A STUDY OF THE REQUIREMENTS FOR SUBMITTING A THESIS TO BE EXAMINED FOR A HIGHER DEGREE

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ABSTRACT

This Thesis entitled The Concept of Dispute Resolution in Islamic Law acquaints the reader with an introduction to the Qur'ān, *sunnah* of the Prophet (ṣ.a.a.s.) and the many provisions relating to dispute resolution during the period of Divine revelation.

The origins of the division of the community into Shī'a and Sunnī is explored and explained in Chapter two. Two furthers chapters on dispute resolution one Sunnī School the Mālikī School and one Shī'a School the Ismā'īlī School are examined.

The Thesis concludes with a detailed consideration of the concept of *mahr*, the possible conflict with English law and the manner in which that conflict may be resolved.

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I should like to express my appreciation to my wife Noorjehan Jindani and to my cousin, Rashida Noormohamed-Hunzai for their proof reading of the many drafts, comments and corrections and for their patient perseverance.

TRANSLITERATION, VOWELS AND NOTES

A. Transliteration:

Many Arabic words were transliterated into Roman alphabet in this thesis. The Library Congress System (LC) is used for this purpose. They are as follows:

ا	=	a	ط	=	ṭ
ب	=	b	ظ	=	ẓ
ت	=	t	ع	=	ʿ
ث	=	th	غ	=	gh
ج	=	j	ف	=	f
ح	=	ḥ	ق	=	q
خ	=	kh	ك	=	k
د	=	d	ل	=	l
ذ	=	dh	م	=	m
ر	=	r	ن	=	n
ز	=	z	ه	=	h
س	=	s	و	=	w
ش	=	sh	ي	=	y
ص	=	ṣ	ء	=	ʾ
ض	=	ḍ	ة	=	a (in construct state – at)

B. Vowels:

a) Long vowels:

ا : ā

و : ū

ي : ī

b) Short vowels:

ـَ : a

ـُ : u

ـِ : i

C. Notes:

1 The proper names such as ʿAlī or ʿAbd Allāh and names of the well known cities such as Kūfa and Madīna have been spelt with the diacritical marks or where appropriate as internationally known save for Mecca which has been spelt as Makka.

2 In this thesis Abdullah Yusuf Ali's translation of the Qur'ān has been used.

3 In the bibliography, author with Arabic names that begin with definite article 'al' are listed according to their main surnames. For example, al-Ṭabarī is included under T.

4 The letter (b.) is short for 'Ibn' = son of, e.g. 'Alī b. Abī Ṭālib.

5 The year of death is abridged to (d.) or if approximate (c.d.) where appropriate. The Islamic (Hijrī) dates are given e.g. 11AH (*Anno Hijrae*) and also where appropriate the corresponding dates given in the Christian calendar thus 10AH/632 and representing both the Islamic and the Christan Calendar (*Anno Domini*).

6 Where place or date of publication of a particular Book or Article is not available then the abbreviation either (n.d.) or (n.p.d.d.) has been used.

7 All the Constitutions referred to in Chapter Four are in my Possession.

8 Except where otherwise stated the *Farmāns* of H.H. Aga Khan III and IV are in the possession of individuals or may be accessed from The Institute of Ismaili Studies or The Religious Education and Tariqa Board in London.

ABBRIVIATIONS

A.C.	Appeal Cases
All E.R.	All England Reports
C.L.J.	Cambridge Law Journal
EI²	Encyclopaedia of Islām [Edition 2nd]
F.L.R.	Family Law Reports
F.S.C.	Federal Sharī'at Court
I.A.	Indian Appeals
I.L.R.	Indian Law Reports
P.L.D.	Pakistan Legal Decisions
P.L.J.	Pakistan Law Journal
P.	Probate
Q.B.	Queens Bench
ṣ.a.a.s.	*Ṣalla-llāhu 'alayhi wa ālihi wa-sallam*
S.C.M.R.	Supreme Court Monthly Review
T.L.R.	Times Law Reports
W.L.R.	Weekly Law Reports

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INTRODUCTION

This thesis entitled The Concept of Dispute Resolution in Islamic Law is an attempt to examine the concept of dispute resolution and its varying interpretations in Islamic Law in one Shīʿa and one Sunnī School of law. It is important to emphasize that the authority for all Muslims (whatever their persuasion), in their daily lives and religious beliefs and practices is the Qur'ān and *sunna*[1] of the Prophet (ṣ.a.a.s.), and in this connection one verse of the Qur'ān, '*Oh ye who believe! Obey Allāh, and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allāh and His Messenger,*'[2] occurs in each of the five chapters.

The plurality of the Muslim world is an irreversible historical fact and goes back to the time of the Prophet (ṣ.a.a.s.).[3] His time was characterised by tribal differences, diversity of allegiances and as Islām spread by different motivations for accepting the faith. In the fourteen hundred years since the Prophet (ṣ.a.a.s.) passed away Muslims have come to live in different cultures, speak different languages and live in different geographical and political contexts. Although the *Shahādah*, (there is no god but Allāh and Muḥammad (ṣ.a.a.s.) is the Messenger of Allāh), unites Muslims, they do differentiate in important aspects of interpretations of their faith. The division of the community can be traced back to the period after the murder of Caliph ʿUthmān b. ʿAffān, (d.35AH/656) when the Muslim community split into two branches, or two

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[1]By the *sunna* is meant Prophet Muḥammad's (ṣ.a.a.s.) sayings (*qawl*), actions (*fiʿl*) and approvals (*taqrīr*).

[2]S4 v59 The Holy Qur'ān (*sūra* 4 verse 59). Hereafter cited as 4:59 i.e., on the left side of the colon indicates the *sūra* and the right side the verse/verses.

[3]Aga Khan III, Sir Sulṭān Muḥammad Shāh, *Final Reconciliation between Sunni and Shiah Doctrines,* Pan-Islam Series, No.5, n.p.d.d. pp.1-6.

Shīʿas, Shīʿat ʿAlī and Shīʿat Muʿāwiya. The appellation Shīʿat ʿAlī came into use as a consequence of the two civil wars waged against the Prophet's cousin ʿAlī b. Abī Ṭālib, (d.40AH/661) on his accession to the Caliphate. The first was known as the battle of *Jamal* (36AH/656).[4] The second when the governor of Syria, Muʿāwiya b. Abī Sufyān (d.60AH/680) challenged ʿAlī's authority as the elected Caliph and took up arms against him at the battle of *Ṣiffīn* (37AH/657). The Shīʿat Muʿāwiya, in the course of time assumed the appellation *ahl al-sunna wa'l-jamāʿa*,[5] that is people of the *sunna* and community, or Sunnīs. Shīʿat ʿAlī, in due course became shortened to Shīʿa. These then are two names given to the two main branches of Islām, Shīʿa and Sunnī.[6]

Chapter One, entitled The Concept of Dispute Resolution in Islamic Law: The Qur'ān and *sunna* of the Prophet (ṣ.a.a.s.), begins with an introduction to the Qur'ān, Allāh's last and final Message to mankind, and the *sunna* of the Prophet (ṣ.a.a.s.), their importance to Muslims followed by a brief explanation of why a chapter is devoted to the subject of dispute resolution. This is then followed by a letter of instruction written by ʿAlī b. Abī Ṭālib, to his newly appointed governor of Egypt, Mālik al-Ashtar. The importance of the letter lies in the primacy it affords to both the authority of the Qur'ān and the unanimously agreed *sunna* of the Prophet (ṣ.a.a.s.), in the concept of dispute resolution, in the rules of conduct of government, judiciary and those who seek to serve the community.

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[4]'The Camel', the main thrust of the battle fought was close to Baṣra, near ʿĀ'isha, who was present during the fighting on a camel in a palanquin whose cover had been reinforced by iron plates. *EI²*, *s.v.* 'Al-Djamal,' Vol.II, (Leiden, 1965), p.414.
[5]'Tradition', *EI²*, *s.v.* 'Sunna,' Vol.IX, (Leiden, 1997), pp.878-881
[6]Hunzai, F.M., *Oriente Moderno*, Daniela Bredi (ed.), 'Islām in South Asia,' (Rome, 2004), p.147.

The Chapter reviews the background of the Prophet (ṣ.a.a.s.), his birth and life in Makka, the early revelations, his early companions and his marriages. Also reviewed is the geographical and primary position of pre-Islamic Makka, its development as an important trading centre and the commercial acumen of Quraysh, who created a safe environment where merchants could operate. In dispute resolution, early revelations are considered with detailed quotations from the Qur'ān, in the context of those commercial practices that arose in this pre-Islamic period that split and accentuated the division in society between the haves and have-nots and general exhortation to all to consider and reflect upon *Ākhira,* the Hereafter. Detailed consideration is given to the concept of *Īmān,* which encases the three fundamental principles of *Tawḥīd, Nabuwwa, and Ākhira*, all of them important in dispute resolution.

Chapter One considers Divine revelation, and in different places at the character of the Prophet (ṣ.a.a.s.), at conciliation, and resolution of conflict, his most famous dispute resolution action (*fi'l*), the replacing of the *al-Ḥajar al-Aswad*, (the Black Stone) set in the Ka'ba. His pairing of the *anṣār*[7] and *muhājirun*[8] as brothers; the *adhān* or call to prayer and finally the divine revelation[9] that required believers to face Makka when offering prayers, gave Islām its own identity separate from Christianity and Judaism. Mentioned are his two sayings (*qawl*) that compared and elevated dispute resolution above all kinds of prayers, fasting and charity and *lā darāra wa lā dirāra fi'l Islām*; (There

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[7]'Helpers', who invited the Prophet (ṣ.a.a.s.) to take up residence in Madīna, and fought at the Battle of Badr.*EI²*, *s.v.* 'Anṣār,' Vol.I, (Leiden, 1960), p.514.
[8]'Migrants,' these were the small select band of Makkans who accompanied the Prophet (ṣ.a.a.s.) when he migrated to Madīna. *EI²*, *s.v.* 'Muhādjirūn,' Vol.VII, (Leiden, 1993), p.356.
[9]2:144

shall be no harming of one man by another in the first instance nor in retaliation in Islām). His dislike of verbose and eloquent arguments in dispute resolution process and his preference for a quick solution between disputants is considered.

In the resolution of conflict between pagan practices and Islām, God's indirect help to him in the very early conversions of Ṭufayl and Abū Dharr,[10] the two Covenants of al-'Aqaba that set the scene for his migration and safety for Madīna, direct assistance and in the three military engagements of Badr, Uḥud and Khandaq after his to Madīna. Dispute resolution clauses of the Constitution of Madīna are considered in detail and verses of the Qur'ān that gradually complemented and ultimately superseded the Constitution.

Finally, also considered is his approval (*takrīr*) when in negotiations leading to the Treaty of Ḥudaybiyya[11] (6AH/628), his agreement to be designated as son of 'Abd Allāh rather than Messenger of God and substitution of the words *Bismik Allāhuma* in place of the invocation *bismi Allāh al-Raḥmān al-Raḥim*,[12] thus averting a potential conflict, events leading to prior the conquest of Makka. The Chapter concludes with the mention of the principle of delegated judicial authority established during the Prophet's (ṣ.a.a.s.) time and after his passing away.

The passing away of the Prophet (ṣ.a.a.s.), brought to the fore the dormant tensions between the *anṣār* and *muhājirūn* at the *Saqīfa* of the *Banū*

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[10]He joined the Prophet (ṣ.a.a.s.) at Madīna after Khandaq 5AH/627. He was noted for his humility and asceticism. He is credited with 281 traditions. Bukharī and Muslim between them quote 31. *EI²*, *s.v.* 'Abū Dharr,' Vol.I, (Leiden, 1960), p.114.

[11]A major Treaty between the Prophet (ṣ.a.a.s.) and the Makkan. The Prophet (ṣ.a.a.s.) had a vision in which he saw himself performing the *'umra* at Makka. *EI²*, *s.v.* 'Al-Ḥudaybiya,' Vol.III, (Leiden, 1971) p.539. The Qur'ān alludes to this dream, 48:27

[12]Ibn Kathīr, Abū al Fidā 'Imad al-Dīn Ismā'īl, *The Life of Muḥammad, (ṣ.a.a.s.)* Vol.III, tr. Dr Trevor Le Gassic, (Reading, 2000), p.238. Hereafter cited as Ibn Kathīr.

Sā'ida. Although Chapter Two, entitled The *Ṣiffīn* Arbitration Agreement between ʿAlī b. Abī Ṭālib and Muʿāwiya b. Abī Sufyān, is concerned about challenge and rebellion to elected authority, does nevertheless consider the events at the *Saqīfa*, the election of Abū Bakr as the first Caliph, the creation and establishment of the institute of the Caliphate, and the nomination or election of the next three caliphs.[13] ʿAlī's strong objection at being by-passed on two occasions are considered not in the light of challenge but rather in the light of his conduct in the co-operation he offered to elected authority. ʿUmar's murder was unfortunate but an isolated act. The rebellion against and murder of ʿUthmān had repercussions for his successor, ʿAlī b. Abī Ṭālib, and are felt today.

The challenge to ʿAlī's, authority arose when Muʿāwiya b Abī Sufyān refused to accept his dismissal as governor of Syria, which resulted in war. The correspondence between ʿAlī and Muʿāwiya prior to the Battle of *Ṣiffīn* is examined in detail, the battle of *Ṣiffīn*, the circumstances immediately prior to, during and subsequent to its inconclusive ending and the failed arbitration. Negotiations regarding the appointment of arbitrators, the two written arbitration agreements, in almost identical terms are analysed and commented upon, (although the historian al-Ṭabarī[14] gives only one). In particular the failure of either agreement to mention the subject matter of the dispute, a significant omission in the light of deliberations that took place between the two arbitrators

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[13]Abū Bakr; ʿUmar b. al-Khaṭṭāb; ʿUthmān b. Affān and ʿAlī b. Abī Ṭālib. This epithet is used to describe the first four caliphs and to contrast with the more secular rulers who established their own dynasties, i.e. ʿUmayyads and ʿAbbāsīds. *EI²*, *s.v.* 'Khalīfa, al-Khulafā al-Rāshidūn,' Vol.IV, (Leiden, 1978), p.937.

[14]Al-Ṭabarī, Abū Djaʿfar Muḥammad b. Djarīr. Early historian, whose *Ta'rīkh al-rusul wa'l-mulūk*,(History of prophets and kings), has been translated as, *The History of al-Ṭabarī,* by various translators, published in Albany, New York State University, in different years.

at the two conventions firstly at *Dūmat al-Jandal* and then at *Adruḥ*, and the opportunity that this omission gave to ʿAmr b. al-ʿĀṣ, Muʿāwiya's chosen arbitrator, played that brought about a disastrous inconclusive and for Islām, a divisive ending to, what would certainly have been a very important arbitral process. Martin Hinds'[15] detailed analysis of both agreements and consideration is given to his opinion that one of them may be a forgery.

The reference of the dispute to arbitration caused a large section of ʿAlī's supporters to rebel and leave him. Their demand for a resumption of hostilities was met by ʿAlī with equal determination not to be a party to a breach of an agreement, even though that agreement was imposed upon him. The failed arbitration is considered, and the wars waged against him that led to the erosion of his authority and ultimately to his assassination, the murder of al-Ḥasan, and the beheading of al-Ḥusayn the Prophet's (ṣ.a.a.s.) youngest grandchild at Kerbala, the proclamation of Muʿāwiya as Caliph, and ultimate establishment of the ʿUmmayad dynasty.[16] It was the end of political unity and authoritative leadership and the development of early schools of law. The next two chapters examine dispute resolution in two different schools, one Sunnī one Shīʿa.

Where the earlier chapter briefly touches upon the apostasy wars during Abū Bakr's caliphate, and ʿUmar's authoritative address of his acceptance of the supreme office that set the seal of his long Caliphate, Chapter Three, The Concept of Dispute Resolution in the Mālikī School, Imām Mālik, The Muwaṭṭā, The *ʿamāl* of Madīna, named after the jurist and collector of *aḥadīth*, Imām Mālik b.

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[15]Hinds, Martin, 'The Ṣiffīn Arbitration Agreement,' in *The Journal of Semitic Studies* Vol.17, (1972), p.93. Hereafter cited as Hinds.

[16]A dynasty of the caliphs from 41AH/661-132AH/750, and descendants of Umayya b. ʿAbd Shams. The founder Muʿāwiya b. Abī Sufyān ruled from Damascus. *EI²*, *s.v.* 'Umayyads,' Vol.X, (Leiden, 2000), p.840.

Anas,[17] begins with the significance of Abū Bakr's letter to the apostates, followed by a consideration of the importance of some of 'Umar's administrative decisions. In the early formative years of the development of law, the Qur'ān remained the primary source. Two early schools of law, *ra'y* in Iraq and the school of *ḥadīth* in Madīna, developed. The names of the many jurists who formulated and developed law, the merger of some of the schools into the four major schools that exist today and the jurist Muḥammad b. Idrīs al-Shāfi'ī's[18] not inconsiderable contribution to the debate and development of law, his principle of according precedent to the *sunna* of the Prophet (ṣ.a.a.s.), his lucid contribution to the debates on *ijma,* consensus of the community based on tradition and *qiyās*, analogical reasoning based on the Qur'ān, were major factors in the evolution of the principles of jurisprudence in Sunnī Islām.

Ijitihād and *qiyās* were significant legal precepts in the development of law. This Chapter explains the application by a Mālikī judge and jurist, Ibn Rushd[19] of these principles in a judgement that considered the Qur'ān and traditions and legal precepts from another school to arrive at a carefully reasoned judgement. Also considered are the procedural rules adopted in the school by al-Marwardi.[20]

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[17]*The Muwaṭṭā*, the beaten or smooth path. *EI²*, *s.v.* 'Mālik b. Anas, Abū 'Abd Allāh,' Vol.VI, (Leiden, 1991), p.262. The School bears his name. *EI²*, *s.v.* 'Mālikīyya,' Vol.VI, p.278.

[18]Muḥammad b. Idrīs al-Shāfi'ī, '*al-Risāla fi Uṣūl al-fiqh*,' tr. Majīd Khaddūrī, (Baltimore, 1961). Hereafter cited as *al-Risāla*. Descended from al-Muṭṭalib, and possibly related to 'Alī. A student of Mālik, lectured at and composed his *Risāla* in Egypt at the mosque built by 'Amr b. al-'Āṣ,. *EI²*, *s.v.* 'Al-Shāfi'ī,' Vol.IX, (Leiden, 1997), p.181.

[19]*Qāḍ'ī* in Seville, becoming chief *Qāḍ'ī* at Cordoba; known in the west as Averroes. *EI²*, *s.v.* 'Ibn Rushd, Abū al-Walīd Muḥammad b. Aḥmad,' 520AH/1126-595AH/1198, Vol.III, (Leiden, 1971), p.909.

[20]A political theorist whose book *Al-Aḥkām al-Sulṭāniyya wa'l-wilāyātal-Dīniyya*, a classic work of public law that made him well known in the west. *EI²*, *s.v.* 'Al-Mawardī,' 'Alī b. Muḥammad b. Habib,' Vol.VI, (Leiden, 1991), p.869.

Mālik was one of the early compilers of *aḥadīth*. His life spanned two major dynasties, ʿUmmayad and ʿAbbāsīd.[21] He was followed later in history by six major compilers of traditions. Some of the *aḥadīth* quoted by them are mentioned in this thesis. Although Mālik's principle concern is his consideration and explanation of the practice or *al-a'māl* of Madīna as it evolved during the course of time, mentioned in his book *al-Muwaṭṭā*. His absolute reliance on the Qur'ān and on the *ḥadīth* of the Prophet (ṣ.a.a.s.) is considered.

The many legal precepts that are attributed to the school of *e.g.*, *istiḥsān*, *istiṣlāh*, are explained, and in dispute resolution the Chapter concludes with Mālik's reliance on the Qur'ān and the traditions of the Prophet (ṣ.a.a.s.). This Chapter takes a brief look at secular legislation enacted in arbitration in the island Kingdom of Baḥrain,[22] a small outpost of the Mālikī School and, compares enacted legislation with provision in the Mālikī School as a prelude to the consideration of the juxtaposition of Divine legislation with secular laws which theme is also explained in the following two chapters.

Chapter Four is entitled The Concept of Dispute Resolution in the Ismāʿīlī School: The Authority of the Imām from the *Ahl al-Bayt*.[23] The first part of the Chapter is an explanation of the essential principles of the School which

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[21]A dynasty of the caliphs from 132AH/750 to 656AH/1258, and descendants of al-ʿAbbās b. ʿAbd al-Muṭṭalib b. Hāshim. They ruled their empire from Baghdad. *EI²*, *s.v.* 'ʿAbbāsīds,' Vol.I, (Leiden, 1960), p.15.

[22]Major oil producing country, the population is divided into the majority Shīʿa of the Ithnā-ashʿarī persuasion and minority Sunnī who are the ruling family, of the Mālikī School. Also al-Baḥrayn literally 'The Two Seas' is a cosmographical and cosmological concepts appearing five times in the Qur'ān 18:60, 25:53, 27:61, 35:12, 55:19. *EI²*, *s.v.* 'al-Baḥrayn,' Vol.I, (Leiden, 1960), p.941.

[23]'The People of the House of Muḥammad (s.a.a.s.),' in accordance with the Qur'ān 33: 33, Shīʿā and Sunnī agree that the term applies to the Prophet (ṣ.a.a.s.), ʿAlī, Fāṭima, al-Ḥasan and al-Ḥusayn and their progeny. *EI²*, *s.v.* 'Ahl al-Bayt,' Vol.I, (Leiden, 1960), p.257.

are the recognition of ʿAlī b. Abī Ṭālib as first Imām, the concept of the living or *Hāḍir* Imām, the hereditary principle of succession, the appointment or designation of the next Imām, the oath of allegiance or *bayʿa*[24] and the guidance, oral or written, that is received from the Imām in the form of *farmāns*. A particular feature of this School is the dual authority of the Imām that extends to the spiritual well-being of the community as well as for their material progress.[25]

The historical evolution of the term Shīʿa Imāmi Ismāʿīlīs is explained. Also considered in detail is the establishment of the Fāṭimid Empire in North Africa, which stretched from Morocco to Egypt with suzerainty extending to the towns of Makka, Madīna, Palestine and Damascus.

The Ismāʿīlīs are, in their internal administration, governed by their Constitution. In dispute resolution several of the constitutions are considered beginning with the 1905 Constitution ordained in Zanzibar, and finally the 1986 Constitution. Consideration is given to the Articles in the 1986 Constitution and the system of specifically created bodies *e.g.*, the Regional, National and International Conciliation and Arbitration Boards to deal with dispute resolution at national and international level.

The Chapter considers dispute resolution amongst the Ismāʿīls in Syria and Pakistan where there are sizeable Ismāʿīlī minorities, to observe the workings of the dispute resolution provisions of the Ismāʿīlī Constitution, and interaction with national secular legislation, but beginning with a brief history of

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[24]A term, denoting an act of allegiance by person or persons recognising the authority of another person. *EI²*, *s.v.* 'Bayʿa,' Vol.I, (Leiden, 1960), p.1113.
[25]Aga Khan IV, Shāh Karim al-Ḥuaynī, Address at the Swiss-American Chamber of Commerce-Zurich Jauary 14, 1976 in '*Speeches of the Aga Khan,*' (Karachi, 1982), p.16.

each country and its geo-political importance. In conjunction with the above dispute resolution is also looked at within the community in England and Wales.

The preponderance of cases brought before the National Conciliation and Arbitration Board involve divorce and ancillary relief questions with a particular reference to *mahr*, and enforceability or otherwise in English courts. This is an important issue that the community has and shares with the wider Muslim community and is considered in greater detail in the next chapter.

In Chapter Five, The Concept of *Mahr* (Dower) in Islamic Law, A Resolution of a Conflict with English Law, the reader is acquainted with contractual nature of the concept of Marriage and the incidence of *mahr*, Qur'ānic in origin,[26] and western misperceptions of both concepts. This Chapter acquires added significance in the context of large scale Muslim migration to this country who seek recognition of some aspects of their religious beliefs and practices.

Early liberal recognition by English judges, of Muslim marriage practices, contracts, divorce and payment of *mahr*, as in the case of Shahnaz v. Rizwan,[27] are explained. Also explained is the gradual statutory withdrawal of recognition. To resolve a dispute with English law, all relevant statutes are examined, including the Marriage Act, 1949,[28] The Matrimonial Causes Act, 1973 and The Family Law Act, 1986.[29] Arguments are advanced for legislative change in search of a resolution of a conflict between two systems of laws, one Divine, the other secular.

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[26]4:4

[27][1965] 1Q.B.390

[28]Halsbury's Statutes of England and Wales, Vol.27, (London, 2000 [4th Edition]), p.622. Hereafter cited as Halsbury's Statutes.

[29]*ibid*, p.1114.

CHAPTER ONE

The Concept of Dispute Resolution in Islamic Law

The Qur'ān and *Sunna* of the Prophet Muḥammad (ṣ.a.a.s.)

The Qur'ān is Allāh's last and final Revelation, revealed through His Prophet (ṣ.a.a.s.) and enjoins upon Muslims to believe in God, His Apostle, His angels, in all previous scriptures and the Day of Judgement.[30] The Qur'ān explains that, '*with Him are the keys of the Unseen, the treasures that none knoweth but He.*'[31] It is Allāh who created man and knows what his soul suggests to him. He is closer to man than his jugular vein.[32] To Him belongs the dominion of the heavens and the earth.[33] '*To Allāh belongs the East and the West: whithersoever ye turn, there is Allāh's face. Allāh is All-Embracing All-Knowing.*'[34] In addition to being the repository of all knowledge, a Book explaining everything, the Qur'ān is a Guide, a Mercy and a Glad Tiding to Muslims.[35]

The Qur'ān was revealed to the Prophet (ṣ.a.a.s.) in stages over a period of 23 years. The Qur'ān contains 114 Chapters called *sūras* of varying length. Each *sūra* has verses called *āyāt* of which there are 6241. The *sūras* were revealed in Makka and Madīna. Precise dates for the various *sūras* are difficult to assign. The Qur'ān has an exoteric or *ẓāhir* as well as an esoteric or *bāṭin* dimension[36] because the language of the Qur'ān is couched in *amthal* or allegories and parables that can only

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[30]4:136
[31]6:59
[32]50:16
[33]2:107
[34]2:115
[35]16:89
[36]The two words mean external or obvious and inner or hidden respectively and the words have special connotations in the exegesis of the Shīʿa Imami Ismāʿīlī who emphasise this fundamental distinction between the two mentioned in Chapter Four, 'The Concept of Dispute Resolution in the Ismāʿīlī School: The Authority of the Imām from the *Ahl al-Bayt*.'

be explained by a Prophet chosen and inspired by God. This position of the Prophet (ṣ.a.a.s.) is unambiguously described in the Qur'ān. Obedience to him is obligatory because, as the Messenger of God, Revelation and inspiration are to him. He is charged with explaining clearly that which has been revealed and for man to reflect upon both the Revelation and the explanation.[37] It was for the Prophet (ṣ.a.a.s.) to explain the Qur'ān whether revealed as parables or allegories or whether mentioned in general terms. The best example is that of the pillars of Islām such as, *ṣalāt* or prayers, *zakat* or the religious tax, *sawm* or fasting and *hajj* or pilgrimage, and others which were revealed in general terms. Similarly, his explanations of the fundamental principles of *Tawḥīd*, (or Unity of creation), *Nubuwwa* (or Prophethood) and *Ākhira* (or Hereafter), expand on the terse descriptions in the Qur'ān. It is because of this that the Qur'ān declares his position as a *mu'allim*, a teacher or instructor who imparts not only the exoteric knowledge of the Book but also its wisdom.[38]

The Qur'ān is God's last and final message and Islām (submission to His will)[39] is a continuation of that message to mankind that began with Adam and continued through to Noah, Abraham, Moses, Jesus[40] and ended with the last and final Prophet Muḥammad (ṣ.a.a.s.). These then are the six great law-giving *nuṭuqā* (sing. *Nāṭiq*) Prophets or Messengers, who brought with them a new law and a Book because, '*Mankind was one single nation. And Allāh sent Messengers with glad tidings and warnings; and with them He sent the Book in truth, to judge*

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[37] 16:43-44
[38] 2:129
[39] 3:19
[40] 42:13

between people in matters wherein they differed.'[41] All of these revelations were created for a specific purpose as previous messengers were rejected and as the Qur'ān warns, '*Then if they reject thee, so were rejected messengers before thee, who came with clear signs, and the Scriptures. And the Book of Enlightenment (kitāb al-munīr).*'[42]

It is the Apostle who has been sent down with the specific task of rehearsing Allāh's signs and to sanctify man by instructing him in Scripture, Wisdom and in Knowledge,[43] and he is, *'in truth a bearer of glad tidings and a warner.*'[44] Man's obligation is to remember Him, to be grateful and to reject not faith.[45]

The Prophet's (ṣ.a.a.s.) duty and function was to act as the Messenger of Allāh. His mission was to reveal to his community Allāh's last and final Message, the Qur'ān. He is the last and final Prophet (ṣ.a.a.s.) of Allāh, the Seal of all the Prophets, *Khātam al-Nabiyyīn.*[46] The first message revealed via the angel *Gabriel* was in the cave of Ḥirra out side of Makka and contained five verses. '*Proclaim! (or Read!) In the name of thy Lord and cherisher, who created – Created - man, out of a leech-like clot: Proclaim! And thy Lord is most Bountiful, - He who taught (the use of) the Pen, Taught man that which he knew not.*'[47] These five verses that encompass God's omnipresence, His omniscience and man's total indebtedness to Him for the choice of high destiny offered to him, in his quest to extend for himself his spiritual, moral and intellectual horizons, from his Bountiful Creator. The

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[41]2:213 literally *nāṭiq* is a "speaker" and according to the cyclical history of the Ismā'īlīs each of the six eras began with a prophetic speaker bearing a revelation.
[42]3:184; 35:25
[43]2:151; 62:2
[44]2:119; 33:45
[45]2:152
[46]33:40
[47]96:1-5

Prophet's (ṣ.a.a.s.) unstinting belief in Divine Providence moulded his actions, thoughts and designs. In times that were good or in troubled times he constantly, consistently acknowledged the presence of God. It is in this context therefore that for all Muslims the two important sources of knowledge are the Qur'ān and the *sunna* of the Prophet (ṣ.a.a.s.), and through his elaboration, explanation and conduct that the Qur'ān becomes accessible to all believers.

Disputes and resolution of disputes are indeed aspects of human life, and the concept of dispute resolution is contained in the Qur'ān and in the *sunna* of the Prophet (ṣ.a.a.s.). His own lifetime offers many examples of dispute resolution not only prior to the commencement of his mission, when he acquired a well-known reputation as an ideal ethical human being, but also when he was actively involved with his contemporaries during his mission. Exhorting believers to follow in his example, the Qur'ān describes him as, *'Ye have indeed in the Messenger of Allāh an excellent exemplar for him who hopes in Allāh and the Final Day.'*[48] Some of his exalted attributes are described in several verses. Thus, he is ordered to pray on behalf of his followers as, '*And pray on their behalf. Verily thy prayers are a source of security for them,*'[49]and, '*O Prophet! Truly We have sent thee as a Witness, a Bearer of Glad Tidings, and a Warner as one who invites to Allāh's (Grace) by His leave, and as a lamp spreading Light,*'[50] and the one who at the request of his followers intercedes on their behalf and seeks forgiveness from Allāh for them.[51]

In the light of the above it is clear that the Qur'ān and the *sunna* of the Prophet (ṣ.a.a.s.) are inextricably intertwined, complimentary and inseparable. Referring to this dual role of the Qur'ān and the *sunna* of the Prophet (ṣ.a.a.s.) the

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[48]33:21
[49]9:103
[50]33:45-46
[51]4:64

Qur'ān reveals, '*O people of the Book! There hath come to you Our Messenger, revealing to you from Allāh a light and a perspicuous Book.*'[52]

Many of the verses that were revealed were related to particular circumstances. Nevertheless Qur'ānic teachings and the Prophet's (ṣ.a.a.s.) explanations in essence are not confined to time and space but have relevance and a resonance to both the present and future. Many verses exoterically were related to particular circumstances, and in order to understand the message of the Qur'ān and the role of the Prophet (ṣ.a.a.s.), it would be appropriate to have a brief survey of the contexts in which the revelations came and then explained, namely the geographical, commercial, social, and religious contexts, beginning with his family background.

It would be apposite to say that this respect accorded to the Qur'ān and to the traditions of the Prophet (ṣ.a.a.s.) and in the field of dispute resolution, no better written testament exists than a letter written by ʿAlī b. Abī Ṭālib, the first Imām according to Shīʿa Islām and the fourth Caliph according to Sunnī Islām, who was the Prophet's (ṣ.a.a.s.) cousin and son-in-law. The letter is addressed to Mālik al-Ashtar, whom ʿAlī had appointed to be governor of the newly conquered territory of Egypt, less than 40 years after the death of the Prophet (ṣ.a.a.s.). The letter is detailed in its instructions to Mālik al-Ashtar particularly on dispute resolution. It has been preserved and published in full.[53]

The essentials of the instructions given in dispute resolutions are many, and make aware that no civil society could function for the benefit of all its members without that society according respect to and abiding by the principle of

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[52]5:15

[53]Imam Ali, *Nahjul Balagha, Sermons Letters and Sayings* selected and compiled by Abul Hasan, Mohammad, ar-Razi, (Qum, n.d), p.455. Hereafter cited as *Nahj*.

the Supremacy of the Rule of Law. The instructions begin with major guidelines with the following words, '*The most pleasant thing for the rulers is the establishment of justice.*'[54] To ensure just rule, the rulers' actions should be inspired by respect for the Qur'ān and the s*unna* of the Prophet (ṣ.a.a.s.). In matters in which the governor is worried, the advice offered in the letter is to, '*refer to Allāh and His Prophet (ṣ.a.a.s.)*'[55] for guidance. Specifically, the newly appointed governor of Egypt, in matters that appear confusing to him, is to seek guidance from the Qur'ān, in particular, '*O ye who believe! Obey Allāh, and obey the Messenger and those charged with authority among you. If you differ in anything among yourselves, refer it to Allāh and the Prophet (ṣ.a.a.s.).*'[56]

As regards referring disputes to Allāh and His Messenger, the letter of instruction advises al-Ashtar that reference to Allāh's Book means what is clear and unambiguous in the Qur'ān and reference to the traditions of the Prophet (ṣ.a.a.s.) means to the unanimously agreed *sunna*, with regard to which there are no differences, and for settlements of dispute between people, al-Ashtar was advised to, '*select him who is most distinguished of your people in your view.*'[57]

The letter is important in several respects. However in the field of dispute resolution the letter of appointment highlights three areas where al-Ashtar was to have specific regard. In the first place al-Ashtar was to have regard to his own conduct. He should not consider that his appointment carried with it, unfettered authority, in that he should be obeyed in all respects. If the exercise of that authority

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[54]*ibid*, p.461.
[55]*ibid*, p.461.
[56]4:59
[57]*Nahj*, p.461, Chapter Two, 'The *Ṣiffīn* Arbitration Agreement Between ʿAlī b. Abī Ṭālib and Muʿāwiya b. Abī Sufyān,' and Chapter Four, 'The Concept of Dispute Resolution in the Ismāʿīlī School: The Authority of the Imām from the *Ahl al-Bayt*' give one example each of an unanimous agreed *sunna* of the Prophet's (ṣ.a.a.s.).

produced pride or vanity in him, then al-Ashtar, '*must look at the greatness of the realm of Allāh, and of His superiority over yourself.*'[58]

In a clear reference to the Qur'ān,[59] al-Ashtar was advised that agreements made were to be honoured and discharged faithfully. This was because not only Muslims but also unbelievers abided by their agreements. The consequences of breaking the agreements were too horrendous to contemplate. In addition, '*Allāh has made agreements and pledges the sign of His security*' and, '*the breaking of promises earns the hatred of Allāh and the people.*'[60]

Al-Ashtar was to have regard to the fact that each level of society was interdependent on the other levels of society. At the top of the social strata was the Army. But the Army was, '*the fortress of the people, ornament of the rulers, strength of the religion and means of peace.*'[61] In selecting the commander of his forces the governor was to select a person who is most distinguished and, '*who is a well wisher of Allāh, His Prophet (ṣ.a.a.s.) and your Imām.*'[62]

Finally, with regard to the administration of justice and settlements of disputes among the people, al-Ashtar was to appoint such people to judicial offices who had already distinguished themselves. They accepted truth, did not lean towards greed and most importantly al-Ashtar was to secure their financial independence by allowing them remuneration so that there remained, '*no occasion for him to go to others for his needs.*'[63] This last advice was an indirect but obvious reference to the Qur'ān warning believers not to use any part of their property as,

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[58]*ibid*, p.456.
[59]5:1
[60]*Nahj*, p.468.
[61]*ibid*, p.460.
[62]*ibid*, p.460.
[63]*ibid*, p.461.

'*bait for judges*'[64] with the intention of securing either unfair advantage or acquiring other people's property.

It is clear from the contents of this letter that the resolution of conflict is fundamental to the Islamic principle of the community or brotherhood, and that a starting point for resolution of disputes is the Qur'ān, the last and final Revelation of Allāh to His last and final Prophet (ṣ.a.a.s.), and to the unanimously agreed s*unna* of His Prophet (ṣ.a.a.s.).

The pointed reference to, '*well wisher of your Imām'* is a direct and unequivocal reference to ʿAlī himself, who, on his election by the *anṣār* and *muhājirūn* of Madīna to the Caliphate had to fight two major civil wars that were instigated as a direct challenge to his authority, challenges that gradually eroded that authority and led to his ultimate murder. The point would not have been lost on al-Ashtar, who as an outstanding commander in Imām ʿAlī's army and his staunch supporter, al-Ashtar was strongly opposed to the negotiations with Muʿāwiya.[65]

The first, historically known as the Battle of Camel, was brought by Ṭalḥa and al-Zubayr who had pledged their allegiance to ʿAlī, and had allied themselves with ʿĀ'isha, the Prophet's (ṣ.a.a.s.) widow[66] who sought vengeance for the murder of ʿUthmān. The second was the challenge to ʿAlī's authority by Muʿāwiya, governor of Syria, whom ʿAlī had on his accession to the caliphate dismissed, but who had refused to accept his dismissal. The challenge to his authority, that resulted in a full-scale civil war that was only ended, but not resolved, by an arbitration agreement between the nominated representatives of the warring parties.[67] These

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[64]2:188
[65]Chapter Two, 'The *Ṣiffīn* Arbitration Agreement Between ʿAlī b. Abī Ṭālib and Muʿāwiya b. Abī Sufyān.'
[66]post Chapter Two
[67]post Chapter Two

two civil wars were to split the Muslim community permanently into *Shī'as* and *Sunnīs* right down to the present time.

The resolution of conflict is fundamental to the Islamic principle of the community or brotherhood. It is important to refer to the character of the Prophet (ṣ.a.a.s.), his actions, his sayings and his approvals, his faith in preaching God's message when in Makka, administrative decisions following his arrival in Madīna, and to the Qur'ān, in order to understand this principle. The indirect help he received from God in the early conversions to Islām of Abū Dharr and Ṭufayl at the beginning of his mission when still in Makka. The direct help he received from God in his military campaigns against the Quraysh; in his steadfast belief, his mission and some of the many Qur'ānic injunctions pertaining to dispute resolution.

The generally agreed view is that the Prophet (ṣ.a.a.s.) was born on Monday 12th of *Rabī'* I, in the year of the Elephant. (The reference here is to an early Makkan *sūra* that revealed the fate of the Abyssinian ruler Abraha who sought to invade and conquer Makka with a large army and a troupe of elephants and met a disastrous ending when a shower of stones of baked clay from a flight of birds destroyed his army and sealed his ambition).[68] It was in this prosperous town of Makka in the Ḥijāz, a town of Arabia in the year 570AD that the Prophet (ṣ.a.a.s.) of Islām, a direct lineal descendant of Quṣayy was born. The generally accepted position is that his father 'Abd Allāh passed away whilst he was still in his mother's womb. His mother Āmina passed away when he was four years old. He was brought up by his grandfather, 'Abd al-Muṭṭalib until he was eight, when his grandfather passed away. Thereafter the Prophet (ṣ.a.a.s.) was raised and brought up

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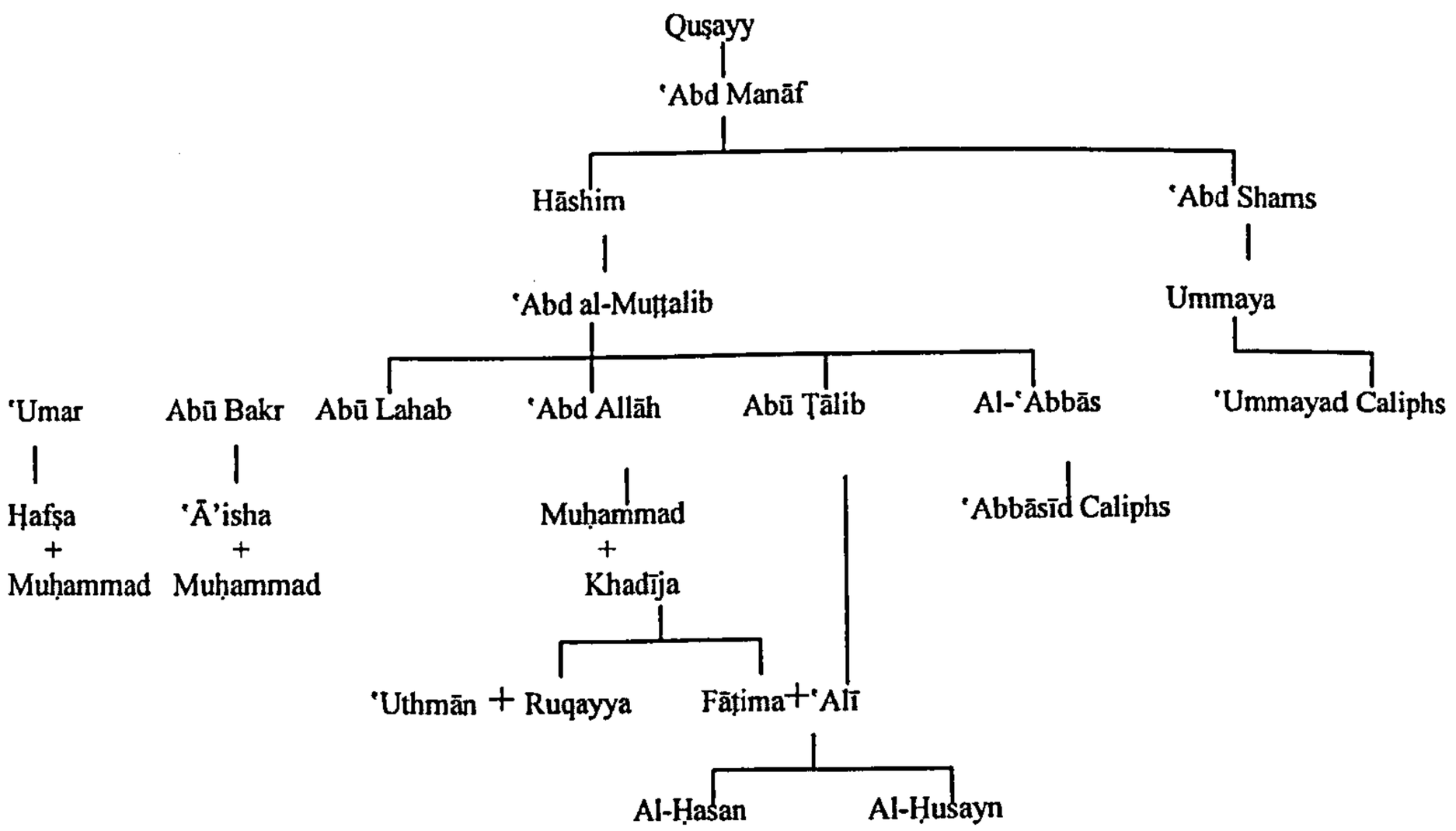
[68] 105:1-5

by his uncle Abū Ṭālib.[69] At the age of twelve he accompanied his uncle to Syria. On one of those journeys he came across a Christian monk by the name of Baḥīra, who confirmed his Prophethood from previous Scriptures. With his birth, Makka, Arabia and surrounding states were to undergo a complete transformation.[70]

The Prophet's (ṣ.a.a.s.) first marriage at the age of twenty-five was to a wealthy Quraysh widow Khadīja, fifteen years his senior. She was a successful and a prosperous businesswoman. He had several children by her. His sons passed away in infancy. His only surviving child by Khadīja was Fāṭima.



Only after Khadīja passed away did he re-marry. Amongst his other wives he married ʿĀʾisha, daughter of Abū Bakr (d.13AH/634) and Ḥafṣa, daughter of ʿUmar b. al-Khaṭṭāb (d.23AH/644), both Companions who later became respectively the first and second caliphs (see family tree above).

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[69]Ibn Kathīr, Vol.I, (Reading, 1998), p.142.
[70]Shahīd, Irfan, 'The Rise and Domination of the Arabs,' in *The Cambridge History of Islām*, Vol.1A, P. M. Holt, Ann K. S. Lambton & Bernard Lewis (eds.), (Cambridge, 1977), p.24. Hereafter cited as Shahīd.

His step daughter Ruqayya, by Khadīja's former marriage was married to ʿUthmān b. Affān (35AH/56). His only surviving daughter Fāṭima by Khadīja was married to his cousin ʿAlī b. Abī Ṭālib (40AH/61). Both ʿUthmān b. Affān and ʿAlī were Companions who later became respectively the third and fourth caliphs.[71]

To be sure Arab society in the Prophet's (ṣ.a.a.s.) time was in a state of transition. Nomadic Arabs were beginning to settle in towns, but most importantly, it was a polytheistic society, and according to the opinion of Irfan Shahīd, ripe for conversion to monotheism, having already come under the influence of Judaism at Yathrib and Christianity at Najran.[72]

Understanding the geography of the region known as the Ḥijāz is also important. As the map (see below, page twenty-two),[73] Makka stood at the centre of the three towns of the Ḥijāz, to the south Ṭā'if, and to the north Yathrib. To the west of Yathrib, (later renamed Madīna), lies Badr. Here an early but important and decisive engagement took place between the Muslims and a Quraysh caravan consisting of goods and money, travelling from Syria south to Makka. Running through the Ḥijāz like a spinal cord was the trade route from Sanʿā in al-Yaman in the south to Gaza and Damascus in Syria in the north.[74]

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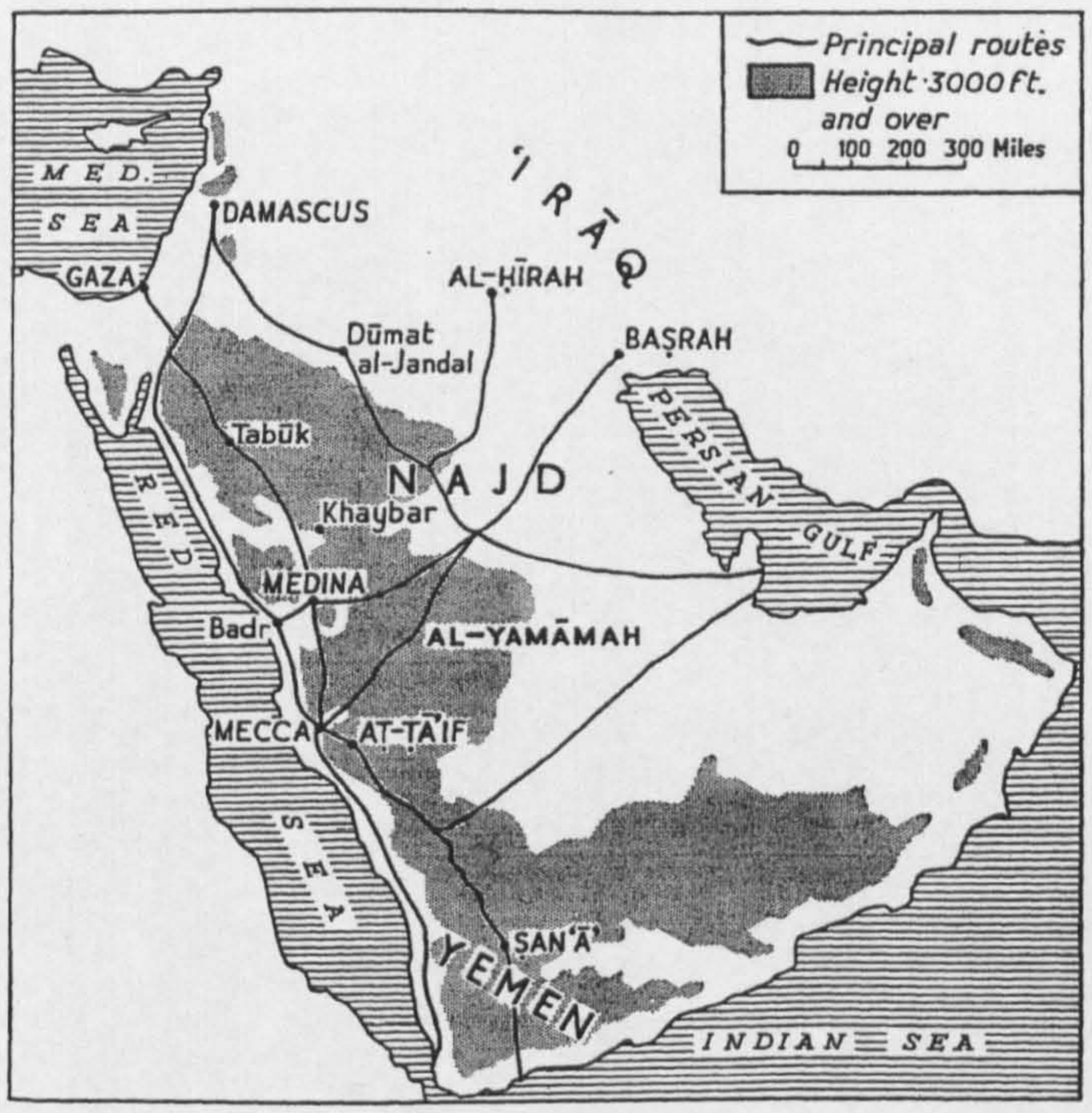
[71]The dates given are the dates on which the caliphates ended
[72]Shahīd, p.23.
[73]*ibid*, p.8. The map shows Pre-Islamic Arabia and the Fertile Crescent.
[74]The birth place of the Prophet (ṣ.a.a.s*)*, *EI²*, *s.v.* 'Makka,' Vol.VI, (Leiden 1991), p.144.



Climatically, the most pleasant of the three towns of the Ḥijāz was Ṭā'if. It was to Ṭā'if that the Prophet (ṣ.a.a.s.) turned for support in the earlier period of Revelations. Makka was most inhospitable during the summer months; and Yathrib was the oasis town, suitable for agricultural cultivation.[75] The two principal Jewish communities there were the *Banū-Naḍīr* and the *Banū-Qurayẓa.* Two other Arab tribes lived there, *Aws* and *Khazraj*. It was they who sought the Prophet's (ṣ.a.a.s.) mediation in their internecine and futile civil wars that simply dissipated their resources, material and manpower and made them dependent on the *Banū-Naḍīr* and *Banū-Qurayẓa*.

Makka[76] stood at the centre of the caravan trade from al-Yaman in the south to Gaza and Damascus in the north. The struggle between the predominantly Christian Byzantine and Zoroastrian Persian Empires may also have diverted trade from the

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[75]The town, where the Prophet (ṣ.a.a.s.) migrated to, to seek refuge from persecution in Makka, and the bulk of the revelation was received. *EI²*, *s.v.* 'Al-Madīna,' Vol.VI, (Leiden, 1991), p.994.

[76]3:96 referred to as Bakka and 48:24 referred to as Makkah.

Orient via the Persian Gulf to the West Coast of Arabia through Makka. It was important for Makka to remain neutral. The scene was therefore set for a singularly Arab form of monotheism to be revealed not only in response to, but as continuation of God's revelation of previous scriptures.

The importance of Makka as a trading centre grew and developed gradually, slowly, imperceptibly. The constant wars between the Byzantine and Persian Empires rendered the traditional trade route to the east through the Gulf difficult for merchants, if not impassable. They resorted once more to the difficult but more tranquil route through Syria down through western Arabia to al-Yaman where vessels from the East would dock at safe ports to load and unload their cargo.

Being at the centre of this route, Makka was well placed to take advantage of the opportunity that fortuitously came its way. Makka as will be seen from the map (above) was at the cross roads of the trade routes southwards to al-Yaman, westwards to the red sea port of Jeddah, northwards to the Mediterranean and eastwards to the Persian Gulf. Sometime before the rise of Islām, Makka was occupied and populated by the tribe of Quraysh. It was Hāshim b. ʿAbd Manāf, great grandfather of the Prophet (ṣ.a.a.s.), grandson of Quṣayy (see genealogy tree below, page twenty-four), who made the tribe of Quraysh and his clan of Hāshim dominant in Makka. He held the high offices of *al-rafāda* and *al-siqāya*, the provision of food and water for the pilgrims, the two great offices that then passed to his son ʿAbd al-Muṭṭalib.[77]

It was ʿAbd al-Muṭṭalib who whilst sleeping within the sacred precinct of the Kaʿba received a vision ordering him to dig up Zamzam.[78]

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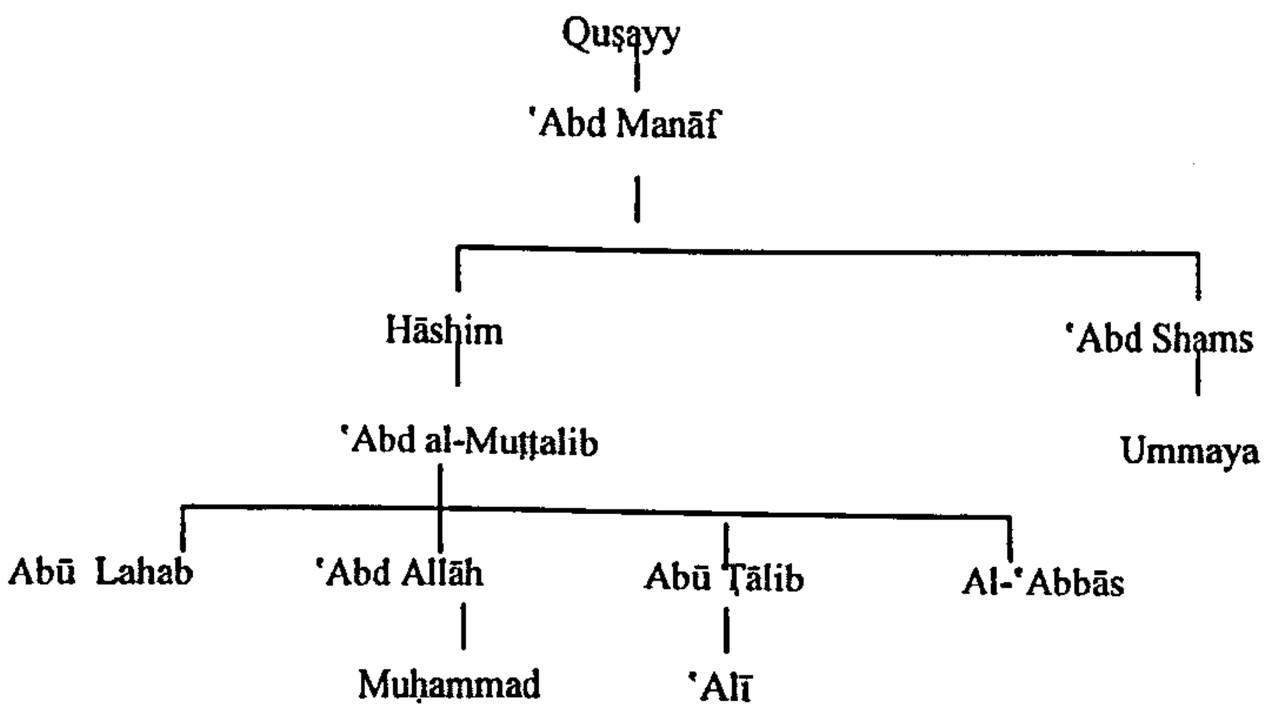
[77]Ibn Kathīr, Vol.I, p.130. The provision of these high offices is described in *EI²*, *s.v.* 'Hāshim b. 'Abd Manāf,' Vol.III, (Leiden, 1971), p.260.
[78]*ibid*, p.120.



However, the Hāshims had not maintained a leading commercial position among the great and prosperous merchants of Makka, although they were probably at the head of a class of commercially less strong clans. It should be remembered that nearly all the inhabitants of Makka belonged to the tribe of Quraysh. It was through the actions of Quṣayy that control of Makka and the Ka'ba passed into the hands of Quraysh. The tribe of Quraysh was divided into several clans. The Prophet (ṣ.a.a.s.) belonged to the clan of Hāshim.

The Quraysh developed Makka into an important trading centre. They carried out extensive trade with the Byzantine, Persian and Abyssinian empires. Twice a year they dispatched great caravans to the north and to the south. These were co-operative undertakings organised by Makkan syndicates of traders and investors. In the neighbourhood of Makka there were many fairs or festivals that attracted people, merchants and traders from all over the Arabian Peninsula. The festivals were important in that they became part of the economic and trading life of Makka. This in turn helped to extend and promote the influence and prestige of the city. The most important of the festivals was that of the 'Ukāẓ.[79] Makka remained different from the other two towns principally because of its status. It has been

[79]Ibn Kathīr, Vol.I, pp.105, 109.

stated that the name Makka has been derived from the Sabean Makuraba, meaning a sanctuary and that the ancient Egyptians knew the town as Macoraba.[80]

Makka's importance and primary position were enacted every year during the '*holy months*.' Arabs from all over the region flocked to the town and some of the Bedouin Arabs, who brought their wares to the 'Ukāẓ festival, probably stayed on. They were introduced to and participated in the rituals of sacrifices and the circumambulation of the Ka'ba. Makka with its sacred precinct was and continued to remain the 'Holy City.' As the holy city Makka assumed cultural importance. The guardians of the Ka'ba, the Quraysh, being the descendants of Ismā'īl and Abraham acquired and played a prominent role in the affairs of the town. Arabs both nomad and sedentary met and integrated.

There is every reason to believe that the Quraysh of Makka elevated the concept of trade to a high level of success. This was partly due to their commercial acumen and partly to historical circumstances. International wars had brought about the fall of the Ḥimyarī kingdom in the south.[81]

To the north the Persian and Byzantine empires became considerably weakened by persistent wars. These wars enabled Makka to acquire a predominant position in trade. The wars raging around the borders of the Ḥijāz enabled the Quraysh to seize the opportunity to allow this fortuitous acquisition of commercial power to grow imperceptibly.

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[80]Hitti, Philip K., *History of the Arabs* (London, 1961 [7th Edition]), p.102. Hereafter cited as Hitti.
[81]Ibn Kathīr, Vol.I, p.18.

As Makka and the Quraysh became commercially prosperous,[82] so too did certain commercial practices arise which marginalised many and left them impoverished; it is also to these commercial practices that the Qur'ān addresses its concerns between the haves and the have-nots. It is to resolve the conflict in these commercial practices that led to material and social imbalances that the Qur'ān sought to address men's minds.

The Revelations should be seen against a rising tide of property, wealth and power and the accumulation of all these into the hands of a small but select few merchants from the tribe of Quraysh. This rising tide of property, power and accumulated wealth into the hands of a few wealthy merchants resulted in a social and economic imbalance. Poverty was on the increase that in turn led to or perpetuated certain deplorable and abhorrent practices such as female infanticide. None was more revolting than the practice of burying alive the first born infant daughter. The Qur'ān alludes to this deplorable pagan practice of female infanticide.[83] At the time when such practices were prevalent and widespread, it is important to refer to the Prophet's (ṣ.a.a.s.) action or conduct because he chose to keep his only daughter Fāṭima. He would have been well aware of the economic consequences of his opposition to female infanticide. Consider then the following verses concerning female infanticide, '*When the female (infant), buried alive, is questioned for what crime she was killed; when the Scrolls are laid open; when the sky is unveiled; when the Blazing Fire is kindled to fierce heat ; and when the Garden is brought near;-(Then) shall each soul*

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[82]Watt, W. Montgomery, 'Muḥammad' in, *The Cambridge History of Islām,* Vol.1A, P. M. Holt, Ann K.S., Lambton & Bernard Lewis (eds.), (Cambridge, 1977), p.45. In the Battle of Badr in 2AH/624 between the forces of Islām and the Quraysh of Makka it is reported that the booty captured included one thousand camels and 50,000 dinars worth of merchandise

[83]16:58-59

know what it has put forward.'[84] With a specific exhortation, '*Kill not your children on a plea of want;- We provide sustenance for you and them.*'[85] And, '*Kill not your children for fear of want: We shall provide sustenance for them as well as for you. Verily the killing of them is a great sin.*'[86]

The Divine Revelation that he was preaching had not only everything to do with acquisition of material wealth in this world, but also it was concerned with the spiritual elevation of the soul. The Qur'ān in an early Makkan verse admonishes wealthy merchants who piled up their wealth believing that this wealth would make them last forever.[87] Morally the problem was the care of the unfortunate who for various reasons were unable to share in this prosperity; the orphans, widows and the poor as the Qur'ān reveals to the Prophet (ṣ.a.a.s.), reminding him of his background,

> Did He not find thee an orphan and give thee shelter (and care)? And He found thee wandering, and He gave thee guidance. And He found thee in need, and made thee independent. Therefore, treat not the orphan with harshness, nor repulse him who asks; but the Bounty of thy Lord- rehearse and proclaim![88]

It is in the resolution of conflict between the fortunate and the unfortunate that the message of Islām stands out at its very core.

In any such division of wealth and power, there would certainly have been a conflict in attitudes that had developed in the ethos of the mercantile economy. Those who were successful would have sought to preserve their power, position and wealth. The manner in which that wealth was obtained may have been suspect. The

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[84]81:8-14
[85]6:151
[86]17:31
[87]104:1-3
[88]93:6-11

acquisition of and preservation of this wealth would certainly have been a material corollary to the individual spirit of materialism that had developed within this new commercial ethos. The Qur'ān sought by various injunctions both positive, commanding believers to perform certain acts and negative, to refrain from certain actions or conduct, to correct this imbalance.

One principal positive injunction must surely be, '*O, ye who believe fulfil (all) obligations.*'[89] It is complete in its terseness and perhaps the basis of all moral conduct and the verse finds a counterpart in another verse also of equal importance that requires good conduct and fair dealings in all walks of life is, ' *fulfil (every) engagement, for (every) engagement will be enquired into* (*on the Day of Reckoning*).'[90] Other positive injunctions that underpin conduct and fair dealings in all walks of life are, '*O, ye who believe stand out firmly for justice as witnesses to fair dealings…*,'[91] and, '*Come not nigh to the orphan's property, except to improve it, until he attains the age of full strength*,'[92] but particularly on commercial transactions where unfair practices had arisen, '*give measure and weight with (full) justice; no burden do We place on any soul but that which it can bear; whenever ye speak, speak justly, even if a near relative is concerned; and fulfil the Covenant of God: thus doth He command you*,'[93] and, '*give full measure when you measure and weigh with a balance that is straight: that is the most fitting and the most advantageous in the final determination.*'[94] And, '*O ye who believe! Eat not up your property in vanity among yourselves but let there be trade by mutual consent.*'[95]

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[89]5:1
[90]17:34
[91]4:135; 5:8
[92]6:152; 17:34
[93]6:152
[94]17:35
[95]4:29

The negative injunctions are to reinforce good commercial practices The most important of these are the prohibition on *ribā*, translated as interest or usury, '*those who devour usury will not stand except as the Satan by his touch hath driven to madness*,[96] and, '*Allāh will deprive usury of all blessings, but will give increase for deeds of charity.*'[97] The other injunction on usury is to give up one's demand for usury.[98] Another important injunction that sanctions not only good commercial practice but good conduct as well is, '*O ye who believe! Eat not up your property in vanities but let there be amongst you trade by mutual good will nor kill (or destroy) yourselves for verily Allāh hath been to you most Merciful.*'[99] The essence of these and other verses exhorting men to ethical conduct is to warn them of the *Ākhira,* the Hereafter (see below, page forty-one), where they will be accountable for their actions.

