

An Introduction to Islamic Family Law

A Teaching and Learning Manual

Shaheen Sardar Ali
University of Warwick, UK & University of Oslo, Norway

Ayesha Shahid
Hull University, UK

Mamman Lawan
Bayero University, Kano, Nigeria

Edited by Gaenor Bruce

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Introduction

Aims and Objectives

This teaching and learning manual has been developed with the aim of supporting teachers and students interested in Islamic law in general and Islamic family law in particular, in both Muslim and non-Muslim jurisdictions. It forms part of a series of manuals and materials including an *Islamic law Bibliography* and a *Glossary of Arabic and English Terms* which have been developed for teaching and learning Islamic law. We suggest that prior to working with this document, readers look at the companion manuals *Approaches to Teaching and Learning of Islamic Law: Sharing some national and international Perspectives* and *Course Manual on Sources of Islamic Law*.

At the date of writing, few higher education institutions in the UK offer Islamic Law courses. Where they do exist they are often short or elective courses, offered as part of degrees in law or in Islamic Studies. One aim of this module is to encourage more teachers to take up the challenge of teaching Islamic Law. As part of a course on Islamic Studies it is crucial that a student has an understanding of Islamic civilisation, encompassing as it does history, theology, philosophy, political thought and sociology. For “regular” law students the study of Islamic law has many benefits. It equips the student with the skill of comparative analysis. For prospective 21st century practitioners a working knowledge of the legal norms of the Muslim population is useful in contextualising their engagement with any area of law, be it family, immigration, contract, finance or crime.

The aim of this course is to enable:

- an understanding of and engagement with the theoretical discourse regarding Islamic law
- an understanding of the development of the principal sources of Islamic law in the area of family rights and their incorporation into state legislation
- a critical and context-based analysis of issues relating to legal reform in the Muslim world, identifying principles of Islamic family law in the legislation of various Muslim countries covered in the module
- an examination of the application of Islamic family law in diasporic communities using the United Kingdom as a case study

In Muslim jurisdictions by contrast, Islamic law courses form part of the compulsory offerings at any law school. Often based on the school of jurisprudence locally prevailing, Islamic law is in these settings all too frequently presented in a sterile, descriptive form. We believe that the need for a teaching and learning resource responding to the needs of constituencies, seeking a critical engagement with the subject cannot be overstated. If contemporary lawyers of the Muslim world are to effectively grapple with the challenge of developing and adapting Islamic law in the future, a comprehensive, inclusive and innovative approach must be encouraged.

This manual therefore attempts to contribute towards filling the gaps in both Muslim and non-Muslim jurisdictions.

Teaching Methods

This introductory course on Islamic family law has three distinct components. It begins with an overview of the sources and principles of Islamic family law,

before going on to examine in more detail the key issues of marriage, divorce and children. Finally, students will examine the codification of family law under various law reform initiatives in the Muslim world at different historical moments and eras, and consider the position of Muslims living in the contemporary diaspora. In our view all of these components are essential, firstly to give students a clear grasp of the core principles of Islamic family law, and secondly to set that understanding in a contemporary context.

The teaching and learning process in Islamic family law must therefore begin with an understanding of the sources of Islamic law and how these are applied in developing a coherent legal formulation on a particular topic. On certain subjects, for instance divorce, there is a wealth of primary source material; in other cases, for instance adoption, there is very little. In each case the original sources of Islamic family law have been supplemented and developed over fourteen centuries of legal thinking. Apprehending the diversity of opinion that results from this is the first hurdle faced by any prospective student of Islamic family law. The law student who takes this course, and is used to the certainty and clarity of 'black letter' family law, must quickly get used to the fact that in the Islamic context, what constitutes a 'legal norm' is open to a variety of possible interpretations and outcomes. The reading and assessments in this manual are designed to reflect that plurality of legal opinion and practice.

This manual is designed to be flexible. The proposed syllabus is designed primarily as a half-module that may be delivered over a teaching term of ten weeks, but it can be easily expanded to a full module delivered over two terms or more. Each topic covered includes a suggested lecture structure, at least one seminar subject, recommended reading lists and summative assessments.

As a ten week course we would recommend delivery of one two-hour lecture every week, supplemented by a small group seminar every fortnight.

The lectures are necessarily fact based, but should also be used to introduce the students to themes and issues that will require further exploration in the seminars. We have tried to include a wide range of readings on each topic which reflect the multifaceted nature of Islamic legal thought, and it is intended that the breadth of the discourse on each topic be introduced in the lectures. This will give students a solid factual foundation upon which to base their own work in the seminars.

In a subject such as Islamic law, small group teaching acquires added significance. Students are able to pose questions and familiarise themselves with the 'culture' of the subject, its line of argumentation and understanding of complex concepts. In small groups students can be expected to engage with the theoretical discourse on any given subject. Alternatively the session could be given over to an in-depth study of one piece of primary source material, for instance one verse of the Qur'an, its interpretation and context. We hope that the course outline and materials are flexible enough to allow teachers to modify the themes covered depending on whether the students are either undergraduate or postgraduate, or from non-Muslim or Muslim jurisdictions. For teachers who wish to extend the course without expanding on the core syllabus, we would suggest setting a supervised research project. For instance, students could be given the opportunity to discuss, evaluate and analyse case studies on law reform in the Muslim world, or to investigate the impact of Islamic family law on Muslim diasporic communities in Europe, the USA or Canada.

Learning Arabic

- ensure students bring the Glossary to class
- write down any Arabic terms used and provide a translation
- get students to repeat the word
- ask for a volunteer to write down each new word during a session
- revise the words at the beginning of the next class

When delivering the module to non-native Arab speakers and/or non-Muslims who are not familiar with Arabic terminology, it is a good idea to have students bring a copy of the glossary accompanying this manual to class. An exercise we have found to be particularly valuable is to ask students to repeat every Arabic word introduced during the course of the lecture. The lecturer starts by writing the word on the board with its definition, says it slowly, and asks students to repeat it at least three times. Thereafter, one student volunteer keeps a list of all new Arabic words used in the lecture that day. The following week, the lecture can begin by repeating and revising the words learnt the previous week. This becomes quite a fun 'game' and students taking this course have counted 103 Arabic words at the end of term and are proud of their new found skills in Arabic and no doubt sharing them with friends and colleagues.

The course does however rely on English language scholarship and English translations of the primary sources of Islamic law i.e., the Quran and Hadith. No prior knowledge of Islamic law or Arabic is required.

Course Outline

This manual covers six central topics, which may be taught over a ten week term or expanded as appropriate (see above):

1. Historical Overview and Sources of Islamic Law
2. Marriage
3. Dissolution of Marriage
4. Parents and Children
5. Law Reform in the Muslim World
6. Application of Islamic Family Law in Diasporic Communities

Assessment methods

In keeping with the challenging nature of the course, we do not recommend simple essay type questions year in and year out. Each year we have set new and challenging research projects for our students, providing them with an opportunity to apply their skills in a more interesting and innovative manner, and we hope that the seminar structures provided reflect this. The manual has adopted a "law in context" methodology, which aims to address the demands of a growing number of students, both Muslim and non-Muslim, and to enable them to acquire a working knowledge and expertise in Islamic law. Students should be encouraged at all stages to consider the relevance of what they are learning to their future practice or to contemporary legal developments. It is for this reason that in addition to the seminars and essays, we have also suggested a formative assessment that can run in conjunction with the course, the details of which can be found in Chapter 6. Students are required to identify a Muslim respondent whom they can consult briefly each week on the topics they are covering in class. This work leads to a written piece in which students can consider Islamic law as it applies in the diaspora, in light of their own primary research material.

For a one-term course, we recommend assessment either by a two hour examination and an assessed research piece of 2,500 words, or a single supervised assessment of 5,000 words.

Materials

The main textbook that we would recommend is Pearl, D. & Menski, W. (1998) *Muslim Family Law (3rd edition)* London: Sweet & Maxwell. In addition, we have produced a list of recommended readings for each topic. In practice, we make sure that these texts are available in the library, or produce copied resource packs for the students. For a more detailed bibliography of Islamic family law readers are referred to the companion manual *Islamic law Bibliography*.

Chapter One

Historical Overview and Sources of Islamic Law

The first part of the course is devoted to providing an overview of the early development of Islamic law and the emergence of various schools of juristic thought in this legal tradition. Knowledge of the formative and classical periods of Islamic Law, set in an historical context, is a basic tool for the understanding of contemporary themes in Islamic Law. Students from non-Muslim jurisdictions may be unlikely to have much knowledge of Islam or of the development of Islamic thought. Students in Muslim jurisdictions may have some knowledge of earlier Islamic periods, but may not appreciate the significance of this period for the crystallisation of themes in Islamic Family Law. We therefore recommend that these sessions are adapted accordingly. A more detailed treatment of the subject can be found in the companion *Course Manual on Sources of Islamic Law*. We recommend teaching this module in two lectures and two seminars.

