

Maliki

For this school marriage is compulsory even if one cannot raise *mahr* least one fails to control his passion even through prayer.[28] Some jurists however still enforce the responsibilities law for fear of fueling stealing to fend for the family. Marriage can only be contracted by the parents of the marrying spouses and divorce is easier for the man.[29] Malaise Ruthven [30] argues that the superior status of the guardians is a contradiction of the Quran which favours individual consent as reflected by the Hanafi. The *mahr* is set at three *dirhams*. Though the Quran sets *iddah* at three months the Maliki set it at twelve months with minimal subsistence (cf 65:1-5).

Shafi

The Shafi School says marriage is superogatory (*mubah*).[31] For a marriage to be valid there must be a suitor, bride, guardians, two witnesses and the *sighah* (proposal and consent). The king or Emir can be a guardian in the absence of the actual guardian since no woman can be a guardian for the other.[32] The school has not fixed *mahr*.

Hanibali

The Hanibali like the Hanafi sees proposal and consent as paramount and has left *mahr* fixing to the bargainers.[33] This is the latest, smallest and strictest school limited only to Iraq and parts of Syria.[34]

Polygyny

Muslims are allowed to marry up to four wives by the lone verse in the Quran (4:3). The Shariah seems to suggest that if one has more than four wives at conversion, he may release the rest and remain with four. The background to the verse is the Battle of Uhud in which many Muslim men lost their lives. This left the nascent Muslim community with numerous widows and female orphans to care for. As a humanitarian gesture, the Muslims with the means and capacity to be fair were encouraged to marry up to four wives in order to provide for them in a strictly patriarchal society. The worrier society with inevitable imbalanced male-female figures called for polygyny.[35]

According to Schacht,[36]

“The reasons for the Quranic legislation on the matter were, in the first place, dissatisfaction with the prevailing conditions, the desire to improve the condition of women, orphans, and the weak in general, to restrict the laxity of sexual morals and to strengthen the moral tie...”

In an era of wars and insecurity the position of women could only play second fiddle to that of men who protected them from danger. Exploiting this loophole to their advantage men tended to make women sex objects and to take and discard them at will. Despite the demise of the warrior society necessitating polygyny, Yusuf Ali [37] still maintains “the event may be past but principles remain.” He argues that despite the historical conditioning of the Quranic legislation, it was meant to be an eternal principle.

Doi [38] however discusses “modernists” whose views run in the face of Yusuf Ali. Their position which is echoed in many political circles in the Muslim World, is that since the event is past and the circumstances no longer exist

monogamy, which is more in line with the term *zawj* is more in line with the will of God. They quote 4:129 which says that it is not possible to be fair to more than one woman. Since this verse comes after 4:3 it abrogates 4:3. The question of abrogation of verses is something well understood among Muslims. In that case 4:3 often quoted as allowing four wives is virtually a prohibition by modern exegesis as it puts impossible conditions for polygyny.[39] Polygyny is conditional and modernists believe that the conditions cannot be met. Abdalati [40] maintains that polygyny is “an exception to the ordinary course – an emergency measure, and it should be confined to that.” Yusuf Ali [41] acknowledges the difficulties associated with polygyny but notes that if the difficulties are noted after the constitution of polygyny the husband should at least strive to meet the external requirements rather than divorcing some of the wives. His interpretation is that 4:3 refers to material satisfaction while 4:129 refers to emotional satisfaction which is not central to practice.

On the political front, Tunisia prohibited polygyny in 1957, and in Syria (1953), Morocco (1958), Iraqi (1959) and Pakistan (1961) polygyny has been semi-outlawed. In these countries polygyny is regulated by government codes administered by the courts which verify the need and level of impartiality.[42] In Tunisia marriage can only be legally dissolved by the law courts at the request of one or both spouses.[43]

5. Temporary Marriage

If a man is out on business it is better to have a second wife there than to prostitute.[44] Mujtaba and Lari [45] maintain that,

“The law of ‘the temporary marriage’ (*ezdevaj-i-muwaqat* or *muta’a*) by the formula (or *seeghe*) laid down in it, was instituted to establish conditions under which a man who was *compelled by the necessities of his business* or for other causes to be away from home for long periods, or *who desired to give temporary assistance to a woman whose life had fallen into difficulties*, could undertake a union for a specified period under strictly controlled conditions (emphasis mine).”

