a minor is appointed as *wasi* (executor), the judge will replace him with another, and if the minor has executed the will before being removed by the judge, his acts of execution of the will are valid and enforceable. Similarly, if he attains majority before being removed, he will continue with the execution of the will (*al-Fiqh 'ala al-madhahib al-'arba'ah* and al-'Allamah al-Hilli's *al-Tadhkirah*).

2. The *wasi's* nomination must be determinate; thus if the testator appoints one of two persons without determining which one of them is to be the executor, the appointment of both is void.

3. The specification of the subject of will (*musa bihi*). Thus if the testator makes a will without specifying it (as when he says: "So and so is my *wasi*", and does not mention the thing over which he is to exercise this authority), the appointment is void according to the Imami, the Hanafi, the Shafi'i and the Hanbali schools. It has been narrated from Malik that such a *wasi* will have authority over the whole estate.

4. That the *wasi* be a Muslim: Thus it is not valid, as per consensus, for a Muslim to appoint a non-Muslim executor. But the Hanafis state: If a Muslim appoints a non-Muslim, it is for the judge to replace him with a Muslim, though the appointment itself will be considered valid. Hence if the non-Muslim *wasi* executes the will before his removal by the judge, or becomes a Muslim, he will remain a *wasi*, as in the

case of a minor.

5. The Shafi'i school observes: It is *wajib* that the *wasi* be an *'adil* person.

The Maliki, the Hanafi and researchers among the Imamiyyah state: It is sufficient that he be trustworthy and truthful, because *'adalah* is a means here and not an end, and when the *wasi* strives to fulfil the provisions of the will – as is *wajib* for him – the purpose is achieved. [10](#)

The Hanbalis say: If the *wasi* is dishonest, the judge will appoint a trustworthy person as a co-executor. This opinion is in consonance with the opinion of al-Sayyid al-Hakim in *Minhaj al-salihin* (vol.2) where he observes: If a dishonest act is committed by the *wasi*, a trustworthy person will be appointed alongside him to stop him from doing so. If this is not possible, he will be replaced by another.

6. As reported in the third volume of *al-Fiqh 'ala al-madhahib al-'arba'ah*, 'bab al-wasiyyah', the Hanafi, the Maliki and the Shafi'i schools require the *wasi* to be capable of executing the provisions of the will.

Al-'Allamah al-Hilli has stated in *al-Tadhkirah*: Apparently, the view taken by our 'ulama', i.e. the Imamiyyah, is that it is valid to appoint an executor incapable of executing the will, and his incapacity will be compensated by the supervision of the *hakim*; i.e. the judge himself will supervise his dispositions, or appoint a capable, trustworthy person to cooperate with the executor.

Refusal to Act as Executor

The testator is entitled to revoke the appointment of an executor, and the executor is entitled to reject his appointment by announcing his refusal, because *al-wasiyyat al-ahdiyyah* in this situation is not binding, as per consensus.

The schools differ regarding the validity of a rejection to act as executor by an executor without informing the testator. The Imami and the Hanafi schools say: It is not valid in any situation for an executor to reject his appointment after the death of the testator, and it is not valid during his life without informing him.

The Shafi'i and the Hanbali schools observe: It is valid for a *wasi* to reject his appointment at the beginning as well as during its course, without any restraint or condition. Therefore, he can reject before acceptance and after it, during the testator's life, by announcing it or without doing so, as well as after his death (*al-Mughni*, vol.6, 'bab al-wasiyyah')

Appointment of Two Executors

There is consensus among the schools that a testator is entitled to appoint two or more executors. If he categorically mentions that each one of them is independent in his dispositions, his word will be acted upon. Similarly, if he categorically mentions that both should act together, then neither of them will have independence of individual action. The schools differ where the testator does not specify anything

concerning their acting individually or jointly. The Imami, the Shafi'i, the Maliki, and the Hanbali schools observe: Both have no power to act individually. So if they quarrel and disagree, the judge will compel them to agreement, and if he is unable to do so, he will replace both of them.

The Hanafis say: Each of the two executors is free to act individually concerning seven things: Shrouding of the deceased, payment of his debt, recovering of his will, returning of articles held in trust by the decedent, buying necessary food and clothing for the minor heirs, acceptance of a gift on their behalf, and pursual of legal proceedings initiated for or against the decedent. This is because agreement in such things is difficult and delays are harmful. Therefore, to act individually is valid in them. (al-Sayyid Abu al-Hasan's *Wasilat al-najat* on Imami fiqh, and *al-Mughni*, vol.6, 'bab al-wasiyyah')

Al-Sayyid Abu al-Hasan has remarked in *al-Wasilah*: If one of the two executors dies or turns insane or anything occurs to him which annuls his appointment as an executor, the second will become independent in the execution of the will, and there is no need to appoint a new co-executor.

Ibn Qudamah states in *al-Mughni*: The *qadi* will appoint a trustworthy person as his counterpart, because the testator was not satisfied with the individual supervision of the surviving executor, and no difference of opinion has been narrated in this issue except from the Shafi'is.

If both the executors die or their condition changes in a manner annulling their appointment, should the judge appoint two new executors or one will suffice? Here the schools differ. The correct view is that the judge will pay attention to expediency. Consequently, if it is expedient to appoint two executors, he will do so; otherwise it will be adequate to appoint one, because what is important is the will's execution, and the reason for the multiplicity of executors is usually the concern and affection of the executor for the legally disabled heir or his friendship with the testator. In any case, there is no doubt that when one or more executors (as the case may be) die, it is as if there was no executor from the very beginning.

The Imamiyyah, the Shafi'is, and the Hanbalis in the more preponderant of the two narrations from Ahmad, state: An executor is not entitled to hand over the job of executing the will to another without the prior permission of the testator.

The Hanafi and the Maliki schools observe: It is valid for an executor to appoint by will another person to fulfil the duties for which he was appointed executor.

[Appointing an Executor for Marriage](#)

The schools differ as to whether anyone having authority (*wilayah*) concerning marriage (of a ward) is entitled to transfer it to another through a will (for instance, when a father authorizes the executor of his will concerning the marriage of his daughter or son).

Malik considers it valid. Ahmad observes: if the father mentioned the name of the specific person to whom his child should be married, it is valid to appoint an executor for marriage, not otherwise.

Al-Shaykh Abu Zuhrah in *al-Ahwal al-shakhsiyyah*, 'bab al-wilayah', narrates from a multitude of *fuqaha* that it is not valid to appoint an executor for marriage; the Imamiyyah hold the same opinion.

A Wasi's Acknowledgment

If a *wasi* makes an acknowledgment of the decedent's liability regarding some property or debt, his acknowledgment is not executable against the heirs, minor or major, because it is an acknowledgment regarding another's dues. If the issue is raised in the court, the *wasi* will be considered a witness, provided he is not himself a party to the case.

If an executor gives evidence in favour of minor heirs or the decedent, his testimony will not be accepted because his testimony affirms his own right of disposal in regard to the subject of his evidence.

Liability of a Wasi

If anything suffers damage at the hands of the *wasi*, he is not liable for it unless he has violated or neglected his duty. If a minor heir on attaining majority accuses the *wasi* of breach of trust or negligence, the burden of proof will rest on the heir, and the *wasi* shall take an oath, because the *wasi* is a trustee, and in accordance with the hadith:

ليس على الأمين إلا اليمين

A trustee is liable for nothing except an oath.

Anyone accusing a *wasi* of breach of trust or negligence is entitled to proceed against him legally, provided that he is sincere in his intent and by doing so seeks the pleasure of God. But if it is known that he has no aim except harassment and defamation of the *wasi*, due to some enmity between them, then his plea will not be heard.

If a person dies intestate, and it is not possible to refer to a *qadi*, a reliable and trustworthy person from among Muslims may take charge of the affairs of his estate, taking care to do what is good and beneficial, especially in matters which may not be delayed. It is the judge's duty to later on endorse these dispositions, and he may not invalidate them.

Probating a Will

The schools concur that a will concerning property or its benefit is proved by the testimony of two males, or a male along with two female, witnesses from among '*adil* Muslims, in accordance with the verse:

وَاسْتَشْهِدُوا شَهِيدَيْنِ مِنْ رِجَالِكُمْ فَإِنْ لَمْ يَكُونَا رَجُلَيْنِ فَرَجُلٌ وَامْرَأَتَانِ مِمَّنْ تَرْضَوْنَ مِنَ الشُّهَدَاءِ

And call in to two witnesses from among your men, or if they are not two men, then one man and two women, such witnesses as you approve of... (2:282)

The schools differ concerning the acceptability of the testimony of 'adil witness from Ahl al-Kitab in the particular case of proving a will. The Imamiyyah and the Hanbalis observe: The testimony of Ahl al-Kitab is valid in the case of will, only during a journey when none else is available, in accordance with the verse:

يَا أَيُّهَا الَّذِينَ آمَنُوا شَهَادَةُ بَيْنِكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ حِينَ الْوَصِيَّةِ اثْنَانِ ذَوَا عَدْلٍ مِنْكُمْ أَوْ آخَرَانِ مِنْ غَيْرِكُمْ إِنْ أَنْتُمْ ضَرَبْتُمْ فِي الْأَرْضِ فَأَصَابَتْكُمْ مُصِيبَةُ الْمَوْتِ

O believers, the testimony between you when any of you is visited by death, at the time of making a will, shall be two 'adil men from among you, or two others from another folk, if you are journeying in the land and the affliction of death befalls you. (5:106)

The Hanafi, the Shafi'i and the Maliki schools observe: The testimony of a non-Muslim will not be accepted in any condition. neither in case of a will nor in anything else. They add: The meaning of the words: *مِنْ غَيْرِكُمْ* in the verse is, 'from among those who are not your relatives', and not 'from those who do not belong to your religion'. (*al-Mughni*, vol.9, 'bab al-shahadah')

The Imami, the Hanbali and the Shafi'i schools say: Ownership of a property is proved by the evidence of one witness along with an oath. The Hanafis observe: A judgment will not be given on the basis of a single witness and an oath. (*al-Mughni*, vol.9, 'bab al-shahadah', and *al-Jawahir*, 'bab al-shahadah')

The Imamiyyah state: The right to one-fourth of a bequeathed property is proved by the evidence of a single woman; to a half by the evidence of two women: to three-fourths by the evidence of three women, and to the whole property by four women witnesses, 'adalah being essential in all the cases. This opinion is particular to the Imamiyyah to the exclusion of other schools, because of authentic traditions from the Ahl al-Bayt ('a) in this regard.

This was as regards the bequest of property or its benefit. Concerning the nomination of an executor, it is not proved except by the evidence of two male 'adil Muslims. Hence, as per consensus, the evidence of Ahl al-Kitab or women, both individually and jointly with men, or a single male witness along with an oath, will not be accepted.

1. Al-Jawahir, 'bab al-wasiyyah'.

2. A dhimmi is a person who pays jizyah to Muslims, while a harbi, according to the Imamiyyah, is one who does not pay jizyah although he may not be at war with them. According to the other schools, harbi is one who takes up arms and attacks travellers on public highways (Ibn Rushd's al-Bidayah wa al-nihayah, vol.2, 'bab al-harabah'). Al-Shahid al-Thani in his book al-Masalik, 'bab al-wasiyyah', has said: A bequest in favour of anyone who does not fight us due to our religion, irrespective of his being dhimmi or harbi, is valid, in accordance with the verse: 60:8,9 (لَا يَنْهَاكُمُ اللَّهُ), as well as the tradition from al-Imam al-Sadiq (A): Give the bequest to the legatee even if he is a Jew or Christian, for surely God has said:

فَمَنْ بَدَّلَهُ بَعْدَمَا سَمِعَهُ فَإِنَّمَا إِثْمُهُ عَلَى الَّذِينَ يُبَدِّلُونَهُ

Then he who alters after having heard it, its sin is on those who have altered it. (2: 181)

Here no difference has been made between a harbi and others.

3. From among the Imami fuqaha', al-Shaykh Ahmad Kashif al-Ghita' favours the Maliki view that it is valid to bequeath in favour of a person not in existence; he remarks in Wasilat al-najat, 'bab al-wasiyyah': "There is no hindrance in a testator's making the ownership of a bequest conditional to the coming into existence of the legatee. Thus the legatee will not own it unless after his coming into being, as is the rule in waqf." But the author has given this view on the condition that there be no ijma' opposing it.

4. The meaning of the word 'property' (al-milk) differs in relation to the owner. Thus, in relation to a person, it means the power and right of disposal over it in any manner the owner desires; in relation to a mosque, it implies the allocation of its income to its use. Consequently, the observation that 'a mosque or something similar has a legal personality capable of holding property and transferring it,' is meaningless.

5. The Imamiyyah consider it necessary that if the legatee rejects the bequest during the life of the testator and dies later, and after him the testator also dies, the right of accepting the will is transferred to the heirs of the legatee, because, they say: Accepting or rejecting a will has no effect during the life of the testator.

6. It is stated in al-Shara'i', al-Masalik and al-Jawahir that if a testator uses vague words in his will for which the law has no interpretation, his heirs will be referred to to determine their meaning. Thus, if he says: "Give him a share from my property," or "a part" or "a portion of it," or "a little of it", or "much of it," or similar terms which do not denote any fixed quantity either lexically, or legally or customarily, the heirs will give anything considered as having value.

7. The four Sunni schools concur on these dispositions being enforceable from a third of the estate, and the Imamiyyah differ among themselves. Most of their earlier fuqaha' considered it enforceable from the original estate, while most of the latter legists from a third. Those among them who favour its enforceability from a third are al-'Allamah al-Hilli, al-Shahid al-Awwal, al-Shahid al-Thani and the authors of al-Jawahir and al-Shara'i', in accordance with the tradition narrated by Abu Basir from Imam al-Sadiq (A):

للرجل عند موته ثلث ماله

A person is entitled to a third of his wealth at the time of his death,
as well as an authentic tradition narrated by Ibn Yaqtin:

للرجل عند موته الثلث والثلث كثير

A person is entitled to a third at the time of his death, and a third is a lot.

These traditions do not differentiate between a bequest and dispositions. According to a tradition narrated by 'Ali ibn 'Uqabah concerning a person freeing his slave, the slave will be freed to the extent of one-third.

Had the Imam said: بعد موته (after his death) instead of عند موته (at the time of his death), it would have been appropriate to take his words to mean a will.

8. Often al-'Allamah al-Hilli quotes al-Mughni verbatim et literatim, and relies on it to explain the views of the schools. It has become clear to me as a result of enquiry and research that scientific cooperation between Sunnis and Shi'is was much greater in the past than it is today. Al-'Allamah al-Hilli quotes in al-Tadhkirah the opinions of the four schools, the Zahiriyyah, as well as other Sunni schools, and Zayn al-Din al-'Amili, known as al-Shahid al-Thani, used to teach fiqh in accordance with five schools in Ba'labak (Lebanon) in 953/1546, apart from teaching in Damascus and at al-Azhar. Similarly, al-Shaykh 'Ali ibn 'Abd al-'Al, known as al-Muhaqqiq al-Thani (d. 940/1533), taught in Syria and al-Azhar. If this proves anything, it proves the unbiased nature of the Imami 'ulama' and their pursuit of knowledge for knowledge's sake, in accordance with the tradition:

الحكمة ضالة المؤمن يأخذها أتى وجدها

Wisdom is the lost property of a believer; he acquires it from wherever he finds it.

Similarly, it proves at the same time the unity of Islamic jurisprudence (usul al-fiqh) and its sources amongst all the schools.

[9.](#) Al-Sayyid Kazim al-Yazdi, *Mulhaq Hashiyat al-Makasib*.

[10.](#) The Imamiyyah legists differ as to whether 'adalah is a condition for a wasi. The prevalent (mashhur) view among them is that 'adalah is necessary, while researchers consider his being trustworthy and reliable as sufficient. There is a third opinion which says that he should not be a known fasiq. The second view is correct, keeping in mind the general nature of the proofs, which include 'adil and non-'adil persons, as well as the exclusion by these proofs of an untrustworthy person because his dispositions do not fulfill the testator's purpose and harm the legally disable beneficiaries.

9. Inheritance

Rules Concerning the Heritage

The Heritage

The heritage (al-tarikah) comprises the following things:

1. That which the deceased owned before his death in the form of:
 - a) tangible property,
 - b) debts,
 - c) any pecuniary right, e.g. the right consequent to *tahjir* (demarcation of ownerless vacant land with an intention of cultivating it), where he intends to cultivate ownerless vacant land and demarcates it by constructing a wall or something of the kind, thus acquiring a right to cultivate it in preference to others; or an option (*haqq al-khayar*) in a contract of sale; or the right of pre-emption; or the right of retaliation (*qisas*) for murder or injury, where he is a guardian of the victim (e.g. if a person kills his son and then dies before retaliation, causing the right of *qisas* to change into a pecuniary right payable from the murderer's estate, exactly like a debt).
2. That which the decedent comes to own at his death, e.g. compensation for unintentional homicide (*al-qatl al-khata'*), where the heirs opt for compensation instead of *qisas*. The rule applicable to this compensation is the one applicable to all other properties, and all those entitled to inherit, including husband and wife, will inherit from it. [1](#)
3. That which the decedent comes to own after his death, e.g. an animal caught in a net that he had placed in his life, and similarly where he is a debtor and his creditor relinquishes the debt after his death or someone volunteers to pay it for him. Also, if an offender mutilates his body after his death and amputates his hand or leg, compensation will be taken from him. All these will be included in the

heritage.²

Deductions from the Heritage

Different types of deductions are made from the heritage. Some of them are deducted from only a third of the heritage, and discussion regarding them has preceded in the chapter on wills. Some deductions are made from the whole heritage, and they too are of different types. Hence, if the heritage suffices, they will be completely met, and what remains of it after these deductions and the execution of the will, will be for the heirs. All the schools concur on this.

If the *tarikah* falls short of meeting these deductions, the more important among them will be given precedence over those of lesser importance. If anything remains after the preferred deductions are made, the next in order will follow; otherwise only the deductions of higher preference will be covered. The schools differ regarding the order of preference of these deductions.

The Imamiyyah state: The first deduction before any other thing, is to meet the *wajib* funeral expenses, such as expenses of ablution (*al-ghusl*), shrouding, carrying the body and digging the grave, if required, irrespective of whether the decedent has made a will to this effect or not. Therefore, funeral expenses, according to them, are prior to debts, irrespective of the debts being related to the fulfilment of religious duties (*haqq Allah*) or to creditors (*haqq al-nas*). They bring proof from the tradition narrated by al-Sakuni from al-Imam Ja'far al-Sadiq ('a):

أَوَّلُ شَيْءٍ يُبَدَأُ بِهِ مِنَ الْمَالِ الْكَفَنُ، ثُمَّ الدَّيْنُ، ثُمَّ الوَصِيَّةُ، ثُمَّ المِيرَاثُ

The first thing which is deducted from the decedent's estate is the shroud (funeral expenses), then debt, then the will, and then the inheritance.

The Ima miyyah fuqaha' differ among themselves regarding the case where a creditor has a right over the estate itself, such as where the decedent dies after mortgaging his property with a pledgee, the property being all that he owned. Here, a group of fuqaha' give the funeral expenses preference over the right of the pledgee, because of the general nature of the traditions which include the above-mentioned tradition of al-Sakuni in which no difference has been made between pledged and unpledged properties.

Other fuqaha' give precedence to the right of the pledgee because the owner of the pledged property is forbidden by the Shari'ah to exercise his rights of ownership, and that which is forbidden by the Shari'ah is like that which is forbidden by reason.³

After meeting the funeral expenses, the repayment of debts will start, irrespective of their being *haqq Allah* or *haqq al-nas*, such as unpaid *khums* and *zakat*, pecuniary atonements (*kaffarat*), the returning of the *mazalim*,⁴ the unperformed obligatory Hajj, and other similar religious and non-religious liabilities. All these debts are in a single category.

Therefore, if all of them cannot be completely met from the estate, they will be covered pro rata like the liabilities of an insolvent person,⁵ allowing no exception to this except *khums* and *zakat*, provided these relate to the actual items of their incidence present, in which case the two will be preferred over other debts. But if these two are due (without the items of incidence being present), they will be treated as all other debts.

The four Sunni schools, along with the Imamiyyah, concur that funeral expenses are preferred over the debts payable from the estate before death. The four schools then differ among themselves in giving precedence to funeral expenses over debts relating to the heritage, such as an article which the owner pledged before his death. The Hanafi, the Shafi'i and the Maliki schools say: Those claims which are related to specific parts of the heritage will be given precedence over funeral expenses (*hashiyat al-Bajuri 'ala Sharh Ibn Qasim*, vol. 1, *fasl al-mayyit*, and Abu Zuhra's *al-Mirath 'inda al-Ja'fariyyah*, p. 40, 1955).

The Hanbalis observe: Funeral expenses will be preferred over all other claims and debts including a pledge, penal damages, etc. (*al-Tanqih fi fiqh al-Hanabilah*, p. 71, al-Matba'at al-Salafiyyah).

In short, according to all the schools, the funeral expenses have precedence over debts unrelated to specific items of the heritage, and the Hanafi, the Shafi'i and the Maliki schools give priority to debts related to specific items of the heritage over funeral expenses, while the Hanbali school gives priority to funeral expenses in this case. Some Imami legists favour the view of the three schools, and others concur with the Hanbalis.

Heirs and the Decedent's Heritage

The schools concur that the heritage devolves on the heirs immediately after the death if there is no debt or will involved. They also concur that the remainder of the heritage exceeding debts and bequests stands transferred to the heirs. The schools differ whether that part of the heritage covered by debts and bequests will be considered transferred to the heirs or not.

The Hanafis state: The part which equals the value of debt will not be included in the property of the heirs. Consequently, if the complete estate is covered by debt, the heirs will not own anything from it. But they have a right to free the estate from the creditors by paying them their claim on the estate. If the estate is not totally covered by debt, the heirs will own the remainder.

The Shafi'is and the majority of Hanbali legists say: The heirs will come to own the indebted part of the estate, irrespective of whether the debt covers the whole estate or only a part of it. However, the debt will relate to the whole estate and the estate will be liable for it. (Abu Zuhrah, *al-Mirath 'inda al-Ja'fariyyah*).

The Imamiyyah differ among themselves on the issue; the majority of them hold the opinion that the estate will be transferred to the heirs whether totally covered by debts or not. The debts will be linked to

it in one of the various ways, like a claim of pledge, or like the claim of damages resulting from the crime of a slave, or linked directly in a way not resembling any of these two ways. In any case, a debt will not hinder the actual act of inheritance, although it hinders the right of disposal in regard to that which is covered by the debt. This opinion is close to the Shafi'i view. (*al-Jawahir and al-Masalik, bab al-mirath*)

The result of the difference of opinion appears in the increase in the estate which takes place between the time of death and the time of repayment of the debt. According to the opinion of the Shafi'is, the Hanbalis and most of the Imami legists, the increase belongs to the heirs and they will dispose it without any hindrance from the creditors and others. But according to the Hanafi view, the increase will be subject to the estate, being linked to the debts payable from it.

Causes of Inheritance and Impediments

Causes of Inheritance

There are three causes of inheritance:

- a. blood relationship (*al-qarabah*),
- b. marriage concluded by a valid contract, and
- c. *al-wila* '.

We can bring these three causes under two heads: consanguinity (*nasab*) and affinity (*sabab*). By *nasab* is meant blood relationship and *sabab* includes both marriage and *al-wila* '. *Al-wila* ' is a bond existing between two persons which creates between them a relationship similar to *nasab*. Hence a person manumitting a slave becomes his *mawla* and inherits from the latter if he has no other heir. We will not discuss here *al-wila* ' with its different meanings and forms because it has no practical application today, and will discuss only the two other causes.

Blood relationship (*al-qarabah*) is established between two persons through legitimate birth when one of them is a direct descendant of the other (such as fathers how highsoever, and sons how lowsoever), or when both of them are descendants of a third person (such as brothers and maternal and paternal uncles). Legitimate birth materializes through a valid marriage as well as through 'intercourse by mistake.' But the marital bond will not materialize except through a valid marriage between man and woman. There is no difference of opinion regarding mutual inheritance between husband and wife. The schools, however, differ concerning the right of inheritance of certain relatives; the Shafi'i and the Maliki schools deny them such a right and consider them exactly like strangers.

These relatives are: Daughter's children, sister's children, daughters of brothers, children of uterine brothers, all kinds of paternal aunts, uterine paternal uncle, maternal uncles and aunts, daughters of paternal uncles and the maternal grandfather. Therefore, if a person dies and has no relatives except

one of those mentioned the heritage escheats to the public treasury (*bayt al-mal*) and they will not receive anything, according to the Shafi'i and Maliki schools, because they are neither among the sharers (*dhawu al-furud*) nor among the residuaries (*'asabat*). (*al-Mughni*, 3rd ed. vol. 6, p. 229)

The Hanafi and the Hanbali schools consider them capable of inheriting in the particular situation where there are no sharers and residuaries.

The Imamiyyah consider them capable of inheriting without this condition. Details will follow.

Impediments to Inheritance

The schools concur that there are three obstacles to inheritance:

- a. difference of religion,
- b. murder,
- c. slavery.

Ignoring slavery, we will discuss the other two causes.

Difference of Religion

There is consensus that a non-Muslim will not inherit from a Muslim.⁶ The schools differ regarding a Muslim inheriting from a non-Muslim. 'He inherits,' say the Imamiyyah; 'He does not,' say the other four schools.

If one of the decedent's sons or relatives who is a non-Muslim becomes a Muslim after his death and after the distribution of the heritage between the heirs, he is not entitled to inherit by consensus. The schools differ as to whether he inherits if he becomes a Muslim after the death but before the distribution of the heritage. He inherits according to the Imamiyyah and the Hanbalis, and not, according to the Shafi'i, the Maliki and the Hanafi schools.

The Imamiyyah state: If there is a single Muslim heir, he will take the whole heritage and the conversion of another to Islam will not entitle him to inheritance.

An Apostate (Murtadd)

A murtadd from Islam does not inherit in the opinion of the four Sunni schools, irrespective of his apostasy being *'an fitrah* or *'an millah*,⁷ except if he returns and repents before the distribution of the heritage. (*al-Mughni*, vol. 6)

The Imamiyyah observe: A *murtadd 'an fitrah*, if a male, will be sentenced to death without being asked to repent, and his wife will observe the *'iddah* of death from the time of his apostasy, and his estate will

be distributed even if he is not executed. His repentance will also not be accepted concerning the dissolution of his marriage, or the distribution of his estate, or the *wujub* of his execution, though it will be accepted in fact and by God, as well as in regard to other issues such as the ritual cleanliness of his body and the validity of his acts of worship (*'ibadat*). Similarly, he may own after his repentance new properties acquired through work, trade, or inheritance.

A *murtadd 'an millah* will be asked to repent. If he does so, he will have all the rights and obligations of Muslims. If he does not repent, he will be executed and his wife will observe the *'iddah* of divorce from the time of his apostasy. Then if he repents while she is undergoing *'iddah*, she will return to him and his property will not be distributed unless he dies or is killed.

A woman will not be sentenced to death irrespective of her apostasy being *'an fitrah* or *'an millah*. But she will be imprisoned and beaten at the times of *salat* till she repents or dies. Her heritage will be distributed only after her death. (al-Sayyid Aba al-Hasan's *Wasilat al-najat* and al-Shaykh Ahmad Kashif al-Ghita's *Safinat al-najat, bab al-'irith*)

Inheritance of Followers of Other Religions

The Maliki and the Hanbali schools say: Followers of different religions will not inherit from each other. Hence a Jew will not inherit a Christian and vice versa, and similarly the followers of other religions.

The Imami, the Hanafi and the Shafi'i schools state: They will inherit from one another because they are a single religious group, considering that all of them are non-Muslims. But the Imamiyyah lay down a condition in the case of a non-Muslim inheriting from another of his kind, that there be no existing Muslim heir. Therefore, if such an heir is present, even though distant, his presence will prevent a non-Muslim heir, even if he is closely related, from inheriting. This condition is not relevant to the other four schools, because according to them, as mentioned earlier, a Muslim does not inherit from a non-Muslim. (*Ghayat al-muntaha*, vol. 2, al-Shi'rani's *Mizan*, *al-Jawahir* and *al-Masalik*)

The Ghulat

Muslims are unanimous in holding that the Ghulat are polytheists (*mushrikun*) and do not belong to Islam and Muslims in any manner. The Imamiyyah have been especially severe concerning the issue of the Ghulat because a large number of their Sunni brothers have unjustly attributed to them the deviations of the Ghulat. The Imami 'ulama' have unequivocally mentioned in their books on doctrine and law that the Ghulat are *kafir*. Accordingly, al-Shaykh al-Mufid in *Sharh 'Aqa'id al-Saduq* (p. 63, 1371 H.) says:

The Ghulat feign to follow Islam. They are those who attribute divinity and prophethood to Amir al-Mu'minin 'Ali and the Imams of his descent, and exceed all limits and deviate from the mean concerning their excellence in the religion and the world. They are misguided, unbelievers, whom Amir al-Mu'minin ordered to be killed and burnt, and the Imams judged them as unbelievers and apostates from Islam.

The Imami 'ulama' mention them in their legal works in the chapter on *taharah* (purification), and consider them ritually unclean. Their mention also occurs in the chapter on marriage, where it is observed that the marriage of Muslim women with them, as well as marrying their women, is *haram*, although the 'ulama' permit marriage with women of *Ahl al-Kitab*. The mention of Ghulat is also made in the chapter on *jihad*, where they are considered polytheists in a state of war. In the chapter on inheritance, the 'ulama' prohibit their inheriting from Muslims.⁸

One Who Denies an Essential of the Faith

There is consensus among the schools that a person who denies any of the established and known doctrines of the faith and considers a *haram* as *halal* or vice versa, making that his creed, goes out of the pale of Islam and becomes an infidel. To this category also belongs one who attributes *kufir* to a Muslim.

It is worthwhile here to point out two issues that have been dealt in detail by the highly learned and leading Imami scholar Aqa Rida al-Hamadani in *Misbah al-faqih*, vol. I.

1. If a person appears to follow Islam and pronounces the *Shahadatan*, though we do not know whether he does so hypocritically, without having faith in it, or pronounces them with veritable faith, there is no difference of opinion in judging him a Muslim. But if we have knowledge of his falsity and know that he has no faith in God and the Prophet (S) but only presents himself as a Muslim hypocritically with a certain purpose in view, will we consider him a Muslim?

The gist of the Shaykh's opinion is that this hypocrite has a reality and an appearance. As to the reality he is a non-Muslim, though his appearance presents him as a Muslim. It is our duty to leave his reality to God Almighty's judgement, and there is no doubt that God will deal with him as a non-Muslim, because it is presumed that he is such in reality. But we, Muslims, will accept his appearance and associate with him as a Muslim regarding marriage and inheritance, because we have been ordered to do so. It is stated in a tradition:

مَنْ قَالَ لَا إِلَهَ إِلَّا اللَّهُ حَقَّنَ دَمَهُ وَمَالَهُ

He who says 'la'ilaha ilia Allah,' his life and property are secure.

This implies that he will be treated as a Muslim, irrespective of any doubt on our part and our knowledge of his verity or falsity. This is also confirmed by the Prophet's treatment of the hypocrites, whom he treated in the same manner in which he treated other Muslims, though he knew of their hypocrisy (*nifaq*).

2. The secret behind the consensus of Muslims regarding the *kufir* of a person denying an established rule is that this denial as such necessitates the denial of the Prophet's prophethood. It follows from this that a person making such a denial, on becoming aware that his rejection amounts to rejecting the

prophethood and the messengerhood of the Prophet (S), will be doubtlessly considered a non-Muslim. But if he is not aware of it -- either because of ignorance, or his belief that his denial does not necessitate the denial of prophethood -- will he be considered a non-Muslim?