The aims and objectives are to:

- set the formation and development of Islamic Law in an historical context
- give students an understanding of the core sources of Islamic law
- illustrate the plurality of thought, custom and application of law within Muslim communities
- introduce students to the critical discourse on this subject

Lectures

The first lecture should provide an introduction to the first core sources of Islamic law: the Qur'an and the *sunna*. We have found it helpful to set the scene for the Prophet Muhammad's revelation by outlining the historical context of the pre-Islamic Middle East and asking students to consider the

possible significance for later legal developments of the competing traditions in existence at that time. The lecture can then go on to provide an introduction to the Qur'an and its 'legal' content. It may be helpful at this stage to discuss how the text came to be ordered in the form we now see it, and point out that there are many translations and interpretations of the text. Follow this with a discussion on the significance of the *sunna* of the Prophet, *hadith* and the concept of *isnad*. Direct students to the fierce theological, political and legal debate that has resulted from the use of *hadith*.

A good way to illustrate the diverse influences on the early development of Islamic law is to show students a map of the Middle East and clearly mark Mecca. Ask the students to identify the dominant political, philosophical and religious forces in existence at the time of the Prophet and the early Islamic Caliphates. Draw attention to the fact that the Middle East was not a monolithic culture and ask students to consider how thought in the early Islamic empire would have been influenced by the conquests.

This first lecture should also be used to set out the key doctrinal differences between the two principal divergent movements in Islam, namely, Shi'ism and Sunnism.

Against this contextual background the course can progress in lecture two towards a discussion on the remaining sources of Islamic law: the concept of *ijma*, and the use of *qiyas* and *ijtihad*. This will introduce students to the formation of the *madhabs* and the tutor can begin identifying differences in the jurisprudence of the four Sunni schools, namely Hanafi, Shafi'i, Maliki and Hanbali. If the course provider intends to also cover Shi'a jurisprudence, there should also be an introduction to the three main Shi'a schools, namely, Athna Asharia, Zaidya and Ismailia. An important point to bear in mind in the teaching and learning of Islamic law is the fact that the division of Muslims into Shia and Sunni impacts heavily on the understanding of the sources of Islamic law by both sects and the consequent development of jurisprudence. It may be helpful at this stage to consider concrete examples of the differences in interpretation that have arisen, and to set them in their historical

context. For instance, why do Shia and Sunni laws of inheritance give different shares to daughters in the absence of a male offspring? Why do Sunni schools of juristic thought require the presence of witnesses for a valid contract of marriage whereas Shia jurists consider it optional? An exploration of these differences can lead to a discussion on the development of *ijtihad*, as well as other juristic techniques such as *talfiq* and *takhayyur*.

Seminars

This topic can be covered in one or two seminars, depending on whether or not the students are familiar with Islam and its development. This time should be used to encourage students to engage critically with the information provided in the lectures and reading. Here are two suggested seminar structures.

Seminar I: the hadith and sunna

This is fertile ground. When considering the hadith, students are at once learning about a core source of law, whilst at the same time learning to identify points of difference between the four madhabs, and engaging with the critical discourse in the texts. Initiate the discussion by asking for comments on the following quotation from Abbott (1967):

Oral and written transmission went hand in hand almost from the start; the traditions of Muhammad as transmitted by his Companions and their Successors were, as a rule, scrupulously scrutinized at each step of the transmission, and that the so-called phenomenal growth of Tradition in the second and third centuries of Islam was not primarily growth of content, so far as the hadith of Muhammad and the hadith of the Companions are concerned, but represents largely the progressive increase of parallel and multiple chains of transmission.

N. Abbott

Studies in Arabic Literary Papyri, Volume II (Qur'anic Commentary & Tradition)
University Of Chicago Press, p. 2.

The seminar should include:

- a discussion on the main points of difference between the four schools of Sunni juristic thought in Islam, with particular reference to their respective positions on *hadith* as a source of Islamic law
- an examination *hadith* and orientalism. Ask students to evaluate the views of certain European scholars on the nature, scope and legitimacy of *hadith* as a source of Islamic law
- students should be asked to identify the key features of the classical and modern theory on *hadith* literature

Seminar II: *ijtihad*

A well established examination question forms the basis of this seminar: “what factors led to the (contested) belief that the doors of *ijtihad* were closed since the 4th century *hijra* or 10th century AD?”

In tackling this subject in detail, students can achieve a greater understanding of the “fifth source” of Islamic Law and why it continues to produce controversy. Begin with this definition of *ijtihad* provided by Kamali (1989):

Ijtihad means striving or self-exertion by the *mujtahid* in deriving the rules of *Shariah* on particular issues from the sources. Normally such rules are not self-evident in the sources and their formulation necessitates a certain amount of effort on the part of the *mujtahid*. Since the divine revelation has come to an end with the demise of the Prophet, *ijtihad* remains the main instrument of interpreting the divine message and relating it to the changing conditions of the Muslim community.

Muhammad Hashim Kamali
“Source, Nature and Objectives of Shariah”
The Islamic Quarterly (London) 33: 223

Students should be asked to identify the rules of undertaking *ijtihad*. Who can undertake *ijtihad*? What are the qualifications of a *mujtahid*?

The discussion should then progress to an analysis of whether in fact the door did ever close on *ijtihad*. What evidence is there that scholars continued to use *ijtihad*? What are the difficulties of making *ijtihad* in the contemporary world? Is any reformist agenda in contemporary Islam dependent upon the use of *ijtihad*?

Assessment: Essay Question

What are the difficulties of making *ijtihad* in the contemporary world? Use the discussion and debate among contemporary Muslim scholars on the issue of organ donations and transplantation.

Reading

The readings are overlapping and repetitive in the sense that they all provide an historical backdrop to the sources of Islamic law and its classification into primary and secondary sources and so on. The reason for suggesting the reading list below is to provide materials from a range of perspectives and authors belonging to 'western' and 'non-western' academia and knowledge systems.

Core texts

D. Pearl & W. Menski, *Muslim Family Law* (1998) 3rd edition, London: Sweet & Maxwell pp. 3-18.

N.J.Coulson, *A History of Islamic Law* (1964) Edinburgh: Edinburgh University Press pp. 9-20

Taha J. al-Alwani, "The Crisis in Fiqh and the Methodology of Ijtihad" (1991) Vol. 8 *The American Journal of Islamic Social Sciences* pp. 317-337.

M.Z.Siddiqi, *Hadith Literature Its Origin, Development and Special Features* (1993) Cambridge: The Islamic Text Society

W. B. Hallaq, "Iftha' and Ijtihad in Sunni Legal Theory: A Developmental Account" in M.K.Masud, B. Messck & D. Powers (eds.) *Islamic Legal Interpretation. Muftis and Their Fatwas* (1996) Cambridge: Harvard University Press pp. 33-43.

Supplementary reading

H.R.Kusha, *The Sacred Law of Islam* (2002) Aldershot:Dartmouth/Ashgate pp. 13-50; 51-79

M.A.Mannan (ed.,) *D F Mulla's Principles of Mohammadan Law* (1995) Lahore: PLD Publishers pp. i-xxii

F. Rehman, *Islam* 2nd edition (1979) Chicago: The University of Chicago Press pp. 30-42; pp. 68-84

A.A.An-Naim (ed.,) *Islamic Family Law in a Changing World. A Global Resource Book* (2002) London: Zed Books pp.1-21

A.A.A.Fyzee, *Outlines of Muhammadan Law* 4th edition (1974) Delhi: Oxford University Press pp. 1-39

J. Burton, *The Sources of Islamic Law. Islamic Theories of Abrogation* (1990) Edinburgh: Edinburgh University Press pp. 1-14.

Chapter Two

Marriage

This part of the course will discuss the institution of marriage in Islam, its contractual nature and the requisites of a valid marriage, such as dower (*mahr*). It invariably generates a lot of interest in class and students find it fascinating to read verses from the *Qur'an* regarding marriage, polygamy and so on. For teachers in non-Muslim jurisdictions addressing a predominantly non-Muslim audience, it may be a good idea to spend some time on the main concepts from a comparative perspective and to place the discussion into context.

The aims and objectives of this session are to:

- give students a clear grasp of the requirements for a valid marriage contract in Islamic law
- encourage students to look at the law of marriage from a comparative perspective
- look at the influence of customary practice
- engage with issues such as polygamy and consent
- ask who can contract a valid Islamic marriage?