With regard to the Hereafter, the Qur'ān warns believers to accept the transient nature of this world and that man must understand that he will have to account for his deeds on the day of judgement, '*Nothing is the life of this world but play and amusement. But best is the home in the Hereafter, for those who are righteous.*'[100]

The Qur'ān warns that belief in the Hereafter is insufficient. Man is enjoined to do good in this world, '*But those who believe and work righteousness will be admitted to Gardens beneath which rivers flow,-to dwell therein for aye with the leave of their Lord. Their greeting there in will be*; "*Peace.*"'[101] Again, '*That Home of the Hereafter We shall give to those who intend not high-handedness or*

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[96] 2:275
[97] 2:276
[98] 2:278
[99] 4:29
[100] 6:32
[101] 14:23

mischief on earth.'[102] Those who follow and practice their faith assiduously, the Qur'ān is specific about their reward, '*Verily He Who ordained the Qur'ān for thee, will bring thee back to the Place of Return.*'[103]

The objective of these positive and negative injunctions is to remind the believers that, '*whoever submits his whole self to Allāh and is a doer of good, has grasped indeed the firmest handhold: and to Allāh shall all things return.*'[104] This concept of the Hereafter is an important exhortation to the believer to keep a constant balance in life between the material and spiritual particularly so as, '*Allāh doth wish to lighten your (burdens): For man was created weak (in resolution).*'[105] Underpinning all of this is the supplication to God to, '*show us the straight way.*'[106]

Fundamental to the principle of dispute resolution is the foundation upon which a stable society is built. Reforming legislation was needed in two essential areas, the first being inheritance and the second being the establishment of the institution of marriage as a basis for a coherent society and family life. Divine Revelations confirmed the status of believing women. They were like men, created by Allāh, '*O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise each other).*'[107] No community of believers could establish itself socially, morally and economically without consideration towards all its members. Legislative changes were needed to give rights to women, who in pre-Islamic days had none. Disputes if any, regarding inheritance rights to the deceased's estate by female members of the deceased's family were made subject to Divine legislative

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[102] 28:83
[103] 28:85
[104] 31:22
[105] 4:28
[106] 1:6
[107] 49:13; 4:1

changes. Divine Revelation in the field of inheritance introduced social changes by restricting the power of testamentary disposition to only one-third of the property of the deceased. Thereafter rights of inheritance were given to daughters and mothers. In certain instances sisters were entitled to share in the deceased's estate.[108]

As with inheritance, so too social reforms were introduced particularly so in the field of marriage that gave women much needed rights. The Qur'ān enjoins marriage as an obligation on all men with these words, '*Marry women of your choice*.'[109] And again on the concept of marriage the Qur'ān states, '*And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquillity with them, and He has put love and mercy between your (hearts).*'[110] Apart from giving women the right to be treated as equal partners the Qur'ān introduced two further provisions to give women additional rights. The first legislative provision introduced is the right to *mahr* or dower,[111] which is her unconditional gift given to her on the occasion of the marriage.[112] The right to dower arose immediately and payment could be deferred; it could not be remitted save with the woman's consent. If divorce occurred before sexual intercourse she was entitled to one-half of the amount pledged. In the event that divorce took place before the amount of dower was pledged then injunction was to, *bestow on them a*

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[108]4:11-12; 4:176

[109]4:3

[110]30:21

[111]4:4, 20, 25; 2:236-237. Chapter Four, 'The Concept of Dispute Resolution in The Ismā'īlī School: The Authority of the Imām from The *Ahl al-Bayt*,' considers *mahr* in the context of their personal law, mentioned in their 1986 Constitution. Chapter Five, 'The Concept of *mahr* (Dower)in Islamic Law, A Resolution of a Conflict with English Law' considers the position of *mahr* in relation to English Law.'

[112]Aṭ-Ṭabāṭabā'ī, al-'Allāmah as-Sayyid Muḥammad Ḥuasyn, *Al-Mīzān fi'tafsīri'l-Qur'ān*, tr. Sayyid Saeed Akhtar Rizvi, Vol.7, O. Spies (ed.), (Tehran, 1990 [1st Edition]), p.260. Hereafter cited as *Al-Mīzān*.

suitable gift according to the means of the husband. Women were now given an independent economic status that they did not enjoy in pre-Islamic days.[113]

The second change introduced by the Qur'ān for women is the right as against her husband. The right was conditional and states that, '*If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves.*'[114] Of all the permissible actions the Qur'ān confirms that none is more reprehensible in the sight of Allāh than divorce. Recognising human weakness clear guidelines are laid down as to how divorce is to be achieved. The starting point for settlement of a matrimonial dispute is an attempt at reconciliation. Two arbiters are to be appointed, one from each family, whose combined efforts are '*to set things right.*' If their desires are sincere then, '*Allāh will cause their reconciliation.*'[115] The emphasis therefore is on the attempt at reconciliation.

The early Makkan *sūras,* revealed for the first time the unity of creation reminding men of life, death, heaven and hell. These verses may in fact be described as the eschatological verses. By contrast, the early Madīnan *sūras* or verses, began with the words, '*Oh you who believe*' and were directed more towards the creation and establishment of a system of administration, law and community organisation of the early Muslim community that came into being after the Prophet's (ṣ.a.a.s.) migration to that city. A late Makkan *sūra* elaborates in greater detail Allāh's creative work in explaining His creation of man,

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[113]Chapter Five, considers the importance of both marriage and *mahr* in the context of both the Qur'ān and the traditions from the Prophet (ṣ.a.a.s.) in the light of major Muslim migration to western countries and the interaction of the community with Western secular laws.

[114]4:128

[115]4:35

> Man We did create man from a quintessence (of clay); Then We placed him as (a drop of) sperm in a place of rest, firmly fixed; Then We made the sperm into a clot of congealed blood; then of that clot We made an (embryo) lump; then We made out of that lump bones with flesh; then We developed out of it another creature.[116]

An early Madīnan *āya* would be, '*O ye who believe! Obey Allāh, and obey the Messenger, and those charged with authority among you.*'[117]

When a *sūra* or *āya* was revealed to the Prophet (ṣ.a.a.s.), a double process was initiated to preserve it. There were the memorisers, *ḥuffāẓ* (sing. *ḥāfiẓ*) who committed them to memory to preserve them. There were also scribes who wrote down the verses. After each divine revelation the Prophet (ṣ.a.a.s.) would personally direct the Chapter and content for the purpose of completion. The Companions who wrote down the verses included *inter alia*, 'Alī b. Abī Ṭālib and Zayd b. Thābit.

The Prophet (ṣ.a.a.s.) took the greatest care to ensure that all the verses were properly written down. There is evidence to suggest that the Qur'ān existed in a complete and orderly form during his lifetime. The task of compilation into one volume had not been done during his life as revelation continued. It was only possible to compile the Qur'ān after he passed away. It is the generally held belief that in a battle between the Muslims and the false prophet Musaylima, a number of *ḥuffāẓ* or memorisers of the Qur'ān were slain. It was this fact that caused 'Umar to give immediate advice to Abū Bakr to begin to compile the Qur'ān before it perished. Accordingly, one of the chief scribes, Zayd b. Thābit, was entrusted with the task. He collected the manuscripts and fragments from some of the Companions, and verified them with all the *ḥuffāẓ*. Finally, a standard written copy

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[116] 23:12-14
[117] 4:59

of the Qur'ān was prepared and kept in the possession of the first Caliph Abū Bakr. After his death it was kept in the safe custody of the second Caliph ʿUmar. After his death, it was transferred into the custody of ʿUmar's daughter Ḥafṣa, the Prophet's (ṣ.a.a.s.) widow.[118]

With the spread of Islām beyond the confines of Arabia, a variety of Qur'ānic recitations arose due to linguistic variations. The Caliph ʿUthmān became alarmed and in order to save the purity of the text, ordered several authentic copies to be made from the standard copy. ʿUthmān appointed a Commission of four members: (1) Zayd b. Thābit, (2) ʿAbd Allāh b. al-Zubayr, (3) Saʿīd b. al-Āṣ, (4) ʿAbd Raḥmān b. Ḥārith b. Hishām. Their task was to prepare copies from the original standard version that had now been obtained from Ḥafṣa. ʿUthmān ordered the newly transcribed copies of the Qur'ān to be sent to different Centres of the Islamic world. These copies became the standard text for all subsequent copies, and are today used by all Muslims, Shīʿa and Sunnī.

The ʿUthmānic recession then became the standard text. Although this is the generally accepted view, there would appear to be even in ʿUthmān's time complete copies of the Qur'ān in the possession of such Companions as ʿAbd Allāh b. Masʿūd, Abū Mūsā ʿAbd Allāh al-Ashʿarī and ʿUbayy b. Kaʿb (d.18AH or 29AH/639 or 649). Apart from ʿUbayy, they continued to use their own copies.[119]

The Prophet's (ṣ.a.a.s.) cousin ʿAlī too, had his own copy and possibly even the Prophet's (ṣ.a.a.s.) copy. Although reports would suggest that he destroyed them[120] should be discounted since in his oral testament immediately before he passed away, he is reported to have bequeathed his and the Prophet's (ṣ.a.a.s.)

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[118] *EI²*, *s.v.* 'Al-Ḳur'ān,' Vol.V, (Leiden, 1986), p.404.
[119] *ibid*, p.406.
[120] *ibid*, p.406.

books and weapons to his son al-Ḥasan on the instructions of the Prophet (ṣ.a.a.s.).[121]

The opening *sūra* of the Qur'ān is the *sūra* al-Fātiḥa, which has several verses as follows,

> In the name of Allāh, Most Gracious, Most Merciful. Praise be to Allāh the Cherisher and Sustainer of the Worlds: Most Gracious, Most Merciful; Master of the Day of Judgement. Thee do we worship, and Thine aid we seek. Show us the straight way, the way of those on whom Thou hast bestowed Thy Grace, those whose (portion) is not wrath and who go not astray.[122]

In the Qur'ān several fundamental principles can be identified. The three foremost are those of *Tawḥīd*, *Nubuwwa*, and *Ākhira*.[123] These principles do not stand in isolation to each other. Encasing the three is *Īmān* or faith. Superimposed above them is God, omnipresent, omniscient. These fundamental principles underpin the concept of dispute resolution.

The Concept of *Īmān:*

Īmān or Faith is the fundamental basis of Islām and enjoins upon all Muslims to believe in Allāh, His Angels, His Revelation, the Qur'ān, and all other revealed books and in His Messengers.[124] In answer to a question posed by the angel Gabriel on what is *Īmān*, the Prophet (ṣ.a.a.s.) is reported to have replied, '*that you affirm your faith in Allāh, in His Angels, in His Books, in His Apostles and*

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[121]Discussed in detail Chapter Four, 'The Concept of Dispute Resolution in the Ismā'īlī School: The Authority of the Imām from the *Ahl al-Bayt*.'

[122]1:1–7

[123]*Ākhira* has been discussed earlier in conjunction with commercial *sūras* commercial ethos of pre-Islamic Arabia and is considered in Chapter Three, 'The Concept of Dispute Resolution in the Mālikī School, Imām Mālik, The Muwaṭṭā, The '*amāl* of Madīna', in the context of *Qiṣāṣ* (retaliation) and *'awf* (pardon).

[124]2:177; 2:285

in the Day of Judgement and you affirm your faith in the Divine Decree to do good and evil.'[125] Two of His angels Gabriel and Michael are mentioned by name in the Qur'ān,[126] whilst a third is referred to as the Angel of Death.[127] Faith in Allāh is also required of individual believers when in this world they are tested by Him with something of fear and hunger, loss of goods or personal possession or belongings, lives of others and those whom they hold dear and the fruits of their labour, by reminding themselves that from Allāh they have come and to Him is their final return.[128]

Īmān is an important principle in dispute resolution and, '*without which no human acts are acceptable to God for no one can be righteous before God unless he is a believer in the true faith.*'[129] According to aṭ-Ṭabāṭabā'ī, faith is the cornerstone of society, requires believers to preserve their unity and, '*to remove every type of dispute or discord by referring it to Allāh and His Messenger.*'[130] The verses on Faith and dispute resolution are,

> O ye who believe! Obey Allāh, and obey the Messenger, and those charged with authority among you. If ye differ in any thing among yourselves, refer it to Allāh and His Messenger, if ye do believe in Allāh and the Last Day: That is best, and most suitable for final determination.[131]
>
> But no by thy Lord, they can have no (real) Faith. Until they make thee judge in all

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[125]Muslim b. al-Ḥajjāj, Abū'l Ḥusayn, *Ṣaḥīḥ Muslim*, Vol.I, tr. A. H. Ṣiddīqī, (Lahore, 1976), p.2. *ḥadīth* No.1. Hereafter cited as Muslim.
[126]2:97-98
[127]32:11
[128]2:155-156
[129]Al-Nuʿmān b. Muḥammad, al-Qāḍ'ī Abū Ḥanīfa, *Daʿā'im al-Islām,* tr. Asaf A. A. Fyzee, Ismail Kurban Husein Poonawala (ed.), (Oxford, 2002), p.3. Hereafter cited as *Daʿā'im.*
[130]*Al-Mīzān*, Vol.8, (Tehran, 1992), p.277.
[131]4:59

disputes between them. And find in their souls no resistance against thy decisions, but accept them with the fullest conviction.[132]

The desert Arabs say, "We believe". Say, "Ye have no faith; but ye (only) say, 'We have submitted our wills to Allāh,' for not yet has Faith entered your hearts. But if ye obey Allāh and His Messenger, He will not belittle aught of your deeds: for Allāh is Oft-Forgiving, Most Merciful".[133]

> Only those are believers who have believed in Allāh and His Messenger, and have never since doubted, but have striven with their belongings and their persons in the Cause of Allāh: Such are the sincere ones.[134]

Īmān and The Concept of *Tawḥīd*:

Islām enjoins faith in the oneness and sovereignty of Allāh. Sūra al-Ikhlāṣ in the Qur'ān is the most complete exposition of the Concept of *Tawḥīd*, '*Say: He is Allāh, the One; Allāh, the Eternal, Absolute; He begetteth not, nor is He begotten; and there is none like unto Him.*'[135] Muslim reports a tradition of the Prophet (ṣ.a.a.s) stating that this verse is equal to one-third of the Qur'ān.[136]

Faith in the Unity of Allāh extends to His worship, in that He alone is worshipped and also in His names and attributes. The above verse refers to Allāh as aṣ-Ṣamad (The Eternal). The Qur'ān also refers to other names or attributes of Allāh such as, al-'Alī (The Most High) and al-Wahhāb (The Bestower). No other verse describes His names and attributes which such awe and majesty as the Throne

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[132]4:65
[133]49:14
[134]49:15
[135]112:1–4
[136]Muslim, Vol.II, p.387, *ḥadīth* Nos.1769-1772.

verse described by the Prophet (ṣ.a.a.s.) as the best verse of the Qur'ān[137] and is replicated below,

> God! There is no God but He,-the Living, the Self-subsisting, Supporter of all. No slumber can seize Him nor sleep. His are all things in the heavens and on earth. Who is there can intercede in His presence except as He permitteth? He knoweth what (appeareth to His creatures as) before or after or behind them. Nor shall they compass aught of His knowledge except as He willeth. His Throne doth extend over the heavens and the earth, and He feeleth no fatigue in guarding and preserving them for He is the Most High, the Supreme (in Glory).[138]

In a deliberation and discussion on the merits of the Qur'ān by some of the Companions, ʿAlī b. Abī Ṭālib has described this verse as having, '*70 words each one of which is full of blessing.*'[139]

Īmān and The Concept of _Nubuwwa_:

Islām is not a new religion. It is in essence the continuation of the guidance and message that Allāh revealed to all His Prophets (ṣ.a.a.s.): Ādam (Adam), Ibrāhīm (Abraham), Ismāʿīl, Isḥaq (Issac), Yaʿqūb (Jacob), Mūsā (Moses), ʿĪsā (Jesus) and his last and final Prophet Muḥammad (s.a.a.s) (peace on them and their progeny). Prophets have existed since the creation of man. In Islām, Allāh is not a silent Allāh. He communicates His messages to mankind through His Prophets (ṣ.a.a.s.). As for the verses sent to the earlier Prophets (ṣ.a.a.s.), the Qur'ān's injunctions are strict, '*And who believe in the Revelation sent to thee, and sent*

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[137]*ibid*, p.387, *ḥadīth* No.1768.
[138]2:255
[139]Ibn Kathīr, Vol.I, p.262.

before thy time, and (in their hearts) have the assurance of the Hereafter.'[140] Thus the Qur'ān states,

> Say: "We believe in Allāh and in what has been revealed to us and what was revealed to Abraham, Ismā'īl, Issac, Jacob and the Tribes, and (the Books) given to Moses, Jesus and to the Prophets, from their Lord: We make no distinction between one and another among them, and to Allāh do we bow our will (in Islām)."[141]

> To thee We sent the Scripture in truth, confirming the scripture that came before it, and guarding it in safety: so judge between them by what Allāh hath revealed and follow not their vain desires, diverging from the Truth that hath come to thee. To each among you have We prescribed a Law and an Open Way. If Allāh had so willed, He would have made you a single People, but (His plan is) to test you in what He hath given you: so strive as in a race in all virtues. The goal of you all is to Allāh, it is He that will show you the truth of the matters in which ye dispute.[142]

> And this (He commands): judge thou between them by what Allāh hath revealed, and follow not their vain desires, but beware of them lest they beguile thee from any of that (teaching) which Allāh hath sent down to thee. And if they turn away, be assured that for some of their crimes it is Allāh's purpose to punish them. And truly most men are rebellious.[143]

Islām was not to be a new religion, '*but a confirmation of what went before it;-a detailed explanation of all things, and a Guide and Mercy to any such*

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[140] 2:4
[141] 3:84
[142] 5:48
[143] 5:49

as believe.'[144] The Qur'ān declares that, '*Muḥammad is no more than a Messenger: many were the Messengers that passed away before him.*'[145]

The Qur'ān accepts that the earlier Scriptures are different and commands Muslims not to simply accept the earlier Revelations, but not to seek to dispute with the Christians and Jews regarding their Scriptures. The Jews and Christians are considered *Ahl al–Kitāb*, People of the Book.[146] Muslims are enjoined to respect them. The Qur'ān thus reveals,

> And dispute ye not with the People of the Book, except in the best way, unless it be with those of them who do wrong but say, 'We believe in the Revelation which has come down to us and in that which has come down to you; our God and your God is One; and it is to Him we submit (Islām).'[147]

The emphasis here is on acceptance and not on toleration. Toleration can in difficult circumstances lead to intolerance, which in turn can lead to disputes. Toleration implies a passive role. Acceptance requires of the parties a more positive act. This is an important injunction particularly in times where there has been large-scale settlement of Muslim peoples in Western Europe, North America and Canada. Their desire to practice their faith in their daily lives is important to them. Often these practices come into conflict with secular laws. The need to open a debate with the authorities to accommodate Muslim aspirations becomes necessary. The manner in which these debates are conducted is clearly highlighted within this verse.[148]

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[144]12:111
[145]3:144
[146]People of the Book, *i.e.*, Jews, Christians and Mulims. 'Ahl al–Kitāb,' *EI² s.v.* Vol.I, (Leiden, 1960), p.264.
[147]29:46
[148]Chapter Five, 'The Concept of *mahr* (Dower) in Islamic Law, A Resolution of a Conflict with English Law,' discusses this aspect of Muslim personal law and the manner in which a dialogue may be opened with secular societies with a view to its recognition.

The twin concepts of *Tawḥīd* and *Nubuwwa* do not stand in isolation to each other. The connecting thread is the authority of the Qur'ān and the Prophet (ṣ.a.a.s.). In these revelations, he is made sole authority to adjudicate in disputes with reference to the Qur'ān and with a clear injunction, that in any of his decisions, judgements and adjudication no resistance is made, but that they are received with Faith or *Īmān*.

Īmān and The Concept of *Ākhira*

Although discussed in general in the context of the commercial practices that developed and then prevailed in the commercial climate of the time at the commencement of the revelations in Makka, some further consideration is apposite to the previous three concepts mentioned above. The transient nature of this world has been considered and in his daily life man is enjoined to consistently consider and to remember the Hereafter. The Qur'ān is replete with such exhortations.

The Qur'ān reminds man that heaven and earth stand by His Command and to Him belongs every being in heaven and on earth and creation is His accomplishment,[149] '*To Allāh belongs the East and the West: withersoever ye turn, there is Allāh's Face. For Allāh is All-Embracing, All-knowing.*'[150] His dominion over His creation is all encompassing. Man is reminded of his ultimate destination, '*Verily, to thy Lord is the return (of all).*'[151] Man is thus warned that he should not sometimes say, '*there is nothing except our life on this earth, and never shall we be raised up again,*'[152] for his ultimate destination is to, '*meet Allāh.*'[153]

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[149]30:25-27
[150]2:115
[151]96:8
[152]6:29
[153]6:31

With this encounter with his Creator, man will be made aware of this whole story firstly as a reminder that, '*We were never absent (at any time or place).*'[154] The purpose of this reminder of Allāh's omnipresence is to take stock of each soul of his deeds on earth for, '*those whose scale (of good) will be heavy, will prosper:*'[155] On the other hand for, '*those whose scale will be light, will find their souls in perdition for that they wrongfully treated Our Signs.*'[156]

An important principle which emerges from a study of the Qur'ān, and in particular the above concepts is the concept of dispute resolution. The Qur'ān is replete with references to dispute resolution. Before we consider in detail the Qur'ānic verses on dispute resolution, the need to consider the Prophet's (ṣ.a.a.s.) essential character, his actions, sayings and approvals in dispute resolution is important.

Before the Revelation came to him, the Prophet (ṣ.a.a.s.) had in his business dealings acquired the reputation of being honest and trustworthy. Indeed his honorific title given to him by the Quraysh was *al-Amīn*, 'The trustworthy one'. This title was to stand him in good stead at the time of the re-building of the Kaʿba, the House of Allāh. Built by the Prophet Abraham and his son Ismāʿīl on the orders of Allāh, it was dedicated to the service of Allāh by both of them. The Qur'ān says, '*And remember Abraham and Ismāʿīl raised the foundations of the House (with this prayer): Our Lord! Accept (this service) from us: for thou art the All-Hearing, the All-Knowing.*'[157]

The re-building of the Kaʿba caused a controversy amongst the builders as to who would have the privilege of placing *al-ḥajar al-aswad,* the black stone back

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[154] 7:7
[155] 7:8
[156] 7:9
[157] 2:127

in its place. Tradition has it that an agreement was reached that the builders would ask the first person to enter the gate of the Mosque to adjudicate in the matter in dispute.'[158] The first such person to enter the Mosque was the Prophet (ṣ.a.a.s.). They all agreed that he would arbitrate in their dispute. His solution was to call for a cloak to be laid out and in the centre of which was placed the black stone. All the disputants were then asked to raise the cloak to the appropriate level. It was then left to the Prophet (ṣ.a.a.s.) to lay the black stone in its place. Ibn Kathīr also reports the incident of the replacement of the black stone in almost identical terms, except that Ibn Kathīr quotes the tradition as coming from 'Alī, the Prophet's (ṣ.a.a.s.) cousin.[159]

The Prophet's (ṣ.a.a.s.) exemplary qualities in the field of dispute resolution are also given by Muslim, where the Prophet's (ṣ.a.a.s.) untiring efforts to effect conciliation between disputants was to establish a process by which such disputes would be settled quickly.[160] The Prophet (ṣ.a.a.s.) is also reported as having said: that the resolving of discord between people was more excellent in degree than fasting (*sawm*), prayer (*ṣalāt*) and charity (*ṣadaqa*). He also equated incitement to dispute as being like a razor that shears religion.[161] Another *ḥadīth* of equal importance is *lā darāra wa lā dirāra fi'l Islām,* (There shall be no harming of one

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[158]Ibn Isḥāq, Muḥammad b. Yasār, *The Life of Muḥammad (ṣ.a.a.s.)*, tr. A. Guillaume (London, 1955), p.85. Hereafter cited as Ibn Isḥāq.
[159]Ibn Kathīr, Vol.I, p.197.
[160]Muslim, Vol.III, p.927, *ḥadīth* Nos.4244-4246. Is also considered in, Chapter Three, 'The Concept of Dispute Resolution in the Māliki School, Imām Mālik, The Muwaṭṭā, The '*amāl* of Madīna.'
[161]Abū Dawūd, *sunan*, (Riyāḍ, 1999), p.693, *ḥadīth* No.4919. Which is also replicated in Fyzee, Asaf A.A., *The Ismā'īlī Law of Wills* (London, 1933), p.67. Hereafter cited as Fyzee, considered in Chapters Two, 'The *Ṣiffīn* Arbitration between 'Alī b. Abī Ṭālib and Mu'āwiya b. Abī Sufyān,' and Four, 'The Concept of Dispute Resolution in The Ismā'īlī School: The Authority of the Imām from the *Ahl al-Bayt*.'

man by another in the first instance nor by retaliation in Islām).[162] As for the words 'resolving of discord between people' they are well reflected in the Qur'ān,

> If two parties among the believers fall into a fight, make you peace between them: but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until he complies with the command of Allāh; but if he complies, then make peace between them with justice, and be fair: for God loves those who are fair (and just).[163]

The Prophet's (ṣ.a.a.s.) dislike of verbose and eloquent use of language in disputed matters is also well reflected in *ḥadīth* attributed to him by Mālik b. Anas,

> I am but a man to whom you bring your disputes. Perhaps one of you is more eloquent in his proof than the other, so I give judgement according to what I have heard from him. Whatever I decide for him which is part of the right of his brother, he must not take any of it, for I am granting him a portion of the Fire.[164]

Another exemplary conduct of the Prophet (ṣ.a.a.s.) in dispute resolution is in the negotiation leading to the Treaty of Ḥudaibiyya. The Treaty, a landmark in the history of Islām represents the culminating point in dispute resolution by conduct. The Treaty was concluded between the polytheists of Makka and the Muslim pilgrims led by the Prophet (ṣ.a.a.s.) determined to accomplish the lesser

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[162]A principle used by the Ḥanafī and Mālikī Schools where a rule applied by strict analogy is ignored and a general rule based on other factors e.g. Necessity is preferred. *EI²*, *s.v.* Vol.4, 'Istiḥsān,' (Leiden, 1978), p.255.

[163]49:9

[164]Mālik, b. Anas, *Al-Muwatta,* Idris Mears (ed.), tr. ʿAisha ʿAbdarahman and Yaʿqub Johnson, (Cambridge, 1982), p.337. Hereafter cited as *Al-Muwatta*; also referred to in Chapter Three, 'The Concept of Dispute Resolution in the Mālikī School, Imām Mālik, The Muwaṭṭā, The '*amāl* of Madīna,' Muslim, Vol.III, p.927, *ḥadīth* No.4247, also mentions this tradition.

pilgrimage, the *'umra, 'Truly did Allāh fulfil the vision of His Messenger. Ye shall enter the Sacred Mosque, if Allāh wills, with minds secure, heads shaved, hair cut short, and without fear. For He knew what Ye knew not, and He granted, besides this, a speedy victory.'*[165] The polytheists were equally determined to prevent them from completing their task. The Treaty was concluded in about 6AH/628. The Treaty was penned by 'Alī b. Abī Ṭālib. It contains several clauses and was intended to last ten years. It is in the commencement and in the designation of the Prophet (ṣ.a.a.s.) that a potential conflict was avoided by concessions made by him.

An objection was taken to the incorporation of the words *Bismi Allāh al-Raḥmān al-Raḥim*. The polytheists insisted on the substitution of these words with *Bismik Allāhuma*. The Prophet (ṣ.a.a.s.) agreed. The next bone of contention was in the description of the Prophet (ṣ.a.a.s.) as *Rasūlu Allāh*, and demanded its removal with the simple substitution of Muḥammad b. 'Abd Allāh. Even to this demand the Prophet (ṣ.a.a.s.) agreed. The Treaty which was intended to last for ten years, through circumstances came to an end in 8AH/630 when Makka fell to the Prophet's (ṣ.a.a.s.) army.[166]

Many if not all of the early Makkan *sūras*, would have been met with an indifferent if not hostile reception. The Makkan idolaters would certainly have seen Allāh as a direct challenge to their beliefs, concept and notion of god, and to their political and commercial authority and domination. Certain concepts would have been incomprehensible if not alien to them. Everything began, *'In the name of Allāh, Most Gracious, Most Merciful'* and, *'He begetteth not, nor is He begotten.'*[167] Man was ungrateful and violent in his love for wealth, his deeds good and bad would be

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[165]48:27

[166]Ibn Kathīr, Vol.III, p.235. The entire incident of the signing of the Treaty and the fall of Makka is recorded and considered by Muslim, Vol.III, p.968, *ḥadīth* Nos.4401-4404.

[167]112:1-4

recorded and if found wanting man would have his home in a bottomless pit which was a fire blazing fiercely. The piling up of material possessions by scandal mongering and backbiting and in rivalry with each other distracted him from the serious things in life.[168]

As for Quraysh, in order to understand the Majesty of Allāh, they had only to consider the covenants of security and safeguard that the Lord of the House extended to them on their journeys in winter and summer, and who provided them with food and protection, '*For the familiarity of the Quraish, their familiarity with the journeys by winter and summer, let them worship the Lord of this House, who provides them with food against hunger, and with security against fear (of danger).*'[169] The protection that He extended to His House in the manner in which He dealt with the Companions of the Elephant,[170] that same protection that He was prepared to extend to His Messenger, Muḥammad (ṣ.a.a.s.).

Either through aloofness and indifference or coolness and outright hostility the Prophet's (ṣ.a.a.s.) message did not gain recruits from the wealthy and powerful merchants. With their position threatened, the wealthy Makkans resorted to persuasion, threats and boycotts, all of which failed to weaken his resolve. On three separate occasions the Quraysh made a personal approach to his uncle Abū Ṭālib, to surrender his nephew to them, but to no avail. Efforts were made by a group of Quraysh through his uncle Abū Ṭālib to attempt to reconcile his nephew to Quraysh. A most prominent member of that group was one Abū Sufyān b. Ḥarb.[171]

However, the death of his beloved wife Khadīja and his uncle Abū Ṭalīb his sole protector in Makka, within a short space must have left him feeling dejected and

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[168]100:8; 104:1-3
[169]106:1-4
[170]105:1-5
[171]Ibn Kathīr, Vol.II, (Reading, 1998), p.82.

lonely.[172] His principal tormentor amongst the Quraysh was none other than his uncle, Abū Lahab.[173] The Qur'ān describes him as the Father of Flame and warns of his reward for his opposition, '*No profit to him from all his wealth, and all his gains! Burnt soon will he be in a Fire of blazing Flame! His wife shall carry the (crackling) wood- as fuel!- a twisted rope of palm- leaf fibre round her (own) neck!*'[174]

For three years after the passing away of his uncle Abū Ṭālib and before his migration to Madīna, his tormentors grew bolder, resorting to physical attacks. Words of consolation from his daughter would produce from him replies to the effect that God would protect him and his family, words that clearly showed his unquestioning faith in his mission and in God's message.[175] The Prophet (ṣ.a.a.s.) sought support amongst the Ṭhaqīf at Ṭā'if.[176] His attempts to gain support amongst them was met with derision and uncompromising rejection. His reception was both humiliating and violent, forcing him to flee in dejection.[177] Soon after the rejection of his preaching and when in prayer, a group of *Jinns* who were listening to him pray, warned their people that they believed and responded to what they had heard.[178]

The Prophet's (ṣ.a.a.s.) patience and his perseverance of his mission in the face of such adversity is well reflected in the Qur'ān and in particular, '*be sure We shall test you with something of fear, and hunger, some loss in goods, lives and the*

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[172]*ibid*, p.88.
[173]*ibid*, p.99.
[174]111:2-5
[175]Ibn Isḥāq, p.191.
[176]Less than 50 miles from Makka, inhabited by Ṭhaqīf. Between these towns, in the valley of Ḥunyan a battle took place in 8AH between the tribes of Hawazin and Ṭhaqīf and the Prophet's (ṣ.a.a.s.) army, commanded by Khālid b. al-Walid. The Muslims won a decisive victory, consolidating the Prophet's (ṣ.a.a.s.) position. *EI²*, *s.v.* 'Ṭā'if,' Vol.X, (Leiden, 2000), p.114. The Battle of Ḥunyan is mentioned in the Qur'ān, 9:25-26.
[177]Ibn Kathīr, Vol.II, p.99.
[178]72:1. This incident is recorded by Ibn Isḥāq, p.192.

fruits (of your toil), but give glad tidings to those who patiently persevere.'[179] This principle of perseverance with patience is further emphasised with an obligation that in difficulties to seek God's help with patience and prayers, with the advice that God is with those who patiently persevere.[180] All of these verses are succinctly encompassed in the verse, '*verily We have created man into toil and struggle.*'[181] So for the believers in moments of trial and tribulation that comes to every believer, his duty remains, '*Then do ye remember Me; I will remember you. Be grateful to Me, and reject not Faith*!'[182]

An attempt at bribing the Prophet (ṣ.a.a.s.) by promising to make him a wealthy man met with no success. An unsuccessful attempt was made on the Prophet's (ṣ.a.a.s.) life by ʿAmr b. Hishām b. al-Mughīra otherwise known as Abū Jahl and whose title was Abu'l-Ḥakam, whilst the Prophet (ṣ.a.a.s.) was at Morning Prayer.[183]

But if success was assured to the Prophet (ṣ.a.a.s.) to complete his mission the one factor that he had to bear in mind consistently and constantly was patience[184] in his mission to, '*invite (all) to the Way of thy Lord with wisdom and beautiful preaching: and argue with them in ways that are best and ways that are most gracious:*'[185] In his call to preach the one Allāh, the Prophet (ṣ.a.a.s.) had therefore to believe unstintingly in the verses he had received and that prayers, patience, perseverance and steadfastness were in order always. Also that the first task of his mission was to, '*admonish thy nearest kinsmen, and lower thy wing to the Believers*

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[179]2:155
[180]2:153
[181]90:4
[182]2:152
[183]Ibn Isḥāq, pp.119, 132.
[184]16:126-127
[185]16:125

who follow thee'[186] and having done that to preach openly what he was commanded to preach.[187] Should any member of his family seek to actively oppose him then severe punishment awaited him in the hereafter.[188]

Although opposition to the Prophet's (ṣ.a.a.s.) preaching continued, events were taking place outside the vicinity of Makka and which would have a profound effect upon the course of his life and Islām. If active attempts by him were to be met with rebuffs, events at Yathrib were moving in his favour though in a manner which was both inconspicuous and indirect, and which could not have been foreseen by any ordinary person. The Prophet (ṣ.a.a.s) could well have reflected on God's invisible hand with assistance in two further unexpected conversions. The first of these was that of Abū Dharr who travelled far and whose conversion to Islām, was immediate following his meeting and conversation with the Prophet (ṣ.a.a.s.) at Makka.[189]

The second conversion was that of Ṭufayl of the *Banū Daws*. Both members of tribes of the Western region of Arabia, who would undoubtedly have with God's help carried the Prophet's (ṣ.a.a.s.) message of Islām to parts of Arabia that would have been a great assistance in spreading his message after his migration. With the departure of these two new and unexpected converts, the Prophet (ṣ.a.a.s.) might well have reflected on Allāh's words, '*but We have made the (Qur'ān) a Light, wherewith We Guide such of Our servants as We will; and verily thou dost guide (men) to the Straight Way.*'[190]

The Prophet's (ṣ.a.a.s.) visits to Yathrib are well recorded, and his legendary fairness in dealings would have spread to the oasis, especially his action

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[186] 26:214-215. These verses are discussed in Chapter Four, 'The Concept of Dispute Resolution in the Ismā'īlī School: The Authority of the Imām from the *Ahl al-Bayt*.'
[187] 15:94
[188] 111:1-5
[189] Ibn Kathīr, Vol.I, p.324.
[190] 42:52

when asked to replace the black stone after the completion of the re-building of the Ka'ba. This single act of fair adjudication having caught the imagination of the Quraysh in Makka would certainly have spread to Yathrib; and it was at Yathrib that one single event of such calamitous proportion was to occur that was to start a chain of events which would lead to his emigration to Yathrib and to seal his mission. The persecution of the Prophet (ṣ.a.a.s.) in Makka had continued.

However, the internecine battles in Madīna between the two tribes of *al-Aws*[191] and *al-Khazraj*[192] culminating in the Battle of Bu'āth[193] in 617AD between these two pagan tribes had finally brought to their notice that the continuation of enmity simply meant the dissipation of their societies, and that such dissipation made them weak in men, material and property and wealth. They must surely have realised that by continuing their pointless wars, the Jews of Madīna could remain influential over them. They had heard of Prophet's (ṣ.a.a.s.) legendary adjudication over the replacing of the black stone. They must also have been aware of a late Makkan *sūra, 'To every people (was sent) a Messenger: when their Messenger comes (before them), the matter will be judged between them with justice, and they will not be wronged.'*[194] It was to the Prophet (ṣ.a.a.s.) that they were to turn to adjudicate in their dispute in the certain belief that he would be able to put an end to their disputes that had made life in Yathrib intolerable. It was to Islām that the Prophet (ṣ.a.a.s.) directed them.

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[191]A major tribe of Madīna and an important section of the *anṣār*. The name is mentioned in the Constitution of Madīna. *EI²*, *s.v.* 'Al-Aws,' Vol.I, (Leiden, 1960), p.771.
[192]They appeared keener to settle their dispute with al-Aws. At al-'Aqaba 10 attended as against 2 for al-Aws and at the second covenant of al-'Aqaba 62 attended as against 11. At the battle of Badr, 175 of them fought as against 63 for *al-Aws*. *EI²*, *s.v.* 'Al-Khazradj,' Vol.IV, (Leiden, 1978), p.1187.
[193]The battle was a climax of a series of internal wars. *EI²*, *s.v.* 'Bu'āth,' Vol.I, (Leiden, 1960), p.1283.
[194]10:47

Known now as the two Covenants of al-ʿAqaba they were to open a path, a door through which the Prophet (ṣ.a.a.s.) was to walk to safety from persecution in Makka and even a conspiracy to kill him. These two covenants were the forerunners of two other treaties that were to follow, that of the Constitution of Madīna and al-Ḥudaybiyya. It was the second Covenant at al-ʿAqaba which was more important for two reasons. Firstly six times more people had arrived from Yathrib than when the first Covenant was signed. There were seventy who came to meet him. Secondly at this meeting, an oral promise was extracted from those assembled to protect him in the same way as they would protect their women and children. The conversation that followed is well recorded, and it is clear also from that conversation that the Prophet's (ṣ.a.a.s.) honest and trustworthy reputation had preceded him, as indeed had his mission, which was the preaching of Islām and submission to the one Allāh.

On this second occasion the Prophet (ṣ.a.a.s.) was accompanied by his uncle al-ʿAbbās b. ʿAbd al-Muṭṭalib. Al-ʿAbbās had not yet embraced Islām but was taking a keen interest in his nephew's progress. He advised Khazraj of the protection that was afforded to the Prophet (ṣ.a.a.s.) by his family that he was respected and finally that he was safe in his town. The Prophet (ṣ.a.a.s.) was nonetheless determined to answer their call to adjudicate in their dispute. They therefore must keep trust with him to protect him in the same manner. He invited them to accept and confirm that they would discharge those responsibilities. He invited their spokesman Abū Umama to speak, '*Ask, Muḥammad, for your Lord whatever it is you want. Then ask for yourself .....then tell us of our reward.*'[195]

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[195]Ibn Kathīr, Vol.II, p.137.

The Prophet (ṣ.a.a.s.) is recorded as having replied by first reciting the Qur'ān, inviting the assembled men to worship Allāh, to grant him and his companions refuge and their reward would be paradise.[196]

Their only concern was that the Prophet (ṣ.a.a.s.) would not desert them, particularly as they had relations with the Jews of Madīna. They sought and were given that assurance. The next point of concern was the fact that they had ties to other men in Yathrib and should they keep faith with the Prophet (ṣ.a.a.s.), and should God grant him victory, then he might leave them and return to Makka. The unequivocal reply from the Prophet (ṣ.a.a.s.) was that in that event he would not desert them.[197] On that assurance an invitation was extended to the Prophet (ṣ.a.a.s.) to, '*hold out your hand*' and they pledged their allegiance.

The significance of the agreement is not that it was made orally but that it was to be binding in honour; a promise for a promise which both sides kept to the full and in the case of Khazraj even more. The significance here was that by receiving this promise, the Prophet (ṣ.a.a.s.) could now feel comfortable and secure in the knowledge that he was now part of the family of the people from Yathrib, and that he would continue to receive God's help both direct and indirect so that he could complete his mission.

The principle of a binding exchange of mutual promises, encompassed in the Prophetic tradition, in now clearly discernible in various Qur'ānic injunctions. A clear example is, *'O ye who believe! Fulfil (all) obligations.'*[198] Obligations entered into carry with them a religious sanction, *'and fulfil (every) engagement, for (every)*

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[196]*ibid*, p.137.
[197]Ibn Isḥāq, p.202.
[198]5:1

engagement will be enquired into (on the day of Reckoning).'[199] A third Qur'ānic provision that requires parties to an agreement to know and accept that God is a witness to all agreements is, '*and fulfil the covenant of Allāh.*'[200] With regard to dispute resolution therefore performance of one's promise becomes a fundamental obligation.[201]

Quraysh got wind of the meeting and despite this or perhaps because of it their persecution continued unabated culminating in a plot, a conspiracy to murder the Prophet (ṣ.a.a.s.). The chief architect of the plot was Abū al-Ḥakam b. Hishām known as Abū Jahl. The plot was simple in its design. Its execution required each clan to provide a young warrior who would be provided with a sharp blade; each of them would strike a blow; the responsibility would fall equally on each clan. The object was to eliminate the Prophet (ṣ.a.a.s.) and to force *Banū 'Abd Manāf*, to accept blood money, since they could not fight all of them.

The Prophet (ṣ.a.a.s.) enjoyed Allāh's protection. His faith remained unshaken. He received a command that contained an implicit warning from Gabriel, '*Do not sleep tonight on the bed on which you usually sleep.*'[202] With that he made his preparations to leave Makka for the sanctuary of Madīna. That night he invited his cousin ʿAlī to sleep in his bed and to wrap himself in his green Ḥaḍramī mantle. He assured ʿAlī that he himself used to sleep wrapped in that mantle and no harm would befall him. His other specific instruction was to remain in Makka, to return

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[199]17:34

[200]6:152

[201]The importance of fulfilling and completing agreements entered into are not only highlighted in ʿAlī's letter to al-Ashtar mentioned at the beginning of this chapter but as will be seen in Chapter Two, 'The *Ṣiffīn* Arbitration Agreement Between ʿAlī b. Abī Ṭālib and Muʿāwiya b. Abī Sufyān,' played a crucial role in ʿAlī's determination, in the face of strong advice proffered by a section of his army, not to rescind the arbitration agreement between himself and Muʿāwiya.

[202]Ibn Isḥāq, p.222.

goods belonging to men that were deposited with the Prophet (ṣ.a.a.s.) for safe keeping, '*for anyone in Makka who had property which he was anxious about left it with him because of his honesty and trustworthiness.*'[203] ʿAlī implicitly and without questioning obeyed his order and remained in Makka for three days discharging the Prophet's (ṣ.a.a.s.) obligations, before joining him in Madīna.

The conspirators realised the following morning, when they saw ʿAlī arise from the Prophet's (ṣ.a.a.s.) bed that the plot to kill the Prophet (ṣ.a.a.s.) of Islām had failed. Allāh's design, ever present in seeking to protect His Messenger, was explained with a Revelation, '*Remember how the unbelievers plotted against thee, to keep thee in bonds, or slay thee, or get thee out (of thy home). They plot and plan, and Allāh too plans, but the best of planners is Allāh.*'[204]

As for the general plotting of the unbelievers which would have continued until the Prophet's (ṣ.a.a.s.) final victory over them the Qur'ān confirms, '*And (the unbelievers) plotted and planned, and Allāh too planned, and the best of planners is Allāh.*'[205] The Prophet (ṣ.a.a.s.) arrived in the oasis of Madīna on 24th/27th Sept 622AD. But not before he was to receive one Revelation which would have set his heart and mind at peace, '*Verily He Who ordained the Qur'ān for thee, will bring thee back to the Place of Return. Say: "My Lord knows best who it is that brings true guidance, and who is in manifest error.*"'[206]

Three administrative decisions, first the pairing of the *muhājirūn* and the *anṣār* as brothers, second the call to prayer, the *adhan*, and third, the raids or *gazwas*, would over a period of time unite the young community of believers into,

'*...a single Brotherhood: so make peace and reconciliation between your two*

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[203] *ibid*, p.224.
[204] 8:30
[205] 3:54
[206] 28:85

(contending) brothers;'[207] the object of which was to assist and facilitate resolution of disputes between them. The Prophet (ṣ.a.a.s.) himself taking his cousin ʿAlī by the hand chose him as his brother with these words, '*This is my brother.*'[208] This confirmation of ʿAlī's position does not stand in isolation, but read in conjunction with his last and final pronouncement at the Farewell Pilgrimage, '*O you people, know that what Aaron was to Moses, ʿAlī is to me, except that there shall be no prophet after me,*'[209] reflected in the Qur'ān, '*And Moses had charged his brother Aaron (before he went up): "Act for me amongst my people: Do right, and follow not the way of those who do mischief.*"'[210]

With his arrival in Madīna emphasis on his mission had now changed from eschatology of the Makkan period to community administration, organisation and law. The Prophet's (ṣ.a.a.s.) genius as an administrator and community organiser came to the fore yet again. At the forefront of his attempts to organise his community, the Prophet (ṣ.a.a.s.) would have been aware of the historical enmity of the two Madinese tribes (some of whom had embraced Islām) that is, of *al-Aws* and *al-Khazraj* and their Battle of Buʿāth. They were now asked to offer hospitality to the Makkan emigrants and at the same time deal with those of their brethren who had not accepted Islām. The answer lay in the Constitution of Madīna concluded between the *muhājirūn* and *anṣār* on the one side and the Jews on the other side. Unlike the two Covenants of al-ʿAqaba which were oral, this particular document, was in writing and is preserved in full. Ibn Isḥāq looks at one of the most important and earliest of the historical documents in Islām, the Constitution of Madīna. He quotes the Constitution in full.[211]

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[207]49:10
[208]Ibn Isḥāq, p.234.
[209]*Daʿāʾim*, p.22.
[210]7:142
[211]Ibn Isḥāq, p.231.

The preamble to the Constitution begins with *inter alia* the *basmallah*, In the name of Allāh, Most Compassionate, Most Merciful. It goes on to confirm that,

> This is a document from Muhammad the prophet [governing the relations] between the believers and Muslims of Quraysh and Yathrib, and those who followed them and joined them and laboured with them. They are one community (*umma*) to the exclusion of all men.[212]

> Believers shall not leave anyone destitute among them, by not paying his redemption money or blood wit in kindness.[213]

> The Jews shall contribute to the cost of war so long as they are fighting along side the believers. The Jews of the B. 'Auf are one community with the believers (the Jews have their religion and the Muslims have theirs), their freedmen and their persons except those who behave unjustly and sinfully, for they hurt but themselves and their families.[214]

> Yathrib shall be a sanctuary for the people of this document.[215]

The Constitution concludes with a statement that God approves the content of the document, He is the Protector of the good and God-fearing and Muhammad (ṣ.a.a.s.) is the Apostle of God. The two clauses concerning dispute resolution are,

> Whenever you differ about a matter it must be referred to God and to Muhammad.[216]

> If any dispute or controversy likely to cause trouble should arise it must be referred to God and to Muhammad the apostle of God.[217]

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[212]*ibid*, p.232.
[213]*ibid*, p.232.
[214]*ibid*, p.232.
[215]*ibid*, p.233.
[216]*ibid*, p.232.
[217]*ibid*, p.233.

Ibn Kathīr considers the Constitution in detail, expresses no opinion on its authenticity considers its terms in detail and without comment. He does mention a clause of the Constitution that might replicate the above paragraphs.[218]

Two modern authors, Haykal and W. Montgomery Watt consider the Constitution. Whereas Haykal is simply content to record the authenticity of the document,[219] it is Watt who offers a detailed consideration, examination and comment as to the Constitution's crucial all-important dispute resolution clauses.[220]

Montgomery Watt considers the Constitution at length, however in the crucial field of dispute resolution he has drawn attention to two important clauses, different from each other. His opinion is directed at these two clauses as replicating each other and therefore one is superfluous, but he does not venture an opinion as to which one. The two clauses are reproduced below. Montgomery Watt is at pains to point out that both clauses say that disputes are to be referred to 'Allāh and Muḥammad (ṣ.a.a.s.).' Watt's comment that the second clause is more precise misses an essential difference between the two clauses. To understand the significance and the meaning of the two clauses, both of them are quoted in full,

1) Wherever there is anything about which you differ, it is to be referred to God and to Muḥammad (peace be upon him)

2) Whenever among the people of this document there occurs any incident (disturbance) or quarrel from which disaster for it (the people) is to be feared, it is to be referred to God and to

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[218]Ibn Kathīr, Vol.II, p.212.

[219]Haykal, Muḥammad Ḥusayn, *The Life of Muḥammad (ṣ.a.a.s.)* tr. Ismā'īl Rāgī A. al Fārūqī (Philadelphia, 1976, [3rd Edition]), p.180. Hereafter cited as Haykal.

[220]This aspect of the governance and administration of a community by a way of a constitution is considered in Chapter Four, 'The Concept of Dispute Resolution in the Ismā'īlī School: The Authority of the Imām from the *Ahl al-Bayt*.'

> Muḥammad, the Messenger of God (God bless and preserve him). God is the most scrupulous and truest (fulfiller) of what is in this document.[221]

There is no doubt that both clauses stipulate God and through Him the Prophet (ṣ.a.a.s.) as the supreme arbiter of disputes. The essential distinction between the wordings of each clause is that in Clause1 reference of disputes to the Prophet (ṣ.a.a.s.) is wide ranging in that any dispute whether *inter se* or in relation to the interpretation of the Constitution was to be referred to the Prophet (ṣ.a.a.s.). An obvious example would be the interpretation and meaning of the word '*neighbourly protection'* mentioned in the Constitution. Whereas Clause2 refers specifically to quarrels between two or more individuals, which is serious enough to warrant a breach of the peace, or from which a disaster was feared, should be referred to the Prophet (ṣ.a.a.s.). A typical example would be where two parties took to arms to settle their disputes. '*God is the most scrupulous and truest (fulfiller) of what is in this document.*'[222]

The interpretation and meaning is that in any dispute *inter parties* concerning the meaning of the document in relation to fights, duties, obligations arising there under was to be referred to Allāh and to the Prophet (ṣ.a.a.s.). The sophistication of the language used, would suggest that both clauses were constructed with specific purposes in mind and could be read and interpreted independently of the whole document where this was necessary.

The second event was a series of Revelations[223] designed to inculcate in the community of believers a code of conduct *inter se* so as to bind them further into a

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[221]Watt, Montgomery W., *Muhammad at Madina,* (Karachi, 1956), p.223.
[222]*ibid*, p.224
[223]49:1-18

united community. Conduct such as recognition of the Prophet (ṣ.a.a.s.) as the Messenger of Allāh, the manner in which the community of believers was to approach him or address him. Most importantly the making of peace and reconciliation between the believers were not to defame or laugh at others and where a fight breaks out between believers, then the believers were to realise that they were one brotherhood and peace and reconciliation were to be effected.[224]

This legal principle of settling disputes between the various parties and signatories to this document is taken further in many verses in the Qur'ān of particular significance that establishes a mechanism by which dispute resolution is to be established, '*If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they seek to set things aright, Allāh will cause their reconciliation: For Allāh is full of knowledge, and is acquainted with all things.*'[225] The Qur'ān provides a mechanism for resolving dispute, but also enjoins upon believers to reduce their agreement to writing in transactions involving future obligations. Further, the Qur'ān insists that in any such written transactions, the parties to the transaction must choose witnesses. The purpose of committing agreements to writing and requiring witnesses is to prevent doubts among the parties in any future dispute relating to the particular transaction in question.[226] The particular verses that establish the authority of the Prophet (ṣ.a.a.s.) as judge are,

'*Allāh doth command you to render back your Trust to those to whom they are due; and when ye judge between people that ye judge with justice: verily how*

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[224]49:10
[225]4:35
[226]2:282-283. Chapter Two, 'The *Ṣiffīn* Arbitration Agreement Between 'Alī b. Abī Ṭālib and Mu'āwiya b. Abī Sufyān' considered in the light of these two Qur'ānic injunctions. Also, Chapter Three, 'The Concept of Dispute Resolution in the Mālikī School, Imām Mālik, The Muwaṭṭā, The '*amāl* of Madīna.'

excellent is the teaching which He giveth you! For Allāh is He Who heareth and seeth all things.'[227]

'O ye who believe! Obey Allāh, and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allāh and his Messenger, if ye do believe in Allāh and the Last Day: that is best, and most suitable for final determination.'[228]

'But no by Lord, they can have no (real) Faith. Until they make thee judge in all disputes between them. And find in their souls no resistance against thy decisions, but accept them with the fullest conviction.'[229]

'We have sent down to thee the Book in truth, that thou mightest judge between people by that which Allāh has shown thee; so be not an advocate for those who betray their trust;'[230]

Six months after settling in Madīna, the Prophet (ṣ.a.a.s.) began sending out groups of people on what historians have called raids or *ghazwas*. Early historians considered their raids a form of revenge on the Quraysh for the Muslims' expulsion from Makka. Another explanation is that the raids had a purely psychological objective, which was to press home to the Quraysh that they should come to an accommodation with the Muslims.[231] The more logical explanation would be that the purpose of the raids was simply to organise reconnoitring parties to keep the *muhājirūn's* expectations of return alive. In addition pacts of friendship were signed with the *Banū Ḍamra* and the *Banū Mudlij*. The raids organised were of small parties and apart from the raid led by 'Ubayda b. al-Hārith b. al-Muṭṭalib

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[227]4:58
[228]4:59
[229]4:65
[230]4:105
[231]Haykal, p.203.

when a single solitary arrow was fired, the physical encounters with the Makkans never took place. In these small-scale raids sent out by the Prophet (ṣ.a.a.s.), the *anṣār* or helpers did not participate nor were they asked to do so.

It was the expedition led by ʿAbd Allāh b. Jaḥsh b. Riʿāb al-Asad in the sacred month of *Rajab* that remains important. Only eight emigrants and no helpers accompanied al-Asad. He was given a sealed letter by the Prophet (ṣ.a.a.s.), with clear instruction not to open and read the letter until he had travelled for two days. After reading the letter he was to proceed to Nakhla, a place between Makka and Ṭā'if. He read the letter and explained the contents to his companions and the instructions he had received from the Prophet (ṣ.a.a.s.). On the last day of the sacred month of *Rajab* they encountered a caravan belonging to Quraysh carrying merchandise. Concerned that if they left Quraysh alone, they would enter the sacred precinct of the Kaʿba and would be safe from the raiding party. To attack in the prohibited month would mean the taking of life, a breach of the rules of engagement. They decided to attack; they killed as many of the Quraysh as possible and captured the caravan and returned to Madīna.[232]

On receiving the news of what happened, the Prophet (ṣ.a.a.s.) was angry and refused to accept his one-fifth set aside for him by the raiding party. It was now that a Revelation confirmed that the raid that took place in the prohibited month was more serious with Allāh, '*Say*: "*fighting therein is a grave (offence); but graver is it in the sight of Allāh to prevent access to the path of Allāh to deny Him, to prevent access to the Sacred Mosque, and drive out its members.*"'[233]

The point of the raid could not have been lost on the Quraysh. The Prophet (ṣ.a.a.s.) must have accepted that dispute with the Quraysh would soon be resolved.

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[232]Ibn Isḥāq, p.281.
[233]2:217

The manner and timing of the resolution would be at Allāh's command. The resolution of the conflict was to reach its climax with three major engagements with Quraysh culminating in loss of life on both sides. The first and most decisive battle was that at Badr.

These two verses now sanctioned war with Quraysh as a means of resolving the conflict between the parties. The Prophet (ṣ.a.a.s.) attempted to seize a returning caravan of Quraysh that was unarmed. He was keen to seize this unarmed caravan that would have boosted his men's morale and simultaneously inflicted a not inconsiderable economic damage on Quraysh. But Allāh's design was that of a command to meet the larger armed caravan in battle.[234]

But in setting out with the original intention of meeting an unarmed caravan, and having by Divine hand, been forced to engage the enemy, the Prophet (ṣ.a.a.s.) would have been aware of the Second Covenant of al-'Aqaba and the promise extracted from the *anṣār* to protect him, within the territorial confines of Madīna.

The Prophet (ṣ.a.a.s.) acting under the command of the Qur'ān,[235] consulted with and obtained the consent of the *anṣār* of Madīna to fight. Although in arriving at their collective decision to fight on behalf of the emigrants *(muhājirūn)*, the *anṣār* would have been aware that they were under no obligation to do so since their promise to protect the Prophet (ṣ.a.a.s.) was to be effective only within the precincts of Madīna. On the other hand they would have been aware of the Revelation[236] commanding them, the believers, not to be like the unbelievers, but to be prepared to fight and die for the sake of their brethren. Here the principle

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[234]8:7;22:39-40
[235]42:38
[236]3:156

of brotherhood established by the Qur'ān was taken one stage further when Muslims are commanded to sacrifice their lives for the sake of Islām. They chose to fight with the Prophet (ṣ.a.a.s.).

Battle of Badr was joined on Friday morning the 17th *Ramdan* in the second year of the Ḥijra (2AH/624). A small band of Muslims numbering no more than 300 ill equipped men (175 of *al-Khazraj* fought as against 63 for *al-Aws*) originally set out to attack a small caravan of 40 men. However, they met and defeated a large well equipped force of Quraysh numbering 1000 men. The Prophet (ṣ.a.a.s.) prior to battle, surveyed his opponents, and entreated Allāh for help, '*O God, fulfil what you promised me; O God, if this force perishes You will never again be worshipped on earth*,'[237] to secure his victory, were answered. The prayers were answered but with a revelation that where Prophet (ṣ.a.a.s.) sought to attack Abū Sufyān's unarmed 40 men, Allāh gave him a larger force to attack, '*Behold! Allāh promised you one of the two parties, that it should be yours: Ye wished that the one unarmed should be yours, but Allāh willed to establish the Truth according to His words, and to cut off the roots of the Unbelievers.*'[238] As for Prophet's (ṣ.a.a.s.) invocation for help from God, he was reminded of that help, '*Remember ye implored the assistance of your Lord, and He answered you: "I will assist you with a thousand of the angels, ranks on ranks.*"'[239]

No doubt with loss sustained at the Battle of Badr, it was inevitable that the army of Quraysh would seek to avenge the defeat at Badr. Events were moving towards a clash of arms, in what is known as the Battle of Uḥud, so called because the Prophet (ṣ.a.a.s.) had encamped at the foot of the mountain named Uḥud. He

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[237]Ibn Kathīr, Vol. II, p.277.
[238]8:7
[239]8:9

received information from his uncle ʿAbbās b. ʿAbd al-Muṭṭalib via a messenger, of a planned an attack on Madīna, by Quraysh under the command of Abū Sufyān. Once again a *Shūrā* or consultative Council was assembled to decide tactics.

It is known that the Prophet (ṣ.a.a.s.) favoured an organising of his defences in Madīna but the majority view was to go out to meet the enemy. At the head of a small army of 700 men the Prophet (ṣ.a.a.s.) marched out to meet Abū Sufyān and decided to take up positions on Mount Uḥud. Battle was joined on the 7th *Shawwāl* in the third year of the Hijra (3AH/625). Three thousand angels sent by Allāh to assist the Muslims equal in number to the enemy forces were of no avail when Muslim archers in disobedience of their orders deserted their posts.[240] The consequence of such desertion left the Prophet (ṣ.a.a.s) exposed and indeed he was wounded. As the Prophet (ṣ.a.a.s.) lay injured and bleeding profusely from his face, ʿAlī b. Abī Ṭālib poured water from his shield to wash the Prophet's (ṣ.a.a.s.) face and Fāṭima put ashes from a burnt mat on to the wound which stemmed the flow of blood.[241] The lesson of Uḥud was to obey the Prophet (ṣ.a.a.s.) and to trust in his judgement.

The third and final engagement was the Battle of the Ditch in 5AH/627, so called because the Muslim army had on the advice of an early Persian convert and a Companion, Salmān al-Fārsī, built a ditch around the North of their encampment to protect them from the encroaching Makkans. Individual rather than set piece battles ensued. The Makkans could not pierce the defences. The siege lasted about two weeks. It was the month of February. A cold wind blew up scattering their tents. The disheartened Makkans left and the siege was lifted. Once again Allāh's assistance was on their side, '*O ye who believe! Remember the Grace of Allāh,*

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[240]3:121-125
[241]Muslim, Vol.III, p.984, *ḥadīth*, No.4414.

(Bestowed) on you, when there came down on you hosts (to overwhelm you): but We sent against them a hurricane and forces that ye saw not: but Allāh sees (clearly) all that ye do:'[242] The importance of these three encounters was that they consolidated the Prophet's (ṣ.a.a.s.) position and may have paved the way for his decision to go for the *'umra*, a year after the Battle of the Ditch. The consequence of this decision was that it resulted in the Treaty of al-Ḥudaybiyya with Quraysh. Although concern was expressed by some of those who had accompanied him and had expressed disappointment at the terms of the Treaty, nonetheless, they all pledged their allegiance to the Prophet (ṣ.a.a.s.) as is evidenced by a Revelation.

> Verily those who plight their fealty to thee plight their fealty in truth to Allāh: the hand of Allāh is over their hands: then any one who violates his oath, does so to the harm of his own soul, and any one who fulfils what he has covenanted with Allāh,- Allāh will soon grant him a great Reward.[243]

The Treaty was in fact a prelude to the conquest of Makka, and it must have become apparent that the dispute with Quraysh was drawing to a close. The Prophet (ṣ.a.a.s.) prepared for the conquest of Makka. He must have been aware that Makka because of its strategic position was important to the survival of Islām. Further Makka housed the Ka'ba. The conversion of Quraysh to Islām would have ended the hostile environment that existed between the two towns.