“Other causes” may refer to soldiers at the front as happened in the conquest periods of Islam when many spent long periods in the provinces and could marry ‘what their right hand possessed’ (captives). Mujtaba and Lari [46] include merchants, soldiers, students and tourists on the list of those deserving *mutah*. The temporary marriage was there to regularize a rampant illicit behaviour. Surah 4:24 directs that women in temporary and conditional marriages must receive their *mahr*. Children born out of such marriages are *bona fides* inheritors from their fathers and this marriage differs from the regular one only in length of time. Mujtaba and Lari [47] eulogize the institution since it “blocks the way to women selling themselves, raises the general tone of public morality, and gives the needed assistance to women, who through no fault of their own, either by the death of their husband or some other disaster, have fallen on bad times.”

6. Divorce

Divorce of all things allowed is the most hateful to Allah (4:128). It therefore should come as the last resort. It occupies so much space in the Quran to demonstrate that it is so much condemnable, but Islam as a religion of the "Golden mean" would not tolerate absolute indissolubility.[48] This gives the Muslim marriage its sacramental and contractual (civil) nature.[49] Though adultery may lead to divorce it may also lead to death by stoning.

In divorce the Quran appeals against over-hastiness (2:226f, 237; 4:24). The first step is admonition. If the wife refuses to repent then the husband is encouraged to sever conjugal relations with her, which takes the form of an oath. Should this fail then the husband is allowed to beat her lightly without leaving scars. The Sunnah particularly stresses the issue of not leaving scars. Legally there is no consensus among jurists on the beating, which is followed by taking recourse to the family courts for arbitration (*hakama*) (4:25).[50] These family courts comprise members from both sides. Islam stuck to the idea of arbiters because of the love for justice which must pervade all spheres of life (4:105).

According to Doi this love for justice stems from the time of the Prophet who demonstrated impartiality in the story of Ta'imah bin Ubairaq, a nominal Muslim.[51] Ubairaq is said to have stolen a set of armor, and pressed for it, he threw it in the house of a Jew in the hope that the Jew would get the conviction since he was a non Muslim. But when Muhammad was asked to arbitrate, he acquitted the Jew and convicted Ubairaq against the wishes of all his Muslim sympathizers. Justice as one of Allah's attributes means that whoever stands for justice stands as Allah's witness. In arbitration therefore one should stand for justice even against parent, kinsman, the rich or oneself (4:135).

If arbitration fails the *iddah* (period of waiting before divorce) follows. This period of three months or so is meant to give spouses the opportunity for reconciliation while still under one roof as well as determine whether the wife is not pregnant. If she be pregnant then she must give birth under the same roof except in exceptional cases (65:1). During these months of waiting the husband repudiates his wife three times during her clean periods. The husband may repudiate his wife twice without being asked to part ways with her (2:229f). He may have said it in anger and reconciliation is possible after the second pronouncement but not after the third. When the husband has repudiated his wife three times he is bound to part ways with her at the end of the waiting period.

He is not allowed to reconcile with her again until she has married another man had has been divorced by him after the consummation of the marriage.[52] But according to Schacht [53] there has also arisen the practice of *tahlil*, in which a temporary or fake marriage is arranged and immediately dissolved with real or pretended consummation, to allow the wife to re-marry her former husband. This practice is *bidah* (innovation) and therefore

condemned, but nevertheless binding where it has been applied in juridical terms.

7. Types of Divorce

Talak

Schacht [54] describes *talak* (literally to set the animal free) as the normal divorce procedure. He says, "The normal case is the repudiation (*talak*) of the wife by the husband; and is either revocable (*ra'ji*) or definite (*ba'in*)." Only the definite repudiation dissolves the conjugal community and it is necessary to conclude a new marriage if the two spouses wish to reconcile. The three *talak* repudiations are supposed to be pronounced during the wife's three successive periods of purity from menstrual flow, "but it has become customary to pronounce the triple repudiation in one declaration; this is considered an innovation and is forbidden, but is recognized as valid." [55]