Lectures

The starting point for this topic is the fact that marriage is a civil contract in Islam and that both parties are at liberty to include mutually acceptable stipulations in it. At the same time, the plural legalities operating within family law also require consideration and there needs to be awareness amongst students of how the cultural and social norms tend to overshadow the bare legal requirements of the contractual nature of marriage in the Islamic legal tradition. As an example, we suggest use of the *Saima Waheed* case to

highlight the complex interplay between law and social norms and the role of courts in adjudicating upon these issues.

- Ask the students to investigate/consider how many Muslims they know have included stipulations in their marriages.
- If they are not being used, why not? Are they restricting or expanding the rights of the parties?

Secondly, discuss and analyse the concept and role, both legally and socially, of the marriage guardian or wali.

- How does this fit into the Muslim social context where there is a '*nikah* father/brother' or representative who seeks consent of the bride and then represents her in the actual *nikah* ceremony?
- Distinguish this from the legal right of a Muslim male and female to freely consent to marriage.

A third point for exploration in these sessions may be *Mahr* or dower as it is translated in English language writings on the subject. This translation often confuses students who tend to mix up the concept with dowry. Consider the differences between the two terms in law and in practice. Both are in law the sole property of the woman. Is it always so in practice?

- Recognise the subtle and nuanced implications of similar sounding names
- Contextualise some of the terms and relate these to contemporary terminology and usage
- Highlight the difference between *dower* and *dowry*, or *mahr* in Arabic, is the *sum of money or property that* the husband in a Muslim contract undertakes to give to his wife and is her sole property
- Dowry, *jehaiz* in South Asian languages or *trousseau* in French, is the sum of money or property given to the woman by her natal family as

her wedding gift and includes household goods, her personal effects etc.

Finally consider those whom Muslims are not permitted to marry, and where the right to marry may be restricted by legal requirements. When discussing prohibited degrees of relationship in marriage, the term '*fosterage*' needs to be clarified and explained from a comparative perspective. '*Fostering*' has a legal significance in the UK and other western jurisdictions as meaning the taking up of parenting responsibilities for a child or children by persons other than the biological parents. In the Islamic legal tradition, where a woman breast feeds a child other than her own biological offspring she becomes the foster mother, her husband the foster father and children, foster siblings. The relationship created is akin to a biological one insofar as it places the fostered child in a similar position in relation to prohibition to inter marry as if the child were actually a biological child of the 'foster' mother/father. A lively class discussion is likely to ensue leading to challenging questions regarding the application of related principles of Islamic law, including the right of the foster child to inherit from the foster parents and so on.

Seminars

Here are two suggested seminar structures, both of which require the students to examine the primary source materials.

Seminar I: Consent

This topic covers two important issues in respect of a contemporary Muslim marriage: Who can validly contract a Muslim marriage, and whether a marriage is rendered invalid by a lack of consent.

In the first part of the seminar, remind the students of the elements of a valid contract of marriage and focus in particular on the concept of *wilaya* and the debate generated by the *Saima Waheed* case, which provides the reading for the seminar: [Abdul Waheed v Asma Jehangir \(PLD 1997 Lah 331\)](#).

Ask the following questions:

- Who are parties to the marriage contract in Islam?
- Is the guardian a party to the marriage contract?
- What is the purpose of the consent of the guardian? Is it a legal requirement impacting on the validity of the marriage?
- Why is the consent of the guardian not required at the time of dissolution of the marriage?
- What are the legal consequences where one or both of the parties to the marriage do not consent?
- How is consent given, implied or assumed?

Ask students to consider the distinction between an ‘arranged’ and ‘forced’ marriage and the difference in validating or invalidating a contract of marriage on this basis. An arranged marriage can be perfectly consensual and in accordance with the requirements of consent under Islamic law. A forced marriage is no marriage in the eyes of Islamic law as there is lack of a basic requirement i.e., consent. A short exercise in class may be to ask how one would construct ‘consent to marriage’.

Seminar 2: Polygamy

Ask students to consider Sura IV, verses 3 and 129 of the Qur’an:

“If ye fear that ye shall not
Be able to deal justly
With the orphans,
Marry women of your choice,
Two, or three, or four;
But if ye fear that ye shall not
Be able to deal justly (with them),
Then only one, or (a captive)
That your right hands possess.
That will be more suitable,
To prevent you
From doing injustice.”

[Sura IV, verse 3]

“ye shall not be able to deal in fairness and justice between two women
however much ye wish.”

[Sura IV, verse 129]

They should consider the context in which the verses were revealed and ask whether they are context and time specific. Can a general rule allowing polygamy be based on these verses? During the seminar, the students should work in small groups to produce suggested drafts of a law based on these verses.

Assessment: Essay Questions

1. “It is well-known that polygamy is a controversial issue in Islam. This is not only so because of principled objections to polygamy as an institution, but because the classical Muslim position on polygamy itself is not as simple and uncomplicated as is often assumed.” (Pearl & Menski:1998: 237)

In light of the Qur’anic verses on polygamy, would you agree that “in Islam, monogamy is the rule while polygamy is only an exception?” (Bharatiya: 1996: 74).

2. Hanadi is a 19 year old girl living in Pakistan with her mother and father. Her family are wealthy. She meets a 25 year old teacher named Shafik and wishes to marry him. Her father refuses to consent to the marriage and Hanadi leaves her parents home and decided to marry Shafik anyway. She approaches the local imam who agrees to conduct the *nikah* ceremony for them. Shafik is not very wealthy and cannot afford to give Hanadi a *mahr*. Hanadi tells him that she does not want a *mahr*. The imam insists on a small *mahr* and so Shafik agrees to pay a nominal sum amounting to £50. The *nikah* is concluded and Hanadi and Shafik marry.

Question: Is this *nikah* contract valid according to the relevant criteria of the school of thought? In particular, consider the requirement for a *Wali* and the need for a *mahr*.

Reading

The reading for this topic aims to give students a basic understanding of the contract of marriage in Islam whilst exposing students to the reality that within the Islamic legal tradition, there is a range of opinions and approaches towards family law, from the most conservative to the very progressive and contemporary.

Core texts

S. S. Ali, Is an Adult Muslim Woman *sui Juris*? Some Reflections on the Concept of 'Consent in Marriage' without a Wali with particular reference to the Saima Waheed case, 3 *Yearbook of Islamic and Middle Eastern Law* 1996, 156-174

A.A.A.Fyzee, *Outlines of Muhammadan Law* 4th edition (1974) Delhi: Oxford University Press

A. Al-Hibri, "Marriage Laws in Muslim Countries: A Comparative Study of Certain Egyptian, Syrian, Moroccan, and Tunisian Marriage Laws" (1992) Vol. 4 *International Review of Comparative Public Policy* pp. 227-24.

D. Pearl & W. Menski, *Muslim Family Law* (1998) 3rd edition, London: Sweet & Maxwell, Chapters 6, 7 and 8

Supplementary reading

S. S. Ali, Women's Human Rights in Islam: Towards a Theoretical Framework, 4 *Yearbook of Islamic and Middle Eastern Law* 1998, 117-152

S. S. Ali, "Marriage, Dower and Divorce: Superior Courts and Case Law in Pakistan" in F. Shaheed et al (eds.,) *Shaping Women's Lives Laws, Practices and Strategies in Pakistan*, (1998) Lahore, Pakistan: Shirkatgah, pp. 107-142. Co-authored with R.Naz.

A.A.An-Naim (ed.,) *Islamic Family Law in a Changing World. A Global Resource Book* (2002) London: Zed Books.

M.A.Mannan (ed.,) *D F Mulla's Principles of Mohammadan Law* (1995) Lahore: PLD Publishers

Z. Mir-Hosseini, *Marriage on Trial. A Study of Islamic Family Law* (2000) London: I.B. Tauris.

J. J. Nasir, *The Islamic law of Personal Status* (1990) London: Graham & Trotman.

Chapter Three

Dissolution of Marriage

This topic explores the concept of dissolution of marriage in Islamic law including *talaq*, *khul'* and *mubarat*. As indicated in earlier sections, it is important to place the concepts within the wider normative framework of the Islamic legal tradition. It is suggested that the student be introduced to *Qur'anic* verses on *talaq*, and other forms of dissolution of marriage and to extrapolate general principles on the subject from these readings. Bear in mind that we will come back to these verses and principles in a later part of the course, particularly in Chapter Five, which examines Law Reform in the Muslim World and Chapter Six, which considers the Application of Islamic Law in Diasporic Communities.