The sanctity of Makka as enumerated and the Prophet (ṣ.a.a.s.) would have in mind the part from the Qur'ān and in particular, '*Remember We made the House a place for assembly for men and a place of safety; and take ye the Station of Abraham as a place of prayer; and We covenanted with Abraham and Ismā'īl that*

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[242] 33:9
[243] 48:10

they should sanctify My House for those who compass it round,'[244] and, '*turn thy face in the direction of the Sacred Mosque wherever ye are, turn your faces in that direction.*'[245] Finally, '*Behold! Ṣafā and Marwa are among the Symbols of Allāh.*'[246] These three verses (amongst many) would have made it incumbent on the Prophet (ṣ.a.a.s.) to take all steps necessary to incorporate Makka into the Islamic Community.

He conceived of a plan to capture the city. He wished to surprise Quraysh before they could execute a plan to defend the city. His main concern was to conquer the city without bloodshed. His plan was conceived following the abortive visit by Abū Sufyān to ascertain Prophet's (ṣ.a.a.s.) intention for the city. Quraysh must have been aware that the conquest of Makka was only a matter of time. As he prepared his army in Madīna for a final assault on Quraysh, Thābit b. Abū Balta'ah asked his wife Sārah to take a letter hidden on her person, addressed to Quraysh to warn them of the impending assault. The Prophet (ṣ.a.a.s.) suspected the plot, immediately commissioned 'Alī and accompanied by al-Zubayr b. al-'Awwām to follow her and to recover the letter which they did.[247]

The Muslim army left Madīna and by the time they had arrived at al-Zahrān, four miles from Makka they numbered 10,000. The Prophet's (ṣ.a.a.s.) uncle al-'Abbās accompanied by all the family left Makka and met up with the Prophet (ṣ.a.a.s.) and embraced Islām. A two-prong advance on the city achieved the conquest of Makka. The Prophet (ṣ.a.a.s.) ordered Khālid b. Walīd, Al-Zubayr

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[244]2:125
[245]2:144, 149, 150
[246]2:158
[247]Al-Mufīd, *Kitāb al-Irshād*, tr. I.K.A., Howard, (Horsham, 1981), p.35. Hereafter cited as *Kitāb*.

b. al-ʿAwwām and Saʿd b. ʿŪbāda[248](d.12/13AH) to enter the city and gave to Saʿd his banner to carry.[249] The Prophet (ṣ.a.a.s.) received reports from ʿUmar and Abū Sufyān to the effect that Saʿd b. ʿŪbāda had stated that the sanctuary i.e. the Kaʿba would lose its sanctity; so perturbed did he become that violence would ensue and he had given orders that with the exception of some, no one should be killed, that he ordered ʿAlī to, '*go to Sa'd and take the standard away from him. You be the one who enters Makka with it.*'[250]

The importance of the Qur'ān and the *sunna* of the Prophet in dispute resolution and in particular, '*O ye who believe! Obey Allāh and obey the Messenger and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allāh and the Messenger*,'[251] becomes self-evident.

Disputes and resolution of conflicts do not stand in isolation but in any society there has to be in existence the authority available to its members to refer their disputes for adjudication. During his stay in Madīna one of the many functions that were carried out by the Prophet (ṣ.a.a.s.) was exercising judicial authority over the nascent Muslim community. His judicial authority was based on the Qur'ān and in particular, the above quoted verse. This principle of referring differences or disagreements for determination by the Prophet (ṣ.a.a.s.) is encapsulated in many verses of the Qur'ān with a proviso that such references to adjudicate upon disputes was not only a sign of real faith but also required of believers acceptance with conviction of decisions as a sure sign of a fairer decision and for them to find in

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[248]One of the key figures in the events at the *Saqīfa* of the *Banū Sāʿida*, mentioned and considered in the next chapter. *EI²*, *s.v.* 'Saʿd b. ʿŪbāda,' Vol.IX, (Leiden, 1997), p.698.
[249]Ibn Kathīr, Vol.III, p.398.
[250]*Kitāb*, p.92. This incident is also mentioned by Ibn Kathīr, Vol.III, p.399.
[251]4:59

their souls no resistance to such decisions.[252] However the exercise of that judicial authority whether of a conciliatory nature or of a judicial nature, could under the provision of the Qur'ān and under Prophetic tradition be delegated to other persons.

Thus in any dispute between two parties, an authority could be appointed from either party with the desired object of endeavouring to effect a reconciliation between the two parties, God willing.[253] Although *prima facie* the verse in question refers ostensibly to family disputes between husband and wife, nonetheless it can and has been applied in any situation to resolve a conflict or dispute between any two parties whatever the nature of the dispute. Thus, judicial authority of the Prophet (ṣ.a.a.s.) was delegated by him on a number of occasions to individuals, but particularly so to Muʿādh b. Jabal on his appointment as a judge to al-Yaman,[254] and ʿAlī b. Abī Ṭālib, who exercised delegated judicial authority not only during the Prophet's (ṣ.a.a.s.) lifetime but also during the Caliphates of Abū Bakr and ʿUmar b. al-Khaṭṭāb, suggesting perhaps that the practice of delegating judicial authority continued after the passing away of the Prophet (ṣ.a.a.s.).[255]

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[252]4:65
[253]4:35
[254]The exchange of words of appointment between the Prophet (ṣ.a.a.s.) and Muʿādh are considered in Chapter Three, 'The Concept of Dispute Resolution in the Mālikī School, Imām Mālik, The Muwaṭṭā, The '*amāl* of Madīna.'
[255]*Kitāb*, p.138.

CHAPTER TWO

The *Ṣiffīn* Arbitration Agreement Between

ʿAlī b. Abī Ṭālib and Muʿāwiya b. Abī Sufyān

The Prophet (ṣ.a.a.s.) passed away on Monday 12th *Rabīʿ* I of the eleventh year of the Ḥijra after a brief illness. His request to, '*bring me writing materials with which I can write you a document after which you will never go astray*,'[256] was either turned down or ignored. The issue of succession to his authority became of prime importance.

Two years prior to his passing away the *anṣār*, who had been generally dissatisfied with their condition and at the growing influence of Quraysh gathered at the *Saqīfa* (roofed building), of the *Banū Sāʿida* to pledge their oath of allegiance to their leader Saʿd b. ʿŪbāda. There was also a proposal from them for a two-leader solution, one from *anṣār* and one from *muhājirin*, if implemented, would certainly have been damaging to Islām.

Saʿd was the leader of the *anṣār* to whom the Prophet (ṣ.a.a.s.) gave his banner immediately prior to the conquest and entry into Makka. However, ʿAlī was ordered to take the standard away from him and to enter Makka with it, because the Prophet (ṣ.a.a.s.) became perturbed at reports about Saʿd's remarks, '*today is the day of the great battle; today the sanctuary will lose its sanctity*,'[257] meaning that the sanctity of the Kaʿba would end. Another comment that reflected his hostility towards Quraysh and Makka was, '*Today is the day of slaughter, the day of*

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[256]Ibn Kathīr, Vol.IV, (Reading, 2000), p.326. The Qur'ān 2:180 enjoins believers to make a will when death approaches.

[257]*ibid,* Vol.III, p.399. The distribution of gifts to late converts after the fall of Makka had fuelled resentment by the *anṣār* who had through Saʿd expressed their feelings. This resentment may have surfaced at the time of the *Saqīfa*.

capturing any daughter.'[258] His open hostility, apparent to ʿUmar and Abū Sufyān mentioned in the previous chapter, and noted by al-ʿAbbās, the Prophet's (ṣ.a.a.s.) uncle, who also complained of Saʿd's comments.[259]

Also at the meeting were Abū Bakr and ʿUmar. They could see the situation was rather fluid. After a chaotic and heated debate, the leadership crisis was resolved by the combined efforts of Abū Bakr, ʿUmar and Abū ʿUbaydah al-Jarrāḥ. ʿUmar invited Abū Bakr, '*stretch out your hand O Abū Bakr, so that I may give you the oath of allegiance.*'[260] At the meeting of the *Saqīfa* of *Banū Sāʿida*, ʿAlī was not present; his supporters were there who proposed his name. A principal proponent of ʿAlī's name was al-Zubayr b. al-ʿAwwām.[261] ʿAlī was himself busy with the preparation and the eventual burial of the Prophet (ṣ.a.a.s.). As ʿAlī, together with others washed the Prophet's (ṣ.a.a.s.) body with his shirt still on, resting the Prophet's (ṣ.a.a.s.) head on his own chest, he called out, '*by my father and mother! How sweet smelling you are, alive or dead.*'[262]

Abū Bakr then became the first Caliph or successor to the Prophet (ṣ.a.a.s.). Abū Sufyān, an implacable opponent of the Prophet (ṣ.a.a.s.) and of Islām, father of Muʿāwiya, challenged his authority. He offered ʿAlī his help, '*O Abū Ḥasan, stretch out your hand so that I may give you the oath of allegiance.*'[263] ʿAlī's reply was as emphatic as it was swift, '*By God, you do not intend anything but (to stir up) dissension (fitnah). For long have you desired evil for Islām. We do not need your advice.*'[264]

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[258] *Kitāb*, p.92.
[259] *ibid*, p.92.
[260] Al-Ṭabarī, Vol.IX, (Albany, N.Y., 1990), p.184.
[261] *ibid*, Vol.X, (Albany, N.Y., 1993), p.10, footnote 56.
[262] Ibn Kathīr, Vol.IV, p.372.
[263] Al-Ṭabarī, Vol.IX, p.199.
[264] *ibid*, p.199.

Abū Bakr took for himself the honorific title of *Khalīfat Rasūl Allāh*, successor of the Messenger of God. If anything his intention at the time must have been to follow as Caliph both the policies and the practices of Prophet (ṣ.a.a.s.). His first act was to continue the preparation of the army for an immediate campaign towards Syria that the Prophet (ṣ.a.a.s.) had been planning prior to his passing away. In fact Abū Bakr must have felt duty bound to put into action his last plan (See map below page 105), in spite of the fact that the whole of Arabia was restless, seething with rebellion.

However, Abū Bakr's reign as Caliph was characterised by the *ridda* or apostasy wars. The situation for the new Caliph was fluid and Abū Bakr with 'Umar's active support held out until the army returned from its campaign in the north when command was transferred to Khālid b. al-Walīd[265] (d.21AH/641) and Abū Bakr began to gain control of the situation and to consolidate his grip on power. The rebellious tribes were one by one subjugated. It was on Khālid that the Prophet (ṣ.a.a.s.) had previously conferred the title of 'The 'Sword of Allāh.'

According to al-Ṭabarī, 'Alī and all of the *Banū Hāshim* had not immediately pledged their allegiance to Abū Bakr. However, 'Alī could not have been unaware of the fact that he might, with his reluctance to acknowledge the authority of the first Caliph, make himself the focal point of opposition by some Muslims that would only split Islām. He had after all for the sake of Islām, declined the strong military support that was offered to him by Abū Sufyān.

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[265]Fought against the Prophet (ṣ.a.a.s.) at Uḥud and converted to Islām in the year 6AH/627 or 8AH/629. He is known for his military defensive skills at the Battle of M'uta and fought in many battles including Ajnādayn, Aqrabā, and Yarmūk. *EI²*, *s.v.* 'Khālid b. al-Walīd b. al-Mughīra al-Makhzūmī,' Vol.IV, (Leiden, 1978), p.928.

ʿAlī, not wishing to be the focal point of opposition, offered his allegiance to Abū Bakr. It was six months later and after the death of his wife Fāṭima, that he requested a meeting with Abū Bakr at his house. At that meeting with members of the *Banū Hāshim* family present, he offered his allegiance with an explanation of the reasons for the delay. In the first place he was keen to emphasize that it was not the denial of Abū Bakr's good qualities, '*nor the rivalry of good, which God has given you*,'[266] that prevented him from giving the oath of allegiance. It was rather the fact that he felt that he had a better right to succeed to the authority that he considered Abū Bakr had monopolised.

According to Muslim, ʿAlī is reported to have said that it was neither jealousy nor denial of the high position that God had conferred on Abū Bakr but that he felt that he should have been consulted and, '*that we should have a share in the government, but the matter had been decided without taking us into confidence, and this displeased us.*'[267]

Abū Bakr's Caliphate was short. Prior to his passing away, he consulted amongst others, ʿAbd al-Raḥmān b. ʿAwf and ʿUthmān regarding his successor. Al-Ṭabarī, states that he invited ʿUthmān to write his testament, designating ʿUmar as his preferred or chosen successor.[268] According to Madelung, who does not mention a will, considers that ʿUmar's succession was formally announced as Abū Bakr's preferred choice.[269] There is also reason to suppose that ʿUmar acquired the title of the supreme office of state as of right.

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[266]Al-Ṭabarī, Vol.IX, p.197.
[267]Muslim, Vol.III, p.956, *ḥadīth* No.4352.
[268]Al-Ṭabarī, Vol.XI, (Albany, N.Y., 1993), p.147.
[269]Madelung, W., '*The succession to Muḥammad a study of the early Caliphate*,' (Cambridge, 1997), p.55. Hereafter cited as *Succession*. Another view is that ʿUmar assumed *de facto* power later confirmed by a majority of the Companions. *EI*², *s.v.* ʿUmar (I) b. al-Khaṭṭāb, Vol.X, (Leiden, 2000), p.819.

ʿAlī expressed his disappointment at being bypassed for the second time. In his strongly worded speech of *al-Shiqshiqiyya*, he remarked, '*I watched the plundering of my inheritance till the first one went to his way but handed over the Caliphate to Ibne Khaṭṭāb after himself.*'[270] Whatever his personal opinion was, he extended his co-operation to both Caliphs as elected authority. His acceptance of the offices of the first two Caliphs is endorsed in the exchange of letters with the governor of Syria, Muʿāwiya b. Abī Sufyān, discussed later.

ʿUmar's acceptance of the office was emphatic and authoritative, '*God has put me in-charge of your affairs, because I am aware of what is most advantageous for you,*'[271] and set the pace of his long Caliphate. In accepting the Caliphate, he invoked God's help to preserve him, inspire him with justice to carry out his task, according to His commandment.[272] ʿUmar was the driving force behind the early conquests and according to Ameer Ali, '*Omar's energy of character made him an important factor in the future commonwealth of Islām.*'[273]

ʿUmar's first act on his appointment to the Caliphate, decide that the most appropriate title to refer to him was '*Commander of the Faithful.*' On his deathbed ʿUmar appointed a committee of six to discuss, deliberate and nominate a successor. The Committee comprised of ʿAlī, ʿUthmān, Saʿd b. Abī Waqqāṣ, ʿAbd al-Raḥmān b. ʿAwf, al-Zubayr b. al-ʿAwwām and Ṭalḥa ʿAbd al-Raḥmān. In the case of deadlock ʿAbd al-Raḥmān was given the casting vote. After the Committee deliberated between themselves and after consultation of the people, a question identical in terms was put to both ʿAlī and ʿUthmān, '*Will you indeed act in*

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[270]*Nahj*, Sermon 3, p.59.
[271]Al-Ṭabarī, Vol.XV, (Albany, N.Y., 1990), p124.
[272]*ibid*, p.124.
[273]Ameer Ali, Syed, '*Spirit of Islam*,' (Delhi, 1923), p.37.

accordance with God's Book, the practice of His Messenger and the example of the two Caliphs after him?'[274] In 'Uthmān's case the answer recorded was in the affirmative. The reply 'Alī gave was either, '*I hope to do this and act thus to the best of my knowledge and ability*'[275] or '*No, but based on my own effort in all this and in accordance with my own ability.*'[276] Whichever version of his reply is considered, the Caliphate was offered to 'Uthmān. He then became the third Caliph.

'Uthmān's Caliphate ended with a rebellion against his authority and his murder. The generally accepted position is that he was killed on 18th *Dhu'l Ḥijja* 35AH or 36AH.[277] He was eighty-two years old at the time of his death. 'Uthmān's murder was to bring about a crisis in the community, leading to further unprecedented challenges to the authority of his successor, 'Alī b. Abī Ṭālib and ultimately to the latter's murder and the murder of his children, the Prophet's (ṣ.a.a.s.) grand-children. Each of these events will now be examined in turn.

'Alī returned home from the mosque. At his home he received some of the Companions who invited him to accept the pledge of allegiance which he rejected, '*It's better that I be a wazīr than an amīr*,'[278] (*i.e.*, a high officer of state as opposed to a commander, prince). An unsuccessful search was made to find a leader. The Egyptians approached 'Alī; he sought to distance himself from them, and repeatedly disowned their plan. The Kūfans searched unsuccessfully for al-Zubayr, whilst the Baṣrans searched for Ṭalḥa. Both of them rejected approaches made to them and disowned plans to make them leaders.[279] The atmosphere in Madīna was

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[274]Al-Ṭabarī, Vol.XIV, (Albany, N.Y., 1994), p.152.
[275]*ibid*, p.152.
[276]*ibid*, p.160.
[277]*ibid*, Vol.XV, p.250.
[278]*ibid*, Vol.XVI, (Albany, N.Y., 1997), p.2.
[279]*ibid*, p.10.

tense; the pressure on the people of the city was great. The threat from the murderers of 'Uthmān continued. The pressure from the Egyptians continued, '*By Allāh! If you don't sort it out, tomorrow we'll kill 'Alī and Ṭalḥa and al Zubayr and many others beside.*'[280] It was in this hostile atmosphere that 'Alī reluctantly accepted the Caliphate, and insisted that any pledge to him should be made in public in the mosque.

In his first *Khuṭba* (address or sermon) as Caliph, 'Alī extolled and praised Allāh and said, '*Almighty and Glorious Allāh has sent down a Book that Guides. In it He has made clear what is good and what is evil, so take hold of the good and leave the evil.*'[281] The sermon is long and sets out a clear path for believers to follow and advises them with the words, '*so obey Almighty and Glorious Allāh! Don't go against Him*!'[282] Even as he finished his sermon and was still on the *minbar* the threats from the Baṣrans and Kūfans, the murderers of 'Uthmān, did not stop. Their threats were pointedly made to the newly appointed Caliph, '*Take it, but Beware, Abū Ḥasan*! *We are settling the leadership the way we settle a nose rein*!'[283] The implication of this threat was that his powers and authority to act in the best interest of the community as he saw fit were clearly limited.

On his accession to the Caliphate, a number of Companions including Ṭalḥa and al-Zubayr, who had pledged their allegiance, demanded that, *'Alī! We stipulated that Allāh's punishment should be applied. These people participated in the death of this man and have thereby forfeited their lives.*'[284] To this request 'Alī

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[280]*ibid*, p.13.
[281]*ibid*, p.16. See also *Nahj,* Sermon 165, p.278.
[282]*ibid*, p.16.
[283]*ibid*, p.16. Although there is a suggestion that these words may have been uttered at *Siffīn*. See also *ibid* at p.139.
[284]*ibid*, p.18.

reminded them that he was not able to deal with people who ruled over the rulers. His authority even as Caliph was limited, '*My friends, I am not unaware of what you know, but how can I deal with the people who rule us, not we them*?'[285] Having expressed the limitation of his authority he went on to add this warning (perhaps as a portent of things to come), '*If it is stirred up, Muslims would take up different positions.*'[286] The Qur'ān provides in the case of murder, '*We have given his heir authority (to demand Qiṣāṣ or to forgive).*'[287] Ṭalḥa and al-Zubayr could not have been satisfied with this explanation. ʿĀ'isha, who had expressed strong anti ʿUthmān sentiments,[288] was persuaded to join them after she claimed to, '*seek revenge for the blood of ʿUthmān, and you will strengthen Islām.*'[289]

Her presence lent respectability and legitimacy to their designs. The resultant discord led to a direct challenge to the Imām's authority. The ensuing battle, the Battle of the Camel, began but not before ʿAlī ordered a copy of the Qur'ān to be held up between the opposing armies inviting the rebels to settle their dispute with him on the basis of the contents therein.[290] The rebels ignored his plea. The result was a victory for ʿAlī and defeat of the three, the death of Ṭalḥa and al-Zubayr and the return of ʿĀ'isha to Madīna. However her departure was not before one last encounter with ʿAlī, who expressed his horror at her action, '*You roused the people, and they became excited. You stirred up discord among them such that*

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[285]*ibid*, p.18, *Nahj,* Sermon 166, p.278.
[286]*ibid*, p.18.
[287]17: 33
[288]Al-Ṭabarī, Vol.XVI, p.39.
[289]*ibid*, p.52.
[290]*ibid*, p.126.

some killed others.'[291] Her plea to ʿAlī was for clemency from him, '*Ibn Abī Ṭālib! You have won your victory. Give me an honourable pardon.*'[292]

ʿAlī to be sure had one more obstacle to his authority to overcome before he could claim sovereignty and suzerainty over all the Muslim lands. Muʿāwiya, son of Abū Sufyān, appointed as Governor of Damascus by ʿUmar and of the whole of Syria by ʿUthmān, had not pledged his allegiance to him. ʿAlī had dismissed him but Muʿāwiya had refused to accept his dismissal and relinquish his post as Governor of Syria. Indeed ʿAlī had with the intention of breaking with the policies of ʿUthmān, dismissed all the appointed governors save for Abū Mūsā al-Ashʿarī because al-Ashtar had requested ʿAlī to retain him in Kūfa.[293] He had sworn allegiance to ʿAlī, who was aware that Abū Mūsā's attitude towards his election as Caliph had been lukewarm. Anticipating war with Muʿāwiya, ʿAlī had written to him, Qays b. Saʿd, and ʿUthmān b. Ḥunayf ordering them to move their men towards Syria.[294] Subsequently ʿAlī sent Qaraẓah b. Kaʿb al-Anṣārī as replacement governor at Kūfa with a letter, in the severest terms, demanding Abū Mūsā's 'withdrawal' who duly complied. Later he sent his son al-Ḥasan and ʿAmmār b. Yāsir to mobilise the men of the garrison city.[295] ʿAlī's victory at Baṣra had spurred Muʿāwiya into action. He realised ʿAlī's determination to remove him as governor of Syria was serious. Muʿāwiya not only refused to relinquish his post but challenged ʿAlī's election to the Caliphate. The challenge became personal and war seemed inevitable.

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[291] *ibid*, p.127.
[292] *ibid*, p.127.
[293] *ibid*, p.112.
[294] *ibid*, p.33.
[295] *ibid*, p113.

Prior to the Battle of *Ṣiffīn*,[296] both ʿAlī and Muʿāwiya had exchanged letters which are revealing of ʿAlī's conduct immediately subsequent to the Prophet's (ṣ.a.a.s.) death. One of ʿAlī's letters to Muʿāwiya was delivered by Jarīr b. ʿAbd Allāh al-Bajalī, appointed governor of Hamdān by ʿUthmān, recalled by ʿAlī, who had nevertheless pledged allegiance to him. The letter stressed three fundamental points. Firstly, that the same people, who had offered their allegiance to the first three Caliphs had given their allegiance to him. Secondly, the right of *shūrā* belonged to both *muhājirūn* and *anṣār*. Thirdly, when those present had made their choice and had agreed on the appointment of an Imām, those who were absent could not reject the choice thus made.[297] The significant point about attributing the right of consultation to the *anṣār* was that ʿAlī was returning to the practice of the Prophet (ṣ.a.a.s.) who had treated *muhājirūn* and *anṣār* as equals.

Muʿāwiya's reply was forthright and rejected the right of the people of the Ḥijāz to determine or choose the Caliph. He demanded that the right accrued to all Muslims who should be consulted on the question of the succession, an implication that ʿAlī should resign. As for ʿAlī, that he lawfully fought the *Baṣrans* did not equate with the situation in Syria since the *Baṣrans* had pledged their allegiance to him as Caliph, but the Syrians had not. Finally, he directly equated ʿAlī with the murder of ʿUthmān, denied that ʿAlī was anything like Abū Bakr, ʿUmar or ʿUthmān and that ʿAlī should surrender the murderers of ʿUthmān to him, Muʿāwiya, who would then assemble a *Shūrā*. The implication being that ʿAlī should stand trial for the murder of the third Caliph.[298]

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[296]It is now identified with village of Abū Hurayra near al-Raqʿa. *EI²*, *s.v.* 'Ṣiffīn,' Vol.IX, (Leiden, 1997), p.552.
[297]Al-Ṭabarī, Vol.XVI, p.195. The exchange of letters is also mentioned in *Nahj,* Letters No.6 and 8, pp.393 and 394.
[298]*Succession*, pp.193; 205.

The *Ṣiffīn* Arbitration agreement is the culmination of events that represented at each stage, a challenge to the authority of the elected Caliph. Islām as a faith demanded of believers obedience to authority, through devotion and self-sacrifice. An example of this obedience to authority and self-sacrifice is clearly evidenced by the actions of Khālid b. al-Walīd, and ʿAmr b. al-ʿĀṣ, conquerors of Syria and Egypt respectively (ʿAmr built a mosque there where the jurist al-Shāfiʿī composed his treatise al-Risāla), when dismissed from their positions of authority by ʿUmar and ʿUthmān respectively, they did accept in a, '*remarkably patient and uncomplaining fashion when removed from governments which they had founded and commands of troops whom they had led to glorious victory.*'[299] Both ʿAmr and Khālid, according to the opinion of the Aga Khan III, '*were motivated by a profound moral obedience to authority and devotion to duty, yet both had been in their youth like the usual worthless Meccan aristocrats.*'[300]

Unfortunately for ʿAmr, he was seduced by the material wealth and position that the Governor of Syria, Muʿāwiya b. Abī Sufyān offered him. Witness then the contents of ʿAlī's letter to ʿAmr, written more in sadness at the latter's compromise of his religion and principles than in anger, '*You have made your religion subservient to the worldly seeking of a man whose misguidance is not a concealed affair and whose veil has been torn away.*'[301] His letter to ʿAmr was perhaps a feint plea to remind him that his alliance with Muʿāwiya was against his own instinct, and that war with ʿAlī went, '*against the grain, for we will be fighting*

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[299]Aga Khan III, *Selected Speeches and Writings of Sir Sultan Muhammad Shah,* Vol.I, K. K. Aziz, (ed.), (London, 1998), p.208. Hereafter cited as *Selected Speeches.*
[300]*ibid*, p.208.
[301]*Nahj,* Letter No.39, p.440.

someone whose Islamic precedence, virtue, and close relationship to the Prophet you well know. But in fact all we're really after is this world.'[302]

Muʿāwiya, son of Abū Sufyān and Hind, Governor of Syria, took a position of challenging ʿAlī's authority, a challenge that resulted in a civil war ultimately to the murder of the fourth Caliph and his two sons al-Ḥasan and al-Ḥusayn, the Prophet's (ṣ.a.a.s.) grandsons, whom he had himself described on many occasions as, '*These two sons of mine, Ḥasan and Ḥusayn are the two chiefs of the youth of the people of Paradise and their father is better than both of them.*'[303] Again, '*Jibrīl came to me and gave glad tidings to me that Ḥasan and Ḥusayn are the two chiefs of the youth of the people of Paradise.*'[304] Another tradition attributed to the Prophet (ṣ.a.a.s.) is, '*these two sons of mine are my two plants of sweet basil (to sweeten) the world.*'[305]

Where ʿAlī's letter to ʿAmr was sad in tone, his letter to Muʿāwiya is forthright in its condemnation of the conduct of the Governor of Syria,

> You have ruined a large group of people whom you have deceived by your misguidance, and have flung them in the surges of your sea where darkness has covered them and misgivings are tossing them. As a result they have strayed from the right path and turned on their backs.[306]

Muʿāwiya's principal demand was to continue his rule over Syria, and to hold on to power took several different attempts to persuade ʿAlī to permit him to remain as governor. ʿAlī's replies were uncompromising in their rejection to

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[302]Al-Ṭabarī, Vol.XVI, p.195.
[303]Hunzai, Faquir Muḥammad & Rashida Noormohamed-Hunzai, *Holy Ahl I-Bayt in the Prophetic Traditions*, (Karachi, 1999), p.56, *ḥadīth* No.34247. Quoting Al Muttaqī, ʿAlī, *Kanzu'l-'ummāl,* (Beirut, 1979). Hereafter cited as *Traditions*.
[304]*ibid,* p.56, *ḥadīth* No.34248.
[305]*Kitāb*, p.296.
[306]*Nahj*, Letter 32, p.435.

accommodate Muʿāwiya's demands, '*As for your demand to me for (handing over) Syria, I cannot give you today what I denied you yesterday.*'[307] Muʿāwiya's attempts to persuade ʿAlī that they were both descended from ʿAbd Manāf, was received with an equally dismissive reply. Both of them were no doubt sons of ʿAbd Manāf, however, he went on to add that Umayya could not be like Hāshim, nor Ḥarb like ʿAbd Muṭṭalib nor Abū Sufyān be like Abū Ṭālib.'[308] ʿAlī was contemptuous of Muʿāwiya's challenge to his election as Caliph. Those who had sworn allegiance to Abū Bakr, ʿUmar and ʿUthmān had sworn allegiance to him on the same basis as they had sworn allegiance to them,[309] a clear reference to the process of consultation, which was confined to the *muhājirūn* and the *anṣār* of Madīna. As for apportioning the blame on ʿAlī for ʿUthmān's murder, Muʿāwiya would find him the most innocent of all in respect of ʿUthmān's blood.[310]

Again, to Muʿāwiya's request for the murderers of ʿUthmān to be handed over so as to try them, ʿAlī's reply was again to refuse that request and to directly challenge Muʿāwiya. ʿAlī was not keen to surrender his authority to any one by obliging him, '*I have thought over this matter and I do not find their handing over to you or to someone else possible for me.*'[311] But if Muʿāwiya persisted in seeking vengeance for ʿUthmān's murder, then ʿAlī's advice to him was to seek that retribution in open combat with ʿAlī. If Muʿāwiya chose that option, then he was reminded by ʿAlī of the fate of some members of his family, '*I am Abul Hasan who*

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[307]*ibid*, Letter 17, p.404.
[308]*ibid*, Letter 17, p.404.
[309]*ibid*, Letter 6, p.393.
[310]*ibid*, Letter 6, p.393.
[311]*ibid*, Letter 9, p.395.

killed your grand-father, your uncle and your brother by cutting them to pieces on the day of Badr.'[312]

'Alī was not content simply to answer Mu'āwiya's challenges regarding 'Uthmān's murder. He pointedly accused Mu'āwiya of both being indifferent to the latter's murder when it happened and of using 'Uthmān to further his own worldly ambition and at the crucial point of the rebellion against 'Uthmān, forsaking him in his hour of need.'[313]

As for Mu'āwiya's character and his deeds 'Alī is fully aware, '*he deceives and commits evil deeds.*'[314] 'Alī warns him of the day of judgement, '*What will you do when the coverings of this world in which you are wrapped are removed from you.*'[315] Advising Mu'āwiya that ignorance was no defence and to, '*Fear Allāh in respect of what you have amassed and find out your true right therein,*'[316] and inviting him to, '*turn your face towards the next world because this is our path and your path.*'[317]

In many instances the Qur'ān refers to the concept of the 'face.' In particular, '*So set thou thy face truly to the religion being upright, the nature in which Allāh has made mankind: no change (there is) in the work (wrought) by Allāh: that is the true Religion: but most among mankind know not.*'[318] Again, '*But set thou thy face to the right Religion, before there come from Allāh the day which there is no chance of averting: On that Day shall men be divided (in two).*'[319]

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[312]*ibid*, Letter 10, p.398.
[313]*ibid*, Letters 28 and 37 pp.418 and 439.
[314]*ibid*, Sermon 198, p.344.
[315]*ibid*, Letter 10, p.397.
[316]*ibid*, Letter 30, p.423.
[317]*ibid*, Letter 55, p.473.
[318]30:30
[319]30:43

The correspondence between the two that had begun before the parties met in combat was interrupted only by war, resumed for a brief period after the war but not after the appointment of the two arbitrators. ʿAlī's most telling point to Muʿāwiya was that Abū Sufyān, Muʿāwiya's father, had stated to ʿAlī that he was more entitled to '*this matter*' (meaning the caliphate), than Abū Bakr. Moreover his father invited ʿAlī to stretch out his hand so that he may back him and pledge his allegiance but that ʿAlī had declined the offer for two main reasons. Firstly, that the people were still close to infidelity and secondly ʿAlī feared division among the people of Islām. In other words, for ʿAlī, unity of nascent Islām was far more important than division. It must now be for Muʿāwiya to follow in his father's footsteps. Muʿāwiya must have chosen to ignore that information.

ʿAlī's refusal to reconsider his dismissal of the governor of Syria explains his determination to remove him. He, Muʿāwiya, was equally determined to defy authority and hold on to his governorship. The arguments on both sides had been fully explored and rehearsed. Muʿāwiya was not prepared to give ground and accept the authority of the elected Caliph. War was inevitable. The ensuring battle now known as the Battle of *Ṣiffīn* began. The divisive nature of the battle was such that loyalties were split and members of the same family found themselves on opposite sides.[320]

ʿAlī left for *Ṣiffīn* during the month of *Dhu'l-Ḥijja* 36AH. There is some evidence to suggest that minor skirmishes continued during that month with Muʿāwiya's contingents. A truce was agreed during the month of *Muḥarram* 37AH so that a peaceful settlement could be reached.[321] No settlement having been reached by the end of the month of *Muḥarram*, minor skirmishes were resumed for the first seven

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[320]Khālid b. al-Walīd's two sons fought on opposite sides at *Ṣiffīn*. *EI²*, *s.v.* 'Ṣiffīn,' Vol.IX, (Leiden, 1997), p.552.
[321]Al-Ṭabarī, Vol. XVII, (Albany, N.Y., 1996), p.20.

days of *Ṣafar*. The final all out battle of *Ṣiffīn* began on the 8th or 10th *Ṣafar* 37AH/28th July657 and lasted for between three to four days, with the final all night, all out battle involving horseman and foot soldiers. The clamour of noise was so violent that it has been recorded in history as the 'night of clamour,' *laylat al-harir*.[322]

The position of Muʿāwiya and the Syrians gradually began to deteriorate to such an extent that when ʿAmr b. al-ʿĀṣ saw that ʿAlī's forces had gained the upper hand, and would lead to the destruction of his master and the Syrians, he advised Muʿāwiya, '*we will raise the maṣāḥif* (sing. *muṣḥaf*); *their contents are to be authoritative in our dispute*.'[323] His advice to Muʿāwiya, to raise the *maṣāḥif* had a more sinister purpose, which was to, '*increase our unity and their division*.'[324]

With the raising of the *maṣāḥif*, the Syrian army proclaimed, '*This is the Book of God between us and you. Who will protect the frontier districts of the Syrians if they all perish, and who those of the Iraqis if they all perish*?'[325] The ploy appeared to achieve its objective; firstly it increased the division in ʿAlī's army and of his support. By contrast the respite that this ploy offered was to increase the unity of Muʿāwiya's army. When ʿAlī's army saw that the *maṣāḥif* had been raised, they are reported to have said, '*we respond to the Book of God, and we turn in repentance to it*.'[326] The second objective of the exercise was to make the contents of the Qur'ān authoritative in the dispute between the two opposing sides.

Al-Ashʿath did not take part in the battle. The call for the protection of the borders of Iraq and Syria was a clear reference to the threat that was still present from the Persians and Byzantine empires that would certainly increase should two

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[322]'Alī b. Abī Ṭālib,' *EI²*, *s.v.* Vol.I, (Leiden, 1960), p.381.
[323]Al-Ṭabarī, Vol.XVII, p.78.
[324]*ibid*, p.78.
[325]*ibid*, p.78.
[326]*ibid*, p.78.

well-armed Arab armies slaughter themselves in the field of battle. His publicly proclaimed fears reached Muʿāwiya and ʿAmr must have known of this and played on the fears of the Iraqī.

ʿAmr b. al-ʿĀṣ had correctly predicted the divisions in ʿAlī's army. ʿAlī on the other hand tried in vain to warn his supporters that this raising of the *maṣāḥif* was, on ʿAmr's part a ruse. The division in ʿAlī's army increased to the point where rebellion was threatened. ʿAlī had to personally intervene by calling on his men to desist attacking al-Ashtar. He warned his army that Muʿāwiya, ʿAmr and others were men without the religion and without Qur'ān. However, some of his men were adamant, insisting that if they were called to the Book of God they had no choice but to respond. ʿAlī remonstrated with them but to no avail. This time some of his supporters went even further by threatening ʿAlī that if he did not recall al-Ashtar from the field of battle and further did not respond to the offer of cessation of hostilities, they would, '*deliver you up entirely to the enemy or do what we did with Ibn 'Affān.*'[327] (The reference here is to ʿUthmān).

ʿAlī had to resort to strong words to ensure his army remained united. He implored them with these words, '*The only reason why I have fought against them was so that they should adhere to the authority of this Book, for they have disobeyed God in what He has commanded and they have forgotten His covenant and rejected His Book.*'[328] The words were carefully chosen by ʿAlī. He also extolled them to reflect that they had right on their side. Taken together, both would have emanated from the traditions of the Prophet (ṣ.a.a.s.), '*There will be civil strife (fitnah) after me. When that will take place, adhere to 'Alī b. Abī Ṭālib, who is the discerner (al-fārūq)*

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[327] *ibid*, p.79.
[328] *ibid*, p.79.

between the truth and the falsehood.'[329] Al-Ṭabarī reports an identical tradition on the authority of Sa'd b. Abī Waqqāṣ, '*there will be a fitnah in which the best will be he who is inconspicuous and fears God.*'[330]

Indeed the Prophet (ṣ.a.a.s.) had correctly foretold *Ṣiffīn* when he informed Ammār b. Yāsir not only of his death but the manner of his dying in that an evil gang would kill him.[331] Ammār fought on 'Alī's side and was killed by the Syrians at *Ṣiffīn*. According to Shī'a sources this tradition is replicated save that the Prophet (ṣ.a.a.s.) said, '*O Ammār, you will be killed by a rebellious party.*'[332] Part of his army was adamant not to continue the fight, threatening 'Alī with the same fate that befell 'Uthmān and demanded the recall of al-Ashtar, '*Send for him and have him come to you. Otherwise, by God, we will withdraw from you.*'[333] No amount of convincing or pleading from the Commander of the Faithful or al-Ashtar would persuade them to change their mind.

They even resorted to threats of physical violence on al-Ashtar. Al-Ashtar's pleas to them were to give him some more time, as victory was so close, was met with a firm rebuff. To emphasise their point they struck the face of al-Ashtar's mount until 'Alī placated them with these words, '*We have agreed to make the Qur'ān an authority (ḥukm) between us and them.*'[334]

Al-Ash'ath b. Qays who had not taken part in the battle of *Ṣiffīn* was quick to propose to 'Alī that he would approach Mu'āwiya to ascertain his terms for the cessation of hostilities. Bearing in mind Mu'āwiya's earlier demands for revenge

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[329] *Traditions*, p.18, *ḥadīth* No.32964.
[330] Al-Ṭabarī, Vol.XVII, p.105.
[331] Ibn Kathīr, Vol.II, p.204.
[332] *Da'ā'im*, p.485.
[333] Al-Ṭabarī, Vol.XVII, p.80.
[334] *ibid*, p.81.

for the blood of ʿUthmān and his refusal to acknowledge ʿAlī as duly elected Caliph, his reply was quite subdued. He only asked for the appointment of two arbitrators, one from each side who would, *'act in accordance with the Book of God, not opposing it. Then we will follow what they agree upon.'*[335] Al-Ashʿath who had no interest in prolonging the war sought no further clarification and readily accepted what he considered to be Muʿāwiya's just proposals. Muʿāwiya and the Syrians further proposed that their representative would be ʿAmr b. al-ʿĀṣ.

If the call to the Iraqī element in ʿAlī's army was meant to isolate ʿAlī from the bulk of his army, then it clearly succeeded. But it also had a second and more serious effect on the negotiations that followed. It had a direct bearing on the appointment of the arbitrator. The Iraqīs and Al-Ashʿath chose Abū Mūsā al-Ashʿarī, insisting that ʿAlī should accept him to be his representative. ʿAlī immediately discounted his nominated arbitrator as he did not consider him to be trustworthy and because Abū Mūsā had, '*separated from me and had caused people to abandon me.*'[336]

Instead, ʿAlī first proposed his cousin Ibn ʿAbbās. This counter proposal was refused. He then suggested his commander al-Ashtar as his representative. ʿAlī's second choice of arbitrator too was rejected. ʿAlī then asked if they refused to accept anybody but Abū Mūsā. His men replied in the affirmative. ʿAlī then replied, *'then do what you want.'*[337] Both al-Aḥnaf and al-Ashtar were seriously concerned at the erosion of ʿAlī's authority. Al-Ashtar volunteered to kill ʿAmr whilst al-Aḥnaf remarked, '*Commander of the Faithful, you have been assaulted by*

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[335] *ibid*, p.82.
[336] *ibid*, p.82.
[337] *ibid*, p.83.

a crafty and cunning man and by one who made war against God and His Messenger at the beginning of Islām.'[338]

He went on to add a warning to ʿAlī of Abū Mūsā al-Ashʿarī's qualities and character as a man, casting doubt on his ability to execute his responsibility with due diligence, '*I have tested this man and tried him out in varying circumstances, and I have found him dull-witted and shallow in intellect. If you insist on Abū Mūsā al-Ashʿarī, then make sure someone is watching him.*'[339] He suggested his own name as arbitrator, having warned ʿAlī of the unreliability and indecisiveness of Abū Mūsā. but to that proposal ʿAlī did not respond.[340]

The majority view prevailed. Al-Ashʿath was with the majority in insisting on Abū Mūsā as ʿAlī's arbitrator. One can only speculate on his motives although Hinds, who has carried out a thorough and detailed research and has written on the events at *Ṣiffin*, is of the opinion that by so doing al-Ashʿath was helping to prolong the deadlock between ʿAlī and Muʿāwiya, put and keep a check on ʿAlī's powers of action and regain his former measure of power and influence.[341]

ʿAlī, having been unsuccessful in persuading his army to continue the fight, also his authority challenged on his own choice of arbitrator, and having an arbitrator appointed on whom he had no confidence, must have reflected on the verses of the Qur'ān, '*Truly thou canst not cause the Dead to listen, nor canst thou cause the Deaf to hear the call, (especially) when they turn back in retreat. Nor canst thou be a guide to the Blind, (to prevent them) from straying: only those wilt thou get to listen who believe in Our Signs, so they submit.*'[342]

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[338] *ibid*, p.83.
[339] *ibid*, p.83.
[340] *ibid*, p.83.
[341] Hinds, p.99.
[342] 27:80-81

The proposal to appoint Abū Mūsā al-Ashʿarī as arbitrator and to so insist, in the face of strong objection from ʿAlī, may indeed have sealed the fate of the arbitration. The authority of the Caliph was again undermined. The negotiations leading up to the arbitration agreement were also to cause some problems particularly in the honorific description of ʿAlī as Commander of the Faithful. Al-Ashʿath b. Qays insisted on its removal, in spite of al-Aḥnaf advice to ʿAlī against its erasure, '*Do not efface the title of Commander of the Faithful, for I fear that if you efface it, the title will never revert back to you.*'[343] It was erased and ʿAlī remarked, '*God is most great. A precedent (sunnah) following a precedent and an example (mathal) following an example.*'[344]

ʿAlī explained that this was exactly what happened at the signing of the Treaty of al-Ḥudaybiyya. He went on to explain further that as he was writing on behalf of the Prophet (ṣ.a.a.s.), the terms of the Treaty of al-Ḥudaybiyya, he inserted the title of the Prophet (ṣ.a.a.s.), 'Messenger of Allāh.' Abū Sufyān, Muʿāwiya's father, objected to the title and demanded that it be erased from the Treaty. It is difficult not to draw a remarkable historical parallel between the demands made on ʿAlī to erase the title *'amir al-mu'minīn'* to that made by Muʿāwiya's father to the Prophet (ṣ.a.a.s.) to erase the title '*rasūl Allāh.*' Angry words were exchanged between ʿAmr and ʿAlī, with the latter adding, '*I hope that God cleanses my circle of you and the likes of you.*'[345]

The agreement now known as the *Ṣiffīn* Arbitration Agreement was written. There are two such agreements with important differences, referred to as Versions A. and B. Amongst the early historians who have mentioned both

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[343] Al-Ṭabarī, Vol.XVII, p.84.
[344] *ibid*, p.84.
[345] *ibid*, p.84.

agreements, al-Ṭabarī (c.224/5-310AH/839-923)[346] mentions only Version A. The only author to solely mention Version B. is al-Dīnawarī (d.c.282AH/895).[347] The historian al-Minqarī (d.c.212AH/827)[348] gives both versions of the agreement. We will examine the Version A. mentioned by al-Ṭabarī. This Version A. is from the rendering of Abū Mikhnaf Lūt b. Yahya (d.157AH)[349] whose great-grand-father, Mikhnaf b. Sulaym was at one time 'Alī's governor in Isfahān and who fought and was killed at *Ṣiffīn*.

Version A.

> In the name of God, the most Merciful and Compassionate, this is what 'Alī b. Abī Ṭālib and Mu'āwiyah b. Abī Sufyān have mutually determined. 'Alī has decided it for the men of al-Kūfah and those of their party (*Shī'ah*) who are with them of the believers and the Muslims; Mu'āwiya has decided it for the men of Syria and those believers and Muslims with them.
>
> We will comply with the authority (*ḥukm*) of God and His Book, and nothing else will bring us together. We will refer to the Book of God,[350] from its opening to its close. We will effect what it lays down and eliminate what it does away with. The two arbitrators (*ḥakamān*)-and they are Abū Mūsā al-Ash'arī' 'Abdallāh b. Qays and 'Amr b. al-'Āṣ al-Qurashī[351]-will act in accordance with

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[346]Author of *History of al-Ṭabarī*. *EI²*, *s.v.* 'Al-Ṭabarī, Abū Dja'far Muḥammad b. Djarīr b.Yazīd,' Vol.X, (Leiden, 2000), p.11.

[347]Author of *Al-Akhbār al-ṭiwāl*, *EI²*, *s.v.* 'Al-Dīnawarī, Abū Sa'īd Naṣr b. Ya'ḳūb,' Vol.II, (Leiden, 1965), p.300.

[348]Author of *Waq'at Ṣiffīn*. Brockelmann, *Geschichte der Arabichen Litteratur*, *EI²*, *s.v.* 'Al-Minqarī, Abū'l Faḍl Naṣr b. Muzāḥim b. Saiyār al-'Aṭṭār,' Vol.I, (Leiden, 1937), p.214.

[349]Author of *Kitāb Ṣiffīn*. *EI²*, *s.v.* 'Ṣiffīn,' Vol.IX, (Leiden, 1997), p.552.

[350]Literally, "the Book of God is between us"

[351]It is not clear whether we are meant to understand the two names were part of the document or whether this is an explicit editorial interpretation. The two versions analysed by Hinds contain the names.

whatever they find in the Book of God. For whatever they do not find in the Book of God they will resort to the just precedent (*al-sunnah al-ʿādilah*), which unites and does not divide.

The two arbitrators have from ʿAlī and Muʿāwiyah and from the two armies, pacts and covenants and from the people an assurance that they have security for themselves and their families. The community will be helpers (*anṣār*) for the two arbitrators regarding what they both determine, and the believers and Muslims of both parties are bound by God's pact and covenant that we will abide by the contents of this document (*ṣaḥifa*), that what the two of them decide upon is obligatory for the believers. Security, right conduct, and the setting aside of arms are to be between the believers wherever they go, for themselves, their families, their properties, those of them who are here and those who are absent. ʿAbd Allāh b, Qays and ʿAmr b. al-ʿĀṣ have sworn to God that they will decide the issue disputed among this community and that they will not return to warfare or division so long as they are not disobeyed.

The appointment time for the decision is *Ramaḍān*, but, if the two of them wish to defer that, they may defer it by mutual consent. If one of the two arbitrators dies, then the commander of (his) party (*Shīʿah*) will choose in his stead one of those who are recognised for justice and probity and will not delay. The place in which they will make their decision shall be a place equidistant between the people of al-Kūfah and those of Syria, and, if they so wish and desire, only those whom they want may be present there with them. The two arbitrators will take whomsoever they wish of those (now) present and write the fact of their witnessing to what is in this document. They will be helpers (of the two arbitrators) against whoever abandons what is in this document and desire impiety (*ilḥād*) and injustice regarding it. Oh God, we ask for Your help

against whoever abandons what is in this document.[352]

It was witnessed by from among ʿAlī's companions:

Al-Ashʿath b. Qays al-Kindī	ʿAbd Allāh b. ʿAbbās
Saʿīd b. Qays al-Hamdānī	Warqā' b. Sumayy al-Bajalī
ʿAbd Allāh b. Muḥill al-ʿIjlī	Ḥujr b. ʿAdī al-Kindī
ʿAbd Allāh b. al-Ṭufayl al-ʿĀmirī	ʿUqba b. Ziyād al-Ḥaḍrāmī
Yazīd b. Ḥujayya al-Taymī	Mālik b. Kaʿb al-Ḥamdānī

And it was witnessed by from among the companions of Muʿāwiya

Abū al-Aʿwar al-Sulamī ʿAmr b. Sufyān	Ḥabīb b. Maslama al-Fihrī
Al-Mukhāriq b. al-Ḥārith al-Zubaydī	Ziml b. ʿAmr al-ʿUdhrī
Ḥamza b. Mālik al-Hamdānī	ʿAbd al-Raḥmān b. Khālid al-Makhzūmī
Subayʿ b. Yazīd al-Anṣārī	ʿAlqama b. Yazīd b. al-Anṣārī
ʿUtba b. Abī Sufyān	Yazīd b. al-Ḥurr al-Absī

ʿAmr wrote this on Wednesday 17th *Ṣafar* 37AH.

Version B.

This is what ʿAlī b. Abī Ṭālib and Muʿāwiya b. Abī Sufyān and their parties have mutually determined in what they come to terms concerning the authority of the Book of Allāh and the *sunna* of His Messenger. ʿAlī's decision is for the people of ʿIraq and those who were from his party, both the absent and the present. The decision of Muʿāwiya was for the people of Syria and those who were from his party, both the present and the absent.

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[352]Al-Ṭabarī, Vol.XVII, p.85.

We agreed to comply with the judgement of the Qur'ān in what it passes and stop at its command in what it commands. Only the Qur'ān can unite us. We made the Book of Allāh, from the beginning to the end, the arbitrator between us on the matter in which we differ. We preserve life to what it (Qur'ān) preserves and destroy what it destroys. On that we mutually determine and by which we mutually agree.

ʿAlī and his party agreed to send ʿAbd Allāh b. Qays as the supervisor and arbitrator, while Muʿāwiya and his party agreed to send ʿAmr b. al-ʿĀṣ as the supervisor and arbitrator. They shall be put under Allāh's covenant and His obligation. The greatest of what Allāh puts one of His executers under is that they will take the Book as a guide (*imām*) in what they have been sent for; that they will not go beyond it in judging what they have found in it written. If they do not find (anything) specified in the Book of Allāh, they will have recourse to the *sunna* of the Messenger of Allāh, which unites; they will not intend to disagree with them both nor will they follow their personal desires, nor will they enter into a doubt.

ʿAbd Allāh b. Qays and ʿAmr b. al-ʿĀṣ took from ʿAlī and Muʿāwiya Allāh's covenant and His pledge to agree with what they decide in accordance with the Book of Allāh and the *sunna* of His Messenger, nor will they invalidate it, nor will they betake themselves to something else. They (the arbitrators) have in their judgement security for their blood, properties and families as long as they do not transgress the truth, irrespective of whether one is pleased or not, and the community will be helpers for them (both) regarding what they decide on the basis of justice.

If one of the arbitrators dies before concluding a judgment, the Commander of his party and his companions shall choose someone who does not fail to do justice and fairness in his place, with the conditions

required of his predecessor that he shall swear an oath and he will judge in accordance with the Book of Allāh and the *sunna* of His Prophet (ṣ.a.a.s.). If one of the Commanders dies before concluding the judgement, then it is up to his party to appoint a person instead of him with whose justice they are pleased.

With this Agreement, the truce negotiation peace and reconciliation commence and the weapons are put aside. It is upon the arbitrators Allāh's covenant and His pledge is that they will spare no effort to do personal reasoning (*ijtihād*), nor will they intend to do injustice; nor to enter in a doubt; and nor will they go beyond the judgement of the Book or the *sunna* of the Messenger of Allāh. If they do not do what is expected from them to do, the *Umma* will be released from the bond of their judgement; there will be no covenant or any responsibility.

The decision is binding on the two leaders, the two arbitrators and the two groups, with conditions specified in this document. Allāh is the closest witness and the nearest protector. The people are now safe with their lives, families and their properties until the expiration date and the weapons are to be put aside and the roads shall be free. The present and the absent of the two groups are equal in safety issues.

The arbitrators shall meet in a fair place between the people of 'Iraq and the people of Syria. Only those who are approved by the arbitrators can attend the meeting. The Muslims fixed a deadline for these two judges, which is the end of the month of *Ramaḍān*. If they wish to deliver the judgement before this date they can do so. If they want to delay beyond the month of *Ramaḍān* until the end of the Season (i.e. the Season of Pilgrimage) they can do so too.

However, if they cannot reach a decision in accordance with the Book of Allāh and the

sunna of His Prophet (ṣ.a.a.s.) until the end of the Season, the Muslims shall be in a state of war before the Agreement. There shall be no condition that would bind each side.

It is incumbent upon *Umma* to honour the Agreement of Allāh and His covenant by fulfilling it in totality as laid out in this document. They are in league against those who intend heresy or injustice by attempting to breach the Agreement.[353]

ʿAbd Allāh b. ʿAbbās	Al-Ashʿath b. Qays
Al-Ashtar Mālik b. al-Ḥārith	Saʿīd b. Qays al-Hamdānī
Al-Ḥuṣayn & al-Ṭufayl, sons of al-Ḥārith b. al-Muṭṭalib	Abū Usayd Mālik b. Rabīʿa al-Anṣārī
Khabbāb b. al-Artt	Sahl b. Ḥunayf
Abū al-Yasār b. ʿAmr al-Anṣārī	Rifāʿa b. Rāfiʿ b. Mālik al-Anṣārī
ʿAwf b. al-Ḥārith b. al-Muṭṭalib al-Qurashī	Burayda al-Aslamī
ʿUqba b. ʿĀmir al-Juhannī	Rāfiʿ b. Khadīj al-Anṣārī
ʿAmr b. al-Ḥamiq al-Khuzāʿī	Al-Ḥasan and al-Ḥusayn sons of ʿAlī
ʿAbd Allāh b. Jaʿfar al-Hāshimī	Al-Nuʿmān b. ʿAjlān al-Anṣārī
Ḥujr b. ʿAdīyy al-Kindī	[Yazīd b. Hujjiyya al-Bakrī]
Warqā' b. Mālik b. Kaʿb al-Hamdānī	ʿUtba b. Abī Sufyān
Muḥammad b. Abī Sufyān	Muḥammad b. ʿAmr b. al-ʿĀṣ
Yazīd b. ʿUmar al-Juzzamī	ʿAmmār b. al-Aḥwaṣ al-Kalbī
Suʿda b. ʿAmr al-Tājībī	Al-Ḥārith b. Ziyād al-Qīnī
ʿĀṣim b. al-Muntashir al-Juzzāmī	ʿAbd al-Raḥmān b. Dhī al-Kilāʿ al-Ḥīmayrī
Al-Ṣabāḥ b. Jalhaʿa al-Ḥīmayrī	Thumāma b. Ḥawshab
ʿAlqama b. Ḥakīm	Ḥamza b. Mālik

We swore the oath of Allāh and His covenant between us.

ʿUmar wrote this on Wednesday 17th *Ṣafar* 37AH.

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[353]Al-Minqarī, Naṣr b. Muzāḥim, *Waqʿat Ṣiffīn*, A.M. Hārūn (ed.), (Qum, Iran, 1382AH), p.404.

In relation to both arbitration agreements they are both remarkably similar yet important differences may be perceived. The first paragraph of Version A. simply re-iterates the names of the parties to the agreement as ʿAlī b. Abī Ṭālib and Muʿāwiya b. Abī Sufyān, and defines the territory over which their jurisdiction extends, in Muʿāwiya's case, to the whole of Syria, whereas in ʿAlī's case to the town of Kūfa only.

The second paragraph states the obligation to apply the Book of God, the Qur'ān, from beginning to end, and then mentions the names of the arbitrators without stating whom the arbitrators represent. There then appears a curious phrase to the effect that what the arbitrators do not find in the Qur'ān, they would apply the just precedent (*al-sunnah al-ʿādilah*), that unites but does not divide. The subject matter of the dispute is not mentioned.

By way of contrast Version B. contains a Preamble that goes on to name the two parties to the agreement as ʿAlī b. Abī Ṭālib and Muʿāwiya b. Abī Sufyān. It describes ʿAlī's territorial jurisdiction over the whole of Iraq. There then follows a clause giving effect to the Qur'ān as the sole arbiter of the dispute. In contrast to Version A, Version B. not only names the two arbitrators but also specifically states who they are appointed by and who they represent. In the case of ʿAlī, it is Abu Mūsā and ʿAmr representing Muʿāwiya.

An important feature of both agreements therefore is in their reference to comply with the authority *ḥukm* of God and His Book. Thus both agreements make the Qur'ān the substantive law of the arbitration. What is particularly important about Version B. in its repeated emphasis in both paragraphs three and four to make the Qur'ān as the sole authority, and only as a last resort were the arbitrators to have recourse to the *sunna* of the Messenger of Allāh. Paragraph two contains one further

provision and that is an oath from both parties that they would accept the Award made in accordance with the provision of the Book of God and the *sunna* of His Messenger which unites.

These then are the important differences between Versions A. and B. that what the arbitrators could not find in the Qur'ān, they would, '*resort to the just precedent (al-sunnah al-'ādilah), which unites and does not divide.*' By way of contrast Version B. repeatedly emphasises the Book of God and *'the sunna of the Messenger of God.'*

Other important features of both agreements are that the deliberations of the arbitrators would be in private and that only those invited could attend. If as explained above the substantive law of the arbitration was to be the Qur'ān then the procedural law applicable was to be at the discretion of the arbitrators.

Provision was made in Version A. for the appointment of a second arbitrator in the event of one of the arbitrators predeceasing the publication of the Award. However Version B. goes one stage further by making provision for the appointment of a replacement leader (Commander) in the event that either ʿAlī or Muʿāwiya passes away and such new leader was to be appointed or nominated by their respective Shīʿa. Thus death of either leader would not affect the continuation of the deliberation.

Finally, the venue of the deliberation was to be equidistant from Damascus and Kūfa and the Award had to be published before the end of the month of *Ramaḍān*, though if the arbitrators so chose they could publish their Award earlier. Guarantees of personal and family safety were written into both arbitration agreements for the benefit of both arbitrators.

Significantly what is missing from both the arbitration agreements was the subject matter of the dispute that the parties had agreed to be arbitrated upon. Yet it is

not difficult to imply into the agreements that what should have been discussed was the authority of the elected Caliph to appoint and dismiss, at his discretion, persons who would serve in his administration for the benefit of the community. This then remains a major flaw in an otherwise well constructed document and gave an opportunity to ʿAmr b. al-ʿĀṣ to exploit this loophole for the personal benefit of his master Muʿāwiya by raising the issue of the murder of ʿUthmān and the right that would accrue to his heir to demand *qiṣāṣ*.

There were 10 signatories as witnesses to the document. The first of these is al-Ashʿath b. Qays al-Kindī. Could ʿAlī have signed the agreement? The answer is certainly not. Al-Ṭabarī does not state that the document, Version A. was signed by ʿAlī. Indeed his comment when Abū Mūsā was foisted on him against his wishes, as an arbitrator, '*then do what you want*,' clearly indicates that his role thereafter was passive.

It is therefore to al-Ashʿath we must turn to determine the authorship of that agreement. There is every reason to believe that al-Ashʿath first became acquainted with Islām from family conversation, when his grand-father's half brother ʿAfīf, visited ʿAbd al-Muṭṭalib, in Makka to purchase provision, when the religion was still in its infancy, saw and observed the Prophet (ṣ.a.a.s.), Khadīja and ʿAlī pray at the Kaʿba. There is also reason to suppose that his curiosity at this new form of worship would have been aroused and would have spoken to family members on his return to his native Kūfa. He must surely have been approached by the Prophet (ṣ.a.a.s.) and invited to embrace Islām which he did not.[354]

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[354]*Nahj*, p.95. This incident is recorded by Ibn Kathīr, Vol.I, p.312 and also al-Ṭabarī, Vol.VI, (Albany, N.Y., 1988), p.82. ʿAfīf is known to have recorded his regret at not being the fourth person to embrace Islām.

Al-Ash'ath resurfaces again when Islām became firmly established after the conquest of Makka and deputations began to arrive in Madīna to accept Islām and to pledge allegiance to the Prophet (ṣ.a.a.s.). Both Ibn Kathīr and Ibn Isḥāq[355] recorded the conversation and his approach to the Prophet (ṣ.a.a.s.) as being opportunistic, half-hearted and disrespectful. His presence and conversation with the Prophet (ṣ.a.a.s.) breached the particular injunction of the Qur'ān[356] requiring believers to observe a proper code of conduct or etiquette when in the presence of the Prophet (ṣ.a.a.s.).

His conversion to Islām appears to have been wafer-thin in commitment as soon after the Prophet (ṣ.a.a.s.) passed away, al-Ash'ath apostatised. Captured during the *ridda* wars, he was taken as prisoner to Madīna where he re-embraces Islām and was married to Abū Bakr's sister Umm Farwa.[357]

He took part in the Battle of Yarmūk (16AH/637), fought south of Damascus, at the River Yarmūk, a tributary of the Jordan, and lost an eye. In an exchange of words with 'Alī after the Battle of Nahrwān, he was castigated as, '*a weaver son of a weaver brought up by unbelievers and a hypocrite. Curse of Allāh and all the world upon you.*'[358] It is suggested that he was one of the co-conspirators who plotted 'Alī's assassination.[359] The reference to al-Ash'ath as unbeliever and a hypocrite may have been to his past and has a counterpart in the Qur'ān, '*those who conceal the clear (Signs) We have sent down, and the Guidance, after We have made it clear for the People in the Book,-on them shall be Allāh's curse, and the curse on those entitled to curse.*'[360]

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[355]Ibn Kathīr, Vol.IV, p.98. Ibn Isḥāq, p.641.
[356]49:1-4
[357]*Nahj*, p.95.
[358]*ibid*, p.96.
[359]*ibid*, p.96.
[360]2:159

Al-Ashʿath b. Qays al-Kindī had been appointed governor of Ādharbāyjān by ʿUthmān and whose daughter was married to the deceased Caliph's eldest son. Al-Ashʿath may indeed have resented ʿAlī's recall of him as governor of Ādharbāyjān. ʿAlī had also demanded of al-Ashʿath an account of the treasury of that province. It is reported that ʿUthmān gave him a stipend of 100,000 dirham annually from the land tax of Ādharbāyjān.

Jarīr b. ʿAbd Allāh al-Bajalī was another prominent ʿUthmānid governor who had been recalled by ʿAlī as soon as he arrived in al-Kūfa. ʿAlī had asked both of them to pledge their allegiance. Al-Bajalī complied with the Caliph's request immediately. Not so with al-Ashʿath. It was he who insisted on the cessation of hostilities, volunteered to go and speak to Muʿāwiya, accepted and brought back Muʿāwiya's proposals for settlement and insisted on the deletion of ʿAlī's description as Commander of the Faithful.[361]

ʿAlī's two sons, al-Ḥasan and al-Ḥusayn, are shown as witnesses to Version B. As ʿAlī himself was not a signatory to the document it is unlikely that he would have allowed his sons to act as witnesses, unless he had a direct influence on its terms.