The summary of the Shaykh's reply is that an ignorant person can be viewed in different situations. At times his ignorance is the result of his absorption in sin and absence of attention to what is *haram* (like a person who has indulged constantly in fornication from the first day to his present old age, and this continuity has developed in him the belief that his act is *halal*, not *haram*); such a person is definitely a *kafir*.

At times his ignorance is due to his following a person whom it is not valid to follow. Such a person is also a non-Muslim even if he believes that his denial does not lead to denying the Prophet's messengerhood.[9](#)

It may be that none of the two above-mentioned causes are the result of his ignorance; rather, his ignorance may be the result of his lack of attention to the station of prophethood, so that if he is informed about it he would desist from his denial. Such a person is doubtlessly a Muslim because he resembles one who disputes regarding a certain thing with the Prophet (S) while not recognizing him, but when he comes to recognize that he is the Prophet (S), he refrains and is penitent.

There are other cases mentioned by the author of *Misbah al-faqih* which we leave for reasons of space. Those seeking details should refer to the first volume of the book.

Homicide

The schools concur that homicide, when intentional and without legal authority, impedes inheritance. This is based on the tradition:

لَا مِيرَاثَ لِلْقَاتِلِ

There is no (share in) inheritance for a murderer.

Moreover, since the murderer's act expedites inheritance, his intention will be frustrated. Apart from this, the schools differ.

The Imamiyyah observe: He who kills his relative as *qisas* or in self-defence or on the orders of a just judge, or for similar other reasons justified by the Shari'ah, in these instances homicide is no obstacle to inheriting. Also, unintentional homicide (*alqatl al-khata'*) is no hindrance.[10](#)

The author of *al-Jawahir* states: The intentional act of a child and a lunatic is considered *khata'* (mistake). Similarly *khata'* includes a quasi-intentional act (*shibh al-'amd*). An instance of *shibh al-'amd* is where a father beats his child with an intention of correcting him and the child dies as a result of the

beating. Al-Sayyid Aba al-Hasan al-'Isfahani writes in *al-Wasilah*: "Some of the causes which lead to death--like digging a well on a road, if a relative falls in it--the person having dug the well will inherit him, though he will be liable to pay the compensation (*diyyah*).” Accordingly, there is no hindrance to the concurrence of the liability to *diyyah* and inheritance.

Each one of the four Sunni imams has a separate opinion in this case. The opinion of Imam Malik concurs with the Imamiyyah. The opinion of al-'Imam al-Shafi'i is that unintentional homicide is an obstacle to inheritance, just like intentional murder; the same is the case where the murderer is a child or a lunatic.

The opinion of Imam Ahmad is that a homicide that calls for punishment, even if of a monetary kind, impedes inheritance. This excludes lawful killing, such as killing for *qisas*, or in self-defence, or in war, the killing of a rebel (*baghi*) at the hands of an '*adil* person -- in all these cases he will inherit.

The opinion of Imam Abu Hanifah is that a homicide which hinders inheritance is one which necessitates *qisas* or *diyya* or *kaffarah* (atonement). This includes *al-qatl al-khata'*, but not *al-qatl bi al-tasbib* (where the accused is an indirect cause of homicide) or homicide by a lunatic or a minor. (*al-Mughni*, vol. 6, and Abu Zuhrah's *Mirath al-Ja'fariyyah*)

Distribution of the Heritage

As pointed out earlier, inheritance results due to marriage or consanguinity, and there is no difference of opinion that the husband or wife has a share with all other heirs, the husband being entitled to one-fourth when there are descendants and one-half in their absence, and the wife to one-eighth in the presence of descendants and one-fourth in their absence.

The schools differ concerning a daughter's off spring, whether he/she is in the category of descendants whose presence is capable of lowering the share of the spouse from its higher to its lower limit or if his/her presence and absence has no effect. Details of this will come while discussing the inheritance of spouses.

There is again no difference of opinion that the distribution of the heritage begins with *ashab al-furud* (the 'sharers,' whose shares have been determined by the Qur'an) and that there are six kinds of these shares. But the schools differ regarding the number of sharers entitled to these shares and regarding the residuaries (those entitled to the remainder after the sharers have received their shares).

The schools also differ about the capacity to inherit of: daughter's children; uterine paternal uncles and aunts; and maternal uncles, aunts and grandfather. We mentioned earlier that these heirs fall in the category of distant kindred in the classification adopted by the four Sunni schools, and the rules applicable to them differ from those applicable to the sharers and residuaries.

The Shares and Sharers

A 'share' (*al-fard*) is a fixed portion (of the heritage) determined by the Qur'an. According to consensus there are six such shares: $1/2$, $1/4$, $1/8$, $1/3$, $2/3$ and $1/6$. Some have summarized it by saying: " $1/3$ and $1/4$, and the double and half of each."

$1/2$ is the share of the only daughter if there is no son sharing with her, and according to the four Sunni schools the son's daughter is like the daughter, while according to the Imamiyyah she takes the place of her father. Half is also given to the only sister, either full or half on the father's side, if there is no brother sharing with her. A husband gets half if the wife has no offspring to inherit her.

$1/4$ is the husband's share if the wife has a descendant and the wife's if the husband has no descendant.

$1/8$ is the share of a wife if the husband has a descendant.

$2/3$ is the combined share of two or more daughters in the absence of male children, and of two or more sisters, full or consanguine, if there is no brother sharing with them.

$1/3$ is the share of the mother if the decedent has no male child, or brothers whose presence, as per the forthcoming details, prevents her from inheriting more than one-sixth. Two or more uterine brothers and sisters also inherit one-third.

$1/6$ is the share of the father and the mother in the presence of a child. The mother also gets one-sixth if the decedent has brothers. The same is the share of a single uterine brother or sister. The inheriting of one-sixth as sharers by the above three enjoys concurrence. The four Sunni schools add to these sharers entitled to one-sixth, one or more son's daughters along with the daughter of the decedent. Hence if the decedent has a daughter and a son's daughter, the former will take half and the latter one-sixth.

But if the decedent has two or more daughters and a son's daughter, the latter will be prevented from inheriting unless she has a male counterpart of her class, such as when she has a brother or, lower in order, her brother's son, i.e. the great grandson of the deceased. One-sixth is also given to the paternal grandfather in the absence of the father.

A grandmother, just like a mother, inherits a sixth if she is a paternal or maternal grandmother or mother of the paternal grandfather. Thus if she is the mother of the decedent's mother's father, she will not inherit. If two parallel grandmothers, such as the mother's mother and the father's mother are present together, the share of one-sixth will be equally divided between them. [11](#)

Some of the six different shares coexist with some others. Hence, a half can exist with a half (e.g. husband and sister, each receiving a half), with one-fourth (e.g. husband and daughter, she receiving a half and he one-fourth), with one-eighth (e.g. wife and daughter, the former getting an eighth and the

latter a half), with one-third (e.g. husband and mother, where her share is not reduced by a brother, he receiving a half and she a third), and with one-sixth, (e.g. husband and the only uterine brother or sister, the former receiving a half and the latter one-sixth).

One-fourth can coexist with two-thirds (e.g. husband and two daughters, he receiving a fourth and they two-thirds), with one-third (e.g. wife and two or more uterine brothers or sisters, she receiving one-fourth and they one-third) and also with one-sixth, (e.g. wife and a single uterine brother or sister, the former receiving one-fourth and the latter one-sixth).

One-eighth can coexist with two-thirds (e.g. wife and two daughters, she receiving one-eighth and they two-thirds) and with one-sixth (e.g. wife and either parent in the presence of a child).

Two-thirds can coexist with one-third (e.g. two or more consanguine sisters along with uterine brothers) and with one-sixth (e.g. two daughters and either parent).

One-sixth can coexist with itself (e.g. parents in the presence of a child).

Those shares which do not coexist are: one-fourth and one-eighth, one-eighth and one-third, and one-third and one-sixth.

The Residuaries (al-'Asbat)

According to the four Sunni schools, there are three types of *nasabi* residuaries: [12](#) a residuary by himself (*'asabah bi nafsaha*), a residuary through another (*'asabah bi ghayriha*), and a residuary along with another (*'a abah ma'a ghayriha*).

A 'residuary by himself' includes all males between whom and the decedent there is no intervening woman, and the meaning of being such a residuary is that he is independent of others (in his right to inherit as a residuary), and that he is a residuary in all cases and situations. A 'residuary through another' and 'residuary along with another,' are residuaries in certain cases without being so in others, as will become clear later.

The 'residuaries by themselves' are the closest of residuaries and inherit in the following order:

- the son,
- then the son's son, how lowsoever; he takes the place of his father,
- then the father,
- then the paternal grandfather, how highsoever;
- then the full brother;

- then the half-brother by father;
- then the son of the full brother;
- then the son of the half-brother by father;
- then the full paternal uncle,
- then the consanguine paternal uncle (who is father's half-brother by grandfather),
- then the son of the full paternal uncle,
- then the son of the consanguine paternal uncle.

If some of them exist along with others, the son will supersede the father, in the sense that the father will take his *fard* (share) --which is one-sixth-- and the son will take the remainder as a residuary.

According to the four Sunni schools, the son's son will similarly supersede the father, and the father will supersede the paternal grandfather. They differ regarding the paternal grandfather as to whether he will supersede the brothers in inheritance or if they inherit jointly with him, so that all of them are considered as belonging to the same class.

Abu Hanifa observes: The grandfather will supersede the brothers and they will not inherit anything along with him. The Imami, the Shafi'i and the Maliki schools state: They will inherit with him because they belong to his class.

Among the residuaries, those related from both sides will supersede those related from only one side. Hence a full brother will supersede a consanguine brother and the full brother's son will supersede a consanguine brother's son. Similarly, in the case of paternal uncles the degree of their nearness (to the decedent) is taken into consideration, and the nearest is preferred. Therefore, the decedent's paternal uncle supersedes his father's paternal uncle, and he in turn will supersede the grandfather's paternal uncle.

The following four female relatives are considered 'residuaries through another':

1. daughter or daughters,
2. son's daughter or daughters,
3. full sister or sisters,
4. consanguine sister or sisters.

It is known that all the above-mentioned inherit as sharers in the absence of a brother. [13](#) One of them is entitled to a half, and if more, to two-thirds, and if they have a brother they inherit as residuaries --

according to the four Sunni schools-- but not if they are alone, and will share the heritage with him, the male receiving twice the share of females.

As regards 'residuaries along with another,' they are full or consanguine sister or sisters that inherit along with a daughter or son's daughter. Therefore, a sister or sisters inherit as 'sharers' if there is no daughter or son's daughter inheriting along with them, and inherit as residuaries with a daughter or son's daughter. Hence the daughter or the son's daughter will take her share and the full or consanguine sister or sisters will take the remainder, thereby becoming residuaries along with the daughter.

After this explanation it becomes clear that a full or consanguine sister inherits in three different ways. She is a sharer if she has no brother and the decedent no daughter, a 'residuary through another' if she has a brother, and a 'residuary along with another' if the decedent has a daughter. The same applies in the case of two or more sisters. It also becomes clear that full and consanguine paternal uncles will not share in the heritage along with the daughter except in the absence of full or consanguine brothers and sisters.

The four Sunni schools concur that if there is a single residuary without any sharers, he will inherit the whole heritage, and in the presence of a sharer he will take the remainder after the sharer has taken his share. If there is no residuary, according to the Maliki and the Shafi'i schools, the excess will escheat to the *bayt al-mal*, and according to the Hanafi and the Hanbali schools it goes to the sharers by way of 'return' (*radd*), and the estate will not escheat to the *bayt al-mal* in the absence of sharers, residuaries and distant kindred.

The Residuaries From the Imami Viewpoint

The Imamiyyah do not recognize these three different kinds of residuaries and limit the heirs to 'sharers' and 'residuaries' without differentiating between male and female residuaries. Hence, a single son is entitled to the whole estate; a single daughter and a single sister too are similarly entitled. They classify the heirs, both males and females, into three categories:

1. Parents and children, how lowsoever.
2. Brothers and sisters (and their children), how lowsoever, and grandparents, both paternal and maternal, how highsoever.
3. Paternal and maternal uncles and aunts and their children. [14](#)

Whenever there exists a male or a female heir in the higher category, it will prevent all others belonging to the lower category from inheriting, whereas in the opinion of all the other schools these different categories may combine and inherit together, and at times all the three categories may inherit together, such as a mother along with a uterine sister and a full paternal uncle, in which case the mother receives one-third, the sister one-sixth, and the uncle the remainder.

Al-Ta'ib

The six kinds of shares determined in the Qur'an at times equal the whole estate, such as two daughters along with parents ($2/3 + 1/6 + 1/6$). Here the question of *'awl* and *ta'sib* does not arise, because the two daughters will take two-thirds and the parents one-third.

At times the total of the shares does not exhaust the whole estate, such as a single daughter, whose share is half, or two daughters, whose share is two-thirds. This (in Sunni schools) results in *ta'sib*.

When the total shares exceed unity --such as when the husband, the parents and the daughter inherit together, the share of the husband, the daughter and the parents being one-fourth, one-half and one-third respectively-- the estate cannot cover all the three shares together. This results in *'awl*. *'Awl* will be discussed in the second chapter.

As to *ta'sib*, it has been defined here as the sharing of inheritance by the residuaries along with the closely-related sharers (such as where the decedent has two or more daughters and no son, or where he does not have any children, but has one or more sisters, no brother, and a paternal uncle).

Here, the Sunni schools regard the brother of the decedent as an heir along with the daughter or daughters, and he receives one-half with the one daughter, and one-third if there are two or more daughters. Similarly, they regard the paternal uncle to be an heir along with a sister or sisters.

The Imamiyyah state: *Ta'sib* is void, and it is *wajib* that that which remains after the sharers have received their shares be returned to the closely-related sharers. Hence, (in the above examples) the whole estate, according to them, will be inherited by the daughter or daughters and the brother will receive nothing, and if the deceased has no child at all, but has a sister or sisters, they will inherit the whole estate to the exclusion of the paternal uncle, because a sister is nearer to the decedent than him and the 'nearer excludes the remote.'

This difference between the Sunni schools and the Imamiyyah originates from the tradition of Tawus. The Sunni schools accept this tradition while the Imamiyyah reject it. The tradition states:

أَلْحِقُوا الْفَرَائِضَ بِأَهْلِهَا، فَمَا بَقِيَ فَلِأَوْلَى عَصَبَةِ ذَكَرٍ

Give the sharers their respective shares, and of what remains, the first in order is a male relative.

It has also been narrated in another form:

فَمَا بَقِيَ فَهُوَ لِرَجُلٍ ذَكَرٍ

And what remains is for the male relative.

Hence, the daughter being a sharer is entitled to half the estate, and the brothers being the nearest male relatives of the decedent after her will be given the remaining half. Similarly, if the decedent has no children at all, and has a sister without any brother, the sister will take half as a sharer and the other half will be inherited by the decedent's paternal uncle, because he is the decedent's nearest male relative after his sister.

The Imamiyyah do not endorse the veracity of Tawus's tradition and reject its attribution to the Prophet (S), because, according to them, Tawus is an unreliable (*da'if*) narrator. Had they endorsed this tradition they would have concurred with the Sunni schools, in the same manner as the Sunni schools would have concurred with them if they had rejected this tradition. After rejecting this tradition's attribution to the Prophet (S), the Imamiyyah negate *ta'sib* on the basis of the Qur'anic verse:

لرِّجَالٍ نَّصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ وَلِلنِّسَاءِ نَصِيبٌ مِّمَّا تَرَكَ

الْوَالِدَانِ وَالْأَقْرَبُونَ مِمَّا قَلَّ مِنْهُ أَوْ كَثُرَ ۗ نَصِيبًا مَّفْرُوضًا

Men are entitled to a share of what the parents and near relatives leave, and women are entitled to a share of what the parents and near relatives leave, whether it is little or more, a determined share. (4:7)

This verse proves an equality between men and women concerning the right of inheritance, because it speaks about the women's share exactly as it speaks about men's, whereas those who accept *ta'sib* differentiate between male and female relatives and give the males the right to inherit to the exclusion of females where the decedent has a daughter, a brother's son and a brother's daughter.

They give one half to the daughter and the other half to the brother's son, without the brother's daughter getting anything, although she is in the same category with him. Similarly, if the decedent has a sister, a paternal uncle and a paternal aunt, they divide the estate between the sister and the uncle and exclude the aunt.

The Qur'an entitles both men and women to inheritance, while these schools entitle men and neglect women. This shows that the opinion justifying *ta'sib* is void because it leads to a void conclusion. [15](#)

In objection to this stand, it is observed that the inheriting of the whole estate by a daughter or daughters is contrary to the verse of the Qur'an:

فَإِنْ كُنَّ نِسَاءً فَوْقَ اثْنَتَيْنِ فَلَهُنَّ ثُلُثَا مَا تَرَكَ وَإِنْ كَانَتْ وَاحِدَةً فَلَهَا النِّصْفُ

وَلِأَبَوَيْهِ لِكُلِّ وَاحِدٍ مِّنْهُمَا السُّدُسُ مِمَّا تَرَكَ إِنْ كَانَ لَهُ وَلَدٌ

Then if they are more than two females they shall have two-thirds of what the deceased has left, and if there is only one, she is entitled to half the estate; and for his parents, each is entitled to one-sixth of what he has left if he has a child (4: 11)

Similarly, the inheriting of the whole estate by a single sister contradicts the explicit verse:

إِنْ امْرُؤٌ هَلَكَ لَيْسَ لَهُ وَلَدٌ وَلَهُ أُخْتٌ فَلَهَا نِصْفُ مَا تَرَكَ وَهُوَ يَرِثُهَا

إِنْ لَمْ يَكُنْ لَهَا وَلَدٌ فَإِنْ كَانَتَا اثْنَتَيْنِ فَلَهُمَا الثُّلُثَانِ

If a childless man dies and he has a sister, her share is half of what he has left, and he shall be her heir if she has no child; then if there be two sisters, their share is two-thirds (4: 176)

The Qur'an determines the share of a single daughter as half and that of two or more daughters as two-thirds. Similarly, it determines the share of a single sister to be half and that of two or more sisters to be two-thirds, while the Imamiyyah obviously oppose this law.

The Imamiyyah give the following reply in regard to the first verse (4: 11):

1. Certainly, the Qur'an has determined the share of two or more daughters to be two-thirds and that of a single daughter as half; but it is necessary that there be another person so that the remainder after the deduction of the share could revert to him. The Qur'an does not specifically mention this person, and had it done that, there would have been no difference of opinion. The Sunnah also makes no mention of it, neither explicitly nor implicitly, and the tradition, *وَأُلْحِقُوا الْفَرَائِضَ*, is not authentic as already mentioned.

Hence nothing remains to prove specifically to whom the remainder goes, except the following verse of the Qur'an:

وَأُولُو الْأَرْحَامِ بَعْضُهُمْ أَوْلَىٰ بِبَعْضٍ فِي كِتَابِ اللَّهِ

Some relatives are preferred over some others in the ordinance of God. (33:6)

It proves that the nearer relative is to be preferred to the more distant, and there is no doubt that one's daughter is more closely related to one than one's brother, because she is related to him directly while his brother is related to him through either parent or both of them. Therefore, in such a case, the remainder will revert to the daughter or daughters, to the exclusion of the brother.

2. The Hanafi and the Hanbali schools observe: If the deceased leaves behind a daughter or daughters and there exists none else from among the sharers and the residuaries, [16](#) the whole estate will devolve on the daughter, half as a share and the other half by 'return,' and similarly on the two daughters, two-thirds as their share and the remaining by way of 'return.' If the verse does not prove the negation of the 'return' devolving on the sharers in this case, it will similarly not negate it in other cases, because a single proof is incapable of being broken into parts.

Furthermore, the Hanafi and Hanbali schools say: If the decedent leaves behind a mother and there are no other sharers and residuaries, she will take a third as a sharer and the remaining two-thirds by way of 'return'. If a mother can take the whole estate, it is similarly wajib that the daughter be also entitled to it, because both of them belong to the class of sharers. (*al-Mughni* and *al-Shi'rani's Mizan, bab al-fara'id*)

3. The four Sunni schools concur that if the decedent leaves behind his father and a daughter, the father will take one-sixth as a sharer and the daughter will similarly take half as a sharer, and the remainder will revert to the father, despite the Qur'anic verse:

وَالْأَبَوَيْهِ لِكُلِّ وَاحِدٍ مِّنْهُمَا السُّدُسُ مِمَّا تَرَكَ إِنْ كَانَ لَهُ وَلَدٌ

and for his parents, each is entitled to one-sixth of what he has left if he has a child (4: 11)

Hence as the share determined by this verse does not negate the father's right to receive more than one-sixth, similarly the share determined in the verse:

فَلَهُنَّ ثُلُثَا مَا تَرَكَ

they shall have two-thirds of what the deceased has left (4: 11)

will not negate the daughters' right to receive more than two-thirds nor a single daughter's right to the excess over half, especially after the shares of both the daughters and the father have been mentioned in the same verse and the same context.

4. The Qur'an says:

وَاسْتَشْهِدُوا شَهِيدَيْنِ مِنْ رِجَالِكُمْ فَإِنْ لَمْ يَكُونَا رَجُلَيْنِ فَرَجُلٌ وَامْرَأَتَانِ

And call two witnesses from among your men, but if there are not two men, then one man and two women (2:282)

This verse explicitly states that a debt is proved by two male witnesses and also by the evidence of a male and two female witnesses. Some of the four Sunni schools consider it provable by a single male witness and an oath; rather, Malik says: It is proved by the evidence of two women and an oath. Hence, as this verse does not prove that a debt is not provable by a single male witness along with an oath, similarly the verse relating to inheritance does not prove the invalidity of reverting the remainder to a daughter or daughters, and to a sister or sisters.

The Imami reply in regard to the second verse (4:176) *وَإِنْ أَمْرٌ هَلَكَ لَيْسَ لَهُ وَوَلَدٌ* is that the word *walad* is applicable to both a male and a female child, because it is derived from *wiladah* (birth), which includes son and daughter, and also because the common denominator between a person and his relatives is kinship, which is inclusive of males and females. The Qur'an has used the word *awlad* for children of both sexes.

وَصِيكُمُ اللَّهُ فِي أَوْلَادِكُمْ لِلذَّكَرِ مِثْلُ حَظِّ الْأُنثِيَيْنِ

God charges you, concerning your children: to the male the like of the portion of two females (4:11)

وَمَا يَنْبَغِي لِلرَّحْمَنِ أَنْ يَتَّخِذَ وَلَدًا

And it is not befitting the All-merciful to take a child. (19:92)

As these verses show, the word *walad*, stands for 'child,' irrespective of sex.

يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنثَىٰ

O mankind, we have created you from a male and a female (49:13)

Accordingly, since a son prevents the brother from inheriting, a daughter will also prevent him. What has been said about the daughter's inheritance applies in the case of the sister as well. Apart from this, the Imamiyyah have raised a number of objections against the Sunni schools, bringing to their notice certain conclusions that follow logically from their thesis, which are as unnatural as they are opposed to *qiyas*, which is practiced by these schools.

Among these criticisms is the one mentioned in *al-Jawahir*, that if the decedent has ten daughters and a son, the son, in this case, will take one-sixth and the daughters the remaining five-sixths. If in the place of the son the decedent has a paternal uncle's son (i.e. if he leaves behind ten daughters and a paternal uncle's son), according to the rule of *ta'sib* the uncle's son will receive one-third and the daughters two-thirds, and consequently the son's position here is worse than that of the uncle's son!

This is despite the fact that man has greater affection for his children when compared to his brothers, and he sees in his children, sons and daughters, an extension of his own existence. It is for this reason that we see individuals belonging to the Lebanese families having only daughters changing their school of fiqh from Sunni to Shi'i solely because they fear that their brothers and uncles will become coheirs with their children.

Presently, there are many Sunni scholars thinking of forsaking the principle of *ta'sib* and accepting the Imami view concerning the inheritance of a daughter, exactly as they have abandoned the view invalidating bequest in favour of an heir and have accepted the Imami view despite the consensus of the Sunni schools regarding its invalidity.

Al-'Awl

'Awl is applied where the shares exceed the heritage, such as where the decedent leaves behind a wife, parents and two daughters (the shares being, the wife's one-eighth, the parents' one-third, the two daughters' two-thirds; here the estate falls short of the sum of one-eighth, one-third and two-thirds [$27/24$]). Similarly, if a woman dies and leaves behind her husband and two agnate sisters, the share of the husband is one-half, and that of the sisters two-thirds; here the estate falls short of the sum of half and two-thirds ($7/6$). 'Awl occurs only if the husband or the wife is present.

The schools differ regarding the issue. Will the deficit, in such a case, be diminished proportionately from the shares of all the sharers, or will it be diminished from the shares of only some of them?

The four Sunni schools accept the doctrine of 'awl, the rule that all the shares will be diminished proportionately, exact like the creditors' claims when the assets fall short of meeting them. Hence the heirs are wife, parents and two daughters, according to these schools it will be an instance of 'awl. The obligation is met by dividing the heritage into 27 parts, though it earlier comprised 24 parts. The wife will take $3/27$ (i.e. her share becomes $1/9$ instead of $1/8$), the parents take $8/27$ and the daughter $16/27$.

The Imamiyyah do not accept the doctrine of 'awl and keep the corpus (in the previous example) fixed at 24 parts by diminishing the share of the two daughters. Hence the wife takes her complete share of $1/8$ (which is $3/24$), the parents take $1/3$ (which is $8/24$), and the remainder goes to the two daughters.

The four schools argue in favour of the validity of 'awl and the reduction of all the shares by citing the precedent of a woman who died during the reign of the Second Caliph, 'Umar, leaving behind a husband and two agnate sisters. The Caliph gathered the Companions and said: "The shares determined by God for the husband and the two sisters are a half and two-thirds respectively. Now if I start with the husband's share, the two-thirds will not remain for the two sisters, and if I start with the two sisters, the half will not remain for the husband. So give me advice."

Some advised him to follow 'awl by diminishing all the shares proportionately, while Ibn 'Abbas

vehemently opposed it. But 'Umar did not accept his view and acted according to the opinion of others, telling the heirs: "I do not see any better way regarding this estate but to distribute it amongst you in proportion to your shares." Hence 'Umar was the first person to apply *'awl* to the shares and all the Sunni schools followed him.

The Imamiyyah argue regarding the invalidity of the doctrine of *'awl* by observing that it is impossible for Allah, *subhanahu*, to divide an estate into shares of half and two-thirds, or shares of one-eighth, one-third and two-thirds, because, otherwise, ignorance and frivolity would be attributed to Him, while He is too exalted to deserve such attributes. Hence, it has been narrated from 'Ali ('a) and his pupil 'Abd Allah ibn 'Abbas that they said: "He Who can count the number of sand grains (in the universe) surely knows that the number of shares do not exceed six."

The Imamiyyah always diminish the share of the daughters or sisters, and the shares of the husband, the wife and the parents remain unaltered; because the daughters and the sisters have been assigned a single share and do not face a reduction from a higher to a lower share. They, therefore, inherit as sharers in the absence of a male heir and as residuaries in his presence, and at times they are entitled along with him to less than what they are entitled to when alone.

However, the share of the husband is reduced from a half to one-fourth, the wife's from one-fourth to one-eighth, the mother's from one-third to one-sixth, and in certain cases the father, inherits one-sixth as a sharer; the share of none of them further diminishes from its determined minimum, and nothing is reduced from it. Hence, when the shares exceed the corpus, a start will be made from this minimum limit and the remainder will go to the daughters or sisters.

Al-Shaykh Abu Zuhrah, in *al-Mirath 'inda al-Ja'fariyyah*, quotes Ibn Shihab al-Zuhri¹⁷ as having said, "If it were not for the preference given to the fatwa of the just leader 'Umar ibn al-Khattab over the fatwa of Ibn 'Abbas, the observation of Ibn 'Abbas is worthy of being followed by every scholar and worthy of consensus over it." The Imamiyyah have adopted the opinion of Ibn 'Abbas --may God be pleased with both of them-- which is a good rule, as pointed out by Ibn Shihab al-Zuhri, who was an ocean of knowledge.

Exclusion (al-Hujb)

By *Hujb* is meant the exclusion of some relatives from inheritance. *Hujb* is either exclusion from the actual inheritance itself (such as the exclusion of the grandfather by the father, which is called '*hujb al-hirman*') or prevention from a part of the inheritance (such as the reduction of the husband's share by a child from a half to one-fourth, which is called '*hujb al-nuqsan*').

The schools concur that parents, children, husband and wife are not excluded by *hujb al-hirman*, and whenever present they will take their share from the inheritance and no impediment prevents them from it, because they are the nearest to the decedent, being related to him without any intermediary, while *all*

others are related through an intermediary.

The schools concur that the son excludes brothers and sisters from inheritance, and, with greater cause, the paternal and maternal uncles. The son does not prevent the paternal grandfather and the maternal grandmother, in the opinion of the Sunni schools, and the son's son in the absence of the son, is exactly like the son, inheriting as his father would have inherited and excluding in the same manner.

There is consensus among the schools that the father excludes the brothers and sisters from inheritance, as well as the paternal grandfather. But the maternal grandmother, according to the Sunni schools, inherits along with the father and takes one-sixth in the absence of the mother, and in the opinion of the Hanbalis the paternal grandmother inherits along with the father, i.e. her son. The Shafi'i, the Hanafi and the Maliki schools say: She will not inherit with him, because she is excluded by him. (*al-Mughni*, vol. 6, p. 211, and *al-Bidayah wa al-nihayah*, vol. 2, p. 344)

The Imamiyyah state: The father is similar to the son and none of the grandparents inherit along with him, because they belong to the second category while he belongs to the first of the categories of heirs.

The four schools say: The mother excludes all kinds of grandmothers (*al-Mughni*, vol. 6, p. 206), but does not exclude grandfathers, brothers or sisters, nor the full and agnate paternal uncles and aunts, and all of them share the inheritance with her.

The Imamiyyah observe: The mother, like the father, excludes all kinds of grandparents, brothers and sisters.

The four schools state: The daughter does not exclude the son's son, and two or more daughters exclude the son's daughters, except when they have a male counterpart. But a single daughter does not exclude the son's daughters. A single daughter or daughters exclude cognate brothers.

The Imamiyyah say: A daughter is like a son and excludes the children's children, both male and female, and, with greater justification, the brothers and sisters.

The schools concur that a grandfather and brother exclude paternal uncles and aunts, and a child, male or female, brings down the husband's share from a half to one-fourth and the wife's share from one-fourth to one-eighth. The schools differ regarding the minimum number of brothers or sisters required to diminish the mother's share from one-third to one-sixth.

The Malikis say: The minimum required to diminish her share is two brothers. The Hanafi, the Shafi'i and the Hanbali schools observe: Two brothers or two sisters suffice.

The Imamiyyah state: Brothers do not diminish the share of the mother unless the following conditions are fulfilled:

1. There should be two brothers, or a brother and two sisters, or four sisters. Hermaphrodites will be

considered sisters.

2. The absence of impediments to inheritance, such as homicide and difference of religion.
3. That the father be present.
4. The brothers should be either full or agnate.
5. They should have been born. Hence, unborn brothers do not exclude.
6. They should be alive. Hence, if one of them is dead, he will not exclude.

On the whole, the difference between the Sunni schools and the Imami school is that the Imamiyyah prefer the nearer relative to the more distant, irrespective of his/her belonging to the same category (e.g. the son supersedes the son's son, and the father supersedes the grandfather) or another category (e.g. the son's son supersedes the brothers).