The aims and objectives of this session are to:

- provide students with a sound understanding of the *Qur'anic* law on dissolution of marriage
- encourage students to engage with wider cultural, sociological and political issues surrounding the dissolution of marriage for Muslims today
- introduce students to ideas about how such *Qur'anic* verses might be codified in modern legal systems

Lecture

The most prevalent form of the dissolution of marriage is the *talaq*. *Talaq* and its legal implications are an important and controversial aspect of Islamic family law and one that we recommend is dealt with in some detail in view of its practical impact for Muslim marriage and divorce globally. The popular understanding and viewpoint of a vast majority of Sunni Hanafi Muslims

regarding pronouncement of *talaq* is that pronouncing the word “*talaq*” three times in a row has the consequence of an irrevocable dissolution of marriage. This is also the understanding of ‘Islamic divorce’ for many non-Muslims. The lecture should therefore begin with an explanation of the different modes of pronouncing *talaq*, the *ahsan*, *hasan* and *bidda* forms of the pronouncement and their legal roots and application. From here the lecture can progress to consider how and why an increasing number of Muslims and Muslim governments have taken issue with the summary mode of divorce, and how laws in these jurisdictions have declared this infamous ‘triple *talaq*’ illegal under Islamic law. Why did the triple *talaq* emerge as a possible avenue of dissolving marriage, why has it continued to date and on what grounds is it being prohibited in contemporary legislation of Muslim jurisdictions, is a question for every student of Islamic family law. As a comparison, it may be useful to look at Shia jurisprudence and reasoning behind the illegality of the triple *talaq* in that sect of Islam.

The lecture should also cover the alternative modes of dissolution of marriage, *khul’* and *mubarat*, explaining their legal origin and their application.

Seminar

In the small group session the students should be encouraged to debate the comparable legal positioning of *talaq*, *khul’* and *mubarat*.

Some questions arising include the following:

- is *khul’* comparable and ‘legally’ ‘equal’ to *talaq*; within the *Qur’anic* worldview; within *hadith* literature and within the practice of Muslims
- when does a divorce, either by *talaq*, *khul’* or *mubarat* become legally operative and why

The literature on these issues, and indeed the everyday practice of Muslim communities across the world, presents a variety of viewpoints on each of these questions. These disparate opinions and approaches towards the dissolution of marriage are a productive starting point for seminar discussions,

but can also be a challenge for the tutor. It is not possible to resolve these questions in a class on Islamic family law, but the teaching and learning process ought to highlight controversies and potential debates which will be a useful grounding for the students when they later come to learn how Islamic marriages are dissolved in contemporary society.

Assessment: Research Project

Ask the students to consider in detail the three modes of *talaq*: *talaq al-ahsan*, *talaq al-hasan* and *talaq al-bidda*. Encourage students to dig out the historical antecedents of this development. Can we say that *talaq al-bidda* (the triple talaq) is 'legally good/sound/valid' but morally/ethically/religiously 'bad'? How do we 'square' this with the verses on dissolution in the Qur'an? Consider the legality of each mode in contemporary Islamic jurisdictions.

Assessment: Problem Question

Read the following case study, choose one of the four Sunni juristic schools of thought and consider whether the marriage would be validly dissolved or not. If not, what is the procedure that needs to be followed?

Anita and Amir have been married for two months. They get into a big argument and Amir is furious and decides to end the marriage with Anita. He pronounces the triple talaq and tells her that they are divorced.

Assessment: Drafting Skills

Ask students to develop a draft law on the dissolution of marriage based on the relevant Qur'anic verses. Ask students to consider the following:

- what was the historical context of these verses and how should they be viewed in contemporary society?
- how should dissolution (*talaq*, *khul'*, *mubara't*, *faskh*) be categorised under Islamic and codified law?

- what are the legal, as opposed to moral/ethical requirements of a valid dissolution?
- is it possible to incorporate the moral/ethical voice of the Qur'an into statute/black letter law?

Readings

Core texts

S. S. Ali, "Marriage, Dower and Divorce: Superior Courts and Case Law in Pakistan" in F. Shaheed *et al* (eds.), *Shaping Women's Lives Laws, Practices and Strategies in Pakistan*, (1998) Lahore, Pakistan: Shirkatgah, pp. 107-142. Co-authored with R.Naz.

D. Pearl & W. Menski, *Muslim Family Law* (1998) 3rd edition, London: Sweet & Maxwell. Chapter 9.

J. Rehman, "The Sharia, Islamic Family Laws and International Human Rights Law: Examining the theory and practice of Polygamy and Talaq" (2007) *International Journal of Law, Policy and the Family*, pp 1–20.

Supplementary reading

S. S. Ali, Women's Human Rights in Islam: Towards a Theoretical framework, 4 *Yearbook of Islamic and Middle Eastern Law* 1998, 117-152

S. S. Ali, "The Law of Inheritance and Reported Case Law Relating to Women" in F. Shaheed *et al* (eds.), *Shaping Women's Lives Laws, Practices and Strategies in Pakistan*, (1998) Lahore, Pakistan: Shirkatgah, pp. 163-180. Co-authored with K. Arif.

A.A.An-Naim (ed.), *Islamic Family Law in a Changing World. A Global Resource Book* (2002) London: Zed Books.

A.A.A.Fyzee, *Outlines of Muhammadan Law* 4th edition (1974) Delhi: Oxford University Press

A. Al-Hibri, "Marriage Laws in Muslim Countries: A Comparative Study of Certain Egyptian, Syrian, Moroccan, and Tunisian Marriage Laws" (1992) Vol. 4 *International Review of Comparative Public Policy* pp. 227-24.

M.A.Mannan (ed.), *D F Mulla's Principles of Mohammadan Law* (1995) Lahore: PLD Publishers

Z. Mir-Hosseini, *Marriage on Trial. A Study of Islamic Family Law* (2000) London: I.B. Tauris.

J. J. Nasir, *The Islamic law of Personal Status* (1990) London: Graham & Trotman

Chapter Four

Parents and Children

Following on from the discussion regarding marriage and modes of dissolution, we enter into an area of law that regulates the relationship between parents and children, the rights of children to an identity, support and maintenance and the right to inherit from parents.

Subjects that should be covered in this section are:

- the status of children at birth (legitimacy in the context of the legality of the marriage of parents)
- custody (*Hizanat*)
- guardianship (*Wilayat*)
- adoption and the concept of *Kafalah*

We suggest covering this subject in one lecture and one seminar.

Lecture

The first point to make in this session is the important link between marriage and legitimacy of children. Legitimacy is established either by the birth of a child in a marriage which is valid (*sahih*) or irregular (*fasid*), but not one that is void (*batil*). Alternatively, it may be established through the doctrine of acknowledgement (*iqrar*). Legitimacy, or the right to establish parentage, is not only the framework in which the rights of the child are placed, but it is a significant indicator of the wider cultural and religious practices under discussion in the rest of the course.

Ask the students to consider and debate the following passage from Pearl & Menksi:

“Illegitimate birth is severely stigmatised in Muslim law, *inter alia*, because it threatens a dominant principle in traditional Muslim law; that of purity of the blood line through males. Concern over legitimacy, as the institution of the *idda*’ period confirms, seeks to avoid confusion over paternity, but also reflects a desire to uphold proper sexual mores in society and to avoid illicit sexual relations (*zina*).”

Another important point linked to the question of legitimacy is the period of gestation. Pearl and Menski argue that perhaps in view of the drastic consequences attendant upon individuals who are not considered legitimate, all Sunni schools recognise gestation periods well beyond the medically proven maximum. Tutors can well expect a robust discussion on this issue in view of the capacity of medical science to ascertain maximum gestation period of a foetus. Hanafis concede a gestation period of up to two years between conception and birth of a child. Hanbali and Shafi’i jurists accept gestation of up to four years with Malikis up to five years. There has been much debate with the Islamic legal discourse about these ‘classical’ limits. For instance, Nasir concludes that in practice it has been laid down as one lunar year. Some discussion may be useful here regarding the concept of the ‘sleeping foetus’.

Moving on from the issue of paternity, the lecture should cover the law relating to children in the event of dissolution of the parents’ marriage. The starting point for this discussion is the basic distinction between custody (*hizanat*) and guardianship (*wilaya*). Custody means the care and control of the child, but under the doctrine of *hizanat* the rights and obligations of the mother (and persons who might take their place) are also delineated. Guardianship on the other hand, focuses on legal rights and obligations of the child’s father and his representatives. In practice, the ‘best interests of the child’ often blurs the

distinction between the two concepts and this will be explored further in the seminar. All schools of thought (Sunni and Shia alike), agree that the mother has the first claim to the custody of her infant, but a difference of opinion exists as to whom should have custody in the absence of the mother as well as when the period of custody ends.

