SELECTED ESSAYS IN ISLAMIC LAW

INCORPORATING CONTEMPORARY ISSUES

by

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Other publications by the Author

1. The Islamic Law of Succession (Published by Butterworths Ltd)
2. The Basic Concepts of the Islamic Law of Divorce
3. The Rules of Hajj and Umrah
4. The Rules of Itikaaf (Translation)
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Foreword

The essays contained in this book which were written in the recent past cover issues relating to Islamic Law.

Although they do not purport to be exhaustive in any way, I hope at the very least they reflect the dynamism and flexibility of Islamic Law as a comprehensive and all-encompassing system covering all the situations of life. There is no doubt whatsoever that Islamic Law, the Shariah, in its infinite breadth and depth can easily be applied to new situations and changing circumstances. An impartial study of its underlying principles would reveal that they are dynamic and rooted in equity and, as a Divine System, are free from the imperfections of secular man-made systems of Law.

The distinguished Muslim jurists of the past have left us a vast and valuable legacy of legal literature dealing in detail with the finest points that have no parallels in modern secular systems of Law. It is for the contemporary Muslim jurists to build on that invaluable juristic legacy, to use effectively its guiding principles and to further infer principles from the primary sources of the Holy Quran and Sunnah, and apply them to changing situations and circumstances. This task, I am happy to say, has commenced through the medium of the Islamic Fiqh Academy of Jeddah, a body comprising leading Muslim jurists, who have in their work to date passed important resolutions on a number of contemporary issues after serious discussion and debate.

I sincerely hope that the essays contained in this book will inspire the reader to search for more and create a deeper sense of awareness to apply the Shariah, which governs all the activities of Muslims.

In all humility and as a humble student, I ask the reader to remember this sinful soul in his pious prayers. May the Almighty accept this humble effort.

M.S. Omar
30 August 1993

The key to the Revival of Islam

As we come close to the end of the twentieth century, there are signs worldwide of an Islamic revival. From the decline and decadence of the of the last one hundred years, Muslims once more are beginning to re-assert their identity and are showing an uncompromising willingness to practice Islam in their day to day activities.

In Muslim countries, in Algeria, Sudan, Egypt there is a new awareness of Islam. The people have realised that Westernism and Western values are not the answer. That the only answer is a return to the fundamentals and principles embodied in the Holy Quran and Sunnah, the only guarantee of happiness and advancement.

But for Islam to dominate the world again and become a major player, there is a fundamental prerequisite: the practice of Islam as a whole, the practice of its teachings and noble principles in every facet of our lives. That alone can guarantee a true and genuine Islamic revival.

The tragedy is that we have chosen consciously or unconsciously to apply Islam in certain areas only. We have limited its scope and have thereby deprived ourselves from truly realising the spirit of Islam - from establishing a true connection with our Creator.

Our practice abounds with contradictions and anomalies. The moneylender consumes interest but yet prays five times a day. Somebody prays extra but thinks nothing of harming another. Dishonesty and commercial fraud is not only accepted but justified. Male and female intermingle freely and think nothing of it. Our example is like the blind men who were asked to describe an elephant which they had touched. Each described the part that he had touched as being descriptive of the elephant but nobody described the whole.

These are just a few examples. The point is that in our interaction with other human beings, in our dealings, we have relegated Islam to the background. The result has been disastrous: Islam has been portrayed as an empty shell, a facade, devoid of any reality and spirit. Apart from impeding our own spiritual

development, the failure to implement Islamic teachings in the real arenas of life has made no meaningful impact on the non-Muslims in our society. They view us as no different from them, as people who have deeply imbibed the material and cultural values of the West, and for whom religion is a set of dry rituals and ceremonies, far removed from man's economic, social and political development.

We have for whatever reason become accustomed to think that the Sunnah is limited to certain mundane habits of our beloved Holy Prophet (SAW). The Sunnah is the Prophetic example in all spheres of life. It is the mainspring of our actions, and the source of spiritual energy and blessings. The Holy Prophet (SAW), as the divinely-appointed interpreter of the eternal principles enshrined in the Holy Quran, gave us a beautiful model and we are ordered in the Holy Quran to follow that model of life as closely as possible to obtain success in this world and in the hereafter. That model is not confined to a few areas of our lives. Take any authentic compilation of Hadith, and we will note that the Prophetic model is so complete and detailed that it covers all the possible situations of life and earthly existence.

Those amongst us who under the influence of Orientalists seek to cast doubts and aspersions on the authenticity of the Sunnah as recorded in authentic collections of Hadith are doing a grave injustice to themselves. Not only have they betrayed their ignorance of the highest standards of scrutiny that were used to classify the Hadith and discard the spurious ones, but they have cut themselves off from the every essence of Islam and its spirit. They are Muslims in name but secular in thought and spirit. The Quran and Sunnah are inseparably linked as the only sources of Guidance, whose implementation must free man from the shackles of exploitation, oppression and materialism. As the Holy Prophet (SAW) himself said:

> " I leave behind two supports. If you hold fast to them, you shall never go astray: The book of Allah and My way."

It is therefore absolutely necessary for a true revival of Islam to portray the full Muslim personality which does not distinguish between the secular and spiritual, which is integrated, which tests all human behaviour and action against the divine standards of the Holy Quran and Sunnah, and which is premised on a deep sense of Accountability and God - Consciousness. Such a Muslim has truly surrendered, he has entered Islam fully because all his actions are both in conformity with the Sunnah and directed solely for the pleasure of Allah. In whatever he does, he is impelled by one enquiry: is this act in accordance with the Holy Quran and Sunnah?

In short, therefore, the key to Islamic revival is a return to the pure teachings

teachings of the Holy Quran and Sunnah. The uncompromising and sincere implementation of Islamic teachings in all our activities, whether economic, political, social, family or otherwise, would not only result in the revival of Islam but would give it the dominance which it enjoyed in earlier times. Islam must become a way of life, a Deen, and not a religion in the narrow sense. It is a dynamic, practical and all-encompassing. It is for us, Muslims, to take up the challenges and march forward. When the Iranian Emperor asked a companion of the Holy Prophet (SAW), what Islam meant, he replied:

> "Islam has liberated us from the injustices of man-made religions (and ideologies) and returned us to the justice of Islam; Islam has liberated us from the worship of man (and materialism) and reverted us to the worship of Allah, Islam has liberated us from the narrowness of this world and has conferred upon us its width and depth.

MAHOMED SHOAIB OMAR
23 AUGUST 1993

Contents

Foundational Principles Underlying Human Rights In Islamic Law

The promotion and observance of human rights in the world, in the pursuit of social and political justice, has become a central idea of our time. One of the purposes of the United Nations is to promote and encourage respect for human rights and for fundamental freedoms and all its member states have in article 56 of its Charter pledged themselves jointly and separately to achieve that purpose. Almost all states have accepted the Universal Declaration of Human Rights (adopted in December 1948) as "a common standard of achievement for all peoples and all nations...". Many states have moreover adhered to the principal covenants on human rights.[1]

Human rights and fundamental freedoms, embodied in the Universal Declaration and subsequent international intruments, were in fact recognised, observed and enforced by Islam as binding obligations some 1400 years ago at its inception.[2] They are referred to in detail in the Holy Quran[3] and the Sunnah[4] which are the two primary sources of Islamic Law.

The purpose of this article is to show that Islam has gone much further than traditional and modern theories of human rights - it has laid down sound foundational principles for the promotion, observance and enforcement of human rights. It is submitted respectfully that the widespread violations of

1. including the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

2. The suggestion by certain Western scholars that the "first theoretical design of human rights" was given by John Locke (1632-1704 AD) is incorrect. The Holy Prophet Muhammad (may peace be upon him) in his celebrated sermon (632 AD) on his farewell pilgrimage to Makkah proclaimed a charter of human rights. He condemned as illegal all kinds of racial discrimination and economic exploitation; he upheld the rights of the weak and downtrodden and the rights of women and proclaimed: "O People, your life (and protection of physical personality), your honour and your property are sacrosanct..."

3. The Holy Quran according to Muslims is the word of God which was revealed to the Prophet Muhammad (may peace be upon him).

4. The Sunnah is the practice of Prophet Muhammad (may peace be upon him) which is both an independent source of Law and a practical application of the principles contained in the Holy Quran. There are two other sources of Law, namely, the consensus of qualified jurists of a particular time ("IJMA"), and the inference of principles from the primary sources and their application to new situations ("QIYAS").

human rights in the world today is largely attributable to the absence of such foundational principles - and, without them, human rights would remain largely a theoretical concept. These principles are set out below.

1. EMPHASIS ON OBLIGATION AS OPPOSED TO RIGHTS

Although rights and obligations are reciprocal, Islam has laid great emphasis on the fulfillment of obligations as opposed to the claiming of rights in every field of human activity. This is embodied in the Islamic legal maxim to the effect that the obligations due to other human beings enjoy priority over rights due to oneself. The emphasis on fulfillment of obligations has created a psychological attitude showing serious concern for the fulfillment of obligations. It is apparent that if each person strives to fulfil his obligations, the corresponding rights due to those entitled would be fulfilled. The rationale underlying the principle is that the prevention of harm or prejudice to another (by the fulfillment of obligations) is to be preferred to individual gain or advantage as an act of worship and obedience.

Two examples will illustrate the application of the principle from an Islamic standpoint. In the one case, the Holy Prophet Muhammad (may peace be upon him) stated that a certain companion, who did not indulge in extra acts of devotion,[5] would enter paradise because he always spoke good of others and he did not bear envy and malice towards anyone. In the other case, he stated that a certain woman, who engaged in prayers and fasting, would enter hell because she used to harm her neighbour.[6]

2. PREFERENCE FOR OTHERS AT INDIVIDUAL LOSS

A corollary to the strong emphasis on the fulfillment of obligations is the principle of preference for others where such preference causes individual hardship. This is encouraged in Islam and is regarded as a means of achieving divine proximity and pleasure. The principle, which extends beyond the mere fulfillment of obligations (or, granting of human rights in all spheres), is expressed in the following verse of the Holy Quran:

> "They prefer others over themselves although poverty is their own lot."
> (S 59 : V 9)

The history of Islam is replete with noble examples of such self sacrifice and

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5. beyond those prescribed and referred to as "FARD" or compulsory.

6. both incidents are reported by the well known compiler of Prophetic practice, IBN HANBAL in his AL-MUSNAD, 6 VOLS.

preference. AYESHA (may Allah be pleased with her), the wife of the Holy Prophet Muhammad (may peace be with him), was once fasting. She had a piece of bread as her only provision. She gave the bread to a poor and needy person who called at her door. In the battle of YARMUK[7], a man offered water to a dying Muslim soldier who was his relative. Before he could drink, the cry of another dying soldier was heard. He indicated that the water must be given to the latter. The latter, in turn, upon hearing the cry of a third dying soldier lying nearby indicated that the water must be given to him (the third soldier). When the person with the water reached the third soldier, he had died. He then returned to the second soldier who by then had also died. He finally went back to his relative, the first soldier, who also by then had died.[8]

3. OBLIGATIONS ARE A TRUST TO BE DISCHARGED

According to Islam, all classes of obligations constitute a trust which must be discharged to those entitled. The observance of human rights is not merely a duty imposed by Law but amounts to the discharge of a trust for which Man, is held accountable in the hereafter. The concept of trust provides the mainspring for the recognition and enforcement of human rights - a denial of these rights amounts to serious breach of trust whose implications are far-reaching and beyond the temporal sphere. The Holy Quran aptly highlights the principle:

> "God orders you to discharge your trusts to those to whom they are due..."
> (S 4 : V 58)

This concept of discharging trusts impelled the second caliph of Islam, Umar[10] (may Allah be pleased with him), the ruler of a great empire, to walk the streets of the city of Madina at night in order to seek out the underprivileged and needy with a view to assist them. When Umar Ibn Abdul Aziz[11] became ruler

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7. fought in 636 AD between the Muslims and Byzantines.

8. both incidents are recorded by the authoritative commentator of the Holy Quran, AL-QURTUBI in his AL-JAMI LI AHKAM AL QURAN, 18 VOLS,. in the commentary to verse 9 of surah 59.

9. The word "AMANA" as used in the Holy Quran (S4 : V58) is extremely wide in meaning and covers all possible classes of obligations owed by an individual to another and all classes of responsibilities that devolve upon him. For example, the giving of advice and the protecting of confidential information are expressly regarded as acts of trust ("AMANA"); a person who is guilty of breach of trust is regarded as being devoid of true faith (IMAN), see AL-ALUSI, TAFSIR RUH AL MAANI, 15 VOLS.

10. UMAR BIN AL-KHATTAB whose rule extended over Arabia, Mesopotamia, Syria, Egypt and Jerusalem. He was, inter alia, a great champion of justice. He ruled from 634 AD to 644 AD.

11. who brought about great reforms in his short reign of 2 years and 5 months (717 AD to 720 AD). He was an embodiment of justice and righteousness. See ABDUL HASSAN ALI NADVI, SAVIOURS OF ISLAMIC SPIRIT Vol 1 p15 to 36 (LUCKNOW, 1983).

of the most powerful empire of the time in 99AH (717 AD), he returned personal property received from previous rulers to the state (as public property) and himself led a simple and austere life at a meagre salary to the extent that he did not have enough money to undertake the pilgrimage. These are just a few examples selected at random.