They say: One who is related through both parents excludes his consanguine (agnate) counterpart on the same side. Hence a full sister excludes a consanguine brother, and a full paternal aunt excludes a consanguine paternal uncle; but a full paternal uncle does not exclude a consanguine maternal uncle, because they are not from the same side. The Imamiyyah do not discriminate between male and female heirs regarding their right to inheritance. Therefore, in the same way as the children's children represent the children in their absence, the children of brothers and sisters represent their parents in their absence.

The Sunni schools do accept the doctrine of preferring the nearer relatives to the more distant ones, though not totally; rather, they lay down the condition of unity of class, i.e. the nearer one excludes another who is related through him/her, except the uterine (cognate) brothers, who are not excluded by the mother though they are related through her, and similarly the great grandmother, who inherits with the grandmother, i.e. with her daughter.

But if he/she is not related through another, he/she is not excluded; e.g. the father, though he excludes the paternal grandfather, does not exclude the mother's mother, and similarly the mother, though she excludes the maternal grandmother, does not exclude the paternal grandfather. The uncles and aunts of the decedent are preferred over the uncles and aunts of the decedent's father. Similarly, the grandparents of the decedent are preferred over his/her father's grandparents. The nearer grandmother excludes the more distant grandmother. All this is due to the doctrine of the nearer being preferred. [18](#)

These schools also differentiate between male and female heirs. Hence, the brothers of the decedent inherit with his daughters, though they do not inherit with his sons. The brothers' children do not inherit with the grandparents in the opinion of these schools, as opposed to the Imamiyyah.

This is a very brief account of the exclusions through which I intended to highlight the salient features of

the Imami and the Sunni schools. Otherwise, the chapter on exclusions is a vast one and it is possible for a writer to include in it all the issues of inheritance. This will become clear from the forthcoming discussions.

The Return (al-Radd)

The question of 'return' arises only in the case of the sharers, because their shares are fixed and determined. At times they exhaust the whole estate (e.g. parents and two daughters, the parents receiving one-third, and two-thirds going to the two daughters), and on other occasions they do not exhaust it (e.g. a daughter and the mother, the former receiving half and the latter one-sixth).

In the latter case, the question arises as to what is to be done with the remaining one-third and to whom should we return it. In the event of there being no specific shares for the heirs (such as brothers and uncles, who do not inherit as sharers) the question of return does not arise.

The four Sunni schools say: The excess of the sharers' shares is given to the residuaries. Hence if the deceased has a single daughter she will take half and the remainder goes to the father; and in his absence, to the full or consanguine sisters because they are residuaries with a daughter; and in their absence to the full brother's son; and in his absence to the consanguine brother's son; and then, in this order: the paternal uncle, the consanguine uncle and the paternal uncle's son. In the absence of all of them, the excess will be returned to the sharers in the proportion of their shares, except the husband and the wife, as they are not entitled to the return.

For example, if a decedent leaves behind mother and a daughter, the mother will take one-sixth and the daughter half as their respective shares, and the remainder will be given to them as 'return' by division into four parts, the mother receiving one-fourth and the daughter three-fourths. Similarly, if he leaves behind a consanguine and a uterine sister, the former will take the daughter's share and the latter the mother's share.

The Shafi'i and the Maliki schools say: If there is no residuary, the remainder, after the assignment of the sharers' shares, will escheat to the *bayt al-mal*.

The Imamiyah observe: The sharers are entitled to the remainder in proportion to their shares by way of 'return' if there exists no relative in their category; and if such a relative exists, after the sharer takes his share the remainder will go to that relative (e.g. when the mother and the father are heirs, after the mother takes her determined share, the remainder shall go to the father).

If there exists with a sharer a relative who does not belong to his category, the sharer will take his share and then also the remainder by way of 'return' (e.g. when the decedent is survived by his mother and a brother, she, after taking one-third as a sharer, will take the remainder by way of 'return,' the brother receiving nothing because he belongs to the second category, while she belongs to the first category).

Similarly, if there exists a consanguine sister with a paternal uncle, she will inherit the first half as a share and the second half by way of 'return,' to the exclusion of the uncle, because he belongs to the third category while she belongs to the second category.

The Imamiyyah do not give the 'return' to a uterine brother or sister in the presence of a consanguine brother or sister. Hence if the decedent is survived by a uterine and a consanguine sister, the former is entitled to one-sixth and the latter to a half (as sharer) as well as the remainder by way of 'return,' to the exclusion of the uterine sister.

Yes, a uterine brother or sister is entitled to the 'return' if there is none belonging to their category, such as if the decedent is survived by a uterine sister and a consanguine paternal uncle, the whole estate will devolve on her to his exclusion, because he belongs to the third category, while she belongs to the second category.

The Imamiyyah also do not entitle the mother to the 'return' in the presence of those who prevent her from inheriting in excess of one-sixth. Hence if the deceased has a daughter and parents, and also brothers -- who exclude the mother from inheriting one-third-- the remainder will go only to the father and the daughter. But if there are no brothers to exclude the mother, the 'return' will be shared by the father, the daughter, and the mother in proportion to their shares.

It will be seen while discussing the inheritance of husband and wife, that the Imamiyyah entitle the husband and not the wife to inherit by way of 'return' in the absence of all other heirs apart from them.

The Inheritance of a Fetus; Disowned and Illegitimate Children

The Inheritance of a Fetus

If a person dies while his wife is pregnant, the distribution will be postponed, if possible, till childbirth; otherwise, a share will be withheld for the child. The schools differ regarding the share to be withheld.

The Hanafis observe: The share of a single son will be withheld for the child in the womb, because it is generally so and it is improbable that it should fall short. (*Kash al-haqa'iq fi sharh Kanz al-daqa'iq*, vol. 2, *bab al-fara'id fi fiqh al-Hanafiyyah*)

Mu'awwad Muhammad Mustafa in *al-Mirath fi al-Shari'ah al-Islamiyyah* and Muhammad Muhammad Sa'afan, quoting from *al-Sirajyyah*, state that Malik and al-Shafi'i have said: A share of four sons and four daughters will be withheld.

A curious incident has been reported in *al-Mughni* (3rd ed. p.314): It has been narrated from *al-Maridini* that a pious and learned resident of Yaman informed him that a woman of Yaman gave birth to a thing resembling a paunch. They thought that it contained no child and threw it away on the wayside. When the sun rose and it was warmed up by sunshine, it wriggled and burst open and seven male infants

emerged from it. All of them survived and were physically sound, except for the smallness of their bodily members. This gentleman from Yaman further added: One of them wrestled with me and put me down, and I was reproached by the people, who would say, "You were beaten by a seventh of a man!"

The Imamiyyah state: The share of two male children will be withheld for caution's sake and the husband and the wife will be given their minimum shares.

A child in the womb will inherit on condition of its being born alive¹⁹ and its mother giving birth to it in less than six months --or even six months, if her husband copulates and dies immediately afterwards. It is also necessary for the maximum gestation period not to expire after the death, in accordance with the difference among the schools regarding this period, as already mentioned in the chapters on marriage and divorce. Therefore, as per consensus, if the child is born after the expiry of the maximum gestation period, he will not inherit.

Child Disowned by the Father (Walad al-Mula'annah)

The schools concur that there will be no mutual inheritance between the couple if the husband accuses the wife of adultery, and between the child born thereafter and its father and paternal relatives. However, the child, its mother and maternal relatives will inherit mutually. While inheriting from the child, its relatives through both parents and relatives through the mother enjoy the same status. Hence his full and uterine brothers are considered equal in status.

The Imamiyyah observe: If the father takes back his accusation and accepts the child, the child will inherit from the father, but the father will not inherit from the child.

The Illegitimate Child (Walad al-Zina)

The four Sunni schools concur that an illegitimate child is similar to a child disowned by the father, in all that which has been mentioned concerning the absence of mutual inheritance between the child and the father and the presence of such inheritance between the child and its mother. (*al-Mughni*, vol. 6, *bab al-fara'id*)

The Imamiyyah say: There is no mutual inheritance between an illegitimate child and its fornicator mother, in the same manner as there is no such inheritance between the child and its fornicator father, because there is a common impeding cause between the two, i.e. fornication.

The Marriage and Divorce of an Ill-Person

The Hanafi, the Shafi'i and the Hanbali schools say: Marriage during illness is similar to marriage during health in respect of each spouse inheriting from the other, irrespective of whether the marriage is consummated or not. In this context an 'ill person' means one in his death-illness.

The Malikis observe: If a marriage contract is concluded during the illness of either spouse, the marriage will be considered invalid except where it has been consummated. (*al-Mughni, bab al-fara'id*)

The Imamiyyah state: If a person marries during death-illness and dies before consummation, the wife will neither be entitled to *mahr* nor inheritance from him. Further, he will not be entitled to inherit her if she dies before him, prior to consummation, and then he dies after her as a result of that illness (*al-Jawahir, bab al-mirath*). If a woman marries during death-illness, the rule applicable to a healthy woman applies to her concerning the right of the husband to inherit from her.

The schools concur that if an ill person divorces his wife and dies before the completion of the *'iddah*, the wife will inherit from him irrespective of the revocability or irrevocability of the divorce.²⁰ They also concur that she will not inherit if he dies after the completion of her *'iddah* and before her marriage with another. The Malikis and the Hanbalis observe: She will inherit regardless of the length of time.

The Hanafi and the Shafi'i schools state: After the completion of her *'iddah* she becomes a stranger and is not entitled to any share in the inheritance. (*al-Mughni, bab al-fara'id*)

This opinion is in accordance with the Islamic jurisprudential principles, because the marital bond snaps on the completion of the *'iddah*, making her marriage with others permissible, and every woman whose marriage with others becomes permissible does not inherit from her former husband. This principle cannot be departed from except on the presence of a Qur'anic verse or a confirmed tradition.

The Imamiyyah say: If a husband divorces his wife during his death-illness in a revocable or irrevocable manner (as in the case of a triple, menopausal divorcee with whom marriage has not been consummated), and then dies before the completion of one year from the date of divorce, she will inherit from him if the following three conditions are fulfilled:

1. that his death be the result of the illness during which he divorced her;
2. that she should not have remarried;
3. that the divorce should not have been given on her demand.

They base these conditions on the traditions of the Ahl al-Bayt (*'a*).

The Father's Share in Inheritance

Following are the different situations relating to the father's share in inheritance:

1. The schools concur that the father, in the absence of the mother, children, children's children, grandmothers and spouse, is entitled to the whole estate, though by relationship (*qarabah*) according to the Imamiyyah, and through *ta'sib* according to the rest, i.e. the difference lies in naming the cause leading to inheritance, not in the actual inheritance and his share in it.

2. If a spouse exists with the father, he/she will take the maximum share to which he/she is entitled and the remainder, as per consensus, will go to the father.

3. If there are with the father a son, or sons, or sons and daughters, or the son's son how lowsoever, the father will take one-sixth and the remainder, as per consensus, will go to the others.

4. If there is a single daughter with the father, they will be entitled to a half and one-sixth respectively as sharers. The remaining one-third will return to him by way of *ta'sib* according to the Sunni schools. Hence the daughter receives half as share, and the father the other half as share and 'return.' The father excludes the grandfathers, brothers and sisters, both paternal and maternal, irrespective of their being full, consanguine or uterine.

The Imamiyyah observe: The remainder will return to the father and the daughter together, and not solely to the father. The remainder will be divided into four parts, the father receiving one part and the daughter three parts, because in every instance of 'return' in which two sharers are involved, the remainder will be divided into four parts, and if three sharers are involved, it will be divided into five parts (*Miftah al-karamah*, vol. 28, p. 115).

5. If there are two or more daughters with the father, according to the Sunni schools the daughters will take two-thirds and the father one-third.

The Imamiyyah say: The father receives one-fifth and the daughters four-fifths, because the one-sixth which remains after they have taken their shares returns to all of them and not solely to the father, as mentioned in the preceding example.

6. If a maternal grandmother is present with him, she will take one-sixth and he the remainder, because in the opinion of the Sunni schools a maternal grandmother is not excluded by the father (*al-'Iqna' fi hall al-faz Abi Shuja'*, vol. 2, *bab al-farai'd*)

The Imamiyyah observe: The father will receive the whole estate and the grandmother is not entitled to anything in any manner, because she belongs to the second category and he to the first.

7. If there are the father and mother together, she will take one-third if not prevented from it according to the Sunni schools, by two brothers or sisters, and by two brothers or one brother and two sisters or four sisters according to the Imamiyyah, as mentioned while explaining *hujb*; the father will take the remainder. But if she is partially excluded by the brothers, her share will be reduced to one-sixth and the father will take the rest. A consensus prevails here.

A question might be appropriately raised here: Why do the Imamiyyah not return the remainder to both parents, as done by them if a daughter inherits with the father?

The reply is that both the father and the daughter are sharers when they inherit together, and when sharers inherit together each takes his determined share and the remainder 'returns' to all of them in

proportion to their shares. In the present case, the father while inheriting with the mother inherits as a residuary and not as a sharer because there is no child present, whereas the mother inherits as a sharer, and whenever a sharer inherits together with a residuary the latter takes the remainder. (*al-Masalik*, vol. 2, *bab al-mirath*)

8. If a daughter's son is present with the father, the father will take the whole estate and the daughter's son, according to the four Sunni schools, will get nothing because he is among the distant kindred.

The Imamiyyah say: The father will receive one-sixth as his share and the daughter's son will take half as his mother's share. The remainder will return to both exactly in the manner mentioned in the fourth illustration pertaining to his inheriting with the daughter.

The Mother's Share in Inheritance

Following are the different situations relating to the mother's inheritance:

1. The Imamiyyah observe: The mother is entitled to the whole estate in the absence of the father, children, children's children and spouse.

The other schools say: The mother will not receive the whole estate except in the absence of all sharers and residuaries, i.e. in the absence of the father, the paternal grandfather, children, children's children, brothers, sisters, their children, grandfathers how highsoever, paternal uncles and their children. As to the presence of grandmothers, they do not prevent her from inheriting the whole estate, because all of them are excluded by her in the same manner as the grandfathers are excluded by the father. Similarly, maternal uncles and aunts do not prevent her from inheriting the whole estate, because they are related to the decedent through her and one who is related through another person is excluded by that person.²¹

2. If the situation mentioned in the first mode prevails along with the presence of a spouse, the spouse will take his/her maximum share and the remainder will go to the mother.

3. If with the mother are present a son, or sons, or sons and daughters, or son's son how lowsoever, according to consensus she will take one-sixth and the remainder will be taken by the others.²²

4. If a single daughter inherits with the mother and there are no other residuaries, such as the paternal grandfather, brothers, and paternal uncles, and no sharers, such as sisters and spouse, the mother will receive one-sixth and the daughter half as sharers, and the remainder, according to the Imami, the Hanafi and the Hanbali schools, will be shared by both after dividing it into four parts, the mother receiving one part and the daughter three parts.

The Shafi'i and the Maliki schools state: The remainder will escheat to the *bayt al-mal*, and it has been mentioned in *al-'Iqna' fi hall al-faz Abi Shuja'* (vol. 2) that if an -orderly system of *bayt al-mal* does not

exist, as when the ruler is unjust, the remainder will return to the sharers in proportion of their shares.

5. If there are two daughters inheriting with the mother in the absence of all other sharers and residuaries, as in the preceding illustration, the views expressed there apply here as well, except that the remainder here will be divided into five parts, one part going to the mother and the other four to the two daughters.

6. The case where she inherits with the father has been discussed in the preceding section regarding the father's share in inheritance.

7. Where she inherits with the paternal grandfather in the absence of the father, the four Sunni schools observe: The paternal grandfather will represent the father, and the rule is the same in both cases.

The Imamiyyah say: The mother is entitled to the whole estate, to the exclusion of the grandfather, because he belongs to the second category and she to the first. As per consensus, the grandmothers, paternal as well as maternal, do not inherit with the mother and, similarly, the maternal grandfather too does not inherit with her. According to the Sunni schools, none of the grandparents except the paternal grandfather inherit with the mother, and none of them inherit with the father except the maternal grandmother. But the Imamiyyah do not consider grandparents capable of inheriting with either parent.

8. If a full or consanguine brother is present with the mother, she will, according to the Sunni schools, take one-third as sharer and the remainder will go to the brother on account of *ta'sib*, and if there are with her two full or consanguine or uterine brothers or sisters,²³ she will take one-sixth and the remainder will be taken by the brothers, because she is excluded by them from inheriting more than one-sixth.

According to the Imamiyyah, she will take the whole estate by share and 'return,' to the exclusion of the brothers.

9. If, along with her, are present a full or consanguine sister or two such sisters, the rule is like the case where a daughter or two daughters are present with her, as mentioned in the fourth and fifth cases.

10. If a single uterine brother or sister is present with her, and there exists no other sharer or residuary, he/she will take one-sixth and the mother one-third, as sharers, and the remainder will 'return' to them in proportion to their shares. If there are with her two or more uterine brothers or sisters, they and the mother will each take one-third as sharers and the remainder will be proportionately shared by them together, because that which remains after the sharers have been assigned their shares returns to them proportionately in the opinion of the Hanafi and Hanbali schools, and escheats to the *bayt al-mal* according to the Shafi'is and the Malikis. The Imamiyyah give the whole estate to the mother.

11. If a full sister and a consanguine sister are present with her, the mother will take one-third, the full sister half, and the consanguine sister one-sixth to complete the two-thirds (for her one-sixth and the

full sister's half add up to two-thirds, the maximum which two or more sisters can inherit). The Imamiyyah entitle the mother to the whole estate.

12. According to the Sunni schools the presence with her of full or consanguine paternal uncles and aunts is like that of full or consanguine brothers with respect to inheritance and their respective shares.

13. Where there are with her a paternal uncle and a uterine sister, the mother will take one-third, the sister one-sixth, and the remainder will go to the uncle. Hence the uncle who, according to the Imamiyyah, belongs to the third category, inherits together with the sister (who belongs to the second category) and the mother (who belongs to the first category). The Imamiyyah entitle the mother to the entire estate.

14. If with the mother are present the husband, uterine brothers and full brothers, this case is called *al-mas'alat al-himariyyah* (the case of the donkey), because in such a case the Caliph 'Umar had recognized the uterine brothers' right to inheritance and excluded the full brothers, which led one of the full brothers to say:

يَا أَمِيرَ الْمُؤْمِنِينَ هَبْ أَنْ أَبَانَا كَانَ حِمَارًا

O Leader of the Faithful, assume that our father were a donkey.

Thereat, 'Umar changed his decision and included them among the heirs.

The Hanafi and the Hanbali schools observe: The husband will take half, the mother one-sixth, and the uterine brother one-third. The full brothers will receive nothing as they are residuaries and the inheritance is exhausted by the sharers alone; i.e. every sharer takes his share and nothing remains for the residuaries. The Maliki and the Shafi'i schools say: The one-third will be distributed among the full and uterine brothers, a male receiving the share of two females (*al-Mughni*, vol. 6, p. 180, 3rd ed.)

The Imamiyyah state: The whole estate goes to the mother.

15. If only a daughter's daughter is present with the mother, according to the Sunni schools, the mother will take one-third as sharer and the rest as 'return' and the daughter's daughter will receive nothing.

The Imamiyyah say: The position of the mother with the daughter's daughter is similar to her position with the daughter, as mentioned in the fourth case.

[Does the Mother Take One-Third of the Remainder?](#)

The Sunni schools observe: If the father and a spouse are present with the mother, the mother will take one-third of what remains after the spouse has taken his/her share, not a third of the undivided estate. The stated reason, as mentioned in *al-Mughni*, is that if she takes one-third of the original estate, her

share will exceed the father's share. Al-Shaykh Aba Zuhrah says in *al-Mirath 'inda al-Ja'fariyyah*: "The father's taking half the mother's share appears far-fetched from the viewpoint of the intent of the Qur'anic verse."

He means that on the basis of the mother's taking one-third from the original estate and not from the remainder, her share will be 8/24, the husband's share 12/24 and the father's 4/24, which is half the mother's share. It is improbable for the verse to have intended such a result. But if she takes one-third of the remainder, her share will be 4/24 and the father's will be 8/24, which is twice her share; this is more probable and possibly what might have been intended by the verse.

The author of *Kashf al-haqa'iq* says: If the paternal grandfather is present instead of the father, he will not cause the mother to take one-third of the remainder; rather, she will take one-third of the original estate. Accordingly, this situation arises only when the father and a spouse are present with the mother, and other instances are not covered by it.

The Imamiyyah say: The mother is entitled to one-third of the original estate and not to a third of the remainder, irrespective of the presence of a spouse because the *zahir* (literal sense) of the Qur'anic verse:

فَلِأُمَّهِ الثُّلُثُ

for his mother is one-third (4:11)

proves that it is one-third of what the decedent has left, and this statement has not been restricted to a situation where a spouse is not present. Further, the rules of the *Shari'ah* are not derived by reasoning or by applying the criterion of improbability.

The Inheritance of Children and Grandchildren

The Sons

In the absence of the decedent's parents and spouse, a son is entitled to the whole estate, and similarly two and more sons. When the sons and daughters inherit together, a male receives twice a female's share. A son, as per consensus, excludes grandchildren, brothers, sisters and grandparents. There is consensus that a son's son is like a son in the son's absence.

The Daughters

The Imamiyyah observe: A daughter or two or more daughters, in the absence of the parents and spouse, will inherit the whole estate (a single daughter takes half as her 'share' and the other half as 'return', and similarly two or more daughters take two-thirds as their 'share' and the remainder as 'return',

without anything going to the residuaries).

The four Sunni schools say: Full and agnate sisters are residuaries with daughter or daughters. This implies that a single daughter will inherit half of the estate as her share in the absence of a son or another daughter, and that two or more daughters will inherit two-thirds as their share in the absence of a son. Hence if the decedent has a daughter, daughters, or a son's daughter, and also has a full or an agnate sister or sisters, if the decedent has no brother the sister or sisters will inherit the remainder as residuaries after the daughter or daughters have taken their share.

A full sister is like a full brother in the application of *ta'sib* and in excluding an agnate brother's son and those who come after him in the order of residuaries, and an agnate sister is a residuary like an agnate brother and excludes a full brother's son and those residuaries who come after him. (*al-Mughni*, 3rd. ed. vol. 6, p. 128, and al-Sa'idi's *al-Mirath fi al-Shari'at al-Islamiyyah*, 5th ed. p. 16)

The Imamiyyah state: None of the brothers or sisters inherit along with a daughter or daughters, nor with a son's daughter or a daughter's daughter, because a 'daughter', how lowsoever, belongs to the first category of heirs, whereas brothers and sisters belong to the second.

The Hanbali and the Hanafi schools state: If there is no sharer, residuary, or any other heir except daughters, they will be entitled to the whole estate, partly as a share and partly by the way of 'return'. But if the father is present with them, he will take the remainder after their share is given. If the father is not present, the remainder will go to the grandfather, and in his absence to the full brother, then to the agnate brother, then to the full brother's son, then to the agnate brother's son, then to the full paternal uncle, then to the agnate paternal uncle's son.

When none of these residuaries and sharers (such as sisters) is present, the daughters take the entire estate even if the decedent has daughters' children, sisters' children, brothers' daughters, uterine brothers' children, paternal aunts of all kinds, uterine paternal uncles, maternal uncles and aunts, and maternal grandmother.

The Maliki and the Shafi'i schools say: If the above-mentioned situation arises, a daughter or daughters will take their prescribed share and the remainder will escheat to the *bayt al-mal*. (*al-Mughni*, vol. 6, *bab al-fara'id* and *Kashf al-Haqa'iq*, vol. 2, p. 356)

Children's Children

The schools differ where the decedent is survived by children and grandchildren. The four Sunni schools concur that a son excludes both grandsons and granddaughters from inheritance; i.e. the children's children do not inherit anything in the presence of a son. But, if the decedent leaves behind a daughter and son's children, if the son's children are all males or some males and some females, the daughter will take a half and the other half will go to the son's children, who divide it among themselves in the proportion of the male taking twice a female's share. If there are son's daughters along with a daughter,

the daughter will be entitled to a half and the son's daughter or daughters to one-sixth and the remainder will go to the sister. (*al-Mughni*, 3rd ed. vol. 6, p. 172)

If the decedent has two daughters and son's children, and there is no male among the son's children, the latter will not be entitled to anything. But if there is a male among them, the two or more daughters will take two-thirds and the remainder will go to the son's children, who divide it among themselves in the proportion of the male taking the share of two females (*al-Mughni*, vol. 6, pp. 170, 172). A daughter excludes the children of another daughter in a manner similar to the exclusion of a son's son by a son.

The Imamiyyah say: None of the grandchildren inherit in the presence of a single child, male or female, of the decedent. Hence if he leaves behind a daughter and a son's son, the entire estate will go to the daughter to the exclusion of the son's son.

If the decedent has no surviving children, male or female, though has children's children, the four Sunni schools concur that a son's son is like a son and represents him in excluding others from inheritance, in the application of *ta'sib*, etc. And if there are sisters inheriting with the son's son, the estate will be divided in the proportion of a male receiving twice a female's share. The four schools also concur that son's daughters are like daughters in the absence of daughters, in that a single son's daughter is entitled to half the estate, and if they are two or more they are entitled to two-thirds.

Like daughters, they exclude uterine brothers from inheritance, and share the estate with the son's son, a male receiving twice a female's share, irrespective of whether the son's son is their own brother or their paternal uncle's son. To sum up, a son's daughter is similar to a daughter. In other words, the children of the decedent's son are exactly like his own children. (*al-Mughni*, vol. 6, p. 169)

According to the Shafi'i and the Maliki schools, daughters' children do not inherit anything irrespective of their sex, because they are considered as distant kindred. Hence if none among the sharers and residuaries exist, the daughters' children will be excluded from inheritance and the estate will escheat to the *bayt al-mal*. The same applies to the son's daughters' children.

The Hanafi and the Hanbali schools state: The son's daughters' children will inherit in the absence of sharers and residuaries. (*al-Mughni*, vol. 6, *fasl dhawi al-'arham* and *Kashf al-haqa'iq*, vol. 2, p. 255).

This was a summary of the opinions of the four Sunni schools regarding the inheritance of grandchildren in the absence of children.

The Imamiyyah observe: The children's children represent the children in their absence and each among them takes the share of the child through whom he is related. Therefore, the daughter's children, even if several and males, are entitled to one-third, and the son's children, even if a single daughter, are entitled to two-thirds. They distribute their share among themselves equally if of the same sex, and if they differ then a male is entitled to twice a female's share, irrespective of their being son's children or daughter's children, and the nearer descendants exclude the remote ones.

They inherit jointly with the decedent's parents and the 'return' reverts to the daughter's children, males or females, in the same manner as it does to the daughter. If the husband or the wife inherits with them, they are entitled to their minimum share.²⁴

The Inheritance of Brothers and Sisters

Brothers and Sisters

In the opinion of the Sunni schools, brothers and sisters inherit in the absence of the son and the father,²⁵ and inherit jointly with the mother and daughters. According to the Imamiyyah, they do not inherit except in the absence of parents, children and the children's children, male or female. Brothers and sisters are of three kinds:

1. full,
2. agnate (consanguine),
3. cognate (uterine).

Full Brothers and Sisters

The following situations pertain to the inheritance of full brothers and sisters:

1. Where males and females inherit together and there does not exist along with them any sharer or residuary (i.e. in the absence of the father, mother, daughter, grandmother, son and son's son), they are entitled to the whole estate and distribute it in accordance with the rule that a male receives twice a female's share.
2. Where they consist of males, or males and females, and there is along with them a uterine brother or sister, the uterine brother or sister will take one-sixth and the remainder will go to the full brothers and sisters, a male taking the share of two females. If there are two or more uterine brothers or sisters, they are entitled to one-third irrespective of their sex, with the remainder going to the full brothers and sisters.
3. Where the decedent has a full sister, she is entitled to a half as her share; if more than one, their share is two-thirds. If there does not exist along with a full sister or sisters a daughter or any uterine brothers and sisters, or *sahih* grandfathers²⁶ and *sahih* grandmothers, the remainder, according to the Imamiyyah, will return to the sister or sisters.

The other four schools say: The remainder will return to the residuaries who are: the full paternal uncle, and in his absence the agnate paternal uncle, in his absence the full paternal uncle's son, and then the agnate paternal uncle's son, and in his absence the remainder will return, according to the Hanafi and the Hanbali schools, to the sister or sisters because only the sharers are entitled to the return conditional on the absence of residuaries; but according to the Shafi'i and the Maliki schools the remainder will

escheat to the *bayt al-mal*.

To sum up, the position of full sisters is like that of daughters; a single sister takes a half, and two or more two-thirds, and if they inherit jointly with full brothers they divide the estate, with a male taking twice a female's share.

4. The Sunni schools say: If the decedent has a full and an agnate brother, the former will inherit to the exclusion of the latter, and the agnate brother will take the full brother's place in his absence.

If the decedent has full sister and one or more agnate sisters the full sister takes a half and the agnate sister or sisters one-sixth, except when there is also an agnate brother, in which case they are entitled along with their brother to a half, which they distribute in the proportion of a male taking twice a female's share.

If the decedent has full and agnate sisters, the full sisters are entitled to two-thirds and the agnate sisters receive nothing unless accompanied by an agnate brother, in which case they, along with their brother, are entitled to the remainder, which they distribute in the proportion of a male receiving twice a female's share.

To sum up, a full brother excludes an agnate brother; a single full sister does not exclude agnate sisters; and full sisters exclude the agnate sisters from inheritance when not accompanied by a male counterpart.

The Imamiyyah state: Full siblings exclude agnate siblings irrespective of their number and sex.

Therefore, if the decedent leaves behind a full sister and ten agnate brothers, she will inherit to their exclusion.

5. If there is with a sister or sisters a daughter or two daughters of the deceased, the daughter or daughters will take their respective Qur'anic share of half or two-thirds, and the remainder, according to the Sunni schools, will go to the sister or sisters; a son's daughter is exactly like a daughter in this respect.

The Imamiyyah observe: The whole estate will go to the daughter or daughters and the sisters will receive nothing.

Agnate Brothers and Sisters

Agnate brothers and sisters take the place of full brothers and sisters in their absence, and the same rule applies to both. A single sister will receive a half and two or more sisters two-thirds; the principle of 'return' is similarly applicable to both in the manner mentioned earlier.

Uterine Brothers and Sisters

Uterine brothers and sisters do not inherit in the presence of the father, the mother, the paternal grandfather, children, sons' daughters (i.e. the uterine brothers and sisters are excluded by the mother, the daughter and the son's daughter). [27](#)

We have mentioned earlier while discussing the inheritance of the mother and the daughter that according to the Sunni schools full and agnate brothers and sisters inherit with the mother and the daughter. Rather, if they are present along with daughters' children, it is only they, according to the four Sunni schools, who inherit by excluding the daughters' children, even if they are males.

The uterine brothers and sisters are not excluded by the presence of full or agnate brothers and sisters, and a single uterine brother or sister inherits one-sixth; if more than one, they inherit one-third, irrespective of their sex, and, according to consensus, they share the inheritance equally, with a female receiving a share equal to that of a male.

A Subsidiary Issue

The author of *al-Mughni* observes: if there exists a full, an agnate and a cognate sister, the first will take a half, and the second and the third one-sixth, with the remainder returning to them in the proportion of their shares. This implies that the corpus be divided into five parts, the full sister taking three of them and the other two sisters one each.

The Imamiyyah say: The full sister will take a half and the uterine sister one-sixth, without the agnate sister receiving anything because of her exclusion by the full sister; the remainder will return solely to the full sister. [28](#) Here the corpus will be divided into six parts, five of them going to the full sister and one to the uterine sister.