A significant omission in Version A. to the names as signatories is that of Mālik al-Ashtar who refused to sign the agreement and as has been seen earlier opposed the cessation of hostilities. Angry words were exchanged between al-Ashtar and al-Ashʿath but to no avail, as the former remained adamant that he would not sign the agreement. Yet we see in Version B. al-Ashtar's name appears as a witness as indeed does that of ʿAbd Allāh b. ʿAbbās.

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[361] Al-Ṭabarī, Vol.XVII, p.82.

With publication of the terms of the arbitration agreements, a cry of '*La ḥukma illā li'llāh*,' went up in 'Alī's camp.[362] Evidently many were dissatisfied with the process of arbitration that would have substituted the judgement of men for God's judgement. They tried unsuccessfully to persuade 'Alī to renounce the agreement and resume hostilities. 'Alī in turn explained that he was never in favour of ending hostilities and referring his dispute with Mu'āwiya to arbitration, or to the appointment of Abū Mūsā as his arbitrator. He was not now prepared to rescind that agreement, before Abū Mūsā was sent to *Dūmat al-Jandal*. He reminded his men that, '*we have a written agreement with them and stipulated conditions, and we have made them promises and given them our word regarding it.*'[363] 'Alī went on to quote to them the Qur'ān, '*Fulfil the Covenant of Allāh when ye have entered into it, and break not your oaths after ye have confirmed them; indeed ye have made Allāh your surety; for Allāh knoweth all that ye do.*'[364]

It is not the purpose of this thesis to discuss the authenticity of either version. Hinds, acknowledges in a detailed study of both versions, that there are indeed two versions. He states that 'Alī's copy (for Mu'āwiya) was written by his scribe 'Abd Allāh b. Rafi' and Mu'āwiya's scribe, 'Umayr b. 'Abbād al-Kinānī wrote a copy (for 'Alī).[365] He considers Version A. is authentic and Version B. he argues to be '*spurious*.'[366] Some consideration is therefore given to his arguments. In arriving at his conclusion he does take into account several factors. These include amongst other things the variation in the wording in each version, thus pointing out that the essential difference between the two versions is in the reading

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[362]No judgement except God's. *EI²*, *s.v.* ''Alī b. Abī Ṭālib,' Vol.I, (Leiden, 1960), p.381.
[363]Al-Ṭabarī, Vol.XVII, p.111.
[364]16:91
[365]Hinds, p.108 footnote 1
[366]*ibid*, p.107.

of the words, '*the just and not dividing sunna*' mentioned in Version A. in contrast to the more specific words of Version B. which reads, '*sunnat rasūl Allāh.*' The latter version according to Hinds reinforces the point by twice mentioning in the text, '*kitāb Allāh wa sunnat rasūlihi/nabiyyihi.*'[367]

A much more precise requirement than the vague rendering in Version A., makes Hinds' preference for Version A. and his description of Version B. as both '*spurious*' and '*suspicious*' all the more interesting and some consideration is given to his arguments. In particular he is concerned at the violent reaction of the Iraqīs who after the terms of the agreement were read out to them, revolted with a cry in unison of, '*La ḥukma illā li'llāh.*'[368]

Version A. stipulates in the event that the arbitrators did not find anything in the Book of God they would resort to the vague, '*Just precedent which unites and does not divide.*' It is this particular provision that Hinds suggests caused the rebellion in ʿAlī's ranks and the rebels who warned ʿAlī to repent and withdraw his acceptance of the Arbitration, or they would withdraw their support from him.[369] It is clear to see why Hinds considers the wording in Version A that caused the rebellion in ʿAlī's army. The vagueness of the phrase would suggest the desire to resort to the pre-Islamic precedents. Hinds further states that the more precise words, '*sunnat rasūl allāh,*' in Version B. would certainly not by contrast have produced such a violent objection as Version A. had.[370] The Qur'ān not only alludes to the practices of the pre-Islamic past but also admonished those who showed a stubborn resistance to change amongst unbelievers as well as the early

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[367]*ibid*, p.106.
[368]*ibid*, p.101.
[369]*ibid*, p.101.
[370]*ibid*, p.102.

converts to Islām, preferring to continue to hold fast to precedence set by their forefathers, even when the Qur'ān warned that those pre-Islamic precedents were wrong and contrary to good moral and ethical conduct.[371] Although Hinds employs other arguments to express his preference of the authenticity of version A., clearly the weight of his argument is focused on this particular provision that caused the outcry in 'Alī's camp. His conclusion therefore is that Version A. is authentic and Version B. spurious.

Hinds has not taken into account three very important factors pertaining to Version B. Firstly 'Alī's warning of Mu'āwiya's character, '*By Allāh! Mu'āwiya is not more cunning than I am, but he deceives and commits evil deeds. Had I not been hateful of deceit I would have been the most cunning of all men.*'[372] As to why he took up arms against Mu'āwiya and his entourage was because, *'they should adhere to the authority of this Book for they have disobeyed God and rejected His Book.*'[373]

Secondly, the importance of the words Book of Allāh and the *sunna* of His Messenger, in Version B, must surly have been there for a purpose. 'Alī might not have had a direct hand in the drafting of the agreement but he would have made his views known to his principal supporters. It is unlikely that he would have given *carte blanche* to Mu'āwiya in the preparation of the agreement. He would have been there in the background advising his supporters. 'Alī, an authority on the Qur'ān, would have wanted to see that the arbitration agreement reflected the Book of God, in particular, the verse of the Qur'ān, *'O ye who believe! Obey Allāh and obey the*

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[371]2:170; 5:104; 7:28. Also discussed in Chapter Three, 'The Concept of Dispute Resolution in the Mālikī School, Imām Mālik, The Muwaṭṭā, The '*amāl* of Madīna.'
[372]*Nahj,* Sermon 198, p.344.
[373]Al-Ṭabarī, Vol.XVII, p.79.

Messenger, and those charged with authority among you.'[374] Having thus established the precedence of the Qur'ān, the continuation of the same verse, '*If ye differ in anything among yourselves, refer it to Allāh and His Messenger*,' would have established the authority of the *sunna* of the Prophet (ṣ.a.a.s.) as the secondary source of reference. This provision and the fact that Version B. specifically mentions the '*sunna which unites*' has direct counterpart in 'Alī's letter of instruction to his newly appointed governor to Egypt, Mālik al-Ashtar, commanding him to follow or observe the Prophet's (ṣ.a.a.s.), '*unanimously agreed sunna in regard to which there are no differences*,'[375] referred to in Chapter One.

The third important factor is the presence of the signatures of al-Ḥasan and al-Ḥusayn as witnesses to Version B. It is only a matter of conjecture at present as to how those two signatures together with those of Mālik al-Ashtar and 'Abd Allāh al-'Abbās came to be on that document. The possibility should not therefore be excluded that 'Alī may indeed have wanted an agreement that counter-balanced anything that 'Amr and Abū Mūsā would have produced. Another factor that 'Alī would have seriously considered is al-Aḥnaf's advice to him that Abū Mūsā was dull-witted and of shallow intellect. As will be seen later he was certainly no match for 'Amr's cunning. The possibility should not be excluded that the entire Version A. is the brain-child of 'Amr b. al-'Āṣ designed for the benefit of his master, Mu'āwiya b. Abī Sufyān.

Therefore, those four signatures in Version B. principal supporters of 'Alī were there to give effect to 'Alī's wishes to have an agreement that stipulated not only reference to the Book of God but also to the *sunna* of His Messenger that unites. It

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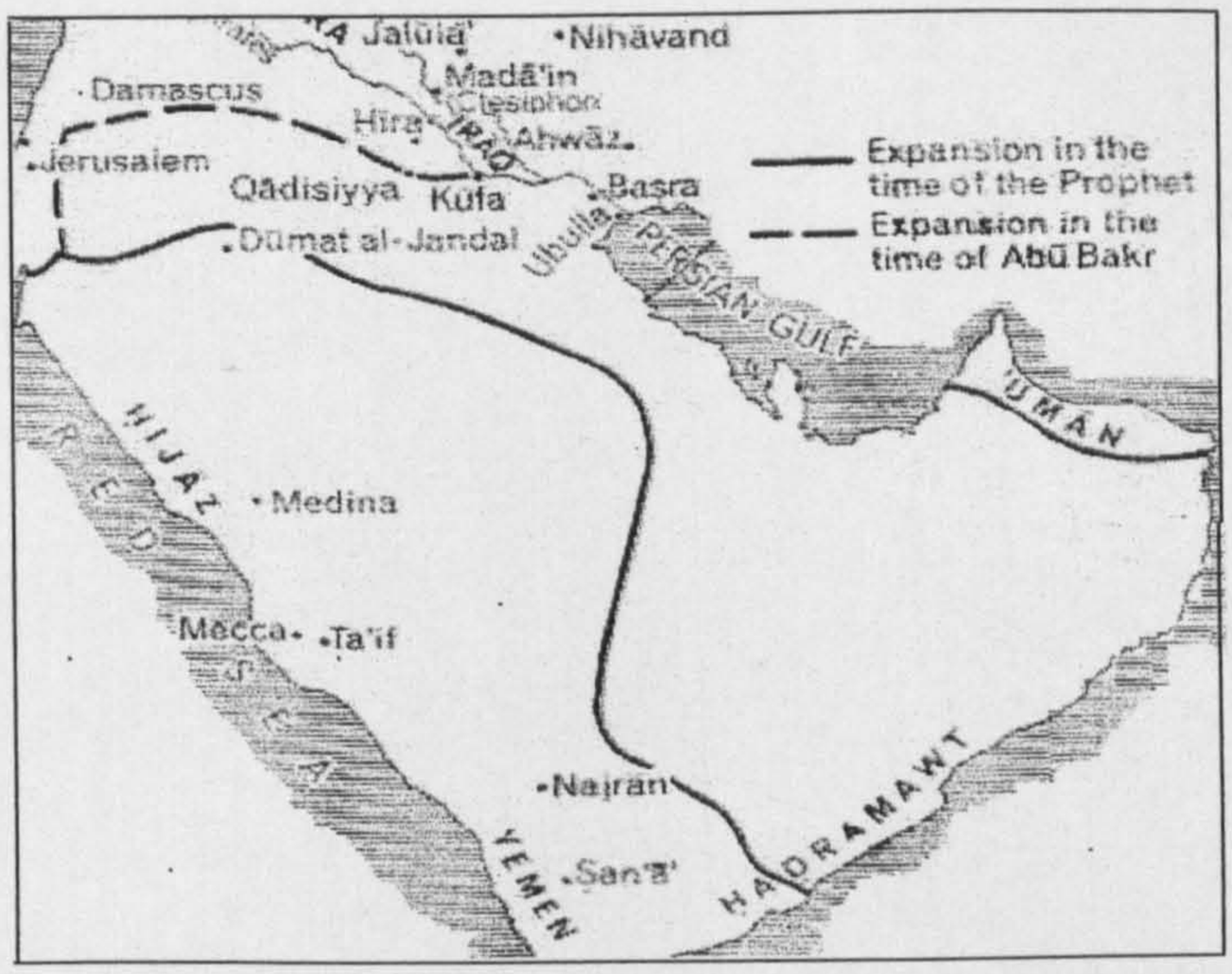
[374] 4:59

[375] *Nahj*, Letter 52, p.461.

may well be that both agreements are authentic and genuine, and prepared by both sides with a view to an exchange of the documents. However, after a careful consideration of all facts, Hinds is the first to admit that in his attempts to arrive at the conclusion, tentative though it is, that Version A. is substantially genuine is based on evidence that is internal and circumstantial and that there needs to be established realistic criteria so that early sources of Islamic history may be reviewed.[376]



According to al-Ṭabarī, the arbitrators met, half way between Iraq and Syria at *Dūmat al-Jandal* in *Ramaḍān* 37AH/Feb.658 (see map above).[377] There is no clear evidence of whether they met at *Dūmat al-Jandal* or *Adhruḥ*.[378] This chapter will

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[376]Hinds, p.113.

[377]Shahīd, p.19. For a morden attempt to reconcile contradictory traditions about the place of arbitration, see, *EI² s.v.* ''Alī b. Abī Ṭālib ', Vol.I, (Leiden, 1960), p.381.

[378]Place between Ma'an and Petra, (Morden day Jordan) and submitted to the Prophet (ṣ.a.a.s.) on payment of tribute during the expedition to Tabūk in 9AH/631 and became famous in history because of the conference that took place after *Ṣiffīn*. *EI²*, *s.v.* 'Adhruḥ' Vol.I, (Leiden, 1960), p.194.

argue that the final plenary session took place at a second meeting at *Adhruḥ* in *Shab'ān* 38AH/Jan.659, and that (the conversation recorded between ʿAmr and Abū Mūsā [see below] which took place at *Dūmat al-Jandal,* did in fact take place partly at *Dūmat al-Jandal* and partly at *Adhruḥ*).[379]

Consideration is first given to the events as recorded by al-Ṭabarī. Muʿāwiya arrived with his escorts. ʿAlī did not participate in this meeting. Having had no control over the appointment of his arbitrator, there is every reason to believe that after the signing of the two agreements, his role thereafter was passive though watchful. However, both sides would have had their escorts watching over their respective arbitrators.

The omission of the subject matter of the dispute left both agreements open to manipulation. At this first meeting ʿAmr b. al-ʿĀṣ, having secured to his advantage, a cessation of hostilities, and an agreement that reflected his own views, now took advantage of this omission to begin the meeting. According to al-Ṭabarī, the murder of ʿUthmān and Muʿāwiya's close connection to the murdered Caliph was raised by ʿAmr, who proposed to Abū Mūsā the arguments the latter should employ to support Muʿāwiya's candidacy in particular that Muʿāwiya was the next of kin to the unjustly murdered Caliph, the brother-in-law of the Prophet (ṣ.a.a.s.), through Umm Ḥabībah, a Companion and finally an able and competent administrator. He went further and attempted to bribe Abū Mūsā with authority and position should the latter accede to his request. Abū Mūsā's swift rejection of the overt attempt to bribe him was

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[379]Many western authors and more recently Madelung W., *Succession*, have, after a detailed research of historical records concluded that there were two meetings of the arbitrators. This section will seek to argue that this is indeed so, but based on the character of ʿAmr and Muʿāwiya. However see also al-Ṭabarī, Vol.XVIII, (Albany, N.Y., 1987), p.10, where he acknowledges that there was a second meeting at *Adruḥ*.

countered with a proposal that he would not accord precedence to Muʿāwiya over ʿAlī as the latter was one of the first of the *Muhājirūn*.[380]

A warning to ʿAmr, that victory for his master could be secured by a change of tack. He resumed by according precedence to Abū Mūsā on the basis that he was a Companion of the Prophet (ṣ.a.a.s.) and senior to ʿAmr, and invited him to speak first. At this meeting, discussion also turned on the appointment of a new Caliph, with Muʿāwiya's name being suggested but Abū Mūsā refused to countenance his name. ʿAmr proposing the name of Abū Mūsā's son as Caliph but he refused and instead proposed the name of ʿUmar's son ʿAbd Allāh b. ʿUmar.[381]

He must have been aware of Abū Mūsā's lukewarm support of ʿAlī and of his shallow intellect. No agreement having been reached, and sensing that neither ʿAlī nor Muʿāwiya would win favour with Abū Mūsā, he then invited Abū Mūsā for his proposal, who immediately suggested that both Muʿāwiya and ʿAlī should be deposed. ʿAmr accepted his proposal and Abū Mūsā was then invited by the former to speak first and to make public their agreement. As Abū Mūsā went forward to speak, he was warned by Ibn ʿAbbās that ʿAmr was not to be trusted that he was a treacherous man and that he may even have been tricked by him. He went further and advised him that he should let ʿAmr speak first. Abū Mūsā brushed aside the warning and insisted that an agreement had been reached and he for one was going to honour that agreement. He spoke first and in accordance with that oral agreement reached with his opposite number, pronounced that in accordance with the agreement reached with his counter part both ʿAlī and Muʿāwiya were deposed. ʿAmr then came forward to speak and in

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[380] Al-Ṭabarī, Vol.XVII, p.104.

[381] *ibid*, p.107. According to al-Ṭabarī, Abū Mūsā raised the issue of reviving ʿUmar's Caliphate, thus proposing his son which was quickly countered by ʿAmr proposing his Abū Mūsā's son instead.

his reply invited those present to note that Abū Mūsā had spoken and had deposed his representative, ʿAlī.

ʿAmr then went on to confirm that he too would agree to depose ʿAlī but in contrast to his agreement with Abū Mūsā, went on to support his candidate Muʿāwiya who as the next of kin of the murdered Caliph, sought vengeance for his blood and was the right person to succeed him. There was uproar and violence broke out with Abū Mūsā referring to ʿAmr as treacherous, unrighteous and a dog. The latter retorted insultingly, by referring to Abū Mūsā's shallow intellect and comparing him to '*a monkey that carries writings.*'[382] Abū Mūsā fled to Makka in disgrace. It can therefore be surmised from this event that at *Dūmat al-Jandal*, the parties had agreed that ʿUthmān had been killed unjustly. ʿAmr and the Syrians returned to Damascus to acknowledge Muʿāwiya as Caliph in *Dhu'l-Qa'da* 37AH.[383]

Al-Ṭabarī records the entire meeting, deliberation and acrimonious and violent ending of the arbitrators' meeting as taking place at *Dūmat al-Jandal*. He also records al-Wāqidī, who states that the two arbitrators met in the month of *Sha'bān* in 38AH/Jan.659, (presumably at *Adruḥ*) but does not record the venue.[384] Consideration is now given to the argument that the final plenary session was at *Adhruḥ*.

The cry of, '*La ḥukma illā li'llāh*,' to Version A.'s, '*Just precedent which unites and does not divide,*' that extended the authority of the arbitrators to beyond '*kitāb Allāh*,'[385] was a major problem for ʿAlī and grew louder between the signing of the agreements 17th *Ṣafar* 37AH/Aug.657, and the first meeting of the arbitrators

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[382] *ibid*, p.109.
[383] *ibid*, Vol.XVIII, p.210.
[384] *ibid*, Vol.XVII, p.110.
[385] Hinds, pp.101 and 106.

in *Ramaḍān* 37AH/Feb.658. The discontent in ʿAlī's army reached ʿAmr and Muʿāwiya. An astute and opportunistic person, ʿAmr would have wanted to prolong his deliberation with Abū Mūsā, if only to gauge which way the wind would blow. He would not have been in any hurry to arrive at a decision. He would by raising the issue of ʿUthmān's murder, manoeuvre his opposite number into agreeing that ʿUthmān was killed unjustly, that Muʿāwiya was his rightful heir entitled to vengeance and there was no person of stature who could inherit the mantle of the supreme office, that of Caliph. ʿAmr must also have been aware of Abu Mūsā's anger at being offered a bribe, and that the latter would not countenance the name of either Muʿāwiya or ʿAlī for the Caliphate.

It was from here only a small step towards suggesting that the parties should disperse and agree to meet again. His agenda must surely have been to promote Muʿāwiya for the Caliphate. Witness then, ʿAmr's return to his master, in *Dhu'l-Qa'da* 37AH/Apr.658, when Muʿāwiya is acknowledged Caliph.[386] A strange situation, since one of Muʿāwiya's demand to ʿAlī was that the right to elect a Caliph rested with the whole community and not to the *anṣār* and *muhājirūn* of Madīna.

Although at *Dūmat al-Jandal* the arbitrators reached a decision (that neither ʿAlī nor Muʿāwiya, was a suitable for the supreme office and that agreement could not be reached on a successor), decided nonetheless to keep secret both their deliberations and their result, it is almost certain that both parties came to know about it. ʿAlī's reaction when the news of the deliberation was leaked and the chaos that followed reached him, was instant, emphatic and a model of controlled anger. His rejection came in the words of a sermon, '*we did not name people the arbitrators, but we*

[386]Al-Ṭabarī, Vol.XVII, p.110.

named the Qur'ān the arbitrator.'[387] (The words spoken here are almost identical to those reported by al-Ṭabarī, when ʿAlī met up with those men who later opposed the arbitration. At this meeting, ʿAlī made it clear to them that if the two arbitrators deviated from their task, he would consider himself absolved from further participation in the arbitral process, in effect inviting his men to show patience, and continue their loyalty to him, in case hostilities resumed).[388]

ʿAlī went on to explain that the Qur'ān does need interpreters, but implied that these arbitrators had deviated from their task of interpreting the Qur'ān and the *sunna* of the Prophet (ṣ.a.a.s.). They had by their action and conduct exercised a personal preference contrary it would seem to the spirit of the agreement. In exercising their personal preference they had in fact departed from their oath, '*Now therefore if arbitration is truly done through the Qur'ān we would be the most rightful of all people for the Caliphate or if it is done by the Sunna we would be the most preferable of them.*'[389] It will be noticed, his comment expresses a clear preference for Version B.

As for the conduct of the arbitrators, ʿAlī was scathing,

> But they deviated from it, abandoned what was right although they had it before their eyes their desire was wrong-doing and their behaviour was going astray, although we had settled with them to decide with justice, to act according to light and without interference of their evil views and wrong judgement. Now that they have abandoned the course of right and have come out with just the opposite of what was settled we have a strong ground (to reject that verdict).[390]

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[387]*Nahj,* Sermon 123, p.221.
[388]Al-Ṭabarī, Vol.XVII, p.103. His account of the meeting with the *Khawārij* would suggest that ʿAlī met them soon after the signing of the agreements. But the sermons read together would suggest that he met them after the failed arbitration at *Ṣiffīn.*
[389]*Nahj*,Sermon 123, p.221.
[390]*ibid,* Sermon 175, p.291.

ʿAlī, tried in vain to persuade those of his followers who opposed the arbitration agreement to show patience, '*Bear patiently, for the promise of God is truth, and do not let those who have no certainty despise you.*'[391] They on the other hand tried unsuccessfully to persuade him to change his mind and rescind the agreement, now separated from him. They came to be known as the *Khawārij*.[392] The conflict that had led to the failed arbitration brought about a renewed pledge from those who remained loyal to 'Alī', and who gave their oath of allegiance based on the invocation of the Prophet (ṣ.a.a.s.) at *Ghadīr Khumm*, '*We are the friends of those whom you befriend and enemies of those you show enmity.*'[393] This oath of allegiance based on the tradition of the Prophet (ṣ.a.a.s.) was one of the important milestones in the development of Shīʿa law. As we shall see later it was a pledge in almost identical terms that 'Alī's eldest son al-Ḥasan, sought after his father's assassination at Kūfa and allegiance was offered to him as Caliph.

The *Khawārij* became rebellious to a point where they were a serious threat to public order. They were a major problem for ʿAlī, who was preparing to fight Muʿāwiya. Their presence if unchecked could have had disastrous consequences for him. Apart from that they were too numerous to ignore. ʿAlī chose to mount a full-scale battle against them and slaughtered them at the Battle of al-Nahrawān *Ṣafar* 38AH/July658, fought on the east of the Tigris River. The battle left his army tired, in need of replenishment of supplies and the need to regroup. He was unable to move swiftly against Muʿāwiya. That left the governor of Syria free and unfettered, and with 'Amr's advice he must have taken the opportunity to re-convene a meeting between

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[391] Al-Ṭabarī, Vol.XVII, p.113.
[392] *ibid*, p.110.
[393] *ibid*, p.117. The events at Ghadīr Khumm are considered *in extenso* in Chapter Four, 'The Concept of Dispute Resolution in the Ismāʿīlī School: The Authority of the Imām from the *Ahl al-Bayt*.'

the arbitrators at *Adhruḥ* in *Shabʿān* 38AH/Jan.659.[394] As for ʿAmr no better opportunity could have presented itself to challenge ʿAlī. His hostility to ʿAlī was personal; his disdained for the latter's authority obvious and his seduction by Muʿāwiya complete. In an exchange of words with Shurayaḥ b. Hāni', he is reported to have said, '*when have I ever accepted the advice of ʿAlī, done what he has said, or taken account of his views.*'[395] He was pressed by the former why he was not prepared to except, '*the advice of your master, the one who after their Prophet is the lord of the Muslims*?'[396] When Shurayaḥ went on to add that Abū Bakr and ʿUmar, who were ʿAmr's better, asked for and had acted on his advice, ʿAmr angrily retorted that he did not wish the conversation with Shurayaḥ to continue.[397]

Adhruḥ was an appropriate venue and as far away as possible from Kūfa and Baṣra. Here Muʿāwiya and ʿAmr could act out and complete their scheme of deposing ʿAlī knowing that he would have been unable to mount an attack, because of the distance and the rest his army needed after the Battle of al-Nahrwān. This second meeting had for ʿAlī no significance as Abū Mūsā was no longer his representative and in any case following the failure of the first meeting at *Dūmat al-Jandal*, he would no longer have felt bound to participate. At this final plenary secession of the arbitrators, it is suggested that the acrimonious and violent ending of the first meeting took place here at *Adhruḥ*, after ʿAmr reneged on his agreement with Abū Mūsā to depose both ʿAlī and Muʿāwiya. It was here at *Adhruḥ* that the Syrians swore allegiance to Muʿāwiya as Caliph.

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[394] *EI²*, *s.v.* ''Alī b. Abī Ṭālib', Vol.I, (Leiden, 1960), p.381.
[395] Al-Ṭabarī, Vol.XVII, p.108.
[396] *ibid*, p.108.
[397] *ibid*, p.108.

Before ʿAlī could regroup and raise an army to fight Muʿāwiya for perhaps the final decisive time, he was murdered by Ibn Muljan. He was one of three who hatched a plot to assassinate not only ʿAlī but also Muʿāwiya and ʿAmr b. al-ʿĀṣ. According to al-Ṭabarī, ʿAlī was killed on Friday the 17th *Ramaḍān* 40AH.[398] Ibn Muljan was waiting for him to arrive, and as he entered the mosque Ibn Muljan struck him on the top of his head with a sword. The wound proved fatal. Shīʿa Imāmi Ismāʿīlī sources relate that he passed away on the 21st *Ramaḍān* 40AH.[399] Immediately prior to his passing away, ʿAlī pronounced his testament. It is long and though in its entirety it is addressed to his eldest son al-Ḥasan, one particular sentence was addressed to all those who were present, '*I commend to you, Ḥasan, and all my offspring and family, the fear of God your Lord. Die only as Muslims and hold fast together to the rope of God, not separating.*'[400] His final words were addressed to his son al-Ḥasan, '*I heard Abū al-Qāsim saying, "the restoration of unity is better than all your prayer and fasting."*'[401]

According to Fyzee, he appointed his son al-Ḥasan guardian of his blood, Imām after him and heir to his knowledge, books and weapons in trust for his younger brother,[402] and was quoted as saying that he heard the Prophet (ṣ.a.a.s.) say, '*the composing of differences and the strengthening of bonds of friendship was better than all fasting and prayers.*'[403]

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[398]*ibid*, p.213. There is some confusion in the identification of the precise date as 15th Ramadān should have been a Friday. See footnote 838, although three of the chain of the authorities report that it was on Friday.
[399]Fyzee, p.78.
[400]Al-Ṭabarī, Vol.XVII, p.220. The reference here is to the Qur'ān 3:102-103
[401]*ibid*, p. 220. The reference here is to the Prophet (ṣ.a.a.s.).
[402]Fyzee, p.77.
[403]*ibid*, p.69.

On 'Alī's death Qays b. Sa'd. was the first to offer allegiance to al-Ḥasan as Caliph. Al-Ḥasan accepted his allegiance and undertook to follow, '*the Book of God and the example of His Prophet, for that includes every stipulation.*'[404] He would have been aware of two important but related obstacles. The first of which was that he would have had to seek endorsement of his nomination by the *anṣār* and *muhājirūn* of Madīna, so that the continuity of the practice of electing the Caliph was preserved. Alternatively, he would have had to acknowledge Mu'āwiya's objection that the right of participating in such electoral process was extended to all. The corollary to all this is that he would have had to negotiate with Mu'āwiya, something that his father had refused to do and he certainly would not have wanted to. The second, of course was that as the Syrians had acknowledged Mu'āwiya as Caliph, and that he, Mu'āwiya, would have been unwilling to relinquish authority that that position gave him, without perpetrating another major civil strife and loss of blood.

The other problem that al-Ḥasan would have had to take into account was the fact that at least the support given by the Iraqī to his father was lukewarm. When the people of Iraq had offered their allegiance to al-Ḥasan he accepted on condition that, '*You must be totally obedient, make peace with whom I make peace, and fight whom I fight.*'[405] For those Iraqīs who were present and prepared to offer their allegiance two factors must have been self-evident. The first of these must have been the significance of the words '*totally obedient*,' that had a direct counterpart to the Qur'ān which was to, '*O ye who believe! Obey Allāh, and obey the Messenger, and those charged with authority among you.*'[406]

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[404] Al-Ṭabarī, Vol.XVIII, p.2.
[405] *ibid*, p.7.
[406] 4:59

The second and equally important point was the entire condition that al-Ḥasan stipulated and required compliance with had a remarkable resonance to the Prophet's (ṣ.a.a.s.) invocation at *Ghadīr Khumm* on behalf of his late father, which was, '*O God, protect all who protect him and oppose those who oppose him.*'[407] It would appear that the majority were not prepared to subscribe to al-Ḥasan's triple condition and the Prophet's (ṣ.a.a.s.) grandson was stabbed though not fatally.

Perhaps realising that undivided loyalty and support from the Iraqīs was not forthcoming, al-Ḥasan immediately concluded an agreement with Muʿāwiya for the transfer of power to him and for safe conduct and retention of the sums in the treasury at Kūfa and together with his younger brother al-Ḥusayn retired to Madīna. But not without one last parting comment to the people of Iraq that, *'I am glad to be rid of you for three reasons: your killing of my father, your stabbing of me, and your plundering of my possessions.'*[408]

Apart from the fact that he may have been disappointed with Iraqī response to his request for total unconditional support, it may also be that in seeking accommodation with Muʿāwiya, one factor may have dominated al-Ḥasan's thoughts. He must have thought hard and long about the Prophet's (ṣ.a.a.s.) tradition mentioned in his late father's testament that settling of discord or dispute was better than fasting or prayer. This is a unanimously agreed tradition that is also recorded in Sunnī sources.[409] It is unlikely that he would have wanted to prolong a long and bloody conflict.

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[407]Ibn Kathīr, Vol.IV, p.301. This invocation is also mentioned by al-Ṭabarī, Vol.XVII, p.117.
[408]Al-Ṭabarī, Vol.XVIII, p.11.
[409]Abū Dāwūd, *Sunan* (Riyāḍ, 1999), p.693, *ḥadīth* No.4919

With the retirement of the Prophet's (ṣ.a.a.s.) two grandsons to the relative safety of Madīna, the surrender of Kūfa to Muʿāwiya, Muʿāwiya was proclaimed Caliph. There are two dates given for the transfer of power to him but the most accepted one is *Rabīʿ* I 41AH/July661, with Muʿāwiya being acknowledged as Caliph in *Jumādā* I, 41AH/Sept.661.[410]

In the year 56AH Muʿāwiya proclaimed his son Yazīd as heir apparent and died in *Rajab* 60AH. He was 77 years old when he died. Al-Ḥasan b. ʿAlī b. Abī Ṭālib died in 49AH at the age of 45 or 46. Both Shīʿa and Sunnī sources record that he died either from a long illness or poison administered by his wife Juʿda bint al-Ashʿath. Some historians have directly blamed Muʿāwiya for al-Ḥasan's murder. The agreement that Muʿāwiya had signed with al-Ḥasan precluded him from grooming his son for the succession. Muʿāwiya was certainly an ambitious man who would want to establish and perpetuate his dynasty. Hence it is suggested that he bribed Juʿda with a large sum of money and the hand of his son Yazīd in marriage to carry out the murder. On receiving confirmation of al-Ḥasan's death he paid Juʿda the sum agreed but did not go ahead with the marriage that he had promised.[411]

Muʿāwiya's vanity did not desert him even as he lay dying. He demanded of his family that they make arrangements for him to be propped up; his head and face to be anointed with oil and kohl or antimony to be put around his eyes. He also demanded that he should be made to look '*the healthiest of people*.'[412] Those who entered the room to greet him should be made to stand. When he was finally left

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[410]Al-Ṭabarī, Vol.XVIII, p.210. Although the Syrians had acknowledged Muʿāwiya as Caliph in *Dhu'l-Qa'da* 37AH, or in *Sha'bān* 38AH/Jan.659 after the first failed arbitration was reconvened at Adhruḥ.
[411]*EI²*, *s.v.* 'Al-Ḥasan b. Abī Ṭālib,' Vol.III, (Leiden, 1971), p.240.
[412]Al-Ṭabarī, Vol.XVIII, p.212.

alone with his family he remarked, '*by my posing for the gloaters by whom I am seen, indeed I am not ruined by the uncertainties of time.*'[413]

Immediately Muʿāwiya's death was confirmed, the oath of allegiance was given to his son Yazīd. The reports of the day on which the oath was given vary. The date is either 15th or 20th *Rajab* 60AH. Other reports state it was at the beginning of the month. Yazīd wasted no time in trying to consolidate his grip on power. He considered the last surviving grandson of the Prophet (ṣ.a.a.s.) a threat to his authority. He immediately wrote two letters to the governor of Madīna, al-Walīd b. ʿUthbah b. Abī Sufyān. The first of these letters informed the governor of the death of his father and the second letter was more sinister and menacing in tone and commanded the governor to seize the Prophet's (ṣ.a.a.s.) grandson al-Ḥusayn and to extract from him the oath of allegiance. Two others who were also to be seized in a similar fashion were ʿAbd Allāh b.ʿUmar and ʿAbd Allāh b. al-Zubayr. The letter went on to demand that al-Walīd was to, '*Act so fiercely that they have no chance to do anything before giving the oath of allegiance. Peace be with you.*'[414]

Al-Walīd duly obliged and sent a summons to al-Ḥusayn to attend upon him. Al-Ḥusayn together with his retinue visited the governor's residence. The governor demanded that the Prophet's (ṣ.a.a.s.) grandson give the oath of allegiance to his master Yazīd. This al-Ḥusayn was reluctant to do and suggested instead that rather than give his allegiance in private, the governor should invite him to give the oath of allegiance in public. The governor agreed with that suggestion. The Prophet's (ṣ.a.a.s.) grandson then went on to add that when the people were summoned to give their allegiance, he too should be summoned.[415]

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[413] *ibid*, p.212.
[414] *ibid*, Vol.XIX, (Albany, N.Y., 1990), p.2.
[415] *ibid*, p.5.

The Prophet's (ṣ.a.a.s.) grandson had no intention of giving his oath of allegiance to Yazīd. Al-Ḥusayn together with his family and retinue left Madīna that night for Makka. As he left the town the Prophet's (ṣ.a.a.s.) grandson recited the following words from the verse of the Qur'ān, *"O my Lord! Save me from people given to wrong-doing."*[416] As he entered Makka, al-Ḥusayn recited the following words from the same *Sūra* of the Qur'ān, "*I do hope my Lord will show me the smooth and straight Path.*"[417]

Whilst at Makka al-Ḥusayn received at least two sacks, full of letters from the Shīʿa's of Baṣra and Kūfa. The letters invited him to take over the leadership of the Muslim community. His reply to the Shīʿa of Baṣra is an early statement of the Shīʿa principle of the authority of the *Imām* from the *Ahl al-Bayt*,

> God gave preference to Muḥammad before all His creatures. He graced him with prophethood and chose him for His message. After he had warned His servants and informed them of what he had been sent with, God took him to Himself. We are his family, those who possess his authority (*awliyā'*), those who have been made his trustees (*awaṣiyā'*), and his inheritors; we are those who have more right to his position among the people than anyone else.[418]

The letters al-Ḥusayn received from his Shīʿas of Kūfa were also inviting him to join them in Kūfa to be their leader and spiritual guide, as they had no *Imām* other than him. Al-Ḥusayn must surely have been aware that these were the same Iraqīs who had forced his father to accept the arbitration process with Yazīd's father Muʿāwiya and who had treated his elder brother with such disloyalty that he

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[416] *ibid*, p.9. The Qur'ān 28:21
[417] *ibid*, p.10. The Qur'ān 28:22
[418] *ibid*, p.32.

was forced to leave Kūfa for the relative safety of Madīna. According to Jafri, one particular letter that would certainly have caught his attention was a letter signed by some of his Shīʿas of Kūfa. These same people had been his late father's staunchest supporters and had fought with ʿAlī at the Battles of *Jamal* and *Ṣiffīn*.[419] Al-Ḥusayn replied to their calls and inviting his trusted cousin Muslim b. ʿAqīl b. Abī Ṭālib to visit Kūfa and to report back to him on what he observed.[420]

After a stay in Baṣra and Kūfa, Muslim sent a letter to al-Ḥusayn to say that eighteen thousand people had given their oath of allegiance and the letter continued, *'Hurry and come when my letter reaches you. All the people are with you. None of them has any regard or desire for the clan of Muʿāwiya. Peace be with you.'*[421]

On receiving the news, al-Ḥusayn made preparations to go to Iraq. He was warned by Ibn ʿAbbās, who counselled patience, of the dangers that lay ahead and that the Iraqīs were not to be trusted. He also advised al-Ḥusayn that if he was determined to leave Makka, then he should proceed to al-Yaman where he could seek sanctuary amongst the fortresses and gorges of the area where his father had his Shīʿa. If he was determined to leave for Iraq, then he should at least consider the position of his women and children lest they should be forced to watch his death in the same manner as ʿUthmān was killed in the presence of his wife.[422]

His second advice came from Ibn al-Zubayr, who told him to remain in Makka, that the oath of allegiance would be given to him and that he would have all the advice and assistance and support that he needed. This second piece of advice

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[419]*ibid*, p.24. A point that is also confirmed by Jafri, S.H.M., *The Origins and Early Development of Shīʿa Islām*, (Beirut, 1979), p.177.
[420]*ibid*, p.16.
[421]*ibid*, p.57.
[422]*ibid*, p.67.

from al-Zubayr was emphatically rejected by al-Ḥusayn. His reply was that his father had warned him that, *'There will be in Makka a ram (i.e., a leader) who will cause its sanctity to be violated.'*[423] He went on to add that he did not wish to be that kind of leader.

Al-Ḥusayn left Makka for Kūfa on the 8th *Dhu'l-Ḥijja* 61AH/10thSept.680. He and his small band of followers, supporters and family reached Karbalā on the 2nd *Muḥarram* 61AH/2ndOct.680, where they pitched their camp. His last and final words to his sister Zaynab, were that he had seen the Apostle of God in his sleep who assured al-Ḥusayn that he was returning to the Prophet (ṣ.a.a.s.). That was on the 9th *Muḥarram* 61AH.[424] On the 10th *Muḥarram*, with superiority in numbers the 'Umayyad army of Yazīd attacked. The unevenly matched combat lasted that whole day. The Prophet's (ṣ.a.a.s.) only surviving grandson was the last to fall. His head was severed from his body and taken to Yazīd in Damascus. He was survived by his son 'Alī, who together with the womenfolk were taken prisoner to Damascus.

'Alī became the Imām after him and subsequently came to be known as Zaynu'l-'Ābidīn, meaning the ornament of worshippers because of his exemplary engrossment in prayers. The Caliphate as originally constituted after the death of the Prophet (ṣ.a.a.s.) was never to return to the *Ahl al-Bayt*, although the Imāms from the progeny of 'Alī were successful in establishing the Fāṭimid Caliphate in North Africa which is considered in some detail in Chapter Four.

As an Institution, the Caliphate lasted more than thirteen hundred years, vested ultimately in the Ottoman emperors. Five years after the ending of the First World War, on the 29thOctober 1923, the Turkish Grand National Assembly passed

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[423] *ibid*, p.69.
[424] *ibid*, p.112.

a law declaring Turkey to be a Republic. It was no longer stated in the Constitution that the religion of the State was Islām. The law went on to add that the head of the state was the President of the Republic. Muṣṭafā Kemāl Atatürk, (1298/9-1357AH/1881-1938),[425] saviour of the nation. (His decisive part in the campaigns conducted against the Allies and Greeks [1020-22], caused the Assembly to confirm on him the title of *Ghāzī*, "victor"). He was elected as the first President of the Republic at the sitting of the Grand National Assembly. The Caliphate ended as a consequence of Turkey's defeat at the end of the First World War. Atatürk had a fierce determination to adopt western secular values and institutions as a paradigm for a future Turkey. This determination extended to the secularisation of the state, abolishing religious courts, *sufi* orders, Qur'ānic Schools and ultimately the Sultanate and the Caliphate. There was clearly a dichotomy between the authority and position of the President of the Republic and the status of the last Ottoman Caliph ʿAbd al-Majīd. It became self evident that the days of the Caliphate were coming to an end.

Anticipating this end and seeking to preserve an ancient Islamic institution that had served the Muslim community, the Imām of the Ismāʿīlīs, His Highness The Aga Khan III, and Syed Ameer Ali[426] wrote to the Turkish Prime Minister, inviting him and the National Assembly to consider seriously the useful role that the Caliphate had played and that the actions of the Grand National Assembly had created an uncertain position with regard to the Caliphate. Paragraphs four and five gave cogent reasons why it was important in Sunnī Islām to retain the Caliphate,

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[425]Father of the nation, *EI²*, *s.v.* 'Muṣṭafā Kemāl Atatürk,' Vol.I, (Leiden, 1960), p.734.
[426]Author of *inter alia, Spirit of Islam*, (Delhi, 1923), and *A Short History of The Saracens,* (London, 1961). Judge of the High Court, Calcutta. Member of the Judicial Committee of the Privy Counsel.

4) In our opinion the Caliph-Imam symbolizes the unity of the Sunni communion, and the fact that he is a member of the Turkish people and is a descendant of the founder of the Turkish nation gives to Turkey a position pre-eminent among Islamic nations.

5) For fourteen centuries it has been the cardinal principle of the Ahl-i-Sunnat, and on this we believe, is the Ijmaa-i-Ummat, that the Caliph, the Vice-gerent of the Prophet, is the Imam of the Sunni congregations, and that between him and the general body of worshippers there is a nexus which knits together the Ahl-i-Sunnat. This mystical element cannot be eradicated from the Muslim mind without creating discord in the world of Islam.[427]

Their plea fell on deaf ears. On 2nd March 1924, the proposals for the abolishment of the Caliphate, were endorsed at a meeting of the peoples' party. On 3rd March 1924, the Grand National Assembly adopted the law abolishing the caliphate and banished members of the Imperial family from the Turkish Republic.

The important factors in this chapter are now considered and analysed and placed in the context of the next two chapters. The passing away of the Prophet (ṣ.a.a.s.) created a vacuum in the supreme authority of the community. Although this chapter is concerned about the arbitration agreement between ʿAlī and Muʿāwiya, it does discuss the creation of that authority to guide the community and challenges to authority that led to war, the murders of ʿAlī and his two sons al-Ḥasan and al-Ḥusayn, that left a vacuum in the community for a leader to guide it in accordance with the Qur'ān and the traditions of the Prophet (ṣ.a.a.s.).

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[427]Shah, Sirdar Ikbal Ali '*ThePrince Aga Khan An Authentic Life Story*,' (London, 1993), p.174.

The inconclusive ending of the Battle of *Ṣiffīn* and the failed arbitration, demonstrates practically that although the Qur'an is an explanation of everything, it is not so in a literal sense, it needs an authoritative guide to interpret its meaning. Both the main groups of Islām, Shīʿa and Sunnī, originally known as Shīʿat ʿAlī and Shīʿat Muʿāwiya, have felt this throughout history. It will not be possible in this thesis to analyse all the later Schools that developed. This thesis will confine itself to analysing one School from Sunnī Islām, the Mālikī School and one from Shīʿa Islām, the Ismāʿīlī School. In both instances an attempt will be made to demonstrate their perennial need of an exponent(s)/teacher(s) to interpret the Qur'ān according to the exigencies of time and space, in the context of dispute resolution.

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[427]Shah, Sirdar Ikbal Ali '*ThePrince Aga Khan An Authentic Life Story*,' (London, 1993), p.174.

CHAPTER THREE

The Concept of Dispute Resolution in the Mālikī School

Imām Mālik, The Muwaṭṭā, The *'amāl* of Madīna

As the previous two chapters have established, that for Muslims the Qur'ān, '*We have sent down to thee the Book in truth, that thou mightest judge between people by that which Allāh has shown thee; so be not an advocate for those who betray their trust;*'[428] and the *sunna* of the Prophet (ṣ.a.a.s.), '*Ye have indeed in the Messenger of Allāh an excellent exemplar for him who hopes in Allāh and the Final Day, and who remember Allāh much,*'[429] are the unanimous and universal primary sources of law and none more so than in the Mālikī School.[430] It is to this School that I now consider the concept of dispute resolution. But some historical and introductory comments are relevant, particularly in relation to the early development of Islamic law.

Also, mentioned in the previous Chapter, that on passing away of the Prophet (ṣ.a.a.s.), the *anṣār* and *muhājirūn* of Madīna met at the *Saqīfa* of *Banū Sā'ida* and elected as first Caliph Abū Bakr, following pledges of loyalty received from 'Umar b. al-Khaṭṭāb and others assembled. His Caliphate was short (11-13AH), and the territorial jurisdiction of Muslim sovereignty was restricted to Arabia alone. His brief period as Caliph was one of consolidation rather than territorial expansion. The problems that arose were neither large nor diverse and similar to those that had arisen during the Prophet's (ṣ.a.a.s.) time save that he had to contend with a serious rebellion by many diverse Arab tribes.

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[428] 4:105

[429] 33:21

[430] A group of jurists who formed themselves into a School after the adoption of Mālik's doctrine. *EI²*, *s.v.* 'Mālikiyya,' Vol.VI, (Leiden, 1991), p.278.

It is this preoccupation with the *ridda* wars that characterises his short Caliphate. The *ridda* or apostasy wars broke out when many of the Arabian tribes believed that their contract, association and allegiance with Islām ended with the passing away of the Prophet (ṣ.a.a.s.). Abū Bakr realised the danger these divers rebellions posed to Islām, made an attempt to resolve a conflict by writing to those who had apostatised and inviting them to re-embrace Islām.[431] His letter, with references to the Qur'ān, notably that God sent Muḥammad (ṣ.a.a.s.) with His truth to His creation as a bearer of good tidings and as a warner,[432] and as one calling (others) to God, with this permission and as a right-guiding lamp.[433] That God had no associates, He was Living, Eternal neither slumber nor sleep, overcome Him,[434] is a firm re-statement of his belief in Islām.

He warned, those who apostatised, that the Prophet (ṣ.a.a.s.), with God's permission, struck any person who turned his back on Him, until he recanted, willingly or grudgingly,[435] and of God, '*He guards His cause, takes vengeance on His enemy, and punishes them*,' [436] warning that the army would be sent to quell the rebellion. The majority of the tribes were defeated. The most important was the Battle of '*Aqrabā*' (12AH/633), fought on the borders of al-Yamāma, between the false prophet Musaylima, [who had wanted to be accepted either as equal to or as a rival to the Prophet (ṣ.a.a.s.)], aided by members of the *Banū Ḥanīfa* who refused to pay *Zakāt*.[437] The Muslim forces were led by Khālid

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[431]Al-Ṭabarī, Vol.X, p.55.
[432]2:119
[433]33:46
[434]2:255
[435]Al-Ṭabarī, Vol.X, p.55.
[436]*ibid*, p.56.
[437]*Da'ā'im*, p.309.

b. al-Walīd,[438] and Musaylima was killed thus putting an end to his pretensions.

By contrast, the Caliphate of 'Umar b. al-Khaṭṭāb, (13-23AH) was long. Internally it was one of relative stability; externally, one of territorial expansion.

The conquest of new lands, Iraq, Syria, Persia and Egypt during his period, brought with it a host of new problems civil, military, social, domestic, criminal, and revenue and which were not in the Prophet's (ṣ.a.a.s.) *sunna* as they did not exist in his time. In the legislative history of Islām, 'Umar's Caliphate stands out prominently. He provided legislation for a large number of issues. It is well known that like Abū Bakr, 'Umar consulted, received and acted in accordance with advice rendered by people of knowledge, particularly 'Alī b. Abī Ṭālib and Mu'ādh b. Jabbal. A well-known acknowledgement of advice acted upon and attributed to him is, *'but for 'Alī, 'Umar would have perished,'*[439] is an acknowledgement of the support he received from 'Alī.

A particular advice which 'Umar accepted from 'Alī was the establishing of the register under the title of *diwān* and to, *'divide every year the revenue that is collected for thee and keep not back anything.'*[440] The *diwān*, or department of revenue, collected, recorded and regulated the receipts and expenses of the revenue and kept a record of all of the Arab race and their clients, who after priority payments were made for the fiscal and civil administration of each province and military requirements, was distributed to those on the register who were entitled.[441]

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[438]Who was given command of the army after his return from campaign in Syria. *EI²*, *s.v.* 'Abū Bakr,' Vol. I, (Leiden, 1960), p.109.
[439]*Da'ā'im*, p.106. A similar comment is reported of Mu'ādh.
[440]As-Suyuti, Jalaluddin, *History of the Caliphs*,' tr. Major H.S. Jarrett, (Calcutta, 1881), p.148. He accepted 'Alī's advice for dating the *Hijra* (Islamic calendar), *ibid*, p.143. Hereafter cited as As-Suyuti.
[441]Ameer Ali, Syed, *A Short History of the Sarcenes* (London, 1961), p.61. Hereafter cited as Ameer Ali.

In due course 'Umar's decisions and actions assumed the status of legal precedents for future generations (and for Sunnī Islām commanded legal authority second only to the Qur'ān and the Prophetic traditions).

Under Abū Bakr's Caliphate, 'Umar was in charge of the administration of justice and distribution of the poor-tax.[442] He was the first Caliph to appoint judges, independent of governors, and to fix their salaries.[443] Legal activity flourished in the capital, Madīna. His appointment of Ka'ab b. Sur al-Azdī and Shurayḥ al-Kīndī ('Alī described him as, '*the best judge amongst the Arabs*'),[444] as judges and teachers of *fiqh* in 18AH at Baṣra and Kūfa respectively,[445] demonstrated his approach to such appointments, in that he was guided more by consideration of a person's ability to understand the basic principles of the Qur'ān and *sunna*. Neither of the appointee was or had been a Companion. Both had given proof of their command of deductive powers by analogy from the Qur'ān and the Prophet's (ṣ.a.a.s.) *sunna*. A notable Companion 'Abd Allāh b. Mas'ūd[446] was sent to Kūfa, Iraq, by 'Umar b. al-Khaṭṭāb where in 21AH/642 he permanently settled.

On the question of the administration of justice, 'Umar's letter to Abū Mūsā al-Ash'arī is instructive. His most telling points to him are that claimants and respondents in a dispute must be treated equally, it is for the claimant to

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[442]*ibid*, p.56. 'Alī was entrusted with correspondence and supervision and treatment of captives.
[443]*ibid*, p.62.
[444]Although he had an uneasy working relationship with 'Alī. *EI²*, *s.v.* Vol.IX, 'Shurayḥ b. al-Ḥārith B. Kays, Abū Umayya al-Kīndī,' (Leiden, 1997), p.508.
[445]Al-Ṭabarī, Vol.XIII, (Albany, N.Y., 1989), p.159, who held offices at the time of 'Umar's death , *ibid*, Vol.XIV, p.165.
[446]He is said to have received the Qur'ān directly from the Prophet (ṣ.a.a.s.). Witnessed the Battles of Badr and Uḥud and remained unshakeable in his loyalty to the *Ahl al-Bayt*. *EI²*, *s.v.* ''Abd Allāh b. Mas'ūd,' Vol.III, (Leiden, 1971), p.873

prove his case and for the respondent to give evidence on oath (should he contest the claim), Abū Mūsā should refer to the Qur'ān and *sunna* of the Prophet (ṣ.a.a.s.) and he was to use his judgement,[447] but only as a last resort where he was unable to site direct authority from the Qur'ān and *sunna*. All relevant points which later schools that developed were able to apply.

In due course decisions and actions assumed the status of legal precedents for future generations, (and for Sunnī Islām commanded legal authority second only to that of the Qur'ān and Prophetic traditions). 'Umar was the first Caliph to appoint judges and teachers of fiqh in every Muslim city. Legal activity flourished in capital, Madīna.

Ijtihād played a prominent role in it. *Ijtihād* meant the application of deduction to the principles of the Qur'ān and the Prophet's (ṣ.a.a.s.) *sunna* and the derivation of new judgements to meet new situations (brought about by territorial expansion). A prime example of the practice of *ijtihād* by the second Caliph is in his treatment of the spoils of war. The Qur'ān had prescribed the manner in which the spoils of war were to be divided,

> And know that out of all the booty that ye may acquire (in war), a fifth share is assigned to Allāh,-and to the Messenger, and to near relatives, orphans, the needy, and the wayfarer,-if ye do believe in Allāh and in the revelation We sent down to our Servant on the Day of Discrimination-the Day of the meeting of the two forces. For Allāh hath power over all things.[448]

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[447]Rahman-Hamoodur '*Reflections of Islām*,' (Lahore, 1999), p.149.
[448]8:41.The reference here is to the Battle of Badr.

The Prophet (ṣ.a.a.s.) acted in accordance with this injunction. But the circumstances under which the prescription was revealed had undergone a change since he passed away. In accordance with the new situation ʿUmar acted differently. Thus conquered land was treated as state property and the conquerors given fixed amount as salaries.[449] In this period of relative internal stability his Caliphate allowed for development of legal activity, which saw a large number of judgements.

As-Suyuti quotes a tradition of the Prophet (ṣ.a.a.s.) from ʿUbayy b. Kaʿab that, Gabriel related to him, '*verily Islām will weep at the death of Omar.*'[450] Certainly, his passing away led Ameer Ali to speculate, '*Had Omar lived longer, his force of character would have enabled him to make the Arabs more homogeneous, and thus prevented the disastrous civil wars that led to the ruin of Islām.*'[451]

After the assassination and death of ʿUmar, centres of law began to appear in the Muslim world. In Iraq, mosques of Baṣra and Kūfa became centres of law. [In Baṣra a Companion Abū Mūsā al-Ashʿarī b. Qays (d.c.44AH/654)[452] played a leading role; whilst in Kūfa, ʿAlī b. Abī Ṭālib figured prominently. He had moved his capital there on his election to the Caliphate and had remained there until his assassination in 40AH].

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[449]Guraya, Dr. M.Y., *Islamic Jurisprudence in the Modern World*, (Lahore, 1992), p.58, quoting Abu Yusuf, *Kitab al-Kharaj*, (Egypt, 1302AH), p.20. Hereafter cited as Guraya.
[450]As-Suyuti, p.122.
[451]Ameer Ali, p.57. The author adds without citation that, 'A European writer considers these civil wars and bitter tribal feuds as the salvation of Europe.'
[452]A native of al-Yaman', joined the Prophet (ṣ.a.a.s) at Khaybar where he swore fealty to him and took part in the Battle of Ḥunayn in 8AH/630 *EI²*, *s.v.* 'Abū Mūsā al-Ashʿarī,' Vol.I, (Leiden, 1960), p.695.

(In these early formative years of law, in this process of evolution of jurisprudence, the Qur'ān remained its primary source. However, with the conquest of new territories, a host of new problems arose for which there was no precedent. The need for subsidiary authority became apparent).

Two Schools of law developed; the School of *ra'y* and the School of *ḥadīth*. *Ra'y* is individual reasoning or opinion of the jurist and was used in the early formative years of Islām, whose proponents were known as *ahl al-ra'y*. It was a practical or pragmatic approach to the issues that needed resolving and could be described as a means of exercising *ijtihād*, [exercising one's own judgement where there was no established precedent of the Prophet (ṣ.a.a.s.)],[453] in those early formative years but was replaced by *qiyās*, which may be described as careful reasoning.

The School of *ra'y* had its origin in Iraq. The School's most celebrated proponent was ʿAbd Allāh b. Masʿūd (d.c.33AH/653), an early convert to Islām. Kūfa the most populous city became the centre of learning. However *ra'y* does not stand in isolation and apart from *qiyās* as a method of legal reasoning. Also encompassed within the concept of *qiyās*, (analogical reasoning), are other legal precepts such as *istiḥsān,* (consideration of equity)[454] or *istiṣlāh* (The purpose of which is to take account of the public good) and *maṣlaḥa*[455] or *al-maṣāliḥ al-mursala*, (consideration of public good). This last legal doctrine is particularly

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[453]An effort a jurist makes to discover the law from the sources. *EI²*, *s.v.* 'Idjtihād,' Vol.III, (Leiden, 1971), p.1026.

[454]A principal used by the Ḥanafī and Mālikī schools in where a rule applied by strict analogy is ignored and a general rule based on e.g. Necessity is preferred. *EI²*, *s.v.* 'Istiḥsān,' and 'Istiṣlāh,' Vol.IV, (Leiden, 1978), p.255.

[455]A principle of interpretation that seeks to discover, protect and preserve the public interest or public good. Though, no reference can be found to *maṣlaḥa* or *istiṣlāh* in Mālik's writing. 'Maṣlaḥa', (pl. *al-maṣāliḥ*). *EI²*, *s.v.* Vol.VI, (Leiden, 1991), p.738.

associated with the Mālikī School, as indeed is another legal precept, known as *sadd al dharī'a* (blocking the means).[456] Some short explanation of these principles and their interdependent relationship is considered.

Istiḥsān is a method by which a jurist may exercise *ijtihād* to arrive at a decision, which serves the interest of justice. It is distinguished from *qiyās* in that it departs from the strict rules of analogy. Another description is juristic preference. *Istiḥsān*, according to Kamali, '*has provided Islamic law with the necessary means with which to encourage flexibility and growth.*'[457] The proponents of *istiḥsān* argue in favour of the precept based on an *ḥadīth*, '*the best of your religion is that which brings ease to the people*,'[458] and the Qur'ān, '*Allāh intends every facility for you; He does not want to put you in difficulties.*'[459]

The principle objection comes from al-Shāfī'ī, '*it is unlawful for anyone to exercise istiḥsān whenever it is not called for by a narrative, whether the narrative is a text of the Qur'ān or sunna.*'[460] According to him, only scholars may give an opinion based on a narrative. If a narrative is not found then opinion may be given by analogy, on the strength of a narrative. Shāfī'ī was strict in that analogy could not be abandoned.

One can discern an early application of the principle of *istiḥsān* in the Muwaṭṭā. Mālik reports the purchase and sale of fruit from a garden with the

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[456]Dutton, Y. *The Origins of Islamic Law,* (Richmod, Surrey, 1999), p.34. Hereafter cited as *Origins*.
[457]Kamali, Muḥammad Hāshim, *Principles of Islāmic Jurisprudence,* (Cambridge, 1991), p.246. Hereafter cited as *Principles*.
[458]*ibid*, p.247 quoting al-Sarakhsī (d.483AH), Mabsūṭ X.
[459]2:185
[460]*al-Risāla*, p.304.

purchaser retaining right to manage the garden. The purchaser suffered a loss when the produce was damaged. The seller refused to annul the sale or abate the price. The matter reached the Prophet (ṣ.a.a.s.), who asked if the seller had really sworn not to do a good turn to the buyer? When the seller heard of the Prophet's (ṣ.a.a.s.) remark, he affirmed to abide by whatever decision was made.[461]

The jurist may resort to *al maṣāliḥ al-mursala* and arrive at a ruling that serves a useful purpose or prevents a possible future harm. According to Kamali, and applying the principles of *al-maṣāliḥ al-mursala*, the School would sanction the oath of allegiance or *bay'a* to a lesser qualified person to be an *Imām* so as to prevent a possible chaos or disorder in society. Again the principle could be applied where the *Imām* considers it necessary to levy additional taxes on the rich, when the Public Treasury or *bayt al-māl* has run out of funds and the additional levy would prevent injustice or sedition (*fitnah*).[462]

The School of *ḥadīth*,[463] whose proponents were known as *ahl al-ḥadīth*, had its origin in Makka, where an early interest developed in the collection and recording of traditions or *aḥadīth* of the Prophet (ṣ.a.a.s.). Traditions meant an account of the Prophet's (ṣ.a.a.s.) actions, sayings or approvals, tacit or express, of what was said or done in his presence.

Many individuals collected and recorded traditions. As the numbers of traditions grew it became important to authenticate each tradition by a complete chain or *isnād* from the narrator back to the Prophet (ṣ.a.a.s.). In *al-Muwaṭṭā*,

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[461]Imam Malik, '*Muwatta*,' tr. Muhammad Rahimuddin, (Lahore, 2000), p.290. Hereafter cited as *Muwatta*.'

[462]*Principles*, p.280.

[463]Account of what the Prophet (ṣ.a.a.s.) said or did or of his tacit approval of what was said or done in his presence. *EI²*, *s.v.* 'Ḥadīth,' Vol.III, (Leiden, 1971), p.23.

Mālik b. Anas (d.179AH/767) gives several traditions, some with a complete chain of authority. However his principal thrust was explaining the *ʿamāl* or the practice of Madīna. Traditions were classified into four major categories of trustworthiness, *ṣaḥīḥ* (sound), *ḥasan* (good), *ḍaʿīf* (weak), and *saqīm* (infirm).

An early compiler of *aḥadīth* was Ibn Isḥāq (d.150AH). His biography of the Prophet (ṣ.a.a.s.) is regarded as one of the most important sources of the study of his life.[464] It should be noted that two ancient schools of law, the Iraqī and the Madinese, though they differed in their legal approach, in essence shared the basic concept which was the *sunna* (pl. *sunan*) or practice, the living tradition of the school itself which reflected on the one hand the everyday customs of the school, coupled with the doctrine of its scholars, and on the other hand customs believed to be traceable through a complete *isnād*, all the way back to the Prophet (ṣ.a.a.s.).

The collections of tradition came to play an important part in the development of law. Apart from Mālik and Ibn Isḥāq, six other collectors of *aḥadīth* were Muḥammad Ismāʿīl al-Bukhārī (194AH/810-256AH/870), Sulaymān b. al-Ashʿath Abū Dā'ūd (202AH/817-275AH/889), Abu'l-Ḥusayn Muslim b. al-Ḥajjaj (c.202AH/817-261AH/875), Abū ʿĪsā Muḥammad al-Tirmidhi (209AH/824-270AH/883) al-Nasā'ī (d.303AH/915), Abū ʿAbd Allāh b. Yazīd b. Māja (318AH/930-380AH/991).

In the early formative years, the terms *ḥadīth* and *sunna* were related concepts.[465] *Ḥadīth* meant the orally transmitted and later written or documented 'revered practices' of the earliest Muslims, including that of the Prophet (ṣ.a.a.s).

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[464]Ibn Isḥāq, *The Life of Muḥammad.*
[465]*EI²*, *s.v.* 'Sunna', Vol.IX, (Leiden, 1997), p.878.

Sunna had a much wider connotation and included not only 'the revered practices' of the above but also other practices of pre-Islamic past.[466] Initially it meant the approved practice introduced by the Prophet (ṣ.a.a.s.) and of the pious Muslims of the early generations. Thus *sunna* came to be regarded as any good precedent set by the people of the past. Its meaning may indeed have included any precedent set in the pre-Islamic past. The term *sunna* came to play a major part in the political and legal field. It occurs in both arbitration agreements negotiated at *Ṣiffīn*. (The early interpretation and application of the term *sunna*, as discussed in Chapter Two, caused a major rift in 'Alī's camp). It was the jurist al-Shāfiʿī (150AH/767-204AH/820), who drew attention to the primacy of the *sunna* of the Prophet (ṣ.a.a.s.) as a second source of law.