4. TAQWA OR GOD-CONSCIOUSNESS

The fulfillment of all classes of obligations under Islamic Law is qualified by God-Consciousness. In other words, Man in discharging obligations must be fully conscious of accountability in the hereafter when the substance and the real facts would be revealed and exposed before him. For this reason, the Holy Quran and the statements of the Holy Prophet Muhammed (may peace be upon him) repeatedly qualify commands embodying obligations with the words "fear of God". In the human rights context, the observance of human rights is not merely adherence to the letter of the law but arises out of a deeper sense of God-Consciousness. This in turn acts as the strongest and most effective deterrent to the infringement and denial of human rights. God-Consciousness ensures that in borderline cases or in cases of doubt, the benefit is given to the aggrieved party and possible violations of human rights are avoided and the basic rights of the individual are protected. God-Consciousness ensures further that human rights are enforced with a sense of ultimate accountability before almighty God and not selectively and hypocritically. Most importantly, a Muslim who fulfils an obligation for the sake of attaining divine pleasure performs a sacred act of worship and is promised manifold rewards in the hereafter. Accountability in the hereafter which is a corollary of God-Consciousness is strikingly expressed in the following Quranic verses:

a) "On that day Men will proceed in groups sorted out to be shown (the results) of their deeds (which they have done). Then anyone who has done atom's weight of good shall see it; and anyone who has done an atom's weight of evil shall see it."
(S 99 : V 6)

b) "For every act of hearing, and seeing and of (feeling in) the heart will be questioned (on the day of judgement)"
(S 17 : V 36)

An example from Islamic history will illustrate the impact of God-Consciousness and accountability on the conduct of a Muslim. Abdullah Ibn Umar, a well known companion of the Holy Prophet Muhammad (may peace be upon

him), once tested a shepherd. He asked him to sell him a sheep belonging to his flock which he cared for. The shepherd replied that the sheep belonged to the owner, his employer, and he had no authority to do so. Abdullah responded that he (the shepherd) should inform his employer that a wolf had eaten the sheep and the latter would not know the truth. The shepherd thereupon pointing to the heavens replied "Where is Allah (God)?" In other words, God was omnipresent and he was conscious that he could not deceive God to whom he was accountable.[12]

5. HUMAN RIGHTS ARE ALL-ENCOMPASSING AND COVER ALL FACETS OF LIFE

Human rights in Islam is an extremely broad concept which covers all domains and facets of earthly existence. It is not merely limited to the political, social, economic, civil and cultural rights specified in the various international instruments and covenants on human rights. It covers all human relationships and imposes obligations on Man which have the effect of protecting the environment, the natural resources, the plants and vegetation, and all the creatures and animals.[13] The recognition and enforcement of human rights under Islamic Law is really an application of the all-embracing and comprehensive concept of justice in Islam which is absolute. Muslims are ordered in the Holy Quran to uphold and enforce justice at every moment and in every conceivable human inter-relationship or transaction in the following general terms:

> "Oh believers: uphold justice continually and steadfastly..."
> (S 4 : V 135)

> "God orders you (Man) to enforce justice..."
> (S 6 : V 90)

> "Exercise justice, for that is closer to piety..."
> (S 5 : V 8)

Whilst governments are obliged to grant and enforce human rights under Islamic Law, individuals are equally obliged in their mutual dealings and

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12. It must be noted that accountability to God stems from the fact that Man according to the Holy Quran is the vicegerent of God on earth whose function is to carry out His orders and laws. See Quran S2 : V30; S38 : V26; S6 : V165; S10 : V14 and S57 : V7

13. in accordance with the number of statements of the Holy Prophet Muhammad (may peace be upon him). On one occasion, he stated:

> "SHOW MERCY AND COMPASSION TO EVERYTHING IN THE EARTH, AND GOD WILL SHOW MERCY TO YOU".

relationships to observe justice and fulfil the obligations imposed upon them - which from an Islamic perspective plays an equally important part in enforcing human rights. In other words, human rights under Islamic Law is not simply limited to specified claims against the government for the recognition and granting of human rights. The object of human rights according to Islam is to achieve justice and justice cannot be established until all persons (including all levels of government) deal with each other justly and equitably. This only can create a truly just society in which justice is supreme at all levels. The purpose of divine guidance according to Islam is to establish justice amongst mankind as stated by the Holy Quran in the following words :

> "We have sent Prophets with clear proofs and we have revealed to them the scriptures and the Scale (the rules) of Justice in order that Mankind may be steadfast upon justice."
> (S 57 : V 25)

6. HUMAN RIGHTS ARE SUPREME AND CANNOT BE ABROGATED

Human rights are an integral part of Divine Law and are expressly enjoined in the two primary sources namely, the Holy Quran and the Sunnah. The latter enjoy absolute supremacy and individuals and government (including the Courts) are obliged in their divinely-ordained capacities as trustees to enforce and implement those rights. They do not have the power to deny or abrogate those rights which are immutable. Any denial or abrogation of human rights amounts to serious disobedience to God in which case the following statement of the Holy Prophet Muhammad (may peace be upon him) applies:

> "There is no obedience to the created in the face of disobedience to the Creator."

On the other hand, the observance and enforcement of human rights in the Islamic view amount to a sacred act of worship which establishes proximity with God - in view of the fact that Islam does not distinguish between the secular and the spiritual which is the basis of the Western philosophy of life.[14]

The supremacy of human rights has been practised by Islam to an unparalleled extent. ALI (may God be pleased with him), the fourth caliph of Islam, was the ruler of a great empire. He claimed that a non-Muslim citizen had stolen his shield and brought an action in the Ordinary Court for the recovery thereof. He failed to discharge the onus of proof resting upon him because the judge

14. Almost three-quarter of Islamic teachings cover economic, political, social, family and other matters.

ruled that the evidence of his son, HASAN, a man whose honesty and credibility was beyond doubt, was not admissible in favour of his father. That was the only evidence and the action was dismissed. The person concerned admitted later having stolen the shield and, in the light of this great example of Equality before the Law, accepted Islam.[15]

7. HUMAN RIGHTS GRANTED TO ALL EQUALLY WITHOUT DISCRIMINATION

Islam guarantees the enjoyment of human rights and fundamental freedoms to every person without distinction as to race, colour, descent or ethnic origin. The Holy Quran states in this regard:

> "O Mankind, We have created you from a single (pair) of a male and a female, and made you into nations and tribes so that you may know each other (not that you may despise each other). Verily the most honoured of you in the sight of God is (he who is) the most Righteous of you." (S 49 : V 13)

The Holy Prophet Muhammad (may peace be upon him) stated as follows[16]:

> "There is no superiority or preference between Arabs and non-Arabs except on grounds of piety and God-Consciousness. All of you have descended from ADAM (may peace be upon him) and Adam was created from dust."

15. see Sunan Baihaqi, Vol. 10 p. 136
16. see Musnad of Hanbal, Vol. 5 p. 411

Damages for Breach of Contract in Islamic Law

Modern secular law recognises an action for the recovery of damages for breach of contract. The injured party is entitled, as compensation for breach of contract to be placed in the position he would have been in had the contract been performed by the other defaulting party.

Take the following two simple examples:

A person sells his house for R100,000.00. The buyer refuses to pay the price and repudiates the contract. If the market value of the house is R80,000.00 the seller is entitled to claim the difference of R20,000.00 from the defaulting buyer being damage which he has suffered as a result of the buyer's breach of contract.

A building contractor undertakes to build a house for R100,000.00. within a fixed stipulated time-period. The contractor in the course of construction abandons the project and refuses to complete the work. The owner causes the work to be completed by a third party at a cost of R120,000.00. The owner is entitled to recover the difference of R20,000.00 from the defaulting contractor suffered by him as a result of the defaulting contractor's breach of contract.

The question that arises is whether Islamic Law recognises an action for recovery of damages for breach of contract and, if so, what are the limitations to the action, and what kind of damages that flow from a particular breach of contract are recoverable. Whether, for example, loss of profits resulting from breach of contract are recoverable? These are delicate questions which must be answered by qualified jurists after discussion and debate.

The purpose of this article is to give some examples which indicate that Islamic Law has recognised compensation for loss suffered by a party in different situations even outside the field of contract. The examples set out below are based on Hanafi law only. Examples could be found in the other schools of law also.

1. SELLER CLAIMS PRICE FROM PURCHASER

The seller sells a thing to a purchaser for an agreed price. The thing is still in the possession of the seller. The buyer cannot be found and by his conduct effectively repudiates the contract. The seller institutes action in Court for payment of the price. The judge sells the thing on behalf of the buyer and the proceeds of the sale are used to settle the price. Any surplus, after settlement of the price, is paid over to the buyer. Any deficit, however, being the difference between the proceeds of the sale and the agreed price will be recovered by the seller from the purchaser.

ثم ان فضل شئ يسلم للمشترى لانه بدل حقه
وان نقص يُتبع هو ايضًا - هداية - باب السلم - مسائل منثورة

"Then in the case of a surplus, that amount will be retained for the benefit of the buyer because it is in substitution of his right. If there is a deficit, then the seller will pursue the buyer and recover the same."

The point to note in this example is that in the case of a deficit, arising from the proceeds of the sale by the judge, the seller suffers a loss which he then recovers from the purchaser by reason of the latter's breach of contract in failing to pay the price.

2. CLAIM AGAINST NON-CONTRACTING PARTY: BUYER RECOVERS FROM CREDITORS OF DECEASED ESTATE

The creditors of a deceased estate have lodged valid claims against the estate. The judge or state sells property belonging to the deceased estate to a bona fide buyer to settle those claims. The buyer pays the price but the state breaches its obligation to deliver the property because a third party proves a valid right as owner thereto. In the meanwhile, the price paid is for some reason lost and cannot be recovered by the buyer from the state for reasons of public interest. The buyer however is not left without a remedy because he may recover his loss (being the amount of the price paid by him) directly from the creditors for whose benefit the property of the deceased was in the first place sold.

و يرجع المشترى على الغرماء لان البيع واقع لهم فيرجع عليهم
عند تعذر الرجوع على العاقد و لهذا يباع بطلبهم -
هداية - باب التحكيم - فصل فى القضاء بالمواريث

"The buyer will look to payment of his loss to the creditors because the sale was for their benefit, so the buyer will recover from them in the event of his

legal inability in recovering from the other contracting party."

The innocent buyer in this case clearly suffers damages equal to the price paid by him. Because he cannot recover the loss from the other contracting party, he is entitled to recover from the creditors whose claims against the estate directly cause his loss. But for those claims, the property of the deceased would not have been sold and the innocent buyer would not have suffered loss.

3. CLAIM AGAINST OTHER CONTRACTING PARTY: BUYER RECOVERS LOSS FROM SELLER-EXECUTOR PERSONALLY

In this case, the executor sells the property belonging to the deceased estate to pay the claims of creditors. The buyer pays the price which for whatever reason is lost. The executor fails to deliver the property bought because it belongs to a third party who validly claims the same. The buyer recovers the price personally from the executor, although the latter acts in a representative capacity. The executor in turn recovers from the creditors the amount of his loss.

رجع المشترى على الوصى لانه عاقد نيابة عن الميت، وصار كما اذا باعه بنفسه، ويرجع الوصى على الغرماء لانه عامل لهم - هداية -

"The buyer will recover his loss from the executor because he is the contracting party, on behalf of the deceased, just as if he sold the property personally, and the executor in turn will recover the loss from the creditors because he acted for their benefit."

It is significant to note in this example that the executor is personally liable to the innocent buyer although he in substance acted in a representative capacity. The executor in turn recovers his loss from the creditors although he concludes no contract with them.

Similarly, if the property of the deceased was sold for the benefit of heirs, the buyer will recover the loss suffered by him from the executor personally, and the latter in turn will recover his loss from the heirs.

والوارث اذا بيع له بمنزلة الغريم لانه اذا لم يكن فى التركة دين كان العاقد عاملا" له - هداية -

"The heirs are in the position of the creditor, if property of the deceased is sold for their benefit, because if there are no debts owing by the deceased, the executor as the contracting party acts for them."

4. CLAIM AGAINST NON-CONTRACTING PARTY: CLAIM BY DEFENDANT AGAINST WITNESS WHO RETRACTS EVIDENCE AFTER JUDGEMENT

A witness for example testifies that the Defendant owes the Plaintiff a sum of money. The court grants judgement in favour of the Plaintiff for that sum. The witness after judgement retracts his evidence. The Defendant who has paid the judgement debt may recover his loss from the witness directly.

واذا شهد شاهدان بمالٍ فحكم الحاكم به ثم رجعا ضمنا المال للمشهد عليه لان التسبيب على وجه التعدّى سبب الضمان ... وقد سبقا للاتلاف تعدّيا . - هداية -

"Two witnesses testify in respect of property, the judges grants judgement on the basis of that evidence, than the witnesses retract their evidence, they are liable to the Defendant (against whom they have testified) for the amount of property (the judgement debt) because a negligent act causing the loss is a cause of compensation - they have caused damage negligently."

5. NOTIONAL HARM IN EXERCISING RIGHT AFFECTING RIGHT OF ANOTHER

Islamic Law goes further and has prohibited potential or notional harm to another. The owner of a lower storey according to Abu Hanifah (RA) cannot drive a nail or make a wedge in his property without the consent of the owner of the upper storey - although such conduct does not cause actual harm to the owner of the upper storey. The reason for that is

لانه تصرف فى محل تعلق به حق محترم للغير - هداية -

"because the use (of one's own property) relates to a circumstance connected with the revered right of another"

and further that:

على انه لا يعرى عن نوع ضرر بالعلو من توهين بناء او نقضه -

"such conduct (in using one's property) is not free from any class of harm to the owner of the upper storey in the sense of weakening his building or breaking it down."

6. DAMAGES FOR THE USE OF PROPERTY WITHOUT OWNER'S PERMISSION

According to the Hanafi Jurists, a person who uses the property of another without the latter's permission is not obliged to compensate such owner for the loss which he has suffered because he was deprived of the use of his property. The rule as stated in Chapter 8, article 596, of the well known code Majalla, is subject to two exceptions when compensation is payable:

a) if the property belongs to a minor, or is Wakf property, then in all cases compensation is payable in order to protect or preserve such property;

b) if the property is let for the purpose of deriving income, then compensation is payable if the user or occupier has no claim in so using or occupying under contract or ownership.