Children of Brothers and Sisters

The four Sunni schools say: An agnate brother excludes from inheritance a full brother's son, and the full brother's sons exclude the agnate brother's sons. As to the children of sisters of all kinds (full, agnate and uterine), the uterine brothers' children and the full and agnate brothers' daughters, all of them belong to the group of distant kindred who do not inherit anything in the presence of full or agnate paternal uncles and their children. In the absence of full or agnate uncles and their children, they are entitled to inherit in the opinion of the Hanafi and Hanbali schools, while according to the Shafi'i and Maliki schools they are not so entitled and are considered essentially incapable of inheriting and the estate escheats to the *bayt al-mal*[29](#) (*al-Bidayah wa al-nihayah*, vol. 2, p. 345, and *al-Mughni*, vol. 6, p. 229).

The Imamiyyah state: The children of brothers and sisters of all kinds do not inherit in the presence of even a single brother or sister of any kind, and when no brother or sister is present, their children take their place, each taking the share of the person through whom he is related to the decedent. Hence,

one–sixth is the share of the son of a uterine brother or sister, and one–third is the share of the children of uterine brothers when the number of the brothers is more than one.

The remainder goes to the children of a full or agnate brother, the full brother's children excluding the agnate brother's children. Hence an agnate brother's son does not inherit with a full brother's son. The children of uterine brothers and sisters share the inheritance equally among themselves like their parents, while the children of agnate brothers and sisters share their inheritance with disparity, a male taking twice a female's share, like their parents.

The higher in generation among the brothers' and sisters' descendants exclude those of the lower generation; hence a brother's grandson is excluded in the presence of a sister's daughter, in accordance with the rule that the nearer excludes the remote. The children of brothers, like their parents, inherit jointly with the grandparents in the absence of their parents; hence, a brother's or sister's son will inherit with the paternal grandfather, and similarly the great grandfather will inherit with the brother in the absence of the grandfather.

The Maternal Grandfather

The Sunni schools observe: The maternal grandfather is included in the category of distant kindred who do not inherit in the presence of a sharer or residuary. Accordingly, the maternal grandfather does not inherit with the paternal grandfather, the brothers and sisters, the children of full or agnate brothers, the paternal uncles or their sons. When all of them are absent and there is no sharer present, according to the Hanafi and the Hanbali schools, the maternal grandfather is entitled to inherit. According to the Shafi'i and the Maliki schools, he is never entitled to any inheritance.

The Imamiyyah say: The maternal grandfather inherits with the paternal grandfather and with brothers and sisters of all kinds, and, likewise, he excludes paternal and maternal uncles and aunts of all kinds from inheritance, because he belongs to the second category of heirs, whereas they belong to the third. Hence if a maternal grandfather is present with a full paternal uncle, he takes the whole estate to the exclusion of the paternal uncle.

Grandmothers

There is consensus that the mother excludes from inheritance all kinds of grandmothers.

The Sunni legists state: In the absence of the mother, her mother represents her and inherits jointly with the father and the paternal grandfather, taking one–sixth in their presence. Similarly, there is no difference of opinion concerning the maternal and paternal grandmothers inheriting jointly. According to the Sunni schools, they are entitled to one–sixth, which they share equally among themselves.

The nearer grandmother excludes the more distant grandmother on her side. Hence the mother's mother

excludes the latter's mother; the father's mother also excludes similarly. The nearer maternal grandmother (e.g. the mother's mother) prevents a remote paternal grandmother (e.g. the paternal grandfather's mother). The Sunni schools differ among themselves as to whether or not a nearer paternal grandmother, such as the father's mother, excludes a remote maternal grandmother, such as the maternal grandfather's mother (*al-'Iqna' fi hall al-faz Abi Shuja'*, vol. 2, and *al-Mughni*, vol. 5, *bab al-fara'id.*). According to the Hanbalis, the father's mother inherits with her son; hence when they inherit together, she takes one-sixth and he the remainder.

The Imamiyyah say: If the maternal grandmother is present along with the paternal grandmother, the former takes one-third and the latter two-thirds, because the maternal grandfathers and grandmothers take one-third irrespective of whether they are one or more, dividing their share of the estate equally, and the paternal grandparents take two-thirds, whether one or more, and divide their share with disparity (a male taking twice a female's share).

The Paternal Grandfather

The four Sunni schools concur that the father's father represents the mother in her absence and inherits jointly with the son, like the father, though differing from the father in respect of his wife, the father's mother, because she does not inherit with the father, except in the opinion of the Hanbalis, but inherits jointly with the paternal grandfather, i.e. with her husband.

The father also differs from the paternal grandfather in the case of both parents jointly inheriting with a spouse; here, the mother inheriting jointly with the father and spouse receives one-third of the remainder after deducting the share of the spouse, and while inheriting jointly with the paternal grandfather and spouse she receives one-third of the original estate and not one-third of the remainder.

The four schools also concur that the paternal grandfather excludes from inheritance uterine brothers and sisters as well as the children of full and agnate brothers. These schools differ among themselves concerning whether the paternal grandfather excludes full and agnate brothers and sisters or if he inherits jointly with them.

Abu Hanifa observes: The paternal grandfather excludes all kinds of brothers and sisters from inheritance, exactly in the manner that they are excluded by the father. This is despite the fact that according to the Sunni schools the maternal grandfather excludes none of the different kinds of brothers and sisters, because he is included, as mentioned earlier, among distant kindred.

The Maliki, the Shafi'i, and the Hanbali schools and the two disciples of Abu Hanifa, Abu Yusuf and Muhammad ibn al-Hasan, state: Full and agnate brothers and sisters inherit jointly with the paternal grandfather. The manner of their inheriting with him is that he will be given the greater of these two: one-third of the whole estate or a brother's share. Accordingly, if there exist a brother and a sister, he will receive equal to a brother's share and take two-fifths of the estate, and if there exist three brothers,

he will take one-third because a brother's share will be one-fourth. (*al-Mughni*, vol. 6, p. 218)

The Imamiyyah observe: The grandparents, brothers and sisters inherit together and belong to the same category. Hence if they exist together and are related to the decedent from the father's side, the grandfather and the grandmother will take the share of a brother and a sister respectively and the estate will be distributed with each male receiving twice a female's share. And if they are all related through the mother, they will distribute the estate with a male receiving twice the share of a female.

And if they exist together and are related to the deceased from either side --such as if there are with the maternal grandparents full or agnate brothers and sisters-- the grandfather or the grandmother or both together will inherit one-third and the brothers and sisters two-thirds.

And if the paternal grandparents exist along with uterine brothers and sisters, a sole uterine brother or sister will receive one-sixth; if they are more than one, they will be entitled to one-third, distributed equally among males and females, with the remainder going to the grandparents who distribute it with the grandfather receiving twice the share of the grandmother.

'Children' how low soever, of brothers and sisters of all kinds, represent their parents in their absence while inheriting along with all kinds of grandparents, each one of them inheriting the share of the person through whom he or she is related.

The Inheritance of Paternal and Maternal Uncles and Aunts

The four schools say: Aunts, both paternal and maternal, uterine paternal uncles and all kinds of maternal uncles and aunts do not inherit with full or agnate paternal uncles and their sons.³⁰ Hence if there exists a full or agnate paternal uncle or his son, all the above-mentioned will be excluded from inheritance because they belong to the class of distant kindred, whereas he belongs to the class of residuaries, and according to them the residuaries supersede the distant kindred; rather, the Shafi'i and the Maliki schools do not consider them capable of inheriting at all, as mentioned repeatedly above.

A full paternal uncle inherits in the absence of full or agnate brothers and their sons, and not with full and agnate sisters, because though residuaries, they (the sisters) supersede the paternal uncle in the application of the doctrine of *ta'sib*.

A full paternal uncle inherits jointly with the daughter and the mother, because the two inherit as sharers and he as a result of *ta'sib*, and when a residuary inherits jointly with a sharer, the sharer takes his share and what remains of the estate goes to the residuary. And if there is no sharer at all, the residuary receives the whole estate.

Accordingly, if there are daughter's children or daughter's son's children with full or agnate paternal uncle or their sons, according to the four schools the whole estate will go to the uncle or his son to the exclusion of the daughter's children, even if there happen to be males among them. According to the

Imamiyyah the opposite applies and the whole estate is inherited by the daughter's children to the exclusion of the paternal uncle.

In the absence of a full paternal uncle, the agnate paternal uncle takes his place, and in his absence the full paternal uncle's son. As to the mode of inheritance of a full paternal uncle and those who take his place, he takes, as pointed out earlier, the whole estate in the absence of all sharers, and in their presence he takes the remainder. To sum up, a full or an agnate paternal uncle is exactly like a full brother, or an agnate brother in the absence of a full brother.

The nearer 'paternal uncle' will supersede the distant one; hence the decedent's paternal uncle supersedes his father's paternal uncle, and the father's paternal uncle supersedes the grandfather's paternal uncle. Similarly, the full paternal uncle supersedes the agnate paternal uncle. In the absence of full and agnate paternal uncles and their sons, according to the Hanafi and the Hanbali schools, uterine paternal uncles, paternal aunts of all kinds, maternal uncles and maternal aunts become entitled to inherit.

If one of them exists solely, he will receive the whole estate, and if they exist together, the agnates will receive two-thirds and the cognates one-third. Hence if the decedent is survived by a maternal uncle and a paternal aunt, the uncle will receive one-third and the aunt two-thirds. The uterine maternal uncles and aunts distribute the estate in the proportion of a male receiving twice the share of a female, despite the fact that the uterine brother's children distribute the estate by allocating equal shares to males and females.³¹ ('Abd al-Muta'al al-Sa'idi's *al-Mirath fi al-Shari'at al-Islamiyyah, fas l irth dhawi al- 'arlham*)

The Imamiyyah state: In the absence of the parents, children, children's children, brothers, sisters, brothers' and sisters' children and the grandparents, the uncles and aunts, both maternal and paternal and of different kinds, become entitled to the estate. Some among them inherit to the exclusion of some others, while others among them inherit jointly.

If there exist paternal uncles and aunts and there are no maternal uncles and aunts with them, then a single paternal uncle or aunt is entitled to the entire estate irrespective of whether he or she is a full, an agnate, or a uterine uncle or aunt.

If there exist two or more paternal uncles and aunts related similarly to the decedent, and they are all full or agnate, they will distribute the estate with the male taking twice the female's share. If they are all uterine, they will distribute it without any difference between males and females. But if the paternal uncles and aunts differ in the manner of their relationship with the deceased (some being full, some agnate and others uterine) then only the agnates among them will be excluded from inheritance by the full paternal uncles, for they inherit only in the latter's absence. The agnate paternal uncle and aunt will take the same share which the full paternal uncle and aunt would take if present.

If full or agnate paternal uncles and aunts exist together with uterine paternal uncles and aunts, a sole

uterine uncle or aunt will be entitled to one-sixth, and if more than one, they together will be entitled to one-third, sharing it equally without differentiating between the sexes.

If there exist maternal uncles and aunts but no paternal uncle or aunt, a sole maternal uncle will take the whole estate irrespective of his being full, agnate or uterine. If there are two or more maternal uncles or aunts who are similarly related to the deceased (i.e. they are all either full or agnate or uterine), they will distribute the estate equally among themselves, a male receiving an equal share with a female.

But if they differ in the manner of their relation with the deceased (i.e. some are full, some agnate and others uterine) only the agnates among them will be excluded by their full counterparts. Where the full or agnate maternal uncles or aunts inherit with their uterine counterparts, a sole uterine uncle or aunt will take one-sixth, and if more than one, they together will be entitled to one-third, sharing it equally without differentiating between the sexes, with the remainder going to the full or agnate maternal uncles and aunts who also share it equally without differentiating between the sexes.

If a paternal and a maternal uncle or aunt inherit together, the maternal uncle or aunt will take one-third irrespective of their being one or more, and the paternal uncle or aunt two-thirds irrespective of their being one or more. The maternal uncles and aunts will distribute their share of one-third as they distributed it while they were the sole heirs in the absence of paternal uncles and aunts, and the paternal uncles and aunts will also similarly distribute their share of two-thirds.

In the absence of all paternal and maternal uncles and aunts their children take their place, each of them taking the share of the person through whom he or she is related, irrespective of there being one or more. Hence if one paternal uncle has a number of children and another paternal uncle only one daughter, the single daughter will be entitled to a half and the children of the other uncle to the other half.

The nearer from among the paternal or maternal side excludes the remote from its own side as well as from the opposite side; hence a paternal uncle's son does not inherit in the presence of a paternal or a maternal uncle, except in the particular instance where a full paternal uncle's son is present with an agnate paternal uncle, when the whole estate goes to the paternal uncle's son. A maternal uncle's son does not inherit in the presence of a maternal or a paternal uncle; hence if a paternal uncle's son is present with a maternal uncle, the entire estate goes to the maternal uncle, and if a maternal uncle's son is present with a paternal uncle, the whole estate goes to the paternal uncle.

Paternal and maternal uncles and aunts of the decedent and their children supersede in inheritance the paternal and maternal uncles and aunts of his father. Every child born to a nearer relative supersedes the remoter relative. Hence if a paternal uncle's son exists with the father's paternal uncle, the former is entitled to the estate, and similarly a maternal uncle's son when present with the father's maternal uncle, following the rule of the supersedence of the nearer relative.

If the husband, or wife, is present with paternal and maternal uncles or aunts, the husband or the wife

will be entitled to his or her maximum share, the maternal uncles or aunts to one-third, irrespective of their number, and the remainder will go to the paternal uncles or aunts irrespective of their number. Hence the reduction of share is borne by the paternal uncle in all cases where the spouse is present along with the paternal and maternal uncles.

Therefore, if the husband is present with a maternal uncle or aunt and a paternal uncle or aunt, the husband will take three-sixths, the maternal uncle or aunt two-sixths, and the paternal uncle or aunt one-sixth; and if there is a wife, she will take three-twelfths, the maternal uncle or aunt four-twelfths, and the remainder of five-twelfths will go to the paternal uncle or aunt.

The Inheritance of the Spouses

The schools concur that the husband and the wife inherit jointly with all other inheritors without any exception, and that the husband is entitled to half the wife's estate if she does not have any child, neither from him nor from another husband, and to one-fourth if she has a child, either from him or from another husband. They also concur that a wife is entitled to one-fourth if the husband has no child, neither from her -nor from another wife, and to one-eighth if he has a child from her or from another wife.

The four Sunni schools observe: Here, by 'child' is meant only the decedent's own offspring or the son's child, irrespective of its sex. A daughter's child, on the contrary, does not prevent a spouse from taking his or her maximum share; rather, the Shafi'i and the Maliki schools say: The daughter's child neither inherits nor excludes others because it belongs to the category of distant kindred.

The Imamiyyah state: By 'child' is meant one's offspring as well as the children's, children irrespective of their being sons or daughters. Hence a daughter's daughter, exactly like a son, reduces the share of either spouse from the higher to the lower value.

If there are many wives, they will distribute their share of one-fourth or one-eighth equally among themselves. The schools concur that if a person divorces his wife revocably and then one of them dies during the period of *'iddah* of the divorcee, they will inherit from each other as if the divorce had not occurred.

The schools differ regarding the situation where there is no other heir except the spouse as to whether the remainder will return to the spouse or escheat to the *bayt al-mal*.

The four schools say: It will return neither to the husband nor to the wife (*al-Mughni*).

The Imamiyyah are divided on this issue into three groups, each having a different opinion.

The first view is that it will return to the husband and not to the wife; this is the preponderant opinion and the legists have acted accordingly.

The second view is that it returns to both the husband and the wife in all situations.

The third view is that it returns to both in the absence of accessibility to a just (*'adil*) imam, as is the case at the present, and it returns to the husband and not the wife in the presence of an *'adil* imam. This is the opinion of al-Saduq, Najj al-Din ibn Sa'id, al-'Allama al-Hilli and al-Shahid al-'Awwal, and their argument is that some traditions say that it returns to the wife while some other traditions say that it does not return to her; hence we consider the first group of traditions to be applicable in the absence of an *'adil* imam and the second group of traditions to be applicable in the event of his presence.

A Missing Person's Property

A missing person is one who has disappeared with no news of his whereabouts and it is not known whether he is alive or dead. We have discussed in the chapters on marriage and divorce about the rules applicable to his wife and her divorce after four years, and here we intend to discuss the distribution of his property as well as his right to inheritance if any relative of his dies during the period of his disappearance. It is obvious that the divorce of the wife after four years neither entails that his estate be distributed after this period nor that it shouldn't; rather, it is possible that the wife be divorced but the estate be not distributed because there is no causal relationship between divorce and death.

The schools concur that it is *wajib* to delay the distribution of his estate so that a period of time passes after which he is not expected to be alive,³² and the specification of this period is the prerogative of the judge and differs with circumstances. When the judge gives a ruling announcing his death, the (surviving) relative nearest to him as regards inheritance at the time of this announcement will inherit him, but not any of his relatives who has died during the period of his disappearance.

If a relative of the missing person dies during the period of his disappearance in which there is no news of him, it is *wajib* to set aside his share, which will be considered like the rest of his property until his actual condition is known or until the judge rules announcing his death after the period of waiting.

Inheritance of Persons Killed by Drowning, Fire and Debris

Both Sunni and Shi'i legists have discussed the issue of the inheritance of persons killed by drowning, fire, building collapse and the like. They differ regarding the inheriting of one of them from another in an obscure situation in which it is not known whose death among them took place earlier.

The Imams of the four Sunni schools, the Hanafi, the Shafi'i, the Maliki and the Hanbali, have observed that none among them inherits from the other and the estate of each one of them will be transferred to the living heirs, excluding the heirs of the other decedent, irrespective of whether the cause of death, and the resultant ambiguity, is drowning, building collapse, murder, fire or plague.³³

The Imami *mujtahidun* have done extensive work on this issue, and those of the last generation have

sufficiently elucidated it by going into minute details which have not crossed the minds of the legists of early and latter eras. Before going into the specifics of the inheritance of victims of drowning, building collapse, etc., they take up the more general issue of two incidents of known occurrence but of unknown sequence, in which the precedence of each to the other leads to different legal consequences.

The latter day Shi'i *mujtahidun* (*muta'akhhirun*) view the issue of the inheritance of victims of drowning and the like as a particular case of a more general problem that is not limited to any single chapter or issue of fiqh, but relates to any two events of known occurrence but of obscure precedence and subsequence, irrespective of whether the two events relate to contracts, inheritance, crime, etc.

Hence the problem includes two contracts of sale, one concluded by the owner himself with A regarding a particular article, and the second by his agent concerning the same article with B, it being unknown which of the two preceded the other so that the validity of the former and the invalidity of the latter contract could be ascertained.

The problem thus concerns any two events in which the consequences of one event are dependent on the precedence of the other over it, where there is nothing to prove that the two events took place simultaneously or successively. Therefore, the issue of drowned persons or the like is not an independent issue; rather, it is one of the many particular issues that come in the purview of a general rule.

Thus we see that the Shi'i *mujtahidun* initially concentrate on elucidating the rule itself and then discuss the issue of inheritance of victims of drowning and the like to see whether the general rule is applicable to them or if they are excluded from its application. There is no doubt that this manner of presenting the argument is more beneficial.

As the understanding of this rule depends upon the comprehension of two other closely-related principles, we shall explain them to the needed extent so as to grasp the said rule, although a discussion of these two principles is not less beneficial than that of the rule itself.

These two principles are as follows:

- a) The presumption of non-occurrence of an event whose occurrence is doubtful.
- b) The presumption of delayed occurrence of an event known to have occurred.

The Presumption of Non-Occurrence

Suppose you had a relative living abroad with whom you used to correspond. At one point he stopped writing to you and you did the same. After a long period of time it came to your mind that you should write to him. You wrote to him at his earlier address without the doubt troubling your mind that he might have died or moved to another place. What led you to pay no attention to the possibility of his death or

change of his address?

Similarly, we believe in the honesty and integrity of a person, and rely upon him by depositing with him our valuables. Then he acts in a manner which raises a doubt in our minds that he might have changed, yet, we, despite this doubt, continue to treat him in the past manner. The same rule applies to all correspondences, transactions and communications.

The secret here is that man is led by his nature to accept the continuity of an earlier situation until the contrary is proved. Hence if A is known to be alive and later a doubt arises about his death, the presumption accepted by human nature is to consider him alive until his death is known in some manner. This is what is meant by 'the presumption of non-occurrence of an event' whose occurrence has not been proved, and the following statement of al-'Imam al-Sadiq (a) points towards it:

مَنْ كَانَ عَلَى يَقِينٍ ثُمَّ شَكَّ فَلَا يُنْقِضُ الْيَقِينَ بِالشَّكِّ، إِنَّ الْيَقِينَ لَا يُنْقِضُهُ إِلَّا الْيَقِينُ،

لَا تُدْخِلُ الشَّكَّ عَلَى الْيَقِينِ، وَلَا تَخْلُطُ أَحَدُهُمَا عَلَى الْآخَرِ،

وَلَا تَعْتَدُ بِالشَّكِّ مَعَ الْيَقِينِ فِي حَالٍ مِنَ الْأَحْوَالِ

If a person is certain (about something) and then doubts (its remaining so), his earlier certainty will not be demolished by the doubt.

Surely, certainty cannot be annulled by anything except certainty; doubt cannot dislodge certainty, nor does any of them mix with the other, under no circumstance give credence to doubt in the presence of certainty.

Hence, when we know that someone owes a debt for a particular sum and later claims having repaid it, the presumption is that he owes the debt until its repayment is proved. That is, we ought to know the payment of debt in the way that we know the fact of indebtedness, because knowledge is not annulled by anything except knowledge and a doubt arising after knowledge has no effect.

Therefore, one who makes a claim which contradicts the earlier condition of something, the burden of proof rests on him to prove his claim, and he whose claim is in accordance with the earlier condition is only liable to take an oath.

The gist of the above discussion is that the principle of presumption of non-occurrence of an event means the acceptance of an earlier existing situation until the contrary is proved.

The Presumption of the Delayed Occurrence of an Event

If a judge has knowledge of A's being alive on Wednesday and of his being among the dead on Friday, without knowing whether he died on Thursday or on Friday and has no clue to determine the time of his death, how should he decide the issue? Should he rule that A died on Friday, or that he died on Thursday?

Three different periods are involved in this case:

- a) the period in which he was known to be living i.e. Wednesday;
- b) the time at which he is known to be dead, i.e. Friday;
- c) the period between the two times, i.e. Thursday, in which he is neither known to be alive nor dead.

The above principle requires that this intermediate period be considered similar to the period preceding it, not to the period subsequent to it. That is, the period of ignorance about his life will be regarded similar to the preceding period in which he was known to be alive. Hence we will remain on our knowledge of his being alive until the time of the knowledge of his death. The result is that his death will be presumed to have taken place on Friday. The same rule is applicable to every event of known occurrence in which a doubt arises regarding the time of its occurrence, provided that it is a single event and not a chain of events.

The Knowledge of Occurrence of Two Events with Ignorance of Their Order of Succession

Having explained the two principles concerning the presumption of non-occurrence of an event and the delayed occurrence of a single event, let us examine the general rule which is the end of this discussion.

The general rule concerns two events known to have occurred in which the consequences of each are dependent on its preceding the other, while there exists total ignorance about the precedence of any one of them. Among the instances when this problem arises are: the conclusion of two contracts, one concluded by the owner and the other by his agent; the occurrence of a birth and the making of a gift of property; the deaths of two mutual heirs none of whom is known to have died before the other.

The application of this rule depends upon the judge's knowledge of the time of occurrence of each one of the two events or his ignorance about the time of occurrence of both events or one of them. Hence three different situations arise:

1. Where the judge comes to know the time of occurrence of both the events by examining the statements made by the parties to the suit or through circumstantial evidence. Here he will rule in accordance with his knowledge.

2. Where the judge is ignorant of the precedence of one event over the other, though he comes to know the time of occurrence of one of them (such as, his knowing that a horse was sold on June 2, without knowing whether or not it was defective on June 1, to justify its return, or became such on June 3, to make it unreturnable).

Here the event whose time of occurrence is known will be given precedence over the event whose time of occurrence is unknown, because the presumption of delayed occurrence of an event will not be applicable to an event whose time of occurrence is known; this knowledge prevents the application of the presumption to it. As to the event whose time of occurrence is unknown, the presumption of delayed occurrence is applicable to it because this principle is relied upon in instances of ignorance.

To sum up, if two events take place one whose time is known and the other whose time is unknown, the one whose time is known will be considered as having occurred earlier irrespective of whether the two events are of the same kind (e.g. the death of two persons, or the conclusion of two contracts) or of different kinds.

3. Where the judge is ignorant of the time of occurrence of both the events, there is no rule capable of determining the precedence or subsequence of either event, because there are no grounds for applying the principle of presumption to one of them as opposed to the other.

Therefore, the presumption of delayed occurrence of an event is applicable only where a single event has taken place, or where two events occur and the time of occurrence of one of them is known. But where both the events have no known time of occurrence and there is nothing to differentiate between the time of occurrence of the two, reliance on the principle of presumption becomes impossible.³⁴

Victims of Drowning and Burial under Debris

At times, there are two close relatives who do not inherit from each other--e.g. two brothers who have children--; such a case does not come in the purview of our present discussion, for the inheritance of each is received by his own children, irrespective of his and his brother's death occurring simultaneously or successively.

At times, only one of the two decedents is entitled to inherit from the other (e.g. two brothers of whom only one has children). This situation is also outside our ambit of discussion (because the estate of the brother having children will be transferred to his children, and the estate of the childless brother will be transferred to his relatives, excluding the brother who has died along with him by drowning, fire, etc.).

This is because a condition of inheritance is that the heir be known to live at the time of death of the person being inherited (while in the above case we have no knowledge of the brother having children being alive at the time of the childless brother's death).³⁵

There are other cases where both are entitled to inherit from each other (e.g. a son and a father; two

brothers who do not have surviving parents and are childless; a couple, where the heirs of some of them are not those of the other).

This situation is the focus of our discussion, and the Imamiyyah legists lay down two conditions for the mutual inheritance of each from the other.

1. The deaths of both should be the result of a single cause, and should result specifically either by drowning or by being buried under fallen debris (such as where they are in a building which collapses upon them or in a boat which sinks with them). Hence if one of them dies by drowning and the other due to fire or the collapse of a building, or both die together in a plague or battle, they will not inherit mutually. Reportedly, the French law requires the unity of cause for mutual inheritance, but does not limit the causes to drowning and burial under debris, as observed by the Imamiyyah; rather, in that law, mutual inheritance also takes place if the cause of death is fire.

2. The time of death of both should be unknown; hence if the time of death of just one of them is known, only the one whose time of death is unknown will inherit.

To give an example, suppose a building collapses on a couple or a boat sinks with both aboard and during the rescue operations the husband is found taking his last breath at 5 o'clock. Two hours later the wife is found dead, and no one knows whether she died before, after or simultaneously with the husband. The time of death of the husband is known, while that of the wife is unknown. The principle of presumption of delayed occurrence of an event requires that the wife, whose time of death is unknown, inherit the husband whose time of death is known, while he is not entitled to inherit anything from her.

Where the situation is reversed, the time of death of the wife being known and that of the husband remaining unknown, the husband will inherit not the wife. In other words, where the time of death of only one of them is known, the person whose time of death is unknown inherits from the one whose time of death is known, without the latter inheriting from the former. As the right to inherit is limited to the person whose time of death is unknown, there is no difference made in this situation by the cause of death, and the result is the same irrespective of whether the cause of death is drowning, fire, burial under fallen debris, epidemic or war.

But if the time of death of both is unknown, such as where the couple is found dead without the time of death of any of them being known, both are entitled to inherit mutually; that is, each inherits from the other. This difference between a situation where the time of death of one of two decedents is known and where the time of death of neither is known, has neither been reported from any foreign law, nor have I found it in the books of the early and latter Sunni legists nor the early Shi'i legists. This difference is only mentioned in the works of jurisprudence (*usul al-fiqh*) of recent Shi'i *mujtahidun*.

To sum up, the Imamiyyah limit the scope of mutual inheritance to the situations where the cause of death is either drowning or falling debris and where the time of death of both the decedents is unknown. Accordingly, if both die natural deaths, or by fire or are killed in battle, or as a result of a plague, etc.,

mutual inheritance will not take place, and the estate of each decedent will be transferred to his own living heirs without any of the two decedents inheriting from the other.

And where the time of death of only one of them is known, the decedent whose time of death is not known will inherit from the one whose time of death is known, without the latter inheriting from the former.

The Mode of Mutual Inheritance

The method applied in mutual inheritance is that it is first assumed, in the example given above, that the husband died before the wife. Consequently, her share of his estate is separated and her heirs inherit her property which existed while she was alive, along with her share of her husband's estate that was added to it.

Then it is assumed that the husband died after the wife. Consequently, his share of her estate is separated and his heirs inherit his property which existed prior to his death, along with his share of the wife's estate which was added to it. None of the two will inherit from the property which each of them has inherited from the other.

Hence, if the wife possessed 100 liras and the husband 1000 liras, the wife inherits from his 1000 and the husband from her 100 only, because if one of them inherits from the property which the other has inherited from him, it will lead to a person inheriting a part of his own property after his death! And it is impossible for a person to inherit a thing which he has left to be inherited by another.

To sum up, if two mutual heirs die by drowning or being buried under falling debris, when neither the sequence of their deaths is known nor the time of death of one of them, according to the Imamiyya h, each of them will inherit from the other from the property each owned prior to death.

Illustrations

A study of the above discussion will show that in many cases the four Sunni schools exclude women and those related through them from inheritance. The daughter's children, paternal aunts, uterine paternal uncles, the maternal grandfather, maternal uncles and maternal aunts are not entitled to inheritance in the presence of any of the residuaries who are relatives of the deceased through the father.

A full, or agnate, brother's daughter does not inherit with her own brother, and similarly a paternal uncle's daughter does not inherit with her own brother. Had there not been an explicit mention in the Qur'an of the inheritance of daughter, agnate sister, or sisters, and uterine brothers and sisters, their situation would have been similar to that of other female relatives and those related through them.

This was the practice during the *Jahiliyyah* during which the system of inheritance was biased in favour

of males and the practice of restricting inheritance to the eldest son who bore arms and fought was prevalent. Where there was no child capable of bearing arms, they gave the inheritance to the relatives of the father.

The reader has observed throughout the discussion of the Sunni system of inheritance that a woman inherits only where her share has been specifically mentioned in the Qur'an or where *qiyas* leads to her being considered equal to a female sharer --such as where a son's daughter is considered equivalent to a daughter. Apart from this, women are deprived from inheritance.

The Imamiyyah have considered both males and females as equally entitled to inherit, and the following examples illustrate this.

1. Where the decedent has left behind a daughter and a full or an agnate brother:

The four schools: Daughter: $\frac{1}{2}$ Brother : $\frac{1}{2}$

The Imamiyyah: The whole estate goes to the daughter to the exclusion of the brother.

2. Where the heirs are a daughter and the mother:

The four schools: Mother: $\frac{1}{6}$ Daughter: $\frac{3}{6}$

The remaining $\frac{2}{6}$ will be taken by the paternal grandfather if present, otherwise by the full brother, in their absence by the agnate brothers, and so on in the descending order of residuaries.

The Imamiyyah: Mother: $\frac{1}{4}$ Daughter: $\frac{3}{4}$

The residuaries receive nothing.

3. Where the deceased is survived by the parents and daughter's children:

The four schools: Mother (in the absence of a *hajib*): $\frac{2}{6}$ Father: $\frac{4}{6}$

The daughter's children receive nothing.