Direct students to consider:

- how the different schools have arrived at their own age limits of custody
- the practicality of the Shafi'i doctrine of 'discretion'
- how the different age limits are incorporated into contemporary legislation and practice
- whether the age limits are mandatory or discretionary
- the role of the court in determining custody and guardianship – how much discretion does a judge have?
- whether the parties can forfeit their role and in what circumstances custody or guardianship can be awarded

The last controversial subject that can be dealt with in the lecture is adoption. The generally held opinion regarding adoption, amongst Muslims and non-Muslims alike, is that adoption is not allowed in Islam and Islamic law. In practice however, various formal and informal devices are employed to support and take account of the welfare of orphaned or destitute children, as well as the interests of childless couples, who may seek to treat a child as their own. The doctrine of kafalah or nurturing and caring for a child other than one's biological offspring is an example of a practice akin to adoption. Likewise, the relationship of fosterage (arising out of breastfeeding a child) creates a prohibition of marriage amongst 'foster' relations, including foster parents, foster siblings etc. Students should be referred to the Qur'anic verses on the subject, and engage with the context and purpose of the prohibition:

"Allah has not made
For any man two hearts
In his (one) body: Nor has
He made your wives whom ye
Divorce by Zihar your mothers.
Nor has He made your
Adopted sons your sons,
Such is only your (manner of) speech
By your mouths. But Allah
Tells (you) the truth, and He
Shows the (right) way.
Call them by (the names)
Of their fathers: that is
More just in sight of Allah,
But if ye know not
Their father's (names, call them)
Your brothers in faith,
Or your Maulas,
But there is no blame on you
If ye make
A mistake therein".

Surah Ahzab (The Clans)
Chapter 33, verses 4 and 5

Seminar

Provide the students with a copy of the House of Lords decision in EM (Lebanon) v SSHD [2008] UKHL 64. This was a case concerning the removal from the UK of a Lebanese woman and her child. The Appellant claimed that if returned to Lebanon she would lose custody of her child to her ex-husband, and appealed on the basis that this would be a breach of her right to family life protected by Article 8 of the ECHR. Ask the students to critically evaluate the findings of the Lords, based on the “expert evidence” that was before them.

Some of the questions that should come up for discussion and debate in class include the following:

- Is Lord Hope correct when he states that any attempt by the mother to retain custody would “be bound to fail”? [paragraph 5]

- Is Lord Bingham correct when he states that the *sharia* court would have “no discretion” in determining which parent has custody of the child? [paragraph 24]
- What considerations would a *sharia* court take into account in determining where the child should live?
- What was the relevance of the father’s past conduct?
- Could the *sharia* court take into account the “best interests” of the child? Is “best interests” an objective or subjective test?

The *dicta* of the Lords in this case also makes a good starting point for a wider discussion of the application of “universal” human rights and discrimination in the context of Islamic family law.

Assessment: Essay Question

“Traditional Islamic law does not appear to allow formal adoption because it refuses to accept the legal fiction which an adoption creates, namely that an adopted child can become an equal to a blood relative of the adopting father.”

Pearl & Menski, p. 408

Analyse this statement in light of Qur’anic verses and practice in the Muslim world regarding adoption.

Some tips for students on how to address this question:

- Read the Qur’anic verses supposedly prohibiting adoption (The Clans, Sura 33, verses 4 and 5)
- Explore and understand their context
- When and in response to what situation were these verses revealed?
- What are the legal rules you are able to extrapolate from these verses?

- Is it pointing towards a blanket prohibition of the concept of adoption? Define adoption as a western concept and then try to engage with it from within the Islamic legal tradition.
- What about the doctrine of kafalah, or looking after, nurturing and caring for children not your biological offspring?
- Look at the concept of laqet or foundling and the duty to look after them.
- How would you construct rules regarding adoption on the basis of the above explanation?

Reading

Core texts

S. S. Ali, "A Comparative Perspective of the United Nations Convention on Rights of the Child and the Principles of Islamic Law. Law Reform and Children's Rights in Muslim Jurisdictions" in S. Goonasekere (ed.) *Protecting the World's Children: Impact of the UN Convention on the Rights of the Child in Diverse Legal Systems* (2007) Cambridge: Cambridge University Press pp. 142-208.

S. Ishaque, "Islamic principles on adoption: examining the impact of illegitimacy and inheritance related concerns in context of a child's right to an identity" (2008) Vol. 22 *International Journal of Law, Policy and the Family* pp. 393-420.

D. Pearl & W. Menski, *Muslim Family Law* (1998) 3rd edition, London: Sweet & Maxwell. Chapter 10.

S. S. Ali, "Custody and Guardianship: Case Law 1947-97" in F. Shaheed *et al* (eds.,) *Shaping Women's Lives Laws, Practices and Strategies in Pakistan*, 1998) Lahore, Pakistan: Shirkatgah, pp. 143-162. Co-authored with M.N. Azam.

S. S. Ali, "Rights of the Child under Islamic Law and Laws of Pakistan: A Thematic Overview" (2006) Vol. 2 *Journal of Islamic State Practices in International Law*, pp. 1– 16.

Supplementary reading

A.A.An-Naim (ed.,) *Islamic Family Law in a Changing World. A Global Resource Book* (2002) London: Zed Books.

M.A.Mannan (ed.,) *D F Mulla's Principles of Mohammadan Law* (1995) Lahore: PLD Publishers

J. J. Nasir, *The Islamic law of Personal Status* (1990) London: Graham & Trotman.

Chapter Five

Law Reform in the Muslim World

Aims and Objectives

This part of the course draws upon the concepts and normative framework of the earlier part of the course to analyse the extent to which these principles of Islamic family law find a place in the legislation of contemporary Muslim jurisdictions. It uses examples of law reform from South-Asian jurisdictions including the following:

- The Child Marriages Restraint Act 1929. This law is an example of a 'standard setting law' by the British colonial government to discourage child marriages.
- The Dissolution of Muslim Marriages Act 1939 (India, Pakistan and Bangladesh). This law reflects the responsiveness on behalf of the British colonial government and Muslims of British India to formulate a law acknowledging Muslim women's rights to initiate dissolution of their marriage on 'Islamically' accepted grounds, but denied to them due to their conflict with local customary practices.
- The Muslim Family Laws Ordinance 1961 (Pakistan). This is an example of 'indigenous' local demands for family law reform including banning polygamy, modifying rules of inheritance to include orphaned grandchildren of predeceased sons/daughters and prohibiting the infamous 'triple talaq'.
- As an example of the Maghreb (North African region), the Moroccan Family Code (Moudawana) of 2004 offers a fascinating example of law reform in the contemporary Muslim world.

Lecture

The main aim of this lecture is to provide students with an opportunity to link theoretical perspectives on Islamic law and its sources, to their application in contemporary legislation and to develop their analytical skills. To this end, we ask the following critical questions:

- What are the merits and de-merits of codification of Islamic family law?
- Is codification a useful mechanism for formalising Islamic family law, or indeed, any field of the Islamic legal tradition?
- Does codification lead to fossilisation of norms and rules, even concepts; in particular within Islamic family law?

An interesting method of engaging students with the processes of law reform in the Muslim world is to provide an historical and contextual overview. What was the motivation to reform and codify, and what led to the inclusion and exclusion of certain interpretative formulations within Islamic law when legislating in this area. The Rashid Commission Report from Pakistan which was the pre-cursor to the Muslim Family Laws Ordinance 1961 is one example.

Tips for promoting discussion:

- provide excerpts from the Rashid Commission recommending legally abolishing polygamy in the then forthcoming family law.
- Compare this to the actual provisions of the MFLO relating to 'restraining' rather than prohibition of polygamy.
- On what basis is the MFLO 'Islamic?'; Who's views does it represent?
- What would be the challenges confronted by law makers in further codification/modification of these provisions?

Some landmarks in the evolution of codification of Islamic family law:

- First major redefinition of traditional Muslim law - Ottoman Empire in the 19th century. These were attempts at codification of law.
- The Tanzimat, as they were known, introduced a range of codified laws. The form of these laws was European but there was some attempt to integrate certain principles of Islamic criminal law.
- The Majalla or The Civil Code of 1876 (Contract and tort of Hanafi Sunni law) Majalla is important in that it represents the earliest example of official promulgation of significant parts of the *Shari'a* by authority of a modern state. It did not only draw upon Hanafi Sunni jurisprudence but chose also to incorporate divergent views from the Hanafi traditions. The Majalla as example of *takhayyur*.
- Ottoman Law of Family Rights 1917 contained (limited) rights to divorce by Muslim women, a reform based on the Maliki and Hanbali doctrine on the subject.
- The Turkish reforms as aspiration for other countries in the Muslim world.
- Juristic techniques of Muslim jurisprudence including *Ijtihad*, *Takhayur*, *Talfiq* were used in the modern day legal reform in the Muslim world. For instance: An adult Muslim woman's right to enter into marriage of her own accord without intervention of her male guardian (a principle of the Hanafi school), has been adopted by applying *talfiq* in jurisdictions where the Hanafi School is not otherwise followed. Morocco, following the Maliki School, used this to reform her Family Code.
- The DMMA is another example where principles of four schools of thought were merged together to arrive at a codified law. The formulation is secular as it does not contain the *Qur'an* or *Sunna*

directly but Islamic principles of law and justice were invoked and used as a justification for the said legal reform.