Ta'lik al-talak

This is another repudiation by the husband which is conditional but automatic.[56] The husband simply pronounces that "if such and such a thing happens or fails to happen my wife will be free." If the aforementioned situation is fulfilled or fails to happen respectively, the marriage is automatically dissolved, but there are always ways of averting the situation. The husband simply fasts for three consecutive days if he needs to save the marriage from collapse. This repudiation though revocable has become important in practice. Other than the two methods mentioned so far there is also the *mubara'a* (mutual consent), which has no financial loss to either spouse; and the *twafid* in which the wife is empowered to repudiate herself.[57]

Khul

Divorce by *khul* (literally to remove the dress from the body) entails loss of assets by the wife while the husband binds himself with an oath he cannot reverse.[58] If the wife initiates divorce by *khul* she loses her dowry, but if the husband initiates it through *talak*, she retains it (2:229). The Quran gives the right of divorce to the man but the jurists have worked out ground for divorce from the other side.[59] Islamic *fiqh* (jurisprudence) however accepts that "divorce is in the hand of man." [60] A woman cannot be given the right of divorce because she is not susceptible to reason. If she returns the *mahr* or a portion of her property she is regarded as having divorced her husband, but that can be revoked during *iddah* if the woman shows conciliatory moves and the man accepts them.

Kadi assisted divorce

Marriage may be dissolved by a *kadi* (judge) on his own initiative or that of one of the partners (*tafrik*).[61] A *kadi* acts on his own, in cases of gross Shariah violations such as marrying two sisters at once. Even the *wali* has the right to call for the dissolution of a marriage based on the unbearable conditions suffered by one he acts on behalf. The wife may also initiate it if she was married against her will as a minor; and a husband in the same circumstances can do the same. On coming of age a spouse can apply to the judge to have a forced marriage terminated.

A woman can also be granted divorce in the case of continued absenteeism by the husband. The wife can also

divorce her husband in cases of chronic diseases such as leprosy, elephantiasis, lunacy, impotence, or castration. In such cases a wife is granted *hagg-i-faskh* by *fiqh* by which she does not lose financial gains as in *khul*. The Shariah makes health partners choose to care for the sick.[62]

Levirate Marriage

During the Jahiliyyah period a step son or brother inherited the deceased's widow and property even against her will. This tradition is no longer allowed which means that compulsory inheritance is now punishable.[63] Inheriting a father's wife now stands prohibited (4:22). The Quran gives the widow and the divorced the right to dispose themselves in marriage (2:232, 240). This means that the levirate marriage can now only be by consent since the widow is bound to turn down any compulsory acquisition. Islam has changed the *Jahiliyyan* law that disqualified a woman from inheriting from the father or husband.

Use of contraceptives

In his 2002 discussion on Christian-Muslim dialogue the current writer [65] noted that the Muslims and Catholics formed a formidable alliance against the use of contraceptives including condoms at the World Population Summit in Egypt in 1994. The bloc's argument was that contraceptives are open to abuse leading to moral and family decay. They recommended that instead of condoms couples should make use of infertile periods if their reason for employing them was family size control. Otherwise the use of condoms in particular with their unfathomable availability led to rampant promiscuity.

Poverty and Gender Roles

Mujtaba and Lari [65] accept that "too many women in the East" are condemned to an "unsatisfactory way of life" but rejects that this is intrinsic to Islam. They condemned the political, social and financial institutions for causing this situation due to the neglect of the precepts of Islam. The majority of women live in abject poverty but cannot rise due to love for families and children (*ndinogariara vana vangu*). Women fear the difficulty of living alone in a patriarchal world if they take their husbands to court for "violence and tyranny." [66] In discussing the wife's role Abdalati [67] says, "She must be attentive to the comfort and well-being of her mate. She may neither offend him nor hurt his feelings...With respect to intimacy, the wife is to make herself desirable; to be attractive, responsive, and cooperative." She is not permitted to do anything that may make her relationship less gratifying or desirable. The woman's dressing must be modesty.

To get the family going alcohol has been negated because it is injurious to reason and lowers the man's moral sense and spiritual sensitiveness. When Islam arose alcohol consumption was rife and men heaved in its stupor (5:9).

Islamic Marriage Principles and HIV and AIDS

(a) Islamic Principles as a Possible Panacea to the Problems of HIV and AIDS

1. Marriage is the only legal framework for procreation (4:1). Taking for granted that the virgins who come to

know each other in wedlock are free from inborn HIV and AIDS this principle as greatly reduces the chances of infection.