The Imamiyyah: Mother: $\frac{1}{6}$ Father: $\frac{2}{6}$ Daughter's children: $\frac{3}{6}$

4. Where a woman is survived by her parents and husband:

The four schools: Husband: $\frac{6}{12}$ Mother: $\frac{2}{12}$ Father: $\frac{4}{12}$

The Imamiyyah: Husband: $\frac{3}{6}$ Mother: $\frac{2}{6}$ Father: $\frac{1}{6}$

5. Where the heirs are the parents and a wife:

The four schools: Wife: $\frac{3}{12}$ Mother: $\frac{3}{12}$ Father: $\frac{6}{12}$

The Imamiyyah: Wife: $\frac{3}{12}$ Mother: $\frac{4}{12}$ Father: $\frac{5}{12}$

6. Where the father and daughter inherit:

The four schools: Father: $\frac{1}{2}$ Daughter: $\frac{1}{2}$

The Imamiyyah: Father: $\frac{1}{4}$ Daughter: $\frac{3}{4}$

7. Where the daughter and the paternal grandfather are present:

The four schools: Daughter: $\frac{1}{2}$ Grandfather: $\frac{1}{2}$

The Imamiyyah: The daughter inherits the whole estate to the exclusion of the grandfather.

8. Where the decedent is survived by a wife, the mother, and the paternal grandfather:

The four schools: Wife: $\frac{3}{12}$ Mother: $\frac{4}{12}$ Grandfather: $\frac{5}{12}$

The Imamiyyah: Wife: $\frac{1}{4}$ Mother: $\frac{3}{4}$

The grandfather receives nothing.

9. Where the decedent is survived by the paternal and maternal grandfathers:

The four schools: The whole estate is inherited by the paternal grandfather with the maternal grandfather receiving nothing.

The Imamiyyah: Paternal grandfather: $\frac{2}{3}$ Maternal grandfather: $\frac{1}{3}$

10. Where the decedent is survived by the maternal grandmother and the maternal grandfather:

The four schools: The whole estate is inherited by the maternal grandmother to the exclusion of the maternal grandfather.

The Imamiyyah: Maternal grandmother: $\frac{1}{2}$ Maternal grandfather: $\frac{1}{2}$

11. Where the decedent is survived by the maternal and paternal grandmothers:

The four schools: They will together inherit $\frac{1}{6}$ which they will distribute equally, and the remainder will go to the highest in the order of residuaries, and in their absence it will revert to the grandmothers in the opinion of the Hanafi and Hanbali schools, and escheat to the *bayt al-mal* in the opinion of the Maliki and the Shafi'i schools.

The Imamiyyah: Maternal grandmother: $\frac{1}{3}$ Paternal grandmother: $\frac{2}{3}$

12. Where the decedent leaves behind a son's daughter and a daughter's daughter.

The four schools: The son's daughter is entitled to a half and the remainder is given to the residuary without anything being given to the daughter's daughter.

The Imamiyyah: Each one of them will take the share of the person through whom they are related;

Son's daughter: $\frac{2}{3}$ Daughter's daughter: $\frac{1}{3}$

13. Where the decedent leaves behind a daughter's son and a son's daughter:

The four schools: The son's daughter gets a half and the remaining half goes to the residuary, without the daughter's son receiving anything.

The Imamiyyah: Daughter's son: $\frac{1}{3}$ Son's daughter: $\frac{2}{3}$

14. Where the decedent leaves behind a daughter and a son's daughter:

The four schools: Daughter: $\frac{3}{6}$ Son's daughter: $\frac{1}{6}$

The remainder goes to the residuary.

The Imamiyyah: The daughter takes the whole estate to the exclusion of the son's daughter.

15. Where the decedent is survived by two daughters and a son's daughter:

The four schools: Two or more daughters receive two-thirds and the remainder goes to the residuary, with the son's daughter receiving nothing.

The Imamiyyah: The whole estate goes to the daughters.

16. Where the decedent leaves behind two daughters, son's daughters and a son's son:

The four schools: The two daughters receive two-thirds and the remaining one-third goes to the son's daughters and son's son who distribute it with a male receiving twice the share of a female.

The Imamiyyah: The whole estate goes to the two daughters without the son's children receiving anything.

17. Where the decedent is survived by a daughter and a full or agnate sister:

The four schools: Daughter $\frac{1}{2}$ Sister $\frac{1}{2}$

The Imamiyyah: The whole estate goes to the daughter and the sister receives nothing

18. Where the decedent leaves behind 10 daughters and a full or agnate sister:

The four schools: Sister: $\frac{1}{2}$ 10 daughters: $\frac{1}{2}$

The Imamiyyah: The 10 daughters are entitled to the whole estate without the sister receiving anything.

19. Where the decedent is survived by a daughter and a uterine brother:

The four schools: The daughter receives a half as the sharer and the remainder goes to the residuaries.

The uterine brother receives nothing.

The Imamiyyah: The whole estate goes to the daughter.

20. Where the decedent leaves behind a daughter, a full or an agnate sister, and a full or an agnate paternal uncle:

The four schools: Daughter $\frac{1}{2}$ Sister $\frac{1}{2}$

The paternal uncle receives nothing.

The Imamiyyah: The daughter receives the whole estate.

21. Where the decedent is survived by a full or an agnate paternal uncle and a similar aunt:

The four schools: The uncle receives the whole estate to the exclusion of the aunt.

The Imamiyyah: Uncle: $\frac{2}{3}$ Aunt: $\frac{1}{3}$

22. Where the decedent leaves behind a daughter and a full or an agnate paternal uncle:

The four schools: Daughter: $\frac{1}{2}$ Uncle: $\frac{1}{2}$

The Imamiyyah: The whole estate goes to the daughter.

23. Where the decedent is survived by a daughter, a full or an agnate paternal uncle's son and a uterine paternal uncle:

The four schools: Daughter: $\frac{1}{2}$ Uncle's son: $\frac{1}{2}$

The uncle receives nothing.

The Imamiyyah: The whole estate goes to the daughter.

24. Where the decedent leaves behind maternal uncles and aunts and a full or an agnate paternal uncle's son:

The four schools: The paternal uncle's son receives the whole estate without the maternal uncles and aunts receiving anything.

The Imamiyyah: The maternal uncles and aunts will take the whole estate without the paternal uncle's son receiving anything. The method of distributing the estate between the maternal uncles and the maternal aunts has been mentioned earlier while discussing their inheritance.

25. Where the decedent is survived by a paternal uncle's daughter and a full or an agnate paternal uncle's son:

The four schools: The whole estate goes to the paternal uncle's son without the paternal uncle's daughter receiving anything, even where she is the full sister of the paternal uncle's son.

The Imamiyyah: Uncle's daughter: $\frac{1}{3}$ Uncle's son: $\frac{2}{3}$

26. Where the decedent leaves behind a maternal grandfather and a full or an agnate paternal uncle:

The four schools: The paternal uncle takes the whole estate to the exclusion of the maternal grandfather.

The Imamiyyah: The whole estate is inherited by the grandfather to the exclusion of the paternal uncle.

26. Where the decedent is survived by a full or an agnate brother's son and five sons of another full or agnate brother.

The four schools: The estate will be divided according to the number of sons and not as per the number of fathers. Hence the estate will be divided into six parts with each receiving one part

The Imamiyyah: The estate will be divided into as many parts as there are fathers and not into as many parts as there are heirs; each will receive the share of the person through whom he is related to the deceased. Hence one brother's son will receive five-tenths and the other brother's five sons will together receive five-tenths, each getting one-tenth.

27. Where the decedent leaves behind a brother's son and a full or an agnate brother's daughter:

The four schools: The male will inherit not the female, even though she is his full sister.

The Imamiyyah: They inherit jointly, the male receiving twice a female's share.

These examples are enough to give a complete picture of the intrinsic difference between the rules of inheritance of the Imamiyyah and the rules of inheritance of the Sunni schools.

1. The author of al-Jawahir says: The preponderant (mashhur) opinion among the Imamiyyah legists is that those related through the mother do not inherit the compensation for involuntary homicide. As to the right to qisas it is inherited by all those who inherit the heritage excepting the husband and the wife, who, however, will inherit the compensation in lieu of qisas.

2. Al-Shaykh Ahmad Kashif al-Ghita, Safinat al-najat, bab al-wasaya.

3. This is the proof (dalil) mentioned by al-Sayyid al-Hakim in al-Mustamsak, bab kafan al-mayyit. Al-Shaykh Muhammad Abu Zuhrah, in al-Mirath 'inda al-Ja'fariyyah, writes: It is obvious in this situation that the right of the creditors relates to the property itself and supersedes all other rights to that property. Through this observation, the Shaykh attributes to the Imamiyyah a consensus concerning the preference of the right of the pledger over funeral expenses, while there is a difference of opinion among them on this issue, and neither of the two differing opinions is preponderant to justify the attribution of consensus.

4. There is a difference between the mazalim and usurped (maghasib) properties. The mazalim are those in which haram and halal wealth has been mixed and the owner is unable to discern due to his ignorance, while the maghasib properties have a known owner. The mazalim also differ from those properties whose owners are not known (majhul al-malik), because in the latter the ignorance is concerning the property itself and its being mixed with other property is not necessary. The rule for the mazalim is to give them away as charity (sadaqah) on behalf of its (real) owner when there is no hope of finding him.

5. Al-Sayyid al-Hakim in Mustamsak al-Urwah, vol. VII, mas'alah 83, says: This—i.e. pro rata distribution—is customary among us, and this is what is required by the principle of not preferring something without a cause for such preference (tarjih bila murajjih) as well as the tradition of the Prophet (S): "The debt due to God is better entitled to repayment," is understood not to imply a difference (between the debts due to God and the debts due to people); rather it solely explains that it is wajib to fulfil haqq Allah and that neglecting it is not permissible.

6. The word 'Muslim' includes all those who pray facing towards the Ka'bah (ahl al-qiblah). Hence a Sunni inherits from a Shi'i and vice versa, in accordance with Qur'anic nass, the Sunnah, and ijma'. Rather, this rule is among the essentials of the faith, exactly like the wujub of salat and fasting.

7. Al-Murtadd 'an fitrah is a born Muslim who apostatizes. Al-Murtadd 'an millah is one born to kafir parents who then becomes a Muslim and later deserts his faith.

8. I believe that there is no one today who considers 'Ali ('a) and his descendants to possess divinity and that this sect has become extinct. I have myself visited those places in Syria which are inhabited by the 'Alawis, who are accused of holding such beliefs. I lived among them for a few days and travelled from one village to another in their region. I saw them following Islamic practices like all other Muslims, without the least difference. What do we say about one who proclaims from the ma'adhin at the times of prayer "La ilaha ilia Allah, Muammad rasal Allah"? Is not negating the divinity of all except Allah contrary to accepting the divinity of others? Then how is it correct to attribute ghuluw to them, when God has said:

وَلَا تَقُولُوا لِمَنْ أَلْفَىٰ إِلَيْكُمْ السَّلَامَ لَسْتَ مُؤْمِنًا

And do not say to anyone who offers you peace: 'You are not a believer'? (4:94)

9. This when he can acquire knowledge of the facts but neglects to do so. But one incapable of acquiring such knowledge is excusable.

10. The author of al-Jawahir has narrated from a large number of Imami legists that a culprit in an unintentional homicide is prevented from inheriting the compensation, without being prevented from inheriting from the remaining heritage.

11. 'Abd al-Muta'al al-asa'idi, al-Mirath fi al-Shari 'at al-Islimiyyah, 5th ed., p. 14.

12. 'Asabiyyah is of two types, related to nasab or sabab, and by sabab is meant the wila' of the manumitter and his children.

13. A single daughter and daughters, according to the Imamiyyah inherit as sharers as well as by 'return,' similarly, a single sister and sisters. But a son's daughter/daughters take the share of the person through whom they are related, that is the son.

14. These three categories of heirs are natural, because there is no intermediary between the decedent and his/her parents and children; hence they belong to the first category. Subsequently, after them, come the brothers/sisters and the grandparents, because they are related to the decedent through a single intermediary, the parents; hence, they belong to the second category. After them is the category of the paternal and maternal uncles/aunts, because they are related to the decedent through two intermediaries, i.e. the grandfather or the grandmother, and the father or the mother; hence they

belong to the third category.

[15.](#) Al-Shaykh Abu Zuhrah, in al-Mirath 'inda al-Ja'fariyyah, has dealt with the proofs mentioned by the Imamiyyah refuting ta'sib, but he has not mentioned this argument of theirs.

[16.](#) Full or consanguine sisters are residuaries with a daughter, and jointly share the estate with her like the full or consanguine brothers.

[17.](#) The famous and great Tabi'i faqih who has been highly eulogized by the Sunni 'ulama'. He had met ten Sahabah.

[18.](#) The paternal grandmother does not exclude a distant maternal grandmother in the opinion of the Shafi'i and the Mliki schools (e.g. the father's mother with the mother's mother's mother), while in the opinion of the Hanafi and the Hanbali schools she is excluded. (al-Sa'idi's al-Mirath fi al-Shari'at al-Islamiyyah)

[19.](#) The schools differ regarding the signs of life, whether it is the making of sounds or movement (crying or breast-feeding). That which is important is that life be proved in any possible manner. Hence, if it is proved that the child was born unconscious and possessed life, he will doubtlessly inherit.

[20.](#) This is the earlier opinion of al-Shafi'i; his latter opinion is that a divorcee of a revocable divorce inherits during 'iddah, while a divorcee of an irrevocable divorce does not.

[21.](#) The rule that one who is related through another is excluded by the other, is fully accepted by the Imamiyyah, while the Sunni schools consider the uterine brothers an exception. Hence, according to them, they inherit with the mother though they are related through her. The Hanbalis are of the opinion that a paternal grandmother inherits along with the father, i.e. along with her son. (al-Mughni, 3rd. ed., vol. 6, p. 211)

[22.](#) According to the Sunni schools, the mother will receive one-sixth if the decedent has children or son's children, how lowsoever. As regards the daughter's children, their presence or absence is of no effect and they do not stop the mother from inheriting more than one-sixth. According to the Imamiyyah, the daughter's children are like one's own children. Hence, the daughter's daughter is considered a child who excludes the mother from inheriting more than one-sixth, exactly like a son.

[23.](#) Kashif al-haqa'iq fi sharh Kanz al-daqa'iq, vol. 2, and al-'Iqna' fi hall al-faz Abi Shuja, vol. 2, bab al-fara'id.

[24.](#) See al-Jawahir, al-Masalik and other books on Imami fiqh. The whole text quoted here is from al-Shaykh Ahmad Kashif al-Ghita's Safinat al-najat, which I have preferred to the text of my own book al-Fusul al-Shariyyah, because it is more lucid and comprehensive.

[25.](#) Regarding the inheritance of brothers and sisters in the presence of the paternal grandfather, the Sunni schools differ among themselves. This is discussed in the part on grandparents of this section.

[26.](#) A "sahih" grandfather, in the terminology of Sunni fuqaha', is one between whom and the decedent no female intervenes (e.g. the father's father), and a sahih grandmother is one between whom and the decedent no "fasid" grandfather intervenes (e.g. the mother's mother). The intervening of a "fasid" grandfather (e.g. the mother's father's mother) makes the grandmother also a "fasid" grandmother.

[27.](#) According to the Sunni schools, a daughter excludes uterine brothers and sisters from inheritance, though not full or agnate brothers and sisters, despite their opinion that where a sharer and a residuary are present, the distribution will start with the sharer and the remainder will go to the residuary, and a uterine brother or sister is included in sharers while full and agnate brothers or sisters are residuaries. Hence it was obligatory here that the daughter not exclude a uterine brother and sister, or if she were to affect such exclusion, to exclude all kinds of brothers and sisters as observed by the Imamiyyah.

[28.](#) The Imamiyyah do not give the return to a uterine brother or sister where they jointly inherit with a full or agnate brother or sister; the return goes only to the latter.

[29.](#) On the basis that full or agnate brother's sons are regarded as residuaries and the brother's daughters as distant kindred, the four schools concur that if the decedent leaves behind a full or agnate brother's son who is accompanied by his own full sister, he takes the whole estate to her exclusion.

[30.](#) They don't inherit only with the paternal uncle's daughters; their presence is similar to their absence in the presence of paternal uncle's sons. Therefore, the four schools concur that if a decedent is survived by a full or agnate paternal uncle's son accompanied by the latter's own full sister, he will be entitled to the whole estate to her exclusion.

[31.](#) The Sunni fuqaha' have extensively discussed about distant kindred, whom they consider a third category of heirs after the sharers and the residuaries. They mention different situations and conditions, which cannot be recorded, enumerated

and comprehended easily. Hence the instances mentioned here suffice to present a general outline of them. Those interested in details should refer to al-Mughni, 3rd ed. vol. 6, and al-Sa'idi's Kitab al-mirath fi al-Shari'at al-Islamiyyah. [32](#). According to the authors of al-Masalik and al-Jawahir, the preponderant opinion among Shi'i fuqaha' is that the decedent's property will not be distributed until after confirming his death, either by tawatur, testimony, or by a report supported by indications capable of leading to such knowledge, or by the expiry of a period after which a like person does not generally stay alive.

[33](#). Al-Shi'rani, vol. 2, Kitab al-mizan, bab al-'irth.

[34](#). The details of this will be found in the books of usul al-fiqh of the Imamiyyah (bab tanbihat al-'istishab); of these is the popular al-Rasa'il of al-Shaykh al-'Ansari, Taqirrat al-Na'ini of al-Sayyid al-Khu'i, and Hashiyat al-Rasa'il of al-Shaykh al-'Ashtiyani.

[35](#). See Miftah al-Karamah, al-Masalik, and al-Lum'ah.

10. Waqf

Waqf

'*Wuquf*' and '*awqaf*' are the plurals of '*waqf*' and its verb is '*waqafa*', though '*awqafa*' is also rarely used, as in *al-Tadhkirah* of al-Allamah al-Hilli. The word '*waqf*' literally means 'to detain' and 'to prevent', as in '*wuqiftu 'an sayri*', i.e. 'I was prevented from making my journey.'

In the context of the Shari'ah it implies a form of gift in which the corpus is detained and the usufruct is set free. The meaning of 'detention' of the corpus is its prevention from being inherited, sold, gifted, mortgaged, rented, lent, etc. As to dedication of the usufruct, it means its devotion to the purpose mentioned by the *waqif* (donor) without any pecuniary return.

Some legists consider *waqf* to be illegal in the Islamic Shari'ah and regard it as contradictory to its basic principles except where it concerns a mosque. But this view has been abandoned by all the schools of *fiqh*.

Perpetuity and Continuity

All schools, excepting the Maliki, concur that a *waqf* is valid only when the *waqif* intends the *waqf* to be perpetual and continuous, and therefore it is considered a lasting charity. Hence if the *waqif* limits its period of operation (such as when he makes *waqf* for 10 years or until an unspecified time when he would revoke it at his own pleasure, or for as long as he or his children are not in need of it, etc.) it will not be considered a *waqf* in its true sense.

Many Imami legists hold that such a condition nullifies the *waqf*, though it will be considered as valid *habs* (detention) [1](#) if the owner of the property intends *habs*. But if he intends it to be a *waqf*, it will be void both as *waqf* as well as *habs*. By a valid *habs* is meant that the usufruct donated by the owner for a

particular object will be so applied during the period mentioned and return to him after the expiry of that period.

However, this is not something which contradicts the provisions of perpetuity and continuity in *waqf*, although al-Shaykh Abu Zuhrah has made a confusion here due to his inability to appreciate the difference between *waqf* and *habs* in Imami *fiqh*. Consequently he has ascribed to them the view that perpetual and temporary *waqf* are both valid. This is incorrect, because according to the Imamiyyah a *waqf* can only be perpetual.

The Malikis say: Perpetuity is not necessary in *waqf* and it is valid and binding even if its duration is fixed, and after the expiry of the stipulated period the property will return to the owner.

Similarly, if the *waqif* makes a provision entitling himself or the beneficiary to sell the *wuquf* property, the *waqf* is valid and the provision will be acted upon (*Sharh al-Zarqani*, vol. 7, 'bab al-waqf').²

If a *waqf* is made for an object which is liable to expiry (such as a *waqf* made for one's living children, or others who are bound to cease existing) will it be valid? Moreover, presuming its validity, upon whom will it devolve after the expiry of its object?

The Hanafis observe: Such a *waqf* is valid and it will be applied after the expiry of its original object to the benefit of the poor.

The Hanbalis say: It is valid and will thereafter be spent for the benefit of the nearest relation of the *waqif*. This is also one of two opinions of the Shafi'is.

The Malikis are of the opinion that it is valid and will devolve on the nearest poor relation of the *waqif*, and if all of them are wealthy, then on their poor relatives (*al-Mughni*, *al-Zarqani*, and *al-Muhadhdhab*).

The Imamiyyah state: The *waqf* is valid and will devolve on the heirs of the *waqif* (*al-Jawahir*).

Delivery of Possession

Delivery of possession implies the owner's relinquishment of his authority over the property and its transfer to the purpose for which it has been donated. According to the Imamiyyah, delivery is a necessary condition for the deed of *waqf* to become binding, though not for its validity. Therefore, if a *waqif* dedicates his property by way of *waqf* without delivering possession, he is entitled to revoke it.

If a *waqif* makes a *waqf* for public benefit (e.g. a mosque or a shrine or for the poor), the *waqf* will not become binding until the custodian (*mutawalli*) or the *hakim al-shar'* takes possession of the donated property, or until someone is buried in the donated plot of land, in the case of a graveyard, or prayers are offered in it, if it is a mosque, or until a poor person uses it with the permission of the *waqif*, in a *waqf* for the benefit of the poor. If delivery is not effected in any of the above-mentioned forms it is valid for a *waqif* to revoke the *waqf*.

If a *waqf* is made for a private purpose, such as for the benefit of the *waqif*'s children, if the children have attained majority, it will not become binding unless they take possession of it with his permission, and if they are minors the need for giving permission does not arise because the *waqif*'s possession of it as their guardian amounts to their having taken possession.

If the *waqif* dies before possession has been taken, the *waqf* becomes void and the property assigned for *waqf* will be considered his heritage. For example, if he makes the charitable *waqf* of a shop and dies while it is still in his use, it will return to the heirs.

The Malikis say: Sole taking possession does not suffice and it is necessary that the donated property remain in the possession of the beneficiary or the *mutawalli* for one complete year. Only after the completion of one year will the *waqf* become binding and incapable of being annulled in any manner.

The Shafi'is and Ibn Hanbal in one of his opinions, state: A *waqf* is completed even without delivering possession; rather, the ownership of the *waqf* will cease on the pronouncement of *waqf* (Abu Zuhrah, *Kitab al-waqf*).

Ownership of the Waqf Property

There is no doubt that prior to donation the *waqf* property is owned by the *waqif*, because a person cannot make *waqf* of a property that he does not own. The question is whether, after the completion of the *waqf*, the ownership of the property remains with the *waqif*, with the difference that his control over its usufruct will cease, or if it is transferred to the beneficiaries. Or does the property become ownerless, being released from ownership?

The legists hold different opinions in this regard. The Malikis consider it to remain in the ownership of the *waqif*, though he is prohibited from using it.

The Hanafis observe: A *waqf* property has no owner at all, and this is the more reliable opinion according to the Shafi'i school.³ (*Fath al-Qadir*, vol.5, 'bab al-waqf'; Abu Zuhrah, *Kitab al-waqf*)

The Hanbalis say: The ownership of the *waqf* property will be transferred to the beneficiaries.

Al-Shaykh Abu Zuhrah (1959, p.49) has ascribed to the Imamiyyah the view that the ownership of the *waqf* property remains with the *waqif*. He then observes (p.106): This is the preponderant view of the Imamiyyah.

Abu Zuhrah does not mention the source relied upon by him for ascribing this view, and I do not know from where he has extracted it, for it has been mentioned in *al-Jawahir*, which is the most important and authentic source of Imami fiqh. According to most legists, when a *waqf* is completed, the ownership of the *waqif* ceases; rather, it is the preponderant view and the authors of *al-Ghunyah* and *al-Saria'ir* have even reported an *ijma'* on this view.

Though all or most Imami legists concur that the ownership of the *waqf* ceases, they differ as to whether the *waqf* property totally loses the characteristic of being owned (in a manner that it is neither the property of the *waqif*, nor of the beneficiaries. and, as the legists would say, is released from ownership) or if it is transferred from the *waqif* to the beneficiaries.

A group among them differentiates between a public *waqf* (e.g. mosques, schools, sanatoriums, etc.) and a private *waqf* (e.g. a *waqf* for the benefit of one's descendants). The former is considered as involving a release from ownership and the latter a transfer of ownership from the *waqif* to the beneficiary.

The difference of opinion regarding the ownership of *waqf* property has practical significance in determining whether the sale of such property is valid or not, and in the case where a *waqf* is made for a limited period or for a terminable purpose. According to the Maliki view that the *waqf* remains the *waqif's* property, its sale is valid and the corpus will return to the *waqif* on expiry of the period of *waqf* or when the object for which the *waqf* was made terminates. But according to the view which totally negates the ownership of *waqf* property, its sale will not be valid, because only owned property can be sold, and a *waqf* for a limited period will also be invalid.

According to the view which considers the ownership of *waqf* property as transferred to the beneficiaries, the property will not return to the *waqif*. The consequences of this difference will be more obvious from the issues to be discussed below. It is necessary to understand this divergence of viewpoints because it affects many issues of *waqf*.

The Essentials of Waqf

There are four *arkan* (essentials) of *waqf*: (1) the declaration (*al-sighah*) (2) the *waqif* (3) the property given as *waqf* (*al-mawqufah*) (4) the beneficiary (*al-mawquf 'alayh*).

The Declaration

There is a consensus among all the schools that a *waqf* is created by using the word '*waqafu*' (I have made a *waqf*), because it explicitly signifies the intention of *waqf* without needing any further clarification. They differ regarding the creation of *waqf* by the use of such words as '*habastu*' (I have detained), '*sabbaltu*' (I have donated as charity), '*abbadtu*' (I have perpetually settled) etc., and go into needless details.

The correct view is that a *waqf* is created and completed by using any word which is capable of proving the intention of creating a *waqf*, even if it belongs to another language, because here words are means of expressing one's intention, not an end in themselves.⁴

Al-Mu'atat (The creation of Waqf without the Sighah)

Is a *waqf* completed by an act (such as when someone makes a mosque and calls the people to pray in it, or allows burials to take place in a piece of land with an intention of making it a *waqf* for a graveyard) without one uttering '*waqafu*' or '*habastu*' or similar words, or is it necessary that the declaration take place, the act by itself being insufficient?

The Hanafi, Maliki and Hanbali schools say: An act by itself is sufficient and the property becomes, consequent to the act, a *waqf* (Ibn Qudamah's *al-Mughni*, vol.5, 'bab al-waqf'; *Sharh al-Zarqani 'ala Mukhtasar Abi Diya'*, vol.7, 'bab al-waqf').

A group of major Imami scholars also holds this view, including al-Sayyid al-Yazdi in his work *Mulhaqat al-Urwah*, al-Sayyid Abu al-Hasan al-Isfahani in *Wasilat al-najat* and al-Sayyid al-Hakim in *Minhaj al-Salihin*. Al-Shahid al-Awwal and Ibn Idris have also been reported to hold this view.

The Shafi'is observe: A *waqf* is completed only by the recital of the *sighah* (*al-Mughni*, vol.5).

Acceptance

Does *waqf* require acceptance or is its declaration as *waqf* (by the *waqif*) sufficient? In other words, is *waqf* created by a single decision, or is it necessary that there be two concurrent decisions?

In this context the legists have divided *waqfs* into public (in which the *waqif* has no specific beneficiary in his mind, e.g. *waqfs* made for the poor and *waqfs* of mosques and shrines) and private *waqfs* (e.g. a *waqf* made for the benefit of one's children).

The four Sunni schools concur that a public *waqf* requires no acceptance, and according to the Malikis and most Hanafi legists a private *waqf*, like a public one, requires no acceptance.

The Shafi'is incline towards the necessity of acceptance (al-Hisni al-Shafi'i, *Kifayat al-akhyar*, vol. 1, 'bab al-waqf'; Abu Zuhrah, *Kitab al-waqf*, p. 65, 1959 ed.).

The Imami legists differ among themselves, holding one of the following three opinions:

1. Necessity of acceptance in both public and private *waqfs*.
2. Absence of such necessity in both kinds of *waqfs*.
3. A distinction is made between a public and private *waqf*, and acceptance is necessary only in the latter. This is the same view which the Shafi'is have favoured, and is also the correct one.[5](#)

Al-Tanjiz

The Malikis observe: It is valid for a *waqf* to depend upon a contingency. Therefore, if the owner says: "When such and such a time comes, my house will become a *waqf*," it is valid and the *waqf* is completed (*Sharh al-Zarqani 'ala Mukhtasar Abi Diya'*, vol. 7, 'bab al-waqf').

The Hanafi and the Shafi'i schools state: It is not valid to make a *waqf* contingent on the occurrence of an event; rather, it is *wajib* that *waqf* be unconditional, and if it is made to depend upon a contingency, as in the above-mentioned example, it will remain the property of the owner (Shirbini's *al-'Iqna'*, vol. 2, 'bab al-waqf'; *Fath al-Qadir*, vol. 5, 'kitab al-waqf').

I don't know how these two schools allow divorce to depend upon a contingency, while they disallow similar dependence in other spheres of *fiqh*, despite the fact that caution and stringency are more necessary in marital issues when compared to other issues.

The Hanbalis say: A *waqf* can be made contingent on the occurrence of death. Apart from this, dependence on any other contingency is invalid (*Ghayat al-muntaha*, vol. 2, 'bab al-waqf').

Most Imami legists consider *tanjiz* (its being unconditionally operational) as *wajib* and do not permit its being made contingent on a future event. (al-'Allamah al-Hilli, *al-Tadhkirah*, vol. 2; *al-Jawahir*, vol. 4; and *Mulhaqat al-'Urwah*, 'bab al-waqf').⁶ Therefore, if a person says: "When I die, this property will become a *waqf*," it will not become a *waqf* after his death. But if he says: "After my death, make this property a *waqf*," it will be considered a will for creating a *waqf* and the executor of the will will be responsible for creating the *waqf*.

Al-Waqif

The schools concur that sanity is a necessary condition for the creation of a *waqf*. Therefore, a *waqf* created by an insane person is not valid, because the Shari'ah does not burden him with any duty and does not attach any significance to his decisions, words or deeds.

The schools also concur upon maturity as a necessary condition. This implies that a *waqf* created by a child, irrespective of his being discerning or not, is invalid, and neither is the guardian entitled to create a *waqf* on his behalf, nor the *waqif* empowered to act as a guardian in this regard or to allow the creation of such a *waqf*. Some Imami legists consider a *waqf* created by a child over ten years as valid, but most of them oppose this view.

An idiot is also incapable of creating a *waqf*, for it is a disposition of property and an idiot is not authorized to carry out acts of such a nature.⁷ The Hanafis say: It is valid for an idiot to bequeath one-third of his wealth provided that the bequest is for charitable purposes, irrespective of whether it is in the form of a *waqf* or otherwise (*al-Fiqh 'ala-madhahib al-'arba'ah*, vol.2, 'bab mabthath al-hajr 'ala al-safih').

Niyat al-Qurbah

There is no doubt that the intention of creating a *waqf* is necessary for its creation. Hence if a declaration signifying the creation of *waqf* is made by a person who is intoxicated, unconscious, or asleep, or is made in jest, the recital will be void, because of the principle of unchanged status of the ownership of the

property.

The schools differ on the question as to whether *niyyat al-qurbah* (the intention to seek God's good-pleasure) is a necessary condition like sanity and puberty (so that if a *waqif* makes a *waqf* for a worldly motive it would fail to be operative) or if it becomes operative without it.