- The MFLO drafted in light of *Qur'anic* verses. Registration of marriages, procedure for divorce and the role of the arbitration council, orphaned grandchild and inheritance, permission of existing wife in polygamous marriages unions.
- The 20th century as the century of law reform in the Muslim world.

Seminar

This session will concentrate on linking the theoretical concepts of Islamic Law explored in the earlier part of the course to its practical application by various Muslim jurisdictions through attempts to reform their family law. We will use the Moroccan Family Code (Moudawana) adopted on February 5, 2004 as an example.

- Read the text of the Moudawana
- Pick up specific provisions of the Moudawana and indicate what juristic technique, for example, *talfiq*, *ijtihad* and so on, has been used to formulate that section of the law.
- For instance, the Maliki school of thought (followed in Morocco) requires the presence and consent of the *wali* (male guardian) of an adult Muslim woman as a pre-requisite for a valid marriage. Yet, the Moudawana departs from this principle.
- Principles of international human rights law including children's and women's rights to non-discrimination and equality, are invoked and recalled as guiding principles in the Moudawana. This is done on the basis of contractual obligations considered paramount in Islamic law and as the country has ratified these human rights treaties, domestic laws take this reality on board.

- The Moroccan King's speech regarding the rationale and objective of the reform is incorporated into the preamble of the Moudawana, extracts from which are given below:

"Adopt a modern form of wording and remove degrading and debasing terms for women.

Place the family under the joint responsibility of both spouses, given that 'women are men's sisters before the law' in keeping with the words of my ancestor the Chosen Prophet Sidna Mohammed, Peace Be Upon Him, as reported, 'Only an honourable person dignifies women, and only a villainous one degrades them.'

Entitle the woman who has come of age to tutelage as a right, and she may exercise it according to her choice and interests, on the basis of an interpretation of a holy verse stipulating that a woman cannot be compelled to marry against her will: "...place not difficulties in the way of their marrying their husbands, if it is agreed between them in kindness.' A woman may of her own free will delegate tutelage to her father or a male relative.

Equality between women and men with respect to the minimum age for marriage, which is now fixed at eighteen years for both, in accordance with certain provisions of the *Malekite* School, and authorize the judge to reduce this age only in justified cases, and further, equality between girls and boys under custody who may choose their custodian at the age of fifteen.

Concerning polygamy, we took into consideration the commitment to the tolerant principles of Islam in establishing justice, which the Almighty requires for polygamy to take place, as it is plainly stated in the Holy Koran: He said '...and if you fear that you cannot do justice (to so many) then one (only).' And since the Almighty ruled out the possibility for men to do justice in this particular case, He said: 'You will not be able to deal equally between (your) wives, however much you wish (to do so),' and he thus made polygamy quasi impossible under *Sharia* (religious law).

We further adhered to the distinguished wisdom of Islam in allowing men to legitimately take a second wife, but only under compelling circumstances and stringent restrictions, with the judge's authorisation, instead of illegitimate polygamy occurring if we prohibit it entirely.

From thence, polygamy shall be allowed only in the following circumstances and according to the following legal conditions:

The judge shall not authorize polygamy unless he has verified the husband's ability to guarantee equality with the first wife and her children in all areas of life, and there is an objective and exceptional motive that justifies polygamy.

The woman has the right to stipulate a condition in the marriage contract by which her husband will refrain from taking another wife, as Omar Ibn Al-Khattab, may God be pleased with him, is quoted as saying: 'The intersection of rights is in the conditions.' In the absence of such a condition, the first wife is summoned to obtain her consent, and the second wife must also be notified and consent to the fact that the husband is already married to another woman. Moreover, the first wife has the right to petition for divorce for harm suffered.

As a token of our royal concern for our dear subjects residing abroad, marriage procedures are to be simplified for them: the marriage contract is to be drawn up in the presence of two Muslim witnesses and in accordance with the procedures in effect in the country of residence, and then registered with the proper Moroccan consular or judicial authorities, according to the *Hadith*: 'Seek ease, not hardship.'

Make divorce, defined as the dissolution of marriage, a prerogative that may be exercised as much by the husband as by the wife, in accordance with legal conditions established for each party and under judicial supervision to control and restrict the abusive arbitrary practices of the husband in exercising repudiation, and this according to the rules established on the basis of the *Hadith* by Prophet Mohammed, Peace Be Upon Him, 'The most hateful to God among all lawful things is divorce.' The new legislation also reinforces the mechanisms for reconciliation and mediation both through the family and the judge. If the husband has the right of repudiation, the wife may also avail herself of this right through *tamleek* (assignment). In all cases, before repudiation may be authorized it must be ascertained that the repudiated woman has received all of her vested rights. A new procedure for repudiation has been established that requires judicial permission, and the repudiation cannot be registered until all vested rights owed to the wife and children have been paid in full by the husband. Irregular pronouncements of repudiation by the husband shall not be considered valid.

Expand the woman's right to file for divorce when the husband does not fulfil any of the conditions stipulated in the marriage contract, or for harm caused to the wife such as lack of financial support, abandonment, violence, and other harm, in view of endorsing the general legal principle: 'neither harm nor be harmed,' to promote equality and equity between the two spouses. Another new provision introduces of the right of divorce by mutual consent under judicial supervision.

Protect children's rights by inserting provisions of international conventions ratified by Morocco into the *Moudawana*. Children's interests with respect to custody are also guaranteed by awarding custody to the mother, then to the father, then to the maternal grandmother. Should this prove impossible, the judge will entrust custody to the most qualified relative. Furthermore, the child under custody is guaranteed suitable accommodation, separate from the other financial maintenance obligations, and cases concerning maintenance obligations must be settled swiftly within a one-month time limit.

Protect the child's right to acknowledgement of paternity in the event the marriage has not been officially registered for reasons of *force majeure*, where the court examines the evidence presented to prove filiation, and establish a five year time limit for settling outstanding cases in this regard to put an end to the suffering endured by children in this situation.

Allow the granddaughter and grandson on the daughter's side the right to inherit from their grandfather, just as the grandchildren on the son's side, in keeping with the principles of *ijtihad* (juridical reasoning) and justice in the compulsory legacy.

Concerning the management of property acquired by the two spouses during marriage: while confirming the principle of separate marital property, the bill makes it possible for the couple to agree, in a document separate from the marriage contract, on a framework for managing assets acquired during marriage. In case of disagreement, the judge shall resort to general rules of evidence to assess each spouse's contribution to the development of the family capital.

Ladies and gentlemen, honourable Members of Parliament,

The reforms, of which we cited the most important, should not be considered as a victory of one group over another, but rather constitute achievements for all Moroccans, and we took care to ensure that they were consistent with the following principles and references:

I cannot, as Commander of the Faithful, permit what God has forbidden and forbid what God has permitted.

Adopt the tolerant principles of Islam in advocating human dignity, and enhancing justice, equality and good amicable social relations, and with the cohesiveness of the *Malekite* School as well as *ijtihad* (juridical reasoning), which makes Islam valid for any time and place, to implement a modern *Moudawana* for the family, consistent with the spirit of our glorious religion.

Not consider the *Moudawana* as a law for the woman only, but a *Moudawana* for the entire family - father, mother and children - and further ensure that this *Moudawana* eliminates discrimination against women, protects the rights of children and preserves men's dignity."

Assessment Question:

Read the text of the *Moudawana* carefully. Identify specific provisions of this law indicating which juristic techniques, for example, *ijtihad*, *talfiq* etc., have been employed to arrive at that particular provision.

Core Reading

Buskins, L. 'Recent Debates on Family Law Reform in Morocco, Islamic Law as Politics in an Emerging Public Sphere', *Islamic Law Society*, Vol. 10, No. 1, Public Debates on Family Law Reform Participants, Positions and Styles of Argumentation in the 1990's (2003), pp 70-131.