2. The strict separation of sexes stands a chance of mitigating the problem of HIV and AIDS. Most cases of illicit sex are caused by the eyes which can only admire in close proximity.
3. The excessive powers of the *wali* whip the minors into line making them respect the sexual boundaries set by the society in fear of the sanctions inherent in being caught red-handed.
4. Heavy penalties for fornication and adultery act as a positive deterrent to sexual license.
5. The Responsibilities Law reduces the chances of the wife committing adultery to fend for the family in the case of a financially incapacitated husband being allowed to marry. An impotent man would force the wife to secretly experiment with other men (*kupindira*) to save herself from the shame of bareness. Continued absenteeism with its financial deprivation in a patriarchal society would have forced the woman into infidelity if she was not freed to join a responsible man of her choice by the Responsibilities Law.
6. Islam has put value and merit on marriage as opposed to Christianity which has put celibacy ahead of marriage (I Corinthians 7). The Quran emphasizes that marriage is a legal solution to the problem of fornication (17:22), and Abdalati calls it the moral safeguard.
7. Marriage publicity has the positive value of authenticating a union and excluding illicit behaviour common in secret marriages. Marriage registration gives it the aura for respect and stability.
8. Compulsory *mahr* payment empowers the woman. Empowerment stabilizes relationships and minimizes chances of extra marital affairs for economic purposes on the part of the woman.
9. Conditional caring for the chronically ill gives an outlet for women whose husbands may have contracted AIDS outside wedlock to recue themselves and stay free of the disease.
10. Circumcision reduces chances of contracting HIV and AIDS.
11. The Islamic dress code is laudable for not exposing the population to temptations.
12. The modification of the Levirate marriage Law in relation to its *Jahiliyyan* counterpart which left the widow with no option but to marry her deceased husband's relative or lose out completely on property and livelihood has positive ramifications. Islam has empowered the widow to turn down compulsory acquisition and has allowed her to inherit a portion of her father and late husband's property. Inheritance has empowered the woman to have livelihood outside marriage.
13. If we agree that in the pub casual sex is a merit, then we should also accept that the banning of alcohol consumption is a good mitigation as many illicit sexual acts are done under alcoholic influence.

(b) Islamic Principles as a Possible Carriers of HIV and AIDS

1. The "Responsibilities Law" excludes the less economically privileged from marriage. Jurists by

- enforcing this law leave the affected people with no outlet for their sexual emotions besides fornication and adultery.
- The excessive powers of the *wali* can lead minors into marriage without any tests for HIV and AIDS as minors may not have the audacity to challenge authority.
 - Guided consent in an arranged meeting does not empower the partners sufficiently to deal with the problems of the AIDS scourge.
 - Polygyny creates conditions for dissatisfaction among the wives (4:129) and this can be a recipe for disaster. A single marriage with five partners increases the chances for coming across the virus.
 - The principle of temporary marriage even if positively used in the modern world exposes partners to the virus that causes AIDS. Some of the women in need may be widows of AIDS victims.
 - The subordination of woman which Mujtaba and Lari describe as "violence and tyranny" leads women to accept a man who has had temporary marriages without complaints. Women have no power to decide when and how to have sex as their duty is to soothe the husband.
 - Divorce by *khul* deprives the woman of livelihood thereby thrusting her into the habit of temporary marriages for survival. Abject poverty that Mujtaba and Lari discuss is a key driver leading people into illicit bread and butter unions which are prone to contracting HIV and AIDS.
 - The re-marriage law has problems if dogmatically followed. Making reconciling partners remarry only after the woman has consummated and dissolved a marriage with another man exposes partners to the AIDS scourge.
 - The negation of condom use has dire consequences in mitigating the spread of HIV and AIDS.

8. Conclusion

The study has concluded that the Islamic Family Laws make marriage user friendly to quiet an extent. This is true of laws that enforce virginity and fidelity in marriage. On the corollary there are also other laws that leave gaps for the infiltration of HIV and AIDS. This is especially true for those laws that permit multiple relationships while condemning condom use. Due to limited time and space this paper has not been conclusive on the issues of modernists and *tahlil*. Future research that concentrates on the application of modern hermeneutics in relation to these two issues would help evaluate whether Islamic practice with the Quran as its immutable first source can rise to the level of indisputable panacea to the problems of HIV and AIDS.

