tion of French Civil Law was rejected as a result of the objections made by Ahmed Jawdat Pasha[57], Fuad Pasha and Shirwani-zâdah Rushdu Pasha – despite of the insistent demands of 'Ali Pasha and Qabuli Pasha – and it was eventually decreed that *Majalla* be prepared.

When the decision was made that a national civil law was to be prepared, the Association of *Majalla (Majalla Jam'iyyeti)* was formed under the chairmanship of Ahmed Jawdat Pasha, Minister of *Dîwân-i Ahkâm-i Adliyyah* (Civil Court) to prepare Majalla. This association prepared the first 100 articles and the first book, *Kitâb al-Buyû'*, through intensive studies and submitted them to the scrutiny of jurists, particularly *Shaikh al-Islam*. Then, after the necessary corrections had been made in light of criticisms, it was submitted to the Office of the Grand Vizier with a Protocol dated 1285/1869 and took effect following the imperial decree issued within the same year. That was followed by fifteen other books and eventually *Majalla* was completed with *Kitâb al-Qadhâ*, dated 1293/1876.

During the eight years in which Majalla was being prepared (1868-1876) the opposing civil servants and the French ambassador De Bourre did their best to nullify that work. In fact, as result of those efforts, Jawdad Pasha was dismissed from his office of Minister of *Dîwân-i Ahkâm-i Adliyyah* in 1287/1869 and, after completion of the 4th book of Majalla, from the association as well. However, those civil servants who perceived that the task could not be carried on without Jawdat Pasha had him reappointed to this task and promoted him to even higher positions. Use was made of the eminent jurists of the time, especially *Ahmed Jawdat Pasha*, in the preparation of *Majalla*.

Since *Majalla* comprised significant reforms with respect to system and contents at the time and had been written with very sound legal reasoning, it was adopted and applied not only in Turkey, within its present boundaries, but in a broader area covering Egypt, Hijaz, Iraq, Syria, Jordan, Lebanon, Kıbrıs (Cyprus), Palestine and Israel. In fact, *Majalla* remained in force until 1928 in Albania, Bosnia and Herzegovina and until 1984 in Kuwait. Research has revealed that some decrees of Majalla are still in force in Israeli law even today.[58]

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[57] Ahmed Jawdat Pasha (1822 —1895) was a famous Ottoman statesman, historian, sociologist, and legist. He played an important role in the preparation of Mecelle, the civil code of the Ottoman State in the late 19th and early 20th centuries, which was the first codification of Islamic law with Western standards. Cevdet Pasha oversaw the formulation of the Mecelle. He is also well known for a book on Ottoman history, now known as Cevdet Paşa Tarihi ("History of Cevdet Pasha"). Ahmed Cevdet Pasha's grave is located in the graveyard of the Fâtih Mosque in Istanbul.

[58] Ahmed Jawdat Pasha, *Ma'rûdhât* (Petitions), (Istanbul: Enderun, 1980), p. 200; Türkgeldi, Ali Fuad, *Rijal-i Muhimma-i Siyasiyyah* (High Officials of Politics) (Istanbul: TTK, 1928, p. 127; Fındıkoğlu, Z. Fahri, *Hukuk Sosyolojisi* (Istanbul: Istanbul University, 1958), p. 244; Mardin, Abul-Ula, *Medenî Hukuk Cephesinden Ahmed Jawdat Pasha*, (Istanbul: Istanbul University, 1946), pp. 64-65, 66-88; Ba-

We should mention here that in Ottoman State the relationship between m*adh-habs* was ranked accordingly. The *qâdhî* in the *Sharî'ah* courts judged according to his own school, and would, of course, consult a *muftî* from his own school. If, however, the case was referred to a higher court or *majlis*, it came into a multi-school body.[59]

ron de Testa, *Recucil des Traites de la Porte Ottomane*, vol. VII (Paris: 1892), p. 469; Ahmed Jawdat Pasha, *Tadhakir* (Ankara: TTK, 1967), vol. IV, pp. 95f.; *Ma'rûdhât* (Petitions), p. 201; for Protocol see: PA, İrade-Dosya Usulü, no. 65/7; Akgündüz, *Külliyât*, pp. 372ff.

[59] Cf. Sâmir Mâzin al-Qubbaj, *Majallah al-Ahkâm al-'Adliyyah; Masâdiruhâ wa Atharuhâ fî Qawânîn al-Sharq al-Islamî*, ('Ammân: Dâr al-Fath, 2007), pp. 23ff; Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law,* (Oxford University Press US, 2005), pp. 219-20.