The Hanafis say: *Qurbah* is a necessary condition and requires to be fulfilled, either presently or ultimately; i.e. the property donated should necessarily be used for charitable purposes, either from the time of creation of the *waqf* or at a later date; e.g. when one makes a *waqf* for the benefit of some wealthy people presently alive, and after them, for the benefit of their destitute descendants (*Fath al-Qadir*).⁸

Malik and the Shafi'is observe: *Niyyat al-qurbah* is not necessary in a *waqf* (Abu Zuhrah, *Kitab al-waqf*, p.92 ff.).

The Hanbalis state: It is necessary that *waqf* be made for a pious, spiritual purpose (e.g. for the poor or for mosques, bridges, books, for relatives, etc.) because the Shari'ah has created the institution of *waqf* for acquiring spiritual reward, otherwise the purpose for which it was incorporated in the Shari'ah is not achieved (Ibn Dawayan, *Manar al-sabil*, p.6, 1st ed.).

From among the Imamiyyah, the authors of *al-Jawahir* and *Mulhaqat al-'Urwah* observe: *Qurbah* is not a condition for the validity of *waqf*, or for taking its possession, rather it is essential for acquiring its spiritual reward. Therefore a *waqf* is completed without the presence of a spiritual motive.

Death Illness

An illness resulting in death or generally capable of causing it is called death illness (*marad al-mawt*).

All the schools concur that if a person in such an illness makes a *waqf* of his property, it will be valid and will be created from the bequeathable third, and if it exceeds this limit the consent of the heirs is necessary regarding the excess.

Summarily, all those conditions required of a seller (e.g. sanity, puberty [*bulugh*], maturity [*rushd*], ownership, absence of a legal disability, such as insolvency or idiocy) are also necessary for a *waqif*.

Al-Mawquf

The schools concur that a *mawquf* property should fulfil all the conditions required of a saleable commodity, that it should be a determinate article owned by the *waqif*. Therefore the *waqf* of a receivable debt or an unspecified property (such a when the owner says 'a field from my property' or 'a part of it') or that which cannot be owned by a Muslim (e.g. swine) is not valid. The schools also concur that the *mawquf* should have a usufruct and must not be perishable. Hence that which cannot be utilized except by consuming it (e.g. eatables) will not be valid as a *waqf*. To this class also belongs the *waqf* of

usufruct; therefore, if a tenant makes a *waqf* of the usufruct of a house or land which he has rented for a specific period, it will not be valid, because the notion of *waqf* as something in which the property is detained and its usufruct dedicated for a charitable purpose is not fulfilled here.

There is consensus as well regarding the validity of *waqf* of immovable property, e.g. land, building, orchard, etc.

All the schools, excepting the Hanafis, concur on the validity of *waqf* of movable property, such as animals, implements and utensils, for they can be utilized without being consumed.

According to Abu Hanifah, the *waqf* of movable property is not valid. But of his two pupils, Abu Yusuf and Muhammad, the former accepts the *waqf* of movable property provided it is attached to an immovable property (for instance, cattle and implements attached to an agricultural land) and the latter limits its validity to the weapons and horses used in war (*Fath al-Qadir*, vol.5, and *Sharh al-Zarqani*, vol.7).

The schools further concur that it is valid to make *waqf* of an inseparable share (*musha'*) in a property (e.g. an undivided half or one-fourth or one-third) except where it is a mosque⁹ or graveyard, because these two are incapable of being jointly owned (al-'Allamah al-Hilli, in *al-Tadhkirah*; al-Shi'rani in *al-Mizan*; Muhammad Salam Madkur in *al-Waqf*).

According to the author of *Mulhaqat al-'Urwah*, a work on Imami *fiqh*, the *waqf* of the following forms of property is not valid: 1) mortgaged property; (2) property whose possession cannot be delivered (for instance, a bird in the sky and a fish in water, even if they are owned by the *waqif*); (3) a stray animal; (4) usurped property which the *waqif* or the beneficiary are unable to recover; but if this property is made a *waqf* for the benefit of the usurper the *waqf* is valid because the condition of possession is achieved.

The Beneficiary (al-Mawquf 'Alayh)

Al-mawquf 'alayh is the person entitled to the proceeds of the *waqf* property and its usufruct. The following requirements must be fulfilled by the beneficiary:

1. He should exist at the time of the creation of the *waqf*. If he does not (as when a *waqf* is created for a child to be born later), the Imami, Shafi'i and Hanbali schools consider the *waqf* as invalid, while the Maliki school regards it as valid. It is stated in *Sharh al-Zarqani 'ala' Mukhtasar Abi Diya'*: A *waqf* in favour of a child to be born in the near future is valid, though it will become binding only on its birth. Therefore, if it is not conceived or miscarries, the *waqf* will become void.

According to all the schools, when the beneficiary ceases to exist after having existed at the time of the creation of *waqf*, the *waqf* is valid (as when a person creates a *waqf* for his existing children and their future descendants). Regarding a *waqf* in favour of a foetus, the Shafi'i, Imami and Hanbali schools consider it invalid, because a foetus is incapable of owning property until it is born alive. This principle is

not negated by the allocation of a share in inheritance for an unborn child in anticipation of its birth and by the validity of a bequest in its favour, because these two instances have specific proofs for their validity. Furthermore, the allocation of a share in inheritance for an unborn child is meant to safeguard its right and to avoid the complications which would arise as a result of redistribution.

2. He should be capable of owning property. Hence it is neither valid to create a *waqf* nor to make a bequest in favour of an animal, as done by Westerners, especially women, who bequeath part of their wealth to dogs. Regarding the *waqf* of mosques, schools, sanatoriums etc., it is actually a *waqf* in favour of the people who benefit from them.

3. The purpose of the *waqf* should not be sinful (as it would be when made for a brothel, or a gambling club, pub or for highwaymen). As to a *waqf* made in favour of a non-Muslim, such as a *dhimmi*, there is consensus about its validity, in accordance with this declaration of God Almighty:

لَا يَنْهَاكُمُ اللَّهُ عَنِ الَّذِينَ لَمْ يُقَاتِلُوكُمْ فِي الدِّينِ وَلَمْ يُخْرِجُوكُمْ مِنْ دِيَارِكُمْ أَنْ تَبَرُّوهُمْ وَتُقْسِطُوا إِلَيْهِمْ إِنَّ اللَّهَ يُحِبُّ
الْمُقْسِطِينَ

God does not forbid you respecting those who have not waged war against you on account of your religion and have not driven you forth from your homes, that you show them kindness and deal with them justly. Verily, Allah loves the doers of justice. (60:8)

The Imami legist al-Sayyid Kazim al-Yazdi observes in the chapter on *waqf* of his book *Mulhaqat al-Urwah*: "...Rather, it is also valid to create a *waqf* in favour of a *harbi* and to show kindness to him in order to encourage him to righteous conduct."

Al-Shahid al-Thani, in *al-Lum'ah al-Dimashqiyyah, bab al-waqf*, states: "A *waqf* in favour of *dhimmi*s is valid, because it is not sin and also because they are creatures of God and a part of humanity which has been honoured by Him." He adds: "It is not valid to create a *waqf* in favour of any of the Khawarij or Ghulat,¹⁰ because the former charge Amir al-Mu'minin 'Ali ('a) with unbelief and the latter ascribe divinity to him, while the middle path is the right one, as mentioned by 'Ali ('a) himself:

هلك فيّ اثنان: مبغض قال، ومحِبُّ غال

Two kinds of people will perish concerning me: the one who hates me and the other who goes to the extreme in his love for me.

4. The beneficiary should be specifically known. Thus a *waqf* created in favour of an unidentified man or woman will be void.

The Malikis say: A *waqf* is valid even if the *waqif* does not mention the purpose of the *waqf*. Hence if he

says: "I dedicate this house of mine as *waqf*, without adding anything else, the *waqf* will be valid and its usufruct will be spent for charitable purposes (*Sharh al-Zarqani 'ala Abi Diya*).

The Imami, Shafi and Maliki schools observe: It is not valid for a *waqif* to create a *waqf* for the benefit of his own person or to include himself among its beneficiaries, because there is no sense in a person transferring his property to himself. But if, for instance, he makes a *waqf* in favour of the poor and later becomes poor himself, he will be considered one of them, and similarly if he creates a *waqf* in favour of students and later becomes a student himself.

The Hanafi and Hanbali schools, however, permit such a *waqf* (*al-Mughni*; Abu Zuhrah, al-Shi'rani's *al-Mizan*; *Mulhaqat al-Urwah*).

A Waqf for prayers (al-waqf 'ala al-salat)

The invalidity of a *waqf* created for the *waqif's* benefit reveals the invalidity of a large number of such *waqfs* in the villages of Jabal (Lebanon) which have been created by their *waqifs* to meet the expenses of the prayers to be offered posthumously on their behalf. This is so even if we accept the validity of a proxy reciting *mustahabb salat* on behalf of the dead – aside from its validity with respect to the *wajib salat* – because it is in fact a *waqf* in one's own favour.

Doubts Concerning Waqf

The Imami author of *al-Mulhaqat* observes: If a doubt arises as to which among two persons is the beneficiary, or which among two purposes is the intended object of the *waqf*, the solution is effected by drawing lots or by effecting a 'compulsory compromise.' (*al-sulh al-qahri*). 'Compulsory compromise' means distribution of the usufruct among the two parties or purposes.

If the purpose of the *waqf* is unknown and we do not know whether it is for a mosque or for the poor or for some other purpose, the *waqf* will be applied to charitable purposes.

If a doubt arises as to which of two properties is subject of *waqf* (such as where we know the existence of a *waqf*, but are not certain whether it relates to the *waqif's* house or shop) resort will be made to drawing lots or to a compulsory compromise; i.e. a half of both the house and the shop will be treated as *waqf*.

Conditions of a Waqif and His Pronouncement

The Waqif's Intention

If a *waqf* is a gift and a charity, the *waqif* is the giver of that gift and charity, and it is obvious that any sane and mature adult free of financial disability is free to grant from his property whatever he wishes to anyone in any manner he chooses. It is stated in the hadith:

الناس مسلطون على أموالهم

People have been given full authority over their properties, and one of the Imams ('a) has said:

للقوف بحسب ما يقفها أهلها

Waqfs are to be managed in a manner provided by their *waqifs*.

Accordingly, the legists say: The conditions laid down by the *waqif* are like the words of the Lawgiver, and his pronouncements are like His pronouncements as regards the obligation of following them.

Similar is the case of a *nadhir*, *halif*, *musi* and *muqirr*. [11](#)

Consequently, if the intention of the *waqif* is known (that he had a specific intention and none else), it will be followed even if it is against the commonly understood meaning of his words. For instance, if we know that he intends by the words 'my brother' a particular friend of his the *waqf* will be given to the friend, not to his brother. This is because usage is valid as a means of determining one's intention, and where we already know the intention, the usage loses its significance. But if we are unaware of the intention, the usage is followed, and if there is no particular usage concerning it and nothing special is understood from the words of the *waqif*, the literal meaning will be resorted to, exactly like the procedure applied regarding the words of the Qur'an and the Sunnah.

The Permissible Conditions

We had observed that a *waqif* meeting all the conditions is entitled to lay down conditions of his choice. Here we mention the following exceptions.

1. A condition is binding and enforceable when it is contiguous to the creation of *waqf* and occurs along with it. Thus, if the *waqif* mentions it after completing the deed, it will be null and void, because the *waqif* has no authority over the *waqf* property after its ownership has passed on from him.
2. He may not lay down a condition which contradicts the nature of the contract (for instance, the condition that the ownership of the *waqf* property will be retained by him, so that he could pass it on as inheritance to his heirs, or sell it, or gift it or rent it or lend it if he so intends). The presence of such a condition implies that it is and is not a *waqf* at the same time. Because the presence of such a condition abrogates the deed creating the *waqf*, the *waqf* will be left without a deed, while the presumption is that it is not executed without a deed. In other words, such a *waqif* is similar to the seller who declares: "I sell this to you on the condition that its ownership will not be transferred to you and that its consideration will not be transferred to me." This is the reason why the legists have concurred that every condition contrary to the contract, apart from being void, also nullifies the contract.

But the famous legist al-Sinhuri mentions in his compilation of select laws from Islamic *fiqh* that the Hanafis exclude mosques from the above rule. Hence a void condition does not nullify its *waqf*, while in *waqfs* other than for mosques such a condition is void and also nullifies the *waqf* (Madkur's *al-Waqf*).

3. The condition should not oppose any rule of the Islamic Shari'ah. For instance, it should not require the performance of a prohibited or the omission of an obligatory act. It is mentioned in the hadith:

مَنْ اشْتَرَطَ شَرْطاً سِوَى كِتَابِ اللَّهِ عَزَّ وَجَلَّ فَلَا يَجُوزُ ذَلِكَ لَهُ وَلَا عَلَيْهِ

He who lays down a condition contradicting the Book of God Almighty, it will neither be valid for him nor against him.

One of the Imams (A) states:

المسلمون عند شروطهم، إلا شرطاً حَرَّمَ حلالاً أو أَحَلَّ حراماً

Muslims are bound by the conditions that they lay down, except those which prohibit a *halal* or permit a *haram*.

Excepting the above-mentioned kind, all other conditions mentioned at the time of the deed that neither contradict its spirit nor any rule of the Book and the Sunnah are valid and their fulfilment is *wajib* by consensus (for instance if the *waqif* lays down the condition that a home is to be built for the poor from the agricultural produce of the *waqf* or if it is to be spent on the scholars, etc). Summarily, the *waqif*, like anyone else, is required to base all his dispensations on the principles of logic and the Shari'ah, irrespective of whether they pertain to *waqf* or matters of diet, travel. etc. Therefore, if his act is in accordance with the Shari'ah and reason, it is *wajib* to respect it, not otherwise.

The Contract and This Condition

There is no doubt that a void condition, whatever its form, does not require to be fulfilled. It is also evident that a void condition which is contrary to the spirit of a contract nullifies the contract itself. Hence there is consensus regarding its being void in itself and its nullifying effect extending beyond itself, without there being any difference between *waqf* and other forms of contract in this regard.

The schools differ regarding a condition which is contrary to the Book and the Sunnah without going against the spirit of the contract (for instance, when a person makes his house a *waqf* in favour of Zayd on condition that he perform *haram* acts in it or abstain from performing *wajib* duties), as to whether the invalidity of this condition necessitates the annulment of the contract as well (so that the carrying out of the contract is not necessary, in the same way as fulfilment of the condition is not necessary), or if the invalidity would be limited to the condition.

According to the Hanafis, as mentioned by Abu Zuhrah in *Kitab al-waqf*, p. 162: The conditions which contradict the regulations of the Shari'ah are void, while the *waqf* is valid. It does not become void due to their invalidity, because a *waqf* is a charity and charities are not invalidated by void conditions.

The Imamiyyah differ among themselves. Some among them observe that the presence of a void condition does not necessitate the annulment of the contract while others consider that necessary. A third group abstains from expressing any view (*al-Jawahir* and al-Ansari's *al-Makasib*).

Our view here is that the invalidity of a condition which contradicts the precepts of the Book and the Sunnah does in no manner entail the invalidity of the contract. The reason is that a contract possesses certain essentials (*arkan*) and conditions, such as, the offer, its acceptance, the contracting party's sanity, maturity, and ownership of the subject of transaction, and its transferability. When these aspects of the contract are fulfilled, the contract is undoubtedly valid. As to the presence of void conditions, which have no bearing, immediate or remote, on the essentials and conditions of the contract but exist only marginally, their invalidity does not extend to the contract. Even if it is presumed that the invalidity of a condition creates a discrepancy in the contract – such as an uncertainty resulting in risk in a transaction of sale – the contract will be void in such a situation as a result of the uncertainty, not because the condition is void.

The author of *al-Jawahir* also holds this opinion. With his singular acumen and precision, he observes: "The claim that an invalid condition if considered restrictive entails the invalidity of the contract and if considered hortative does not lead to its invalidity, is sophistic and fruitless."

Such a distinction is obviously sophistic and nonsensical, because in practice there is no recognizable difference between the two conditions, and it is evident that the regulations of the Shari'ah have been framed on the basis of the general level of understanding of the people and not on the basis of subtle logical distinctions.

We have mentioned that the legists divide the conditions into valid and invalid ones, and regard the fulfilment of the former as obligatory. They have also divided invalid conditions into those which contradict the spirit of the contract and those which do not, yet contradict the rules of the Shari'ah. They concur that the first kind is both invalid and invalidating, and differ concerning the second, some considering it as invalid without being invalidating, while others consider it both invalid and invalidating.

The legists then differ regarding many particular cases and issues as to whether they belong to the class of invalid conditions, and supposing that they do, as to whether they are invalidating as well. Here we shall mention a few of such cases.

[The Option to revoke \(al-Khayar\)](#)

According to the Shafi'i, Imami and Hanbali schools if a *waqif* lays down a condition giving himself the option for a known period to either confirm the *waqf* or revoke it, the condition is void along with the

waqf, because this condition is contrary to the spirit of the contract.

According to the Hanafis both are valid (*Fath al-Qadir, al-Mughni* and *al-Tadhkirah*).

Inclusion and Exclusion (al-Idkhal wa al-Ikhraj)

According to the Hanbalis and the preponderant Shafi'i opinion, if a *waqif* lays down a condition entitling him to exclude from the beneficiaries of the *waqf* whomever he wishes and to include others as beneficiaries, the condition is not valid and the *waqf* is void, because the condition is contrary to the spirit of the contract and invalidates it (*al-Mughni* and *al-Tadhkirah*).

The Hanafis and the Malikis consider the condition valid (*Sharh al-Zarqani* and Abu Zuhrah).

The Imamiyyah make a distinction between the right to include and the right to exclude. They state: If he lays down a condition stipulating an option to exclude whomever he wishes from the beneficiaries, the *waqf* is void, and if the condition is that he may include those who would be born in the future among the beneficiaries, it is valid, irrespective of whether the *waqf* is in the favour of his own children or those of someone else (*al-Tadhkirah*).

Waqif's Maintenance and the Payment of his Debts

The Imami and the Shafi'i schools say: If one creates a *waqf* in favour of someone and includes a condition requiring the payment of his debts and the provision of his maintenance from the proceeds of the *waqf*, the *waqf* and the condition are both void (*al-Jawahir* and *al-Muhadhdhab*).

A Note

In view of the mention above of the condition of option (*shart al-khayar*) and the cases of *waqf* which are limited by a condition, it will be appropriate here to point out the difference between the following terms commonly used by Imami legists: *khayar al-shart* and *shart al-khayar*, *mutlaq al-'aqd* and *al-'aqd al-mutlaq*.

Shart al-khayar is involved where the executor of a contract makes an explicit mention of the word *khayar* (option) while executing the contract and thereby reserves for himself the right to use it. For instance, he may say: "I sell this article to you and I shall have the option to annul the sale and revoke it within such and such a period." As to *khayar al-shart*, which is more properly an option that results from the non-fulfilment of a condition, the party executing the contract makes no mention of it in the contract; rather, it is implicit in some condition that he lays down; such as where the seller says to the customer, "I sell this thing to you on the understanding that you are a scholar" and later on the buyer turns out to be illiterate. The non-fulfilment of the condition gives the seller the option to avoid the sale and revoke it; he may either confirm the sale if he wishes or revoke it. The difference between the meanings of the two terms is obviously great.

The difference between *al-'aqd al-mutlaq* and *mutlaq al-'aqd* will become clear when we understand the

different forms of the contract. The kind of contract in which no conditions are stipulated is called *al-'aqd al-mutlaq*. Another kind is a conditional contract (*al-'aqd al-muqayyad*), which may contain either positive or negative conditions. A contract in general, irrespective of inclusion of any positive or negative conditions, is *mutlaq al-'aqd*, a term which includes both *al-'aqd al-mutlaq* and *al-'aqd al-muqayyad*. Accordingly, *al-'aqd al-mutlaq* and *al-'aqd al-muqayyad* differ from each other, yet are two kinds that fall under *mutlaq al-'aqd* (like 'man' and 'woman' with reference to 'human being').¹²

Sons and Daughters

If a *waqf* is created in favour of sons, it will not include daughters, and vice versa. If it is created in favour of children, both are included and will equally share the benefit. If the *waqif* states: "The male will receive twice the female's share" or "they will both share equally" or "the female will receive twice the male's share," or states, "the woman that I have married will not have a share in it," all these provisions are valid, considering that they are conditions laid down by the *waqif*. I did not find among the books of the five schools of *fiqh* that have been accessible to me any view which differs from what has been mentioned, excepting the one which Abu Zuhrah narrates on page 245 of *Kitab al-waqf* from the Malikis. There it is stated: Consensus prevails among the Malikis that it is a sin to create a *waqf* in favour of sons to the exclusion of daughters, and to entitle someone to its benefit on condition of his abstinence from marriage; and some of them consider its sinful character the cause of its invalidity.

I believe that the opinion holding the invalidity of the above conditions, as well as the opinion which includes daughters in the *waqf* when it has been created solely in favour of sons, have both been abandoned and carry no weight among the Malikis. Though I have with me more than five works of the Malikis, including their voluminous as well as shorter works, despite my search I have not found in them any reference to this view.

On the contrary, they contain the following observation: The words of the *waqif* will be understood according to the common usage and they are like the words of the Lawgiver with respect to the obligation of their observance. Indeed, it has been narrated from 'Umar ibn 'Abd al-'Aziz that he made an effort to include daughters in *waqfs* made in favour of sons, but he was not a Maliki. Apart from this, if his efforts prove anything, they prove his compassionate and humanitarian disposition.

The Grandchildren

In the same way as the legists differ concerning the validity of some conditions, as to whether the invalid ones are just void or are void as well as invalidating, they also differ concerning the meaning of certain words, and among such instances is the case where the *waqif* says: "This *waqf* is in favour of my children (*awladi*)," without making any further clarification. Here the question arises as to whether the words 'my children' includes grandchildren as well, and if they do, whether they include both the sons' and the daughters' children or the sons' children only.

The preponderant (*mashhur*) Imami view is that the words 'my children' do not include grandchildren, although al-Sayyid al-Isfahani states in *Wasilat al-Najat*: "The word 'children' (*awlad*) includes both male and female grandchildren," and this is the correct view because that is what it means in customary usage, which is the criterion in this regard.

The author of *al-Mughni* has narrated from Ibn Hanbal that the word 'child' (*walad*) applies to one's sons and daughters and to the son's children, not to the daughter's children.

The Shafii's observe: The word 'child' (*walad*) includes both sons and daughters, but it does not generally include grandchildren. But the words *walad al-walad* (grandchild), according to them as well as the Hanafis, include both the sexes (*Fath al-Qadir* and *al-Muhadhdhab*).

The Malikis say: Females are covered by the word *awlad*, but not by the phrase *awlad al-awlad* (children's children) (al-Zarqani).

This view of the Malikis is self-contradictory, because both the word *awlad* and the phrase *awlad al-awlad* are derived from the same root, *w.l.d.* How can it include both the sexes when used singly and only males when used in a construct phrase?

The Management of Waqf (al-Wilayah 'ala al-Waqf)

The *wilayah* over *waqf* is the authority granted to someone for managing, developing and utilizing the *waqf* and for applying its yield for its specified purpose. This *wilayah* is of two kinds: general and particular. The general *wilayah* is enjoyed by the *wali al-'amr*, and the particular one by any person appointed by the *waqif* at the time of the creation of *waqf* or by *hakim al-shar'*.

The schools concur that the *mutawalli* should be an adult, sane, mature and trustworthy person. Rather, the Shafii and some Imami legists include the condition of *'adalah* as well. In fact, trustworthiness and reliability (*wathaqaah*), along with the ability to fully administer the *waqf*, suffice.

The schools concur that the *mutawalli* is a trustee and is not liable except in the event of breach of trust and misfeasance.

The schools, except the Maliki, also concur that the *waqif* is entitled to grant himself the authority of administering the *waqf*, either alone or along with another person, for life or for a fixed period. He is also entitled to give this authority to someone else.

According to *Fath al-Bari*, Malik has stated: It is not valid for a *waqif* to grant himself the *wilayah*, for then it may become a *waqf* in one's own favour, or the passage of time may lead to the fact of its being a *waqf* being forgotten, or the *waqif* may become insolvent and apply it for his own benefit, or he may die and his heirs may apply it for their own benefit. But if there is no fear of any of these conditions arising, it does not matter if he keeps its administration in his own hands.

The schools differ where the *waqif* does not grant anyone this authority to himself or someone else. The Hanbalis and the Malikis observe: The authority of managing the *waqf* will rest with the beneficiaries provided they are known and limited, otherwise the *hakim* will exercise it (*al-Tanqih* and *Sharh al-Zarqani*).

The Hanafis state: The *wilayah* will remain with the *waqif* even if he does not explicitly mention it (*Fath al-Qadir*).

The Shafilis differ among themselves, holding three opinions. The first opinion is that the *wilayah* will rest with the *waqif*, the second that it will rest with the beneficiaries, and the third that it will be exercised by the *hakim* (*al-Muhadhdhab*).

The preponderant view among the Imamiyyah is that when the *waqif* does not name the *mutawalli* the *wilayah* belongs to the *hakim*, which he may exercise personally or appoint someone to it. Al-Sayyid Kazim, in *al-Mulhaqat*, and al-Sayyid al-Isfahani, in *al-Wasilah*, observe: This is correct in respect of public *waqfs*, but as to private *waqfs* it is for the beneficiaries to safeguard, improve, rent the *waqf* and realize its income without the *hakim's* permission, and this has been the practice.

The Imamiyyah say: If the *waqif* retains the *wilayah* over the *waqf* for himself and is not trustworthy, or gives it to a person of known impiety (*fisq*), the *hakim* is not empowered to annul the *wilayah* of either the *waqif* or the person appointed by him. This is mentioned in al-'Allamah al-Hilli's *al-Tadhkirah*. Rather the author of *al-Mulhaqat* observes: If the *waqif* provides that the *hakim* should have no say in the affairs of his *waqf*, it is valid, and if the person appointed by the *hakim* to administer the *waqf* dies, this power will rest with the beneficiaries or *'adil* individuals from among Muslims.

The Hanafi author of *Fath al-Qadir* (vol.5, p.61) states: If the *waqif* retains the *wilayah* with himself, in the event of his being untrustworthy the *qadi* is bound to abrogate his authority. Similarly, if he provides that the ruler and the *qadi* are not empowered to abrogate his authority and hand it over to another, the condition is void because it opposes the rule of the Shari'ah.

I do not know how this view could be reconciled with what Abu Zuhrah has narrated in *Kitab al-waqf*, p. 372, from *al-Bahr*, that a *qadi* is not to be removed on grounds of impiety; for in such a circumstance the *mutawalli* is better entitled to remain, because the administration of justice is a more elevated and sensitive job.

When the *waqif* or *hakim* has appointed a *mutawalli*, no one has any authority over him as long as he is fulfilling his *wajib* duty. But if he falls short of his duty or breaches the trust reposed in him, so that his remaining would be harmful, the *hakim* is empowered to replace him, though it is better that he appoint, as observed by the Hanbalis, a trustworthy and energetic person alongside the former.

If the person appointed by the *waqif* dies, or becomes insane, or is affected by any other disability which renders him incapable, the *wilayah* will not return to the *waqif* unless he had so stipulated at the time of

executing the *waqf* contract.

The Malikis permit its return to the *waqif*, and he is also empowered to remove the *mutawalli* at his pleasure.

The Imamiyyah and the Hanbalis state: If the *wilayah* is granted to two persons, they will act independently if so stipulated by the *waqif*, and if one of them dies or becomes incapable of performing his duty, the other will singly perform the task. But if the *waqif* provides that they act jointly and not individually, it is not valid for any one of them to act individually. Where there is no explicit provision in this regard, the *waqif* will be understood to have meant that they should not act individually, and hence the *hakim* will appoint another person and make him join the existing one (*al-Mulhaqat* and *al-Tanqih*).

It has been narrated in *Fath al-Qadir* from Qadi Khan al-Hanafi: Where the *waqif* grants the *wilayah* to two persons, if one of them provides in his will that his companion is entitled to exercise his *wilayah* over the *waqf*, after he dies it becomes valid for the person alive to exercise *wilayah* over the whole *waqf*.

The author of *al-Mulhaqat* observes: If the *waqif* provides a part of the benefits of the *waqf* for the *mutawalli*, the same will hold good irrespective of whether it is a large or a small amount, and if nothing is provided, he will be entitled to the compensation for a comparable job (*ujrat al-mithl*). This is in concurrence with what *Madkur* narrates in *Kitab al-waqf* regarding the Egyptian law.

The schools concur that the *mutawalli* appointed by the *waqif* or the *hakim* is entitled to appoint an agent for the achievement of any purpose of the *waqf*, irrespective of whether the appointing authority explicitly provides for it or not, except where it insists on his performing it personally.

The schools also concur that the *mutawalli* is not empowered to transfer the *wilayah* after him to another person where the original *wali* prohibits it. Similarly, they concur upon the validity of his delegating the *wilayah* to someone else where he has been authorized to do so. But where the *wali* has made no mention of this issue, either affirmatively or negatively, the Hanafis hold that he is entitled to do so, while the Imami, Hanbali, Shafi'i and Maliki schools consider that he is not so entitled, and if he does delegate it, his act is null and void.

The Children of 'Ulama' and Awqaf

There exist in our times '*ulama*' whose greed for mundane things equals Imam 'Ali's love for his faith. Hence, they give the *wilayah* over the *waqf* in their hands to their children and then to their grandchildren and so on till the day of resurrection. They hide their intention by using the words "...the most capable in order of capability from this lineage."

I do not intend to criticize this innovation – or tradition – by quoting verses and traditions. But I will raise some questions here. Is the intention of such an '*alim*', while transferring this authority to his progeny, the betterment of the *waqf* and society, or is it only for securing the private advantage of his descendants?

Does the motivation of this idea come from moral sense, continence, piety and self-denial for the cause of the faith, or is it motivated by a wish to provide some booty for his descendants by selling and exploiting one's religion? Does such a person have knowledge of the future through which he knows that the most capable among his descendants would be better for the cause of Islam and Muslims than the most capable individual from someone else's descent?

Consequently, why doesn't this *'alim* take a lesson from the rift he has observed and witnessed between the children of the *'ulama'* and the people of the place where the *waqf* exists, as well as between the children themselves in determining 'the most capable', and their eventually concurring over the distribution of *waqf* as if it were inherited property?

The Sale of Waqf

Do there actually exist causes which justify the sale of *waqf* property? What are these causes if they exist? And if such a sale is valid and takes place, what is the rule concerning the proceeds? May we replace it (the original *waqf* property) with something capable of fulfilling the objectives of the *waqf*, so that a new property takes the place of the old one and is governed by the rules applicable to it?

Al-Makasib and al-Jawahir

We will discuss the opinions of the different schools in detail and this discussion will make clear the replies to these as well as some other questions. I haven't come across anyone among the legists of the five schools who has dealt with this issue in such detail as the two Imami legists al-Shaykh al-Ansari, in *al-Makasib*, and al-Shaykh Muhammad Hasan, in *al-Jawahir*, 'bab al-tijarah'. The two have examined the issue from all the angles, together with its numerous sub-issues, and have sifted the various opinions expressed in this regard. We will present a summary of the important issues dealt with in these two incomparable books on which we have relied more than any other work in presenting the Imami viewpoint.

In this regard it may be pointed out that al-Shaykh al-Ansari and the author of *al-Jawahir*, in what they have left of their works, do not save the reader from toil and effort; rather, they require from him application, patience, intelligence and a substantial educational background. Without these it is not possible to follow these two authors or even to trace the path they have taken. Rather, they leave him lost and unable to find safe passage.