The Shafei view on the other hand is that the user or occupier is obliged to pay compensation equal to the market rental because

لان المنافع اموال متقومة حتى تضمن بالعقود وكذا بالغصوب
شرح المجلة - علامة لاتاسى -

"benefits constitute property of commercial value to the extent that they are compensated in contract and also in the case of taking property without the permission of the owner"

The Shafei view is broader and establishes a clear juridical basis for recovering loss or damages in the form of loss of profits, rentals and the like. On this view, a person whose lease has expired and continues to occupy property against the will of the owner is obliged to compensate the owner for the loss of rental for the period of the unlawful occupation.

7. TENANT LIABLE TO LANDLORD FOR DAMAGES

Articles 600 to 606 of the Majallah are illustrations of cases where the tenant is liable to the landlord because he breaches specific contractual obligations namely:

a) the leased property is destroyed or damaged because of the tenant's negligence or breach of an express term of contract (article 601);

b) the tenant is obliged to compensate the landlord for the value of the thing if it is destroyed because of his negligence; similarly, if the thing suffers a diminution of value;

c) the tenant uses the thing abnormally or contrary to the ordinary usage and causes the landlord indirect loss e.g. the tenant starts an abnormal fire which destroys the thing let (article 603);

d) the tenant breaches express terms of the contract imposing obligations on him (article 605);

e) the tenant fails to take proper care of the property which is damaged or destroyed thereby (article 604);

f) the tenant breaches his duty to return the property let to him upon expiry of the lease and the property is damaged.

8. LIABILITY OF EMPLOYEES AND INDEPENDENT CONTRACTORS

In articles 601 and 611 of the Majalla employees and independent contractors are held liable in specific circumstances.

Employees who act contrary to express instructions or agreed terms of contract are held liable to their employers for damages suffered thereby.

An independent contractor on the other hand is apparently held liable even if he was not at fault:

الاجير المشترك يضمن الضرر و الخسار الذى تولد عن نفعه و صنعه ان كان بتعريه و تقصيره او لم يكن

"an independent contractor (e.g.. tailor) is liable to pay compensation for loss and damage arising from his actions and work whether such loss is caused by his negligence or not" (article 611)

Islamic Law is a dynamic system of law and must be applied to new situations and circumstances. The above examples which were given by Muslim jurists many centuries ago, in the light of their own economic conditions, shows the flexibility and equity underlying Islamic Law. It is imperative that contemporary Muslim jurists now consider the important question of damages for breach of contract and provide answers if Islamic Law is to meet the many challenges of the contemporary world.

The Scope and Application of the Islamic Law of Succession

1. CRITERIA FOR ENTITLEMENT OF INHERITANCE

There are two possible criteria for devolution of property by inheritance:

i) MATERIAL NEEDS OF THE BENEFICIARIES

According to this criteria, the estate of a deceased person would devolve to those persons related to him as are most deserving from the viewpoint of financial needs and obligations. For instance, TESTATOR X has two sons, A and B. A is a medical practitioner. He has a lucrative practice and earns a large income. Son B, on the other hand, is a salesman in a retail business and earns sufficient to support his family. According to this test, therefore, TESTATOR X would leave a greater proportion of his estate to the more financially deserving of his two sons, namely B.

This criteria contains serious flaws. It is impossible to precisely define financial needs and obligations, more particularly in the case where a number of relatives are involved. Serious disputes between potential beneficiaries would arise as to which of them is in greater financial need. Moreover, financial needs are relative: common experience shows that a rich person may become poor and vice versa. In the example above, the medical practitioner (son A) could easily become incapacitated from working due to disease or other cause with the result that his financial position may deteriorate. On the other hand, the salesman (son B) could, through initiative and enterprise, significantly improve his financial standing, if not becoming extremely wealthy. In the result, it would become impossible to equitably apportion shares among potential beneficiaries. It therefore follows that this criteria for devolution of property by inheritance is inequitable and impractical.

ii) RELATIONSHIP TO THE DECEASED

According to this criteria, the estate of a deceased person should devolve upon those persons who are related to him. In view of the fact we are all descendants of one father, namely ADAM ( ) every person is related to one another.

This in turn means that relationship in general is unsuitable as a standard of entitlement as the estate of a deceased would have to be divided into innumerable parts thereby rendering division practically impossible.

It follows that a limitation has to be imposed on the criteria of relationship in general. The limitation of closeness or proximity of relationship to the deceased has been imposed by Islam so as to base inheritance on principles of justice and equity as set out below.

iii) THE ISLAMIC VIEW: PROXIMITY OF RELATIONSHIP TO THE DECEASED

The Qur'an has established the principle that entitlement to inheritance is based on closeness in relationship to the deceased. The Qur'an states:

﴿للرجال نصيب مما ترك الوالدين والأقربون وللنساء نصيب
مما ترك الوالدان والأقربون مما قل منه أو كثر نصيبا
مفروضاً﴾ [النساء : ٧]

"MEN SHALL RECEIVE A SHARE FROM THE ESTATES LEFT BY PARENTS AND NEAREST RELATIVES. WOMEN SHALL ALSO RECEIVE A SHARE FROM THE ESTATE LEFT BY PARENTS AND NEAREST RELATIVES - WHETHER SUCH SHARE CONSTITUTES SMALL OR LARGE PORTION OF THE ESTATE - THE SHARE IS A FIXED SHARE" (4:7)

In this verse, the word اقربون has been used to denote that the distribution of inheritance is based on proximity of relationship to the deceased, and not on financial needs and obligations. This is supported by the next verse wherein ALLAH orders Muslims that, if at the time of the distribution of inheritance; other relatives (who are not entitled to a share), orphans and the needy are present, then the major heirs should treat them kindly and give them some portion from their inheritance as solace and consolation.

﴿وإذا حضر القسمة أولوا القربى واليتامى والمساكين
فارزقوهم منه وقولوا لهم قولا معروفا﴾

"AND WHEN OTHER RELATIVES, ORPHANS AND THE NEEDY ARE PRESENT AT THE TIME OF THE DISTRIBUTION OF INHERITANCE, GIVE THEM SOMETHING FROM THE INHERITANCE WITH THE CONSENT OF THE HEIRS, AND SPEAK TO THEM IN A KIND MANNER" (4:8)

In this verse, ALLAH Almighty draws distinction between the relatives, orphans and needy who are not entitled to inheritance, and those entitled,

namely, the nearest relatives -

It is therefore clear that according to the Qur'an, mere relationship and need is not sufficient for entitlement of inheritance.

The principle of proximity of relationship is expressed in another way, namely, the nearer in degree of relationship to the deceased excludes the more remote. The principle is stated in a well known SAHIH HADITH as follows:

«ألحقوا الفرائض بأهلها فما بقى فهو لأولى رجل ذكر»

"GIVE TO THE NAMED SHARERS FIXED BY THE QUR'AN THEIR RESPECTIVE SHARES - WHATEVER REMAINS THEREAFTER BE APPORTIONED TO THE NEAREST MALE RELATIVE". (BUKHARI)

2. RULE OF PROXIMITY OF RELATIONSHIP: BEST RULE.

Western systems of law differ as to the rules that govern the devolution of property by inheritance. In fact, if a man applies his reason and intelligence to devise a common system of inheritance, then he would not reach consensus - as differences in prevailing systems of inheritance in the world testify! This is precisely the reason why ALLAH Almighty has prescribed a system of inheritance based on equity and justice, and which takes into consideration all interests, benefits and advantages due to man. The creation of a system of inheritance if left to man's subjective and fallible judgment will ultimately become an expression of man's passions and desires, as is the case with western systems of inheritance. The Qur'an states:

﴿آباؤكم وأبناؤكم لا تدرون أيهم أقرب لكم نفعا

فريضة من الله ، إن الله كان عليما حكيما﴾

" BETWEEN YOUR FATHERS AND SONS, YOU DO NOT KNOW WHICH OF THEM IS NEARER TO YOU IN BENEFIT. ALLAH IS UNDOUBTEDLY MOST KNOWLEDGEABLE AND MOST WISE". (4:11)

In this verse, ALLAH explains clearly that the rules of inheritance are not a matter to be left to man's subjective opinion. ALLAH is all-knowing and He has accordingly specified the shares of different beneficiaries in a manner that is just and equitable. ALLAH'S commandments are based on certain knowledge and great wisdoms (HIKMAH). For this reason, He has made the principle of proximity of relationship as the basis of the LAW of INHERITANCE. An impartial study of the systems of inheritance prevailing in the world in

comparison to Islamic Succession Law would leave one with no doubt whatsoever as to the superiority of the latter. To quote the words of an orientalist scholar:

> "In these provisions we find ample attention paid to the interests of all those whom nature places in the first rank of our affections; and indeed it is difficult to conceive any system containing rules more strictly just and equitable."
> (MACNAUGHTEN: PRINCIPLES AND PRECEDENTS OF MOHAMMEDAN LAW)

3. OBLIGATION TO FOLLOW ISLAMIC LAW OF SUCCESSION

The Qur'an imposes an absolute obligation on every Muslim to follow the Islamic Law of Succession. The Qur'an states that this Law has been ordained and made compulsory on every Muslim.

﴿فريضة من الله﴾ [النساء ١١]

"ALLAH HAS MADE THIS LAW OBLIGATORY ON EVERY MUSLIM" (4:II)

Moreover, the words:

﴿نصيبًا مفروضًا﴾ [النساء ١١]

"FIXED SHARE" (4:7)

indicate that the shares prescribed by the Qur'an cannot be changed or altered by man to the extent that upon his death ownership in the assets of the deceased automatically pass to his legal heirs in the prescribed proportions without the consent of such heirs. This is the only instance in Islamic Law where ownership is acquired without the consent or voluntary act of the person who acquires such ownership.

«لا يدخل فى ملك الإنسان شئ بغير اختياره إلا الإرث اتفاقا»
(الأشباه والنظائر لابن نعيم)

In verse 14 of SURAH NISA, ALLAH states that whoever breaches the Islamic Law of Succession, then ALLAH shall cause him to enter the Fire to dwell therein for ever.

4. APPLICATION

According to those legal systems based on English law, a TESTATOR has absolute power to dispose of his property by valid will to whomsoever he pleases - known as freedom of testation. According to this principle, a TESTATOR is free to exclude his near relatives in preference to remoter ones or even persons not related to him. The Courts are bound to give effect to the dispostive intention of the TESTATOR as expressed by the terms of his Will and have no power to deviate from, or alter, the express provisions of the Will.

This principle, although an expression of the subjective desires of the TESTATOR, may be usefully employed to give effect to the Islamic Law of Succession. A provision in a Will reading

> "I hereby bequeath my entire estate and effects to my heirs determined at the time of my death in accordance with, and in the proportions prescribed by, the Islamic Law of Succession"

is of full force and effect and may be enforced in any South African Court.

On the other hand, if a Muslim dies without a Will, his estate will devolve according to the local rules of intestate succession. The rules of this Law materially conflict with the Islamic Law of Succession and such estate will not devolve according to Islamic Law. It follows that it is imperitive for a muslim to draw a will which complies with Islamic Law. In drawing such a will, he has the option but he is not obliged to leave any amount not exceeding a third (1/3) of his estate to a third party, such as charity or an adopted child. This bequest is known as Wasiyah and is paid after the discharge of the debts of the deceased. The balance after deducting the Wasiyah would compulsorily devolve upon the prescribed heirs determined at the time of death in the prescribed proportions according to the rules of the Islamic Succession Law. In deciding on the amount of the Wasiyah, it is important to bear in mind the statements of the Holy Prophet (SAW) to the effect that it is better to leave one's heirs well off, than that they become deprived and become dependant on others. A Wasiyah to an heir is void unless the remaining major heirs consent thereto after the death of the deceased.

Grounds for Dissolution of a Marriage in Islamic Law : Rights of the Wife

Although the right of divorce, in the Shari'ah, is restricted to the husband only, the wife has also been given a right to apply to a court of law, in certain situations, for the dissolution of her marriage. If the court is satisfied after hearing both the parties that the application is based on such grounds as warrant the dissolution of the marriage according to Shari'ah, it may pass a decree of dissolution whereby the marriage is dissolved.

New and changed circumstances and conditions have created new problems in the social, political and economic arenas of life. As a result, the legal rules of one madhhab (school of law) are sometimes inadequate to deal with the changed circumstances.

In recognition of this reality of applying rules to suit new circumstances and customs, the Muslim jurists have held that in cases of necessity the applicable rule of another madhhab may be selected in accordance with certain conditions. Similarly, and in absence of a clear text of the holy Qur'an, or Hadith (sayings of the Prophet), or a consensus of jurists (ijma), the qualified jurists (who satisfy certain criteria of ability and insight) may by means of inference, analogy and legal reasoning deduce rules directly from the primary sources, the Qur'an and Sunnah (practice of the Prophet), to deal with the new problems. In view of the fact that the Shari'ah (laws of Islam) is the Divine code of law to last until the Day of Judgement, the answers to all new problems may easily be inferred by the mujtahid (person qualified to exercise ijtihad). The scope and application of ijtihad is, however, beyond the scope of this article.

In the sphere of Family Law also, certain rules of the Hanafi school, for example, do not provide adequate solutions to certain family problems which are products of modern conditions. For instance, as will appear later, serious hardship is caused to a wife whose husband is missing. To resolve such problems that the well-known scholar of our times Maulana Ashraf Ali Thanvi (R.A.) wrote the book entitled AL-HILAH AL-NAJIZAH. What follows purports to be no more than a summary of the principles contained in that book, and other authentic references including Kitab-Ul-Faskh Wath Tafriq published by Muslim Personal Law Board of India (Bihar and Orissa).