This he did by first elucidating and then equating the term *sunna* as that of the Prophet (ṣ.a.a.s.) in preference to those of ancient authorities. His point of origin for the elevation of the *sunna* of the Prophet (ṣ.a.a.s.) and hence giving it priority and sole position of authority is the Qur'ān. In particular he quotes from the Qur'ān, invocations such as, "*Our Lord! send amongst them a Messenger of their own, who shall rehearse Thy Signs to them and instruct them in Scripture and Wisdom, and purify them: for thou art the Exalted in Might the Wise.*"[467] To which God replies, '*A similar (favour have ye already received) in that We have sent among you a Messenger of your own, rehearsing to you Our Signs, and purifying you, and instructing you in Scripture and Wisdom and in new Knowledge.*'[468]

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[466]*ibid*, p.879.
[467]2:129.
[468]2:151. Shāfiʿī uses this as an example in his *al-Risāla*, p.110.

Having thus established the primacy of the traditions of the Prophet (ṣ.a.a.s.) of Allāh, he then goes on to quote from the Qur'ān the manner, in which believers are to accord respect to him,

> Only those are Believers, who believe in Allāh and His Messenger: when they are with him on a matter requiring collective action, they do not depart until they have asked for his leave; those who ask for the leave are those who believe in Allāh and His Messenger; so when they ask for thy leave, for some business of their, give leave to those of them whom thou wilt, and ask Allāh for their forgiveness; for Allāh is Oft-Forgiving, Most Merciful.[469]

However, Shāfi'ī could also have supported the force of his arguments with other verses. Particularly relevant are three verses exhorting believers to accept the authority of the Prophet (ṣ.a.a.s.). The first of these is warning the believers that whilst mere profession of statements of belief in Allāh and His Prophet (ṣ.a.a.s.) are fundamental to belief, nonetheless a certain degree of continuous commitment is required on their part. Thus the Qur'ān warns that, '*They say, "We believe in Allāh and in the Messenger, and we obey:" but even after that, some of them turn away: they are not (Really) Believers*,'[470] is a clear indication that the commitment to Allāh and His Prophet (ṣ.a.a.s.) is total and continuous.

Two other verses may be considered. One such verse requires believers to attend upon the Prophet (ṣ.a.a.s.), '*when they are summoned to Allāh and His Messenger, in order that he may judge between them, behold, some of them*

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[469] 24:62
[470] 24:47

decline (to come).'[471] The answer that the Qur'ān commands of such of the believers, '*when summoned to Allāh and His Messenger, in order that he may judge between them, is no other than this: They say, "We hear and we obey": It is such as these that will prosper.*'[472] Finally, the Qur'ān re-iterates the reward for those believers, '*as obey Allāh and His Messenger, and fear Allāh and do right, that will triumph.*'[473]

Al-Shāfi'ī quotes many verses from the Qur'ān, but of primary importance is the verse, '*O ye who believe! Obey Allāh, and obey the Messenger and those charged with authority among you. If ye differ in anything among yourselves refer it to Allāh and His Messenger if ye do believe in Allāh and the Last Day.*'[474] Having thus established the sole authority of the Prophet (ṣ.a.a.s.), he then equates that authority with God's authority by quoting the verse of the Qur'ān,

> Verily, those who plight their fealty to thee plight their fealty in truth to Allāh: The Hand of Allāh is over their hands: then anyone who violets his oath, does so to the harm of his own soul, and anyone who fulfils what he has covenanted with Allāh,-Allāh will soon grant him a great Reward.[475]

It was from this point onwards that Shāfi'ī came to consider the *sunna* of the Prophet (ṣ.a.a.s.) as the second most important root or *aṣl* (pl. *uṣūl*). Once this boundary had been crossed, a special preference now developed for *sunna*

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[471] 24:48
[472] 24:51
[473] 24:52
[474] 4:59, For Shāfi'ī this verse is of primary importance, see *al-Risāla*, p.112.
[475] 48:10; 4:80, Shāfi'ī considers this pledge to substantiate his argument of the authority of the Qur'ān and the Prophet (ṣ.a.a.s.). See *al-Risāla*, p.114.

recorded in *ḥadīth* whose *isnāds* went all the way back to the Prophet (ṣ.a.a.s.). The terminology *sunnat al-nabī* now took sole precedence.[476]

It was left to a later jurist Aḥhmed b. Ḥanbal (d.241AH/855), to perfect Shāfiʿī's logic by pointing out that the verse of the Qur'ān, '*Ye have indeed in the Messenger of Allāh an excellent exemplar for him who hopes in Allāh and the Final Day, and who remember Allāh much,*'[477] of equal importance as those verses quoted by al-Shāfiʿī.

In the Introduction to this thesis, *ijmāʿ* or consensus of the community as the third source of law, after the Qur'ān and *sunna*, in Sunnī Islām, has already been touched upon. The question therefore to be asked is, does *ijmāʿ* have its root in either the Qur'ān or in the *sunna*?

The Qur'ān commands believers, '*O ye who believe! Obey Allāh and obey the Messenger and those charged with authority among you.*'[478] Those charged with authority are the *ulu'l-amr*. According to a tradition of the Prophet (ṣ.a.a.s.) based on his saying, '*my community shall not agree on an error,*'[479] since God has commanded obedience to the *ulu'l-amr*, therefore they, the *ulu'l-amr* must be immune from error. It has been argued that *amr* in the verse refers to both secular and religious leaders. The *ulamā* or religious leaders are the authority to be obeyed.

Although *ijmāʿ* (consensus of the community), does not emanate directly in divine revelation, it is derived from a tradition of the Prophet

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[476]A term denoting pre-Islamic custom that eventually came to mean the revered practices of the Prophet (ṣ.a.a.s.). *EI²*, *s.v.* 'Sunna,' Vol.IX, (Leiden, 1997), p.878.
[477]*ibid*, p.879. The Qur'ān 33:21
[478]4:59
[479]Al-Tirmidḥī, Muḥammad b. 'Īsā, *Al-Jāmiʿ*, (Riyāḍ, 1999), p.498, *ḥadīth*, No.2167.

(ṣ.a.a.s.), whereas *qiyās* as is shown, derives its ultimate authority from the texts themselves. Accordingly, *ḥadīth* provides a much stronger argument in favour of the concept of *ijmā'*. After the Qur'ān and *sunna, ijmā'* and *qiyās* become the third and fourth and final source of law in Sunnī Islām.

The Introduction also mentions *qiyās* as the fourth and final source of law. Therefore some brief explanation is required to consider the importance of *qiyās*. In this too indebtedness is owed in Sunnī Islām to al-Shāfi'ī. *Qiyās* or reasoning by analogy stands not in isolation but in conjunction with *ijtihād*, both terms have the same meaning.[480] To advance his argument Shāfi'ī quotes from the Qur'ān, '*We see the turning of thy face (for guidance) to the heavens: now shall We turn thee to a Qibla that shall please thee. Turn then thy face in the direction of the Sacred Mosque. Wherever ye are, turn your faces in that direction*,'[481] and he asks a rhetorical question as to how a person should find the direction of the Sacred Mosque, if he finds himself in a strange environment.

To this Shāfi'ī, gives his answer by referring back to the Qur'ān and in particular, '*It is He who maketh the stars (as beacons) for you, that ye may guide yourselves, with their help, through the dark spaces of land and sea: We detail Our Signs for people who know*.'[482] The other verse he quotes is, '*And marks and sign-posts; and by the stars (men) guide themselves*.'[483] Thus Shāfi'ī is able to demonstrate that by the use of *ijtihād* and *qiyās* a person should find the direction of the Sacred Mosque. The application of *qiyās* is the consideration of the facts and applying the facts to the textual sources and traditions of the

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[480] *al-Risāla*, p.288.
[481] 2:144
[482] 6:97
[483] 16:16

Prophet (ṣ.a.a.s.). An example of the use of both *qiyās* and *ijtihād* in the Mālikī School, is the *fatwā* of a prominent Mālikī judge and jurist Ibn Rushd.[484] Before discussing his *fatwā* in some detail, an introductory explanation is considered necessary.

The case involved murder and the admitted guilt of the perpetrator of the crime in the Andalusia city of Cordoba in Muslim Spain in 516AH/1122. The murderer was in a state of inebriation which was no defence, when he committed his crime and the victim left three children, all minors. He was sentenced to death according to the *fatwā* (pl. *fatāwā*) of Ibn al-Ḥājj (d.529AH/1134),[485] and other jurisconsults, in accordance with the principal of the Mālikī School, based on the dictum of Mālik that a verdict could not be postponed until the children attain majority so as to give them, the children, the right of exercising an option, and sentence was carried out.[486] The victim also left a brother and his two adult sons.

According to Ibn Rushd, although the deceased's children who were at the time of the commission of the crime too young, did not possess legal capacity and therefore could not be consulted on the question of punishment, the case for *qiyās* must first be explored fully from the Qur'ān and traditions of the Prophet (ṣ.a.a.s.) before recourse is had to other legal precepts. In other words Ibn Rushd was challenging the basic ruling and judgement. However, before a detailed explanation of his reasoning is made some general explanation of the

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[484]Ibn Rushd, *Ḅidāyat al-Mujtahid*, Vol.2 tr. Imran Ahsan Khan Nyazee, (Reading, England, 1996), p.486. Hereafter cited as *Ḅidāyat*.
[485]Hallaq, Wael B., *A History of Islamic Legal Theories*, (Cambridge, 1997), p.157. Hereafter cited as *History*.
[486]*Ḅidāyat*, p.487.

relationship between *qiṣāṣ* (retaliation) and *'afw* (pardon) is explained. *'Afw* can either be in return for *diya* (blood money) or without it in the light of two *aḥadīth* of the Prophet (ṣ.a.a.s.).[487]

The question to be discussed was if the pardon and the *diya* were the exclusive right of the heirs of the victim, with no option being accorded to the perpetrator of the crime i.e. the person liable to *qiṣāṣ* or if consent of both parties is required to the payment of *diya*. In the event that the killer does not wish to pay the *diya,* the heirs have an option, either retaliate or pardon for *diya*. Mālik basing his decision on an *ḥadīth* attributed to the Prophet (ṣ.a.a.s.), from Anas b. Mālik, '*the decree of Allāh is qiṣās*,' held that the murderer could not be pardoned for *diya*.[488] However, Mālik is aware of another *ḥadīth* that the heir or next of kin of the victim has a choice based on a tradition of the Prophet (ṣ.a.a.s.), that, '*one whose kin is killed may choose one of two alternatives, whichever he may prefer: the acquisition of diya or pardon.*'[489] This tradition is reported by Abū Hurayra.[490]

Prima facie, there is therefore a conflict in the meaning of the two *aḥadīth*, which is avoided if the Qur'ānic injunction, '*nor kill (or destroy) yourselves: for verily Allāh hath been to you most Merciful*,'[491] is read in conjunction with the verse, '*and anyone who remits the retaliation by way of charity, it is an act of atonement for himself*,'[492] then reconciliation becomes

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[487]*ibid*, p.486.
[488]*ibid*, p.486.
[489]*ibid*, p.486.
[490]Converted to Islām in 7AH/629. A narrator of traditions that appear in the *Ṣaḥīḥs* of Muslim and al-Bukharī. *EI²*, *s.v.* 'Abū Hurayra,' Vol.I, (Leiden, 1960), p.129.
[491]4:29
[492]5:45

obligatory and the dichotomy between the two *aḥadīth* is removed.[493]

If, as Ibn Rushd argues, the second of the two *aḥadīth* is preferred when applied in conjunction with the above quoted Qur'ānic verses, then, on that basis can retaliation be postponed where the victim has heirs, who are both majors as well as minors? Especially so where the victim has brothers who are of majority but heirs who are still minors.[494] The consideration of the facts and applying the facts to the textual sources and the traditions of the Prophet (ṣ.a.a.s.), Ibn Rushd was in fact exercising another important precept of law, that of *ijtihād*, which may be described as the greatest possible effort of a qualified jurist to reach a legal decision within the law. Where the victim left minor children then based on the theory of analogy, he argued that the retaliation should be postponed until the minors reached majority.[495]

However, the arguments presented by Ibn Rushd are basic. Hallaq offers an explanation.[496] To arrive at this judgement, Ibn Rushd draws on cases in other areas of the law where the children's right is protected until they reach majority, *e.g.,* the right of pre-emption, a right not recognised in the Mālikī School. The second argument Ibn Rushd advances in favour of postponement is from the verses that favour forgiveness, '*hold to forgiveness till Allāh brings about His command*'[497] and, '*and ask for Allāh's forgiveness. For Allāh is Oft-forgiving most Merciful.*'[498]

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[493] *Bidāyat*, p.487.
[494] *ibid*, p.487.
[495] *ibid*, p.487.
[496] *History*, p.158.
[497] 2:109
[498] 2:199

This reasoning, this *fatwā* was a landmark decision. It demonstrated Ibn Rushd's ability through *qiyās* to challenge a legal doctrine of his, Mālikī School. The significance here lies in the fact that the ruling was viewed by his contemporaries with horror because his reasoning was against the basic doctrine of the School, as propounded by Mālik. According to Hallaq, this *fatwā* was incorporated in standard text manuals of the Mālikī School.[499]

The person who is entitled to practice *ijtihād* is known as *mujtahid*. He may be either a *faqīh* or jurist or *muftī* or a jurisconsult with this important distinction. Whereas the jurisconsult must possess the same qualities as the jurist, that of possessing a just and trustworthy character, he must in addition be known to take religion and religious matters seriously.[500]

Briefly, where a jurist refers to the Qur'ān, *sunna* and *ijmā'* to determine a particular ruling, but cannot find a particular solution, he turns to *qiyās* (analogical reasoning), by identifying a common ratio or cause between a ruling in the text and the issue for which a solution is sought. Where such a solution through *qiyās* results in hardship or unfairness, the jurist can depart from it in favour of an alternative analogy where the ratio is less obvious but arrives at a favourable solution. This alternative analogy is called *istiḥsān.*

The Qur'ān and the Prophetic traditions, the *aḥadīth*, remained the cornerstone of legislation. The *ḥadīth* had been limited to the political, social and economic climate of Madīna and related more to the personal life of the Prophet (ṣ.a.a.s.) and his religious practices than to the practical problems of life, though believers resorted to him for guidance and advice on solutions to day-to-day

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[499] *History*, p.160.
[500] *ibid*, pp.117, and 123.

problems. Mālik quotes a particular example where a believer asked of the Prophet (ṣ.a.a.s.) the correct time for offering morning or *fajr* prayer and the Prophet (ṣ.a.a.s.) gave his reply by offering his morning prayers between early dawn one day and the next day by offering morning prayers in the light of daybreak. The Prophet (ṣ.a.a.s) is then reported to have said that the time for morning prayers extends between these two periods.[501] There is also authority in the Qur'ān to the effect that the Prophet (ṣ.a.a.s.) was spoken to and consulted, '*O ye who believe! Raise not your voices above the voice of the Prophet, nor speak aloud to him in talk, as ye may speak aloud to one another, lest your deeds become vain and ye perceive* not.'[502]

Makka and Madīna were the homes of *ḥadīth* and the Companions who acted as judges, teachers of *fiqh* and ministers of law throughout the period of the first four Caliphs (11-40AH) and the greater part of the 'Umayyad rule, became in the latter half of the first century, nucleus of a school of *fiqh* known as the school of *ḥadīth*. The students and people, who had studied and absorbed the legal decisions, writings and judgements of the Companions, became, after the death of these Companions, the custodians of the legal sciences. They treated the legal decisions and judgements of their teachers with utmost respect and jealously preserved and guarded them. These people are known as the first class of jurists of Makka and Madīna. They were Sa'īd b. al-Musayyab (d.93AH), 'Urwa b. al-Zubayr (d.94AH), 'Ubayd Allāh b. 'Abd Allāh (d.98AH) and Salim b. 'Abd Allāh (d.106AH), a most prominent *Tābi'ī* (or the next generation after the *Ṣaḥāba* or

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[501] *Muwatta*,' p.1.
[502] 49:2

Companions).[503] They were followed by the second generation of *Tābi'ūn* jurists. Mālik was the inheritor of knowledge from these, the second generation of *Tābi'ūn*.

The rule of 'Umar b. 'Abd al-'Azīz (99-101AH/717-726),[504] (former governor of Madīna, later of Makka and Ṭā'if who worked in close association with jurists of Madīna), was the culminating point in the history of the 'Umayyad Caliphate. Mālik mentions his judgements both as governor of Madīna and as Caliph. The propaganda of the 'Abbasīd movement directed against the 'Umayyad rule culminated in a brutal overthrow of the established order. A major battle was fought on the banks of the Zāb River (132AH/750), a tributary of the Tigris, which resulted in the defeat of the 'Ummayad Caliph Marwān II. The 'Abbasīd revolution had succeeded.

The 'Abbasīd period heralded a great development in the evolution of *fiqh*. The first two centuries of 'Abbasīd rule, particularly the first is distinguished for large-scale and basic compilation of books, for the formulation and codification of its *uṣūl* (fundamentals), the crystallisation of some of its schools, and the rise of new ones. Unlike the 'Umayyads who appointed judges to cater for public justice, and developed a number of essential features for the administration of justice, the 'Abbasīds appointed a chief justice *qāḍī al-quḍāt* at Baghdad who was to control all the judicial appointments. The first Chief Justice to be appointed was Abū 'Umar b. Yūsuf, who was known for his strict adherence to the Mālikī School.

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[503]Guraya, p.112, quoting, Abu Zahr, *Mālik b. Anas*, (Cairo 1952), p.158.
[504]Fifth Caliph of the Marwānid branch of the Umayyad dynasty. *EI²*, *s.v.* ''Umar (II) 'Abd al-'Azīz b. Marwān b. al-Ḥakam, Abū Ḥafṣ al-Ashadjdj,' Vol.X, (Leiden, 2000), p. 808.

The first ʿAbbasīd period was an epoch of enormous compilation in all the branches of knowledge including *fiqh*. The greatest and most basic works on theoretical and practical law of all the legal systems were accomplished in this period. Mālik laid down the foundations of his system by writing his *al-Muwaṭṭā*. It was the followers of Mālik who gave his name to this particular school that has survived in some parts of the Arabian Peninsula, the Gulf States and in parts of North and West Africa.

Apart from official judges appointed in every city, there were many legal representatives who privately practised law in every city, town and village. The public in respect of their legal needs consulted these legal representatives. Such conditions however did not last long. The compilation of the books of different schools of *fiqh* in the first century (ʿUmmayad period), and second century AH (first ʿAbbasīd period), set the stage for the hardening of legal attitude of the public and their division into different jurisprudential schools or *madhāhib*.[505]

The development over these first two centuries of *fiqh*, both theory and practice proceeded along the schools of many great *mujtahids* who pursued their own legal methods in the cultivation of law. Great scholars of the first century such as Ibrāhīm al-Nakhaʿī (d.95AH/713), al-Ḥasan al-Baṣrī (d.110AH/728), and Ḥammād b. Abī Sulaymān (d.120AH/738), Ibn Shihāb al-Zuhrī (d.124AH/742), and of the second century[506] such as Ibn Abī Laylā (d.148AH/765), Abū Ḥanīfa (d.150AH/767), Awzāʿī (d.157AH/774), Mālik b. Anas (d.179AH/795), Abū

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[505] *History*, p.9.

[506] *ibid*, p.17. The names of these great jurists are also mentioned by Schacht, J, *An Introduction to Islamic Law*, (Oxford, 1996), p.40. Hereafter cited as *Introduction*.

Yūsuf (d.182AH/798), Shaybānī (d.189AH/805), Shāfiʿī (d.204AH/820), Aḥhmed b. Ḥanbal (d.241AH/855), and others.

Over the course of time many of these schools fell out of use. The four schools of *fiqh* which did not fall out of favour but which grew stronger and stronger and which are now followed are known after the names of the jurists who practiced, formulated and taught law. These are Abū Ḥanīfa (80-150AH), Mālik (93-179AH), Shāfiʿī (150-204AH) and Aḥhmed b. Ḥanbal (164-241AH).

Mālik, Ibn Ḥanbal and al-Shāfiʿī are all champions of the school of *ḥadīth*, but since they differed from one another in important respects from and in their attitude towards *ḥadīth*, they came to have separate theories and courses of *fiqh*. Mālik was born at Madīna, read *fiqh* with the city's jurists, the second generation of the *Tābiʿūn*, Nāfiʿ the freed slave of ʿAbd Allāh b. ʿUmar, Shihāb al-Zuhrī and Rabīʿa b. Abī ʿAbd al-Raḥmān being the most important of them and inherited the legal heritage of his predecessors.[507] In his *al-Muwatta*,[508] Mālik acknowledges the influence of the Imām Jaʿfar al-Ṣādiq (d.148AH/765),[509] a direct descendant of the Prophet (s.a.a.s.). He was born, lived and died in Madīna, was a notable scholar of both *fiqh* and *ḥadīth*. In his lifetime he gained a massive reputation for both his knowledge and piety. His death marked a major split in the Shīʿa community, between those who followed and acknowledged as Imām his elder son Ismāʿīl al-Mubārak, who today are known as Ismāʿīlīs and those who

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[507] *Origins* p.12.

[508] *Al-Muwatta*, p.338.

[509] Recognised as a transmitter of *ḥadīth* and authority on *fiqh*. *EI²*, *s.v.* 'Djaʿfar al-Sādiḳ' Vol.II, (Leiden, 1965), p.374. Chapter Four, 'The Concept of Dispute Resolution in the Ismāʿīlī School: The Authority of the Imām from the *Ahl al-Bayt*' considers the split that occurred in the Shīʿa community on his passing away.

acknowledged as Imām his younger son Mūsā al-Kāẓim, who came subsequently to be known as *Ithnā 'asharī,* or Twelvers.

Mālik was the champion of this heritage and the most outstanding jurist of his day. Legal traditions of Madīna were the guiding principles of his *fiqh* and he gave the *ḥadīth* of the Prophet (ṣ.a.a.s.) a prominent position in his system. He argued that since the Prophet (ṣ.a.a.s.) had lived the greater part of his life as a legislator at Madīna, the Madīnans should naturally be the most well acquainted persons with the *sunna*. On the basis of this logic, he regarded Madīnan practices or *'amāl* in legal matters as authoritative as law and greater in legal force than an *ḥadīth* transmitted by a few transmitters. In a letter Mālik wrote to al Layth b. Sa'd, he expresses strong disapproval of the latter's conduct in not following what was the established practice of Madīna.[510] It is this preference and reliance on the practices of Madīna and according to Dutton, '*that differentiates his madhhab from all other madhhabs, as it is also the point on which the proponents of all other madhhabs disagreed with him.*'[511]

Mālik was the inheritor of the legal tradition of Madīna and the most prominent jurist of his day in the whole of the Ḥijāz. He compiled a book in which he collected all the judgements and traditions of the Companions and the *Tābi'ūn*, including his own, in reference to particular legal issues. Four of his students settled in North Africa and through them, Mālik's legal system spread throughout the Maghrib. After Madīna, Alexandria in Egypt became the second centre of Mālikism. Al-Qāsim al-'Utākī (d.191AH/806), '*was the intermediary*

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[510] *Origins*, p.39.
[511] *ibid*, p.34.

through whom the doctrine gained sway in the Maghrib and Muslim Spain.'[512] Another pupil, Yaḥyā b. Yaḥyā settled in Spain and became legal advisor to the Caliph of Spain. *Al-Muwaṭṭā* and Mālik's *fatawā* soon became the cornerstone of legal practices of Muslim Spain. The Mālikī School was introduced into Spain at the end of the 2nd century AH, not only by Ibn Yaḥyā but also by other scholars of the school tutored and initiated into the Madhhab either by Mālik himself or by his pupils.[513] Today the Mālikī School survives in North Africa in Morocco, Algeria, Libya and Tunisia and in the East in Baḥrain and the United Arab Emirates. In many areas such as Yemen and Egypt, the Shāfi'ī School has superseded the doctrine. The Mālikī School still has many adherents in West Africa.

Mālik was born (c.93AH/711) more than fifty years after the Battle of *Ṣiffīn,* the assassination of ʿAlī, and subsequent events that brought the ʿUmmayad dynasty to power and during the reign of the sixth ʿUmmayad Caliph al-Walīd b. ʿAbd al-Mālik (86AH/705-98AH/705).[514] His father was Anas b. Mālik well known as a transmitter of *ḥadīth.* He would have been 39 years of age when the dynasty was overthrown and the ʿAbbasīd Caliphate established in Baghdad. His formative years were in Madīna, far from the centres of conflict that brought the ʿUmmayads to power. Those who fought for either side at the Battles of *Jamal* and *Ṣiffīn* and who survived were possibly too few in numbers, too old to cast their memories back to those turbulent times or settled in different parts of the far flung

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[512]A contemporary and colleague of Mālik, *EI²*, *s.v.* Mālikiyya Vol.VI, (Leiden, 1991), p.280.
[513]*ibid,* p.279.
[514]Descendants of ʿUmmaya b. ʿAbd Shams The first three Caliphs are known as Sufyanids descendants of Abū Sufyān b. Ḥarb the others are known as Marwānids descendants of Marwan b. al-Ḥakm b. Abī'l-Āṣ. *EI²*, *s.v.* ''Umayyads', Vol.X, (Leiden, 2000), p.840.

empire to have had any influence on Mālik, during those early formative years. A deeply pious man, there are reports of Mālik studying *fiqh* at a very young age at the encouragement of his mother. He lived and died (179AH/795) in Madīna. He turned towards acquiring and preserving traditions of the Prophet (ṣ.a.a.s.) and analysing the evolution in the change in the practice of Madīna, what Mālik called his *al-'amāl*.

As will be seen later, it was this acquisition and preservation of the traditions that brought him to the attention of the new order of the ʿAbbasīd Caliph. The ʿAbbasīds considered the necessity for uniformity and standardisation. Though, it might be added that it is not the first time that such a thought would have occurred. The Qur'ān had already been compiled; it was now left to the early Muslims to seek an authoritative compilation of the Prophet's (ṣ.a.a.s.) *sunna* and *aḥadīth*. Indeed such a compilation would be in keeping with the Qur'ānic injunction, '*You have indeed in the Messenger of Allāh an excellent exemplar for him who hopes in Allāh and Final Day, and who remember Allāh much.*'[515] Indeed the Qur'ān went further and commanded, '*take what the Messenger gives you, and refrain from what he prohibits you.*'[516] That such a task would have to be undertaken in the light of these injunctions is obvious.

According to Sunnī Islām, this concept of looking to the exemplary conduct of the Prophet (ṣ.a.a.s.) is not only Qur'ānic in origin but was also applied by him in his appointment of Muʿādh b. Jabal as a judge to the al-Yaman, as is witnessed by the following conversation between him and Muʿādh,

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[515] 33:21
[516] 59:7

The Prophet asked, Muʿādh 'On what will you base your judgements?'
He replied, 'I will decide according to what is based in the Book of God'
'And suppose if you do not find what you need in the Book of God?'
He replied, 'then according to the *sunnah* of the Messenger'
'And suppose you do not find what you need in the *sunnah* of God's Messenger?'
He replied, 'I will formulate the judgement according to my opinion and will spare no effort.'[517]

Although it is suggested the first written record of the term *sunna* of the Prophet (ṣ.a.a.s.) appears in letters received by the ʿUmayyad Caliph, ʿAbd al-Mālik b. Marwān I (65-86AH/686-705), from the *Khārijite* ʿAbd Allāh b. ʿIbād and al-Ḥasan al-Baṣrī, this is not evidence that the term was not used before then, as it appears to have been used impliedly by Abū Bakr in his letter to the apostates, by ʿUmar in his letter of advice to Abū Mūsā and by ʿAlī b. Abī Ṭālib, in his letter of instruction to his newly appointed governor of Egypt, Mālik al-Ashtar mentioned in Chapter One.[518]

It is said that ʿUmar b. al-Khaṭṭāb intended to compile the extant Prophetic traditions during his time but abandoned the attempt.[519] Had he undertaken this momentous task, certainly one and possibly two civil wars that erupted during the reign of ʿAlī, might well have not occurred. It may be that this lack of a written authority of authentic Prophetic traditions has led Schacht to speculate that, '*the Arabs were, and are, bound by tradition and precedent.*

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[517]Abū Dāwud, *Sunan*, III, p.1019, *ḥadīth,* No.3585.
[518]*Nahj,* Letter No. 53, p.461.
[519]Guraya, p.58 quoting Ibn Saʿd, *al-Tabaqāt*, Vol.III, (Beyrout, 1957), p.287.

Whatever was customary was right and proper; Whatever their forefathers had done deserved to be imitated.'[520]

However, it is to this reference to the traditions of the forefathers that the Qur'ān addresses itself in several different verses. This address is directed against those Arabs who, '*when it is said to them: "Follow what Allāh hath revealed": They say: "Nay! we shall follow the way of our fathers." What! even though their fathers were void of wisdom and guidance?*'[521] And again, '*When it is said to them: "Come to what Allāh hath revealed; come to the Messenger:" They say: "Enough for us are the ways we found our fathers following." What! even though their fathers were void of knowledge and guidance?*'[522] Again, when challenged that a particular act was an indecent act, '*When they commit an indecency they say: "we found our fathers doing so;" and "Allāh commanded us thus:" Say: "Nay, Allāh never commands what is Indecent: do ye say of Allāh what ye know not?*'[523]

Even where the Qur'ān was specific in the condemnation of the conduct of the pre-Islamic Arabs as being astray, in that their desire was to return to their gods and that Islām was the last and final religion, their retort would be to arrogantly dismiss such sentiments as, '*this is nothing but made-up tale.*'[524] There was a stubborn resistance to change, and to continue to hold on to the ancient ways that they knew best and to reject innovative changes that the Prophet (ṣ.a.a.s.) legislated to introduce.

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[520] *Introduction*, p.17.
[521] 2:170
[522] 5:104
[523] 7:28
[524] 38:7

It may also be that in seeking to preserve the precedents from the past, that the practices the Prophet (ṣ.a.a.s.) sought to introduce did not have the authority of antiquity, the pre-Islamic Arabs were also seeking to challenge the authority of the Prophet (ṣ.a.a.s.). It was this resistance to change and to abandon these pre-Islamic practices that, according to Schacht, resurrected themselves, '*at an early period the ancient Arab idea of sunna, precedent or normative custom, reasserted itself in Islām.*'[525] However, with the ultimate triumph of Islām, normative rules that were prescribed by divine legislation and Prophetic traditions ceased to be innovation and gradually acquired the force of precedent, tradition, in fact *sunna*, '*This ancient Arab concept of sunna was to become one of the central concepts of Islamic Law.*'[526] He also goes on to add that the term *sunna* of the Prophet (ṣ.a.a.s.) first arose at the time of the assassination of 'Uthmān (23-35AH) and a successor had to be appointed. The rebellion against the third Caliph was on the basis that he had explicitly deviated from the policies of his predecessors and implicitly from the Qur'ān.[527]

This indeed may be the case since one of the two arbitration agreements drawn up after the battle of *Ṣiffīn* in the reign of 'Alī (35-40AH), does not refer to the *sunna* of the Prophet (ṣ.a.a.s.) but rather the vague phrase, *al-sunnah al-'ādilah wa ghayr al-muffriqa* (the *sunna* that unites and does not divide), which in itself caused a major rift in the Muslim community, and which his been considered in the previous chapter.

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[525] *Introduction*, p.17.
[526] *ibid*, p.17.
[527] *ibid*, p.17.

However, Schacht may be only partially correct in his assessment that the term *sunna* arose at the time of the assassination of the third Caliph. There is evidence to suggest that the term may also have been used at the time of the fatal wounding of the second Caliph ʿUmar when the conditional offer of the Caliphate was made to both ʿUthmān and ʿAlī requiring compliance with, *inter alia*, the traditions of the Prophet (ṣ.a.a.s.). The desire to emulate the traditions go back to the conversation between the Prophet (ṣ.a.a.s.) and Muʿādh b. Jabal, were certainly present but possibly dormant. It was as earlier mentioned, left to al-Shāfiʿī to seek to focus attention to the term *sunna* by associating the it with the Qur'ān and the Prophet (ṣ.a.a.s.).

In 132AH, the ʿAbbasīds were successful in the overthrow of the ʿUmayyad dynasty, and their attempts to impose a unified Muslim Law only brought to the fore the regional and geographical legal practices and differences which had not surfaced due to the stable government of their predecessors. These legal practices and differences were set out in a brief but comprehensive account which has come down to us in a letter written by an ʿAbbasīd official dignitary, the Secretary of State, Ibn al-Muqaffaʿ which is set out below,

> Among the issues which Amir al-Mu'minin should take into consideration, is the matter of these two cities (Kufah and Basrah) and of other provinces and regions, concerning these contradicting legal problems, the conflict of which has become a great issue in connection with the blood marital relations and properties of the Muslims. The blood and the marital relations which are permitted in Hira are prohibited in Kufah. The same kind of legal conflict is taking place in the middle of Kufah. A thing is being permitted in one locality but it is being prohibited in the other. In addition to this, diverse judgements are being given

> regarding the blood of the Muslims and their honour. These decisions are given by the Judges and are being enforced (by the Government). In the face of all this, there is not a single group from the people of 'Iraq and of Hijaz which perceives this situation; rather they take pride in what they adhere to and pour scorn at what the others possess. This attitude of theirs has thrown them into a situation, which perturbs anyone who hears it from the intellectuals.[528]

It is at this critical historical junction that Mālik b. Anas comes into prominence both in official and private capacity. Abū Ja'far al-Manṣūr, the second 'Abbasīd Caliph, took into consideration his secretary's advice and approached one of the most venerated, respected personalities of his time, Mālik b Anas, and asked him for his assistance in what the Caliph clearly considered to be a crisis of his time. The application of Islamic law in different parts of the empire was neither uniform nor consistent and apart from submitting a detailed report about the conflicting and diversified legal decisions, Ibn al-Muqaffa' invited the Caliph to intervene. The course of action he proposed was as follows,

> If the Amir al-Mu'minin thinks it proper, he should command that all such decisions and different opinions (of the Judges and jurists) should be presented to him in a book. Every school should present the base of its argument from the sunnah or the analogy (*Qiyas*). Then the Amir al-Mu'minin should evaluate and assess this (material) and pass his judgement in all the cases according to his own opinion which is given to him by God. He must, then, resolutely stick to it, and forcefully forbid the people to go against it. He should embody rules and regulations in a very comprehensive book.[529]

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[528]Guraya, p.63 quoting Ibn al-Muqaffa', *Rasa 'il al-Bulaghā '*, M.K 'Ali (ed.), (Cairo, 1954), p.126.
[529]*ibid*, p.66. at p.127

Al-Manṣūr, rather than take the responsibility of this advice on his shoulders approached Mālik b. Anas. His preference would almost certainly have been for the precedents practised by the people of Madīna. After all, it was to this city that Prophet (ṣ.a.a.s.) had fled, sought and was granted refuge and where the bulk of the Qur'ān was revealed, where his final resting place is and where pilgrims would arrive for their annual pilgrimage.

But if Mālik felt flattered by being invited to participate in an undoubted attempt by the Caliph at a resolution of different legal and judicial systems by the promulgation of a unified unitary system, the manner of al-Manṣūr's language and approach to him may indeed have put Mālik off. The conversation between the two is fully recorded. Al-Manṣūr is reported to have said,

> I would like to promulgate your books which you have compiled *i.e.*, the Muwaṭṭa'. They would be copied. Then I would send one copy each to all the regions of the Muslims. I would command them to act according to the verdicts contained in your compilation. They would not be allowed to go against these verdicts.[530]

Al-Manṣūr stated his reason for approaching Mālik was the fact that he had realised that real knowledge was that which had been related by the people of Madīna, and then went on to add,

> They will be forced to follow it, otherwise their heads will be struck off with swords and their backs will be cut into pieces with lashes. You better hurry up in its compilation and put it down in writing. Muhammad b. al-Mahdi will visit you in Medinah next year to hear the compilation from you and would find that you had finished it, God willing.[531]

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[530]*ibid*, p.65, quoting al-Ṭabarī, *Zayl al-Muzayyal*, '*Tarikh al-Umam wa al Mulūk*,' Vol.XIII, p.1519.
[531]*ibid*, p.64 quoting Ibn Qutaybah, *al-Imamah wa al-Siyasah*, (Egypt, 1348AH), p.163.

For three very practical reasons Mālik's reply as recorded was clearly against enforcement by decree of his compilation, i.e. *al-Muwaṭṭā*. In the first place, the people had already adhered to different practices and traditions in different parts of the empire. Secondly, that this adherence to their own practices came from their own understanding of reports and traditions from the many Companions who had settled in the conquered territories. Finally, perhaps most importantly, great severity and hardship would be caused by this forceful imposition of new practices.

It would in fact cause conflict and dispute in the empire, which would indeed be difficult to resolve without bloodshed. It may also be that Mālik did not want his name associated with a ruler who may at some future time implement in his, Mālik's name, despotic measures. Mālik's polite but firm refusal must have come as a disappointment to al-Manṣūr. He is reported to have answered, '*For my life, had you agreed with me I would have commanded accordingly.*'[532]

Mālik's clear preference for the practice, the *'amāl* of Madīna to be adopted by all, is witnessed by the contents of his letter to al-Layth b. Sa'd in which he says,

> All people are subordinate (*taba'*) to the people of Madina. To it the *Hijra* was made and in it the Qur'ān was revealed, the lawful (*ḥalāl*) made lawful and the forbidden (*ḥarām*) made forbidden. The Messenger of Allah, may Allah bless him and grant him peace, was living amongst them and they were present during the very act of revelation. He would tell them to do things and they would obey him, and he would institute *sunnas* for them and they would follow him, until Allah took him

[532]*ibid*, p.65. quoting al-Ṭabarī, *Zayl al-Muzayyal*, '*Tarikh al-Umam wa al Mulūk,*' Vol.XIII, p.1519.

to Himself and chose for him what is in His presence, may Allah bless him and grant him peace.

So, if there is something which is clearly acted upon in Madina (*idhā kāna l-amr bi-l-Madīna ẓāhiran ma'mūlan bi-hi*), I am not of the opinion (*lam ara*) that anyone may go against it, because of this inheritance that (the Madinans) have which it is not permissible for any others to ascribe to, or claim for, themselves. Even if the people of other cities were to say, 'This is the practice (*'amal*) in our city', or 'This is what those before us used to do (*wa-hādhā lladhī maḍā 'alayhi man maḍā minnā*),' they would not have the same authority for that, nor would it be permissible for them in the way that it is for (the people of Madina).[533]

It is apparent from the contents of Mālik's *al-Muwaṭṭā,* that among the legal arguments, Mālik's greatest concern is his exposition of the actual practice of Madīna, what he calls *al-'amāl*. His objective must have been to put on record the practice as something specific and explicit and to achieve this there are several expressions and phrases in his *al-Muwaṭṭā*, which convey this sense of practice. He uses different phrases or words to express different shades of *'amāl* or practices such as,

(1) 'The *sunna* with us is that'

(2) 'What is done in our community'

(3) 'What people have settled among us is that'

(4) 'This is the way of doing things in our community about which there is no dispute'

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[533] *Origins*, pp.37-38 quoting 'Iyāḍ, ibn Mūsā al-Yaḥṣubi, al-Qāḍ'ī, *Tartīb al-mādrik wa-taqrīb al-masālik li-ma'rifat a'lām madhhab Mālik*. Aḥmad Bakir Maḥmūd, (ed.), (Beirut/Tripoli, 1387/1967).

(5) 'The generally agreed on-way of doing things in our community'[534]

In one of his above quoted definitions of *'amāl*, Mālik uses the term *sunna*. There is no doubt that by the time of Mālik, the generally agreed meaning of *sunna* was used to mean the normative and exemplary conduct of the Prophet (ṣ.a.a.s.). Here Mālik uses the term *sunna* as the 'practice' or 'established practice' of Madīna. In doing so he was able to place on permanent record a survey of law, justice, ritual and practice according to the *sunna* usual in Madīna. It is clear from the contents of his letter to al-Layth b. Sa'd that Mālik was well aware of what the 'practice' in other areas of the Islamic empire was, but whatever the practice was, it was according to him of less authoritative persuasion than the Madīnan *'amāl*.

It is also clear from Mālik's letter to al-Layth b. Sa'd that whilst Mālik's reliance or preference for the Qur'ān and the Prophet's (ṣ.a.a.s.) *sunna* is absolute, nonetheless he is clearly concerned to show that his Madīnan *'amāl* or practice is authoritative. Such references may take the form of direct references where Mālik makes citations from the Qur'ān and also implied references, where Mālik makes indirect references to the Qur'ān. It is the detailed formulation of rules of procedure and evidence that is a particular feature of this School. To understand Mālik's formulation of the rules of evidence and procedure, a detailed consideration of the *sūra* is important. It is to these two particular rules to which consideration is given, beginning with the Qur'ān.

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[534] *Al-Muwatta*, p.337.

The Qur'ān[535] gives specific guidance some may call it obligation concerning transactions. The first part of the verse deals with future obligations. The second part of the verse deals with transactions involving payment and delivery made by the parties instantaneously. In the case of transactions involving future obligations the agreement or contract should in writing, '*O you who believe! When you deal with each other in transactions involving future obligations in a fixed period of time reduce them to writing.*'[536] Failure to reduce the agreement to writing does not invite legal or religious sanction; it is simply that a written agreement is, '*juster in the sight of Allāh, more suitable as evidence, and more convenient to prevent doubts among yourselves.*'[537]

The verse requires witnesses to the agreement. The preference expressed is for two men or one man and two women. In an age when writing or ability to write was the preserve of the few, the scribe should not refuse to provide his services, since it is with God's mercy that he has learnt to write. His obligation was to record the agreement so as to faithfully discharge his commission. He assumes a fiduciary capacity and has to act with full justice to both parties and at the same time remembering to do so as though the entire transaction was being carried out in the presence of God. What is emphasised is commercial probity at the highest possible level.

This fundamental acknowledgement of God's presence is repeated no less than five times in the same verse, making it essentially obligatory on the parties to the transaction to acknowledge the omnipresence of God in their daily dealings.

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[535] 2:282-283
[536] 2:282
[537] *ibid.*

Ethical conduct in all transactions commercial or otherwise becomes therefore a prime requirement, '*give full measure when you measure and weigh with a balance that is straight: that is the most fitting and the most advantageous in the final determination,*'[538] and to ensure such behaviour contracts should, except where express provision is made to the contrary, be in writing. The Qur'ān acknowledges that not all transactions will be reduced to writing. Such transactions called, '*on the spot,*' will not require a scribe. In such cases there is an obligation to take witnesses. Finally, both witnesses and scribes should not suffer harm.

Where the parties are on a journey and a scribe is not available, the Qur'ān provides an alternative solution by requiring one of the parties to the transaction to deposit a pledge with the other party but simultaneously making that other party, the recipient of the pledge, a trustee, to faithfully discharge his trust, bearing in mind that God is a witness to the agreement and pledge.[539]

Underpinning the obligation to commercial probity at the highest level is the verse, '*To Allāh belongeth all that is in the heavens and on earth. Whether ye show what is in your minds or conceal it, Allāh calleth you to account for it.*'[540] This verse read in conjunction with or in isolation of previous verses, enjoins upon believers to have full consideration of the principle of *Ākhira* in all that they do.

Mālik is aware that not all agreements will be committed to writing. He accepts that the majority of agreements will be oral and '*on the spot.*' The need for witnesses is therefore of paramount consideration. Where strict Qur'ānic rules have not been complied with, Mālik resorts to an *ḥadīth* of the Prophet (ṣ.a.a.s.), to

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[538] 17:35
[539] 2:283
[540] 2:284

the effect that judgement may be given on the basis of an oath, either by the claimant or the respondent and one witness. Mālik accepts that the tradition of an oath with one witness goes back to the Prophet (ṣ.a.a.s.), and his *isnād* is Imām Ja'far al-Ṣādiq from his father Muḥammad al-Bāqir, all the way back to the Prophet (ṣ.a.a.s.).[541] Muslim reports traditions on the authority of Ibn 'Abbās that judgement must be given for the defendant and his oath and for the claimant by his oath and one witness.[542]

To this legal principle Mālik mentions two exceptions. The first being that if a woman who takes the oath with one witness to the effect that she has been divorced by her husband, then her husband may be required to give evidence of the fact of divorce. A similar procedure is followed where a master of a slave is required to testify to the slave's claim to his manumission. Mālik, refers to this as the precedent of the *sunna* as presumably meaning this practice of Madīna. He is aware of criticisms of this procedure, but offers this justification,

> Do you think that if a man claimed property from a man, the one claimed from would not swear that the claim was false? If he swears, the claim against him is dropped. If he refuses to take the oath, the claimant is made to take the oath that his claim is true, and his right against his companion is established.[543]

Mālik asks a theoretical question, '*In what place in the Book of Allāh does he find it*?'[544] To which he gives his reply, '*even if it is not in the Book of*

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[541] *Al-Muwatta,* p.338.
[542] Muslim, Vol.III, p.927, *ḥadīth* Nos.4244-4246.
[543] *Al-Muwatta,* p.338.
[544] *ibid*, 339.

Allāh, the Mighty, the Majestic! It is enough that this is the precedent of the sunna.'[545]

It is his ability to rely on the Qur'ān, the traditions of the Prophet (ṣ.a.a.s.), and to search by analogy, *qiyās* and to offer judgement based on logic, which illustrates how he derives his judgements and that makes Mālik a foremost authority.

The Qur'ān is clear in its injunction to believers to fulfil contracts, '*O ye who believe! Fulfil (all) obligations.*'[546] And, '*and fulfil (every) engagement for (every) engagement will be enquired into (on the Day of Reckoning).*'[547] It is as to how contracts are formed, that explains Mālik's approach.

A contract is formed by 'offer' and 'acceptance' in the session called the *Majlis al-'aqd*. The parties to the *Majlis* in a simple case, the buyer and the seller, are bound as soon as a valid agreement is reached. Mālik begins his discourse on the *Khiyār al-Majlis* with an *ḥadīth* from the Prophet (ṣ.a.a.s.), '*Both parties in a business transaction have the right of withdrawal as long as they have not separated, except in the transaction called Khiyar.*'[548] The essence of this *ḥadīth* is that as long as the parties have not separated, the *Majlis al-'aqd* is still in session and either party may rescind the agreement. Once the parties have separated they are bound to complete the transaction. Mālik's comment on this *ḥadīth* is, '*There is no specified limit nor any matter which is applied in this case according to us.*'[549] At first glance it would appear that Mālik is contradicting an *ḥadīth* from

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[545] *ibid*, 339.
[546] 5:1
[547] 17:34
[548] *Al-Muwatta*, p.303.
[549] *ibid*, p.303.

the Prophet (ṣ.a.a.s.). However, it could also mean that the *ḥadīth* had been superseded by another unrecorded tradition.

For Mālik, the interests of justice, truth and the means of reaching the truth are paramount. He supports his arguments for arriving at the truth by, what he calls (i) recognition of the proper course of action, and (ii) the location of proof, then an oath would be permissible. For Mālik, the logic of the oath is paramount and it matters not whether it is the oath of one witness or two, as long as the interests of justice are served, '*And the firmament has He raised high, and He has set up the Balance of Justice, in order that ye may not transgress (due) balance. So establish weight with justice and fall not short in the balance.*'[550] The truth is arrived at for the believers by acknowledging that God knows all things. Therefore, '*the believers should guard themselves against disobeying the orders and prohibitions, and the best way of guarding themselves is in giving truthful evidence.*'[551]

The redress of wrong is a primary consideration of this School. In order to give efficacy to the Qur'ān and the tradition of the Prophet (ṣ.a.a.s.), Mālik considers procedural law and rules of evidence as important as substantive law. Indeed, they both complement each other. To arrive at the truth, Mālik, proposes the '*intimidation*' of the respondent, to the extent of holding him, the respondent, in custody for a short period or where the issues to be discussed is one of debt, obliging the respondent to provide a guarantor or where the dispute relates to land or property, requiring the temporary transfer of the subject matter in dispute into

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[550] 55:7-9

[551] *Al-Mīzān*, Vol.4, (Tehran, 1982), p.306.

the hands of a neutral third party to protect the asset or even the income therefrom. If the issue is one of tax, questioning the respondent about his source of income.[552]

An important procedural rule adopted by Mālik is the treatment of both claimant and respondent on equal footing, by seating them side-by-side. Thus a claimant with a potentially strong case, but with weak presentational skills would not feel intimidated by a powerful and influential respondent.[553] The precedent for this procedural rule stems also from the Caliph al-Ma'mūn who sat his own son al-'Abbās, the respondent, next to the claimant, a woman.

Finally, where it is known that the claimant's character is both tyrannical and treacherous, the claimant must in the case of dispute concerning land, provide good reason for filing a claim against the respondent and where the claimant's claim is for debt against the respondent, he must show a series of financial transactions with the respondent.[554] Should the claimant succeed in showing a series of transactions of a financial nature with the respondent, the respondent is then made to take the oath. If he does, the claim against him is dropped.[555]

Mālik, a renowned jurist, has taken such painstaking steps to arrive at the truth because the interests of justice override all other consideration. This meticulous attention to detail in dispute resolution in the Mālikī School is its obvious feature, and the rules formulated to arrive at the truth, in turn explain, Mālik's reliance express or implied on the Qur'ān, '*We have sent down to thee the Book in truth, that thou mightest judge between people by that which Allāh has*

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[552]Al-Māwardī, Abū al-Ḥassan, '*Al-Aḥkām al-Sulṭāniyya w' al-Wilāyāt al-Dīniyya*,' tr. Wafaa, H. Wahba, (Reading, England, 1996), pp.86 and 101.
[553]*ibid*, p.95.
[554]*ibid*, p.101.
[555]*Al-Muwatta*, p.340.

shown thee; so be not an advocate for those who betray their trust;'[556] At the beginning of his chapter on the Book of Judgements, Mālik reverts back to the Qur'ān, that exhorts believers to consider the Prophet (ṣ.a.a.s.) as an excellent example to emulate,[557] quotes a *ḥadīth* regarding disputes and the settlement of disputes,

> I am only a man to whom you bring your disputes. Perhaps one of you is more eloquent in his proof than the other, so I give judgement according to what I have heard from him. Whatever I decide for him which is part of the right of his brother, he must not take any of it, for I am granting him a portion of the Fire.[558]

This *ḥadīth*, read in conjunction with or independently of the Qur'ān not to use one's property as bait for judges, confirms the fallibility of arbitrators, judges and mortals and in the opinion of Saleh, '*throws light on the transcendental ethics of the Islamic sense of justice,*'[559] that goes beyond substantive and procedural judicial wrangling. It is submitted that Mālik's reliance on the above quoted *ḥadīth* has led this School to formulate detailed rules of procedure and evidence to back up Mālik's reliance on the substantive law, -the Qur'ān.

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[556]4:105

[557]33:21

[558]*Al-Muwatta*, p.337. This *ḥadīth* read in conjunction with 2:188 warns believers not to use property '*as bait for judges*' so as to gain, wrongfully and knowingly, another's property. Also to one who deliberately denies a debt knowing that the denial is false.See also Sayyid Quṭb, '*Fī Ẓilāl al-Qur'ān*' Vol.I, tr. Adil Salahi & Ashur Shamis, (Leicester, 1999), pp.194-195. Hereafter cited as Quṭb.

[559]Saleh, Samir, *Commercial Arbitration in the Arab Middle East*, (London, 1984), p.17. Hereafter cited as *Commercial Arbitration.*

Baḥrain Introduction

Baḥrain is an archipelago in the Gulf situated to the west of Saudi Arabia connected to the mainland by a manmade causeway. The country represents a small outpost of the Mālikī School, its capital is Manama. Baḥrain first embraced Islām in (7AH/629), when the Prophet (ṣ.a.a.s) dispatched a letter, to the ruler of Baḥrain, al-Munthir b. Sawa al-Tamīmī, calling him and his people to accept Islām. The letter was delivered by his Companion al-Ḥaḍramī. Most accepted Islām and Baḥrain became an important centre for Muslim expansion. During the *ridda* wars, some Baḥrainīs apostatised. Al-Ḥaḍramī regrouped loyal forces and defeated the rebels.

At this stage, a brief historical sketch of the country as an independent Muslim state and how there remains in Baḥrain today vestiges of the Mālikī School is considered. Baḥrain has had a chequered history of rulers. The conversion in 261AH/874 of Ḥamadān Qarmaṭ to Ismāʿīlīsm, and his despatch of Abū Saʿīd al-Djannabi, a follower of Qarmaṭ and his brother-in-law, ʿAbdān, Ismāʿīl as *dāʿī (pl. duʿāt)*, religious missionary to Baḥrain, the country came under the influence and rule of Ismāʿīlī *dāʿī* in 286AH/899, who successfully established an Ismāʿīlī (Qarmaṭī) State there. They went on to extend their conquest and influence to al-Qaṭīf, ʿUman and al-Yamāma. However, the Ismāʿīlī *daʿwa* (mission) did not remain loyal beyond the seventh Imām, Muḥammad b. Ismāʿīl, broke away from mainstream Ismāʿīlīsm and refused to accept the authority of the Fāṭimid Caliph-Imāms of Egypt. Their rebellion extended to ravaging of the Makkan pilgrim caravans and removing and carrying away of *al-ḥajar al-aswad*, black stone, agreeing to its return in 399AH/950 after

the ʿAbbasīds paid a large ransom.[560] Today, the very small Ismāʿīlī population is of Indo-Pakistani origin that live, work or trade on temporary but renewable work permits.

There were several periods when different Arab nobles or dynasties ruled Baḥrain. The Ottomans unsuccessfully challenged the Portuguese, who had occupied the island in 920AH/1515. The Persian emperor Shāh ʿAbbās I, finally drove them out in 1011AH/1602, occupied and brought Baḥrain under the aegis of the Persian Empire. The Ṣafavids were a major dynasty that ruled Iran from (1501–1732). It was under the Ṣafavid rule that *Ithnā ʿash'arī* Shīʿism became the official branch of Islām in Persia, modern Iran. The Ṣafavid rule was not a continuous one. There were brief periods of interludes when either local rulers or foreign rulers, such the Omanis (1718-1751) or the Hawala (1751-1753) replaced Persian rule. During the Ṣafavid rule a large section of the population adopted the Shīʿa *Ithnā 'ash'arī* creed and Persian became the official language. In (1197AH/1783), Aḥmed b. Khalīfa of the Banū Utba Arabs drove out the Persians and established their rule that has continued till the present time. Between 1235AH/1820 and 1332AH/1914, al-Khalīfa rulers concluded several treaties with the British that gave the British control of foreign affairs and commercial rights in the development of natural resources. Today the majority of the population follow Jaʿfarī (Shīʿa) School of Law and the ruling family follow the Sunnī creed of Islām.[561]

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[560]Dafary, Farhad, *A Short History of the Ismā'īlīs* (Edinburgh, 1998), p.39.
[561]Radhi, Ḥasan ʿAlī A., *The Baḥrain Judiciary System, A Historical and Analytical Study,* Thesis submitted for the Degree of Doctor of Philosophy School of Oriental and African Studies, (London, 2000), p.33. Hereafter cited as Radhi.

In 1882, Lt. Col. E.L. Ross wrote and identified five dispute resolution institutions as being of a judicial or quasi-judicial nature. These are

(1) The Sharīʿa Sunnī Judicature

Two judges are mentioned by name

i) Shaykh ʿAbd al-Raḥmān b. Shaykh ʿAbd al-Laṭīf and

ii) Shaykh Qāsim al-Mihzā.

Shaykh ʿAbd al-Raḥmān arrived from al-Aḥsā', whilst his brother judge was a native of Baḥrain. Both judges were appointed by the ruler and asked to administer justice in accordance with Mālikī doctrine. There is a clear inference that the Sunnī minority and the ruling family were Mālikīs.

(2) The Sharīʿa Shīʿa Judicature

Two Shīʿa judges were appointed who were

i) Shaykh Muḥammad ʿAlī b. Shaykh ʿAbd Allāh and

ii) Shaykh Aḥmad b. Shaykh Salmān

In the event of a dispute between two parties where each one adhered to a different creed of Islām, then a Sunnī judge is appointed to resolve the dispute.

(3) The Ruler

The ruler of Baḥrain was at this time Shaykh ʿĪsā b. ʿAlī. The report describes his judicial role in the administration of justice as based on the Sharīʿa and extended to adjudicating between Pearl divers and their employers.

(4) Amirs

The report identified the Court of Saʿd b. Amir, whose decisions were binding except in major cases by confirmation by Shaykh ʿĪsā, the ruler. His Court also exercised conciliation jurisdiction. The report spoke of a number of amirs appointed by the ruler in various regions and villages.

(5) Al-Majlis al-'Urfī

Another institution identified in a subsequent report to the political agent was the *al-Majlis al-'Urfī* or Trade Council, which met to resolve disputes between merchants where one party to the dispute was a non- Baḥrainī.[562]

Modern Baḥrain has a Constitution that was adopted in 1973, after a United Nations sponsored plebiscite in which the people unanimously resolved to become independent. The Constitution prescribes the *Sharī'a* as a principal source of law. Baḥrain is a constitutional monarchy whose Amir, Hamad b. 'Īsā al-Khalīfa, installed in 1999, proclaimed himself King in February 2002. He has initiated economic and political reforms and has worked to improve relations with the majority Shī'a community. The centrepiece of his political liberalization programme was the National Action Charter and in 2001 the citizens of Baḥrain approved in a referendum his plans. In 2002, they elected members to the reconstituted legislature, the National Assembly that had been disbanded in 1975. Article32 of the Constitution provides for an Executive, a Legislature and a Judiciary. The King is the Head of State and the Executive, who appoints the Prime Minister. The Legislative branch is a bicameral parliament that consists of a *Shūrā* or Council, whose members are appointed by the King and a House of Deputies whose members are elected. Finally, the Judiciary's independence is established by Article101(b) of the Constitution, and Article2 of The Judicial Law 1971, guarantees independence of the judges.[563]

The country, which is small in size but central in location among Gulf countries, requires it to play a delicate balancing act in keeping good relations

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[562] *ibid,* p.53.
[563] *ibid,* p.156.

with its larger neighbours. Natural oil exploration has replaced the pearl industry as a principal source of revenue but declining oil reserve means that the country has to turn to petroleum processing and refining. Baḥrain has a vibrant commercial community and an international banking system based on the western model. It has a Commercial Code that permits the paying and receiving of interest. The country has enacted legislation based on the English Common Law and European Civil Code.

Although *Sharī'a* is, according to Article2 of the Constitution, a principal source of law, Baḥrain has in addition enacted the Judicial Law, 1971, Article3, which states that enacted legislation takes precedence and only in the event of lacunae in such legislation, a judge should have recourse to the principles of *Sharī'a*. Where recourse cannot be had to *Sharī'a* principles, then Custom should be applied, a particular Custom is preferred to a general Custom. Where no Custom exists, then recourse is had to the principles of natural law, equity and good conscience.[564]

The Baḥrain Contract Law, 1969, and the Civil Wrongs Ordinance, 1970, (as amended by The Civil Code, Legislative Decree 19 of 2001), govern the laws relating to civil obligations. Both these statutes are based on the English Common Law. The Commercial Code is based principally on the European Civil Codes. In relation to the above the following points may be considered.

In relation to the juxtaposition of *Sharī'a* and secular laws and the enactment of legislation based on two different legal systems, Common Law and Civil, two points need consideration. The first point that needs elaboration in the

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[564] *ibid*, p.185.

context of the principles of *Sharī'a* is in relation to concept of *ribā.* The injunction in the Qur'ān is specific and unambiguous, '*Allāh has permitted trade and forbidden ribā.*'[565] The Prophet (ṣ.a.a.s.) left no clear explanation of the meaning of the term. No meaning can be discerned from the Qur'ān of *ribā*. It has been translated as usury, in more modern times as interest. In a detailed study of the meaning of *ribā*, Sayyid Quṭb (1906-1966), prefers the more modern interpretation, which is that it is both usury and interest and in that, he draws a distinction between, '*two contrasting socio-economic systems: the ribā-free economic system and the ribā-based non-Islamic system.*'[566] His prescription is for Muslim countries to revert to the usury free economic system based on the Qur'ān, because he argues that the alternative economic system is today responsible for bringing, '*insidious destruction to morals, religion, health and economic strength of modern society.*'[567]

Many modern Muslim states have had to consider and legislate upon the question of whether interest and *ribā* are concepts, which are mutually exclusive, or words that are simply interchangeable. In Tunisia this question was discussed within the framework of legal precepts of *ijtihād* and *ijmā'*. The Tunisian position was explained by the then Grand Muftī, Shaykh Fadhel Ben Achour to a visiting delegation from Pakistan led by Shaharyar M. Khan. The learned Shaykh explained that the consensus of the opinion of those who were responsible for advising the government was that the two concepts were mutually exclusive, in

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[565]2:275, other verses of the same *sūra* relating to '*ribā*' are 276-280 inclusive.
[566]Quṭb, Vol.IV, p.355. He spent three years in the United States for the Ministry of Education. Returned to Egypt in 1951 and joined the *ikhwan* or brotherhood. Arrested in 1954 he spent most of his time in prison until his death.
[567]*ibid*, p.355.

that usury was exploitative and essentially detrimental to the welfare of the State and its people. Interest on the other hand was necessary for the economic regulation of the economy of the state. The Grand Muftī went on to explain that where the central authority of the state, stipulated a rate of interest, then any amount in excess of two percent above the stipulated base rate would be classified as exploitative and therefore *ribā*.[568] In Baḥrain, the Commercial Code governs interest payments.

Writing in the Arab Law Quarterly, Professor Ballantyne elaborates on the second point, which is that the infusion of two legal systems, Common Law and Civil, is in itself, he states, a potential source of conflict. He goes on to add that a confusing situation could well arise in which, '*an Egyptian-trained judge grappling with the English doctrine of consideration in a commercial contract that is governed by the civil Code*,'[569] may well lead to difficulties of interpretation and consequently of judgement.

Dispute Resolution in Baḥrain

Commercial arbitration in Baḥrain is not *Sharī'a* based but civil. The relevant law for local arbitration, covering both Civil and Commercial disputes, is the Civil and Commercial Procedure Law, 1971, Articles233 – 343 Chapter VII, as amended by the Civil and Commercial Procedure Law, amendment Decree No.8 of 1978, (hereafter called CCPL). International arbitration covers disputes in Commercial Matters where there is an international element

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[568] *Interest and Riba*: The Friday Times, Karachi, Pakistan, March 9-15, 2001.
[569] Ballantyne, W.M. 'Note On The New Commercial Law of Baḥrain (Decree Law 7/1987)', in *Arab Law Quarterly*, Vol.2, 1987, p.353.

involved. Baḥrain is an important centre of commercial activities that includes offshore banking, insurance and international commerce in the Gulf region. In view of this, the country felt it is necessary to implement the United Nations General Assembly affirmation of the adoption by the United Nations Commission on International Trade Law, the Model Law.[570] The relevant law is the International Commercial Arbitration Law enacted by Legislative Decree No.9 of 1994. The rules are based mainly on the UNCITRAL rules. In Baḥrain law there are important pre-requisite conditions to a valid arbitration agreement. These are,

(1) Legal Capacity

Under the CCPL, '*arbitration is only permissible by those capable of disposing their rights*' and by analogy with the Contract Law 1969 legal capacity is defined as, '*every person is capable of contracting who is of the age of majority anyone who is not disqualified from contracting.*'[571] The age of majority is by way of analogy with Law of Trusteeship of Minors Funds Article13 (Decree No. 7 of 1986).[572]

(2) Agreement in Writing

Article233(2) of the CCPL requires that, '*the agreement to arbitrate shall be valid only if it is made in writing.*'[573] Article235 of the CCPL gives powers to the Court to help the parties resolve their dispute through arbitration. This is so where the parties have failed to appoint arbitrators. The Article states,

'*Where a dispute arises and the parties have not appointed arbitrators then the*

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[570]*ibid*, 'Baḥrain Recent Developments' in, *Arab Law Quarterly*, Vol.10, (1995), p.385.
[571]Article13
[572]Radhi, p.296.
[573]*ibid*, p.303.