Maddy-Weitzman, B. 'Women, Islam, and the Moroccan State, The Struggle over the Personal Status Law' in *Middle East Journal*, Vol. 59, No. 3, Democratization and Civil Society (Summer 2005) pp 393-410.

D. Pearl & W. Menski, *Muslim Family Law* (1998) 3rd edition, London: Sweet & Maxwell pp.68-83, 166-175, 228-236, 273-278, 382-398.

A A An Naim, "Sharia and positive legislation: is an Islamic state possible or viable?" (1998-1999) Vol. 5 *Yearbook of Islamic and Middle Eastern Law* pp. 29-41

S.S. Ali, "Testing the Limits of Family Law Reform in Pakistan: A Critical Analysis of Muslim Family Laws Ordinance 1961." (2002) *International Survey of Family Law*: Cambridge University Press pp.317-335.

A.A.An-Naim (ed.,) *Islamic Family Law in a Changing World. A Global Resource Book* (2002) London: Zed Books pp. 1-21

Supplementary Reading

S. S. Ali, "Using Law For Women in Pakistan" in Ann Stewart (ed.,) *Gender, Law and Justice*, (2000) London: Blackstone, pp. 139-159.=

S. S. Ali, "A Critical Review of Family Laws in Pakistan: A Women's Perspective" in R.Mehdi (ed.,) *Women's Law in Legal Education and Practice in Pakistan: North South Co-operation* (1997) Copenhagen: Social Science Monographs. pp. 198-223.

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Chapter Six

Application of Islamic Family law to Muslim Diasporic communities

This topic is complex and cannot easily be reduced into one session. In fact, it could quite easily be expanded to comprise an entire module: see the companion manual. Tutors will therefore need to condense or expand the material in this chapter according to the time they have available. For the purpose of this manual the material presented here is concerned primarily with the application of Islamic Family Law to the diasporic communities in the UK. Tutors in other jurisdictions will therefore wish to consider adapting it to reflect their own experience, but the themes and conflicts explored here are no doubt, universally relevant.

Lectures

We suggest beginning with some discussion on the concept of a Muslim 'diaspora'. We use the term 'diasporic communities' to reflect the plurality of practice and belief amongst Muslim migrant communities in Europe, and specifically the UK. In light of those multiple identities, we suggest that there may be some question as to whether the term 'the Muslim diaspora' is a useful categorisation. Indeed this very diversity of peoples is a major theme in many of the issues raised in this module. For instance, writers have argued that it is this diversity which has contributed towards the failure of the Muslim community in UK to have their personal law officially recognised by the State. It would also be useful for students to be given some general background as to where the Muslim presence in the UK came from, and how the behaviour and expectations of the Muslim communities in the UK have been conditioned and affected by their relationships with the UK, both as a colonial power and as a new home. This discussion might helpfully encompass an historical

overview of migration to the UK in the twentieth century, the concept of the “myth of return” and the development of a nascent *Angrezi Shariat*.

A simple way of getting students to think about the diversity of the Muslim community is to ask students to identify all the Muslim communities they have come into contact with in the UK, and compile a list of all of these countries of origin. Invite comparison by asking the students to give examples of their experience of the personal law practices of any of these communities, for instance wedding ceremonies they may have attended.

Against this background, the following inter-related subjects may then be considered.

First, what is the position in classical Islamic Law, of the Muslim who finds himself outside of *dar al-Islam*? Should he abide by the laws of the state he is in, even if they conflict with his own personal law? Or, should his own understanding of the *sharia* prevail? This discussion can be limited to pointing out that in classical Islamic jurisprudence, there is in fact little guidance on this matter. Tutors who wish however to consider this fertile subject in more detail can expand it accordingly. We suggest some discussion of what the proper classification for modern day non-Muslim jurisdictions should be. Can Europe still be considered to be *dar al-Harb*, or should it more properly be classified as *dar al-amaan* or *dar al-suhl*? How does this classification affect the behaviour of the individual in instances of conflict of laws?

Definitions

- Dar al-Islam Land of believers, lit. land of Islam
- Dar al-Harb Land of unbelievers, lit. land of war
- Dar al-Sulh Land of Peace
- Dar al-Amaan Country of refuge, asylum
- Dar al-Ahd Country of treat

This look at the internal Islamic juristic discourse on personal law in the non-Muslim world leads on to the second topic for discussion: how have Muslim

diasporic communities responded politically to their dilemmas? An interesting example of the interaction between the state and the demands of the Muslim communities can be seen in the failure of the Union of Muslim Organisations in the UK and EIRE during the 1970's to have *shari'a* officially recognised as the personal law of all Muslims living in the UK. How should this endeavour, and its failure, be judged in light of the limited successes of other minority groups? Can either the communities or the State learn anything from the State's discourse with these other minorities? How for instance, has the Jewish community negotiated with the formal legal system?

This leads conveniently to the third subject for discussion, namely the way in which the State has sought to contain or accommodate Muslim personal law. This can be done, in the UK context, with a review of the dialectic between the courts and the executive. For instance look at the "liberal high-water mark" (Menski) of *Qureshi v Qureshi* [1971] and compare it with later statutory restrictions placed on the recognition of Islamic *talaq* divorce. This subject could also be expanded to contrast positivist European models of uniform, state imposed law, with the more pluralistic models found elsewhere in the world, notably in former colonies. To what extent has the State elevated public policy concerns over the religious freedom of the individual? Have the concessions which do exist been deliberate or piecemeal? Is it accurate to portray the law relating to minorities in the UK as non-discriminatory? How has public policy been effected by the Human Rights Act 1998?

Relevant case law

- [Alhaji Mohammad v. Knott](#) (1969) 1 Q.B. 1 (1968) 2 W.L.R. 1446; (1968) 2 All E.R. 563
- *Bibi v Chief Adjudication Officer*
- *R (on the application of Begum (Shabana) v Head Teacher and Governors of Dinbigh High School* [2005] EWCA Civ 199; [2005] 1 FCR 530

- R (on the application of Begum (by her litigation friend, Rahman) (Respondent) v. Head teacher and Governors of Denbigh High School (Appellants) [2006] UKHL 15;
- Quoraishi v. Quoraishi (1983) 4 F.L.R. 706; (1983) 3 Fam. Law 86; (1985) F.L.R. 780
- Qureshi v Qureshi (1971) 2 W.L.R. 518
- R v Registrar General of Births, Deaths and Marriages, ex p. Minhas (1976) 2 All E.R. 246 (1977) Q.B. 1
- Seemi v Seemi (1990) 140 N.L.J 747
- Secretary of State for the Home Department v. Syeda Khatoon Shah (1997) Imm.A.R. 584.

All of the discussion thus far lays the groundwork for the final and most significant part of the lecture or lecture series in this module. That is the actual practice of Muslims living in non-Muslim countries and how their strategies interact with official State law. This should include a critical examination of Menski's concept of *Angrezi Shariat*, and students should be encouraged to look at anthropological studies such as Poulter or Ballard in order to place their legal analysis in context. Can a system which rejects legal pluralism ever be said to be 'multicultural'? Is there any prospect that the assimilationist strategies thus far adopted will ever produce social cohesion?

Seminars

For law students in non-Muslim jurisdictions this topic will be the most relevant to their prospective practices, whether these are to be in family law or not. That is because the conflict of laws described above and the consequences of it could arise in any area of practice. Coming at the end of the course this module gives students the opportunity to consider in what ways the laws and customs they have learnt about could impact upon their future case-work. The proposed seminar structure is therefore to ask the students to conduct a 'mock trial'. Students should be divided into two groups, one group

representing the wife in a fictional trans-national divorce and the other group representing the husband.

Assessment: Research Project

Assessment details

You are required to write a case study of a British Muslim. The title of your project is:

Application of Islamic Law in the Muslim Diaspora: Case studies within the UK

Aims and objectives of the assessment

- One of the skills we expect students on this module to acquire is to develop an understanding of principles of Islamic law and how these are applied by individual Muslims as well as Muslim communities around the world. We have therefore set this assessment where students will develop case studies of British Muslims and their understanding of Islamic law mainly in the area of family law and the extent of its application to them in the UK.
- Students are expected, through their conversations and research into the area, to bring out the depth and breadth of Islamic law, knowledge and understanding of their respondents by distinguishing between the various interpretations of Islamic law in the area of family law and the pervasiveness of cultural notions of Islam and Islamic law.
- A further aim of the project is to ascertain what the 'first port of call' is regarding dispute resolution in the area of family law and why. For instance, when a problem arises, do British Muslims turn to: the nuclear family; the extended family; the imam of the mosque; the community; the English courts; the informal Shari'a Councils?