1. MISSING HUSBAND

The Hanafi rule is that a missing husband, whose living or death is unknown, is presumed to be alive until persons of his age living in his locality die. It follows that, until such event, his wife could not validly contract a new marriage. This rule is subject to the exception that, where the husband disappears in circumstances, such as sea voyage, war and extreme sickness, which on a preponderance of probability indicates that he died, the judge may dissolve the marriage by fixing a period which in the circumstances would satisfy him that at the expiry thereof, the person missing is most probably dead.

The later Hanafi jurists, however, on the basis of necessity, and having regard to the changed circumstances and conditions, and the hardships that would befall a wife (if a long period of waiting was fixed) adopted the rule of Maliki madhhab (school of law) , namely, that a waiting period of four years be fixed from the date of the wife's application, to the judge, or in his absence, a judicial committee, for a dissolution of the marriage.

Obviously, before the fixing of the four year period, the judge or judicial committee (as the case may be) must be satisfied that:

i) the applicant was married to the missing husband;

ii) the husband is missing or cannot be found or traced; and

iii) there is no reasonable prospect that the missing husband could be found, traced or located.

This rule is subject to two exceptions:

i) If the judge or judicial committee is satisfied on a preponderance of probability that the wife cannot wait for four years without committing adultery or becoming involved in sin, a waiting period of one year may be fixed whereupon the marriage will be dissolved. According to the Hanbali school, the period in such case is six months; or

ii) If the wife cannot be maintained for the duration of the four year period, she may demand immediate dissolution of her marriage.

The position is clearly summarised by a well known Maliki scholar in the following words:

"Know, that a Muslim woman whose
husband is missing must wait for four
years. Thereafter, she must undergo

a period of iddah[1] of four months and ten days. However, if the missing husband has not made provision for maintenance for the wife who is in dire need thereof, or such wife cannot exercise self restraint and fears, that she may commit fasad[2], then the wife is entitled to a decree of divorce without waiting for any period" [3]

اعلم ان المرأة المسلمة التى فقدت زوجها تعتد اربع سنين ثم تعتد عدة اربعة و عشر . ان المفقود عنها زوجها و لم يترك لها نفقة و احتاجت غاية الاحتياج او خافت على نفسها الفساد - ان لها التطليق بلا تاجيل .

2. ABSENT HUSBAND WHOSE ADDRESS IS KNOWN

As opposed to the missing husband, this refers to the husband who leaves the matrimonial home and whose whereabouts are known. For instance, he may be employed in another city or country.

From a practical viewpoint, however, there is no difference between the case of the missing husband and the husband who is absent in that both breach their duty to maintain the wife and fulfil the marital obligations.

The aggrieved wife who, in such circumstances, applies to a judge or judicial committee for a dissolution of her marriage must prove that:

i) she is married to the absent husband;

ii) such husband does not maintain her, and has made no provision for her maintenance;

iii) she has not waived her right to maintenance; and

iv) the husband has breached his obligation to maintain her.

Thereupon, the judge or judicial committee, will call upon the husband to properly maintain his wife and fulfil her rights within a period of one month, failing which, the judge or judicial committee, will dissolve the marriage.

The Hanafi jurists have in this case also followed the ruling of the Maliki madhhab:

"The procedure of obtaining the divorce of the wife of the missing or

1. iddah: prescribed waiting period
2. fasad: immoral acts, such as adultery
3. Thanvi, Maulana Ashraf Ali: Al-Hilah al-Najizah, p. 181-241

absent husband who cannot be traced, or if traced, refuses to comply, when the application for dissolution of the marriage is based on a failure to maintain the wife is for the wife to prove by means of two witnesses that the absent person is her husband; and that he has made no provision for maintenance for her; and that she has not waived her right to maintenance; she is required to take an oath on these matters where upon the judge will say:

I have dissolved the marriage or I have divorced you on his behalf; or he orders her to divorce herself and makes the divorce an Order of Court. This takes place after the expiry of a period, such as one month" [4]

وطريق تطليق زوجة المفقود
او الغائب الذى تعذر الارسال
اليه او ارسل اليه فتعاند -
ان كان لعدم النفقة -
فان الزوجة تثبت بشاهدين
ان فلانا زوجها غائب عنها
و لم يترك لها نفقة و لا
وكيلا بها -
و لا اسقطتها عنه و تحلف
على ذلك فيقول الحاكم

فسخت نكاحه او
طلقتك عنه - او
يامرها بذلك . ثم يحكم
به ، و هذا بعد التلوم
بنحو شهر .

3. BREACH OF OBLIGATION TO MAINTAIN

In the case of maintenance, two situations must be distinguished:

i) where the husband is absolutely unable to maintain his wife because of poverty and lack of means; and

ii) where the husband has sufficient means and is able to maintain his wife but, out of stubbornness or, for other reasons , refuses to maintain her.

In both these situations, there was no clear provision in the Hanafi law to dissolve the marriage.

The Hanafi jurists have accordingly adopted the provisions of the Maliki and Shafi'i law which provide for dissolution as follows:

a) In the case where the husband is absolutely unable to maintain his wife ((i) above), the judge or judicial committee will, after proper proof of the husband's inability to maintain her, adduced by the wife, make demand on the husband to fulfil his obligations to maintain within a specified time limit, failing which, such judge or judicial committee, will dissolve her marriage. There is a difference of opinion as to the time limit

4. Al-Hilah al-Nijizah, op cit.

to be given to the husband, but it is submitted that this would depend on the circumstances of each case.

"The proponents of dissolution of a marriage for failure of the husband to maintain the wife differ on the time limit to be fixed for the husband to comply. Malik (R.A.) states that the time period should be one or two months. Shafi'i (R.A.) states that the period should be three days." [5]

و قد اختلف القائلون
بالفسخ فى تاجيله
بالنفقة، فقال مالك
يؤجل شهرا او شهرين
و قال الشافعى ثلثة
ايام .

b) Where the husband is possessed of sufficient means ((a) above), then the judge or judicial committee is entitled to immediately dissolve the marriage without fixing any time limit by consensus of opinion according to the Maliki law.

"The judge or judicial committee will dissolve the marriage immediately." [6]

اى طلق الحاكم من
غير تلوّم .

The right of the wife to obtain a dissolution of her marriage on the ground of her husband's failure to maintain her is the viewpoint of the overwhelming majority of jurists (jumhur).

"If the husband is unable to maintain his wife, and she elects to seek the dissolution of her marriage to him, the judge or judicial committee will order such dissolution. This is the opinion of the overwhelming majority of jurists" [7]

ان الزوج اذا اعسر
عن نفقة امرأته
و اختارت فراقه فرق
بينهما . و اليه ذهب
جمهور العلماء .

4. FAILURE OF HUSBAND TO FULFIL WIFE'S RIGHT TO SEXUAL INTERCOURSE

A situation may arise where a husband provides the wife with a residence and properly maintains her, but fails to fulfil the marital obligation of sexual intercourse. As a consequence, there is a serious danger that the wife may become involved in sin.

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5. ibid
6. Al-Hilah al-Najizah, op cit.
7. Nayl al-Awtar, quoted by Maulana Zafar Ahmad Uthmani in the I'la al-Sunnan

The Hanafi law is that the husband is under an enforceable obligation to have sexual intercourse with his wife **once**. In other words, he may be compelled by Court Order to do so, failing which, the marriage may be dissolved.

Thereafter, the Hanafi jurists are divided into two groups as follows

i) One group is of the opinion that the husband is under an obligation to have further sexual intercourse with his wife, but that this obligation is not enforceable by law. In other words, the obligation is a purely religious one (ديانة).

ii) The other group is of the view that the obligation of the husband to have further sexual intercourse is not only a religious one, but is also enforceable by law. In other words, the wife is entitled by decree of Court or a judicial committee to obtain dissolution of her marriage should the husband fail in his duty to have sexual intercourse with her.[8]

"When the wife demands sexual intercourse, the husband is obliged to have intercourse with her. She may enforce this obligation in a Court of Law for the first time. Thereafter, according to some jurists, he is religiously obliged to have further intercourse, but this obligation is not enforceable. According to other jurists, the obligation to have further intercourse is enforceable." [9]

و اذا طالبته وجبت
عليه - و يجبر
عليه فى الحكم مرة -
و الزيادة تجب ديانة
لا فى الحكم عند بعض
اصحابنا - و عند بعضه
يجب عليه فى الحكم .

Although there is basis in Hanafi law to dissolve a marriage for failure to have sexual intercourse, the Hanafi Ulama in recent times have adopted the Maliki law in this regard which provides that the wife may obtain a dissolution because the failure to have sexual intercourse is a greater harm than the failure to maintain.

Not having sexual intercourse can cause greater harm than the failure in not providing (the wife). [10]

لان ضرر ترك الوطء
اشد من ضرر عدم
النفقة .

8. Al-Hilah al-Najizah, op cit.
9. Al-Bahr al-Ra'iq
10. Al-Hilah al-Najizah, op cit.

5. EMASCULATED HUSBAND

According to Hanafi law, if a wife applies to a judge or judicial committee for dissolution of her marriage on the ground that her husband is emasculated or castrated or that his penis is cut off, then the judge or judicial committee, after proof thereof, will immediately pass a decree dissolving the marriage without fixing a period or return day.

و لو وجدت المرأة زوجها مجبوبا جبرها القاضي في الحال و لا يوجل .

"If the wife finds that her husband is emasculated or that his penis is severed, the judge will give her option to dissolve her marriage immediately." [11]

و ان كان مجبوبا فرق بينهما في الحال ، ان طلبت لانه لا فائدة في التاجيل .

"If the husband is emasculated, the judge will immediately order dissolution of the marriage on the application of the wife because there is no benefit in delay." [12]

6. IMPOTENCY OF HUSBAND

An impotent husband means, according to the jurists, that the person who is unable to perform sexual intercourse with his wife as a result of disease, weakness, old age, senility or otherwise, notwithstanding the fact his sexual organs are intact.

In the case of the husband's impotency, the wife may apply to the judge or judicial committee for the dissolution of her marriage. The judge or judicial committee will, in accordance with the procedure laid down by the jurists, fix a period of one year calculated from the date of the order of such judge or judicial committee, in order to give the husband an opportunity to take appropriate remedial measures to end the impotency. If the Court is satisfied at the expiry of the period, in accordance with the procedural and evidential requirements prescribed by the jurists, that the husband has not ceased to be impotent, it will dissolve the marriage.

Umar ibn al-Khattab (R.A). decreed that a period of one year be fixed in the case of impotent husband. [13]

عن سعيد بن المسيب قال : قضى عمر بن الخطاب في العنين ان يؤجل سنة .

11. Fatawah Aalamgiri
12. Al-Hidayah
13. I'la al-Sunnan

The wife loses her right to claim a dissolution of her marriage on this ground in the following circumstances:

i) if she was aware of her husband's impotency prior to the marriage, and, notwithstanding married him; and

ii) if she expressly consented to live with her husband after being informed of his impotency. For example, she says: "I am happy to stay with him although he is impotent." Silence in these circumstances will not be deemed to constitute consent.

7. INSANITY OF HUSBAND

The wife is entitled to obtain a dissolution of her marriage in the event of the insanity of her husband in circumstances where such insanity:

i) causes extreme difficulty to her and renders cohabitation intolerable; and

ii) constitutes an impediment to the fulfillment of her rights.

In this regard, two situations must be distinguished:

a) insanity that is incurable and not accompanied by lucid intervals; and

b) insanity that is accompanied by lucid intervals.

In the case of incurable insanity, on he application of the wife for dissolution and after proof thereof, the judge or judicial committee will forthwith dissolve the marriage.

In the second case, (b), the judge or judicial committee will, after proper proof of insanity, prescribe a period of one year so as to give the husband an opportunity to avail himself of medical treatment. If at the expiry of the period, the husband is not cured of his mental illness, then the judge or judicial committee will, at the instance of the wife, issue a decree dissolving the marriage.

The right to obtain an immediate annulment of the marriage in situation (a) above, accords with the viewpoint of the Hanafi madhhab. The remaining three madhhabs (Maliki, Shafi'i and Hanbali) prescribe the period of one year in both situations before issuing a dissolution order.

The wife waives her right to claim a dissolution of marriage on the ground of

her husband's insanity if:

i) prior to her marriage, she had knowledge of his insanity; or

ii) after becoming aware of his insanity, she expressly consents and agrees to live with him.

8. DISEASE OR DEFECT ON THE PART OF THE HUSBAND

The wife is entitled to obtain an order dissolving her marriage if the husband suffers from a disease or defect which causes her serious prejudice or harm and renders cohabitation intolerable.

Imam Muhammad's statement in regard to the first three (factors upon which a dissolution of the marriage may be obtained) namely insanity and leprosy, to these, Qahastani (R.A.) has added every defect which does not render cohabitation with the husband possible except with prejudice or harm. [14]

قوله في الثلاثة الاول - و هي الجنون والجذام و البرص و الحق بهذا القهستاني كل عيب لا يمكنها المقام معه الا بضرر .

9. CRUELTY OF HUSBAND

According to the Shari'ah, a husband is not permitted to treat his wife with cruelty. The cruelty of the husband may take various forms such as, continuous beatings, assaults and coercion to commit acts prohibited by Shari'ah.

In such circumstances, the wife is entitled to certain relief. Under the Hanafi law, the wife is entitled to obtain a Court order restraining the husband from the commission of such unlawful acts, but she is not entitled to a dissolution order on this ground alone.

On the other hand, under the Maliki law, the wife is entitled to obtain an order dissolving her marriage in consequence of her husband's beatings, assaults and ill-treatment.

Accordingly, in circumstances where the ill-treatment causes serious prejudice to the wife and renders her life a misery, she may claim a dissolution after properly proving her claim.

