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**CONDITIONS FOR VALIDITY  
OF MARRIAGES  
(A COMPARATIVE ANALYSIS)**

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## PREFACE

Glory be to Allah, Lord of the worlds, and praise and peace be on the Prophet Muhammad, his family and companions, and those who follow him till the day of resurrection.

And now, Allah, Glory be to Him (GBTH), sent Prophet Muhammad, peace be upon him (PBUH) for all human beings, who is the bearer of glad tidings and who exhorts against misdeeds, and as a mercy offered to the world.

Allah said in the Holy Qur'an : "We send thee not, but as a mercy for all creatures." (Surah al-Anbiya' : 107).

Allah said : "And verily thou dost guide (men) to the straight way, the way of Allah, to whom belongs whatever is in the Heavens and whatever is on earth : Behold (how) all affairs tend towards Allah (Surah al-Shura : 52 - 53).

Allah also said : "Mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that you may know each other (not that ye may despise each other). Verily the most favoured of you in the sight of Allah is (he who is) the most righteous of you. And Allah has full knowledge and is well acquainted (with all things) : (Surah al-Hujurat : 13).

Nothing in the world is perfect and no word is the last word in any branch of knowledge, least of all in the study and practice of law. This dissertation is a compendium of Muslim Personal law which represents an attempt to codify the Islamic

Laws relating to conditions for validity of Muslim and non-Muslim Marriages in certain countries such as Malaysia, Singapore, Thailand and Indonesia.

This dissertation is based on the Holy Qur'an and the Sunnah and the others text-books of acknowledged authority. It refers to the Rules of Conduct of nearly all the recognised Schools of Law in Islam, e.g. Hanafi, Maliki, Shafi'i, Hanbali and Shiah. The current laws as in force in various Muslim countries including Malaysia have also been stated on the subject, wherever available.

## ACKNOWLEDGEMENT

By the wish of Allah the all Mighty, this humble work is completed. Blessing and peace be upon His Apostle Muhammad (SAW).

Firstly, I wish to express my profound thankfulness and gratitude to my supervisor, Professor Emeritus Tan Sri Datuk Ahmad Ibrahim, Dean of Kulliyah, Kulliyah of Laws at International Islamic University, for his invaluable assistance and painstakingly guided me throughout the period of my studies. May Allah grace him in due course in the Hereafter.

Secondly, I would like to acknowledge a special debt of gratitude to my parents who gave me so much help and support and sacrifice to educate me have been a stepping stone in my life insufficient high gratitude be expressed to them. I also wish to take this opportunity to express my profound appreciation to all my brothers, sisters and in-laws and their families. I thank them all for the enormous moral and material support and the encouragement which they have all afforded to me. Deep gratitude also goes to all my closest friends and my colleagues who shared their time with me in the long hours of discussion, advice throughout the period of my studies and kept my spirits up.

Thirdly, I would also like to record my appreciation and indebtedness to the authorities of the Main Library of International Islamic University and Malaya University, Kuala Lumpur.

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## ABSTRACT

This dissertation has been organised in two parts : Part I deals with the conditions for validity of Muslim Marriages and its contains two chapters.

In Chapter I, I will discuss the definition of marriage in general, concept of marriage before and after Islam, the purpose and the significance of marriage. It also touches what are the conditions of Muslim Marriage in general.

In Chapter II, I will discuss the various conditions for Muslim marriage in detail. Among the areas covered under this chapter is the parties to the marriage, permanent prohibiting of marriages, temporary impediments and other circumstances. I also discuss the concept of ijab and qabul, consent in the marriage which covers consent of the parties and consent of the guardian. It also covered the witness in the marriage and the concept of equality (kafa'ah) in marriage.

Part III deals with the conditions for validity of non-Muslim Marriages in certain countries such as Malaysia, Singapore, Indonesia and Thailand.

The last part of this dissertation consists of the Final Remarks and global conclusion with the comparison between the Islamic law and the common law with that covered in previous chapters was not simultaneous. The simultaneous comparison here was bared on all points, topics and scopes which were discussed in previous chapters.

Finally, this dissertation ends with the index of various important words and names, the glossary of various words given and last but not least, the bibliography of the references that have been used in this dissertation.

## RESEARCH METHODOLOGY

In the course of this research towards the completion of this dissertation, the following methods have been adopted :-

### A. Library research

A Library research has been conducted which includes the collection of various materials from both aspects, the Islamic law and the common law. These materials are as follows :-

- i. Al-Qur'an
- ii. Tafsir
- iii. A hadith with commentaries
- iv. Books on Fiqh
- v. Relevant books on the Islamic Law and Common Law
- vi. Various statutes
- vii. Various dictionaries

### B. Field of Research

A field of research has also been made as follow :-

- (a) reading and collecting materials regarding this subject.
- (b) consultations with the supervisor.
- (c) discussions with the colleagues.