Court ... vested with jurisdiction ...shall appoint arbitrators.'[574] Notice will be given to all parties to attend the session. In the event of absence or non-attendance by either party, the Court will confirm the appointment. There is no appeal from the Court's decision.

An important feature of the CCPL is that it will give effect to an arbitration agreement clause. An arbitration clause may be defined as an agreement to refer a dispute that may arise in the future to arbitration. Saleh expresses an opinion that, such provision itself is a concept, which is foreign, '*and cannot be reconciled with Sharī'a tenets*,'[575] in that arbitration clauses in an agreement are not mentioned. Therefore, he argues that such a clause may be void for uncertainty, and may not be binding on the parties to the agreement. However, such an opinion may be only academic and countered with specific reference to the Qur'ān, '*O Ye who believe fulfil (all) obligations*,'[576] and '*Fulfil the Covenant of Allāh when you have entered into it, and break not your oaths after you have confirmed them*,'[577] and again, '*and fulfil (every) engagement for (every) engagement will be enquired into (on the Day of Reckoning)*.'[578] These verses either individually or jointly therefore sanction the principle of '*pacta sunt servanda*,' or an obligation to perform one's bargain validly entered into.

(3) Subject Matter

The subject matter to be referred to arbitration must be agreed upon, i.e., defined and lawful. In addition the CCPL states that, arbitration is not

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[574] *ibid*, p.301.
[575] *Commercial Arbitration*, p.49.
[576] 5:1
[577] 16:91
[578] 17:34

permissible in which conciliation is not allowed. Baḥrain law does not specifically provide which subject matters can be conciliated upon. Lawyers in Baḥrain consider that conciliation means that matters which are referable to the *Sharī'a* pursuant to Article3 of The Judicial Law 1971. Article233(3) of the CCPL requires that, '*the issue of the dispute must be specified in the arbitration agreement.*'[579] Where the subject matter of the dispute is not mentioned in the arbitration agreement then such an agreement is invalid.

(4) Cause

In Arab jurisprudence, the legality of the object of the agreement is a vital element of the contract that is independent of the legal nature of the obligation. An example is where a seller agrees to sell and to transfer his title to a particular commodity to the buyer. The buyer agrees to pay the price. Accordingly the cause of the seller's obligation is the buyer's obligation to pay the price.[580]

(5) Stay of Judicial Proceedings

Where there is an arbitration clause in an agreement or the parties have signed a separate agreement to arbitrate, then according to Article236, all judicial proceedings are stayed. Where the parties have not agreed upon the time limit of the Award then by virtue of Article237 of the CCPL, the Award must be made within three months from the date of submission to arbitration.

(6) Enforcement

By virtue of Article240, once the Award is made then together with the original arbitration agreement the Award is to be lodged with the Clerk of the

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[579]Radhi, p.299.
[580]*ibid,* p.302.

Court. By virtue of Article241 the Award becomes enforceable by an Order issued out of the office of the President of the Court.[581] This provision stands in contrast to the opinion expressed by Saleh that arbitration in *Sharī'a* is, '*an ancillary remedy with restricted jurisdiction and remains strangely dependent on the Qāḍ'ī, in that an award only becomes effective when confirmed by a Qāḍ'ī.*'[582]

It should be noted that Articles235 and 236 are not mutually exclusive. They complement each other in seeking to facilitate Arbitral proceedings and enforcement of the Award. Indeed from the above analysis of the CCPL, it may be seen that the whole ethos of secular legislation is to put in place dispute resolution procedures that facilitate resolution of conflict as speedily and inexpensively as possible. This may be contrasted with *Sharī'a* principles where the award has to be confirmed by a *Qāḍ'ī* and either party may unilaterally terminate arbitral proceedings before a *Qāḍ'ī* can confirm the award. However, once a *Qāḍ'ī* makes an award it is enforceable as though it is a judgement. The limitation being that only the *Qāḍ'ī* may enforce it. This is particularly so in the Mālikī School.[583]

Finally, three important provisions may be noted in relation to Articles234 and 235. These are,

(A) The arbitrator must give his consent to act.

(B) By virtue of the provision of Article234, the number of arbitrators appointed must always be odd.[584] This does not strictly appear to mirror the strict

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[581] *ibid*, pp.301; 309; 337.
[582] *Commercial Arbitration*, p.25.
[583] *ibid*, p.72, quoting al-Zurqānī, *al-Ṣharḥ* No.129.
[584] Radhi, p.311.

Mālikī provision of not allowing for, '*the appointment of more then one judge (or arbitrator)*,'[585] but retains the principle of having odd numbers of arbitrators.

(C) Once appointed the arbitrator cannot be removed. This mirrors the Mālikī School provision that recognises, subject to certain conditions, the irrevocability of the arbitrator's appointment for the continuation of office.[586]

Arbitration in *Sharī'a* requires Muslims to refer their disputes, to the Qur'ān[587] and the Prophet (ṣ.a.a.s.), and this gives to dispute resolution a closed character. Western arbitration laws are designed to be flexible, quick and inexpensive. The absence of reference in *Sharī'a* to arbitration clauses, and save in the case of the Mālikī School, the necessity for obtaining confirmation of the Award by a *Qāḍ'ī*, denies in *Sharī'a* the flexibility and advantage that arbitration under western secular laws have. As a result many Muslim countries have chosen to adopt secular arbitration law based on western legal systems.[588]

The Judiciary

Article8 of the Judicial Law 1971 provides that the Judicial System shall consist of the *Sharī'a* Judiciary and the Civil Judiciary. The *Sharī'a* branch of the Judiciary being further subdivided between Shī'a or Sunnī Divisions, dealing particularly with personal and family law questions.

As the diagram below shows, the judiciary in Baḥrain is based on western systems of having a series of courts based on a hierarchical structure. At the lower rung of the hierarchy is the Junior Civil Court with original jurisdiction

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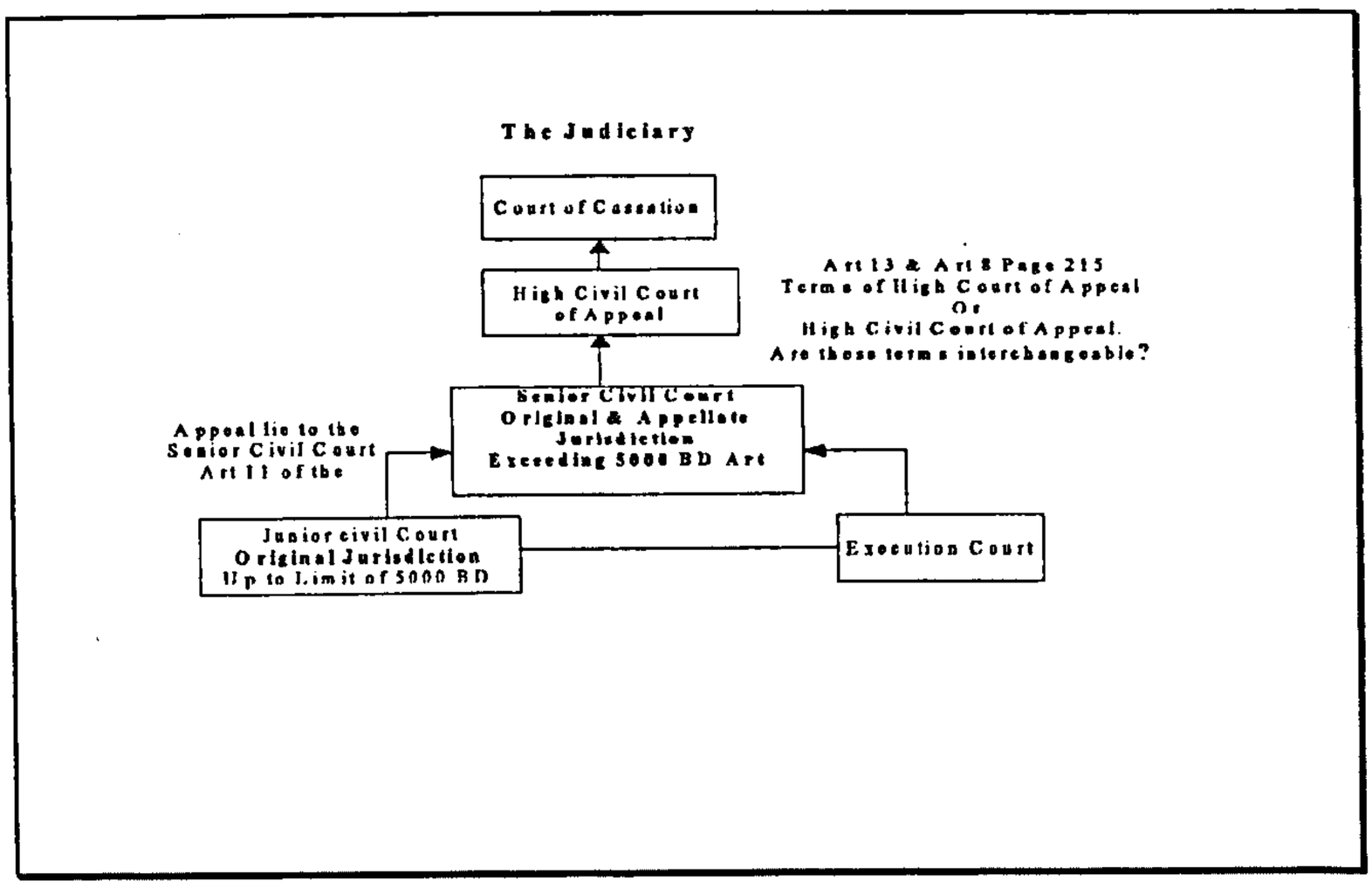
[585] *Bidāyat*, Vol.2, p.554.
[586] *ibid*, p.554.
[587] 4:59; 4:65; 4:105
[588] *Commercial Arbitration*, p.25.

for claims not exceeding Baḥrain Dinar 5,000 and the Execution Court.[589]



Appeals lie to the Senior Civil Court, which also is seized of original jurisdiction where the amount of the claim exceeds Baḥrain Dinar 5,000. This is an important provision to note because appeals lie to the High Civil Court of Appeal pursuant to Article12 of the CCPL. However, appeals will only be heard where the arbitrated amount is such so as to give the Senior Civil Court Jurisdiction to hear the case, sitting as a Court of original jurisdiction. The High Civil Court of Appeal does not have jurisdiction to hear appeals against judgements delivered by the Senior Civil Court sitting in an appellate capacity, as there is no appeal from the court's decision.

This jurisdiction also includes Hearing Arbitration Awards that may be subject to an appeal against where they fall within its value jurisdiction or more accurately if the amount of the arbitration Award is subject to the jurisdiction of the Senior Courts as a Court of First Instance.

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[589]Radhi, p.204.

Further appeals may, in respect of civil, commercial, penal and personal status matters for non-Muslims lie to the Court of Cassation, save that personal status matters for Muslims may not be contested by Cassation. The Court of Cassation is the final court of appeal, and appeals lie on a point of law only and not on fact.[590]

Qualifications and appointments are based on Articles26 and 27 of the Judicial Law 1971. A Junior Court Judge or anyone who is employed in a judicial position should have spent between two and four years in the legal profession. In the case of an appointment of a judge of the Senior Court, the relevant experience required is six years and a judge of the High Court of Appeal, the relevant experience is ten years.

Article2 states that to be appointed as a judge of the Court of Cassation the relevant experience required for qualification is 15 years. Non-Baḥrainī citizens can subject to meeting the relevant qualification condition, be appointed to the various judicial positions. Mention has been already been made of the independence of the Judiciary, and of the Constitutional guarantees that specifically provide for the separation of powers between the three organs of the State, Executive, Legislature and Judiciary.[591] The Constitution grants judges immunity from interference in their administration and conduct of justice, and Article2 of the Judicial Law, 1971, guarantees them independence. The secular laws of the State are subject to review and change. Article4 of the Civil Wrong Ordinances has been repealed. The King and the government no longer enjoy immunity from claims arising in *tort*, by virtue of Legislative Decree 19 of 2001.

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[590] *ibid*, p.180.
[591] *ibid*, p.156.

Article2 of the new Civil Code makes claims in civil wrong against the Executive possible.[592]

In an addendum to his main work, Dr Radhi draws attention to two new legislative provisions as a result of direct criticisms in his original thesis and as a result of which legislative changes were introduced. The Judicial Law, 1971, has been amended, to provide for judges to be appointed arbitrators, administrative cases may be referred to the Civil Court, judges to take up their offices with an oath of allegiance to the King, who is the President of the Supreme Judicial Council. Finally, Legislative Decree 27 of 2002 establishes the Constitutional Court. Baḥrain has adopted both secular laws and *Sharī'a* that takes into account the country's commercial position and its cosmopolitan population that includes non-Muslims. This juxtaposition of secular laws and *Sharī'a* is discussed in detail in Chapter Five in the context of Muslim settlements from different countries and, Muslim family law practices, in England and Wales, with specific references to marriage, divorce and *mahr*.

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[592] *ibid*, p.173.

CHAPTER FOUR

The Concept of Dispute Resolution in the Ismāʿīlī School

The Authority of the Imām from the *Ahl al-Bayt*

Discussion on dispute resolution in the Ismāʿīlī School must begin with a consideration of the concept of *Imāma* in Shīʿa Islām, who are the Shīʿā Imāmī Ismāʿīlīs, their concept of the role and authority of the living or *Hāḍir* Imām from the *Ahl al-Bayt*;[593] the designation or appointment of the next Imām, the manner in which he is to be appointed or designated and the difference or distinction that they draw between the authority of the Imām and that of the Caliph.

The primary sources of law in the Shīʿa Imāmi Ismāʿīlī School are also the Qur'ān and the *sunna* of the Prophet (ṣ.a.a.s.). However, in addition to *nubuwwa*, for the Ismāʿīlīs, *imāma* is also one of the fundamentals of religion. According to their interpretation, religion consists of two essential aspects without which it cannot be complete. They are the *tanzīl* and *ta'wīl*[594] of divine revelation. *Tanzīl*, which literally means 'to cause to descend or bring down,' technically means to express the Qur'ān, which is brought down to the heart of the Prophet (ṣ.a.a.s.) by the Truthful Spirit, '*Verily this is a Revelation from the Lord of the Worlds: With it came down the Truthful spirit to thy heart that thou*

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[593]*The People of the House*, meaning, *The House of Muḥammad (ṣ.a.a.s.)* in accordance with the Qur'ān S33:v33, Shīʿa Imāmī Ismāʿīlīs and Sunnī, both agree that the term applies to the Prophet (ṣ.a.a.s.), ʿAlī, Fāṭima, al-Ḥasan and al-Ḥusayn. Mālik and Abū Ḥanīfa extended the appellation to the most important families of the Banū Hāshim whereas al Shāfiʿī extended it to the Banū ʿAbd al-Muṭṭalib. *EI²*, *s.v.* Vol.I, 'Ahl al-Bayt,' (Leiden, 1960), p.257.

[594]Allegorical interpretation of the Qur'ān. Ismāʿīlī exegesis differed in its desire to seek a hidden *bāṭin* meaning as opposed to the manifest *ẓāhir*. *EI²*, *s.v.* 'Ta'wil', Vol.X, (Leiden 2000), p.390.

mayest admonish in the perspicuous Arabic tongue,'[595] in the form of allegories and parables.

Ta'wīl (interpretation), literally means to 'take something back' to its origin. Technically it means to decipher the symbolic layers of the parables and allegories to give the original and real meaning. *Tanzīl* is the function of the Prophet (ṣ.a.a.s.) and *ta'wīl* is the function of his *waṣī* (legatee) and the Imāms from his progeny. *Tanzīl* is confined to divine revelation, that is, nobody can add a phrase or word to the text of the Qur'ān,[596] revealed to the Prophet (ṣ.a.a.s.), but the *ta'wīl* is based on the Qur'ān, '*no one knows its true meanings (ta'wīlahu) except Allāh and those who are firmly grounded in knowledge*,'[597] and in the Ismā'īlī School[598] and throughout their history, it is the Imāms who unveil the secrets that are hidden within the parables and the allegories.[599]

The Ismā'īlī concept of Imām to guide the community is the historical interpretation that they give to the Qur'ān and traditions of the Prophet (ṣ.a.a.s.) and briefly these will be considered. Further, in Shī'a Islām, *imāma* or spiritual *khilafā* does not depend on the choice of the people, rather it is the continuation of the divine guidance as the Qur'ān commands, '*And the Unbelievers say: "Why is not a Sign sent down to him from his Lord?" But thou art truly a warner and*

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[595]26:192-95; 42:7; 43:3

[596]6:34; 10:64

[597]3:7.The Shī'a translation of the verse is, '*And none knoweth its interpretation save Allāh and those firmly rooted in knowledge*.' *Da'ā'im*, p.31.

[598]7:52-53

[599]36:13-21; These verses that deal with the Companions of the City to whom messengers are sent, who despite a plea from a man amongst them who, '*came running from the farthest part of the City*' pleading with them to, '"*Obey those who ask no reward of you (for themselves), and who are themselves guided...*"' is an example of an allegory, a story symbolising an underlying meaning or a parable, a moral tale and from which lessons may be learnt.

to every people a guide,'[600] explained in an *ḥadīth*, '*I am the warner and 'Alī is the guide. O 'Alī! Those who seek the right way will find it through you after me.*'[601]

As *nubuwwa* depended on His will, '*Allāh did choose Adam and Noah, the family of Abraham, and the family of 'Imrān above all people,-offspring, one of the other: and Allāh heareth and knoweth all things.*'[602] Therefore, *imāma* too depends on the will of Allāh, '*And we made them leaders, guiding (men) by Our Command, and We inspired them to do good deeds, to establish regular prayers and to Give zakat they constantly served Us (and Us only),*'[603] irrespective of whether the people accept it or not. This Divine law has continued from the time of Prophet Adam (Ādam) as the Qur'ān commands of Allāh created him, "*When I have fashioned him (in due proportion) and breathed into him of My spirit, fall ye down in obeisance unto him,*"[604] and made him His *khalīfa* or vicegerent on earth.[605]

> And He taught Adam the names of all things; then He placed them before the angels, and said: "Tell Me the names of these if ye are right". They said: "Glory to Thee: of knowledge we have none, save what Thou hast taught us: in truth it is Thou who art perfect in knowledge and wisdom." He said: "O Adam! Tell them their names." When he had told them their names, Allāh said: "Did I not tell you that I know the secrets of heaven and earth, and I know what ye reveal. And what you conceal?"[606]

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[600] 13:7. The Shī'a translation of the second half of this verse is, '*Thou art a warner only and for every folk a guide.*' *Da'ā'im*, p.30.
[601] *Traditions*, p.16, *ḥadīth*, No.33012.
[602] 3:33-34; For a Shī'a interpretation see *Da'ā'im*, p.40, *Al-Mīzān*, Vol.5, (Tehran, 1983), p.243.
[603] 21:73; 32:24. See also *Da'ā'im*, p.59, and *Al-Mīzān*, Vol.2, (Tehran, 1984), p.79.
[604] 15:29;38:72
[605] 2:30
[606] 2:31-33

Adam in his time was the lord of *tanzīl* (*ṣāḥib al-tanzīl*), and Seth (Shīth), his *waṣī* or successor, was the lord of *ta'wīl* (*ṣāḥib al-ta'wīl*). The other great Prophets Noah (Nūḥ), Abraham (Ibrāhīm), Moses (Mūsā) and Jesus ('Īsā) had their respective *awṣiyā'* or legatees, *i.e.*, Shem (Sām), Ishmael (Ismā'īl), Aaron (Hārūn) and Simon Peter (Sham'ūn al-Ṣafā') as the lords of *ta'wīl*; the *waṣī* of the last and final Prophet (ṣ.a.a.s.) or in Shī'a terminology, the sixth *nāṭiq*, was 'Alī b. Abī Ṭālib,[607] who was lord of the *ta'wīl* as the Prophet (ṣ.a.a.s.) was lord of *tanzīl*. The Prophet (ṣ.a.a.s.) said to Imām 'Alī, '*Indeed, you will fight for the sake of the ta'wīl of the Qur'ān as I fought for its tanzīl.*'[608] (*Innaka tuqātilu 'alā ta'wīli' l-Qur'āni kamā qātaltu 'alā tanzilīh*).

According to the Shī'a Ismā'īlī interpretation of Islām, there cannot be more than six *nuṭaqā (*sing. *nāṭiq)* or six great Prophets who bring a new *sharī'a* or holy law and a new Book because, '*Your Guardian Lord is Allāh, Who created the heavens and the earth in six Days, then He settled Himself on the Throne.*'[609] These heavens and the earth represent the heavens and the earth of the world of religion, and, '*Yet they ask thee to hasten on the punishment! But Allāh will not fail in His promise. Verily a Day in the sight of thy Lord is like a thousand years of your reckoning,*'[610] therefore, according to Ismā'īlī interpretation, the six days of Allāh, each one of which, symbolise the six *nuṭaqā* (literally *speakers*), Adam, Noah, Abraham, Moses, Jesus and Muḥammad (may

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[607]Nāṣir Khusraw, *Wajh-i Dīn* tr. F.M. Hunzai, (forthcoming London, 2005), p.41. Hereafter cited as *Wajh*. For an identical interpretation see also Daftary, Farhad, '*A Short History of the Ismailis*,' (Edinburgh, 1998), p.53.

[608]Suyūtī, Jalal al-Din, *Ta'rīkhu'l-khulafā'*, M.M. 'Abd al-Hamid (ed.), (Karachi, n.d.), p.173; The English translation by Major H.S. Jarrett, (Calcutta, 1881), p.176, '*Verily thou wilt do battle for the Kuran, as thou hast done battle for its revelation*,' does not accord with the original Arabic'. See also *Traditions*, pp.13-14, *ḥadīth* No.32968.

[609]7:54

[610]22:47

peace be upon them and their progeny) because each of these great Prophets had a cycle of approximately a thousand years. Thus, *nubuwwa* came to an end after the sixth *nāṭiq*, the Prophet (ṣ.a.a.ṣ.), passed away and Divine guidance continued and will continue till the Day of Resurrection through the chain of *imāma*.

This fact is evident from the Qur'an, '*and We have vested the knowledge of every thing in the manifest Imām*,'[611] from traditions, an example is that the Prophet (ṣ.a.a.s.) said to Imām ʿAlī, '*O ʿAlī, You are to me as Hārūn was to Mūsā, except that there will be no Prophet after me*.'[612] Thus, the Ismāʿīlī School believes that when *nubuwwa* ended, Divine guidance continued in the form of *imāma*, as the Qur'ān commands, '*But thou art truly a warner and to every people there is a guide*,'[613] and again, '*On the day We shall call together all human beings with their (respective) Imāms: Those who are given their record in their right hand read it (with pleasure) and they will not be dealt with unjustly in the least*.'[614]

On the basis of these and to the interpretation given to the meaning of the words, '*Then if they reject thee, so were rejected messengers before thee, who came with Clear Signs, and the Scriptures. And the Book of Enlightenment*,'[615] that whenever God sent a prophet to order a people to undertake certain actions, He also sent a person with knowledge of the meaning

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[611]36:12. The above quoted Ismāʿīlī translation of this verse of the Qur'ān, does not accord with Yusuf ʿAlī's translation, '*and of all things have We taken account in a clear Book (of evidence).*'

[612]*Traditions*, p.2, *ḥadīth* No.32937.

[613]13:7

[614]17:71; Yusuf Ali's translation does not agree with the original Arabic, *yawma nad'ū kulla unāsim-bi Imāmihim*, which is in the singular; See also *Da'ā'im*, p.36. *Al-Mīzān*, Vol.2, p.81.

[615]3:184; 35:25

of the actions to impart and explain the meanings of the actions thus ordered to be performed.[616] The purpose of sending such a person who knew the meaning of these actions and to explain such meaning was because as the Qur'ān commands, '*Messengers who gave good news as well as warning, that mankind, after (the coming) of the messengers, should have no plea against Allāh: For Allāh is Exalted in Power, and Wise.*'[617]

Ismā'īlī Shī'as maintain that there will always be a need for divine guidance. As the forty-eighth Imām of the Ismā'īlīs, Sulṭān Muḥammad Shāh al-Ḥusaynī writes in his Memoirs,

> The Shia School of thought maintains that although direct Divine inspiration ceased at the Prophet's death, the need of Divine guidance continued and this could not be left merely to millions of mortal men, subject to the whims and gusts of passion and material necessity, capable of being momentarily but tragically misled by greed, by oratory, or by the sudden desire for material advantage.[618]

Shī'a School maintains that the *waṣī* and *walī* of the last and final Prophet (ṣ.a.a.s.) is 'Alī b. Abī Ṭālib. According to them he was appointed to this rank publicly on two occasions. The first at the commencement of his mission and the gathering together and warning the nearest kinsmen in accordance with the Qur'ān, '*And admonish thy nearest kinsmen, and lower thy wing to the Believers who follow thee.*'[619]

The Shī'a interpretation and emphasise the event following the

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[616] *Wajh*, p.41.
[617] 4:165
[618] Aga Khan III, Shah, Sultan Muhammad, *The Memoirs of Aga Khan*, (London, 1954), p.178. Hereafter cited as *Memoirs*.
[619] 26:214-215

revelation. According to them, the Prophet (ṣ.a.a.s.) assembled and advised the Banū ʿAbd al-Muṭṭalib that God never sent a prophet without appointing his vicegerent (*waṣī),* minister (*wazīr*), heir (*warith*), brother (*akh*), and patron (*walī*). He invited each one present to accept those responsibilities. All remained silent except ʿAlī who replied, '*I, O Messenger of God*', the Prophet (ṣ.a.a.ṣ.) responded, '*Yes, you O ʿAlī.*'[620]

Ibn Kathīr[621] confirms in almost identical terms the event in question following the revelation. He reports that the Prophet (ṣ.a.a.s.) having explained to those assembled his mission then asked, '*whoever will aid me in this matter I will consider my brother.*'[622] To this ʿAlī replied, '*O Prophet of God, I will be your wazīr (i.e. your deputy) in this*!'[623] The Prophet (ṣ.a.a.s.) showed his appreciation of ʿAlī's reply to his request and commented, '*This is my brother, so listen to him and obey him*!'[624] Al-Ṭabarī also records the event and states the Prophet's (ṣ.a.a.s.) appreciation of ʿAlī's offer to assist him in his mission with the following words, '*This is my brother, my trustee, and my successor among you, so listen to him and obey.*'[625]

Finally, prior to leaving this physical world, the Prophet (ṣ.a.a.s.) again publicly declared Imām ʿAlī's appointment at Ghadīr Khumm by saying, '*O you people, know that Aaron was to Moses, ʿAlī is to me, except that there shall be*

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[620]*Daʿāʾim*, p.20. This tradition is also quoted by Muslim *Ṣaḥīḥ*, (Riyadh, 1998), p.1059; Al-Bukhārī, *Ṣaḥīh*, (Riyad, 1999), pp.625, 749.
[621]Ibn Kathīr, Vol.I, p.331.
[622]*ibid*, p.333.
[623]*ibid*, p.333. 'Alī's reply is significant and mirrors his later comment when offered the Caliphate following the murder of 'Uthmān, '*It is better that I be a wazīr than an amīr*,' mentioned in Chapter Two, 'The *Ṣiffīn* Arbitration Agreement between ʿAlī b. Abī Ṭālib and Muʿāwiya b. Abī Sufyān.'
[624]*ibid*, p.333.
[625]Al-Ṭabarī, Vol.VI, p.88.

no Prophet after me, and he is your walī after me. Thus 'Alī is the master (mawlā) of the one [who has acknowledged me] as his master,' adding this invocation, '*O God, be affectionate to him who is devoted to 'Alī, and hostile to him who is hostile to 'Alī; give victory to him who helps 'Alī, and forsake him who forsakes 'Alī- and make the truth go with 'Alī wherever he goes.*'[626]

This second event at Ghadīr Khumm, and read in conjunction with the first event that, the Ismā'īlīs rely upon to constitute the authority of 'Alī. Ibn Kathīr too records this event following the Farewell Pilgrimage in some detail. Returning from the Farewell Pilgrimage *ḥajja al-wadā'*, the Prophet (ṣ.a.a.s.) stopped at Ghadīr Khumm on the 18th *Dhu'l-Ḥijja* 10AH/632. There he ordered the area under the large trees swept and following the midday prayer he addressed the assembled crowd and warning them of his imminent departure from this world said,

> It is as if I have received an invitation and have accepted. I have left among you two treasures: the Book of God and my family, my household. Watch how you succeed me in both these. They will never split apart until they come to me at *al-ḥawḍ*.[627]

The Prophet (ṣ.a.a.s.) then took 'Alī by the hand and went on to add the famous words that, according to the Ismā'īlīs, went on to designate 'Alī as the authority after him, followed by an invocation on behalf of 'Alī, '*Whoever has myself as his lord, so is this (man) his guardian. O God, protect all who protect him, and oppose all who oppose him.*'[628] The first Companion to acknowledge this *ḥadīth* and to offer his congratulations was 'Umar b. al-Khaṭṭāb, who said to

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[626] *Da'a'im*, p.21.
[627] Ibn Kathīr, Vol.IV, p.301.
[628] *ibid*, p.301.

ʿAlī, *'Good for you! Morning noon and night you're to be lord of every believing man and woman.'*[629]

The Prophet (ṣ.a.a.s.) in his lifetime had equated ʿAlī's position with that of Aaron.[630] The principle of fraternal assistance that Aaron was to give to Moses is elaborated in greater detail in the Qur'ān. Moses' prayer to God to ease his task, to grant him a minister from his family and specifically his brother Aaron, and to make Aaron share in Moses' tasks is replied to with these words, *'Granted is thy prayer, O Moses!'*[631] The significance of this verse lies in the action of the Prophet (ṣ.a.a.s.) in pairing the *anṣār* and *muhājirūn* as brothers in Madīna and his choosing of ʿAlī as his brother. These are some of the important traditions and, together with the other actions and pronouncements of the Prophet (ṣ.a.a.s.) which the Shīʿa interpret and place reliance on, as constituting the legitimate authority of ʿAlī.

The Prophet (ṣ.a.a.s.) had during his lifetime two sources of authority, *i.e.*, religious which was essential and the other secular, *'which by the circumstances and accidents of his career, became joined to his essential and Divinely-inspired authority in religion.'*[632] Thus, according to Shīʿa Islām, ʿAlī b. Abī Ṭālib was the Imām and spiritual *khalīfa* immediately after the Prophet (ṣ.a.a.s.) *i.e., khalīfatun bi-lā faṣl* (*khalīfa* without interruption). His position as the fourth Caliph as accepted by Sunnī Islām is related to material and worldly power, *i.e.*, that he assumed civil and secular authority, as Abū Bakr had done on his election at the *Saqīfa* of the *Banū Sāʿida*, which is not an essential aspect of

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[629] *ibid*, p.302.
[630] *Memoirs*, p.178.
[631] 20:25-36
[632] *Memoirs*, p.173.

imāma, just as it is not an aspect of *nubuwwa*. As the forty-eighth Imām of the Shīʿa Ismāʿīlīs succinctly put it, '*The Caliph or successor of the Prophet (ṣ.a.a.s) was to succeed him in both these capacities; he was to be both Emir-al-Momenin or "commander of the true believers" and Imam- al-Muslimin or "spiritual chief of the devout.*'[633]

Imāma continues through the chain of Imāms by Divine designation (*naṣṣ*), as, every preceding (*sābiq*) Imām designates the following (*lāḥiq*) Imām. According to Shīʿa traditions, the Prophet (ṣ.a.a.s.) said, '*If the earth remains without an Imām even for a moment, it would perish with all its population.*'[634] According to Shīʿa Islām interpretation, such traditions conform to numerous verses of the Qur'ān,[635] because recognition of God depends on recognition of the Prophet (ṣ.a.a.s.) or Imām in their respective times, as they are His Proof (*ḥujja*) and Veil (*ḥijāb*).[636] Ismāʿīlīs uphold this fundamental principle based on the Qur'ān, '*On the day We shall call together all human beings with their (respective) Imām,*'[637] and a tradition of the Prophet (ṣ.a.a.s.), '*He who dies without the recognition of the Imām of his time, dies the death of a pagan.*'[638] Further, Ismāʿīlīs believe that the Imām has to be "present and living" (*al-hāḍir al-mawjūd*). These briefly are some of the fundamental beliefs of the Ismāʿīlī School. I will now do a brief survey of their history.

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[633] *ibid*, p.178.

[634] Ṭūsī, Naṣīr al-dīn *Rawḍatu't-taslīm*, (ed.) & tr. W. Ivanow (Bombay, 1950), p.128. For an identical tradition see also *Al-Mīzān*, Vol.2, p.83.

[635] 3:33-4, 5:15; 8:24 9:32; 13:3; 24:35; 35:24

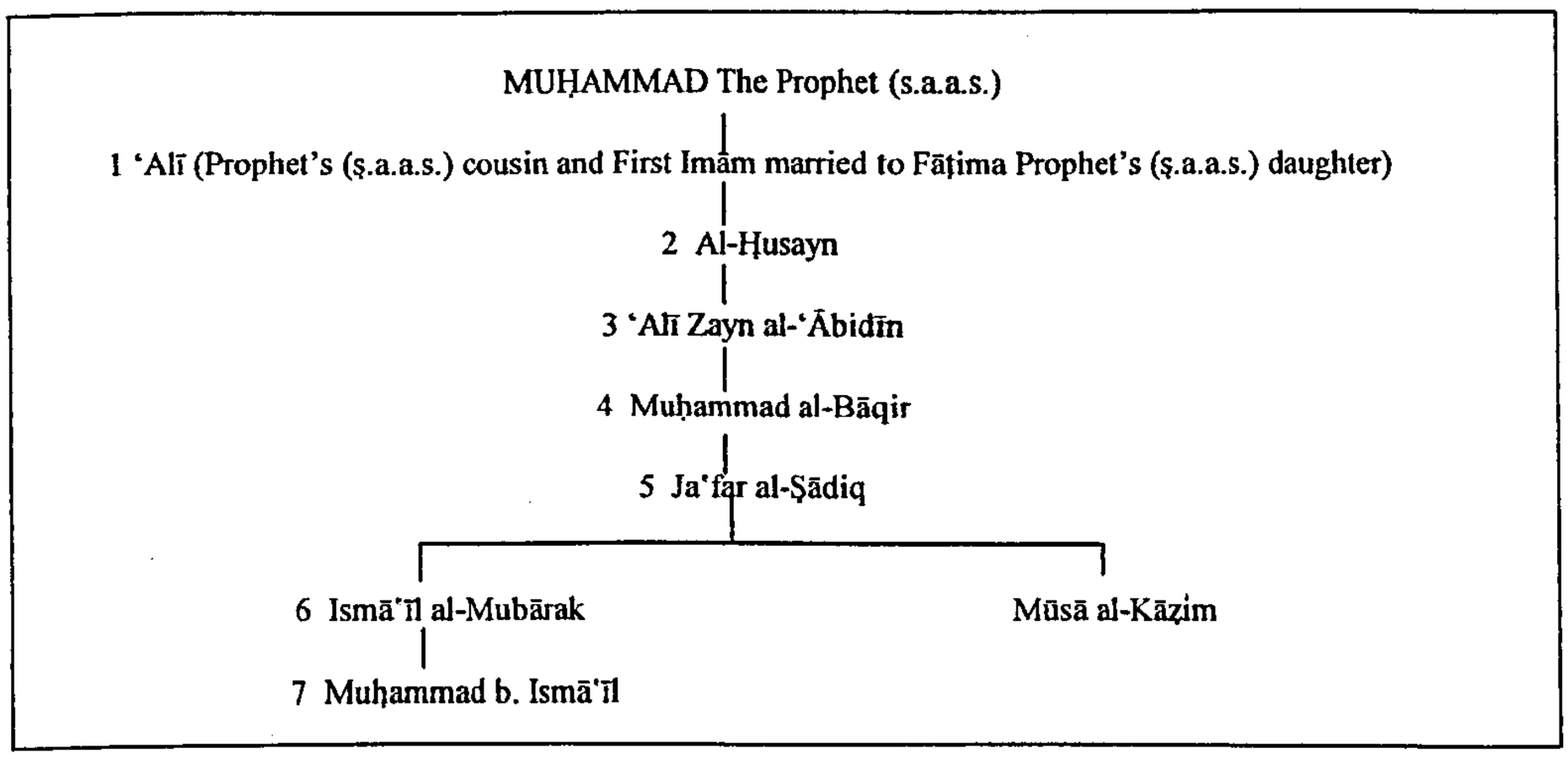
[636] *Faṣl dar bayān-i shināKht-i Imām wa Ḥujjat*, tr. W. Ivanow (Bombay, 1947 [2nd Edition]), p.11;18 who argues strongly that the language of the text would suggest that the author is Naṣīr al-dīn Ṭūsī or by someone who has been influenced by his work *Rawḍatu't-taslīm*.

[637] 17:71. The translation in the plural does not accord with the original text which is in the singular.

[638] *Wajh*, p.280; *Da'ā'im*, p.36.

The term Ismāʿīlīs,[639] refers to those who on the death of Imām Jaʿfar al-Ṣadiq in 148AH/765[640] continued to accept his designation of his eldest son Ismāʿīl al-Mubārak, as the next Imām. As the genealogy tree below shows, Imām Jaʿfar al-Ṣadiq's followers split into two; those who followed the eldest son Ismāʿīl, and from him continued their allegiance or *bayʿa*[641] to his elder son Muḥammad b. Ismāʿīl.

It is generally believed that Ismāʿīl al-Mubārak passed away during his father's life. There were those who gave their allegiance to his younger son Mūsā al-Kāẓim, subsequently came to be known as *Ithnā-ʿashar* or Twelvers. They are today the majority in Iran, Iraq and in Baḥrain. Shīʿā Islām has had over the centuries several splits, highlighted in the two genealogy trees below. This Chapter is concerned with dispute resolution in the Shīʿa Imāmī Ismāʿīlī School whose followers have given their allegiance to their forty-ninth Imām, Mawlānā Shāh Karīm al- Ḥusaynī, *Hāḍir* Imām.



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[639]Those who continued their allegiance to Ismāʿīl, elder son of Jaʿfar al-Ṣadiq. *EI²*, *s.v.* 'Ismāʿīlī', Vol.IV, (Leiden 1978), p.198. See also *EI²*, *s.v.* 'Nizari,' Vol.VIII, (Leiden, 1995), p.84.

[640]Known by the title of al-Ṣādiq, born c.90-148AH/699-/765. *EI²*, *s.v.* 'Djaʿfar al-Ṣādik,' Vol.II, (Leiden, 1965), p.374.

[641]An Arabic term denoting an act of allegiance by person or persons and recognising the authority of another person. *EI²*, *s.v.* 'Bayʿa,' Vol.I, (Leiden, 1960), p.1113.

The Shīʿa Imāmī Ismāʿīlīs are a major Shīʿā Muslim community. The term Shīʿa encompasses many different subdivisions of the followers or supporters of Imām ʿAlī, of which the Ismāʿīlīs are one. They have had a long and eventful history including in the founding and establishing of the Fāṭimid Caliphate in North Africa in 296AH. There, after a long and eventful history, the Fāṭimid Caliphate was established by the first Caliph/Imām of the Fāṭimid dynasty, ʿAbd Allāh -al-Mahdī (although the Ismāʿīlīs have always referred to him as Muḥammad al-Mahdī), who left Salamieh in Syria, ultimately arriving in Sijilmāsa in 292AH, modern day Rissani in south eastern Morocco, where he was put under house arrest.[642] Released from house arrest by the *dāʿī*, Abū ʿAbd Allāh al-Shīʿī in 296AH, he established and became the first Caliph/Imām of the Fāṭimid dynasty. After the conquest of Ifrīqiya, modern Tunisia, he moved his capital to Raqqāda in the suburb of Qayrawān in 297AH/910, where he publicly took the titles of *al-Mahdī* and *amīru'l-Mu'minīn*.[643]

After Egypt was conquered, the fourth Caliph/Imām of the Fāṭimid dynasty, al-Muʿizz li-Din Allāh (341-65AH/953-75), transferred his capital and seat to the newly built city of *al-Qāhira*, the victorious, modern day Cairo, in 362AH/973, where previously in 359AH/970 the first stones of *al-Azhar* mosque were laid.[644] The Fāṭimid dynasty is characterised by two major splits. The first of these occurred toward the end of the reign of the Caliph/Imām al-Ḥākim Bi-ʿAmr Allāh (386-411AH/996-1021), where some Ismāʿīlīs adhered to the teachings of Muhamamd b. Ismāʿīl al-Darazī. They have subsequently come to

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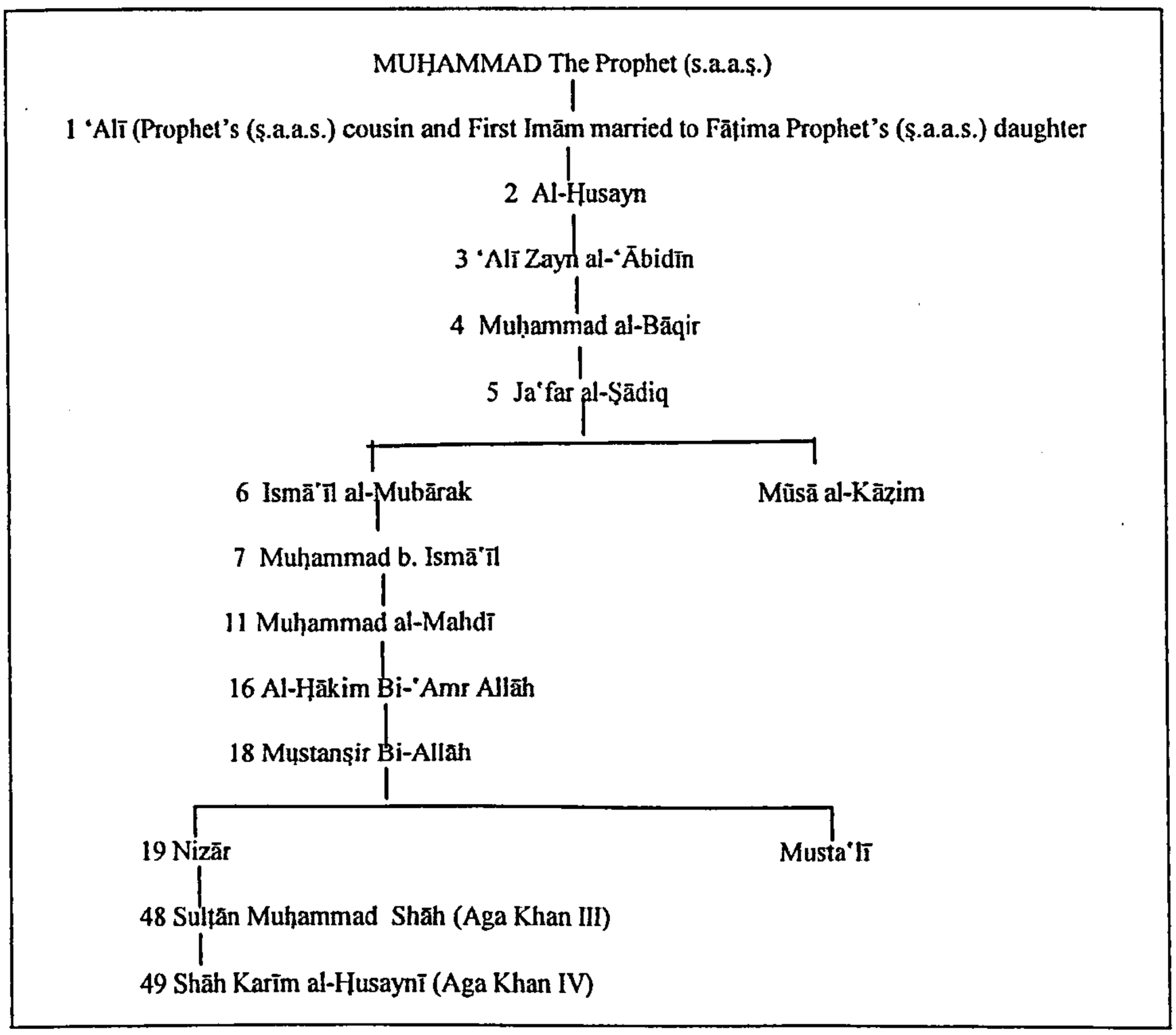
[642]Shīʿa Dynasty and descendents of Fāṭima. *EI²*, *s.v.* 'Fāṭimids,' Vol.II, (Leiden 1965), p.850.
[643]*ibid*, p.852.
[644]*ibid*, p.854.

be known as Druze, Arabic *Darzi* (pl. *Duruz*). The community have no connection with mainstream Ismā'īlīsm, and live in Lebanon, Syria and Israel.[645]

The second split occurred when the commander of the army Badr al-Jamali seized power in the name of al-Musta'lī (487-495AH/1094-1101), younger son of Imām al-Mustanṣir bi'Allāh (420-487AH/1029-1094). Many Ismā'īlīs gave their allegiance as Imām to the younger son, are known as Bohorās.[646] However, a few continued with their allegiance to Nizār, (437-88AH/1045-95), designated Imām, during his father's lifetime. The genealogy tree below details the second split above referred.



[645]Named after the followers of Muḥammad b. Ismā'īl al-Darazi. *EI²*, *s.v.* 'Durūz,' Vol.IV, (Leiden, 1978), p.631.And *Memoirs*, p.181.
[646]Who later split in to two groups called Sulaymānīs and Dā'ūdī. *EI²*, *s.v.* 'Bohorās,' Vol.I, (Leiden, 1960), p.1254.

The concept of a living Imām is fundamental to Ismāʿīlī beliefs. The Ismāʿīlīs have always maintained the need for a living Imām from the Prophet's (ṣ.a.a.s.) family to continue to guide the community. The authority to guide the community is all pervading, and belongs by inherited right to the Prophet's (ṣ.a.a.s.) successors who are of his blood.[647] *Naṣṣ* or designation transfers the authority to a successor.[648] Each incumbent Imām designates his successor from his own family. His followers must respect the designation of the next Imām. Two of the principles enumerated above, that of succession by inherited right and by *naṣṣ* or designation are elaborated further.

These two concepts are not mutually exclusive. The fifth Ismāʿīlī Imām Jaʿfar al-Ṣādiq first codified and elaborated them.[649] The Imām himself was quoting from his grandfather, ʿAlī b. Ḥusayn (Zayn al-ʿĀbidīn 38-94AH/658-712), and his great grandfather Muḥammad b. ʿAlī b. Ḥusayn (al-Baqīr 57-117AH/676-735), who had related ʿAlī's oral will or testament. In the presence of all his children, and his followers and other members of his family as witnesses, ʿAlī stated that the Prophet (ṣ.a.a.s.) had on his death bed bequeathed his books and weapons to him, so he (ʿAlī) was on the authority of the Prophet (ṣ.a.a.s.) bequeathing his books and weapons to al-Ḥasan, with instruction from the Prophet (ṣ.a.a.s) that al-Ḥasan was to bequeath them to his younger brother al-Ḥusayn, and then to his, al-Ḥusayn's son ʿAlī, (Zayn al-ʿĀbidīn). ʿAlī then embraced his grandchild and he concluded his oral testament with these words,

'The Prophet (ṣ.a.a.s.) has commanded you to deliver them to your son,

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[647] *Memoirs*, p.178.
[648] literally 'text' or 'expression' but used by the Shīʿa in this technical sense.
[649] *Daʿāʾim*, p.55.

Muḥammad; and transmit to him the Prophet's (ṣ.a.a.s.) and my salutations.'[650] This then establishes in the Ismā'īlī School the hereditary principle of succession.

One of the weapons was '*Dhu al-Fiqar,*' the sword that came into the Prophet's (ṣ.a.a.s.) hand as booty at Badr. In a notch etched on this sword he saw a vision of the forthcoming Battle of Uḥud. He heard the voice of an angel repeatedly calling out to him, '*la saifa illa Dhu al-Fiqar, la Fata illa 'Alī.*' (There is no sword except *Dhu al-Fiqar*, there is no ideal man except 'Alī).[651]

'*Dhu al-Fiqar*' was with al-Ḥusayn when he and his family and their Shī'a were massacred at Kerbala. His sole surviving son 'Alī, Zayn al-'Ābidīn took it with him to Damascus when he was taken there as prisoner. On being released by Yazīd, he returned to Madīna keeping *Dhu al-Fiqar* with him as a symbol of his authority over his Shī'a.[652]

The sword was used as a model by many of the Arab chiefs of the time. Those words that the Prophet (ṣ.a.a.s.) heard were immortalised by many of them by having them engraved on their swords. This practice of engraving and immortalising the words was carried on into later times and was also found on Ibn Sīrīn's sword (34-110AH/654-728),[653] a Ḥanafī, who claimed that he had modelled his sword like that of Samura, who in turn claimed to have modelled his sword from *Dhu al-Fiqar*.

Sulṭān Muḥammad Shāh al-Ḥusaynī, forty-eighth Imām of the Ismā'īlīs puts this concept of Imāma, as follows; firstly Divine power, guidance and

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[650]Fyzee, p.67.
[651]*Kitāb*, p.58.
[652]Ibn Kathīr, Vol.IV, p.508.
[653]A prominent interpreter of dreams and a traditionist and an *Imām* of piety and scholarship. *EI²*, *s.v.* 'Ibn Sīrīn,' Vol.III, (Leiden, 1971), p.947.

leadership manifested themselves in ʿAlī as the first Imām. The Imām is the successor to the Prophet's (ṣ.a.a.s.) religious authority and, '*he is the man who must be obeyed.*'[654] This obedience becomes obligatory based on the Qur'ān, '*O ye who believe! Obey Allāh and obey the Messenger, and those charged with authority among you.*'[655]

The Imām therefore becomes, the sole authoritative interpreter of the Qur'ān and the unanimously agreed s*unna* of the Prophet (ṣ.a.a.s.), in the Ismāʿīlī School. According to Ismāʿīlī beliefs the sum total of the knowledge or *ʿilm* of the Qur'ān, both esoteric and exoteric are vested in the living Imām based on the tradition of the Prophet (ṣ.a.a.s.), '*I am the city of knowledge and ʿAlī is its gate. Therefore whoever wants knowledge should learn it from ʿAlī, peace be on him.*'[656] The Imām is the guardian of the traditions of the Prophet (ṣ.a.a.s.) emanating from ʿAlī. For Ismāʿīlīs the concept of Imāma is central to their Doctrine and once having given their allegiance or *bayʿa* to the Imām, the authority of the Imām, who guides the followers, is absolute, based on the above quoted verse of the Qur'ān.

With the concept of *ʿilm* are associated two other concepts, that of *ʿaql* and *taʿlīm*. *ʿAql* as the Imām has explained in several *farmāns* (or edicts)[657] is an important aspect of faith, and in the first place extends to the acquisition of knowledge for the better understanding of Allāh's creation. The concept of *ʿaql* has its roots both in the Qur'ān and in the tradition of *haḍrat* ʿAlī, on the importance of the use of man's intelligence to serve the faith. *ʿAql* then is

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[654] *Memoirs,* p.178.
[655] 4:59
[656] *Kitāb*, p.21.
[657] H.H. The Aga Khan IV *Farmāns* made in Hunza, Pakistan, 1st October 1966, London, 5th August 1994, Moscow, 29th January 1995, Zanzibar 14th August 1997.

another facet of faith, and is to be used within the ethics of the faith, in the proper behaviour in society. The use of *ʿaql* in Shīʿa Islām, right from the time of *haḍrat* ʿAlī is to develop the intellect to think, to analyse, to internalise with the aim of bridging the spiritual with the material into constant unity and applying that in the way man lives his life. The Qur'ānic emphasis on the act of reflection encourages the intellect to be inquisitive and accumulate, assimilate and integrate knowledge, reflected in the words of the Qur'ān, '*(Here is) a Book which We have sent down unto thee, full of blessings, that they may meditate on its Signs, and that men of understanding may receive admonition.*'[658]

The importance of the Ismāʿīlī Doctrine of the rightful Imām whose authority and teachings guide the community is embodied in the Doctrine of *taʿlīm*. This Doctrine provides one of the bases of the Ismāʿīlī School and requires of an Ismāʿīlī an oath of allegiance or *bayʿa* to the incumbent Imām. The Imām for his part provides guidance, advice and direction to his community on all spiritual, religious, social, economic and educational matters for the general welfare of the community, '*Only the sinless and infallible ʿAlid Imāms, belonging to the Ahl al-Bayt and possessing special religious knowledge or ʿilm, were qualified to perform the spiritual functions of such guides or teachers.*'[659]

The doctrine of *taʿlīm* or the necessity of authoritative teaching by the rightful Imām of the time is the foundation of the Ismāʿīlī School. Guidance, advice and direction to the community are in modern times delivered either by the Imām visiting his *jamāʿat* in the various countries they live (Ismāʿīlīs live in many countries in particular Afghanistan, China, India, Iran, Pakistan, Syria,

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[658]38:29

[659]Daftary, Farhad, *A Short History of the Ismailis*, (Edinburgh, 1998), p.132. On the infallibility of the Imām see also *Al-Mīzān*, Vol.2, p.83.

Tajikistan, and immigrant communities who have settled in Canada, East Africa, Europe, and the U.S.A.), and delivering such guidance orally or by way of written *farmāns* to the community, which are then read out in the many prayer halls called *jamā'at khanas*. Guidance can also extend to the Imām's interpretive authority of the Qur'ān. The meaning of the verse, '*Verily We have created man into toil and struggle*,'[660] which beautifully encompasses the vicissitudes of life was, in a *farmān* made to the community explained as, '*struggle is the meaning of life; success or defeat are in the hands of God; struggle is man's duty and should be his joy.*'[661]

The twin Doctrines of *ta'līm* and *naṣṣ* are specifically emphasised in the Preamble to the Ismā'īlī Constitution of 1986,[662] but in fact can be traced back to the first Ismā'īlī Constitution of 1905 promulgated in Zanzibar when the first Shī'a Imāmi Ismā'īlī council was established in Africa. Though not containing a Preamble or Preface, the 1905 Constitution makes it clear that it bears the authority of the forty-eighth Imām of the Ismā'īlīs. First published in Gujarati, the English edition did not appear until 1922, and is referred to as The Rules and Regulations of The Shia Imami Ismailia Council although in language and style resembles a Constitution.

There were in time subsequent Constitutions of 1925, 1937, 1946 and 1954,[663] all contained prefaces implicitly referring to the doctrine of *ta'līm*. The

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[660]90:4

[661]Karimabad, Mumbai 1933/34.

[662]The Constitution of the Shia Imami Ismaili Muslims, (Geneva, 1986), p.4 Articles(B) and (C) considered later in greater detail. Hereafter cited as 1986 Constitution.

[663]Rules of The Shia Imami Ismailia Councils of The Continent Of Africa, (Zanzibar, 1925); Rules of H.H. the Aga Khan's Ismailia Councils of The Continent of Africa, (Zanzibar, 1937); The Constitution, Rules & Regulations of His Highness The Aga Khan Ismailia Councils of Africa, (Mombasa, 1946), The Constitution, Rules & Regulations of His Highness Aga Khan Shia Imami Ismailia Councils of Africa, (Mombasa, 1954).

principle of *ta'līm* was specifically stated in the 1962 Constitution in accordance with the '*Spirit of Islām.*'[664] The 1962 Constitution was the first to be ordained by the forty-ninth Imām, Mawlānā Shāh Karīm al-Ḥusaynī, *Hāḍir* Imām, (hereafter H.H. Aga Khan IV), who was designated as the successor to the Imāma, on the passing away of his grandfather, Sulṭān Muḥammad Shāh al-Ḥusaynī, Aga Khan III in July 1957.

The various Ismā'īlī Constitutions of Africa clearly depict a migrant community that slowly and imperceptibly and with the Imām's guidance and advice begins to make permanent settlement in colonial Africa an objective and to create, establish and run institutions that help that community to develop commercially, educationally, socially, economically and professionally, all the time under that authority of the Imām. This experience gained on the continent of Africa is then translated into practical steps to enable the community to re-settle itself in other areas of the world when for various reasons it is required to do so.

Save for the 1986 Constitution, all the above-mentioned Constitutions refer to and are applicable to the Ismā'īlīs settled in Africa. With large-scale migration of Ismā'īlīs fleeing political and economic upheavals from post colonial, independent Africa of the sixties and seventies to Canada, Europe and the United States of America, seeking relative political safety and stability, a new constitution was seen as necessary to regulate their conduct and affairs. This was the 1977 Constitution. The Preamble to this Constitution specifically endorsed the Imām's authority with these words,

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[664]The Constitution of the Shia Imami Ismailis in Africa, (Paris, 1962), p.1. Hereafter cited as The 1962 Costitution.

> There is vested in Mowlana Hazar Imam inherent, absolute and unfettered power and authority over and in respect of all religious, Jamati and social matters including, inter alia, traditions, customs, conventions and usages, of the Shia Imami Ismaili Muslims.[665]

The 1986 Constitution[666] contains a Preamble, which emphasises the Imām's *ta'līm*, or teaching that is required for guiding the community along the path of spiritual enlightenment as well as improved material life. The 1986 Constitution is the first such Constitution which now regulates the conduct of Ismā'īlīs throughout the world. The Preamble to the 1986 Constitution has nine paragraphs. We are here concerned with the first six which are,

> (A) The Shia Imami Ismaili Muslims affirm the *Shahādah 'Lā ilāha illa-llāh, Muḥammadur-Rasūlu-llāh,'* the *Tawḥīd* therein and that the Holy Prophet Muhammad (*Ṣalla-llāhu 'alayhi wa-sallam*) is the last and final Prophet of Allah. Islām, as revealed in the Holy Quran is the final message of Allah to mankind, and is universal and eternal. The Holy Prophet (S.A.S.) through the Divine revelation from Allah prescribed rules governing spiritual and temporal matters.
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> (B) In accordance with Shia doctrine, tradition and interpretation of history, the Holy Prophet (S.A.S.) designated and appointed his cousin and son-in-law Hazrat Mawlana Ali, *Amīru-l-Mu'minīn ('Alayhi-s-salām)*, to be the first Imam to continue the *Ta'wīl* and *Ta'līm* of Allah's final message and to guide the murids, and proclaimed that the Imamat should continue by heredity through Hazrat Mawlana Ali (A.S.) and his daughter Hazrat Bibi Fatimat-az-Zahra, *Khātūn-i-Jannat ('Alayhā-s-salām)*.

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[665]The Constitution of the Shia Imami Ismailis In Europe, Canada & The United States of America, (Nairobi, 1977), p.2.
[666]The 1986 Constitution, pp.4-5

(C) Succession to Imamat is by way of *Naṣṣ,* it being the absolute prerogative of the Imam of the time to appoint his successor from amongst any of his male descendants whether they be sons or remoter issue.

(D) The authority of the Imam in the Ismaili Tariqah, is testified by *Bay'ah* by the murid to the Imam which is the act of acceptance by the murid of the permanent spiritual bond between the Imam and the murid. This allegiance unites all Ismaili Muslims worldwide in their loyalty, devotion and obedience to the Imam within the Islamic concept of universal brotherhood. It is distinct from the allegiance of the individual murid to his land of abode.

(E) From the time of the Imamat of Hazrat Mawlana Ali (A.S.) the Imams of the Ismaili Muslims, have ruled over territories and peoples in various areas of the world at different periods of history and, in accordance with the needs of the time, have given rules of conduct and constitutions in conformity with the Islamic concepts of unity, brotherhood, justice, tolerance and goodwill.

(F) Historically and in accordance with Ismaili tradition, the Imam of the time is concerned with spiritual advancement as well as improvement of the quality of life of his murids. The Imam's *Ta'līm* lights the murids' path to spiritual enlightenment and vision. In temporal matters, the Imam guides the murids, and motivates them to develop their potential.

Explaining the need for a living, dynamic, evolving constitution to administer the affairs of the community, the Imām said to his *jamā'at* in Mumbai inaugurating the first post independence Constitution in a *farmān*,

> If I have seen fit to introduce a new Constitution in 1968, this means that I may see fit to introduce a new Constitution in 1970 or '72 or '74. This means that no

Constitution for our Jamat is firm, solid, immovable document. It is a document which is created to assist the Jamat to administer its affairs satisfactorily and in keeping with the times.

The Constitution of our Jamat here in India, like in East Africa, like in Pakistan is a living document, and where it is not in keeping with the tradition of the Jamat or in keeping with what the times require, amendments will be introduced.[667]

The important feature of all of these Constitutions is the creation of a dispute resolution facility, to enable members of the community to refer their disputes, conflicts, disagreements for resolution. These provisions relating to dispute resolution under the 1986 Constitution will be looked at in detail later and analysed in the context of their application to the Ismāʿīlī community in three important countries, Syria, Pakistan and England and Wales.[668]

The ethos of dispute resolution amongst Ismāʿīlīs goes back to the time of their first Imām, ʿAlī. The classical statement of the role of dispute resolution in the Ismāʿīlī School of Law is to be found in the authoritative testament of ʿAlī, who quotes directly from the Prophet (ṣ.a.a.s.) to the effect that he heard him say, '*the composing of differences and the strengthening of the bonds of friendship among men is better than all fasts and prayers.*'[669] This tradition of the Prophet (ṣ.a.a.s.) is also replicated in Sunnī sources, '*Should I not tell you about something more excellent than fasting, prayer and charity. It is resolving discord.*'[670] This then is an example of what the Imām means when he refers to,

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[667]H.H. The Aga Khan IV, '*Precious Gems*' Vol.1, (Karachi, 1991), pp.85-86. Hereafter cited as *Precious Gems.*

[668]England and Wales constitute a separate legal system to those pertaining in Scotland, Northern Ireland and the Channel Islands.

[669]Fyzee, p.69.

[670]Abū Dawūd, *sunan*, (Riyāḍ, 1999), p.693, *ḥadīth* No.4919

'*the unanimously agreed sunna of the Prophet (ṣ.a.a.s.)*,'[671] in his letter of instruction to his newly appointed governor of Egypt and commander of his army at *Ṣiffīn*, Mālik al-Ashtar.

One common bond that knits together believers is that they are, '*a single Brotherhood.*'[672] The importance of this verse is explained by the Imām in two *farmāns*, '*I would like that my spiritual children should remember that there must at all times be a brotherhood and sisterhood between them*,'[673] and, '*If people have harmed you forget and forgive. Do not hold grudges; do not turn around and say: "he hurt me yesterday, so I will hurt him today." This is not the spirit of Islam and it is not how I understand our Faith should be practiced and this is fundamental.*'[674] It is in the spirit of these *farmāns* that emphasis is placed in the 1986 Constitution on the principle of dispute resolution which is considered in more detail later.