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14. Al-Tahawi

"The Hanafi madhhab is that the husband who harms his wife, for example, by seriously beating her is entitled to be restrained from such conduct by Order of Court. The wife is entitled to claim such a Court Order. On the other hand, the Maliki Madhhab, is that the wife is, in such circumstances, entitled to obtain a Court Order dissolving her marriage." [15]

مذهب الحنفية ان الزوج
الذى يضار زوجته بنحو
الضرب المبرح يستحق
التعزير للزوجة ان ترفع
امرها الى القاضى طالبته
تعزيره - و مذهب المالكية
ان للزوجة فى هذه الحالة
ان تطلب الى القاضى ان
يطلقها منه .

15. Ahwal al-Shaksiyyah

Parental Donations to Children:
Is Equality Necessary?

The question arises whether a parent is obliged to make donations to his children in equal proportions, or can the parent prefer one child over another.

The question arises in the context of the well known Hadith concerning Nauman IBN Bashir (RA) : his father (Bashir IBN SAAD) donated or wished to donate property to him in preference to his other children. He sought the advice of the Holy Prophet (SAW). The Holy Prophet (SAW) asked him : "Do you have other children", he replied : "Yes". The Holy Prophet (SAW) responded according to different narrations as follows:

a) "revoke the donation"
b) "retract the donation"
c) "fear Allah and show equality between your children"
d) "I will not be a witness to injustice"
e) "Take another as your witness to the donation"

The jurists have differed in the interpretation of this Hadith. The overwhelming majority (JUMHUR) have stated that the Hadith does not create an absolute prohibition and have given a number of explanations. The fact that the Holy Prophet (SAW) asked the parent, Bashir IBN SAAD (RA), to take a third party as a witness in itself shows that the prohibition was not absolute (see (e) above).

The overwhelming majority of the jurists are of the opinion that observing equality in parental donations to children is desirable (MUSTAHAB) but not obligatory (WAAJIB). In support of their view, they refer to three well known companions, ABU BAKR, UMAR and ABDUR RAHMAN IBN AUF (RA), who had made donations to certain of their children to the exclusion of others.

The distinguished scholar, Justice Maulana Taqi Usmani in his commentary to SAHIH MUSLIM, known as TAKMILAH FATH UL MULHIM, has given an excellent interpretation to the Hadith referred to above : he states that although the words of the Hadith are general, they deal with a specific situation. There was no valid reason for the father of Nauman to prefer him

in relation to his other brothers and sisters. The donation was made, or contemplated, at the request of the mother of Nauman, according to another Riwaayah. Accordingly, the Holy Prophet (SAW) described the donation as "unfair" and had declined to witness it.

In short, therefore, the question of parental donations to children may be summarised as follows:

a) It is desirable (Mustahab) that parental donations to children should generally be in equal shares;

b) A parent may for a valid reason (e.g. service to parents) prefer one child over another, provided that the purpose of the donation is not to cause harm to the remaining children. The well known text **Durr Ul Makhtaar** states as follows:

وفي الخانيه لا باس بتفضيل بعض الاولاد في المحبة لانها عمل القلب وكذا في العطايا ان لم يقصد به الاضرار، وان قصده فسوى بينهم يعطى البنت كالابن عند الثاني وعليه الفتوى

"The juristic work kaaniyah states: there is nothing wrong in showing more affection to some children because that is a matter of the heart. Similarly, it is permissible to make gifts to some children in preference to others without any intention to cause harm. If the donor parent intends to cause harm, then he or she is obliged to observe equality, the daughter in such event should receive the same share as the son according to the jurist Abu Yusuf (RA), and his view accords with the Fatwa on the matter."

c) If the donor parents intends to cause injury, or has no valid reason, in making the donation, then he or she is obliged to observe equality between the children.

Finally, if the parent elects to divide his estate in his lifetime solely to avoid a dispute between his heirs after his death, then the lifetime transfers, although technically donations, amount in substance to a premature distribution of his estate. In such case, he would be permitted (and it may even be desirable) to distribute his assets between his children in accordance with the inheritance proportions namely, the male child would receive two parts and the female child one part. This in any event accords with the views of Imam Ahmed Ibn Hanbal and Imam Muhammad (RA).

Mudarabah as a Class of Partnership in Islamic Law

Mudarabah is a distinct class of partnership in terms of which the one party, called the rabbul maal, hands over capital to another, called the mudaarib, on the basis that the mudaarib trades with such capital and the resultant profits (if any) are shared between them in pre-agreed proportions (such as two-thirds to the rabbul maal and one thirds to the mudaarib).[1]

The essence of this class of partnership is that it is a partnership relating to profit only. The mudaarib is entitled to profit in accordance with the agreed profit sharing ratio by reason of his labour, and the rabbul maal is similarly entitled to profit as a return on his capital. It follows that ordinarily, in the absence of defined negligence and/or breach of contract, the losses of the partnership will be offset against accrued profits, and thereafter against capital. It also follows that the contract of mudaarabah will be void if the agreement stipulates that the rabbul maal must work together with the mudaarib.[2]

Mudaarabah is a unique class of partnership in that it brings together both capital and labour and employs them productively in business. A person has the capital but not the skills and expertise, whereas another has the skills and expertise to conduct business but not the capital. There is therefore a genuine need to recognise such a partnership which was prevalent at the time of the Holy Prophet (SAW). He confirmed its validity and the noble companions (may Allah be pleased with them) transacted on the basis of mudaarabah. The jurists are accordingly unanimous (IJMA) in regard to its validity.[3]

The contract of mudaarabah itself is concluded by offer and acceptance, or by the use of words which indicate that the parties intend to conclude a contract of mudaarabah. For example, the rabbul maal says to the mudaarib: "Take this capital (e.g. R100,000.00) for the purposes of mudaarabah, and expend labour on the basis that the resultant profits will be shared equally", or the

1. AL-MUGNI, Vol 5, Page 134
2. RADDUL MUHTAAR, Vol 5, Page 645
3. BADAI-US-SANAI, Vol 6, Page 79

rabbul maal says: "Take this cash and treat it as capital, and the profits will be shared equally between us" and the mudaarib accepts the offer.[4]

Upon conclusion of a valid mudaarabah contract, the following legal consequences arise and attach to the mudaarib:

a) the mudaarib, in receiving the capital from the rabbul maal, is a trustee (AMEEN) in the sense that he is not ordinarily obliged to compensate the rabbul maal in the event of loss or destruction thereof.[5]

b) the mudaarib, in commencing his labours, is an agent of the rabbul maal in dealing with and disposing of the property because he does so on his (the rabbul maal's) instructions as the owner thereof.[6]

c) the mudaarib, if he makes a profit, shares therein by reason of his labour, and because the object of mudaarabah is to make a profit.

If, on the other hand, the contract of mudaarabah is void for any reason, then the mudaarib is entitled to remuneration for his labour equivalent to the market rate. If the mudaarib breaches a valid condition of the contract of mudaarabah, then he is strictly liable to make good any loss because he has dealt with the property of another without authorisation[7].

The contract of mudaarabah may be general without any limitation as to duration, or class of business to be conducted, or place where such business is to be conducted, or otherwise as to the category of suppliers and merchants to be dealt with. The contract however may be limited as to any of those matters. The rule in this regard is that the rabbul maal may impose any condition in the contract which is beneficial to him, and the mudaarib is bound to observe such condition otherwise he will be in breach of contract. If the condition is of no benefit to the rabbul maal, then the condition itself will be invalid without affecting the validity of the whole contract.[8]

4. MAJALLAH, article 1405
5. RADDUL MUHTAAR, Vol 5, Page 646
6. HEDAYAH, Chapter on MUDARRABAH
7. HEDAYAH, Chapter on MUDAARABAH
8. MAJALLAH, Article 1407, Commentary of Allama Itasi (RA)

Is a Woman Obliged to Cover her Face in Sharia?

Is it necessary for a woman to cover her face in the presence of strangers (who are not her designated MAHAARIM) according to SHARIA? This question is answered in this article in the context of the claim that the veil or NIQAB is primarily "a social requirement and custom according to the environment and customs of a particular country." In endeavouring to answer the question, I will confine myself to a brief examination of the relevant Qura'nic verses.

1. SURA AN-NUR, VERSES 30 AND 31

And Say to the believing woman
That they should lower
Their gaze and guard
Their modesty; that they
Should not display their
Beauty and ornaments except
What (unavoidably) appears
Thereof; that they should
Draw their veils over
Their bosoms and not display
Their beauty except
To their husbands, their fathers
Their husbands' fathers, their sons
Their husbands' sons
Their brothers or their brothers' sons
Or their sisters's sons
or their women, or the slaves
Whom their right hands
Posses, or male attendants
Free of sexual desires
Or small children who
Have no carnal knowledge of women;
and that they
Should not strike their feet
In order to draw attention

To their hidden ornaments
And O ye believers
Turn ye all together
Towards Allah in repentance that ye
May be successful.

It is apparent that upon a plain reading the purpose of the verse is to eradicate promiscuity, fornication and adultery and all the preliminary steps that lead directly to the commission of such shameful acts. The references to "lowering their gaze", "drawing their veils over their bosoms" and "striking their feet to draw attention" indicates that all acts or omission which in the ordinary course leads directly to sexual promiscuity and FITNAH are forbidden.

In order to totally eradicate sexual promiscuity and FITNAH, the verse goes on to say that a woman is not permitted to display her beauty and charms **except** in degrees to her husband, father, and other classes of persons specified in the verse. The exempt class would constitute the MAHAARIM, and any other would qualify as strangers or GAIR-MAHAARIM. The principle fixed by the verse is, therefore, that a woman cannot display her beauty to any male person other than the persons exempted by the verse. It goes without saying that the face is the focal point of a woman's beauty, and the main source of attraction. Hence, the face of a woman cannot be displayed or shown to a stranger in normal circumstances whether in public or private according to the general principle fixed by the verse as stated above. She is permitted to display her beauty to the exempt class (the MAHAARIM) for obvious reasons of close contact, and because of the considerably lesser danger of sexual promiscuity and fitnah within that class.

ZAMAKSHARI (ولقلة توقع الفتنة من جهاتهم

The Sharia, however, is practical, dynamic and takes into account the real situations of life. A woman may in the case of genuine need be forced to expose her face in the presence of strangers. For example, where she buys a commodity or undergoes medical treatment.

It is against this background that the preceding portion of the verse "they should not display their beauty and charms except what must ordinarily appear unavoidable" falls into proper perspective. The words الا ما ظهر منها are in context an exception to the general rule, and cover those cases of genuine need and necessity when a women is forced to expose her face in the presence of a stranger. That is how the great commentators of the Holy Qur'an have interpreted the verse.

Take the following two examples:

«ولا يبدين زينتهن الا ماظهر منها» .. أى لا يظهرن شيئا من الزنية للأجانب إلا مالا يمكن إخفاؤه (ابن كثير)

"Women must not display any part of their beauty and charms to strangers **except** what cannot possibly be concealed." Ibn Kathir Talsir al Qur'an.

إلم سومح مطلقًا فى الزينة الظاهرة؟ قلت: لأن سترها فيه حرج، فإن المرأة لاتجد بدًا من مزاولة الأشياء بيديها، ومن الحاجة إلى كشف وجهها خصوصاً فى الشهادة ..... وهذا معنى قوله: (إلا ماظهر منها) يعنى إلا ماجرت العادة والجبلة على ظهوره والأصل فيه الظهور.

"Why is the woman permitted to display her external beauty and charms? because to conceal that would cause her inconvenience. A woman is forced to deal in commodities with her own hands. She is compelled by genuine need to expose her face especially at the times of giving evidence, litigating in court, and marriage. She is compelled to walk the streets and expose her feet, especially poor women. This is the meaning of (الا ماظهر منها) that is , 'except what the situations of ordinary life compel her to expose.'" **ZAMAKSHARI**

A further point in the interpretation of الا ماظهر منها has been highlighted by the well known scholar, Moulana Ashraf Ali Thanvi (RA). He states that the verb used is that of the first form ظهر and not اظهر which in the fourth form signifies deliberate exposure or display. The use of ما ظهر indicates that the exposure of the face is confined to need. (see his article, in Vol. 4 of Imdadul Fataawa P. 181, entitled

القاء السكينة فى تحقيق ابراء الزينة

It follows from the aforegoing that upon a proper interpretation of the verse the face and hands of a woman can only be exposed to strangers in a situation of genuine need where concealment would cause her serious inconvenience. (حرج)

2. SURAH AL-AZHAB - Verse 53

"And when you
Ask them
For anything you want,
Ask them from behind
A screen: that makes
For greater purity for
Your hearts and for theirs."

The meaning of this verse is clear: the companions of the Holy Prophet (SAW) were ordered to communicate with the wives of the Holy Prophet (SAW) from behind a screen and not directly face to face. It is obvious that this instruction is not limited to the wives of the Holy Prophet (SAW). The verse has general application and the fact that the noble wives of the Holy Prophet (SAW) are specifically mentioned emphasises the importance of the subject matter. The distinguished jurist, ABU-BAKR JASSAS (RA) in his AHKAMUL QUR'AN states:

وهذا الحكم وإن نزل خاصا فى النبى - صلى الله عليه وسلم- فالمعنى عامّ فيه وفى غيره إذ كنا مأمورين باتباعه و الاقتداء به.

Vol. 3 P. 370

"This order, although revealed specifically in relation to the Holy Prophet (SAW), is general in application because we are ordered to follow him".

Similarly, the well known commentator of the Holy Qur'an Imam Qurtubi (RA) in his AL-JAMI LI AHKAMIL Qur'an states:

ويدخل فى ذلك جميع النساء بالمعنى وبما تضمنته أصول الشريعة من أن المرأة كلها عورة بدنها وصوتها كما تقدم، فلا يجوز كشف ذلك إلا لحاجة كالشهادة عليها.

" All women are in effect covered by the terms of the verse which embraces the SHARI principle that the whole of a woman is (to be concealed) - her body and voice, as mentioned previously. It is not permissible to expose those parts except in the case of need, such as the giving of evidence..."