### C. Problems

Lack of books on Islamic Family Law in the English language absolves me from offering an apology for venturing to treat of so vast a subject. This work, the first of its kind, is an attempt to examine the conditions for validity of marriages.

Several problems were encountered in writing this dissertation. Firstly, I was burdened with considerable difficulty during my study of the Family Law, for I had, in the first instance an inadequate knowledge of the theory, concept and conditions for validity of marriages in Islam and Common Law, nor had I any experience of reading the classical works on the subject. The burden was made worse by the fact that there exists a common practice among some of the authors of Islamic Legal literature who refer to certain hadith and to the writings of one or more of the founders of the four major sunni schools of jurisprudence without indicating the source. This is a somewhat common practice because of the assumption that the reference is so well-known that it does not necessarily require a citation. Wherever possible, I have tried to supply it by going through all the books that I could possibly get on hadith, otherwise I have quoted the author as a secondary source.

Finally, I am very conscious of my shortcomings and imperfections, and leave it to those more competent than me to give the subject a comprehensive treatment.

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- Muslim Family Laws Ordinance, 1961.
- Penang Islamic Family Law, 1985.
- Perak Islamic Family Law, 1984.
- The Indonesian Marriage Law, number 1 of the Year 1974.
- The Law Reform (Marriage and Divorce) Act 1976.

**LIST OF ABBREVIATIONS**

A.C.	:	Appeal Cases (Law Reports); After Christ or anno Domini (A.D)
A.H.	:	Anno Hegirae, in the year of Hegira (After Hijrah)
A.I.R	:	All India Reports
All E.R.	:	All England Law Reports
Art.	:	Article
B.C.	:	Before Christ
Bom.H.C.R.	:	Bombay High Court Reports
Ch.	:	Chapter
C.B.T	:	Criminal Breach of Trust
C.J	:	Chief Justice
C.L.J	:	Current Law Journal
d.	:	date of death of an author
Dr.	:	Doctor
ed.	:	edition
e.g.	:	(Lat <i>exempli gratia</i> ) For example
F.J.	:	Federal Judge
F.M.S	:	Federated Malay States
F.M.S.L.R	:	Federated Malay States Law Reports
F.S.C.	:	Federal Shariah Court
f.f.	:	the pages following
l.e.	:	(Lat. <i>id est</i> ) that is
Id.	:	Idem
Ibid	:	Ibidem
I.L.R	:	Indian Law Reports

JMBRAS	:	Journal of the Malayan Branch of the Royal Asiatic Society
JMCL	:	Journal of Malaysian Comparative Law
K.B.	:	King's Bench (Law Reports)
K.B.D.	:	King's Bench Division
Ky.	:	Kyshe's Law Reports by J.W.N Kyshe 4 vols: Vol. 1 - Civil cases with a historical judicial preface 1786-1885. Vol. 2 - Criminal, Admiralty, Bankruptcy, Ecclesiastical and Habeas Corpus cases. Vol. 3 - Magistrates Appeals Vol. 4 - Cases 1885-1890; court rulings and orders from 1885-1890.
L.J.	:	Lord Justice
L.J.C	:	Lord Chief Justice
L.R	:	Law Reports
Ltd.	:	Limited
M.C	:	Malayan Cases
M.L.J	:	Malayan Law Journal
M.L.R	:	Malayan Law Review
(n.d)	:	No date
Op. cit.	:	Opere Citato
P.	:	page
PP	:	pages
P.P	:	Public Prosecutor
P.B.U.H	:	Peace be Upon Him
P.L.D	:	All Pakistan Legal Decisions
Prof.	:	Professor
Q.B.	:	Queen's Bench (Law Reports)

Q.B.D.	:	Queen's Bench Division
r.a.	:	RadiAllahu 'anhu
S.A.W	:	Sallallah 'alaihi wasallam
S.W.T	:	Subhanahu wa Ta'ala
S.L.R	:	Singapore Law Reports
S.S.L.R.	:	Straits Settlements Law Reports
Sect.	:	Section
Trans.	:	Translation
v.	:	Versus, against
viz	:	namely (videlicet)
vol.	:	Volume
W.L.R.	:	Weekly Law Reports.

## INTRODUCTION

Islam in the last of the Divine Revelations. As the Qur'an states, Islam is not a new religion but the culmination of God's spiritual and temporal commands made known to mankind through Moses and Jesus and the prophets, and Muhammad the last prophet. Islam, therefore continues as the successor and final expression of the Judeo-Christian revelations.