References

- Allen, D. (1987) "Phenomenology of Religion," in M. Eliade (ed.) *The Encyclopaedia of Religion*, Vol. 11, New York: Macmillan, p.273
- Chitando, E. (1998) "The Phenomenological Method in a Zimbabwean Context: To Liberate or to Oppress?" in *Zambezia*, Vol. XXV (i), (p.101)
- Cox, J. L. (1996) *Expressing the Sacred: An Introduction to the Phenomenology of Religion*, Harare: University of Zimbabwe Publications, p.19
- Bettis, J. D. (ed) (1969) *Phenomenology of Religion*, New York: Harper and Row, p.1
- Bettis, J. D. (ed) (1969) *Phenomenology of Religion*, New York: Harper and Row, p.49
- Chitando, E. (1998) "The Phenomenological Method in a Zimbabwean Context: To Liberate or to Oppress?" in *Zambezia*, Vol. XXV (i), (p.104)
- Cox J. L. (1992) *Expressing the Sacred: An Introduction to Phenomenology of Religion*, Harare: University of Zimbabwe Publications, p.38
- Cox, J. L. (1996) *Expressing the Sacred: An Introduction to the Phenomenology of Religion*, Harare: University of Zimbabwe Publications, pp.19f
- Sharpe, E. (1986) *Comparative Religion: A History*, London: Duckworth, p.224
- Doi, A. (1984) *Shariah: The Islamic Law*, London: Ta Ha Publishers, p.115
- Abdalati, H. (1986) *Islam in Focus*, Riyadh: NOPP, p.202
- Doi, A. (1984) *Shariah: The Islamic Law*, London: Ta Ha Publishers, pp.118f
- Abdalati, H. (1986) *Islam in Focus*, Riyadh: NOPP, p.128
- Doi, A. (1984) *Shariah: The Islamic Law*, London: Ta Ha Publishers, p.121
- Abdalati, H. (1986) *Islam in Focus*, Riyadh: NOPP, p.127
- Abdalati, H. (1986) *Islam in Focus*, Riyadh: NOPP, p.127
- Doi, A. (1984) *Shariah: The Islamic Law*, London: Ta Ha Publishers, p.122
- Doi, A. (1984) *Shariah: The Islamic Law*, London: Ta Ha Publishers, p.121
- Doi, A. (1984) *Shariah: The Islamic Law*, London: Ta Ha Publishers, p.123
- Schacht, J. (1986) *An Introduction to the Islamic Law*, Oxford: Clarendon Press, p.117
- Schacht, J. (1986) *An Introduction to the Islamic Law*, Oxford: Clarendon Press, p.161
- Schacht, J. (1986) *An Introduction to the Islamic Law*, Oxford: Clarendon Press, p.7
- Schacht, J. (1986) *An Introduction to the Islamic Law*, Oxford: Clarendon Press, p.161
- Schacht, J. (1986) *An Introduction to the Islamic Law*, Oxford: Clarendon Press, p.167
- Farah, C. (1994) *Islam: Beliefs and Observances*, New York: Baron Educational Series, p.191
- Ruthven, M. (1984) *Islam in the World*, London: Penguin, p.157
- Doi, A. (1984) *Shariah: The Islamic Law*, London: Ta Ha Publishers, pp.141f
- Doi, A. (1984) *Shariah: The Islamic Law*, London: Ta Ha Publishers, p.118
- Ruthven, M. (1984) *Islam in the World*, London: Penguin, p.157
- Ruthven, M. (1984) *Islam in the World*, London: Penguin, p.169
- Doi, A. (1984) *Shariah: The Islamic Law*, London: Ta Ha Publishers, p.118
- Doi, A. (1984) *Shariah: The Islamic Law*, London: Ta Ha Publishers, p.141
- Doi, A. (1984) *Shariah: The Islamic Law*, London: Ta Ha Publishers, p.140