3. SURAH AL-AHZAB - Verse 59

"O Prophet' Tell
your wives and daughters,
as well as all the other
believing women that they
should draw over themselves,
some of their outer garments
(when in public)..."

In his commentary to this verse, Allama abu Abkr Jassas (RA) states as follows:

وفي هذه الاية دلالة على أن المرأة الشابة مأمورة بستروجهها عن الأجنبيين واظهارالستر والعفاف عندالخروج لئلا يطمع أهل الريب فيهن. (أحكام القرآن)

"This verse proves that a young woman is ordered to cover her face from strangers, and to manifest SATR and modesty in public so that doubtful people may not be desirous of her."

It is sufficient to quote the following authentic commentators in their interpretation of the verse:

يغطين وجوههن وأبدانهن بملاحفهن إذا برزن لحاجة .

"They (the women), shall cover their faces and bodies with their outer garments when they appear in public for a valid reason".

يغطين بها وجوههن واعطافهن .

"They shall cover their faces and...sides"

قال ابن عباس: أمر نساء المؤمنين أن يغطين رؤسهن و وجوههن بالجلابيب إلا عينا واحدة .

"Ibn Abbas states that the muslim women are ordered to cover their head and faces with outer garments except for one eye".

see: خلاصة التفاسير

AND ALLAH KNOWS BEST

Sale of Immaterial Rights - Trade Marks, Copyright and Patents

The products of the mind are now recognised as a form of property having a separate existence apart from the personality of the creator. Traditionally, the objects of rights were material things. Western Law now affords protection to what are now described as "Immaterial property rights" such as patents, designs, trade marks, copyright and goodwill. These rights are also regulated by international conventions or treaties such as the International Convention for the Protection of Industrial Property, which has been signed by most countries.

A trade mark, for example, serves two functions - it distinguishes goods of superior quality (bearing the particular trade mark) from goods of inferior quality, and it identifies those goods in the course of trade as belonging to a particular person. The mark itself, for example, "PEPSI", through use becomes a symbol of quality in the minds of consumers and acquires monetary value if its own. The registered owner of the trade mark, or the authorised user, enjoys certain rights: he can Interdict another from using the trade mark on the grounds of deception and he can claim damages from the infringer for the financial loss suffered by reason of the unlawful use of the mark.

Similar considerations apply to patents which are registered to protect new inventions in trade; designs which are registered to protect the original appearance of an article; and copyright which protect literary and artistic works produced as a result of original skill or labour.

Trading in immaterial property rights has become a common feature of modern commerce. The author of a work sells his rights therein to a publisher for an agreed amount of money known as a royalty. Trade marks (including the goodwill of a running business) are sold for substantial sums of money. The same applies to other forms of intellectual property.

The question arises as to whether it is permissible to sell, transfer or assign such rights in Islamic Law. The answer to this question depends upon whether

Islamic Law recognises such immaterial objects of rights as property.[1]

The Hanafi jurists distinguish between pure rights, and rights which attach to a thing. In the former case, the sale of the right itself was not permissible because it did not constitute property and was therefore not the subject of sale. An example of such a pure right is the right to erect the upper storey of a building whose sale was prohibited. On the other hand, the right to draw water from wells was regarded as saleable because the right attached to a thing namely, the land itself. The Shafii and Hanbali jurists, including certain statements of Malaki Jurists, permitted the sale of intangible things by expanding the definition of "sale" to include not only the sale of material property but also "enduring benefits".

The Hanafi view is crisply summarised by the following statement contained in the well known text **Hedayah**.

"If the lower storey belongs to one person and the upper storey to another, and both buildings collapse, or the upper storey only collapses, and the owner of the upper storey sells his right to erect the upper storey, then the sale is not valid because the right to erect the upper storey does not amount to property; because, furthermore, property means what can be physically gathered or brought under one's control, and property in this sense is the subject matter of sale - as opposed to the right to draw water from a well which right may be permissibly sold as a right attaching to the land..."

The whole question was carefully and clearly analysed by the distinguished jurist Maulana Taqi Usmani in a 46 page article entitled ("The sale of pure rights") which was submitted to the Islamic Fiqh Academy based in Jaddah. His conclusions are summarise below: Rights are divided, based on the writings of the Muslim jurists, into seven classes. One of those classes is the following:

"Custom and usage has scope in fixing certain rights to property. The (characteristics of) "Property" are established through the usage of people - as stated by IBN AABIDEEN" (p38)

The registration of a trade mark under the law of a country confers upon the proprietor of the trademark a right which is analogous to a right over a

1. See the article of Hadhrat Maulana Taqi Usmani entitled "The sale of pure rights" at p. 21.

material thing. The ownership of the trade mark, which is evidenced by the registration certificate, is through trade usage effectively regarded as ownership of a material, tangible thing. The trade mark according to mercantile custom acquires the characteristics of property in the sense referred to by the great jurist Ibn Aabideen. The position is analogous to the sale of electricity which has a commercial value and there can be no doubt in the permissibility of its (electricity's) sale. It follows that it is permissible to sell the rights in a trade mark, or transfer or assign such rights or to grant the registered user thereof for consideration, subject to two conditions:

i) The trade mark must be registered according to the law of a particular country. In the absence of registration, the mark is not regarded as property in trade usage and custom;

ii) The sale of the trade mark itself must not cause deception to consumers. This may be done by notifying consumers of the sale and the fact that the proposed use of the mark by the buyer will not affect the standard and quality of the goods bearing the trade mark.

The same principles of Islamic Law apply to other forms of immaterial rights. Copyrights, patents and designs through legal registration acquire the characteristics of tangible property in commercial usage and merchants are free to deal with such rights as they would deal with tangible property. The sale of rights in an import permit, however is subject to the condition that the transferability of the permit is permitted according to the law of a particular country. If transferability is prohibited under law, the sale is invalid in Islamic Law.

The sale of the goodwill of a running business (or, a business carried on as a going concern) falls within the scope of the sale of a trade mark or business name and is therefore permissible under Islamic Law. In this sense goodwill may be defined as:

> "The very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money."
> TERGO V HUNT AC 7 (HL) 24

The sale of the goodwill of a running business would be permitted under Hanafi Law because the goodwill is inseparably attached to the tangible fixed assets of the business as a whole.

Many Landlords are now charging tenants a specified sum of money, which they describe as "goodwill", apart from the rental payable for the duration of the lease. This money is really paid as a consideration for the right to grant occupation of empty premises, at the commencement of the lease and is not refundable even if the tenant vacates the premises before the expiry of the lease.[2] It is sometime described as a premium for entering into the lease in income tax legislation. The payment of premium a is not equivalent to the goodwill of a business in the sense referred to above. It is therefore not permissible for a landlord to charge such a premium, in addition to rental, and amounts to a form of extortion. The landlord could instead add such sum to the rental and receive rental in advance under the agreement of lease. The amounts received in advance would be offset against future rentals. If the agreement of lease is terminated prematurely, the tenant is entitled to a proportionate refund on any amounts paid in advance and not due.

Finally, the Islamic Fiqh academy of Jiddah, a body comprising of leading Muslim Jurists, representing various Muslim countries, has in its fifth session held at Kuwait from 10 to 16 December 1988, resolved as follows in connection with immaterial rights:

1. "A business name, trade mark, copyright, and invention has in contemporary usage acquired commercial value by reason of mercantile custom, and confers on the proprietor thereof specific rights.

2. The sale or transfer of business names and trade marks for monetary consideration is permissible because they have become rights of monetary value, in the absence of fraud and deception.

3. Copyright and inventions are protected in the Shariah the proprietors thereof are entitled to sell or dispose of them."

2. The "goodwill" must be distinguished from "Pugree" prevailing in India where tenants enjoy statutory protection. The matter was considered by the Fiqh academy of India which resolved that "Pugree" may be charged in lieu of, and as a consideration for, the landlord abandoning his right to retake possession of the premises. (see Bahas E. Nazar vol. 8 p. 11)

Stock Exchange and Financial Markets

The Islamic Fiqh Academy, which is based in Jeddah, Saudi Arabia, was established under the auspices of the Organisation of Islamic Conference. The primary object of the academy is to consider contemporary problems in all spheres of life and to provide answers in accordance with the principles of Islamic Law. The members of the Academy comprise of distinguished and leading Muslim jurists representing the various Muslim countries including minorities.

The resolutions of the academy are taken after detailed research and serious debate and discussion, and can be regarded as representing a consensus of a qualified and distinguished body of jurists on a specific issue. This academy at its recent session held in Jeddah on the 14 May 1992 passed resolutions on aspects of the stock market and financial markets, which are summarised below.

1. THE TRADED OPTIONS MARKET

An option refers to the purchased right to buy or sell specified commodities or shares at a fixed price within a specified period. What is bought or sold is the right to buy or sell (but not the obligation). If the option is not exercised within the specified agreed period, the option lapses. On the other hand, if the option is exercised within the stipulated time limit, an agreement of sale results at the **pre-agreed** price.

The object of the transaction is to protect the holder of the option from adverse fluctuations in the price of the specified commodities or shares caused by market movements. It is a form of forward price protection. For example, a person fears that the market price of a commodity which he requires in the next three months will rise. He therefore purchases the right (but not the obligation) to buy the commodity concerned at an agreed price within the specified time limit. Conversely, a trader who expects to take delivery of a specified commodity in the next three months fears that the price thereof may fall in that period. He therefore sells the right (but not the obligation) to sell the commodity at a fixed pre-agreed price within the specified time limit.

The option contract in the sense discussed above may therefore be defined as follows:

"the purchased right (but not the obligation) to buy or sell specified commodities or securities at a fixed pre-agreed price within a specified period. The transaction may be concluded by the parties themselves, or through the medium of a recognised body (e.g. a traded options market) which guarantees the rights of the contracting parties."

The option contract as defined above is not covered by the definition of any existing category of contract recognised by Islamic Law but is a modern-day transaction. The subject matter of such a contract is not property or recognised benefits, nor does it constitute under Islamic Law a financial right which may permissibly be bought and sold. Hence, any dealings in such options are not permissible.

2. CLASSES OF SALES IN THE FINANCIAL MARKETS

Sales originating in the financial markets cover the following four situations:

First, the commodity or the underlying documents of transfer are in the seller's possession and ownership. The buyer has the right as a result of the contract of sale to take immediate possession of the commodity, and the seller has the immediate right to receive payment of the price. This sale is valid in Islamic Law according to well known principles.

Second, the buyer has the immediate right to take possession of the commodity, and the seller has the immediate right to receive payment of the price as a result of the sale. In this case, however, the transaction is not concluded directly by the parties but through the agency of a broker operating through the medium of a financial market. This sale is also valid in Islamic Law.

Third, the contracting parties agree that the seller will physically deliver specified goods to the purchaser at a future date, and the purchaser will physically pay the price therefor at such future date against delivery. This sale is invalid in Islamic Law because delivery of the goods and payment of the price are both deferred to a specified future date. The sale may be adapted to conform to Islamic Law if the conditions for valid salam sale are complied with. In the case of a valid salam sale, however, the purchaser cannot resell the goods until he has first taken delivery thereof.

Fourth, trading in the futures market where there is generally no actual physical delivery or payment at a specified future date but settlement of values in pure financial terms. A futures contract is not permissible in Islamic Law.

3. TRADING IN CURRENCIES

Trading in currencies take place through the four methods of sale referred to in paragraph 2 above. The third and fourth forms of sale referred to above in relation to currencies are not permissible. The first and second methods of sale, however, in relation to currencies are permissible provided that the conditions of the SARF sale are complied with under Islamic Law.

4. SALE OF INDICES

The sale of indices, which are **inter alia** used to measure changes in market values, are not permissible under Islamic Law and amount to gambling.

5. ALTERNATIVE TO IMPERMISSIBLE DEALINGS

There is a need to establish an Islamic financial market which is based on Islamic principles. In particular, the market can function on principles relating to the different classes of sale recognised in Islamic Law, such as, the sale of SALAM, sale of SARF, ISTISNA and the like. The implementation of these principles in the context of an Islamic financial market requires further research.

6. INVESTMENT IN SHARES OF JOINT STOCK COMPANY

6.1 It is permissible to form a joint stock company whose objects and capital are in accordance with Islamic Law. This accords with the principle of Islamic Law that in general a transaction is permissible unless there is evidence to the contrary.

6.2 It is not permissible to buy shares in a company whose main object is prohibited according to Islamic Law e.g. a company whose main object is money-lending on interest, or manufacturing a prohibited commodity such as alcohol.

6.3 As regards those companies whose main trading activity is permissible but sometimes participate in a prohibited activity (e.g. investing money on interest), the academy wishes to consider the matter further and therefore postpones its decision in this regard to the next session.

7. UNDERWRITING

An issue is underwritten when a person or body undertakes to the Company that in return for being paid a commission he will take up the shares which are not taken up by the public. Such an undertaking is valid provided that no fee

or commission is charged for giving the undertaking and the unsubscribed shares are so taken up at their face or nominal value. If, however, the person giving the undertaking renders other services to the company such as preparing and advertising the prospectus, then he may permissibly charge a fee for such services.

8. PAYMENT FOR VALUE OF SHARE IN INSTALLMENTS

A person who buys shares in a company may pay for them by way of a downpayment and the balance of the price in instalments thereafter. The effect of that in terms of Islamic Law is that the person is a shareholder to the extent of what he has paid, at the same time he promises to increase his capital contribution in the future. There is no objection to this because the principle applies equally to the remaining shareholders. Outsiders and creditors of the company however will hold the company liable to the extent of its share capital (as held out) because they have consented to deal with the company on that basis.

9. SUBJECT MATTER OF SHARE

A shareholder in a company owns a proportionate share in the assets (land, buildings, plant, machinery etc.) of the company. The share certificate is evidence of legal entitlement thereto.