The Qur'an, which is the principal source of Islamic law (Shari'a), contains the rules by which the Muslim world is governed (or should govern itself) and forms the basis for relations between man and God, between all persons whether Muslim or non-Muslim, as well as between man and all aspects of the creation. The Shari'a also contains the rules by which Muslim society (or societies) is organized, and it provides the means to resolve conflicts between individuals and between the individual and the state. As such one of the acknowledged goals of the Shari'a is to combat crime through faith and religious observance, and through the various proscriptions and modalities for the establishment of a just criminal justice system.<sup>1</sup>

There is no dispute among Muslims that the Qur'an is the basis of the Shari'a and that its specific provisions are to be rigorously and scrupulously observed.

The Sunnah is a complementary source to the Qur'an and consists of both the sayings (Hadith) of the Prophet and accounts of his deeds. The Sunnah explains and amplifies the Qur'an, and it cannot be interpreted in any way which alters the Qur'an

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<sup>1</sup> M. Cherif Bassiouni, The Islamic Criminal Justice System, Oceana Publications, Inc. N.York, 1982, p. xiii.

or is inconsistent with the meaning of any of its specific provisions. The Qur'an and Sunna thus constitute the very substance of the Shari'a.

Though there are other sources of law, a principle of gradation and priority of sources exists which makes the Qur'an the first source, followed by the Sunnah, and this in turn followed by other sources of law and rules of interpretation of the Qur'an and Sunnah.

The Qur'an contains a variety of law-making provisions and legal proscriptions interspersed throughout its chapters (Surat) and verses (Ayat). A number of rules exist for interpreting these provisions such as the position of a given Ayat within the context of the Surah, which in turn is interpreted in accordance with its place in the sequence of revelations, its reference to other revelations, and its historical context in relation to particular conditions which existed at the time of the given revelation. These and other rules are known as the science of interpretation (Ilm usul al-fiqh). According to these rules one initially is to refer to a specific provision and then to a general provision dealing with a particular situation. No general provision can be interpreted so as to contradict a specific provision, and a specific rule will be controlling over a general proposition. A general provision, however, is always interpreted in the broadest manner, while a specific provision is interpreted in the narrowest manner. Reasoning by analogy is permitted as are applications by analogy.<sup>2</sup>

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<sup>2</sup> Ibid., p. xiv.

Besides the Qur'an and Sunnah, other sources of law make possible the application of Islam to contemporary situations. Muslim scholars do not consider Islam to be an adaptable religion or system of law, in the sense that it is evolutionary, but rather that it is a religion and legal system which applies to all times. It is therefore the application that is susceptible to evolution. Indeed, the provisions of the Qur'an are such that by their disciplined interpretation, with the aid of the Sunnah, and in reliance on other sources of interpretation and sources of law, Islam can provide the solution to contemporary social problems through the rule of law.

Fourteen centuries ago, Islam was a spiritual, social and legal revolution; its potential for the same remains unchanged.

The western reader will doubtless encounter some difficulty in grasping the manner in which the Qur'an elaborates the blueprint for a legal system and the methodology by which provisions of the Qur'an are interpreted and applied. This problem will be apparent throughout this dissertation to specific verses of the Qur'an or statements of the Sunnah, which to an Arabic-speaking Muslim might be more readily understood, than to the non-Muslim non-Arabic speaking person. The problem is essentially cultural (and linguistic), but also conceptual and methodological. Even for the Muslim world the matter is arduous.<sup>3</sup>

Islamic jurisprudence developed over fourteen centuries from the first Islamic revelation in 622 A.D. to contemporary times. During that history various schools of jurisprudence emerged, each giving its own view of the meaning and application of the Shari'a. Many schools even spawned sub-schools with different interpretative

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<sup>3</sup> Ibid.

approaches and applications.

Islamic jurisprudence has also been influenced in its evolution by the various cultures and social systems which it has encompassed. Furthermore, the spread of Islam in time was also across much of the earth's surface, extending at its height from southern France to Central Asia, assimilating races and transforming cultures without destroying them.

Islam took root and spread among so many peoples enduring for so long, notwithstanding human cultural differences, because one of its basic premises is equality in diversity.

The Qur'an expressly states in Surah al-Hujurat 113, to the effect :  
 "O people, we have created you male and female and we have made you into nations and tribes so that you may come to know one another, but the best of you in the face of God is the most righteous among you."

Adding to this is the Prophet's Hadith which means to the effect :  
 "The people are equal as are the teeth of a comb. There is no one better than another, whether he be Arab or non-Arab. The best among you is the most pious."<sup>4</sup>

The Muslims are broadly divided as far as doctrine and law are concerned into two groups - the Sunni and the Shiah groups. The differences between these

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<sup>4</sup> See the idea in C.G. Weeramantry, Islamic Jurisprudence An International Perspective, (1988) p.76.