Methodology:

The project requires a number of research methods. The most important of is for you to have conducted a thorough research on the topic. There is a fair amount of published work in the area, some of which we have included in your bibliography and some articles/chapters are in your pack. You also can access judgements of English courts, some of which are included in your lecture handouts.

Since this is a project that demands some skills of analysing conversations and discussions, you must read up on basic research methods including how to conduct an interview, how to take notes during the interview and how to ask supplementary questions. What is also important is for you to be able to tease out further information from your respondents. Finally but not least, be sensitive to your respondent; make them feel at ease and assure them that what they are saying will not reveal their identity in the assessment etc,

How to go about this project:

- Identify your respondent i.e., the person who you will have conversations and discussions with during the term regarding their views and perspectives on Islamic family law.
- You can choose ANY adult British Muslim who agrees to have these conversations and discussions with you. A British Muslim for the purposes of this project includes any person, irrespective of origin of country/birth/race/ethnicity, who is a British national and has made Britain their home. Their approach to Islam and whether they perform the rituals of the religion are not a material factor in your choice. As long as a person says “I am a British Muslim,” that is fine for them to be your respondent.
- Seek their permission to act as a respondent. Explain to them why you want to have these conversations with them and assure them that the case study is for academic purposes and discussions only. Please make sure that whilst it is important to record the details of the person,

you undertake that their identity is protected. All conversations are to be anonymised in your notes.

- Start by making notes about the respondent's personal details. Are they male or female? How old is the respondent? What is their country of birth? What is their ethnicity? Are they Sunni/Shia? What school of juristic thought do they follow or profess? What is their educational background? have they been to school/college/university? Are they comfortable in speaking to you about their views on Islamic family law?
- Based on the lectures and seminar discussions every week, have conversations and discussions reflecting what you have learnt and read that week in class and in seminars. So for instance, based on the lectures on sources of Islamic law, ask them what they consider as valid sources of Islamic law and why.
- Then move on to specific areas of family law. After lectures on marriage and *mahr*, ask them questions along the following lines: In your immediate and extended family, what processes are followed to enter into marriage? Is it the man and woman who make the choice; is it the parents' and relatives' choice or is it a combination of the two? How is this process explained? Is it in religious terms or a process identified with culture and tradition? Is the *nikah* performed first followed by a civil ceremony or is it the other way round? Why? Is the civil ceremony performed for every marriage in the community? What is the significance of each ceremony? Are there any negotiations regarding *mahr*? How is *mahr* conceptualised? Is it considered an important part of the marriage contract or merely symbolic? Do you consider it as economic security for the woman? Can you provide examples of the sort of *mahr* stipulated? Are you aware of divorced women who have received their *mahr*? If not, why not? If so, was it through the English legal system or through any other forum?

- Next move on to polygamy. What is the respondent's understanding and rationale for polygamy? Is it an unrestricted right of the Muslim male or was it allowed as an exception in certain specific circumstances? Are those circumstances applicable now, especially in the UK? Do you know of any polygamous couples in the UK among the British Muslim community? What are their reasons for being polygamous? Are they aware that as British nationals, polygamy is illegal and an offence under English law? Can polygamy protect a Muslim wife? Ought the English legal system recognise it and allow Muslim men to legally marry more than one wife? What are the reasons for your response?
- Divorce. Can the respondents distinguish between the various forms of dissolution of marriage? How do British Muslims go about getting a divorce? Is it by the husband pronouncing *talaq*? Is it by applying to the courts? What is the consequence of each method? Are they aware of the difference between *talaq*, *khul'a mubarat* and judicial divorce through a court? Is a judicial decree of divorce by an English court a valid divorce in the eyes of British Muslims? Do British Muslims use the Muslim Shari'a Councils to obtain a *talaq* if their former husbands refuse to accept the decision of the court regarding the dissolution of their marriage?
- Inheritance. Is your respondent aware of the Muslim law of inheritance? Do they follow it? If so, how do British Muslims make wills? If so, how do they divide their property and other assets, is it in accordance with the law of inheritance under Islam?
- Adoption. What is the perspective, knowledge and understanding of British Muslims regarding adoption? Do they consider it unIslamic? What if a childless couple adopt a child? Or if a child has no parents? Do they consider it a form of adoption to look after that child? Do they foresee any complications regarding the inheritance of this child?

- Guardianship and custody. Here, too students are expected to broach the subject with their respondents and gain insights into their perspectives on guardianship and custody of a child. Is there any difference between the two concepts?
- Dispute resolution forum/s. Which ones and in what order?

IMPORTANT NOTE:

Please bear in mind that the above questions and issues for discussions are indicative and a guide for the sorts of questions you need to ask the respondents. Your conversations and discussions may raise other issues as well. Please do not feel restrained by these questions and feel free to formulate your own questions.

Next steps and how to write it up

Your research is in two steps. The first one is to find a respondent and make conversations and engage with them in discussions on the subjects above. Make notes of all conversations

The second step is write this up as a review and include analysis and commentary, based upon your readings, lectures, seminar discussions on the one hand and your conversations with your respondents on the other. Here, the aim is for you to be able to highlight the extent to which British Muslims' understandings of Islam are influenced by their knowledge of the sources of Islamic law and the extent to which these are based on their lived experiences, their culture, tradition and where they come from or where their parents came from.

The assessment should also touch upon the extent to which British Muslims feel comfortable, able and willing to use the English courts as their dispute resolution and if not, why they feel so inclined. Finally, which forums do they trust most and why?

Assessment: Essay Question

A tip might be here to ask students to contextualise 'diaspora' in Europe using an historical lens and to conduct research in the area of minorities 'fiqh'.

What do they think of 'Muslim institutions' such as the European Council of Fatwa and Research, Muslim Shari'a Councils of Britain and Muslim Arbitration Tribunal? How does it compare in their view with similar institutions in other religions?

Core Reading

M.S.F.G Foblets, "Family Disputes Involving Muslim Women in Contemporary Europe. Immigrant Women Caught between Islamic Family Law and Women's Rights" in Howland (ed) *Religious Fundamentalism and the Human Rights of Women* (2002) London: Palgrave Macmillan pp.167-178

D. Pearl & W. Menski, *Muslim Family Law* (1998) 3rd edition, London: Sweet & Maxwell pp. 382-398.

S S Ali, (2007) 'Religious Pluralism, Human Rights and Muslim Citizenship in Europe: Some Preliminary Reflections on an Evolving methodology for Consensus' in T Leonon & J Goldschmidt (eds) *Religious Pluralism and Human Rights in Europe* Antwerp: Intersentia, pp. 57-79.

Supplementary Reading

I. Yilmaz, "Marriage Solemnization among Turks in Britain. The Emergence of a Hybrid Anglo-Muslim Turkish Law" (2004) 24 *Journal of Muslim Affairs* pp. 57-66

S. Bano, *Complexity, Difference and 'Muslim Personal Law': Rethinking the Relationship between Shariah Councils and South Asian Muslim Women in Britain* (2004) Doctoral thesis submitted to the University of Warwick 2004.

I. Yilmaz, "Law as Chameleon. The Question of Incorporation of Muslim Personal Law into the English Law" (2001) 21 *Journal of Muslim Affairs* pp. 297-308

B. Berkovits, "Get and Talaq in English Law: Reflections on Law and Policy" in C. Mallat & J. Connors (eds.), *Islamic Family Law* (1990) London: Graham & Trotman pp. 119-146.

S. Poulter, "The Claim to a Separate Islamic System of personal Law for British Muslims" in C. Mallat & J. Connors (eds.), *Islamic Family Law* (1990) London: Graham & Trotman pp. 147-166.

A S Roald, *Women in Islam The Western Experience* (2001) London: Routledge
A.A.An-Naim (ed) (2002) *Islamic Family Law in a Changing World. A Global Resource Book* London: Zed Books pp. 1-21

B. Berkovits, "Get and *Talaq* in English Law: Reflections on Law and Policy" in C. Mallat & J. Connors (eds.), *Islamic Family Law* (1990) London: Graham & Trotman pp. 119-146.

S S Ali, (2007) 'The Twain Doth Meet! A Preliminary Exploration of the Theory and Practice of *as-Siyar* and International Law in the Contemporary world' in J Rehman & S Breau (eds) *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* Leiden: Martinus Nijhoff Publishers.

S. Poulter, "The Claim to a Separate Islamic System of personal Law for British Muslims" in C. Mallat & J. Connors (eds.), *Islamic Family Law* (1990) London: Graham & Trotman pp. 147-166.

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I.Yilmaz, "Marriage Solemnization among Turks in Britain: The Emergence of a Hybrid Anglo- Muslim Turkish Law" (2004) 24 *Journal of Muslim Affairs* pp 57-66