But one who has a firm educational base is bestowed upon by them the most precious of gems (*jawahir*) and the most profitable of earnings (*makasib*), provided he possesses patience and persistence. I am not aware of any other Imami legist from among the earlier or later generations who has bestowed Ja'fari *fiqh* and its principles life and originality to the extent given to it by the mighty pen of these two.

I apologize for this digression which I was compelled to make by my sense of gratitude as a pupil of

these two great figures, or more correctly of their works.

The Present Question

Numerous views have been expressed in this regard and the clash of opinions visible here is not to be seen in any other issue of *fiqh*, or at least in the chapter on *waqf*. The author of *al-Jawahir* has dealt with the medley of conflicting opinions and we mention here a collection of his observations:

The legists differ regarding the sale of *waqf* in a manner the like of which we do not generally encounter in any other issue of *waqf*. Some of them absolutely prohibit the sale of *waqf*, some others allow it under certain circumstances, while a group among them refrains from giving any opinion. Rather, the number of opinions expressed is so large that each legist has his own specific view, and there are instances where a single legist has expressed contradictory views in the same book; for example, the view expressed by him in the chapter on sale contradicts his opinion in the chapter on *waqf*. Sometimes contradictory ideas have been expressed in a single argument, so that that which is observed in the beginning differs from the observations at the time of conclusion. The author of *al-Jawahir* has recorded twelve different opinions and the reader will learn about the most important among them from the issues discussed below.

Mosques

The rule applicable to a mosque, in all the schools of Islamic law, differs from the rules applicable to other forms of *waqf* in a number of ways. Hence all the schools, except the Hanbali, concur that it is not permissible to sell a mosque irrespective of what the circumstances may be, even if it lies in ruins or the people of the village or locality where it is located have migrated and the road to it is cut in such a manner that it is certain that not a single person will pray in it. Despite all this, it is *wajib* that it remain in the same state without any change. The reason given for this is that the *waqf* of a mosque severs all links between it and the *waqif* as well as everyone else except God Almighty, and, therefore, it is at times termed *fakk al-milk* (release from ownership) and at times *tahrir al-milk* (liberation from ownership). That is, earlier it was confined, while now it has become free from all constraints. Now when it is not anyone's property, how can its sale be valid when it is known that sale cannot take place without ownership?

Consequently, if a usurper utilizes a mosque by residing in it or cultivating it (when it is a piece of land), though he be considered a sinner, he is not liable for any damages, because it is not owned by anyone.

It is noteworthy that its ceasing to be anyone's property precludes its ownership through sale or purchase, but this prohibition does not apply if its ownership is acquired through *al-hiyazah* (acquisition), like all other forms of natural bounties (*al-mubahat al-'ammah*).

The Hanbalis say: If the residents of a village migrate from the locale of the mosque and it stands in a place where no one prays in it, or if it is too small for the number of people praying in it and its extension

or building a part of it is also not feasible without selling a part of it, its sale is valid, and if it is not possible to draw any benefit from it except through sale, it may be sold (*al-Mughni*, vol.5, 'bab al-waqf').

The opinion of the Hanbalis is similar in some aspects to the view expressed by the Imami legist al-Sayyid Kazim, who observes in *Mulhaqat al-'Urwah* that there is no difference between the *waqf* of a mosque and its other forms.

Thus dilapidation, which justifies the sale of other forms of *waqf* property, will also justify the sale of a mosque. As to the 'release from ownership', it does not hinder its sale in his view so long as the property has value. The correct view, in our opinion is that it is not valid to own a mosque through a contract of sale, though it is valid to do so through *al-hiyazah*.

That which gives strength to the view expressed by this great legist, that there is no difference (between the various kinds of *waqf*), is that those who permit the sale of a *waqf* which is not a mosque if it is in a dilapidated condition, do so because in a dilapidated state the structure is either unable to fulfill the purpose for which it was endowed or loses the quality made by the *waqif* as the subject of the *waqf* (such as where he endows an orchard because it is an orchard and not because it is a piece of land). This logic applies exactly in the case of a mosque as well, because the condition that it should be used as a place of prayer was what caused it to be made a *waqf*. Now when this condition is not being fulfilled, the property ceases in its use as a mosque. In such a situation, the rule applicable to a non-mosque *waqf* will also be applied here. In that it can be owned through any of the forms of acquisition of ownership, even if it be through *al-hiyazah*.

Properties Belonging to Mosques

Generally mosques have assets in the form of *waqfs* of shops, houses, trees or land, whose profits are utilized for the repairs and carpeting of mosques and for paying its attendants. Obviously, these forms of property do not enjoy the sanctity of a mosque and its merit as a place of worship, because there is a difference between a thing and the properties subject to it.

The two also differ with respect to the rules applicable to their sale. Therefore those who prohibit the sale of a mosque allow the sale of a mosque's assets because there is no causal *shar'i* or non-*shar'i* relationship between them, considering that a mosque is used for worship, a purely spiritual activity, while the *waqf* of a shop (owned by a mosque) is destined for material benefit. Hence a mosque belongs to the category of public *waqfs* – or rather it is one of the most prominent of its forms – while the properties owned by it are private *waqfs* belonging specifically to it. Consequently, it is doubtlessly valid to sell *waqf* properties belonging to mosques, cemeteries and schools, even if we accept the invalidity of the sale of a school or a graveyard.

But is it valid to sell the properties subject to a *waqf* unconditionally, even if there is no justifying cause – such as its being in a dilapidated condition or dwindling returns – or is it necessary that there exist a

justifying cause so as to be treated exactly like a *waqf* in favour of one's descendants and other forms of private *waqf*?

These properties are of two types. The first type is one where the *mutawalli* buys the property from the proceeds of the *waqf*, such as where a mosque has an orchard which the *mutawalli* rents out, or buys or builds a shop from its proceeds for the *waqf*'s benefit, or obtains a shop from charitable donations received. In such a situation, both sale and exchange are valid if beneficial, irrespective of whether there exists any justifying cause mentioned by the legists, because, these properties are not *waqf* but only the proceeds or assets belonging to the *waqf*. Hence the *mutawalli* is free to deal with them in the interest of the *waqf*, exactly like he deals with the fruits of an orchard endowed for the benefit of a mosque,¹³ except where the religious judge (*hakim al-shar'*) supervises the creation of the *waqf* of a real estate bought by the *mutawalli* in which case the real estate will not be sold unless there exists a cause justifying its sale. But where the *mutawalli* creates a *waqf*, it has no effect without the *hakim*'s permission, because the *mutawalli* is appointed for managing the *waqf* and its utilization, not for creating *waqfs*.

The second type of property is one where the benefactors endow it as a *waqf* for the benefit of a mosque or school (as when a person provides in his will that his house, shop or land be made a *waqf* for the benefit of a mosque or school, or he himself makes a *waqf* of it). This kind of property is considered a private *waqf* and its sale is valid if the justifying causes, such as dilapidation or dwindling returns amounting to almost nothing, exist. But if they do not exist, it is not valid. I haven't come across in any work of the four Sunni schools in my possession anyone making this distinction.

This is what I have inferred from what al-Shaykh al-Ansari mentions in *al-Makasib* while discussing the rule applicable to a mosque's mat. He says: "A difference has been made between what is 'free' property (e.g. a mat purchased from the income of a mosque: in this case it is valid for a *mutawalli* to sell it if it is beneficial, if it has fallen into disuse or even if it is still new and unused) and between what is part of a *waqf* in favour of the mosque (e.g. a mat which a person buys and puts in the mosque, or the cloth used to cover the Ka'bah; the like of these are the public property of Muslims and it is not valid for them to alter their condition except in cases where the sale of *waqf* is valid)."

Thus when it is valid for a *mutawalli* to sell a new mat of the mosque which he has purchased from its funds, it is without doubt valid for him to sell other such items. and that which indicates an absence of difference (between a mat and something else) is the Shaykh's own observation soon after the above quotation. There he states: "The rule applicable to baths and shops which have been built for income through letting them and the like, is different from the rule applicable to mosques, cemeteries and shrines."

Exactly similar is the following view of al-Na'ini mentioned in al-Khwansari's *Taqrirat*: "Where a mosque is ruined or forsaken, in a manner that it is no longer in need of the income from its *waqfs* and other sources, the income from *waqfs* pertaining to it will be spent in worthy causes, though it is better that it

be spent on another mosque." Similarly, if the *waqf* is in favour of a certain school or hospital which lies in ruins, its income will be used for charitable purposes or for another institution of its kind.

Waqfs which are not Mosques

We have referred to the opinions held by the different school concerning mosques, and pointed out that the Imami, Shafi'i, Hanafi and Maliki schools are opposed therein to the Hanbalis. But concerning *waqfs* other than mosques, the Imamiyyah have their own specific stand regarding their sale. We will first mention the views of the four Sunni schools and then deal separately with the opinion of the Imamiyyah.

Since the Hanbali have allowed the sale of a mosque on the existence of a justifying cause, it is more in order for them to allow the sale and exchange of a *waqf* which is not a mosque, provided a justifying cause exists.

As to the Shafi'is, they absolutely prohibit its sale and exchange even if it is a private *waqf* (e.g. in favour of one's progeny) and even if a thousand and one causes exist, though they allow the beneficiaries to use up the private *waqf* themselves in case of necessity (e.g. using a dried fruit tree as fuel, though its sale or replacement is not valid for them).

The Malikis, as mentioned in *Sharh al-Zarqani 'ala Abi Diya'*, permit the sale of a *waqf* in the following three situations. First, where the *waqif* stipulates its sale at the time of creation of *waqf*; here his condition will be followed. Second, where the *waqf* is a movable property and is considered unfit for its prescribed purpose; here it will be sold and the amount realized will be used to replace it. Third, an immovable property will be sold for the expansion of a mosque, road or cemetery. Apart from these its sale is not valid, even if it lies in ruins and is not being utilized for any purpose.

As to the Hanafi's, according to Abu Zuhrah in *Kitab al-waqf*, they allow the replacement of public and private *waqfs* of all kinds except mosques. They have mentioned the following three situations in this regard:

1. That the *waqif* should have specified it at the time of creation of *waqf*.
2. The *waqf* should fall in a condition of disuse.
3. Where replacement is more profitable and there is an increase in its returns, and there exists no condition set by the *waqif* prohibiting its sale.

This was a brief account of the views of the four schools regarding a *waqf* which is not a mosque, and, as noticed, they, as against the Imamiyyah, do not differentiate between private and public *waqfs* – excepting mosques – from the point of view of their sale.

Public and Private Waqfs

The Imamiyyah divide *waqfs* into two categories and specify the rules applicable to each one of them as well as their consequences.

Private Waqf

It is a *waqf* which is the property of the beneficiaries, i.e. those who are entitled to utilize it and its profits. To this category belong *waqfs* in favour of one's progeny, '*ulama*', or the needy, the *waqfs* of immovable property for the benefit of mosques, cemeteries, schools, etc. It is regarding this category that there is a difference of opinion between the legists as to whether its sale is valid when the justifying causes are present or if it is totally invalid even if a thousand and one causes exist.

Public Waqf

It is a *waqf* for the common benefit of people in general, not for a specific group or class among them. To this category belong schools, hospitals, mosques, shrines, cemeteries, bridges, caravansaries of the past, springs and trees dedicated for the use of passers-by, because they are not meant for any specific Muslim individual or group to the exclusion of other individuals or groups.

The Imamiyyah concur that these public *waqfs* cannot be sold or replaced in any situation even if they are in ruins or about to be destroyed and fall into disuse, because, according to them, or most of them, they are released from ownership, i.e. gone out of the ownership of the earlier owner without becoming anyone's property. Thus on becoming *waqf* such a property becomes exactly like the free gifts of nature, and it is obvious that there can be no sale except where there is ownership. This is in contrast to private *waqfs* which involve the transfer of ownership of the *waqif* to the beneficiaries in some particular manner. Hence (in the case of public *waqfs*), if the purpose of a *waqf* becomes totally impossible to achieve (such as a school which has no students and consequently no lessons can be held in it) it is valid to transform it into a public library or a conference hall.

We have already pointed out in the discussion on mosques that though they are precluded from being owned through sale, it is valid to own them through *al-hiyazah*. We also said that the author of *Mulhaqat al-Urwah* has criticized the legists on the basis that there is no difference between public and private *waqfs* and that the reason justifying the sale of a private *waqf* also justifies the sale of a public *waqf*. He does not concede that a public *waqf* involves release and freedom from ownership, and there is no impediment to sale in his opinion even if it is accepted to be such, because, according to him, the factor justifying a thing's sale is that it should possess value.

However, we have some remarks to make about the opinion of the legists as well as that of the author of *al-Mulhaqat*. We reject the position of the legists on the ground that though the absence of ownership prevents ownership of a *waqf* through a contract of sale, it does not prevent its ownership through *al-hiyazah*.

Similarly, ownership by itself does not validate sale, because mortgaged property which is certainly owned (by the mortgagor), cannot validly be sold without the consent of the mortgagee.

We reject the position of the author of *al-Mulhaqat* because possession of value by itself is not sufficient, for the unowned gifts of nature, (such as the fishes in the water or the birds in the sky), though they possess value, cannot be sold (in that state). Therefore, as observed earlier, the only way of ownership is through *al-hiyazah*.

Cemeteries

We have already mentioned that cemeteries are public *waqfs* like mosques and that the Imamiyyah do not consider their sale valid in any situation, even if they are in ruins and their signs have been wiped out. I consider it useful to specifically discuss cemeteries in this chapter for the following two reasons.

1. The necessity of mentioning the rules in this regard because there are numerous Muslim cemeteries which have been forsaken and are used for other purposes.
2. Usually there is a difference between cemeteries and other forms of *waqfs*. This difference will become clear in the following discussion.

If we know about a cemetery that a person had donated his land for that purpose and it was used for burial, the rule applicable to public *waqfs* will apply to it, and it will be reckoned among *waqfs* whose sale is invalid even if its signs have disappeared and the bones of the buried have decayed.

But if we know that the cemetery was previously an unused land not owned by anyone and the people of the village used it as a cemetery – as is usually the case – then it is not a *waqf* ab initio, neither public nor private; rather it will remain the common property of all (*al-musha'*) and its *hiyazah* is valid for anyone who takes the initiative. But if a corpse is buried in a part of it, both the opening of the grave and using it in a desecrating manner are not valid. But anyone can personally utilize any part of this land by either cultivating it or building upon it if it is without graves or there are old graves whose occupants' bones have decayed.

Using this land is valid for him, exactly like it is valid for him to use abandoned land or land whose original user has migrated and it has reverted to its previous state.

Where we are unaware of the history of a piece of land which is being used as a cemetery – i.e. as to whether it was an owned land which was endowed by the owner, so that it would be considered a *waqf* and governed by its rules, or if it was an ownerless land which the villagers later used for burying their dead – it will not be considered a *waqf* because the presumption is the absence of a *waqf* unless its existence is proved according to the Shari'ah.

Here one might say: A *waqf* is proved if it is popularly known to be such; therefore why cannot the *waqf* of a cemetery be similarly proved?

Our reply is that if it is popularly known that a certain cemetery is a *waqf* and it has been narrated generation after generation that a particular person had endowed it for a cemetery, we would definitely confirm it as a *waqf*. But if all that is widely held is that it is a cemetery, the sole knowledge of its being a cemetery is not sufficient to prove that it is a *waqf*. It could have been common land.

A Sub-Issue

If a person digs a grave for himself to be buried in it at the time of his death, it is valid for others to bury in it another corpse even if there is extra space in the cemetery. But it is better to leave it for him, refraining from troubling a believer.

Causes Justifying the Sale of Waqf Property

We have already mentioned that Imami legists concur that the sale of public *waqfs*, like mosques and cemeteries, etc., is not valid. But regarding private *waqfs* (e.g. the *waqfs* made in favour of one's progeny, scholars, or the needy) there is a difference of opinion between them where there exists a cause justifying their sale. The following causes justifying the sale of private *waqfs* have been mentioned by these legists.

1. Where there remains no benefit of any kind in the property from the viewpoint of the purpose for which it was endowed (e.g. a dried branch not yielding fruit, a torn mat fit only for being burnt, a slaughtered animal which can only be eaten), there is no doubt that this cause justifies sale.
2. Al-Sayyid Abu al-Hasan al-Isfahani observes in *Wasilat al-najat*: "The articles, carpets, cloth coverings of tombs, and similar items cannot be sold if they can be utilized in their present state. But if they are not required in the location any longer, and their being there would only damage and destroy them, they should be utilized in a similar alternative place, and if such a place does not exist or exists but does not need them, they will be used for public benefit. But where no benefit can be derived from them except by selling them and their retention amounts to their damage and destruction, they will be sold and the proceeds used for the same place if it is in need of it. Otherwise, it will be used in any other similar place if possible or for public benefit.
3. If a *waqf* is in ruins (such as a dilapidated house or an orchard which is not productive) or its benefit is so little as to be reckoned nonexistent, if its repair is possible it will be repaired, even if it entails its being rented out for years; otherwise, its sale will become permissible, provided its proceeds are applied for replacing the former property as mentioned below.
4. If the *waqif* provides for the sale of *waqf* property in case of dispute between the beneficiaries, or dwindling profits, or any other reason which does not make a *haram halal* and vice versa, his desire will be carried out.
5. Where dispute occurs between the beneficiaries of a *waqf* threatening loss of life and property and

there is no way of ending it except through its sale, the sale is permissible and the amount realized will be distributed among the beneficiaries.

This is what the legists say, though I do not know the basis of their opinion except what they have mentioned regarding the countering of a greater by a lesser harm. But it is obvious that it is not valid to remove harm from one person by shifting it to another, and the sale of the *waqf* entails loss to the succeeding generations of beneficiaries.

6. If it is possible to sell part of a dilapidated *waqf* property and repair the remaining part with the proceeds of the sale, such a sale is permissible.

7. If a mosque is ruined, its stones, beams, doors, etc. will neither be treated in accordance with the rules applicable to the mosque itself, nor the rules applicable to fixed property endowed for the benefit of a mosque which forbid its sale except on the presence of a justifying cause. Rather, the rules applicable to them will be those which apply to the income of the mosque and its *waqfs* (such as the rent of a shop belonging to or endowed in favour of the mosque). In this regard the *mutawalli* is free to utilize it in any manner beneficial for the mosque.

The Sale Proceeds of a Waqf

Where a *waqf* is sold on the presence of a justifying cause, how will the sale proceeds be used? Will they be distributed among the beneficiaries exactly like the income generated by the *waqf*, or is it necessary, if possible, to buy with these sale proceeds a similar property to replace the one sold?

Al-Shaykh al-Ansari, as well as many other *mujtahids* observe: The rule applicable to the sale proceeds is the rule applicable to the *waqf* sold, in that it is the property of the succeeding generations. Therefore, if the sale proceeds are in the form of immovable property, it will take the place of the *waqf* sold; if it is cash, we will buy with it the most suitable replacement. The replacement does not require the reciting of a *sighah* for making it a *waqf*, because the fact that it is a replacement naturally implies that the latter is exactly like the former. Hence al-Shahid states in *Ghayat al-murad*: 'The replacement is owned on the basis of the ownership of the replaced property, and it is impossible that it be owned separately.'

Then al-Ansari observes in *al-Makasib*, at the conclusion of the discussion on the first cause validating the sale of a *waqf*: "If it is not possible to buy immovable property from the sale proceeds, the money will be kept in the custody of a trustworthy person awaiting a future opportunity. If deemed beneficial, it is also permissible to do business with it, though the profits will not be distributed among the beneficiaries, as is done in the case of the income generated from the *waqf*; rather the rule applicable here will be the rule applicable to the *waqf* itself because it is part of the property sold and not a true increase."

This is what al-Ansari has said and he, may God be pleased with him, is better aware of his true intent. But I do not perceive any difference between the profits of the sale proceeds of a *waqf* and the income generated from the *waqf* itself. Therefore, as the income of the *waqf* is distributed among the

beneficiaries, it is appropriate that the profits (from the sale proceeds invested) be similarly distributed, though it may be said that the income from the *waqf's* immovable property does not belong to the class of the *waqf* property itself but is separate from it, whereas the profits from business are in the form of money which does not differ from it, and where there is a difference, the rule applicable will also differ. Whatever the case, if the mind is set to work, it finds a solution for every difficulty and doubt from a theoretical point of view. But, obviously, practice should be the criterion, and the tangible reality is that usage does not distinguish between the two situations, and therefore it should be resorted to.

Al-Shaykh al-Na'ini observes in al-Khwansari's *Taqrirat*: If another property is purchased from the sale proceeds of the first property, the latter will neither take the place of the former nor will it be considered a *waqf* similar to the former; rather it is exactly like the income generated from a *waqf* .and it is permissible to sell it without any justifying cause if the *mutawalli* considers its sale to be beneficial.

The correct opinion is the one mentioned by al-Ansari, al-Shahid and other researchers that there is no difference between the replacement and the property replaced.

Some Curious Waqfs

I did not intend to add anything about *waqf* after having finished discussing it and having mentioned the positions of the schools. But incidentally at the time when I had finished the chapter on *waqf* to go on to the chapter on *Hajr* (legal disability), I read a curious and interesting account regarding Egyptian *waqfs* during the eras of the Mamluks and earlier 'Uthmanis. I had received two magazines, the Lebanese *Lisan al-Hal* and the Egyptian *al-Akhbar* dated 7th July 1964, and I set aside my pen and started perusing them so to know about the current developments and to relieve myself of monotony.

By chance I happened to read in the magazine *al-Akhbar* that in the Directorate of *Waqf*, Egypt, is an iron vault that had remained locked for hundreds of years. The Directorate decided to open it to find out its contents. When the doors of this vault were opened, thousands of deeds and agreements covered with dust and piled upon one another were found. Twenty persons were appointed to study them. When they started this work they came across curious and amazing things: 300 deeds written with gold water, a deed executed a thousand years ago, and so on. It made an interesting and enjoyable reading either because it was actually so or due to my immersion in related research and writing. I mention a part of these contents hoping that the reader too would also enjoy reading them:

An immovable property was endowed for providing grass for the mule ridden by the Shaykh of al-Azhar at that time.

A woman created a *waqf* of 3000 feddans (1 Egyptian feddan = 4200.833 sq. metre) for the benefit of the '*ulama'* who followed Abu Hanifah.

Some *pasha* endowed 10,000 feddans for covering the graves of his relatives with branches of palm and myrtle.

A person endowed parts of his wealth for the water-carriers of the city mosque.

Another created a *waqf* for the reciter of the Friday sermon.

A lady created a *waqf* for providing ropes for pails used for supplying water to a mosque.

A *waqf* for providing caftans and outer garments for old persons.

A *waqf* for incensing study sessions.

I remember having read in the past about a *waqf* in Syria whose income is used to buy new plates to replace those broken by maid-servants to save them from the censure of their mistresses.

I have heard that in Homs there is a *waqf* for those who sight the new moon of the *'id* of Ramadan. For this reason there is a multitude of claims of having sighted it in that region. There are also present *waqfs* in some villages of Jabal 'Amil for providing shrouds for the dead.

These *waqfs*, if they reveal anything, show the thinking prevailing at that time, the mode of living and habits of the society in which the *waqif* lived, and that there were a large number of families who could not even provide their dead with a shroud.

1. The difference between *waqf* and *habs* is that in the former the ownership of the *waqif* is completely ended, and this prevents the property from being inherited or disposed of in any other manner. In the latter case, the ownership of the *habs* is preserved, and the *habs* property may be inherited, sold, etc. This difference was not noticed by al-Shaykh Abu Zuhrah and he, as will be noticed, has ascribed to the Imamiyyah that which they do not hold.

2. This issue of perpetuity in *waqf* is intimately linked with the question concerning ownership of *waqf* property, which has been discussed separately in this chapter.

3. Abu Zuhrah has rejected this view (p.50), on the basis that the concept of the ownership of God is meaningless in this context, for God Almighty owns everything. But it will be noticed that the meaning of God's owning the *waqf* is not that it becomes a free natural bounty (like air and water); rather His ownership of it is like His ownership of *khums al-ghanimah*, as mentioned the Qur'anic verse:

وَأَعْلَمُوا أَنَّمَا غَنِمْتُمْ مِنْ شَيْءٍ فَإِنَّ لِلَّهِ خُمُسُهُ

And know that whatever you acquire as *ghanimah*, a fifth of it is for God... (8:41)

4. As to those who say that *waqf* may be created only by using specific words, the gist of their argument is based on the presumption of the continuity of the ownership of the property by the owner. That is, the property was the owner's before the execution of the contract; following it, we will come to entertain a doubt (due to his failure to make his intent explicit through specific words) regarding the transfer of its ownership from him. Accordingly, we will presume the existing situation – which is the continuity of the owner's ownership – to continue.

It will be noticed that this argument holds where there is doubt as to whether the owner intended the creation of a *waqf* or not, or where despite the knowledge of his intention of creating a *waqf* there is doubt as to whether he has executed the contract and created the cause for its existence. But where we have knowledge of both his intention to create a *waqf* as well as his having fulfilled what is required to prove its existence, there remains no ground for doubt. Now, if a doubt arises, it will be considered a mere fancy and will have no effect, unless the doubt concerns the validity of the form of recital (*al-sighah*) as the cause creating the *waqf* and its effect from the point of view of the *Shari'ah*.

5. The distinction has been accepted by a group of leading Imami scholars, such as the author of al-Shara'i, al-Shahidayn (al-Shahid al-Awwal and al-Shahid al-Thani), al-'Allamah al-Hilli, and others. According to it, a private waqf is a contract ('aqd) and requires both an offer and an acceptance, and there is no legal and logical obstacle in a waqf being (bilateral) contract ('aqd) in certain circumstances and a (unilateral) declaration (iqa') in others, although the author of al-Jawahir has opposed it.

6. There is no proof based on the Qur'an, Sunnah or 'aql (reason) concerning the invalidity of contingency (ta'liq) in 'aqd and iqa', and those who have considered it void have done so on the basis of ijma'. But it is obvious that ijma' is authority only when we cannot identify the basis on which it is based; but if its basis is known, its authority will disappear, and the basis on which the mujtami'un (those who take part in the ijma') have relied will itself be weighed to ascertain its authority. In this case the mujtami'un have relied on the assumption that the meaning of insha' implies its immediate presence, and the meaning of being contingent on a future event is that the insha' is not present, and this entails the presence and absence of insha' at the same time.

This argument stands refuted on the ground that insha' is present in actuality and is not contingent upon anything; only its effects will take place in the future on the realization of the contingency, exactly like a will, which becomes operational on death, and a vow that is contingent upon the fulfillment of a condition.

7. The schools differ concerning the disability of an idiot, as to whether it begins at the commencement of idiocy when the qadi has not yet made a declaration of his disability or if it begins after the declaration has been made. We will discuss it in detail in the chapter on wardship ('bab al-hajr').

8. By 'Fath al-Qadir' we mean the book which has become popular by this name, although we know it to be a collection of four books, one of which is Fath al-Qadir.

9. Al-Sayyid Kazim observes in al-Mulhaqat: If a person has a share in a house, he can make a waqf of it for a mosque, and those who come for prayers will take the permission of the other owners. I don't understand what benefit lies in such a waqf.

10. For ascertaining the religious beliefs of a group, there is nothing more authentic than its religious texts – especially those on fiqh and law. Al-Shahid al-Thani, one of the greatest juristic authorities of the Imami Shi'is, has stated explicitly that the followers of other religions are better than the Ghulat and that they are honoured creatures of God. In view of this, is it possible to ascribe ghuluww to the Imamiyyah?

11. Nadhir means one who takes a vow (nadhr); halif means one who takes an oath (half); musii means one who makes a will (wasiyyah); and muqirr means one who makes a confession. (Trans.)

12. Of such pithy expressions common among the theological students of Najaf are: bi-shart shay', bi shart la and la bi-shart. They mean by bi-shart shay', 'on condition that; laying down a positive condition, such as when one says: "I will give it to you if you do such and such a thing." Bi-shart la implies stipulation of a negative condition, such as when one says: "I will give it to you if you don't do such a thing."

La bi-shart means regardless of any positive or negative conditions that may be involved (as when one says: "I will give it to you," without mentioning any positive or negative condition). It is obvious that la bi-shart includes both bi-shart shay' and bi-shart la.

13. The difference between property purchased from the income of the waqf and property purchased from the sale proceeds of a dilapidated waqf is noteworthy. In the former case, the property purchased will take the place of the waqf sold, while the property purchased from the waqf's income will not take the position of a waqf.

11. Hajr, Legal Disability

Hajr literally means *man'* (to prohibit, refuse, prevent, deprive, detain), and this meaning is also evident from the Qur'anic verse:

***(Upon the day that they see the angels, no good tidings that day for sinners: they--i.e. the angels--shall say), 'A ban forbidden.'* (25:22)**

Legally it implies prohibiting the dispositions of a person with respect to all or some of his property. The causes of disability, which we will discuss here, are four: (1) insanity (*al-junun*); (2) minority (*al-sighar*); (3) idiocy (*al-safah*), (4) insolvency (*al-'iflas*).¹

1. Insanity

In accordance with explicit traditions as well as consensus, an insane person is prohibited from all dispositions, irrespective of whether his insanity is permanent or recurring. But if a person suffering from recurring insanity manages his property during the period he is free from it, his dispositions are binding. Further, where it is uncertain whether a particular disposition belongs to the period of sanity, it will not become binding. Because sanity is a condition for the validity of an agreement and an uncertainty regarding it amounts to an uncertainty concerning the existence of the contract itself, not its validity, consequently its very basis is negated. In other words, where there is uncertainty about the validity of a contract due to uncertainty concerning the presence of sanity at the time of its conclusion, we will presume that the situation before the contract continues to exist and will leave it at that.

The rule applicable to an insane person is also applied to a person in a state of unconsciousness and intoxication.

If an insane person cohabits with a woman and she becomes pregnant, the child will be considered his, exactly like in the case of 'intercourse by mistake.'

2. Minority

A minor is considered legally incapable by consensus, and there is a difference of opinion regarding some dispositions of a child of discerning age, as will be mentioned later. When a minor matures mentally and attains puberty he becomes an adult and all his dispositions become enforceable.

The Imami and the Shafi'i schools observe: When a child reaches the age of ten, his will shall be considered valid in regard to matters of charity and benevolence. More than one Imami legist, relying on some traditions, has said: His divorce is also valid.

The reader may refer to the chapter on marriage, the section entitled "Capacity to enter into a Marriage Contract," regarding the age of puberty and its signs.

Liability (al-Daman)

If an insane person or a child destroys another person's property without his permission, they are considered liable, because liability pertains to *al-'ahkam al-wad'iyyah* in which mental maturity and puberty are not considered as conditions.² Therefore, if they have any property that is being administered by their guardian, compensation will be claimed from this property; otherwise, the person entitled to the compensation will wait until the insane person regains sanity and the child attains puberty and then claim from them his dues.

A Discerning Child

A discerning child (*mumayyiz*) is one who can in general distinguish between that which is harmful and beneficial, and who understands the difference between contracts of sale and rent and between a profitable bargain and one entailing loss.

The Hanafis say: The dispositions of a discerning child without his guardian's permission are valid provided they involve sheer benefit, e.g. the acceptance of gifts, bequests and *waqfs* without giving anything in return. But the dispositions in which the possibility of profit and loss exists – such as transactions of sale, mortgage, rent and bailment – are not valid except by the permission of the guardian.

As to a non-discerning child, none of his dispositions are valid, irrespective of the permission of the guardian, and regardless of the thing involved being of petty or considerable worth.