10. BEARER SHARES

The issue of, or dealings in, bearer shares (transferable by mere delivery of the warrant) is permissible because the owner of these shares similarly owns a proportionate share in the assets of the company.

11. PREFERENCE SHARES

A holder of a preference share is entitled to a prior right to any profit distribution, but normally only for the specified and fixed rate of dividend. Because they promise a fixed dividend, and enjoy priority over ordinary shares, preference shares are similar to debt. Upon winding up, preference shareholders enjoy a prior claim on the net assets of a company, The issue by a Company of preference shares is not permissible because they enjoy priority as stated above. However, it is permissible to give priority to shares which are related to administrative matters.

12. TRADING IN SHARES ON THE BASIS OF INTEREST

1. It is not permissible to borrow money from a stock broker or other party, and then to buy shares in a company with the amount of the loan, and

deliver the share certificate to the lender as security and as a pledge for the repayment of the loan. The transaction is an interest-bearing transaction which is secured by the pledge of the shares so purchased. The transaction is forbidden on the basis of the express text of the Hadis to the effect that the lender (of a loan on interest), the borrower, the scribe and the witnesses are all cursed.

2. It is not permissible to sell shares of which the seller is not the owner at the time of sale. Such a sale is normally based on a promise by the stockbroker to lend the shares to the seller thereof on the delivery date. The sale is prohibited because the seller sells shares of which he is not the owner, and the prohibition becomes even more serious in this case because the proceeds of the sale are deposited with the stockbroker who places the money in an interest-bearing account for his own benefit.

13. THE SALE AND PLEDGE OF SHARES

The sale and pledge of shares is permissible but would be governed by the rules of the company. For instance, the articles of association of a company may provide that the shares are freely transferable and may be sold to any third party. On the other hand, the articles may provide that the seller must first offer his shares to existing shareholders in which event the condition is binding. Similarly, if the articles provide that the shares may be pledged to the remaining shareholders, then the pledge would be deemed to operate over a proportionate share of the assets of a company.

14. INITIAL CHARGE ON ISSUE OF SHARES

It is permissible to charge a fee which represents a portion of the selling price of the share to cover expenditure incurred and work performed in the issue of such a share, provided that the percentage charge is properly and appropriately calculated.

15. ISSUE OF NEW SHARES

The company may permissibly issue new shares to increase its capital, provided that all new issues are based on the real value of existing shares (as valued by experts), or are based on their fair market value.

16. LIMITED LIABILITY

It is permissible to form companies whose shareholders are not liable for its debts beyond the value of the shares they hold. The creditors of the company

are aware that their claims are limited to the assets or capital of the company and they accordingly deal with the company on that basis. There is therefore no possibility of deception.

Similarly, the liability of certain shareholders may permissibly be unlimited provided that those shareholders have not charged a fee as consideration for unlimited liability. Companies exist in which the liability of some shareholders is unlimited as opposed to that of others.

17. ADMINISTRATIVE REGULATIONS RELATING TO SHARE DEALINGS

The government is entitled to regulate dealings in certain classes of shares in a manner that such dealings are conducted through the medium of a licensed stock exchange and authorised stockbroker. Such administrative regulations may be imposed for valid purposes and to safeguard the public interest. Similarly, it is permissible to levy a charge on all those who deal on the stock exchange to cover administrative expenses and taxes.

A Muslim can acquire the Shares of a joint stock company on the following conditions:

i) The main business of the company must be halal (permissible) according to Shariah. So a Muslim cannot invest in a company whose main business is haram, like traditional banks, insurance companies, companies dealing in wines etc.

ii) If the main business is halal, but it is involved in borrowing money on interest or placing it's funds in interest bearing account, a Muslim shareholder should raise his voice against this practice in the annual general meeting of the company.

iii) When a Muslim shareholder receives a dividend he must ascertain that proportion of the profit of the company which has accrued on its interest-bearing accounts. Then, a similar proportion from his own dividend must be given by him to a person or persons entitled to receive zakah.

iv) If all the assets of a company are in a liquid form and the company has not yet acquired any fixed assets or any stock for trade, then the sale and purchase of shares must be on their par value only.

If any of these four conditions is contravened, the investment in a company is not permissible in shariah.

FATWA OF JUSTICE MUFTI MUHAMMAD TAQI USMANI-DEPUTY CHAIRMAN ISLAMIC FIQH ACADEMY

Maintenance for Divorced Women : Shah Banu Case

The Supreme Court of India recently ruled in the SHAH BANO case that a divorced woman is entitled under Islamic Law to maintenance beyond the period of iddat and until her remarriage. The case has caused a furore in India as the judgement is contrary to Islamic Law.

Simply put, the Islamic Law position is that a divorced woman is **not** entitled to maintenance beyond the period of iddat. Let us examine this briefly in the light of the Qur'an and Hadis.

Verse 6 of SURAH TALAAQ provides that:
"If the (DIVORCED) women are pregnant, then maintain them **UNTIL** delivery of their child."

Verse 4 of the surah has already provided that the iddat (mandatory waiting period) for pregnant divorced women is until delivery of child. This verse (verse 6) clearly by the use of the word "UNTIL" limits the period of maintenance to the time of delivery. It follows that if pregnant women are to be maintained until expiry of their iddat (at delivery), then others are likewise to be maintained until expiry of their iddat. The periods of iddat for menstruating or non-menstruating women have been specified in the Qur'an. (S 2 : V 228; S 65 : V 4; S 65 : V 4)

The absence of an obligation to maintain after the expiry of iddat is supported by authentic HADIS, notably that of FATIMA BINT QAIS. The latter was divorced by her husband, and the Holy Prophet (SAW) ruled that she was not entitled to maintenance. (SAHIH MUSLIM: KITABUT TALAAQ).

In the result, no jurist has ever held that a divorced woman is entitled to maintenance after expiry of iddat. On the contrary, and in the case of divorce of the category BAAIN, many jurists have held that only pregnant women are entitled to maintenance for the iddat period: non-pregnant women are excluded.

The Supreme Court judgement according to press reports relied on verse 241

of SURAH BAQARAH, which was translated as follows:

"FOR DIVORCED WOMEN, **MAINTENANCE** SHOULD BE PROVIDED ON REASONABLE SCALE. THIS IS A DUTY TO THE RIGHTEOUS."

The word MATA in the verse means "BENEFIT" which includes maintenance within its meaning. (See MAARIFUL QUR'AN) The verse therefore lays down a general principle relating to the **benefit** due to all divorced women in the different circumstances as a consequence of divorce. Hence, the use of the wider word "benefit" (MATA) and not the specific word NAFAQA (maintenance). The benefit due to divorced women in the different circumstances is as follows:

1. If no dowry has been fixed and no sexual intercourse has taken place prior to divorce, then the husband is only obliged to give some benefit or gifts to the wife (S 2 : V 236).

2. If a dowry has been fixed and no sexual intercourse has taken place prior to divorce, then the husband is only obliged to give the wife half the amount of the dowry. (S 2 : V 237)

3. If both a dowry has been fixed and sexual intercourse took place prior to divorce, then the full dowry must be given to the wife. (S 4 : V 4)

4. If no dowry has been fixed, but sexual intercourse took place prior to divorce, then the dowry customarily fixed in the family of the wife (MEHR MITHL) must be given to the wife.

5. In the cases of 3 and 4, the wife is obliged to undergo IDDAT and is therefore entitled to maintenance until expiry of the iddat. There is obviously no iddat (and hence, no maintenance) in cases 1 and 2.

It follows that the judgement of the Indian Supreme Court is wrong. The Court ought to have heard expert evidence on the issue from qualified Muslim jurists. It is not clear why this was not done. Instead, the judges endeavored to give judgement on an issue in which they have no expertise. The result was a misinterpretation of Islamic Law.

Now, what are the rational imperatives? Divorce terminates a marriage whereupon the parties have no relationship whatsoever with each other. There is therefore no reason in logic as to why the husband must continue maintaining the wife after divorce. Reason demands that a person must be free of obligations. For an obligation to arise, there must be valid cause. What cause exists in such a case?

In Islamic law, the obligation to maintain the divorced woman after the expiry of the iddat would in the absence of her remarriage vest in her near relatives based on the priorities fixed in inheritance. In any event, and if she is unable to maintain herself, the Islamic State is obliged to do so.

Some argue that the divorced woman suffers for want of maintenance, as her near relatives invariably fail to maintain her. The answer is why must the husband be penalized in such event contrary to Quranic Law. Cases of hardship do arise, one undoubtedly appreciates, in a non-muslim country where Islamic Law is not applied. However, if muslims implement Islamic Law sincerely and honestly, all problems would be resolved. To do this, a strong and deep sense of Accountability is required. Unfortunately, this to a large extent is absent.

How to Calculate your Zakaat

The purpose of this article is to deal briefly with the important question of how to calculate Zakaah. The reader must, if he requires clarification, consult his local Ulema.

1. MEANING OF ZAKAAT

Zakaat is:

a) levied on specific assets only, deemed by the sharia as having the potential for growth;

b) levied at the rate of 2.5% each year (calculated according to the lunar calendar) on the market value of those assets after deducting therefrom specified liabilities; and

c) the compulsory transfer of a portion of the property of the giver, calculated at the rate of 2.5% as aforesaid, to a poor and needy Muslim who qualifies to receive Zakaah according to Sharia.

2. IMPORTANT PRINCIPLE IN IDENTIFYING ASSETS SUBJECT TO ZAKAAT

Gold, silver and cash (and the assets specified in paragraph 3 below) are subject to Zakaah. Any other asset will only become subject to Zakaah if such asset was aquired or purchased for purposes of resale - in other words, the asset concerned, if aquired for trading purpose, becomes stock in trade in the hands of the purchaser and is accordingly subject to Zakaah. In this regard, the clear intention to resell the asset on part of the buyer must exist at the time of purchase in order to give the asset the character of stock in trade. Take the following example: a person buys a house, which is normally exempt from Zakaah, with the intention of reselling the house at a profit. The market value of the house will be subject to Zakaah at the end of the relevant Zakaah year; similarly, if a person buys industrial property, consisting of land and buildings, with the intention of selling the property at a profit, then the market value of

the property, calculated as at the end of the relevant Zakaah year, will be subject to Zakaat.

On the other hand, if the immovable property was purchased as an investment and not to resell, then the value of the asset is exempt from Zakaah. A subsequent change of intention in the case where the owner, who had originally purchased the immovable property for investment, to hold as capital now decides or intends to sell it for profit will not alter the character of the asset for Zakaah purposes and the asset remains exempt from Zakaah

3. ASSETS SUBJECT TO ZAKAAH

3.1 GOLD AND SILVER

Gold and silver, whether in the form of jewellery or otherwise, will always be subject to Zakaah provided their respective weights exceed:

a) in the case of silver 613,35 grams

b) in the case of gold 87,49 grams

Where one owns gold and solver, together with the cash or stock in trade, Zakaah will be payable if the aggregate value of all these assets exceeds the value of 613,34 grams of silver.

3.2 CASH

The amount of cash held, whether in a bank or building society account or personally on hand, at then end of the relevant Zakaah year will always be subjet to Zakaah.

3.3 DEBTORS

Book debts, or accounts receivable, are treated as cash for Zakaah purposes and Zakaah must be paid on the total value thereof at the end of the Zakaah year concerned. The trader may however elect to pay the Zakaah on the debt in the year in which the debt is actually paid or received. In such a case, the Zakaah must be paid not only for the year in which the debt was paid but also for each preceeding year in which the debt was owing. In order to avoid accounting problems for Zakaat purposes, particularly in the case of traders who carry large book debts, it is desirable that Zakaah be paid each year on the total value of the book debts which are regarded as sound. If the debtor is not in financial difficulty and does not deliberately delay payment, then the relevent book debt would be regarded as sound.

3.4 LOAN ACCOUNTS IN COMPANIES

The shareholders of private and public companies (and close corporations in SA) commonly hold loan accounts in those companies - which represent moneys owed by the companies to the shareholders. The origional capital contributed by the company, which has been credited to loan account, in order to enable it to aquire assets to carry on business should not be taken into account and should be deducted from the amount of the loan account standing to the credit of the shareholder at the end of the Zakaah year concerned. The difference, which invariably represents profits due to the shareholder and a portion of which is sometimes paid out in the form of *"interest on loan account"* for tax purposes, is subject to Zakaah each year and is treated as cash for Zakaah purposes.

EXAMPLE:	Loan account	=	R20,000.00
less:	Origional capital	=	R10,000.00
	Balance subject to Zakaah at the rate of 2.5%	=	R10,000.00
	2.5% of R10,000	=	R250.00

3.5 SHARES IN PUBLIC COMPANIES

Is is relatively easy to deal with shares in public companies, whether listed or unlisted. For this reason, according to the preferable view, such shares are really stock in trade in the hands of the owner thereof - who may trade in shares on the stock exchange (in the case of listed shares) as he pleases. Zakaah is therefore payable on the market value of such shares determined at the end of the relevant Zakaat year and not on the origional cost of acquiring the shares. However if it is possible to ascertain that proportion of the paid up capital of a company which represents fixed assets which are not subject to Zakaah, such as machinery, buildings etc., then it is permissible to deduct that proportion from the market value of a share. For example, if 10% of the paid up capital represents fixed assets and themarket value of a share is R100.00, then Zakaah is payable on R80.00 only. But, if that proportion is unknown, one should pay Zakaah on the total market value of the shares.

3.6 STOCK IN TRADE

As stated in paragraph 2 above, any asset other than the assets referred to above (3.1 to 3.5), will only be subject to Zakaah if the asset was acquired for the purpose of resale. In such a case, the asset qualifies as stock in trade for the purposes of Zakaah. Zakaah must be paid on the market value of the stock in trade at the end of the relevant Zakaat year. This means that the stock should be valued for the purpose of Zakaah in a manner that reflects the price which can be realised if the whole stock is sold in bulk in a single transaction at the

end of the relevant Zakaah year. It must be noted that, in the case of the manufacturer of goods, the stocks would comprise both raw material (e.g. fabric) and the finished goods.