In dispute resolution the Ismā'īlī constitutions play a significant part. The 1905 Constitution[675] states that an Ismā'īlī being desirous of bringing a case before the council should do so by a written petition (Clause24); a scale of fees to be paid depending upon the financial standing of the petitioner.

In the 1905 Constitution, the parties to the action were to be referred to as plaintiff and defendant (Clause25) and on payment of a fee, a written copy of the judgement was to be given to the party making the request (Clause31). Appeals from the decision of the council had to be lodged within 15 days of delivery of

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[671] *Nahj*, Letter No. 53, p.461.
[672] 49:10. Paragraph (D) of The Preamble to the 1986 Constitution refers to this Islamic principle of Brotherhood.
[673] Hydrabad, 21st December 1964.
[674] *Precious Gems*, p.73.
[675] The Shia Imami Ismaili Council Rules and Regulations, (Zanzibar, 1905), pp.5-8 & p.15. Hereafter cited as The 1905 Constitution.

judgement (Clause35) and witnesses could be called (Clauses25 & 41).

What is significant about the 1905 Constitution was that both parties were required to submit to the jurisdiction of the council (Clause43) and once consent to jurisdiction was given, that consent could not be unilaterally withdrawn (Clause44) and either or both parties could employ advocates to represent them (Clause45). A final right of appeal lay to the Imām (Clause75). Thus the 1905 Constitution clearly designated the Imām as the final authority in all disputes initiated by the parties. This fundamental requirement of the acknowledgement of the Imām's authority, which both parties had to accept, and as has been explained, has its roots in the Qur'ān and in the traditions of the Prophet (ṣ.a.a.s.), (that have been outlined at the beginning of this chapter) and not as Walji[676] has sought, however tenuously, to argue anything to do with the dispute that arose during the Imāma of Ḥasan ʿAlī Shāh, the forty-sixth Ismāʿīlī Imām (1219-1298AH/1804-1881), (considered below), and on whom the Persian emperor Fatḥ ʿAlī Shāh had conferred in, 1233-4AH/1818, the honorific title of Āghā Khān (chief or lord), which has subsequently become anglicised to Aga Khan I.

The dispute centred on the authority of the Imām. His authority to collect dues paid by the community and to control their use became the major issue. It became important for the Imām to clarify his authority. Consequently he issued a *farmān* or directive requiring all Ismāʿīlīs in the sub-continent and Zanzibar to follow him in his interpretation of the personal law of the Ismāʿīlī Muslims. According to Picklay, the *farmān* ended with the words, '*Now he who may be*

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[676]Walji, Shirin, R., *A History of the Ismaili Community in Tanzania*, thesis submitted in fulfilment of the requirement for the Degree of Doctor of Philosophy, (University of Wisconsin, 1974), pp. 71-74. Hereafter cited as Walji

willing to obey my orders shall write his name in this book that I may know him.'[677]

The majority of the Ismāʿīlīs accepted and signed the book confirming their allegiance to their Imām. A sizeable minority refused. The dispute simmered for some time coming to a head in 1866 in the Bombay High Court, and came to be known as the 'Khoja Case'. The seceders had claimed that the Ismāʿīlīs were Sunnī Muslims, owed no allegiance to the Aga Khan I and sought the court's assistance in barring him from interfering in the affairs of the community and preventing him from collecting and utilising the dues raised from the community. The presiding judge, Sir Joseph Arnold heard the case, delivered judgement against them, confirmed that the Ismāʿīlīs as followers, supporters of Imām ʿAlī were Shīʿa Muslims, and that their faith and practice had, '*always been bound by ties of spiritual allegiance to the hereditary Imams of the Ismailis.*'[678]

The dispute was complex and centred on the authority of the Imām both spiritual and temporal was in fact no different to challenges that had been mounted against legitimately constituted authority from the time of the Battles of *Jamal and Ṣiffīn*. The judgement did resolve the problem in that many of the dissenters left the community. However, the dissenters still had family and matrimonial ties which over a period of time, became less and less significant. The significant point about the 1866 Khoja Case is that although it is one in a long line of challenges to the Imām's authority, there have not been serious challenges to that authority since.

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[677]Picklay, A.S., *History of the Ismailis*, (Bombay, 1940), p.150.
[678]*ibid*, p.165.

Some thirty-five years after the judgement, and with large scale movement of Ismāʿīlīs seeking settlement in Zanzibar and the hinterland of eastern Africa, the Imām considered it necessary to formulate rules and regulations that would unite those Ismāʿīlīs who remained loyal to him. The 1905 Constitution was the product promulgated in Zanzibar. This Constitution made possible and also strengthened community identity and set boundary limits within which the community could operate. Prior to the ordaining of the 1905 Constitution, the Ismāʿīlī community lacked an organisational base within which to handle cases involving disputes between members of the community. Another example was the difficulty the community had in deciding cases in which one party had left the community.

More importantly expansion of the community into the hinterland of Africa, (where European political and colonial hegemony was being established in the scramble for Africa), and where Ismāʿīlīs came to settle and to come under the legal and political jurisdiction of the British, French, German and Portuguese empires, meant that it became increasingly difficult for the community to function effectively. There was a need for a central authority to administer their affairs. The 1905 Constitution was that vehicle that was ordained in the best interest of the community. Other councils were established in various towns where settlement had taken place and made responsible for legal, administrative and social matters pertaining to the community in their individual and voluntary capacity. The supreme authority was the Aga Khan III, in whom vested absolute power of appointment and dismissal of persons nominated to serve the community. As the Imām, writing in a Foreword to a book on the life of the Prophet (ṣ.a.a.s.) explained that authority,

> By the institution of the 'Ulu 'l-Amr-- who can be interpreted as Imam and Caliph-- and by placing obedience to 'Ulu 'l-Amr immediately after that to God and Prophet, he ensured that the Faith would ever remain living, extending, developing with science, knowledge, art, and industry.[679]

The 1962 Constitution had a tripartite system of Dispute Resolution called, Provincial, Territorial and Supreme Tribunals, each having its Rules of Procedure as laid down in the Constitution.[680] Decisions made by the tribunals under powers granted in the earlier Constitutions, came to be recognised by the colonial authorities so long as the decisions were not, '*repugnant to good order and natural justice*.'[681]

The 1986 Constitution has specifically created Boards to regulate disputes between members of the community at a national and international level and for members, to refer their disputes to the Boards, to be resolved within the environment of conciliation and arbitration.

Article12.1, of the 1986 Constitution, establishes the International Conciliation and Arbitration Board (I.C.A.B.). Article13.1, takes the provision of dispute settlement one stage further by specifically constituted National Conciliation and Arbitration Boards (N.C.A.B.). Article13.4 empowers each N.C.A.B., to constitute within its jurisdiction, Regional Conciliation and Arbitration Boards (R.C.A.B.). Finally Article15 deals with Personal Law.[682]

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[679]Jairazbhoy, al-Hajj Qassim Ali, *Muhammad A Mercy to All Nations,* (London, 1937), p.14
[680]The 1962 Constitution, pp.43-53
[681]Nurbanu Karim Rattansi v Husseinbhai Karim Mohamed, Civil Case No. 94 0f 1953 quoted in Walji, p.184
[682]The 1986 Constitution, pp.18-25.

The composition of the I.C.A.B. consists of a Chairman and six other members, [683] and whose tenure of office is limited to three years.[684] The I.C.A.B. original jurisdiction extends to assisting in conciliation process, as well as acting as an arbitration and judicial body.[685] The I.C.A.B. may hear and adjudicate on matters referred to it by any National Council or any N.C.A.B.,[686] to hear appeals from any N.C.A.B. or appeals allowed by special leave of the I.C.A.B.,[687] and finally, on any matter it may be authorised to hear and decide, from time to time.[688] Decisions of the I.C.A.B. are final and binding on the parties.[689] The I.C.A.B. is empowered to have for its proper functioning such Rules and Regulations including *inter alia,* defining its function, powers and duties, and those of its members, provide rules of procedure for the conduct of conciliation, and rules for the conduct of matters of which it is seized.[690]

By virtue of Article13.2, the composition of the N.C.A.B. consists of a Chairman and four members. Their term of office is limited to three years. In addition, Article13.1(a), confers on an N.C.A.B. jurisdiction to hear and assist in conciliation process between parties in differences or disputes in various matters such as commercial, business and other civil liability issues, and domestic family matters such as those relating to property and children. Article13.1(b), confers on the N.C.A.B. power to act as an arbitration and judicial body over similar matters to those mentioned in Article13.1(a), in addition to take disciplinary

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[683] *ibid,* Article12.2
[684] *ibid,* Article12.3
[685] *ibid,* Article12.1(a) and (b).
[686] *ibid,* 12.6(a)(i) and (ii)
[687] *ibid,* 12.6(b), and 12.6(c)
[688] *ibid,* 12.6(d)
[689] *ibid,* Article12.7
[690] *ibid,* Article12.4(a), (b), (c), and (d)

action under Article14 and any Rules and Regulation there under.

Under Article13.4 the N.C.A.B. may prescribe such Rules and Regulations so as to enable an R.C.A.B. within its jurisdiction to carry out its functions and also to determine the composition of each R.C.A.B., but subject to the approval of H.H. The Aga Khan IV. In addition, by virtue of Article13.4(f), the N.C.A.B. can define the functions, powers and duties as well as provide rules of procedure for the R.C.A.B. within its jurisdiction which would include filing of application, replies, notice of hearing, attendances of parties and witnesses, administration of oaths, conduct of proceedings and pronouncement of decision. There is a right of appeal from the R.C.A.B. to the N.C.A.B. under Article13.6 (b) and (c).

The 1986 Constitution Article15.1[691] makes provision for dealing with the Personal Law of members of the community. The personal law of an Ismā'īlī is defined as that which, '*has evolved in The Shia Imami Ismaili School of thought of Islam*,'[692] and only the Imām of the time, '*has the sole right to interpret the personal law evolved within the The Shia Imami Ismaili School of thought of Islam*.'[693] Finally, where in any territory in which an Ismā'īlī has settled and acquires either residence or domicile and that territory does not recognise and apply Ismā'īlī personal law, then the personal law applicable to him is the law of that territory in which he acquires residence or domicile.[694]

The I.C.A.B., which is a new body, makes provision for settling disputes in commercial matters at an international level, has its origin in the

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[691] *ibid*, p.24.
[692] *ibid*, Article15.2, p.24.
[693] *ibid*, Article15.3, p.24.
[694] *ibid*, Article15.4, p.24

1905 Constitution of settling such disputes at a national level (Clauses43-45) inclusive. However, the Council was only seized with jurisdiction if both parties agreed. The case could proceed in the absence of Defendant without good cause, or dismissed in the absence of the Plaintiff, without good reasons, (Clause28).

The mass movement of Ismā'īlīs fleeing political upheavals in Africa during the decade following political independence from colonial rule, seeking relative political security in Europe, Canada and U.S.A., meant that the *jamā'at* was now more international than previously and trade between those who had migrated and those who remained had increased. The Imām, explained the need to have such an international body, said at the time of the new appointments to the Board,

> To strengthen and enhance our tradition, provision has been made under the Ismā'īlī Constitution that henceforth there should be an International Conciliation and Arbitration Board. The Board, Insha-Allāh, will act with fairness, speed and confidentiality and without excessive cost.[695]

Reviewing the work of the Board, The Imām said,

> The Boards have resolved a very significant number of cases at the Regional, National and International levels. They have endeavoured strongly to fulfil their mandate of providing quick, effective and relatively inexpensive resolution of disputes.[696]

The Personal law provision of the 1986 Constitution had its origin in the 1905 Constitution, which provided that in the event of a serious matrimonial dispute arising, then the first duty of the Council was to attempt a reconciliation

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[695] 7th July 1987
[696] 6th December 1993

and divorce was to be effected only as a last resort. Where the husband initiated divorce, the divorce could only be granted to him on payment of *mahr* (Clause51). "Personal law" may be defined as rules governing the personal relationship of individuals to other members of the society and includes though without limitation to birth, marriage, divorce, children and ancillary issues pertaining thereto and other issues such as *mahr* or dower, (the bridal gift of money or property given to the bride on the occasion of the marriage or contracted to be paid).[697]

In Syria today, where there is a significant Ismā'īlī minority, there is one N.C.A.B. in Salamieh and seven R.C.A.B. based in Damascus, Barri, al-Su'un, Taldara, al-Khawabi, Salamieh and Aleppo. His Highness The Aga Khan IV established the Board in Aleppo in December 1999 by an amendment to the 1986 Constitution. Appeals from R.C.A.B. lie to the N.C.A.B. in Salamieh. Further appeals lie under the provision of the 1986 Constitution to the I.C.A.B.

Whereas in Pakistan, where there is a large Ismā'īlī settlement, dispersed over a much wider geographical area, there are also Regional Panels to assist the R.C.A.B. The N.C.A.B. appoints members to the Regional Panels for a term of one year. By contrast, the United Kingdom with a much smaller population has only an N.C.A.B.; in this case Appeals lie direct to the I.C.A.B.

In Syria and Pakistan, the Ḥanafī School of law applies. In the last century Syria was governed by France and French influence is all pervasive.

Whereas Pakistan inherited from British India the Arbitration Act, 1940, Syria,

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[697]The issue of *mahr* is an important concern for all Muslims settled in Western countries where Islamic law does not apply and who are subject to domestic matrimonial legislation. Chapter Five, 'The Concept of *mahr* (Dower) in Islamic Law, A Resolution of a Conflict with English Law' discusses the issue in detail.

at Independence has enacted secular legislation in arbitration. In the following section dispute resolution is considered amongst the Ismāʿīlīs in Syria and the interaction with national laws. A brief historical introduction precedes a consideration of the legal position.

SYRIA

In Arabic, Bilad al-Sham, formerly a province of the Byzantine Empire included what is to-day Syria, Lebanon, Jordan, Israel, the West Bank of Palestine and spread into several Turkish provinces. The caravan route from al-Yaman in the south to Gaza and Damascus in the north via Makka would have been familiar to the Prophet (ṣ.a.a.s.) who had accompanied his uncle Abū Ṭālib on trade missions to Syria. He must have foreseen the danger of a powerful empire to the north as a threat to his community in Madīna, especially if that empire allied itself with the Quraysh of Makka. The Treaty of al-Ḥudaybiyya had secured the south. An early expedition was launched to Mu'ta in 8AH/629 to secure his northern border. Three thousand Muslims engaged a Byzantine and allied force of two hundred thousand in which three Muslim commanders, Zayd b. Haritha, Jaʿfar b. Abī Ṭālib and ʿAbd Allāh b. Rabah were killed. It was Khālid b. al-Walīd, who took command and regrouped his forces, in a defensive formation that may have forced the Byzantines to withdraw, anticipating Muslim re-enforcements.[698]

The Battle of Mu'ta must have had an indelible impression on the first and second Caliphs. The suppression of the apostasy wars during Abū Bakr's Caliphate now left him free to turn his attention to the north. The conquest of

[698]Ibn Kathīr, Vol.III, p.326.

Syria began in earnest during ʿUmar b. al-Khaṭṭāb's Caliphate. Four Arab commanders operating in Syria at the time were; ʿAmr b. al-ʿĀṣ, Shurahibil b. Ḥasana, Yazīd b. Abī Sufyān and Abū ʿŪbāyda. At the Battle of Ajnādayn (13AH/634) the Muslim army was led by Khālid b. al-Walīd, who defeated the Byzantine forces. The fall of Damascus in 14AH/635 sealed the fate of this Byzantine province. ʿUmar arrived in 18AH/639 to discuss the organisation of Syria. It was also the year of the plague. Yazīd b. Abī Sufyān died and was replaced as governor of Damascus by Muʿāwiya b. Abī Sufyān. It was ʿUthmān who extended his mandate over the whole of Syria.[699]

Syria has been at the crossroads of many invasions. The ʿAbbasīd invasion of 132AH/749; the Fāṭimid having successfully completed the conquest of Egypt invaded Syria in 358AH/969 and conquered Palestine and Damascus. The Crusaders invaded in 1098CE and were later defeated by the Mamlūks of Egypt. The Mongol hordes of Prince Hūlagū were finally defeated by the Mamlūk at the Battle of ʿAyn Jālūt (658AH/1260) led by Baybars.[700] Syria became the battleground of the Il Khans of Persia. Tīmūr (738-807AH/1337-1405) captured Damascus in (803AH/1401), burnt the city to the ground and withdrew to Samarqand. Ottoman Turks in (922AH/1516) captured and ruled the country. Their entry into the First World War in 1914 in alliance with Germany and their defeat in 1918 had enormous political ramifications throughout the region whose consequences are being felt today. The defeat brought about the end of the Ottoman Empire, the Caliphate and the advent of British and French colonial rule in the Middle East that split the country up into its present borders,

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[699] *EI²*, *s.v.* 'Al-Sham,' Vol.IX, (Leiden, 1997), p.261.
[700] Hitti, p.674.

the creation in the region of new states including the State of Israel in 1948.[701]

Unlike her neighbours of Iraq and Jordan, Syria adopted a republican constitution in 1943, gained political independence from French influence in 1946, and became a member of the United Nations. Political pressures from the creation the State of Israel in 1948 saw a military coup in 1949.[702] A new Constitution was promulgated in 1950 subsequently annulled by the 1953 Constitution, followed by a brief period of a union with Egypt and Yemen. The break up of that union meant the re-introduction of the 1950 Constitution. In Syria the Ba'th party with its emphasis on social justice and Arab unity gained sway. Hafiz al-Asad (1930-2000) seized power in 1970. The President to day is his son Bashar al-Asad.[703]

To day, in addition to the countries mentioned earlier, Syria shares common borders with Iran and Turkey and has a long coastline along the Mediterranean Sea. There is an ongoing dispute with Israel that has resulted in war in 1973 and subsequent loss of territory. The population is predominantly Sunnī but there are living within its borders Christians, Alawis, Druze and other Shī'a communities of which the Ismā'īlīs are one.

Resolution of conflict through Arbitration, Mediation and Conciliation, is ingrained in the Syrian Ismā'īlī tradition and has been so since the time of the settlement of four of the Imāms, al-Wafī Aḥmad (d.c.212AH/827), Taqī Muḥammad (d.c.229AH/843), Raḍī al-Dīn 'Abd Allāh (d.c.289AH/901) and finally Muḥammad al-Mahdī (d.c.322AH/933). Disputes were always referred to

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[701] *EI²*, *s.v.* 'Al-Sham,' Vol.IX, (Leiden, 1997), p.265.
[702] Al-Marayati, Abid A. *Middle Eastern Constitutions and Electoral Laws*, (London, 1968), pp.314-317.
[703] Martin, Richard C., (ed.), *Encyclopaedia of Islām and the Muslim World*, Vol.2, (U.S.A., 2004), pp.425 and 458.

the incumbent Imām for settlement. The departure of Muḥammad al-Mahdī for North Africa, where the Fāṭimid state was established meant that until the late 1960s, the Syrian Ismā'īlīs referred their disputes for settlement to respected dignitaries of the community who were recognised for their wisdom and sound judgement.

In early 1970, The Supreme Council for Salamieh acting under its powers granted under the pre-1986 Constitution, appointed a local committee to undertake the function of Conciliation and Arbitration. Similarly the people of Salamieh selected a committee to deal with dispute resolution for all members of the public who sought its services. This committee deliberated under the auspices of the President of the Aga Khan Council, at the offices of the council. There were thus two committees performing similar functions. However, the operation of this latter committee fell into disuse. A novel provision of the former committee was that it included members from other non-Ismā'īlī communities. The committee acquired a great deal of respect for their impartiality, was used by all communities and dealt with disputes that included murder and traffic accidents.[704]

Under the 1986 Constitution, the Imām makes appointments to the N.C.A.B. from amongst Ismā'īlīs residing in countries in which the appointments are to take effect. The principle of outside participation is specifically retained but only in Syria. Members of the N.C.A.B. nominate a person from another community to sit and deliberate with R.C.A.B. but with no right to vote.

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[704]Interview carried out with Tamer 'Abd Allāh Tamer a practicing lawyer in Salamieh who was also at one time President of the Shī'a Imami Ismā'īlī Council for Syria

The R.C.A.B.'s functions under the 1986 Constitution extend to Conciliation and to Mediation. Both processes are less formal. Conciliation is an essential first step in bringing the parties together in an attempt to solve the dispute amicably. The process is voluntary success depends on the co-operation R.C.A.B. receives from both parties since its enforcement powers are limited. The process is initiated by one party making an oral or written approach to R.C.A.B. to help settle a matter. On receipt of the complaint a file is opened and a reference number is given. The other party is notified of the complaint and invited to attend R.C.A.B.'s office for an informal discussion and to enable the party concerned to put his/her side of the story. The information gained is relayed to the complainant who is then invited to attend. R.C.A.B. may visit either party only after each party has accepted R.C.A.B.'s initial preliminary invitation. Parties who attend are dealt with on a first come first serve basis. Each case is dealt with in open session. Only those members of the public attend who have a concern or interest. The sessions are held in an informal atmosphere. A session starts at 10am and depending upon the number and complexity of cases, ends at 12pm. Parties are informed that the services of R.C.A.B. are free, but where money is tendered, that sum is paid to a charity. Meetings are held on Fridays. The R.C.A.B. is composed of a chairman and four members. Two members were also practising lawyers. Two were lady members of whom one was one of the lawyers in private practice. Members nominated to serve consider their appointment a privilege.

Arbitration is a formal procedure where the parties are obliged to sign an arbitration contract. The decision of the R.C.A.B. is binding and enforceable in the civil courts. However, the award must comply with the Law of Judicial

Procedure of Syria in order to be enforceable like any other judgement.[705]

Matrimonial disputes involved breaking off of engagements, maintenance for a divorced/separated wife living alone or with children, custody and divorce. Other types of disputes were also dealt with, including settlement of cases involving compensation payments in death from traffic accidents, and other types of disputes. Cases heard to the end of September 1998 show that the six R.C.A.Bs. dealt with 152 cases, that involved financial (81) and matrimonial (43). The number of individuals involved was 396 of which 351 were Ismā'īlīs and 45 non-Ismā'īlīs.[706]

The first case involved a motorcycle accident in which the complainant's son was killed. The Chairman thanked him for coming. He explained that a copy of his letter of complaint had been sent to the other party and added that every effort would be made to resolve the dispute but that the R.C.A.B. was not a court of law and its findings were not binding on the parties.

The respondent was present but interviewed separately after the complainant had left. The procedure was explained and he agreed to carry on with the mediation. In his defence, he stated that the deceased was careless in crossing the road.

The Chairman then explained to him that there would be further sessions where the parties financial position would be considered and based on information supplied the basis of the compensation would be made. The Chairman also explained that subject to both parties agreement, R.C.A.B. would in this particular case draw up a final written agreement, signed by both parties,

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[705]Qanun Usul al-Muhaqimat No. 84/1953 Vol.3, Chapter 4 Arts. 506-534
[706]Statistical information supplied by the N.C.A.B. based in Salamieh.

and their signatures witnessed. Either party could then register the agreement in the local court in Salamieh. It was explained to both parties that the effect of registering agreement would be enforceable as though it was a judgement of the court. The signatures to the agreement would have to be attested at court, as this was a criminal case.

The next case was the purchase of a business. The buyer's complaint was that he paid the seller of business money, but the seller had no title to the shop, having sold the shop to a previous purchaser. At the first preliminary session he gave a signed statement and he was asked to produce documentary evidence of the contract. He was clearly alleging fraud.

He returned on the second occasion and produced two documents. The first, the contract for the sale of the business identified the land sold, was written in ink and signed by both parties. The second, bore official stamps and was from a government department responsible for registration of titles, was signed and sealed by the department. It was brief and attested to the fact that the seller of the land had no title to the property, but did not state who the current owner was.

The R.C.A.B. noted the seriousness of the complaint, and explained that it went beyond the jurisdiction of the Board. He was advised to consult a lawyer and to bring a complaint in the local court and the procedure was explained to him. Three certified copies of his signed statement and three certified copies of the current proceedings were given to him and advised that statement would be accepted by the court, as evidence of the fact of what he was alleging.

What transpired from observing the proceedings was that, there appeared to be no compulsory motor vehicle insurance in respect of road accidents. The parties had implicit trust and faith in the ability and impartiality of

the Board. The desire of the parties to arrive at a settlement within the spirit of compromise made the task of the Board easier. The desire to use the services of the Board and the parties wish to resort to drawing up their own agreement as in the case of sale of land reflected the economic situation in Salamieh and the parties' low financial means. All these above factors contributed to R.C.A.B.'s popularity and success.

A visit was also made to Aleppo in view of the fact that the R.C.A.B. there was newly constituted.[707] An interview was carried out with the newly appointed chairman. There had been only two cases referred to R.C.A.B. for settlement. One was particularly intractable and was having an adverse effect on the atmosphere in the community.

The dispute related to an agreement entered into by the owner of a plot of land and a property developer. Both signed a partnership agreement. The property developer would build a shopping complex on land owned by the other partner. During the course of construction, a dispute arose and the project came to a standstill. The property developer approached the R.C.A.B. to try to effect a settlement. Five meetings were held and the chairman suggested that the owner should pay a certain sum of money to the developer who on acceptance would surrender all rights to the development and the partnership agreement would end. Neither party seemed satisfied but in the spirit of reconciliation the parties agreed. The dispute ended and the parties became reconciled. What was observed was a desire by all parties to reach a settlement under the auspices of the Board.

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[707]The statistical information supplied did not include R.C.A.B. in Aleppo which was constituted on 13th December 1999 by an amendment to the 1986 Constitution.

PAKISTAN

Pakistan[708] gained independence and became a sovereign State on the 14th August 1947. Pakistan's birth was both traumatic and fraught with problems. As an independent state within the Commonwealth she faced the challenge of assimilating millions of refugees from independent India and at the same time losing millions of people to her neighbour. At birth she was split between West and East Pakistan separated by more than one thousand miles of Indian Territory and both parts were linguistically, ethnically, culturally and racially different.

At independence, the task of forming a Constitution was entrusted to the Constituent Assembly, which was also an interim legislature. A federal structure was proposed with the Governor-General and the Constituent Assembly at the centre and governors and provincial assemblies in the provinces. The Objective Resolution was adopted by the Constituent Assembly formed the fundamental basis for the establishment of Pakistan and was included as an Annex. By an amendment to the 1985 Constitution, the Objective Resolution was incorporated as an integral part of the Constitution, and its principles and provisions became the overriding law, making it became incumbent on all Courts to give effect to the same. One such principle was that Muslims should order their lives, in the individual and collective spheres, in accordance with the injunctions of Islām set out in the Qur'ān and the *sunna* of the Prophet (ṣ.a.a.s.).

The death of the founder of the state, Muhammad Ali Jinnaḥ[709] in 1948, and the assassination of his deputy Liaqat Ali Khan in October 1951 left the new state rudderless. Political stability has eluded her since independence with four

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[708]Meaning the land of the pure. *EI²*, *s.v.* 'Pākistān', Vol.VIII, (Leiden, 1995), p.240.
[709]Known as Ḳa'id-i A'ẓam.' A Barrister, President of the Muslim League and Governor-General Pākistān. *EI²*, *s.v.* 'Djināh, Muḥammad 'Alī,' Vol.II, (Leiden, 1965), p.545.

military coups, of 1958 by General Ayub Khan, of 1969 by General Yahya Khan, of 1977 by General Zia-ul-Haq and finally of 1999 by General Pervez Musharraf. It was Zia's zeal for Islamisation of the Criminal laws and his creation of a Sharī'at Bench of the Supreme Court that is his lasting legacy. The political instability, the war with India that gave power to the armed forces also had two further disastrous consequences for this young democracy. The abrogation by General Yahya Khan of the 1962 Constitution of General Ayub Khan and his introduction of general elections in 1970, on the basis of universal adult franchise, resulted in a sweeping victory for the Awami League of East Pakistan in the federal legislature. This victory did not translate into political power. The result was a disastrous civil war. With India's military help, East Pakistan broke away and a separate state of Bangladesh, recognised by the United Nations, was born in 1971.

The relation between the civilian authority and the military remains fraught with tensions, periodically exploding into physical violence. General Zia-ul-Haq's hanging of the civilian Prime Minister Zulfiqar Ali Bhutto, in the face of strong international objections is one just example. Conversely, the civilian Prime Minister Nawaz Shariff, who held enormous executive powers, forced the resignations of a sitting president, a Chief Justice of the Supreme Court and an army chief of staff. His quarrel with and subsequent dismissal of General Pervez Musharrf in October 1999 brought a premature end to his ambitions and precipitated his political demise.

The relationship between the civilian and authority i*nter-se* was never easy. The daughter of Zulfiqar Ali Bhutto returned from exile and was elected to power with a weak coalition. Ethnic and religious tensions plagued the province

of Sind. Eventually she was removed from office in August 1990, by the president Ghulam Isḥāq Khan. In subsequent elections Nawaz Shariff's party won a convincing victory at both national and provincial levels. His lasting legacy is the Enforcement of the Sharī'a Act 1991, which is discussed below. Pakistan consists of five provinces, Sind, Punjab, Baluchistan, North West frontier and Gilgit Agency. Pakistan shares borders with Iran, Afghanistan, Tajikistan, India and China, two of the most populous and the fastest developing economies in the region. It is a major Muslim country occupying a prominent position in the geo-political situation and is at the crossroads of both Central Asia and the Arabian Sea, the Middle East and West Asia. The war in Afghanistan has had an impact on her, yet to be assessed. The capital Islamabad is federal territory. Political stability still eludes this young state. The population is predominantly Sunnī some Shī'a communities live there, of which the Ism'īlīs are one. Sunnī Shī'a tensions persist, periodically exploding into violence. The dispute with India since independence over the legal and political status of the disputed territory of Jammu and Kashmir has simmered and has resulted in a full-scale war with her neighbour in 1965. The dispute remains unresolved but talks have resumed with her neighbour. With both countries well armed and having successfully tested and now possessing nuclear weapons and the delivery capability system *in situ*, a resolution to this conflict becomes even more urgent.

Pakistan like Syria, is a predominantly Muslim country and has a large Ismā'īlī population. In Pakistan, the rebuttable presumption of fact is that Muslims belong to the Ḥanafī School, and '*has apparently been propounded by virtue of section 114 of the Evidence Act 1872.*'[710]

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[710]Hussein v Ali (1977) PLD p.320 at 325 per Zafar Ḥusayn Mirza J.

There are two other Statutes of relevance to all Ismāʿīlīs. The Muslim Personal Law (*Sharīʿa*) Application Act, 1937, was the first law to enable a Muslim to make a declaration that Muslim Personal Law would govern him. This declaration was of some significance to the Ismāʿīlī community, whose members would continue to be governed by its Customary Law. This privilege was withdrawn by the West Pakistan Muslim Personal Law (*Sharīʿa*) Act, 1962. The Act provided that notwithstanding any custom or usage and in all question of Personal Law, the *Sharīʿa* shall apply where the parties are Muslims. Thus Ismāʿīlī Muslims are now governed by the *Sharīʿa* to the exclusion of customary law previously applicable to them.

Pakistan gained independence by virtue of The Indian Independence Act, 1947, which enacted S.18(3), that the laws of British India were, '*as far as applicable and with necessary adaptations, continue as the law of the new Dominions until other provision is made by the laws of the legislature of the Dominion in Question.*'[711] Successive Constitutions contained articles providing for the continuance of existing laws; The 1956 Constitution, Article224(1), The 1962 Constitution, Article225(1) and The 1972 Interim Constitution, Article280(1). The 1973 Constitution Article268 provides in substantially the same form for the continuation of pre-existing laws. In dispute resolution, the first port of call for Ismāʿīlīs will be the R.C.A.B. or N.C.A.B. The sources of law since Independence are,

a) Statutes enacted in pre-partition British India

b) Pre-Independence decisions of British Indian

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[711]Lau, Martin Wilhelm, *The Role of Islam in the Legal System of Pakistan*, thesis submitted in fulfilment of the requirement for the Degree of Doctor of Philosophy, (University of London 2002), p.28. Hereafter cited as Lau.

Courts including appeals to the Privy Council

c) Post–Independence Statutes and decisions of National Courts including the Supreme Court

d) Personal law (Muslims and Hindus)

e) Islamic law[712]

Pakistan also at least until 1991, inherited a substantial body of English Common Law under the description of 'equity, justice and good conscience.' From the early days of the East India Company Regulations were made in 1781 and 1793 empowering judges to decide according to justice, equity and good conscience, not necessarily confining their decisions on the basis of English Common Law but also to other sources of law such as the Personal Laws of Muslims and Hindus.[713]

The proponent for the introduction of Islamic law was Mr Justice Afzal Zullah. The debates within the judiciary for the Islamisation of laws had its limits and as Lau states, Justice Zullah did not apply Islamic law to areas of law occupied by statutes and judges were equally barred from striking down existing law on the basis of Islamic law. However, where there were certain concepts *e.g.*, natural, moral, universal, that had hitherto been given English legal definitions, then the courts according to Justice Zullah were free to apply those definitions in the light of Islamic philosophy and jurisprudence in preference to English Common Law or rules of equity, justice and good conscience.[714]

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[712]Cotram, Eugene & Mallat, Chibli; *Year Book of Islāmic & Middle Eastern Law*, Vol.1, (Ah Dordrecht, 1994), p.7.
[713]Lau, p.78.
[714]*ibid,* p.81.

By virtue of Section 3(1) of the Enforcement of the *Sharī'a* Act 1991, the Injunctions of Islām as laid down in the Holy Qur'ān and the *sunna* were made the supreme law of the country. However, Section 3(2) of the 1991 Act, precluded challenges to the existing political system was itself made subject to a successful judicial challenge on the basis that the legitimisation of the political establishment was itself contrary to the injunctions of Islām.[715] Lau expresses the opinion that, '*the Act does very little in terms of concrete legal measures to enforce Islamic law*.'[716] Section 4 of the Act did achieve one of its objectives namely that Statutes should be interpreted in the light of Islamic law, if more than one interpretation is possible. Explaining the significance of the enactment, Ajmal Mian, Chief Justice as he then was said,

> The principles of common law or equity and good conscience cannot confer jurisdiction on the Courts in Pakistan. Clause (2) of Article175 of the Constitution of Pakistan provides that no Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law. The High Courts derive their jurisdiction under the Constitution and the statutes.[717]

One of the Statutes inherited from British Indian laws is the Arbitration Act 1940, which governs all arbitration in Pakistan, and provides a complete code for inter party arbitration through the intervention of the courts. Arbitration is widely practised in the country and is the more preferred method of alternative dispute resolution in commercial matters. The Muslim Family Law Ordinance, 1961, governs family dispute matters.

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[715] *ibid*, pp.154-156.
[716] *ibid*, p. 153.
[717] Hitachi Limited v Rupali Polyester 1998 S C M R 1618

At this junction, a brief comparison between the Syrian and Pakistani arbitration laws would be appropriate. By virtue of S2 (a) of the Arbitration Act 1940, there is no difference between a submission to arbitration and an arbitral clause. Both are governed by the term 'arbitration agreement.' The wording of the Section is significant, *'a written agreement to submit present or future differences to arbitration, whether an arbitrator therein is named or not'*[718] and will stay judicial proceedings.

By contrast, the Syrian Code of Civil Procedure is silent on the effect of arbitration clauses or arbitration agreements. According to Saleh, the Court of Cassation has decided that arbitration agreements do stay judicial proceedings and the Court has held that arbitration clauses are wider in effect than an agreement to arbitrate on a specific issue.[719] Another distinction between the two Statutes is that, whereas the Syrian law requires the parties to appoint their arbitrators, no such requirement is necessary under the Arbitration Act, 1940.

There are now enacted in many countries across the world new arbitration laws to cater for the needs of modern commerce. An interview was carried out with the former Chief Justice, now Chancellor of Hamdard University, Karachi, Ajmal Mian. He did not think that there was a need for a new statute. The present one was adequate. He said the working of the Act could be improved by having (1) full time professional arbitrators, (2) lawyers who practise exclusively in arbitration. The present position is of lawyers constantly asking for adjournments to cope with their heavy court schedule. This causes an unnecessary delay. It defeats the purposes of the Act. (3) The procedure for

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[718] Arbitration Act 1940, S.2
[719] *Commercial Arbitration*, p.105.

operating the Act was slow and cumbersome. [This is an interesting comment from a former Chie Justice of Sind, particularly when India has replaced the old Statute with new Arbitration and Conciliation Law 1995 with effect from 1996 modelled on the Model Law on Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL)].

In dispute resolution in family matters relating to e.g. marriages, divorce, dower, the applicable law is the Muslim Family Law Ordinance, 1961. An amendment to the Constitution of Pakistan was to add a new chapter – Chapter 3A. The amendment established the Federal *Sharī'a* Court.

Article203-D of the new Chapter 3A, empowers the Federal *Sharī'a* Court to decide whether any law is repugnant to the Injunctions of Islām. It was the opinion of Rashida Patel, author and practicing lawyer that the result of this amendment would be that the Muslim Family Law Ordinance, 1961, might be the subject of a challenge as being repugnant to the Injunctions of Islām.[720] His Honour Judge David Pearl also expressed his concern that the 1961 Ordinance would be challenged to the point of making it unworkable.[721] In his Opinion, he states that, '*there are cases in Pakistan which tend to undermine the framework of the Muslim Family Law Ordinance, 1961.*'[722]

The Muslim Family Law Ordinance 1961, dealing *inter alia* with marriage, divorce and *iddat*, that is the wife's waiting period before she can re-marry, was the subject of a just such a full-scale challenge by petitions filed under Article203-D of the Constitution of the Islamic Republic of Pakistan, on

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[720]Patel, Rashida, *Socio-Economic Status and Woman and Law in Pakistan*, (Karachi, 1991), p.17

[721]Pearl, David Opinion given to H.H., The Aga Khan Conciliation and Arbitration Board, (London, 1993).

[722]*ibid*, paragraph 12

the grounds that Section5 (that the requirement for the registration of marriage), and Section6 (prescribed procedure to be followed before the husband could take a second wife and punishment for its non-observance thereof), and finally Section7 (that the requirement on the part of the husband who pronounces *ṭalāq* to give to the Chairman of the Arbitrary Council notice in writing of the *ṭalāq* and supply a copy to the wife and the period of *iddat* were all against the Injunctions of Islām). Subject to minor concessions regarding the service of *ṭalāq* S7(3) and period of *iddat* S7(5) which appeared to benefit divorced women, the Chief Justice of Pakistan Mian Mehboob Ahmed upheld S7 of the 1961 Ordinance, that it did not breach the Injunctions of Islām.[723]

In dispute resolution these two national laws, are important. It is unlikely that in the light of the interview carried out with the former Chief Justice Ajmal Mian that the Arbitration Act, 1940, would at least for the present be reviewed. Now that an unsuccessful challenge has been mounted to the Muslim Family Law Ordinance, 1961, stability should follow. Pakistan is predominantly Muslim, and predominantly Ḥanafī. The *majalla*, which is the codification of this Ḥanafī School, and according to the opinion of Powel–Smith,

> Represents the advanced views of the Ḥanafī School, which is predominant in Syria in many other countries... but with the resurgence of Islām, the constitutionality and legality of statutes, which, under foreign pressure, were enacted, are increasingly coming under the scrutiny of Islamic Scholars.[724]

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[723] Allāh Rakha v Federation of Pakistan 2000, PLJ pp.48-91, FSC

[724] Powel–Smith Vincent, *Islamic Studies*, Vol.34, No 1, Spring 1995, p.35 Perhaps not a very practical solution in view of Syria's adoption of civil legislation to replace the *majalla*. It may be that Pakistan will have to consider a new Arbitration Act to meet international commercial demands for quick and inexpensive dispute resolution tribunals.

There is no conflict with the 1986 Ismāʿīlī Constitution, as Article15.2 of the Constitution states that the personal law applicable to Ismāʿīlīs shall be the personal law as has evolved within the Shīʿā Imāmi School of Thought of Islām. As has been explained, an unsuccessful challenge was made in the Pakistan Courts to the Islamic validity of the Muslim Family Law Ordinance, 1961.

It is only a matter of time, before the challenge is mounted to the Arbitration Act, 1940, inherited from British India. In a significant respect the 1940 Act has failed to meet its expectations, which was to provide an alternative system of dispute resolution, which would be both quick and inexpensive. Indeed, justified by the comments of retired Chief Justice Ajmal Mian, the operation of the Act is slow, cumbersome and expensive. Measured against the provisions of the *Qanūn-i Shahādat*, 1991, which is that justice in Islām should be available to all, quick and inexpensive, the operation of the Act must be judged a failure.

The solution suggested by Powel-Smith is, '*The Ḥanafī approach as represented by the majalla, is the time with modern commercial needs...working consideration and the basic structure for any Islamic legislation dealing with arbitration.*'[725] It may well be that the legal system in Pakistan may take a second look at the *majalla*. It was after all the Former Chief Justice of Pakistan who advised lawyers to learn Arabic and to take a fresh look at the *majalla*.[726]

The Ismāʿīlī Constitution recognises that where the country of residence or domicile does not recognise or allow the application of the personal law of Ismāʿīlīs, he shall be governed in that country by such personal law as applicable

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[725] *ibid*, p.35

[726] Braibanti, Ralph *Chief Justice Cornelius Of Pakistan*, (Oxford, 1999), pp.312-314.

to him under the law of that country. It is clear therefore that the law of the land will prevail in determining what constitutes the personal law applicable to an Ismā'īlī. Although Ismā'īlī disputants will at first instance resort to the community based dispute resolution system, the national laws will take precedence.

Based on the Qur'ān and the interpretation given by the forty-ninth Imām of the Shī'ā Imāmi Ismā'īlīs, Conciliation and Arbitration are fundamental in the Ismā'īlī School.

Two important verses of the Qur'ān refer to dispute resolution amongst the believers in the following terms, '*If two parties among the Believers fall into a fight, make ye peace between them*;' and, '*The Believers are but a single Brotherhood: so make peace and reconciliation between your two (contending) brothers*;'[727]

This basic Qur'ānic principle of settling disputes within the tenets of Islām was explained by the Imām His Highness The Aga Khan in a *farmān* made to the Ismā'īlī *jamā'at* of Bangladesh, '*You should not spread out your disputes by any way or means of the media. I consider you as one large family. You should solve your disputes by arbitration and cordial negotiations.*'[728] In his visit to the Ismā'īlī *jamā'at* in Pakistan, he elaborated further on why it was necessary for disputes to be settled under the Constitution,

> Remember that Islam is a faith of peace. It is a faith of harmony. It is a faith of brotherhood. So practice these principles in everyday life. If you disagree, seek to come together, not around a solution where one person wins and the other loses but ask

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[727] 49:9-10

[728] Chittagong, 3rd November 1964

> yourselves what is in the best interest of the jamat? That is the best solution. If it is in a family, what is in the best interest of the family?

And again,

> I emphasize again that the jamat's interest is not best served by resorting to damaging and fruitless litigation at great cost...but to bring their differences and disputes to our Conciliation and Arbitration Boards in accordance with the tradition of our jamat, so that these may be resolved rapidly and cheaply.[729]

The concept of mediation, conciliation and arbitration has deep religious and historical roots for all Muslims. The Ismāʿīlī Constitution has created a fully enabling environment to settle disputes amicably within the faith and in accordance with Ismāʿīlī traditions and within the spirit of Islām.

ENGLAND AND WALES

The Ismāʿīlī community in England and Wales is small and having settled here, fleeing political and economic uncertainty in Africa. The problems encountered are identical to the problems faced by the Ismāʿīlī populations in Syria and Pakistan. The cases that are referred to the Board fall into two categories, with a preponderance of cases that fall to be determined in the matrimonial and ancillary relief field, particularly questions of *mahr* and the payment thereof. A small number of cases might be called commercial.

Article15 of the 1986 Constitution is specifically concerned with personal law of the Ismāʿīlīs. One of the matters raised by Article15 is the question of *mahr* and the Article clearly states that where a particular territory or

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[729]Karachi, 24th October 2000

country in which an Ismāʿīlī acquires residence or domicile and that country does not afford recognition to the Ismāʿīlī personal law as it has evolved, then that Ismāʿīlī shall be governed by the laws of the territory or country in which he/she resides. English law does not recognise Ismāʿīlī personal law and therefore the laws governing matrimonial disputes are *inter alia*, the Marriage Act, 1949, Matrimonial Causes Act, 1973, and the Family Law Act, 1996.[730] The issue therefore is to what extent if any, payment of *mahr* can be enforced in an English court. The next chapter seeks to explore in detail these particular issues by first discussing the twin issues of marriage and *mahr* and to suggest a way forward by looking at current legislation, case law and concludes with a suggestion for the amendment to the Marriage Act, 1949, and the manner in which such amendment should be effected.

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[730]Halsbury's Statutes, Vol.27.

CHAPTER FIVE

The Concept of *Mahr* (Dower) in Islamic Law

A Resolution of a Conflict with English Law

The Qur'ān enjoins marriage as an obligation upon all Muslim men by these words, '*Marry women of your choice*'[731] and again on the concept of marriage the Qur'ān states, '*And among His Signs is this, that He Created for you mates from among yourselves, that you may dwell in tranquillity with them.*'[732] Both Muslim and Bukhari quote on the authority of Anas b. Mālik and ʿAbd Allāh b. Masʿūd that the Prophet (ṣ.a.a.s.) established the institution of marriage and said,

> O young man, those among you who can support a wife should marry, for it restrains eyes (from casting evil glances) and preserves one from immorality; but he who cannot afford it should observe fast, for it is a means of controlling the sexual desire.[733]

Nikāḥ or marriage in Islām according to the Hedaya, '*in its literal sense, signifies a contract of union, which is fully accomplished by the junction of a man and woman*;[734] *Nikāḥ* is thus a covenant entered into between man and woman. In an early Madīnan verse believers were enjoined for the protection of the early Muslim community, '*Do not marry unbelieving woman until they believe: A slave woman who believes is better than an unbelieving woman. Even*

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[731]4:3

[732]30:21

[733]Muslim, Vol.I, p.703, *ḥadīth* Nos. 3233, 3236. Also al-Bukhari, *Sahih*, Vol.VII, tr. Dr. Muhammad Muhsin Khan, (New Delhi, 1984, [5th Edition]), pp.1 and 5, *ḥadīth* Nos.1, 2, 7, 8. Hereafter cited as Bukhari.

[734]Alee, Burhan-ad-Deen, *The Hedaya fi'l-fūrū*, Vol.I, tr. Charles Hamilton, (Karachi, 1991), p.122. The Hedaya literally Guide is a detailed treatise of the Ḥanafī School as applied in the sub-continent, was composed by the author Shaikh Alee, Burhan-ad-Deen, (530-591AH). Hereafter cited as *The Hedaya*.

though she allure you. Nor marry (your girls) to unbelievers until they believe: A man slave who believes is better than an unbeliever even though he allure you.'[735] Though prescribed by the Qur'ān, it is not a sacrament, in the sense that it is indissoluble such as a Christian marriage entered into before God, but a civil contract.[736] Like all civil contracts marriage can be brought to an end by operation of law or by the act of the parties. In this latter case, divorce or *ṭalāq*, is effected under provisions laid down by the Qur'ān.[737] One prominent Muslim author and judge has described marriage as,

> Regarded as a social institution, marriage, under the Muhammedan Law, is essentially a civil contract... In fact, a marriage-contract, as a civil institution, rests on the same footing as other contracts. The parties retain their personal rights against each other as well as against strangers; and according to the majority of the schools, have power to dissolve the marriage-tie.[738]

The forty-eighth Imām of the Shī'a Imāmī Ismā'īlī has succinctly described marriage in the following terms,

> The sacramental concept of marriage is not Islām's; therefore except indirectly there is no question of its religious significance at all, and there is no religious ceremony to invest it with the solemnity and symbolism, like Christianity and Hinduism.[739]

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[735]2:221

[736]Marriage, properly sexual intercourse, but in the Qur'ān used exclusively of the contract of marriage. *EI²*, *s.v.* 'Nikāḥ,' Vol.VIII, (Leiden, 1995), p.26.

[737]65:1

[738]Ameer Ali, Syed, *Muahmmedan Law*, Vol.2, (New Delhi, 1976 [7th Edition]), p.43. Hereafter cited as *Muahmmedan Law*.

[739]*Memoirs*, p.186.

The essentials to marriage, an important contract, are simple and may be made without the execution of a written agreement but by the oral declaration of the parties before witnesses. In an age when oral stipulation of a contract was the norm, '*marriage was contracted by means of declaration and consent.*'[740] Marriage legalises conjugal relationship and imposes on the husband the legal obligation of fulfilling all antenuptial agreements, establishes on both sides the prohibition of affinity and gives to both parties the rights of inheritance. There are four essential requirements to the contract of marriage which are,

(i) offer (*ījāb*)

(ii) acceptance (*qabūl*)

(iii) The agreement to pay the bridal gift or *mahr*[741]

(iv) witnesses (at least two) to the contract

The words of offer and acceptance must be certain. There must be no ambiguity. In other words there must be a clear intention to establish conjugal relationship. It is a contract for the legalisation of sexual intercourse and for procreation.

As a contract, marriage has certain characteristics, which are legal. It can be established without a ceremony and as in all contracts consent and capacity are essential pre-requisites to its formation. The terms of the contract must be capable of being written by either or both of the parties. Once the requisite formalities of the marriage are completed, the spouse (wife) is referred to as *zawj* as in the Qur'ān, '*And We said: "O Adam! dwell thou and thy wife*

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[740]*The Hedaya*, p.72.

[741]In pre-Islamic Arabia *mahr* was given to the father thus importing into the transaction the concept of bridal purchase, a description that led to a libel action in the London High Court, which is discussed later. *EI²*, *s.v.* 'Mahr,' Vol.VI, (Leiden, 1991), p.78.

(*zawjukal-jannata*) *in the garden: And eat of the bountiful things therein as (where and when) ye will; but approach not this tree, or ye run into harm and transgression.*"'[742]

In the case of Alhaji Mohammed v Knott, evidence given by Professor Noel Coulson, M.A. of the Marriage Ceremonies of Nigerian Muslims, it was stated thus, '*In brief, the marriage is affected by a simple contract between guardians of the bride and bridegroom. Sometimes, but not always the signing of the contract is succeeded by the religious ceremony.*'[743]

An important and essential requirement to a valid marriage in Islām, is the payment of dower or *mahr*. Although, the Hedaya states, '*moreover, the payment of dower is enjoined by law, merely as a token of respect, wherefore the mention of is not absolutely essential to the validity of a marriage.*'[744] It has in modern times become an integral part of the marriage contract sanctioned by the Qur'ān, '*And give the women (on marriage) their dower as a free gift, but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer.*'[745] Several authors Muslim and non-Muslim have on the question of *mahr* expressed an opinion, *'No marriage contract is complete and binding unless and until dower has been paid or agreed to be paid.*'[746] Schacht considers *mahr* to be, '*an essential element of the contract of marriage,*'[747] where the bridegroom, '*undertakes to pay the nuptial gift* (*mahr*, *ṣadāq*).'[748] As

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[742]2:35. For a detailed meaning of the term see *EI²*, *s.v.* 'Zawdj,' Vol.XI, (Leiden, 2002), p.464.
[743]Alhaji Mohammed v Knott [1968] 2W.L.R., 1446. [1969] 1 Q.B.1
[744]*The Hedaya*, p.122.
[745]4:4
[746]Doi, A.R.I, *Sharī'a, The Law of Islām,* (London, 1984), p.158.
[747]*Introduction*, p.38.
[748]*ibid*, p.161.

for the bride, '*she has the right to the nuptial gift mahr.*'[749] Although Schacht is firm in his statement that *mahr* is essential to the marriage contract, nowhere does he acknowledge that this essential condition is both Qur'ānic in origin and is according to the traditions of the Prophet (ṣ.a.a.s.). Coulson, is as emphatic as Schacht on the payment of *mahr* in a marriage contract. Unlike Schacht, he does state its origin to be Qur'ānic and moreover goes on to elaborate that with this Qur'ānic injunction the wife was, '*now endowed with a legal competence she did not possess before.*'[750]

Not only marriage and the payment of dower Qur'ānic in obligation, but are also based on traditions of the Prophet (ṣ.a.a.s.). Under the Prophetic tradition dower could also be paid in kind. Thus the Prophet (ṣ.a.a.s.), who used to advise young people to marry, considered dower an absolute obligation. In one particular instance, he sanctioned the marriage of a poor person, who could not pay dower, on the latter's assurance, that he could teach some *sūrās* of the Qur'ān, and in another instance, on the groom offering a banquet in addition to the *mahr*.[751]

The Qur'ān does not use the word *mahr*, rather *ṣadāq* or gift is the preferred word. It is known that prior to Islām, *ṣadāq* was a gift to the bride and *mahr* was paid to the bride's father. This important pre-Islamic practice did not survive into the Islamic era. Dower or *mahr* is therefore Qur'ānic in origin and is fundamental to a Muslim marriage. A matrimonial contract is complete, when it

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[749]*ibid*, p.167.
[750]Coulson, N.J., *A History of Islamic Law*, (Edinburgh, 1964), p.14. Hereafter cited as Coulson.
[751]Bukhari, Vol.VII, pp.7 and 16 *ḥadīth* Nos.10 and 24.

includes a clause giving the bride her dower, agreed by both parties. If dower is not expressly stated, then the law will imply it according to defined principles.

If it is not so mentioned then in countries such as India and Pakistan, where the Ḥanafī School of Islām applies, the law will imply dower according to customary law and in accordance with definite principles. In a leading case on the subject, the Judicial Committee of the Privy Council, (this was then the highest body of appeal from decisions of the Indian courts), said,

> Dower is an essential incident under the Musulman Law to the status of marriage, to such an extent is this so that when it is unspecified at the time the marriage is contracted the law declares that it must be adjudged on definite principles.[752]

According to the Hedaya, the validity of the marriage is not conditional on *mahr* being stated. Where it is not stipulated either in the contract or it is not mentioned at all at the time of the marriage, or if the husband were to stipulate that there should be no dower, the marriage is still valid.[753] The wife will be entitled to *mahr al-mithl* or customary or proper dower according to prescribed rules. Her entitlement varies according also to her social position and personal attributes. Such attributes being her age, beauty, fortune, understanding and virtue. In calculating her proper dower regard must be had to her equality with the women from whose dowers the starting point is to be made *e.g.,* her paternal relations, sisters, aunts or daughters of her paternal uncles, but not to be estimated by the dower of her mother or her maternal aunt.[754]

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[752]Hamira Bibi v Zubaida Bibi, I.L.R 38, reported in *Mohammedan Law*, p.395.
[753]*The Hedaya*, p.122.
[754]*ibid*, p.148.

The Ḥanafī and the Mālikī Schools differ on the question where dower is not fixed and, either,

(i) The husband divorces the wife before consummation, or,

(ii) Dies before the fixing of the amount of dower.

In either case, the Ḥanafī School argues that, the wife is entitled to her gift based on The Qur'ān,

> There is no blame on you if you divorce women before consummation or the fixation of the dower, but bestow on them (a suitable gift), the wealthy according to his means, and the poor according to his means; A gift of a reasonable amount...[755]

Similarly if the parties agree the amount of dower after the marriage, but the husband dies before consummation, then applying the above verse of the Qur'ān, the wife is entitled only to a gift.[756]

According to Mālik, where the husband dies before consummation, the wife is not entitled to *mahr* but would get her share of the inheritance. Mālik gives as an example the arbitration award of Zaid b. Thābit, who adjudicated upon the claim by the daughter of ʿUbaid Allāh b. ʿUmar who was married to the son of ʿAbd Allāh b. ʿUmar, who died before co-habitation or fixation of *mahr*.

Mālik is reported as saying that the ʿUmmayad Caliph ʿUmar b. ʿAbd al-ʿAzīz wrote to an administrator suggesting that any person who gives away a woman in marriage must lay down a condition that she receives a gift or a present, she can as a wife, demand as of right.[757]

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[755] 2:236

[756] *Hedaya*, p.125.

[757] *Muwatta'*, p.233, paragraphs, 1071 and 1072.

The Ḥanafī School support their position by quoting the Qur'ān and from a tradition of the Prophet (ṣ.a.a.s.). In the former case the verse in question after declaring those women who are prohibited in marriage continues, '*Except for these all others are lawful, provided ye seek (them in marriage) with gifts from your property, - desiring chastity, not lust.*'[758] The second point of argument advanced by the Ḥanafī School of the subcontinent in support their point of view is based on decision of the Prophet (ṣ.a.a.s.).

Thus in a hypothetical situation, a man asked ʿAbd Allāh b. Masʿūd about the position of a woman whose husband has passed away before the fixing of her dower. Although he was at first perplexed, by the hypothetical question posed, he replied that in answering the question his reasoning was based on his own *ijtihād.* He felt that she should be treated like any other woman in other words she would be entitled to a proper dower. Several witnesses came forward to say that in a similar situation the Prophet (ṣ.a.a.s.) had given the same decision.[759]

The importance therefore of both marriage and *mahr* in Islām cannot be underestimated. The institution of marriage and the incidence of *mahr* carry added significance when considered in the context of mass migration of Muslims from their country of origin. It is not their national identity but their desire to practice and observe their religious obligations based on the Qur'ān and in particular on the verse, '*Oh, ye who believe! Obey Allāh, and obey the Messenger, and those charged with authority among you,*' that governs their daily lives.[760]

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[758]4:24
[759]Rahman, Tanzil-ur, *A Code of Muslim Personal Law,* Vol.1, (Karachi, 1978), p.225.
[760]4:59

This large-scale influx of peoples from various Muslim countries, both Commonwealth and foreign, has meant that in almost all marriage contracts entered into, dower or *mahr* plays an important part. It is in keeping with their religious practices that a substantial number of immigrants will undergo two marriage ceremonies. The first may be a civil marriage, followed by a religious ceremony or *vice versa*.

The English Courts have, over the years been faced with some very complex if not interesting questions involving Muslim communities in general and Muslim marriages in particular. For English law and lawyers the most important question is not simply one of recognition of diverse ethnic practices but to what extent should diverse ethnic practices be incorporated into the legal sphere. The policy of the Courts with regard to the recognition, payment and enforcement of dower, contracted to be paid, in a Muslim marriage is inconsistent. As will be seen below, such contracts will be recognised and enforced where the marriage is celebrated abroad and according to the law of the place of celebration but not where the marriage is celebrated in England between two Muslims who are English domiciliary.

From the Muslim communities stand point, the English Court's recognition or otherwise of marriage contracts in general and the payment or enforcement of dower in this contract is of particular concern. According to Pearl and Menski, '*More specifically, should English law adapt its principles and rules to accommodate foreign customs.*'[761] An interesting and pertinent observation but perhaps the question should be rephrased to ask if English law

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[761]Pearl, D and Menski, W. *Muslim Family Law*, (London, 1998 [3rd Edition]), p.56. Hereafter cited as *Family Law*.

should adapt to accommodate non-Christian religious practices and as we shall see later the answer may be in the affirmative.

The starting point for any discourse on the recognition and validity of Muslim marriages in English law are the cases of Shahnaz v Rizwan[762] and Alhaji Mohammad v Knott.[763]

In the latter case the question that was to be decided by the English Courts was whether recognition should be given to a potentially polygamous Muslim marriage contract between two Northern Nigerians, one of whom, the bride, was at the time of the marriage ceremony only thirteen. The matter of recognition arose only indirectly. The issue at first instance before the Magistrates, was a complaint brought under legislation then in force-*viz*, Section62 of the Children and Young Persons Act, 1933. The question posed was could the Court, make and enforce an Order taking the thirteen years old bride into care and in need of protection on the grounds that she was exposed to moral danger. The Magistrates made the Order under Section2, on the ground that the girl was exposed to moral danger. The Husband appealed by way of case stated to the Divisional Court of the High Court. The Divisional Court decided that the Muslim marriage was recognised by English Law, and the Court set aside the earlier Decision of the Justices.

What influenced the Divisional Court was the unchallenged expert evidence given by Professor Noel Coulson, M.A, then a lecturer in Islamic Law at the School of Oriental and African Studies about the marriage laws and customs observed by Nigerian Muslims. According to the written Report

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[762][1965] 1Q.B.390 is discussed in greater detail later particularly with reference to *mahr*.
[763][1969] 1Q.B.1 also [1968] 2W.L.R. p.1446.

submitted by Professor Noel Coulson in evidence that the, '*marriage is affected by a simple contract between the parents or guardians of the bride and groom.*'[764] The Report added that it was unlawful for the marriage to be consummated, '*until there were decisive indications of pubertal maturity in the bride.*'[765] The issue of dowry was also stated and the particular circumstance under which dowry is paid.

The importance of dower in a Muslim marriage cannot be underestimated and it is to this concept that one must turn to and in particular to the concept of dower as was understood and applied in the law courts of British India. In a leading Indian case, Lord Parker of Waddington made these remarks on the importance of dower;

> Dower is one essential incident under Mussulman Law to the status of marriage. Regarded as a consideration for the marriage, it is in theory, payable before consummation but the law allows the division into two parts...prompt...the other deferred.[766]

Nowhere in the Qur'ān is the word *mahr* used. The phrase used in the Qur'ān is the *saduqūtihinna* or their gifts.[767] Furthermore, this statement is further strengthened by reference to two verses of the Qur'ān, '*There is no blame on you if ye divorce women before consummation or the fixation of their dower; but bestow on them (a suitable gift). The wealthy according to his means, And the poor according to his means a gift of a reasonable amount is due from*

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[764] *ibid*, p.1451.
[765] *ibid*, p.1451.
[766] Hamira Bibi v Zubaida Bibi [1916] 43 I.A. 294 quoted by Fyzee, Asaf, A.A., *Outlines of Muhammadan Law*, (Oxford, 1974 [4th Edition]), p.134. Hereafter cited as *Outlines*.
[767] 4:4

those who wish to do the right thing.'[768] Further, '*And if ye divorce them before consummation, but after the fixation of a dower for them, then half of the dower (is due to them), unless they remit it or (the man's half) is remitted by him in whose hands is the marriage tie.'*[769]

Although Lord Parker refers to dower as 'consideration' for the marriage, its importance is not lost on the him when in describing the incident of dower, he states, '*...Dower ranks as a debt, and the wife is entitled, along with other creditors, to have it satisfied on the death of her husband out of his estate.'*[770]

In order to understand how this confusion arose in interpreting dower and the concept of dower, one has to refer back to the original idea that originated in Arabia in pre-Islamic times.

Originally the two words *mahr* and *ṣadāq* had different connotations. In pre-Islamic Arabia, there were two types of marriages. The *beena* marriage where the husband visited the wife, but did not bring her home, the second type of marriage was the *baal* marriage where the wife left her family home and went to live with her husband. It was in this latter, or a *baal* marriage, that a gift known as a *ṣadāq* was given to the wife and a compensatory sum paid to the wife's parents known as *mahr*.[771] This pre-Islamic compensatory payment has been interpreted by Coulson as, '*A sale of the woman by her father...who received, qua vendor, the purchase price paid by the husband.'*[772]

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[768]2:236
[769]2:237
[770][1916] 43 I.A. 294.
[771]*Outlines*, p.132.
[772]Coulson, p.14.