The Hanbalis observe: A discerning child's dispositions are valid with the permission of the guardian; so are those of a non-discerning child, even without the guardian's permission, if the thing involved is of petty worth, e.g. where he buys from a confectioner what children usually purchase, or buys a bird from someone in order to set it free. (*al-Tanqih* and *al-Tadhkirah*)

The Imami and the Shafi'i schools state: A transaction by a child whether discerning or not, is altogether illegal, irrespective of whether he acts as an agent or for himself, irrespective of whether he gives or takes delivery, even if the object transacted is trivial and insignificant, and whether it involves a vow (*nadhr*) or a confession (*iqrar*). Al-Shaykh al-Ansari observes in *al-Makasib*: "The basis for invalidating a child's transaction is a narrated consensus (*al-'ijma' al-mahki*) strengthened by an unusual preponderance (*al-shuhrat al-'azimah*). The criterion is to act in accordance with the preponderance."

The Imami legists have mentioned in this regard a number of subtle sub-issues which al-'Allamah al-Hilli has recorded in *al-Tadhkirah*. Among these are the following:

1. If one owes something to a person, and he tells one: "Give what you owe me to my son." when his son is legally incapable, and one does so on the basis of the father's behest, and by chance the child loses it, in such a situation one's liability concerning the debt does not cease and the creditor is still

entitled to demand it from one, although it was he who asked one to deliver it to his son. Similarly, the child will not be responsible for the thing he has lost, and one is neither entitled to claim it from his guardian nor from him on his attaining majority.

As to one's remaining liable for the debt, this is because the debt is not cleared unless it is validly delivered, and it is presumed that neither the creditor nor his authorized representative has taken delivery. As to the delivery taken by the child, its occurrence and non-occurrence are equal, presuming his incapacity for taking and giving delivery. As to the father's permission to deliver to the child, it is exactly like someone telling one: "Throw what you owe me into the sea," and one does as he tells one. Here, one's liability for the debt is not cast off.

The reason for not considering the child liable for the thing delivered to him is that it is the deliverer who has destroyed it by improperly using his discretion and giving it to someone whose possession has no effect, even if it is by the permission and order of the child's guardian.

2. Where one has in one's possession something belonging to a child and his guardian tells one to give it to him, and one gives it to the child who destroys it, one will be liable for it because one is not entitled to act negligently regarding the property of someone legally incapable even if his guardian permits it.

3. If a child gives one a *dinar* to see whether it is genuine or counterfeit, or gives one an article for pricing it or selling it or for some other purpose, it is not valid for one, after it has come into one's hands, to return it to him; rather one must return it to his guardian.

4. If two children buy and sell between themselves and each takes delivery from the other and then both destroy what they have received, their guardians will be liable if they had permitted the transaction; if not, the liability will be borne from the property of each child.

This is what the Imami legists have observed, but what we consider appropriate is this: If we know doubtlessly that a particular disposition of a discerning child is cent per cent to his benefit, it is obligatory for his guardian to accept it and he cannot annul it, especially if his annulling it entails a loss for the child.

As to the general proofs which indicate that a child's disposition is void, they either do not include this situation or it is exempted from these general proofs. This is so because we are sure that the purpose of the Shari'ah is benefit, and when we are certain that it exists, we are bound to accept it exactly like our acceptance of a self-evident notion or a valid syllogism. And this is not *ijtihad* contradicting *nass* (an explicit Qur'anic verse or tradition); rather, it amounts to acting in accordance with *nass* for the knowledge of the aim of the Shari'ah is exactly like the knowledge of a *nass*, if not a *nass* itself.

If we were to accept the view of the Imami and the Shafi'i schools, a prize – for instance, a watch – given by the school to the best student would be something out of place, and if a child under the age of majority were to receive it he would not own it. This is something unnatural and goes against the practice of rational beings, creeds and religions.

A Child's Intentional Act is a Mistake

If a child kills a person or injures him or severs any part of his body, he will not be subject to retribution. He will be dealt exactly like an insane person, because he is not capable of being punished, neither in this world nor in the Hereafter. A tradition states:

عمد الصبي خطأ

A child's intentional act is a mistake.

There– no difference of opinion among the schools concerning this. As to the compensation given to the victim, it will be borne by the paternal relatives (*al-'aqilah*).

In some circumstances where beating a child is permissible, it is only for reforming him, not as retribution (*qisas*) or punishment (*ta'zir*).

3. Idiocy (al-Safah)

An 'idiot' differs from a child due to majority and from an insane person on account of sanity. Thus idiocy as such is accompanied with the capacity to comprehend and distinguish. An 'idiot' is one who cannot manage and expend his property properly, irrespective of whether he has all the qualities necessary for its proper management but is negligent and does not apply them, or lacks these qualities. In short, he is negligent and extravagant, in that he repeatedly performs acts of negligence and extravagance. The acts of extravagance may be such as donation by him of all or a major part of his wealth, or building a mosque, school or hospital which a person of his social and monetary status would not build, so that it is detrimental to his own interests and those of his dependants, and the people view him as having strayed from the practice of rational persons in the management of property.

Declaration of Legal Disability (al-Tahjir)

The schools – with the exception of Abu Hanifah – concur that the idiot's legal disability is confined to his financial dispositions, and excepting where his guardian permits him, his position in this regard is that of a child and an insane person. He is totally free regarding his other activities that are not closely or remotely connected with property. An idiot's disability continues until he attains mental maturity, in accordance with the following verse:

وَلَا تُؤْتُوا السُّفَهَاءَ أَمْوَالَكُمُ الَّتِي جَعَلَ اللَّهُ لَكُمْ قِيَامًا وَارْزُقُوهُمْ فِيهَا وَاكْسُوهُمْ وَقُولُوا لَهُمْ قَوْلًا مَعْرُوفًا وَابْتَلُوا الْيَتَامَىٰ حَتَّىٰ إِذَا بَلَغُوا النِّكَاحَ فَإِنْ آنَسْتُمْ مِنْهُمْ رُشْدًا فَادْفَعُوا إِلَيْهِمْ أَمْوَالَهُمْ

And do not give to fools your property which Allah has assigned to you to manage; provide for

them and clothe them out of it, and speak to them words of honest advice. And test the orphans until they reach the age of marrying; then if you find in them mental maturity, deliver to them their property; (4:5-6)³

This is the view of the Imami, Shafi'i, Maliki and the Hanbali schools, as well as that of Abu Yusuf and Muhammad, the two disciples of Abu Hanifah.

Abu Hanifah observes: Mental maturity is neither a condition for delivering property to its owners nor for the validity of their monetary dispositions. Thus if a person attains puberty in a state of mental maturity and then becomes an idiot, his dispositions are valid and it is not valid to consider him legally incapable even if his age is less than 25 years. Similarly, one who attains puberty in a state of idiocy so that his childhood and idiocy are concomitant, he will not be considered legally incapable in any manner after attaining maturity at 25 years (*Fath al-Qadir* and Ibn 'Abidin).

This contradicts the explicit *ijma'* of the entire ummah, or rather it contradicts the obvious teaching of the faith as well as the unambiguous text of the Qur'an:

وَلَا تُؤْتُوا السُّفَهَاءَ أَمْوَالَكُمُ

The Judge's Order

Imami legal authorities state: The criterion for considering the dispositions of an idiot as void is appearance of idiocy, not the order of a judge declaring him legally incapable. Thus every disposition of his during the state of idiocy is void, irrespective of whether a judge declares him incapable or not, and regardless of whether his idiocy continues from childhood or occurs after puberty. Hence, if an idiot acquires mental maturity, his disability will be removed, returning only on the return of idiocy and disappearing with its disappearance (al-Sayyid al-Isfahani, *Wasilat al-najat*). This opinion is very close to the one expressed by the Shafi'i school.

The Hanafi and the Hanbali schools observe: An idiot will not be considered legally incapable without the judge's declaration. Therefore, the dispositions prior to the declaration of his legal disability are valid even if they were improper: after the declaration his dispositions are not enforceable even if appropriate.

This opinion cannot be substantiated unless we accept that the declaration of the judge alters the actual fact. This view is confined to the Hanafis only. As to the Shafi'i, Maliki and the Hanbali schools, they concur with the Imamiyyah in holding that the judge's order has no bearing, close or remote, on the actual fact, because it is only a means and not an end in itself. We have dealt with this issue in detail in our book *Usul al-ithbat*.

The Malikis say: When a person, man or woman, comes to be characterized with idiocy he becomes liable to be declared legally incapable. But if idiocy occurs after a short period, say a year after his

attaining puberty, the right to declare his legal incapacity lies with his father, because the time of its occurrence is close to the period of his attaining puberty. But if it occurs after a period exceeding a year after puberty, his disability can be only declared by a judge (*al-Fiqh 'ala al-madhahib al-'arba'ah*, vol. 2, 'bab al-hajr').

The Malikis also observe: A woman, even if she becomes mentally mature, is not entitled to dispose her property unless she has married and the marriage has been consummated. After the consummation of marriage, her right to donate is limited to one-third of the property, and for the remainder she requires the permission of the husband until her old age (al-Zarqani).

But all the other schools do not differentiate between the sexes, in accordance with the general import of the Qur'anic verse (4:6):

وَلَا تُؤْتُوا السُّفَهَاءَ أَمْوَالَكُمُ

The Idiot's Confession, Oath and Vow

If an idiot is permitted to dispose his property and he does so, the schools concur that it is valid. As to non-financial acts, such as his acknowledgement of lineage (*nasab*) or his taking an oath or a vow to perform, or abstain from, a certain act that does not involve property, these acts are valid even if the guardian has not permitted them.

If he confesses to having committed theft, it will be accepted only for the purpose of amputation and not for financial liability, i.e. his confession will have effect vis-a-vis the right of God (*haqq Allah*) and not vis-a-vis the rights of other human beings (*haqq al-nas*),

The Hanafis state: His confession will be given credence in regard to those of his assets which have been realized after his disability and not from what he owned at its advent. Also, his will is valid to an extent of one-third in matters of charity and benevolence.

The Imamiyyah state: There is no difference between the former and the latter properties. Rather, they say, it is not valid for an idiot to hire himself for any work even if advantageous without his guardian's permission. They also observe: If a person deposits something with an idiot with the knowledge of his idiocy and the idiot personally destroys it, either voluntarily or by mistake, he will be liable. But if the deposited thing is not destroyed personally by the idiot but as a consequence of his negligence in preserving it, he will not be liable, because in this situation the depositor himself has been negligent and at fault. As to the liability of the idiot where he personally destroys the deposit, it has its basis in the dictum:

مَنْ أَتْلَفَ مَالَ غَيْرِهِ فَهُوَ لَهُ ضَامِنٌ

'He who destroys another's property is liable for it.' (*Wasilat al-najat*)

The Idiot's Marriage and Divorce

The Shafi'i, Hanbali and Imami schools say: The idiot's marriage is not valid, and his divorce (*talaq* or *khul'*) is valid. But the Hanbalis allow his marriage where it is a necessity.

The Hanafis observe: His marriage, divorce, and freeing a slave are valid, because these three are valid even when performed in jest, and with greater reason in a state of idiocy. But if he marries for more than *mahr al-mithl*, the *mahr* will be valid only to the extent of *mahr al-mithl*.

The Proof of Mental Maturity

The schools concur that mental maturity (*rushd*) is ascertainable through testing, in accordance with the words of God Almighty:

وَابْتَلُوا... فَإِنْ أَنَسْتُمْ مِنْهُمْ رُشْدًا

But the modes of testing are not specific, though the legists mention as examples such methods as handing over to a child the management of his property, or relying upon him to buy or sell for fulfilling some of his needs, and the like.

If he shows good sense in these activities, he will be considered mentally mature. As to a girl, she will be given domestic responsibilities to ascertain her mental maturity or the lack of it.

As per consensus, mental maturity in both the sexes is proved by the testimony of two male witnesses because the testimony of two male witnesses is a principle. The Imamiyyah say: It is also proved in the case of women by the testimony of a man and two women, or that of four women. But in the case of men, it is only proved by the testimony of men (*al-Tadhkirah*).

The Guardian

A Minor's Guardian

We have discussed the legal disability of the minor, the insane person and the idiot. It is obvious that every legally incapable person needs a guardian or an executor to attend to the things concerning which his disability has been declared, and to manage them as his representative. Now, who is this guardian or executor? It is worth pointing out at the outset that the discussion in this chapter is limited to guardianship over property. As to guardianship concerning marriage, it has already been discussed in the related chapter.

The schools concur that the guardian of a minor is his father; the mother has no right in this regard except in the opinion of some Shafi'i legists. The schools differ concerning the guardianship of others apart from the father. The Hanbali and the Maliki schools state: The right to guardianship after the father is enjoyed by the executor of his will, and if there is no executor, by the judge (*hakim al-shar'*). The paternal grandfather has no right to guardianship whatsoever, because, according to them, he does not take the father's place in anything. When this is the state of the paternal grandfather, such is the case of the maternal grandfather with greater reason.

The Hanafis say: After the father the guardianship will belong to his executor, then to the paternal grandfather, and then to his executor. If none are present it will belong to the judge.

The Shafi'is observe: It will lie with the paternal grandfather after the father, and after him with the father's executor, followed by the executor of the paternal grandfather, and then the judge.

The Imamiyah state: The guardianship belongs to the father and the paternal grandfather simultaneously in a manner that each is entitled to act independently of the other, though the act of whoever precedes acquires legality, in view of that which is necessary. If both act simultaneously in a contrary fashion, the act of the paternal grandfather will prevail. If both are absent, the executor of any of them will be the guardian. The grandfather's executor's acts will prevail over those of the father's executor. When there is no father or paternal grandfather nor their executors, the guardianship will be exercised by the judge.

The Guardian of an Insane Person

An insane person is exactly like a minor in this regard, and the views of the schools are similar for both the cases, irrespective of whether the child has attained puberty while continuing to be insane or has attained puberty in a state of mental maturity to become insane later. Only a group of Imami legists differ here by differentiating between insanity continuing from minority and that which occurs after puberty and mental maturity. They say: The father and the paternal grandfather have a right to guardianship over the former. As to the latter, the *hakim al-shar'* will act as his guardian despite the presence of both of them. This view is in consonance with *qiyas* (analogical reasoning) practised by the Hanafis, because the guardianship of both the father and the paternal grandfather had ended (on the child's attaining puberty and mental maturity), and that which ends does not return. But the Hanafis have acted here against *qiyas* and have opted for *istihsan*.

The Imami author of *al-Jawahir* says: It is in accordance with caution (*ihhtiyat*) that the paternal grandfather, the father and the judge act in consonance, i.e. the property of an insane person between whose insanity and childhood there is a time gap, will be managed by mutual consultation among the three. Al-Sayyid al-Isfahani remarks in *al-Wasilah*: Caution will not be forsaken if they act by mutual consent.

In my opinion there is no doubt that caution is a good thing, but here it is only desirable and not obligatory, because the proofs establishing the guardianship of the father and the paternal grandfather do not differ in the two situations. Accordingly, the father and the paternal grandfather will always be preferred to the judge, because the applicability or inapplicability of a particular rule revolves around its subject, and the generality of the proofs proving the guardianship of the father and the paternal grandfather enjoy precedence over the generality of the proofs proving the judge's guardianship.

Apart from this, the sympathy of the judge or someone else cannot equal that of the father and the grandfather, and what rational person would approve the appointment by the judge of a stranger as a guardian over a legally incapable person whose father or paternal grandfather are present and fulfil all the necessary conditions and qualifications?

The Guardian of an Idiot

The Imami, Hanbali and Hanafi schools concur that if a child attains puberty in a state of mental maturity and then becomes an idiot, his guardianship will lie with the judge to the exclusion of the father and paternal grandfather, and, with greater reason, to the exclusion of the executors of their wills.

That which was observed concerning an insane person holds true here as well, that no rational person would approve that a judge appoint a stranger as guardian in the presence of the father and the paternal grandfather. Hence, as a measure of caution, it is better that the judge choose the father or the paternal grandfather as the guardian of their child. However, if the idiocy has continued from childhood and the subject has attained puberty in that state, the opinion of the three above-mentioned schools is similar to their opinion concerning a minor (*al-Mughni*, *al-Fiqh 'ala al-madhahib al-'arba'ah*, Abu Zuhrah and *al-Jawahir*). [4](#)

The Shafilis neither differentiate between the guardianship of a minor, an insane person and an idiot, nor between idiocy occurring after puberty and one continuing from childhood.

The Qualifications of a Guardian

The schools concur that a guardian and an executor require to be mentally mature adults sharing a common religion. Many jurists have also considered *'adalah* (justice) as a requirement even if the guardian is the father or the grandfather.

There is no doubt that this condition (*'adalah*) seals the door of guardianship firmly with reinforced concrete and not merely with stones and mud. Apart from this, *'adalah* is a means for safeguarding and promoting welfare, not an end in itself. The inclusion of *'adalah* as a condition, if it proves anything, proves that *'adalah* was not something rare in the society in which those who consider it necessary lived.

There is consensus among the schools that those dispositions of a guardian which are for the good and advantage of the ward are valid, and those which are detrimental are invalid. The schools differ

concerning those dispositions which are neither advantageous nor detrimental. A group of Imami legists observe: They are only valid if the guardian is the father or the paternal grandfather, because the condition for their dispositions is the absence of harm, not the presence of an advantage. But where a judge or an executor is involved, their dispositions are valid only when advantageous. Rather, some of them observe: The dispositions of a father are valid even if they are disadvantageous and entail a loss for the child. [5](#)

Other non-Imami schools state: There is no difference between the father, the paternal grandfather, the judge and the executor in that the dispositions of all of them are invalid unless they are advantageous and entail benefit. This is also the opinion of a large number of Imami legists.

On this basis, it is valid for the guardian to trade with the wealth of his ward – be he a child, an insane person or an idiot – or to give it to another to trade with it, to buy with it real estate for his ward, and to sell and lend from what belongs to him, provided all this is done for benefit and with good intention, and the surety of benefit in lending is limited to where there is a fear of the property being destroyed.

It is beneficial here to mention some sub-issues mentioned by the great Imami legist al-‘Allamah al-Hilli in *al-Tadhkirah*, ‘bab al-hajr’.

1. Pardon and Compromise (al-‘Afw and al-Ṣulh)

Some Imami scholars have said: A child's guardian can neither demand *qisas* (retaliation), a right to which his ward is entitled, because the child may opt for pardon, nor can he pardon, because the child may opt for the execution of the sentence for his own satisfaction. Al-‘Allamah al-Hilli has then opined that a guardian can demand the execution of the sentence, or pardon, or conclude a compromise regarding a part of the child's property, provided it is advantageous.

2. Divorce and Pre-emption (al-Talaq and al-Shuf'ah)

A guardian is not entitled to divorce the wife of his ward, irrespective of whether it is with or without any monetary compensation.

If there is along with the child a co-sharer in a property and the co-sharer sells his share to a stranger, the guardian of the child is entitled to opt for pre-emption or to forgo it, depending on the child's interest. This is the more *sahih* of the two opinions subscribed to by the Shafi'is.

3. Deduction of Claims (Ikhraj al-Huquq)

It is obligatory upon the guardian to deduct from the property of his ward those claims whose payment is compulsory, e.g. debts, criminal damages, zakat, even if they have not been claimed from him. As to the maintenance of those relatives whose maintenance is *wajib* upon the child, the guardian will not pay it to the person entitled unless it is demanded.

4. Spending Upon the Ward

It is obligatory upon the guardian to spend towards his ward's welfare and it is not permissible for him to act either niggardly or extravagantly. He is expected to act moderately, keeping in mind the standard of those similar to the ward.

The guardian and the executor are trustees and are not liable unless breach of trust or negligence is proved. Hence, when a child attains puberty and claims breach of trust or negligence on behalf of the guardian, the burden of proof lies on him, and the guardian is only liable to take an oath, because he is a trustee and the dictum, 'The trustee is liable to nothing except an oath' (وما على الأمين إلا اليمين) will apply.

A Guardian's Sale to Himself

The Shafi'is as well as some Imami legists observe: It is not valid for a guardian or an executor to sell himself any property belonging to his ward or to sell his own property to the ward. Al-'Allamah al-Hilli himself has considered it permissible, making no distinction between the guardian and a stranger, provided such a deal is advantageous (for the ward) and no blame is involved. Similarly it is also permissible for a guardian appointed by the judge to sell to the judge an orphan's property whose sale is valid. This also applies to an executor, even if he has been appointed by the judge to act as a guardian. As to the judge selling his property to the orphan, Abu Hanifah has prohibited it on the basis that it amounts to the judge's pronouncing a decision concerning himself, and such a judgment is void. Al-'Allamah al-Hilli says: "There is nothing objectionable in it," i.e. the opinion of Abu Hanifah.

As may be noted, there is more to it than mere objectionability, because this act is neither the same as pronouncing judgment nor related to it, closely or remotely. Therefore, if it is valid for a judge to buy from the property of an orphan provided it is advantageous, it is also valid for him to sell to the orphan if advantageous, and the distinction is arbitrary.

The Guardian's or Executor's Agent

The guardian and the executor are entitled to appoint others as their agents for those activities which they are not capable of performing personally, as well as for those activities which they are capable of performing personally but do not consider it appropriate on the basis of custom to perform them personally. But where they consider it appropriate, the opinion prohibiting it is preferable.

It is evident here that acting personally or through an agent is a means for securing the ward's advantage and for fulfilling what is *wajib*. So wherever this end is achieved, the act is valid, irrespective of whether it is performed by the guardian or his agent: otherwise, the act is not valid even if performed by the guardian himself.

4. The Insolvent Person (al-Muflis)

'Muflis', literally, means someone who has neither money nor a job to meet his needs. In legal terminology it means someone who has been declared legally incapable by the judge because his liabilities exceed his assets.

The schools concur that an insolvent person may not be prohibited from disposing his wealth, regardless of the extent of his liabilities, unless he has been declared legally incapable by the judge. Hence, if he has disposed of all his wealth before being declared incapable, his dispositions will be considered valid and his creditor, or anyone else, is not empowered to stop him from doing so, provided these dispositions are not with an intent to elude the creditors, especially where there is no reasonable hope of his wealth returning.

A judge will not declare a person insolvent unless the following conditions exist:

1. Where he is indebted and the debt is proven in accordance with the Shari'ah.
2. Where his assets are less than his liabilities. There is consensus among the schools regarding these two conditions.

The schools also concur on the validity of the declaration of disability where the assets are less than the liabilities. They differ where the liabilities are equal to the assets. The Imami, the Hanbali and the Shafi'i schools state: He will not be declared legally incapable (*al-Jawahir*, *al-Tanqih* and *al-Fiqh 'ala al-madhahib al-'arba'ah*). The two disciples of Abu Hanifah, Muhammad and Abu Yusuf, observe: He will be declared legally incapable. The Hanbalis have followed these two in their fatwa. But Abu Hanifah has basically rejected the idea of considering an insolvent person as legally incapable even if his liabilities exceed his assets because legal disability entails the waste of his capabilities and human qualities. However, Abu Hanifah says: If his creditors demand payment, he will be imprisoned until he sells his property and clears his debts.

This form of imprisonment is reasonable – as we will point out later – where the debtor has some known property. But Abu Hanifah has permitted his detention even if no property is known to exist in his name. The following text has been narrated from him in *Fath al-Qadir* (vol.7, p.229, 'bab al-hajr bi sabab al-dayn'): If no property is known to be owned by the insolvent person, and his creditors demand his detention while he says: "I have nothing." the judge will detain him for debts accruing from contractual obligations, e.g. *mahr* and *kifalah*.

This is contrary to the explicit Qur'anic verse:

وَإِنْ كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَىٰ مَيْسَرَةٍ

...if the debtor is in straitened circumstances, then let there be postponement until they are eased. (2:280)

Moreover, there is consensus on the issue among all the legal schools of the Ummah: the Shafi'i, the Imami, the Hanbali, the Maliki, as well as Muhammad and Abu Yusuf (*Fath al-Qadir*, Ibn 'Abidin, *al-Fiqh 'ala al-madhahib al-'arba'ah*, and al-Sanhuri in *Masadir al-haqq*, vol. 5)

3. The debt should be payable presently, not in the future, in accordance with the opinion of the Imami, Shafi'i, Maliki and Hanbali schools. But if part of it is to be paid presently and part of it in the future, it will be seen whether the assets suffice for clearing the present debts; if they do, he will not be declared legally incapable; if not, he will be declared so. If he is declared legally incapable for debts presently payable, the debts payable in the future will remain till the time of their payment arrives (*al-Tadhkirah* and *al-Fiqh 'ala al-madhahib al-'arba'ah*).

4. That the creditors, all or some of them, demand the declaration of his legal disability.

When all these conditions are present, the judge will declare him legally incapable and stop him from disposing his property by selling, renting, mortgaging, lending, and so on, being detrimental to the interests of the creditors.

The judge will sell the assets of the insolvent person and distribute the proceeds among his creditors. If they suffice for repaying all the debts, they will be so applied. In the event of their falling short, a proportionate distribution will be affected.

On the completion of the distribution, the disability will automatically end, because its purpose was to safeguard the interests of the creditors and this has been achieved.

Exceptions:

Al-'Allamah al-Hilli observes in *al-Tadhkirah*, 'bab al-tafliis': From among the assets of the insolvent person, the house where he resides, his slave, and the horse which he rides will not be sold. This is the view held by the Imamiyyah, Abu Hanifah and Ibn Hanbal. Al-Shafi'i and Malik state: All of these will be sold.

A day's provision will also be left for him and his family on the day of distribution, and if he dies before the distribution, the cost of his shroud and burial will be met from his own assets, because funeral expenses have precedence over debts.

In fact all that which is immediately necessary will be left for him, e.g. clothes, a day's provision or more, in accordance with the circumstances, books that are essential for someone like him, the tools of his trade by which he earns his living, the necessary household goods such as mattresses, blankets, pillows, cooking pots, plates, pitchers, and all other things which one requires for his immediate needs.

A Particular Thing and Its Owner

If an owner (from among the creditors) finds a particular thing which the insolvent person had purchased from him on credit, that thing will belong to him in preference to all other creditors even if there exists nothing else besides it. This is the opinion of the Imami, Maliki, Shafi'i and the Hanbali schools.

The Hanafis observe: He is not entitled to it but will have a joint interest in it with the other creditors (*al-Tadhkirah* and *Fath al-Qadir*).

Wealth Accruing after Insolvency

If after legal disability any wealth accrues to an insolvent person, will his disability extend to it exactly like the wealth existing at the time of the disability, or not? Will the insolvent person be completely free in his dispositions concerning it?

The Hanbalis say: There is no difference between the wealth acquired after insolvency and the wealth present at the time of it.

The Shafi'is hold two opinions, and so do the Imamiyyah. Al-'Allamah al-Hilli states: That which is more likely is that the disability extends to it as well, because the purpose of the disability is to give those entitled their claims, and this right is not limited to the wealth existing at the time of the declaration.

The Hanafis observe: The disability does not extend to it and his dispositions as well as acknowledgement (of debt) are valid in regard to it (*Fath al-Qadir*, *al-Tadhkirah*, and *al-Fiqh 'ala al-madhahib al-'arba'ah*).

If a crime has been committed against an insolvent person, if it is unintentional and requires the payment of damages, the insolvent person cannot pardon the crime because the right of the creditors extends to it, and if it is intentional and entails *qisas*, the insolvent person is entitled either to take *qisas* or to opt for damages, and the creditors are not entitled to force him to take damages and forsake *qisas* (*al-Jawahir*).

The Acknowledgement of an Insolvent Person

If after being declared legally incapable an insolvent person acknowledges being indebted to some person, will his word be accepted and that person included among the creditors at the time of distribution of the property?

The Shafi'i, the Hanafi and the Hanbali schools observe: His acceptance will not be valid in respect to his property present at the time of declaration of his insolvency.

The Imami legists differ among themselves, with the author of *al-Jawahir* and a large number of other authorities subscribing to the view of the Hanbali, Shafi'i and Hanafi schools.

Marriage

The Hanafis say: If an insolvent person marries after his being declared legally incapable, his marriage is valid and his wife is entitled to be included among the creditors to the extent of *mahr al-mithl*, and that which exceeds it remains a claim against him.

The Shafi'i and the Imami schools observe: The marriage is valid but the entire *mahr* will be considered a claim against him and the wife will not be entitled to anything along with the creditors.

Imprisonment

The Imamiyyah say: It is not valid to detain a person in financial straits despite the disclosure of his insolvency because the Qur'anic verse says:

وَإِنْ كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَىٰ مَيْسَرَةٍ

And if the debtor is in straitened circumstances, then let there be postponement until they have eased (2:280).

If he is found to possess any known asset, the judge will order him to surrender it, and if he refuses to comply, the judge is entitled either to sell it and clear the debts – because the judge is the guardian (*wali*) of the uncompliant – or to imprison the debtor until he clears his debts himself, in accordance with the tradition:

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It is legitimate to punish and humiliate (as when the creditor calls his debtor 'injust', 'a delayer', etc.) a debtor who possesses (financial capability).

Abu Hanifah observes: The judge is not entitled to sell his property against his will, but he can imprison him.

Al-Shafi'i and Ibn Hanbal state: The judge is empowered to sell and clear the debts (*al-Tadhkirah* and *al-Jawahir*).

Prohibition on Travelling

There is no doubt that if it is permissible to punish a debtor by imprisonment it is also valid to prohibit him from travelling provided the necessary conditions exist. These conditions are: the debt be proven as per the Shari'ah; the debtor be capable of repaying it, and he procrastinate and keep on postponing payment. Apart from this, the interests of the creditors should be feared to be in jeopardy if he travels,

such as where the journey is long and dangerous. Hence if the debt is not proved, or is proved but the debtor's circumstances are straitened and he is unable to repay, or he has an agent or surety, or there is no fear of the creditors' interests being hurt if he travels, in all these circumstances it is in no way permissible to prohibit him from travelling.

From here it becomes clear that the measures taken by the courts in Lebanon for stopping a defendant from travelling simply on the initiation of proceedings against him have no basis in the Islamic Shari'ah but in positive law.

- [1.](#) Last illness (marad al-mawt) is also one of the causes, considering that it leads the person in last illness to being prohibited from dispositions exceeding one-third of his property. We have already discussed this in the chapter on wills under the title, 'Dispensations of a critically ill person.' Please refer.
- [2.](#) Every moral duty that is a duty vis-à-vis God Almighty is conditional on mental maturity ('aql) and puberty (bulugh), whereas every economic duty vis-à-vis people is not conditional to mental maturity and puberty.
- [3.](#) At first the Qur'anic verse mentions the property of the legally incapable while relating it to the second person (kaf al-mukhatab in أموالكم) and the second time to the third person (ha' al-gha'ib in أموالهم), alluding thereby that everything owned by an individual has two aspects: firstly, his personal authority over it, and secondly, that he apply it in a manner profitable to himself and the society, or, at the worst, in a manner unharmed to the two.
- [4.](#) The author of al-Jawahir observes in the 'bab al-hajr': "There is ijma' among the Imamiyyah that if idiocy occurs after the attainment of puberty, the guardianship will be exercised by the judge, and if it continues from childhood, the ijma' has been narrated that it belongs to the father and the paternal grandfather. But the truth is that there is a difference of opinion in the latter case, and a group of scholars has explicitly mentioned that the guardianship belongs to the two.
- [5.](#) Al-Na'ini, in al-Khwansari's Taqirrat (1357 H., vol. 1, p.324) states: "The truth is that the guardianship of the father is a proven fact, even if it entails disadvantage or loss for the child." But the compiler of this work narrates from his teacher, al-Na'ini, that he retracted from this opinion after having been emphatic about it earlier.

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