4. LIABILITIES WHICH MAY BE DEDUCTED

Liabilities, for Zakaah purposes, may be divided into two categories, namely:

i) liabilties incurred in acquiring assets which are exempt from Zakaah; for example mortage bonds on immovable property; or instalments due under suspensive sale agreements in respect of plant and machinery, and fittings and fixtures. The amounts of such liabilities are, in the light of modern business conditions, not deductable.[1]

ii) Liabilities incurred in acquiring assets which are subject to Zakaah; for example, trade creditors (suppliers of stock in trade), bank overdraft and shippers loans to fund the purchase of stocks. Such liablilities should be deducted from the total value of the assets subject to Zakaah in order to arrive at the net amount on which Zakaah is payable.

5. MISCELLANEOUS

5.1 INSURANCE

The Muslim jurists are unanimous that most prevailing classes of insurance are impermissible under Islamic Law. The insured is entitled to the premiums paid by him over the period of insurance. Zakaah must be paid, upon receipt of the indemnity or the insured amount, on the total amount of the premiums paid over the period of insurance (in other words, Zakaah is paid for the preceeding years as well). The surplus (difference between amount of indemnity and premiums paid) must be given to poor and needy persons who qualify to receive Zakaah. It is not allowed in Shariah to use that surplus for personal benefit.

EXAMPLE:	Amount of indemnity received	=	R20,000.00
less:	Total amount of premiums paid	=	R5,000.00
	Surplus distributed as sadaqah	=	R15,000.00
	Zakaah 2.5% of R5,000.00	=	R125.00

1. According to the Maliki view

5.2 PROFITS FROM INVESTMENTS

Profits received from investments in the form of rentals and dividends form part of cash held and is normally used during the year to pay expenses or further investments. For Zakaah purposes, the total amount of cash held at the end of the Zakaah year must only be taken into account and the fluctuations in cash balances during the course of the year must be ignored.

5.3 INCOME TAX

The amount of income tax which is due and payable at the end of the Zakaah year but which has not been deducted, may be deducted from the total value of Zakaatable assets at the time. This is the writer's personal view.

5.4 TRUSTS

Family trusts (trust inter vivos) are commonly created for purposes of avoiding or minimising tax. The income of such a trust is invariably awarded and credited to the account of a beneficiary in the books of the trust and not actually paid out to him or her. In such a case, the beneficiary must pay Zakaah on the total amount of income standing to his credit only at the time he actually receives such amount. In other words, he must pay Zakaah on the accumulated income for the preceeding years upon receipt thereof.

The same principle applies to income credited to the account of a beneficiary from the time to time in the books of a testamentary or will trust.

EXAMPLE INCOME AWARDED		
Year 1		R1,000.00
Year 2		R2,000.00
Year 3		R2,000.00
TOTAL CREDIT TO BENEFICIARY		R5,000.00
Zakaah Payable thereon at 2.5% of R5,000.00	=	R125.00

It is however more convenient for the trustees of such trust to pay the Zakaah each year on behalf of the beneficiaries and to debit their accounts accordingly.

5.5 PENSION AND PROVIDENT FUNDS

If the employee's contribution each month is deducted at source under a compulsory pension or provident fund, then Zakaah is only payable upon receipt of the relevant lump sum in the year of receipt, and no Zakaah is

payable for preceeding yeas. In the case however of a voluntary pension or provident fund, Zakaah is payable on the lump sum not only for the year of receipt but also for preceeding years. In this case, it may be simpler to pay the Zakaah each year on the cumulative value of contributions.

5.6 ASSETS EXEMPT FROM ZAKAAH

The following assets, unless acquired with the clear intention to resell (see para 2 and para 3.6 above), are exempt from Zakaah:

a) plant and machinery
b) goodwill, copyright, patent, trademarks and licenses
c) vacant land
d) land and buildings or improved property
e) residential dwelling
f) diamonds, rubies andother precious metals (excluding gold and silver)
g) furniture, fittings and household effects
h) paintings of value
i) carpets of value
j) motor vehicles and trucks of all classes
k) stamp and coin collection of value
m) equipment of all classes
n) books of value

5.7 THE PRINCIPLE OF JOINDER OF ACQUISITIONS IN THE SAME CLASS

The general principle is that one year must elapse over the Zakaatable property in order to render it liable for Zakaah. This is subject to a qualification; where a person has nisaab of a particular class of Zakaatable property and during the course of the Zakaah year acquires property of the same class from any source whatsoever, then the property so acquired is added to the existing Zakaatable property of the same class and Zakaah is payable on the whole, or the remainder thereof, at the end of the Zakaah year without calculating a separate Zakaah year for each such separate acquisition. For example, a person has cash of R10,000.00 and during the course of the Zakaah year receives a further sum of R5,000.00 by way of a gift. He must pay Zakaah on the sum of R15,000.00, at the end of the Zakaah year and a new year would not be calculated in respect of the subsequent acquisition of the R5,000.00.

We set below an example of how to calculate Zakaah.

ZAKAAT CALCULATION

	ASSETS	TOTAL R	ASSETS SUBJECT TO ZAKAAH R	ASSETS EXEMPT FROM ZAKAAH R
1.	House	120,000		120,000
2.	Furniture and household effects and personal clothing	5,000		5,000
3.	Motor Vehicles	15,000		15,000
4.	Gold coins (Kruger Rands)	5,000	5,000	
5.	Diamonds and gem stones (not for re-sale)	10,000		10,000
6.	Cash on hand and at the bank	25,000	25,000	
7.	Stock in trade - at market value (bulk price)	100,000	100,000	
8.	Plant, machinery and fixtures and fittings and tools of trade	100,000		100,000
9.	Trade debtor (book debts)	25,000	25,000	
10.	Shares in public companies:-			
	- Listed shares - at market value	5,000	5,000	
	- Unlisted shares - at market value	3,000	3,000	
	- Unit trusts - at market value	2,000	2,000	
11.	Immovable property acquired for letting whether company owned or privately owned	200,000		200,000
12.	Loan account in companies - amount of income credited to loan account (excluding capital introduced)	20,000	20,000	
13.	Gold and silver (metal)	40,000	40,000	
14.	Deposits (rental, electricity, etc.)	6,000		6,000
15.	Stamp collection (not for re-sale)	6,000		6,000
16.	Pledge of moveables (e.g. gold coins)	6,000		6,000
17.	Paintings (not for re-sale)	6,000		6,000
18.	Goods purchased but not delivered exempt	6,000		6,000
19.	Loan debtors	20,000	20,000	
TOTAL ASSETS		725,000	245,000	480,000

	LIABILITIES	TOTAL R	DEDUC-TABLE R	NON DEDUC-TABLE R
1.	Mortgage Bond on house	50,000		50,000
2.	Bank overdraft (to fund stocks and trade debtors only)	5,000	5,000	
3.	Trade creditors	40,000	40,000	
4.	Instalment sale and lease creditors to fund motor vehicles/plant and equipment	60,000		60,000
5.	Any other liabilities incurred in respect of an asset on which Zakkah is not payable	10,000		10,000
6.	Shipping loans to finance stock in trade and/or trade debtors	30,000	30,000	
TOTAL LIABILITIES		195,000	75,000	120,000

SUMMARY	R
Total value of assets subject to Zakaah	245,000
Deduct: Liabilities relating only to assets subject to Zakaah	(75,000)
NET AMOUNT SUBJECT TO ZAKAAH =	170,000
ZAKAAH 2,5% x R170,000.00 =	4,250

Postscript

For the sake of simplicity, the original arabic references from authentic juristic works have been omitted.

Advice of a Great Jurist:
Abu Hanifah (RA)

O, my beloved son. May Allah direct you to guidance (HIDAYAH), and assist you (in good works).

I give you certain advices. (As set out below) If you remember them and constantly act upon them, I hope Insha Allah that you will attain success in the world and hereafter.

ONE

Adopt Taqwah by protecting your limbs from sins in fear of Allah; and (adopt Taqwah) by continuously and properly carrying out HIS orders in absolute humility and submissive obedience to Him.

TWO

Do not remain ignorant of that which is necessary to know, (that is, be concerned of acquiring such knowledge).

THREE

Do not mix or become closely associated with a person unless there is a worldly or religious need to do so.

FOUR

Be just against yourself (by fulfilling the rights of others), and do not enforce justice in favour of yourself (by claiming one's own rights) unless in case of necessity.

FIVE

Do not show enmity or hostility to a Muslim or non-Muslim.

SIX

Be content with the wealth and worldly position bestowed upon you by Allah.

SEVEN

Manage your affairs (property etc.) with consideration and care so that you may be free of need of any person.

EIGHT

Do not lower yourself (become lightly esteemed) in the eyes of people.

NINE

Avoid becoming engrossed in futile matters of no benefit.

TEN

On meeting people, be first in making salaam; be good in speech; be likeable to good people and outwardly pleasant to bad people.

ELEVEN

Indulge much in the ZHIKR of ALLAH TAALA and in reciting the DURUD (sending of salutations) to the Holy Prophet (SAW).

TWELVE

Engage yourself repeatedly in the recitation of SAIYIDUL ISTIGFAAR, namely the following dua of the Holy Prophet (SAW):-

> "O ALLAH, YOU ARE MY LORD. THERE IS NO GOD EXCEPT YOU. YOU HAVE CREATED ME. I AM YOUR SERVANT, AND I FIRMLY UPHOLD YOUR COVENANT AND PROMISE TO THE EXTENT THAT I AM ABLE TO DO SO. I SEEK YOUR PROTECTION FROM THE EVIL OF THE SINS I HAVE COMMITTED. I CONFESS TO YOU IN REGARD TO YOUR NIMAH WHICH YOU HAVE CONFERRED ON ME. I CONFESS OF MY SINS. FORGIVE ME, THEREFORE, MOST CERTAINLY, NOBODY APART FROM YOU, CAN FORGIVE SINS."

Whoever reads this dua in the evening and dies that night will enter paradise. Whoever reads this dua in the morning and dies in the course of that day will also enter paradise.

When Abu Darda (RA) was told that his house was destroyed by fire, he replied: It cannot be so because of (my daily recitation of) certain KALIMAH which I heard from the Holy Prophet (SAW).

Whoever reads these Kalimah in the early part of the morning, no calamity or misfortune will befall him until evening. Whoever reads these Kalimah in the late afternoon, no calamity will befall him until the morning. The Kalimah are the following:-

"O ALLAH YOU ARE MY LORD. THERE IS NO GOD EXCEPT YOU. UPON YOU IS MY TRUST, AND YOU ARE THE LORD OF THE GREAT THRONE. WHATEVER ALLAH WILLS WILL HAPPEN AND WHATEVER HE DOES NOT WILL WILL NOT HAPPEN. THERE IS NO POWER AND NO STRENGTH SAVE IN ALLAH THE GREAT THE MOST HIGH. I KNOW THAT ALLAH CERTAINLY HAS POWER OVER ALL THINGS; AND THAT HE HAS COMPREHENSIVE KNOWLEDGE OF ALL THINGS. O ALLAH, I SEEK YOUR PROTECTION FROM THE EVIL OF MYSELF, AND FROM THE EVIL OF ALL EVILDOERS, AND FROM THE EVIL OF THAT CREATURE WHOSE FOREHEAD IS IN YOUR CONTROL. MOST CERTAINLY MY LORD IS ON THE STRAIGHT PATH."

THIRTEEN

Recite the Holy Qur'an daily without fail and convey its rewards to the Holy Prophet (SAW), your parents, teachers and all Muslims.

FOURTEEN

Be wary of your friends more than your enemy, as mischief and wrongdoing has increased amongst people. For your enemies are created from your friends.

FIFTEEN

Conceal your secrets, property, policy (in regard to worldly matters) and your

departure (to a place).

SIXTEEN

Be good to your neighbours, and endure patiently any hurt caused to you by them.

SEVENTEEN

Hold fast to the Mazhab of Ahlus Sunnah Wal Jamaah, and avoid ignorant and misguided people.

EIGHTEEN

Purify your intention in all your affairs, and strive at all times to eat Halal

NINETEEN

Act on five Hadis which I have chosen from five hundred thousand. They are as follows:-

HADIS ONE

Actions and deeds will be judged in accordance with (the sincerity or insincerity) of the intentions. Every person will receive (reward or punishment based) on what he or she intended.

HADIS TWO

A feature of a good Muslim is that he leaves (abandons) whatsoever does not benefit him in this world and the hereafter.

HADIS THREE

None of you truly believes until he loves for his brother what he loves for himself.

HADIS FOUR

Verily Halal is clear and Haraam is clear. Between the two are doubtful matters (the ruling of which) the majority of people do not know. So whoever avoids doubtful matters, he has protected his Deen and his honour. Whoever falls in doubtful matters falls in Haraam, just as a shepherd who pastures his flock around a protected sanctuary (of a king), and comes close to enter it. Beware, every king has his own sanctuary, and the sanctuary of Allah is his prohibitions.

Beware, verily the body consists of a piece of flesh. If it is pure (of sins), the whole body is pure (that is, the deeds will be correct). If it is impure, the whole body will be impure (that is, the deeds will be corrupt). The piece of flesh is the heart.

HADIS FIVE

A Muslim is that person whose fellow Muslims are safe from his tongue and hand.

TWENTY

Be in a state of fear (of divine punishment) and hope (of reward) during the period of good health. And die with good belief in Allah, and with the probability of hope (in being forgiven) together with a pure heart (cleansed of impure qualities, such as hate, jealousy, pride, stinginess etc.).