Both Khaddūrī and Liebesny make a similar description, when *mahr* is described by them as, '*the bride price (mahr) which the husband must pay to the wife in accordance with the marriage contract.*' Again, '*it is not a condition which affects the validity of the contract.*'[773]

This perception, that bride was bought in pre-Islamic times, resulted in the misinterpretation of *mahr* as a bride price in a post-Islamic context. The result was a rather important libel action in the High Court of Justice in London. The Muslim plaintiff husband claimed that the defendant newspaper's headline '*child wife bought for £800'* had injured his feelings and held him up to '*ridicule and contempt'* by the article that followed. The plaintiff had concluded a Muslim marriage under the Mālikī School in Casablanca, Morocco. The £800 was the English equivalent amount of *mahr* that was agreed to be paid under the marriage contract. The presiding Judge Mr. Justice Melford Stevenson in his summing up asked the Jury if the words complained of did in fact defame Mr. Saleh. The defendants' plea of justification was rejected. The Jury concluded the plaintiff was in fact libelled and the defendants were ordered to pay the plaintiff damages.[774] It is therefore easy to understand the confusion that has remained in English Law over the concept of *mahr*.

Whereas in Lord Parker's judgement, dower was described as a consideration, this description was rejected by an Indian Muslim Judge some thirty years earlier. In the leading case of Abdul Kadir v Salima, Mr Justice Mahmood defined dower as follows,

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[773]Khaddūrī, Majīd and Liebesny, Herbert J, *Law in The Middle East Origins and Development of Islamic Law*, Vol.1, (Washington D.C., 1955), p.141.
[774]Saleh v Oldham Press Ltd., The Times Law Report, London, 25th, 26th, 27th June 1963.

> Dower, under Muhammadan Law, is a sum of money or other property promised by the husband to be paid or delivered to the wife on the occasion of the marriage. It is not consideration in the modern sense of the term; but an obligation imposed by the law upon the husband as a mark of respect for his wife.[775]

Although Mr Justice Mahmood does not specifically say so, his reference to *'an obligation imposed by the law'* is a clear reference to the Qur'ān. But it can also be a clear reference to the tradition of the Prophet (ṣ.a.a.s). In a well-known saying attributed to the Prophet (ṣ.a.a.s.), he is reported to have said that, '*Allāh would forgive all sins, except the sin of the man who does not pay the dower (mahr) of his wife or who does not pay the wage of the employee or who sells a free person.*'[776]

Here we see the use of the word *mahr* by the Prophet (ṣ.a.a.s.), and the word *mahr* has also been used in a similar situation by the fourth Caliph 'Alī, '*do not be excessive or do not exaggerate in relation to the dowers (muhūr,* sing *mahr) otherwise there will be enmity.*'[777]

We see here in this example, not perhaps for the first time the words *mahr* and *ṣadāq* used interchangeably or synonymously, whether one uses the Qur'ānic word *ṣadāq* or *mahr*, the *mahr* becomes the absolute property of the wife. She has the full right to deal with the property as she pleases. So strong is the wife's right to the attribute enjoyment of this property, that it was given legal recognition by Lord Parker of Waddington in Hamira Bibi v Zubaida Bibi, where he said,

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[775][1886] I.L.R. 8All 149 at 157 quoted by *Outlines*, (Oxford, 1974 [4th Edition]), p.133.
[776]Al-Qāḍ'ī al-Nu'man, *D'ā'im al-Islām*; Vol.2, Fyzee Asaf, A.A., (ed.), (Cairo, 1960), p.218.
[777]*ibid*, p.219.

> Her right, however is no greater than of any other unsecured creditors, except that if she lawfully obtains possession of the whole or part of his estate...she is entitled to retain possession until it is satisfied. This is called Widow's lien for dower, and this is the only creditor's lien of the Mussulman Law, which has received recognition in the British Indian Courts....[778]

A prominent Shī'ī scholar Ṭabāṭabā'ī, considers that the use of the words '*their dowries*' denotes that the gift is unconditional and an absolute one. His interpretation is strengthened by the conditional clause, '*but if they of themselves be pleased to give up to you a portion of it,*'[779] only seeks to confirm the wife's right. This interpretation that *mahr* is not only a gift but an unconditional gift may be very significant and will be considered later in the light of English statutory enactment

There can be no Islamic marriage without *mahr*. It is an essential term of a contract of marriage. The Prophet (ṣ.a.a.s.) permitted a marriage with only a pair of shoes being given as *mahr*. And where the bridegroom was so poor as not to be able to give any object of value to his intended bride as a gift, he authorised the bridegroom to give his intended bride instructions in the Qur'ān as *mahr*, on his assurance to the Prophet (ṣ.a.a.s.) that he could recite some verses of the Qur'ān.[780] *Mahr* is therefore an unconditional gift and not as Papanek states, *'a divorce indemnity paid in the event of a divorce.'*[781] That *mahr* is the unconditional property of the wife was also re-iterated by Melford

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[778][1946] 43 I.A. 294 at p.300/1.
[779]*Al-Mīzān*, Vol.7, p 260.
[780]*Muwaṭṭā'*, p.232, *ḥadīth* No.1069. See also *EI²*, *s.v.* 'Mahr,' Vol.VI, (Leiden, 1991), p.79.
[781]Hanna, Papanek, *Leadership and Social Change in the Khoja Ismā'īlī Community*. A thesis submitted in fulfilment of the requirement for the Degree of Doctor of Philosophy, (Cambridge, Massachusetts 1962), p.34.

Stevenson J. in Saleh v. Oldham Press Ltd. as follows, *'Dower was the property of the wife... that has been so since the thirteenth century. And in the event of a divorce went to the wife.'*[782]

As to the essential nature of a marriage, Melford Stevenson stated that marriage was entered into by contract, which, '*resulted in marriage having a deeper meaning in Moslem communities.*'[783] The reason being that '*any sexual relations outside of marriage was a serious criminal offence.*'[784] The legal effect of the marriage therefore is established and confers on the parties conjugal rights and the husband is obliged to pay the ante nuptial settlement, fulfilling all ante nuptial agreements and establishes rights of inheritance.

No better illustration can be given of the Concept of *mahr* as a gift to the intended bride on the occasion of marriage than the conversation reported by Ibn Kathīr, when the Prophet's (ṣ.a.a.s.) cousin and future son in law, ʿAlī b.Abī Ṭālib's proposed marriage to his daughter Fāṭima,

> 'Do you have something to give to her in marriage?'
> No, O Messenger of God, 'I don't'
> 'What did you do with the chain mail I provided for you?'
> 'Yes, I have it.'
> 'Then I marry her to you, for it, send it to her as her marriage payment.'[785]

It is clear from this incident that no payment was now due to the father and secondly before a marriage could be contracted, the intended groom should provide a gift for the bride. What is also clear is that *mahr* or dower is an

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[782]The Times Law Report, London, 27th June 1963.
[783]*ibid*, 27th June 1963.
[784]*ibid*, 27th June 1963.
[785]Ibn Kathīr, Vol.II, p.386.

essential pre-requisite in a marriage contract based as it is on the Qur'ān and on the tradition of the Prophet (ṣ.a.a.s.). It is an obligation, a *fard* enjoined upon every Muslim.

A significant consequence of this obligation to pay the dower to the woman is that in Islām the woman is treated as an individual in that she personally receives the dower. With that one obligation, imposed by the Qur'ān, the woman acquires an independent legal status, denied to her Western counter-part until the passing of the Married Woman's Property Act, 1882.[786]

In a study carried out of marriage custom in Morocco, Rosen concludes that the husband pays to the wife or to her marital guardian a sum of money or goods agreed to by the parties as *ṣadāq*. This provision is always entered into the marriage contract. The bride's father, in accordance with local custom, which may vary, adds an equivalent amount to that stipulated in the marriage contract. The total amount is then used to purchase the bride's dowry. This dowry remains the property of the bride even on the dissolution of the marriage.

Rosen goes on to further state that the effect of this is that it gives economic security to the bride. He notes that in a society that grants man the unilateral right to terminate the marriage, there is a strong incentive to maintain either the marriage or face economic loss. Rosen's conclusion is that the recording of dower or *mahr* in the marriage contract therefore plays an important part.[787]

Amongst the Syrian Shī'a Imāmi Ismā'īlīs, *mahr* is always recorded as a sum of money in the marriage contract, but by tradition half is given to the

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[786]Married Women's Property Act, 1982, Section17, discussed more fully later.
[787]Rosen, L. *The Justice of Islam*, (Oxford, 2000), p.15.

bride in the form of goods necessary to set up a home. These goods form the absolute property of the bride, and in the event of a divorce, she will leave the matrimonial home and take the goods with her. She is then free to seek payment of the other half. Though the family of the bride may add to this gift either in goods or money, it is not as in Morocco a local custom.

The importance of *mahr* has not been overlooked by the English Courts. Mr Justice Winn's decision Shahnaz v Rizwan[788] is pertinent to the discussion on the importance of *mahr*. Reference and analysis to this judgement will be made in greater detail later; it is sufficient to note for the present that English Courts have in the past taken judicial notice of this concept. Recognition and enforcement is the next important step.

Western authors, looking at and writing about the Islamic concept of *mahr* have perhaps failed to appreciate the significant contribution *mahr* has made towards treating a woman as an individual and also to a social and economic change in the status of woman. A change not reflected in English Law until the passing of the Married Women's Property Act, 1882. This Act for the first time conferred upon an English woman right to hold and dispose her property, hitherto denied to her. Commenting on women's right in India, His Highness The Aga Khan III stated, '*Happily, one of the great monotheistic religions of the country, Islām, assures women economic independence, regular and settled rights of succession to property.*'[789]

Schacht accepts the woman's right to the *mahr*, the nuptial gift, and to maintenance as social and economic emancipation of the woman and this, '*gives*

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[788][1965] 1Q.B.390
[789]*Selected Speeches* Vol.I, p.595.

her a strong position as against her husband.'[790] However, Schacht's description of *mahr* as a 'consideration' for the Marriage contract, imports into the Islamic Concept of *mahr*, the English notion of a Contract requiring the application of the English doctrine of consideration to be validly enforceable in an English court of law.

This doctrine of consideration required by English law of contract was dismissed by Winn J. in the leading case of Shahnaz v Rizwan with these words,

> What is being sought to be enforced here is a contract entered into is contemplation of, by reassuring, and has been said in at least one decided case, though I doubt if it be very accurate - in consideration of marriage.[791]

The most important point for Winn J. called upon to decide was whether or not this claim for *mahr* by the wife could be enforced in England. The husband/defendant's contention that since the marriage was potentially polygamous though in fact was not so, English Courts could not enforce any rights obligations or duties arising under such a potentially polygamous marriage contract, since such marriages were 'unlawful.' This argument by the husband to evade his religious obligation to pay *mahr* received short shrift with these words,

> ...cases brought to my attention that our Court has never treated a marriage as unlawful merely because it is potentially or indeed contemporaneously with its celebration, a polygamous marriage; provided of course, that the marriage is a

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[790] *Introductions*, pp.161 and 167.
[791] [1965] 1Q.B.390.

> marriage lawful by the personal law of the parties and the *lex loci celebrations*.[792]

And again,

> ...I am bound to recognise the marriage between the parties to this action as lawful marriage upon the admissions, which are contained in the pleadings.[793]

We have therefore two essential decisions,

1 that a potentially polygamous marriage will be recognised by the English Court if it is valid by the personal law of the parties and by the *lex loci celebrations*.

And,

2 *mahr* is not a consideration for the marriage contract.

The Question therefore before Winn J. was whether and in what circumstances will English Courts enforce the right to payment of *mahr* under an Islamic marriage contract. Winn J. was not persuaded by the husband's argument that the right to *mahr* arose out of the potentially polygamous marriage rather than a separate proprietary right, which was or as, a consequence of a separate contract entered into by the parties in contemplation of the marriage.

In substance, the husband's refusal to pay *mahr* was because the wife was seeking matrimonial relief, which she should be denied. In essence, matrimonial relief should be denied, as the claim was founded on a polygamous marriage and that English Court's will not recognise a polygamous or as in this case, a potentially polygamous marriage.

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[792] *ibid*, p.397 The Privy Council decision in Berthiaume v Dastous [1930] A. C. 79 held, that if the marriage in the country where celebrated is good, it is good everywhere, even if the marriage ceremony did not constitute a marriage in the country of the domicile of one or other of the spouses.
[793] *ibid*, p.397.

As has been stated earlier, English Courts will give recognition to such a marriage. However, it would appear that matrimonial relief would only be available under the provision of domestic matrimonial legislation.

For the present suffice it to say, that in this particular case, Winn J. concluded that the wife's claim for the payment of £1400 as *mahr* is enforceable in England, not because the claim lay in the nature of a matrimonial relief. But rather, that the wife was seeking to enforce a proprietary right arising out of a contract,

> It is quite clear on the evidence that the right to dower, once it has accrued as payable, is a right in action, enforceable by a civil action without taking specifically matrimonial proceeding....[794]

And again,

> This right is far more closely to be compared with a right of property than a matrimonial right or obligation, and I think that, upon the true analysis of it. It is a right *ex contractu*, which whilst it can...only arise in connection with a marriage by Mohammadan Law.[795]

Reference has already been made to the influx of Muslims from abroad coming to live and settle in this country. It is to this fact that Winn J. would have had to consider when arriving at his decision and judgement. Indeed, he does say that,

> As a matter of policy, I would incline to the view that, there being now so many Mohammedans resident in this country, it is better that the Court should recognise in favour of women who have come here as a result of a Mohammedan marriage the right

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[794] *ibid*, p.401.
[795] *ibid*, p.401.

> to obtain from their husband what was promised to them by enforcing the contract and payment of what was promised, than that they should be bereft of those rights and receive no assistance from the English Courts.[796]

The large and diverse Muslim community would no doubt find resonance with such judicial sentiments.

The difficulty encountered is that no case has been brought in England to test the validity and enforcement of the payment of dower, where the parties to the marriage, Muslims by profession, undergo both a civil ceremony in a Registry Office, followed by a religious ceremony in which a marriage contract is drawn up and in which contract, the groom promises to pay to his bride a sum of money, which may be paid immediately, prompt dower, or later, deferred dower.

The decision of Winn J. was far reaching. Although, the Judgement clearly stated that the relief sought arose out of contract and was not in the form of a matrimonial relief, nonetheless it is to this aspect of the claim that we must turn to, to ascertain if, under present legislation, matrimonial relief is available. Section23 of the Matrimonial Causes Act, 1973,[797] is an appropriate starting point.

Section23(1) of the Act states,

> On granting of a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter... the Court may make any one or more of the following Orders, that is to say...
>
> (c) an Order that a party to the marriage shall pay to the other such lump sum or sums as may be so specified;

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[796] *ibid*, p.401.
[797] Halsbury's Statutes Vol.27, p.928.

The use of the singular and plural cannot be ignored especially when the Court is empowered to grant relief in the alternative.

The Court's power, to grant matrimonial relief, by way of payment of lump sum or lump sums is regulated by Section25 of the Matrimonial Causes Act, 1973.[798]

The Sub Section states,

> 1) It shall be the duty of the Court in deciding whether to exercise its powers under Section23 ...to have regard to all the circumstances of the case...
>
> 2) as regards the exercise of the powers of the Court under Section23(1)(c),...the Court shall in particular have regard to the following matters...

There then follows several subsections giving the Divorce Court powers to enquire into the income, earning capacity, property and financial resources of the parties to the marriage, conduct, the needs obligations and responsibilities of the parties, the age of each party to the marriage and most importantly,

> h) in the case of proceedings for divorce ...,the value to each of the parties to the marriage of any benefit which, by reason of the dissolution... that party will loose...

It is clear, that in relation to deferred dower, a properly argued case for its payment could be persuasive in moving the Court to make the Order required.

The cumulative provision of Section 25(2)(a), (b), (d) and (h) of the 1973 Act,

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[798] *ibid*, p.972.

cannot be ignored by the Court. To revert back to Winn J.'s judgement in Shahnaz v Rizwan,

> I would like to take this opportunity of expressing my sincere indebtedness and gratitude to both Counsels. The lucidity and-the brevity with which they have presented their respective contentions is most creditable.[799]

The defendant/husband in the above case, represents a minority of Muslim men who might seek to evade their contractual duties or obligation by the plea that the payment of *mahr* being in the nature of a religious obligation, should not be enforced by a secular Court exercising secular jurisdiction dispensing secular justice. It is this argument that now needs to be addressed.

Seven years later the decision in Shahnaz v Rizwan received further endorsement in the leading case of Quereshi v Quereshi.[800] The husband sought and obtained an extra Judicial divorce by filing a *talāq* divorce at the Pakistan High Commission in London. The parties were married in pre-partition India and had subsequently moved from there to Pakistan and thereafter sought settlement in England. The wife did not contest the *ṭalāq* divorce. However, both parties applied to the English Court to pronounce on the validity of the Muslim *ṭalāq* divorce. On the part of the husband, the validity of the divorce and on the part of the wife, the enforcement and payment by the husband to the wife of the *mahr* stipulated in the marriage contract.

This leading case brought before the English Court, the Court was asked to decide on two relevant and interconnected issues arising out of a

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[799][1965] 1.Q.B. 396
[800]Quereshi v Quereshi [1971] 1 All E.R. 325

Muslim and hence a potentially polygamous marriage, the enforceability or otherwise of the payment of dower. Dower or *mahr* had been fixed at the English equivalent of £788.13s.5d. The parties who were married in India and had subsequently migrated to Pakistan came to live in England. The husband had consistently claimed that his domicile of choice was Pakistan. He subsequently divorced his wife by *ṭalāq* and had the Muslim divorce registered at the Pakistan High Commission.

In a remarkable judgement, which marked the high water mark of liberal recognition of such divorces, Sir Jocelyn Simon, P. said,

> I therefore give judgement for the husband ... that the '*ṭalāq*' divorce was valid, and for the wife, on that part of her prayer that claims the sum of £788.13s.5d by way of dower.[801]

These decisions were, it is respectfully submitted, were the first tentative steps by the Court towards recognition of the right of a large Muslim community to regulate its matrimonial affairs in accordance with Qur'ānic injunction and the *sunna* of the Prophet (ṣ.a.a.s). It follows naturally from the recognition of Muslim marriages according to the *lex loci celebrations*. The recognition accorded to the *ṭalāq* Divorce and Judgement for the wife in her claim for the payment of *mahr* represented a significant advance on granting of matrimonial relief to Muslim communities. Unfortunately for the Muslim community of Great Britain the decision that was a watershed in a liberal

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[801] *ibid*, p.347.

approach to ethnic minority divorces was revoked by the legislature a year later.

Section16(1) of The Domicile and Matrimonial Proceedings Act, 1973,[802] states,

> No proceedings in the United Kingdom, the Channel Islands or the Isle of Man shall be regarded as validly dissolving a marriage unless instituted in the Courts of Law of one of those countries.

Commenting on the above Section16(1) Oliver L.J. said in Chaudhary v Chaudhary,

> The obvious intention of Section 16 was to deny by statute the recognition accorded by Qureshi v Qureshi to informal divorces affected in this country.[803]

Section44(1), of The Family Law Act, 1986,[804] that repealed the 1973 Act, states,

> No divorce or annulment obtained in any part of the British Isles shall be regarded as effective in any part of the United Kingdom unless granted by the Court of Civil Jurisdiction.

At first glance, the 1986 Act, looks identical to the wording of Section16(1) of the 1973 Act. Commenting on the latter Act, H. H. Judge David Pearl wrote,

> That a *ṭalāq* divorce pronounced in England with communication to a local official in Pakistan would fall foul of S44 of the Family Law Act 1986, Part II and would not be recognised.[805]

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[802]Halsbury's Statutes, Vol.27, p.715.
[803][1985] 2 W.L.R. 369
[804]Halsbury's Statutes, Vol.27, p.1114.
[805][1987] CLJ 35

The discussion on the legislature's response to the English Courts liberal approach to the pronouncement of *ṭalāq* divorces is apposite to the consideration of *mahr*, the future debate on the subject of which, sooner rather than later, will be brought to the forefront of the political agenda by the Muslim community. The community is anxious for some recognition of a small aspect of Muslim personal law. Discussions have already begun within the Ismā'īlī community on the twin issues of terms and conditions in marriage contracts in general and issues relating to *mahr* in particular, with a view to formalising a contract that may be given legal recognition in an English court of law, as has been mentioned in the previous chapter. The debate in the wider Muslim community will be considered later.

The starting point for such a debate is of course Section16(1) of the Domicile and Matrimonial Proceedings Act, 1973, as amended. The Bill incorporating Clause16(1) was laid before Parliament, on the recommendation of the Law Commission. On the Second Reading of the Bill, the Clause was adopted without amendment and the entire Bill recommended to the Committee of the whole House. The recommendation did not first proceed without a wholesome praise by the future Solicitor-General, Sam Silkin, with these words, '*The whole House will be grateful to the Law Commission for this useful piece of consolidation.*' The future Attorney-General Sir Elwyn Jones stated, '*I congratulate the Government on the expedition with which they have given effect to the admirable output of the Law Commission.*'[806]

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[806]Parliamentary Debates (Hansard), House of Commons, Vol.856 (London, 1972-73), p.174

It cannot be re-iterated strongly enough that for Muslims who have adopted the United Kingdom in terms of both residence and nationality, Islām underpins their identity both individually and as a community. Citizenship and residency are secondary to a Muslim's life.

Being a Muslim does not affect his loyalty to his adopted country. Nor does it affect his genuine desire to live within the laws of that country, even where the laws of the country of his adoption genuinely conflict with his practice of the Divine Law. Prominent examples are marriage and divorce and within these, the question of dower or *mahr*.

The cases of Alhaji Mohammed v Knott, Shahnaz v Rizwan and Qureshi v Qureshi show that the English Judiciary was prepared to move in the direction of recognising, through case law, some aspects of Muslim marriage. It was to be hoped that such recognition, tentative at first and only applicable to situations where the marriage was celebrated abroad, would eventually be extended to cover Muslim marriages and divorces taking place in this country.

Whatever the reasons for the settlement in this country, whether in search of job opportunities, as in the pattern of immigration settlement from the sub-continent prior to the Second World War and immediately after, to the arrivals of Muslim Asians, deliberately forced out of Eastern and Central Africa, to the present arrivals, seeking asylum from ethnic, religious or the linguistic persecution, from Muslim countries, the desire for Muslims to practise their religious beliefs in the field of personal law is immediate and immense. The desire to put into practice their religious and loyal values manifested itself in a demand for full-scale recognition of Muslim personal law in Britain.

Pearl and Menski consider that such a full-scale demand for the recognition of Muslim personal laws was a tactical mistake.[807] The official response was altogether negative, based as it was on a rather weak argument that there are too many schools in Islām, to justify such recognition.

An alternative strategy recommended by the authors was for the Community to have taken a much more piecemeal approach towards recognition. Thus the English legal system has, taking into account Muslim sensitivities, expanded the provisions of Section1(2) of the Slaughter of Poultry Act, 1967, and Section36(2) of the Slaughterhouses Act, 1974,[808] from Jews alone to include Muslims. The authors further go on to quote the advantages enjoyed by the Sikh community in this gradual approach in two significant areas. The first is that of the House of Lords decision in Mandla v Dowel Lee,[809] where the Sikhs are now classified as a racial group,[810] thus granting them exemption from wearing safety helmets by virtue of the Road Traffic Act, 1988, Section16(2).[811]

Therefore, the question for Muslims settled in this country and who have undergone both a civil ceremony of marriage followed by the traditional *nikāḥ* ceremony where the amount of *mahr* prompt or deferred, has been noted is this: under what circumstances, if at all, can or will an English Court enforce payment of *mahr* on the dissolution of the marriage?

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[807] *Family Law*, p.69.
[808] Halsbury's Statutes, Vol.18, (London, 2002 [4th Edition]), pp.858 and 893 respectively.
[809] [1983] 1 All E.R. 1062
[810] *ibid*, p.1072
[811] Halsbury's Statutes, Vol.38, (London, 2001 [4th Edition]), p.774, replacing the Motor Cycle Crash Helmets (R.E.) Act 1976

The answer it is respectfully stated is in the alternative. Either the wife combines her application for ancillary relief under Section23(1)(c) of the Matrimonial Causes Act, 1973, coupled with an action in contract under the principles of Shahnaz v Rizwan, and provided the case was properly argued, particularly bearing in mind the provision of Section25 of The M.C.A., 1973, she would have a good chance of success. Both actions would have to be brought in the same Court and leave of the Court would be required to join the two actions. The alternative will be discussed in the conclusion to this chapter.

The principle of Quereshi v Quereshi is still relevant today. The procedure outlined above, cumbersome though it maybe, may still be available. What was annulled by the legislature was the extra–judicial divorce pronounced at the Pakistan High Commission and recognised by Sir Jocelyn Simon P. Extra Judicial divorces can no longer be recognised by the Courts. Recognition and enforcement of the payment of *mahr* has not been legislated against.

With regard to the enforcement of *mahr*, two alternative procedures may be considered. The first alternative is under Section17, of the Married Women's Property Act, 1882.[812] This legislation is used to resolve issues between husbands and wives concerning title to or ownership of property. The section is particularly useful in cases of polygamous or potentially polygamous marriages, where the parties have no claim to ancillary relief.[813]

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[812]*ibid*, Vol.18, p.732

[813]White v White [2000] 2 FLR 981 in which the House of Lords stressed the need to divide all assets on an equal basis as a starting point in any ancillary relief claim, it is possible that S17 of the MPWA 1882 might obtain a new lease of life where it becomes necessary to determining existing property rights before the resolution of any ancillary relief claim.

As in the early and leading case of Joseph v Joseph, the court held that Section17 conferred upon it (the Court) the right to refund to a wife of a dower following the grant of a petition of nullity of marriage between a Jewish couple.[814] Therefore there is no reason why Section17 of the MWPA 1882, cannot be invoked in appropriate circumstances where ownership of or title to monies or goods representing a Muslim *mahr* were in dispute.[815]

The second alternative approach to the enforcement of payment of *mahr,* may be to see if the principle of imposing a financial penalty on the husband could be carried forward into a Muslim divorce. In Brett v Brett, the Court of Appeal imposed such a conditional financial penalty where the recalcitrant husband refused the wife, a deeply religious woman a Jewish g*het* divorce.[816]

It is now and has been the custom of the English Courts, quite apart from statutory enactment, to comply as far as possible with Jewish Religious practices. An example is of course for Jews to take the oath on the Old Testament.

Statutory enactment such as the Religious Disabilities Act, 1846, S2, has extended to British Citizens professing the Jewish Religion to be subject to the same laws with regards to their schools, places of religious worship, education and charitable purposes, as protestant dissenters from the Church of England.

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[814][1909] P.217 distinguished with later case of Kelner v Kelner [1939], P.411 where the marriage was valid and subsisting.
[815]That it has not been done perhaps lends support to this chapter that English Courts have, for historical reasons been quicker to recognise Jewish marriage within the context of domestic legislation, than Muslim ones.
[816][1969] All E.R. 1007

Muslims may now take the oath on the Qur'ān and reference has been made to extension of the Slaughterhouses Act, 1974, to take into account Muslim Religious practices and beliefs with regard to the Slaughter of Animals and Poultry. Statutory recognition of Jewish faith and practice has been slow but significant. In particular Section26(1) of The Marriage Act, 1949,[817] was a considerable concession to Jewish religious practices, and it is to this statute, I turn to advance Muslim aspirations at least in one significant area of Muslim Personal Law.

Section26(1) of the 1949 Act states,

> ...the following marriages may be solemnised on the authority of a certificate of a superintendent registrar.
>
> (d) a marriage between two persons professing the Jewish faith.'

Thus, English Law expressly recognises marriages solemnised according to Jewish usages and custom. What is required of the parties is the production of a Superintendent Registrar's Certificate or certificate and licence.

Other significant concessions granted by the same Act, are that the building in which the marriage is solemnised need not be registered;[818] neither party need be resident in the district in which the building is situated;[819] a further statutory concession granted is that the provision relating to the hours during which a marriage may be solemnised does not apply.[820]

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[817]Halsbury's Statutes, Vol.27, p.622.
[818]*ibid*, Section26(1)(d)
[819]*ibid*, Section35(4)
[820]*ibid*, Section 75(1)(a)

The statute is wide ranging and covers such procedural matters as delivering to the proper officer of the Synagogue who will register the marriage, the immediate registration of the marriage after solemnisation, in the prescribed form and manner,[821] the Superintendent Register's Certificate or certificate and licence.[822]

All the above provisions relating to Jewish marriages could, with relevant amendment to the Marriages Act, 1949, apply equally to Muslims. But before I consider this, it would be appropriate to consider this latest legislation amending the 1949, Marriage Act.

Reference has been made to the case of Brett v Brett dealing with a Jewish *ghet* divorce. The *ghet* or bill of divorcement is, unlike a *talāq* divorce, a consensual process in which the financial arrangements are agreed and settled in advance of the delivery of the *ghet*. A *ṭalāq* divorce is unilateral, made or pronounced by the husband and communicated to the wife immediately or subsequently. The payment of *mahr* is subsequent to such a pronouncement and communication.

The Family Law Act, 1996,[823] now extends further, by amendment to Section26(1) of The Marriage Act, 1949, recognition of Jewish marriages and divorce custom. Section3(1)(c) of the 1996 Act, states that in any application for a divorce order, the Courts must consider that the parties arrangements for the future are satisfied under Section9(3) which states,

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[821] *ibid*, Section 53(c) p.845 and Section 55(1)(b) p.847
[822] *ibid*, Section 60(1)(e)
[823] *ibid*, p.750.

If the parties –

> were married...in accordance with the usage mentioned in Section26(1) of the Marriage Act, 1949, (marriages solemnised on authority of the Superintendent Registrars Certificate), and
>
> d) are required to co-operate if the marriage is to be dissolved in accordance with those usages

Then the Court may require either party to produce to it a declaration that they have taken such steps as are required to dissolve the marriage in accordance with those usages.

Section9(3) is largely aimed at Jewish divorces. Weight is given to this view by an article written by His Honour Judge David Pearl. After reviewing positions where all the procedures involved in the pronouncement of *ṭalāq* are carried out out-side the jurisdiction of the English Courts, and then the divorce is an overseas divorce capable of recognition subject to the connecting factors to be found in the Family Law Act, 1986.

He states as follows,

> If all the procedures take place in the U.K., then the *ṭalāq* is not capable of recognition by virtue of the Family Law Act, 1986, Section44. A man who originates from Pakistan pronounces the *ṭalāq* in the U.K and then sends a copy of the *ṭalāq* to his wife in Pakistan and sends a notification of the pronouncement to the Chairman of the Union Council in his wife's district in Pakistan? Such non-curial 'transnational' divorces were not recognised under the provisions of earlier legislation. [824]

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[824]Pearl, D., 'The Application of Islamic Law In the English Courts,' in *Yearbook of Islamic and Middle Eastern Laws*, Vol.12. (Ah Dordrecht, 1995), pp.8-9

Judge Pearl then reviews the academic authorities who would argue that such transactional divorces are recognised by virtue of Section44(1) and Section46(1) of The Family Law Act, 1986. However, the learned judge rejects their argument and cites Mr Justice Walls judgement in the Case of Berkovits v Grinberg (A-G intervening),[825] that such transnational divorces cannot be recognised. That recognition is a matter of policy and questions of policy are a matter for Parliament after a full public debate on all questions of policy.

The present position must therefore be that *ṭalāq* divorces do not fall within the ambit of present day legislation.

Section9(3)(a) of The Family Law Act, 1996,[826] clearly refers to the parties being married under the, '*usage's of a kind mentioned in Section26(1) of the Marriage Act 1949.*' Section9(3)(b) gives power to either party to apply to the Civil Court, to require both parties to produce a signed declaration to the effect that the parties, '*have taken such steps as are required to dissolve the marriage in accordance with those usages.*'

It is clear that the words of Section9(3)(a) and (b) of the Family Law Act, 1996, refer to Jewish divorces obtained by a *ghet*. It is evident that this present legislation has made a significant move towards a better understanding of the social, religious and legal needs of the Jewish community. From the Muslim community's standpoint, it sends a clear message to the community that the recognition of their social, religious customs and beliefs, are possible, but only through the process of legislative change.

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[825][1995] 2 All E.R. 683

[826]Halsbury's Statutes, Vol.27, similar amendments would have to be made to Family Law Act, 1996, so as to incorporate any amendment to the Marriage Act, 1949, giving Statutory recognition to Muslim marriages.

Litigation through the Courts to enforce payments of *mahr* whether *'ex-contractu'* as in Shahnaz v Rizwan and Quereshi v Quereshi or under the provision of the Matrimonial Causes Act, 1973, Section23(1)(c), (payment of a lump sum or sums), whether the actions are brought separately or jointly, is and can be a lengthy and expensive process. Such an action would require from both parties considerable commitment of time and energy–both physical and mental the result always, being in doubt. Moreover legal aid may not now be available.

The message to the Muslim community, settled in this country is that recognition is possible. It has taken the Jewish community more than 170 years of Judicial and Legislative changes, to recognise and accept their beliefs, customs and religious practices. But with a more enlightened establishment, it should not take Muslims that long. The starting point for the community must surely be to seek legislative changes to the present legislation. It is a more practical approach and better suited to a wholesale recognition of Muslim Personal Laws. An appropriate starting point would be an amendment to the Marriage Act, 1949. A new Section26(1)(d) could and should be added to future matrimonial family law legislation to read as follows:- A marriage between two Muslims according to the usages of Islam.

The Law Commission was established by The Law Commission Act, 1965.[827] The Commission's statutory task was law reform. In the field of matrimonial law, the Commission first published a Working Paper, dealing with law reform and canvassing for suggestions from the legal profession, proposals

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[827] *ibid*, Vol.41, (London, 2000 [4th Edition]), p.555.

for reform.[828] The Commission followed this Working Paper with a Report that was laid before Parliament in August 1972.[829]

This Report identifies two specific areas, where in any proposal for reform, if enacted, were to be avoided:

(1) Proliferation of Limping Marriages

(2) Forum-Shopping.

The Commission identified that the basis of jurisdiction in Family Law matters was Domicile. The Commission further identified that in English Law, the wife was incapable of acquiring a domicile independent of her husband. In many instances this was of no specific consequence, particularly where the parties were born and had lived all their lives in this country. The Commission further went on to state that, *'It is only in a minority of cases that foreign element comes into the picture.'*[830] The commission went on to identify that this minority was now growing rapidly because of,

> The ease of foreign travel the increasing numbers of persons accepting employment abroad, the influx of permanent or temporary immigrants, and the outflow of permanent or temporary emigrants.[831]

Therefore, the basis upon which English Courts accepted jurisdiction was no longer tenable. The Commission proposed that jurisdiction of the Courts,

I. To be enlarged so as to include a residential qualification additional to that of domicile.

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[828]Working Paper No.28 on Jurisdiction in Matrimonial Causes (other than Nullity) (London, 1970), pp.1-84.
[829]Law Commission: Report on Jurisdiction in Matrimonial Causes No.48, (London, 1972), pp.1-18.
[830]*ibid*, p.2.
[831]*ibid*, p.2, paragraph 5.

II. Ending the dependent domicile of the wife and,

III. Basing jurisdiction on the domicile or a period of habitual residence of either spouse.[832]

With the expansion of the Court's Jurisdiction to entertain Divorce Petition, the very *raison d'etre* of Qureshi v Qureshi was removed.

In that case, the husband retained his Pakistani Domicile of Choice and the wife had her husband's domicile. But now the husband could petition for divorce on the ground of his residence or alternatively the wife acquired a domicile independent of that of her husband. On the strength of her own domicile, she could petition for divorce. It followed from that, that extra judicial divorces were no longer required. The English Courts Jurisdictional grounds to entertain a divorce petition were enlarged, and the Courts were given sole rights to hear petitions for divorce. Section16(1) of the Matrimonial causes Act, 1973, now proscribed all forms of extra judicial divorces. However, what would have moved the Court in accepting the validity of the extra-judicial divorce pronounced by this case would have been to put a final end to what was obviously a limping marriage.

The Law Commission, in both their Working Paper and in their Report were aware that in seeking jurisdictional reform to divorces, the second danger to avoid was that of limping marriages. The Commission's Report is certainly aware of '*Limping marriages*.'[833] But the emphasis placed on the meaning of the words relates to recognition of a divorce '*by one system of law but not by*

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[832]*ibid*, p.2 paragraph 3

[833]Law Commission: Report on Jurisdiction in Matrimonial Causes No.48 (London, 1972), p.3.

another.'[834] But the Commission is also aware that the definition is narrow and '*itself not exhaustive*.'[835] In the context of a Muslim marriage, this definition should be extended to a divorce, which is pronounced by English Court, and the husband either does not or quite simply refuses to pay his *mahr* that was contracted to be paid under the *nikāḥ* ceremony.

David Pearl and Werner Menski identify the problem that arises in a situation where a woman is obtaining a civil divorce but not a *ṭalāq* divorce. The specific terminology used by the authors is not a limping marriage, but rather '*chained spouse*.'[836] Here, the woman feels that it is imperative that she obtains a *ṭalāq* from her husband and payment from him of *mahr*. Dr Badawi has also highlighted the consequence of such a civil divorce. In such a situation he states,

> She becomes eligible for marriage in accordance with the Civil Law, but as the husband has not given her a *ṭalāq*...the woman remains married according to Sharī'a Law.

Conversely,

> The man could re-marry according to Civil Law and according to Sharī'a Law as well, since it is open to him to have polygamous marriage.[837]

Divorce by *ṭalāq* and *mahr* are interconnected in the same way as the incidence of marriage is connected to *mahr*. In Syria where the Ḥanafī School of Sharī'a applies, *mahr* is written into the marriage contract. By tradition the parties agree to a certain percentage being paid promptly and the balance

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[834] *ibid*, p.3.
[835] *ibid*, p.4.
[836] *Family Law*, p.396.
[837] *ibid*, p.397, quoting Badawi, Zakī, *Muslim Justice in a Secular State*. M. King (ed.), (1995), pp.73–80.

becomes deferred *mahr*. Either party may register the *ṭalāq*. Where the husband seeks registration of the *ṭalāq* then the deferred *mahr* becomes due and payable immediately. Where the wife seeks registration of the deferred *mahr,* she may do so in the civil division of the Court and thereafter proceed to seek enforcement in the execution department. The Court will then write to the husband ordering to pay the deferred *mahr* or face imprisonment.[838]

The important point to note is that to be a valid Muslim marriage there must be a valid written contract and *mahr* is an essential component of that contract. However, from the woman's point of view the civil divorce does not dissolve the Muslim marriage. In Islām she still remains married to the man. The man is free to remarry.

The consequence of this is the creation of an informal forum, the Arbitration Council and several others for dealing in divorce and financial settlements relating to Muslim marriages.

From the woman's point of view the difficulty is that to resolve this conflict, she may be pressurised into instituting her own Muslim divorce proceedings known in Islamic Law as *Khul* where she forfeits her rights to financial relief, in essence the right to the payment of *mahr*.

Unlike Syria where civil law enactment is available to enforce payment of *mahr*, English law is not without precedent, when it comes to enforcement of a religious obligation by means of a financial penalty to compel a recalcitrant husband to perform his religious obligation.

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[838]Istambuli, A., *Guide to the Law of Personal Status*, (Damascus, 1985), Arts.5, 53, pp.74, 167 respectively.

In the leading case of Brett v Brett,[839] the question arose as to whether or not a financial penalty could be imposed on the husband to compel him to grant to the wife a *ghet* or Jewish divorce. Unlike a *ṭalāq*, a *ghet* is a consensual divorce requiring the co-operation of both parties. The husband was reluctant to agree. Having been granted a civil divorce, he of course was free to re-marry. The wife who was a practising Jew felt that she was not free to re-marry. In the words of Lord Justice Wilmer, she was not free to re-marry because in her evidence, '*she said that she was an orthodox Jewess, and in those circumstances would not be in a position to re-marry unless the husband granted her a ghet from the Beth Din, which he has so far shown no signs of doing.*'[840] The Lord Justice reviewed the current legislation and in particular The Matrimonial Causes Act, 1965, Section16(1). The subsection reads as follows,

> On granting a decree of divorce or at any time there after, the Court may, if it thinks fit..., make one or of the following orders
>
> (a) an order requiring the husband to secure to the wife, to the satisfaction of the Court, such lump sum... as the Court thinks reasonable...
>
> (b) an order requiring the husband to pay to the wife such lump sum as the Court thinks reasonable.[841]

Wilmer L.J. had to address two issues that were relevant to the case.

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[839][1969] 1 All E. R. 1007

[840]*ibid*, at p.1010, this is an example of a limping marriage or chained spouse in the context of divorces in the Muslim community.

[841]Halsbury's Statutes, Vol.27, (London, 2000 [4th Edition]), p.863. Although Section 16(1) has now been repealed by Matrimonial Proceedings and Property Act 1970.

The first was if he had authority under Section16(1) of the Matrimonial Causes Act, 1965, to order payment of a lump sum and the second issue was if he could order such a lump sum payment but conditional upon the husband fulfilling his obligation by procuring a *ghet* divorce which would free the wife, an orthodox Jew, to re-marry.

The learned judge was in no doubt that he had the power. Reviewing the sub-section, Wilmer L.J. came to the conclusion that, '*if ever there was a case in which...to order the substantial capital payment ...for the wife, the present is the case.*'[842]

Accepting the argument put forward by Counsel representing the wife that additional lump sum capital provision should be made to ensure the husband does procure a *ghet* the learned judge said this,

> I accept the submission put forward by the wife that,...it would be right to make provision in the award for the possibility of the husband persisting in his refusal to grant the *ghet* which would make possible for the wife to re-marry if she wants to.[843]

The judgement of Wilmer L.J. reflects his view that Section16(1) of the Matrimonial Causes Act, 1965, (now repealed) in its application of lump sum awards was wide in its scope with these words,

> ....I have come to the conclusion that the proper award to make in this case is, first, a lump sum award of £30,000, payable in two instalments, £25,000 within 14 days and the balance of £5000 three months from to-day, if by that time the husband has not granted a '*Ghet.*'[844]

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[842]Brett v Brett [1969] 1 All E.R. 1007at p.1013
[843]*ibid*, p.1013
[844]*ibid*, p.1013

Islām enjoins obedience to authority. On this point the Qur'ān is specific, '*O ye who believe! Obey Allāh, and obey the Messenger, and those charged with authority among you.*'[845] Reference has been made to a large Muslim settlement in the United Kingdom. The many Muslim communities live and abide by the laws of their adopted country. This is evidenced from the fact they, the individuals, resort to the civil Courts to redress wrongs. It has also been seen that the civil Courts and parliament are not unsympathetic to Muslim aspirations to practice their faith where that practice does not conflict with the law of the land. What Brett v Brett established is that the English Courts do have the power to order a Jewish husband to procure to the wife an orthodox Jewess, a *ghet* or a Jewish Consensual divorce. The Court was able to compel the husband to make the *ghet* available because, marriages according to the Jewish customs were not at that time recognised by the Marriage Act, 1949. No such recognition is allowed to Muslim marriages. The Court therefore has no power to order the husband to affect a *ṭalāq* divorce. Such a divorce being unilateral, nonetheless it could be argued that the contract that created the marriage and in which the *mahr* is paid is consensual.

Alternatively, *mahr* is an incident arising out of the marriage and payment, and the enforcement of which is not dependent *ṭalāq*. Indeed it could be argued that a claim for *mahr* could be made even during the currency of the marriage.

From the Muslim community's standpoint they must persevere with patience and diligence initially through the civil courts for the right of recognition of the Qur'ānic principle of *mahr* and its enforcement. The

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[845] 4:59

community is aware that judicial recognition has always been readily granted; and whilst the right to extra judicial divorces have been removed by parliament, the judicial recognition and enforcement of *mahr* has not been interfered with.

In the unlikely event of a fresh argument in a civil court of law failing, then and only then can persuasion and pressure be brought to bear on parliament to pass legislation that would grant that recognition so necessary to Muslim aspirations. The desire of Muslims to practice their faith in their daily lives has already been mentioned, as indeed is their desire to live and abide by the laws of their host or adopted country. Many Muslims now live in the United Kingdom. They have been in contact with this country since the days of Britain's involvement in the Middle East and the British Empire in India.

In a report published in the London Times, His Highness The Aga Khan III, the forty-eighth Imam of the Shīʿa Imāmī Ismāʿilīs, said as far back as November, 1931, and which is very relevant to-day. He said that Muslims offered the right hand of friendship to the people of England. It was for the English people to decide whether or not to grasp that hand of friendship. Muslims desired to live in self-respecting amity and on terms of equal friendship with other peoples and races.[846]

Finally, when considering legislative changes in connection with *mahr*, a word of caution. The Law Reform (Miscellaneous Provisions) Act, 1970, Section3(1)[847] states that a party to an agreement to marry who makes a gift of property to another party on a condition, express or implied, that it shall be

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[846]*Selected Speeches*, Vol. II, (London, 1997), p.885
[847]Halsbury's Statutes,Vol.27, p.703

returned if the agreement is terminated, shall not be prevented from recovering any property by reason only of his terminating the agreement.

The purpose of this legislation was to change the law so as to enable the return of gifts or even engagement rings given in contemplation of marriage. There is no reason why this legislation should not equally apply to the payment of *mahr* within a contract stipulating its return in the event the marriage does not take place or is not consummated.

This chapter is important, but not in any sense more important than the preceding four chapters. Rather its importance lays in the topic that is both relevant and current and therefore some consideration is given to additional issues to those already considered earlier. Reference has already been made in the previous chapter to the internal on going discussions in the Ismā'īlī community on the twin issues of *mahr* and its enforceability or otherwise in an English court of law and the recognition or non-recognition of a Muslim *ṭalāq* pronounced in England. The community sought Counsel's opinion on these twin issues. The first opinion obtained from Counsel was that of His Honour Judge David Pearl.[848] They sought advice on 'transnational' divorces, i.e. *ṭalāq* pronounced in England but sought to be perfected abroad. The first part of his opinion has at least in relation to *ṭalāq*, is not relevant to the issues here, but in any case has been superseded by the Family Law Act, 1996. However, in his opinion on the question of *mahr* he expresses the view that a provision should be inserted in the form of consent order, which will bind the parties.[849] His

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[848]Pearl, David Opinion to H.H. The Aga Khan Shī'a Ismā'īlī Conciliation and Arbitration Board, 26th April 1993. The second opinion sought was from Doreen Hinchcliffe but this opinion has not been circulated to the community.
[849]*ibid*, paragraph.14.

conclusion is that without such consent order the legal position of enforcement of *mahr* remains uncertain, although Pearl does express the opinion on the basis of the decision in Shahnaz v Rizwan (already discussed), that the wife's right to *mahr* is *ex contractu* and therefore the court has power to enforce her claim to *mahr*.[850] Article13.1(a) of the Shī'a Imami Ismā'īlī Constitution, 1986, specifically provides for a community based conciliation process to consider *inter alia* domestic and family matters, including those relating to matrimony and matrimonial property matters. The majority of cases that come to the Conciliation and Arbitration Board are dealt with by way of conciliation and in general discussion of lawyers who have sat on the Board in the past is that for the moment at least this function, which has served the community well, should continue with matters or disputes only being referred to national courts for adjudication in the event that the parties did not agree to conciliate.

Where a claim is brought to enforce the payment of *mahr* then there is no doubt that that the court would require evidence of the fact of the celebration of the Muslim *Nikāḥ* and also of the marriage contract. This would require the attendance of the two principal office bearers who officiate in the *jamā'at khanas* or prayers halls known as *mukhi* and *kamadia* and in addition the two witnesses to the marriage contract who would give evidence of the celebration of the marriage in their presence. Both sets of witnesses giving evidence of the correctness of the amount of *mahr* recorded. In addition, the production of the Book of Record in which the duplicate entry of the marriage recorded may need to be produced and maybe even the evidence of the keeper to prove the correctness of the entries. As previously stated, litigation down this road would

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[850] *ibid*, paragraph.15

be an expensive and time-consuming process. This may not necessarily be the case where statutory recognition is granted.

This debate is also current and on going within the wider Muslim community settled in England. In view of the importance and relevance of this debate to the Muslim community some further consideration is given to the matters highlighted in this chapter. It has been reported in the press that the U.K. Sharia Council and the Muslim Parliament of Britain have been discussing a draft Muslim marriage contract; there is nothing to indicate that the subject of *mahr* has been broached. No doubt the subject will sooner or later be discussed.[851] There is no doubt that the earlier decision of Shahnaz v Rizwan is a landmark ruling particularly because of the paragraph mentioned at the top of page two hundred and fifty and the relevance of that and subsequent paragraphs to the present situation.

In this chapter, an assertion is made that the decision in Shahnaz v Rizwan is authority for the proposition that *mahr* is not a consideration for the marriage contract. A contrary argument could also be presented because although Winn J. doubts the accuracy of such a description, he nevertheless held that the wife's right to dower was enforceable as part of a marriage contract. Because, he held it to be a proprietary right in respect of which, should a wife gain physical possession of any property of her spouse, she would be entitled to exercise a lien over that property.[852] It was a right enforceable quite

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[851]Eastern Eye Friday March 5, 2004

[852]See the passage in the All England reports at p.998D-E where there is also mention that a wife or widow's right is assignable under Section3 of the Transfer of Property Act 1882 within the Indian Code. Note that the TPA 1882 came into force at the same time as the MWPA 1882 in this jurisdiction. Shahnaz v Rizwan can, therefore, also be used as authority for the proposition that the right to dower as a proprietary right is one enforceable under s17 of the MWPA 1882.

independently of any claim, e.g., to ancillary relief, arising from the marriage itself. What Winn J. did was neatly to side-step the husband's objections to paying *mahr* on the grounds that, any rights arising from the marriage itself were unenforceable as a matter of public policy, because the marriage was either polygamous or potentially polygamous.

The issue now is, 'to what extent if at all does the community wish to see the English doctrine of consideration apply to the validity or otherwise of the agreement to pay *mahr* based on a contract entered into prior to a *Nikāḥ* ceremony performed in this country?' As long as the words of offer, acceptance and communication of acceptance are sufficiently clear and unambiguous then a Muslim marriage contract becomes binding and enforceable as a valid contract in English law. The issue of concern must be the enforceability or otherwise of the payment of *mahr* which is considered further.

In addition to the Matrimonial Causes Act, 1973, mentioned on page two fifty-four there are two other legislative enactments of potential relevance to the issue of *mahr* considered below:

(1) Section17 of the Married Women's Property Act, 1882. The Section is used to resolve issues between husbands and wives concerning title to or ownership of property, it is particularly useful in cases of either polygamous or potentially polygamous marriages (celebrated abroad), where the parties may have no claim to ancillary relief.[853]

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[853]Although in the wake of White v White (2000) 2 FLR 981 in which the House of Lords stressed the need to divide all assets on an equal basis as a starting point in any ancillary relief claim, it is possible that Section 17 of the MWPA 1882 might obtain a new lease of life where it becomes necessary to determining existing property rights before the resolution of any ancillary relief claim.

Although, I have been unable to find a reported case involving a Muslim dower, the court held as early as 1909, that Section17 conferred upon it the right to enforce refund to a wife of a dower following the grant of a petition of nullity of marriage between Jewish couples.[854] The court having held that "property" within the meaning of Section17 was wide enough to embrace "dower" within the context of a Jewish marriage, there can be no reason why it could not be invoked, in appropriate circumstances where ownership of or title to monies or goods representing a Muslim *mahr* were in dispute. That it has not been invoked lends support to the argument proposed in this thesis that the English courts have, for historical reasons, been much quicker to recognize Jewish marriage rites within the context of domestic legislation, than Muslim ones. [The second statutory enactment considered below has been discussed above nonetheless its importance cannot be overlooked and is replicated below].

(2) Section3(1) of the Law Reform (Miscellaneous Provisions) Act, 1970, provides that a party to an agreement to marry who makes a gift of property to another party to the marriage on a condition, express or implied, that it shall be returned if the agreement is terminated, shall not be prevented from recovering any property by reason only of his terminating the agreement.

Although the purpose of this piece of legislation was to change the law so as to enable the return of gifts or even engagement rings given in contemplation of marriage, there is no reason why it should not equally apply to the payment of Muslim dower within a contract stipulating its return in the event the marriage does not take place or is not consummated. This piece of domestic

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[854]See Joseph v Joseph (1909) P. 217 distinguished in the later case of Kelner v Kelner (1939) P.411.

legislation may indeed be relevant to the issue concerning *mahr*. Reference has already been made to two verses of the Qur'ān[855] regarding *mahr* and payment of a suitable amount in the event of non-consummation of the marriage for whatever reason. This payment is further highlighted by the interpretation given by Ṭabāṭabā'ī, who places emphasis on the fact that this payment constitutes a gift, basing his interpretation on the verses of the Qur'ān in question.[856] Therein therefore is the conflict with English law. The question that becomes relevant to the Muslim community is to what extent, should the host community, be asked to alter two pieces of domestic legislation to accommodate Muslim religious beliefs and practices. The objective is surely not in doubt but the answer must be to seek amendments to domestic legislation step by step.

So far as Section25 of the Matrimonial Causes Act, 1973, is concerned, it is perhaps worth stressing that the function of the court, on ancillary relief, is not to enforce contractual rights, but to divide up the ascertainable assets of a marriage in a pragmatic way which is bound to take into account certain factors, including contributions, income, capital, needs, and particularly the welfare of any dependant children, but above all in a way which is fair. Accordingly, the payment (or not) of a dower, as the case may be, is simply one of many factors the court can take into account. The weight to which the court might attach to it as a factor must depend upon the circumstances of each case: if, for example, the payment of a dower was so substantial as to represent the main capital asset in the case and was paid only a short period of time prior to the divorce petition, it could well be a factor of central importance; if a relatively small payment by

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[855]2:236 & 4:4 on pp.6&7 enjoining all Muslims to give suitable gift on the occasion of marriage to the intended bride.
[856]*Al-Mīzān,* Vol.7, p.260.

way of *'mahr'* was made twenty years before the issue of a petition in a case with other much more substantial capital assets it might hardly play a role at all.

Those specific Section25 factors, which appear to be of direct relevance to a Muslim marriage involving, a payment (or not, as the case may be) of a dower, are as follows:

"property": as already discussed a dower, if paid, is "property" within the meaning of ss2(a): therefore to the extent it has been paid and is held by the wife, it is an asset in her hands which must be taken into account;

"obligations": in so far as a husband is obliged to pay a dower but has not done so, it is an "obligation" within the meaning of ss2(b);

"conduct": since the payment of a dower is a sacred obligation, I would argue that a spouse who flagrantly chose not to honour such an obligation could be guilty of conduct it would be inequitable for the court to disregard pursuant to ss2(h).

Although in this chapter analysis has bee given that the appropriate means of enforcing payment of a dower in the English courts would be for a wife to sue in contract *and* simultaneously pursue her claim in ancillary relief, an argument could be advanced that these two remedies are intended to be mutually exclusive. The reason the claimant in Shahnaz v Rizwan was allowed to enforce her claim in contract was precisely because her marriage was potentially polygamous and, therefore, precluded her from pursuing any ancillary relief claim. Although the claimant in Qureshi v Qureshi[857] was not precluded from pursuing an ancillary relief claim, and indeed had pursued her husband for maintenance, Sir Jocelyn Simon P. found that the husband would almost

[857](1971) 1 All E.R. 325 at p.346h – 347a

certainly return to Pakistan and make any award of ancillary relief in this jurisdiction unenforceable.

There is an interesting passage in Qureshi v Qureshi[858] where the relationship between the two possible remedies is discussed. The court considered that any decision to award a payment of dower in contract would have an indirect bearing upon the wife's claim to maintenance. That a dower had been paid would be a factor, which would necessarily have an effect on the way in which the justices exercised their discretion as to (a) the quantum of maintenance; and (b) the extent to which any arrears would be enforceable.

In short a wife should, be advised of her right in connection with both claims and the difficulties with pursuing the first option. It may be that she will *elect* whether to enforce a claim to dower as a contractual right or within an ancillary relief claim. If she is for some reason precluded from making an ancillary relief claim, or is concerned that any award made might be unenforceable because her husband is about to leave to return to Pakistan or to any other jurisdiction where enforcement might be difficult, she has no option other than to claim in contract; if and to the extent she successfully sues in contract and thereafter brings an ancillary relief claim, the payment of the dower might, in all likelihood, serve otherwise to reduce her capital claim unless its non-payment could be considered by the divorce court as unconscionable conduct. Breach of a religious obligation might indeed be classified as unconscionable conduct.

There is no doubt that sooner, rather then later, the twin issues of *mahr* and *Nikāḥ* will have to be broached by Parliament or the Court.

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[858] *ibid*, at p.346, c-e

CONCLUSION

This thesis has focused on a relevant and important issue in Islām which is dispute resolution and by doing so has sought to acquaint the reader with the many facets of dispute resolution in Islamic law.

Chapter One stresses the importance to all Muslims, of the Qur'ān and *sunna* of the Prophet (ṣ.a.a.s.) and an introduction to the importance of dispute resolution highlighted in ʿAlī b. Abī Ṭālib's letter of instruction to his newly appointed governor to Egypt, Mālik al-Ashtar. After a brief review of the conditions prevalent in Makka at the time of the birth of the Prophet (ṣ.a.a.s.) and the early revelations, seen against the rising tide of poverty and the accumulation of wealth in the hands of the few, this section of the chapter seeks to concentrate on the revelation that exhorted men to consider not only the conflict in society that this inequality of wealth created but also to the concept of *Ākhira* or Hereafter, in the Prophet's (ṣ.a.a.s.) attempt to establish a more just society.

Thereafter dispute resolution is considered in the context of *Īmān* that encompasses the concepts of *Tawhīd, Nabuwwa* and *Ākhira*. This chapter considers the many verses of the Qur'ān that establish in the field of dispute resolution the supreme authority of the Qur'ān and the Prophet (ṣ.a.a.s.) and in the verse, 'O *Ye who believe! Obey Allāh, and obey the Messenger, and those charged with authority from among you. If ye differ in anything among yourselves, refer it to Allāh and his Messenger if ye do believe in Allāh and the last day.*'[859]

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[859] 4:59

Dispute resolution in this chapter focuses on the conflict between Islām and the Quraysh of Makka in particular, on God's indirect help to the Prophet (ṣ.a.a.s.), in the conversion of the Abū Dharr and Ṭufayl but also in the many physical encounters with Quraysh, the three most prominent being Badr, Uḥud and Khandaq. It also considers the Prophet's (ṣ.a.a.s) own ethical conduct in his commercial dealings, the manner of his replacement of the *al-ḥajar al-aswad*, in the treaties he negotiated such as those for ʿAqaba and al-Ḥudaybiyya and in the Constitution of Madīna and the manner of his planning of the conquest of Makka, are all living testament to dispute resolution in Islām.

The Prophet's (ṣ.a.a.s.) judicial authority was delegated by him to many individuals and the practice of delegating judicial authority to Muʿādh b. Jabbal and the development of judicial administration first during the ʿUmmayad period and then during the ʿAbbāsīd administration advancing this principle one stage further. Chapter Three also considers the judicial authority of the Mālikī School whilst Chapter Four considers the judicial authority of the Imām from the *Ahl al-Bayt* in the Ismāʿīlī School.

After a brief survey of the circumstances in Madīna at the time the Prophet (ṣ.a.a.s) passed away, the election of the first four caliphs, at the creation of the institution of the caliphate, the focus of Chapter Two is the two rebellions instigated as a direct challenge against the legally constituted authority of the fourth caliph but the main emphasis is on the *Ṣiffīn* arbitration agreements that were negotiated to end a disastrous civil war. The chapter does highlight the conflict and tension that arose prior to, during and subsequent to the negotiation, deliberations and the conclusion that ultimately led to a failed

arbitration that left the community, hitherto politically united, divided and bereft of authoritative leadership.

However, from the failed arbitration at *Ṣiffīn* there can be some semblance of an attempt, no matter how tentative, to negotiate a method of dispute resolution by the proper application of two important but related verses of the Qur'ān, '*O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing,*'[860] and, '*If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and one from hers; if they seek to set things aright, Allāh will cause their reconciliation.*'[861] The consequence of the failed arbitration was the division of the community into Shī'a and Sunnī. The lesson that is surely drawn from *Ṣiffīn* is that for an agreement to succeed there must be a consensus to a resolution of a dispute.

Chapters Three and Four are not dissimilar in their approach to dispute resolution. Both chapters emphasize the importance of the Qur'ān and the *sunna* of the Prophet (ṣ.a.a.s.).

In Chapter Three, the two relevant letters of Abū Bakr to the apostates and 'Umar b. al-Khaṭṭāb to Abū Mūsā are mentioned and after a brief introduction to the development of various legal precepts in Sunnī Islām, Mālik's birth and background and the historical circumstances of the time, the establishment first of the 'Ummayad then the 'Abbāsīd dynasties, when several schools of law developed, the thrust of this chapter is in explaining the evolution and development of the Mālikī School, the Judgement of Ibn Rushd incorporating into the school legal precepts from another school. The chapter

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[860] 2:282
[861] 4:35

endeavours to explain dispute resolution by the rules of procedure and evidence formulated by Mālik. This chapter also considers and examines secular legislation in Baḥrain on dispute resolution in non-family commercial arbitration.

Chapter Four focuses on dispute resolution in the Ismā'īlī School. After an introduction and an analysis of the Shī'a concept of Imām, the authority of the Imām to guide the community on the Qur'ān and the *sunna* of the Prophet (ṣ.a.a.s.), the hereditary nature of the office of Imām, and the manner in which the succeeding Imām is appointed or designated, the chapter gives an historical background of this small but important Shī'a community and focuses attention on the method of administration and governance particularly on dispute resolution. The various early constitutions are discussed. Finally, concentrating on the 1986 Constitution (as amended), and the Articles thereto pertaining to dispute resolution by the specifically created *ad hoc* bodies known as Regional, National and International Conciliation and Arbitration Boards to whom the community could resort to settle disputes or grievances.

In the context of dispute resolution what is also considered is an important provision and that is Article15 entitled 'Personal Law,' and its importance lies in the provision relating *inter alia* to marriage and *mahr* in the Muslim community. Here Article15 takes into account the fact that the community or *jamā'at* is now international, settled in many countries around the globe and there may indeed be countries that do not accord recognition to the Islamic concepts of marriage and *mahr* and by doing so invites the reader to focus attention on these two concepts in the following concluding chapter.

The twin concepts of marriage and *mahr* are of particular relevance in the light of large scale Muslim migration to western countries and Chapter Five The Concept of *mahr* (Dower) in Islamic Law, A Resolution of a Conflict with English Law endeavours to explain the contractual nature of both concepts and acquaint the reader with these two concepts, reviews the relevant authorities both Muslim and non-Muslim and examines in some detail British Indian and English case law and also English statutes in particular The Marriage Act, 1949, The Matrimonial Causes Act, 1973 and The Family Law Act, 1986, with the view to ascertaining the legal position and comes to the conclusion that whilst Muslim marriages, *nikāḥ*, are not recognised *per se* and do not give to an English court jurisdiction in any family law proceedings, nonetheless *mahr* being in the nature of a contractual obligation is enforceable outside of matrimonial proceedings, albeit through a very cumbersome and as yet untried procedure. The chapter therefore concludes by suggesting to the community the manner and method by which effective amendment to existing legislation should be sought to resolve this potential dispute with English law.

This then is the thesis, an effort that has taken some time to reach fruition. It is placed before the reader for consideration and analysis and who will ultimately be its judge. It is hoped the reader will find pleasure in reading it as it has given me pleasure to have spent the time and effort preparing it.

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