- [34] Hitti P K *History of the Arabs* London Macmillan Press 1981, p.144
- [35] Ruthven, M. (1984) *Islam in the World*, London: Penguin, p.84
- [36] Schacht, J. (1986) *An Introduction to the Islamic Law*, Oxford: Clarendon Press, p.13
- [37] Ali, Y. (1989) *The Holy Quran*, Brushwood: Amana Corporation, note 508
- [38] Doi, A. (1984) *Shariah: The Islamic Law*, London: Ta Ha Publishers, p.149
- [39] Cragg, K. (1964) *The Call of the Minaret*, New York: OUP, p.166
- [40] Abdalati, H. (1986) *Islam in Focus*, Riyadh: NOPP, p.187
- [41] Ali, Y. (1989) *The Holy Quran*, Brushwood: Amana Corporation, note 639
- [42] Doi, A. (1984) *Shariah: The Islamic Law*, London: Ta Ha Publishers, pp.150f
- [43] Doi, A. (1984) *Shariah: The Islamic Law*, London: Ta Ha Publishers, p.108
- [44] Abdalati, H. (1986) *Islam in Focus*, Riyadh: NOPP, p.195
- [45] Mujtaba, S. and Lari, R. M. (translated by Goulding F. J.) (1977) *Western Civilization Through Muslim Eyes*, Tehran, p.108
- [46] Mujtaba, S. and Lari, R. M. (translated by Goulding F. J.) (1977) *Western Civilization Through Muslim Eyes*, Tehran, p.109
- [47] Mujtaba, S. and Lari, R. M. (translated by Goulding F. J.) (1977) *Western Civilization Through Muslim Eyes*, Tehran, p.110
- [48] Abdalati, H. (1986) *Islam in Focus*, Riyadh: NOPP, pp.129f
- [49] Ali, Y. (1989) *The Holy Quran*, Brushwood: Amana Corporation, note 253
- [50] Doi, A. (1984) *Shariah: The Islamic Law*, London: Ta Ha Publishers, p.4
- [51] Doi, A. (1984) *Shariah: The Islamic Law*, London: Ta Ha Publishers, p.166
- [52] Roberts, R. (1971) *The Social Laws of the Quran: Considered and Compared with those of the Hebrew and Other Ancient Codes*, London: Curzon Press, p.25
- [53] Schacht, J. (1986) *An Introduction to the Islamic Law*, Oxford: Clarendon Press, p.167
- [54] Schacht, J. (1986) *An Introduction to the Islamic Law*, Oxford: Clarendon Press, p.163
- [55] Schacht, J. (1986) *An Introduction to the Islamic Law*, Oxford: Clarendon Press, p.164
- [56] Schacht, J. (1986) *An Introduction to the Islamic Law*, Oxford: Clarendon Press, p.164
- [57] Schacht, J. (1986) *An Introduction to the Islamic Law*, Oxford: Clarendon Press, p.164
- [58] Schacht, J. (1986) *An Introduction to the Islamic Law*, Oxford: Clarendon Press, p.164
- [59] Roberts, R. (1971) *The Social Laws of the Quran: Considered and Compared with those of the Hebrew and Other Ancient Codes*, London: Curzon Press, p.19
- [60] Mujtaba, S. and Lari, R. M. (translated by Goulding F. J.) (1977) *Western Civilization Through Muslim Eyes*, Tehran, pp.101-103
- [61] Schacht, J. (1986) *An Introduction to the Islamic Law*, Oxford: Clarendon Press, p.165
- [62] Mujtaba, S. and Lari, R. M. (translated by Goulding F. J.) (1977) *Western Civilization Through Muslim Eyes*, Tehran, pp.104f
- [63] Ali, Y. (1989) *The Holy Quran*, Brushwood: Amana Corporation, note 52
- [64] Dube, E. (2002) *Marriage, A Practical Framework for Inter-religious Dialogue: A Christian-Muslim Example*, UZ: DPhil, p.206
- [65] Mujtaba, S. and Lari, R. M. (translated by Goulding F. J.) (1977) *Western Civilization Through Muslim Eyes*, Tehran, p.98
- [66] Mujtaba, S. and Lari, R. M. (translated by Goulding F. J.) (1977) *Western Civilization Through Muslim Eyes*, Tehran, pp.107
- [67] Abdalati, H. (1986) *Islam in Focus*, Riyadh: NOPP, pp.118f

Author Profile

Dube Edmore completed his BA Special Honours, in Religious Studies with the University of Zimbabwe in 1993; completed his MA in Islamic Studies (1995) and PHD in Christian-Muslim Dialogue (2003) with the same University. He is currently lecturing at Great Zimbabwe University's Department of Philosophy and Religious Studies.