# 6 THE MODERN PERIOD AND ISLAMIC LAW

## 6.1 Some Discussions on the Contemporary Practice of *Sharî'ah* Law

The independence of Muslim countries, a recovered pride in their Islamic heritage, sensitivity to the religious sentiment prevalent amongst the majority of the population, and the conscious refusal to allow unrestricted alien influences in the development of law have led some legal thinkers of Muslim countries to formally declare the opening of the gate of *ijtihâd* and codifying *sharî'ah* rules. There are many other reasons for these developments. During the 19th century Islamic law took a sharp turn due to the new challenges facing the Muslim world: the West had risen to a global power and had colonized a large part of the world, including Muslim territories. Agricultural societies changed into industrial ones; new social and political ideas emerged, and social models slowly shifted from hierarchical to egalitarian. The Ottoman State and the rest of the Muslim world were in decline, and calls for reform and codification became louder. In Muslim countries codified state law started replacing scholarly legal opinion. Western countries sometimes inspired, sometimes pressured and sometimes forced Muslim states to change their laws. Secularist movements pushed for laws deviating from the opinions of the Islamic legal scholars and Islamic legal scholarship remained the sole authority for guidance in matters of rituals, worship and spirituality while losing authority to the state in other areas. The Muslim community became divided into groups reacting differently to the changes. This division persists until the present day.[1]

We see various opinions on Islamic law and its practice being discussed among Muslims and non-Muslims. We will discuss these opinions in the second book when we discuss the interpretation of Islamic law. We do not agree with some views, but we have to look at them for explanatory reasons. We would like to mention only some here.

**Secularists** or **liberals** believe the law of the state should be based on secular

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[1] Wael B. Hallaq, *A History of Islamic Legal Theories, An Introduction to Sunnî Usûl al-Fiqh* (Cambridge: Cambridge University Press 2007), pp. 207-54; Maurits S. Berger, *Klassieke Sharî'a en vernieuwing,* WRR webpublicatie nr. 12 (Amsterdam: Amsterdam University Press, 2006), pp. 16-18; 'Abdullahi Ahmed An-Na'im, *Islamic Family Law in a Changing World: A Global Resource Book*, (London: Zed Books, 2002), pp. 1-21; Ralph H. Salmi, Cesar Adib Majul and George Kilpatrick Tanham, *Islam and Conflict Resolution: Theories and Practices*, (University Press of America, 1998), pp. 61-2.

principles, not on Islamic legal theory.[2]

**Traditionalists** or **conservatives** believe that the law of the state should be based on the traditional legal schools.[3]

**Reformers or modernists** believe that new Islamic legal theories can produce modernized Islamic law and lead to acceptable opinions in areas such as women's rights.[4]

**Salafîs** claim to follow the Prophet Muhammad and his Companions, *tâbi'în* (followers of the Companions), *taba' al-tâbi'în* (followers of the *tâbi'în*) and those who follow these three generations.[5]

We could summarize the momentous change that took place in the Muslim world after 1800 in two main ways: *First,* there was a reduction of the Islamic law to the benefit of legal models taken from European countries. This has been the most dominant tendency in practiced law in most Muslim countries. *Second,* there was in all Muslim countries a counter-tendency to strengthen the Islamic law through codification of the *sharî'ah* and opening a wider space for *ijtihâd*. The last decades of Ottoman state is the best example for codification of the *sharî'ah* and movements of modernization in Egypt by Muhammed 'Abduh and Rashîd Ridhâ is a good example for the latter.[6]

The social transformation of early nineteenth-century Muslim societies was followed by economic encroachment by the West. Most of Muslim societies have started to find out for a solution of their problems via Islamic law. The problem facing Muslim countries today is how to adapt Islamic *Sharî'ah* rules and general principles to the social, political and economic demands of the present age. Earlier Muslim societies faced the same problem and provided solutions to it based on legal interpretations, the invention of *hadîth*s or the arbitrary will of the ruler, who could always

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[2] See for some extremist ideas: 'Abd Allāh Aḥmad Na'īm, *Islam and the Secular State: Negotiating the Future of Shari'a*, (Harvard University Press, 2008), pp. 1ff. Abdulkarim Soroush and Nasr Abu Zaid are among them too.

[3] Cf. Christopher Roederer and Darrel Moellendorf, *Jurisprudence*, (Lansdowne: Juta and Company Ltd, 2007), pp. 475ff.

[4] We could mention among some contemporary examples of modernists Muhammad Abduh (1849-1905), Ali Shari'ati (1933-77), Hasan Turabi and Muhammad Khatami.

[5] See Jasser Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law*: A Systems Approach (London: The International Institute of Islamic Thought, 2008), pp. 144-90; Nasr Abu Zaid, *Reformation of Islamic Thought. A Critical Historical Analysis*, WRR Verkenning no. 10 (Amsterdam: Amsterdam University Press, 2006), pp. 21-22; Mahmood Monshipouri, "Islam and Human Rights in the Age of Globalization," in Ali Mohammadi, *Islam Encountering Globalization*, (Routledge, 2002), pp. 91-110.

[6] Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law,* (Oxford University Press US, 2005), pp. 222ff.

"persuade" a jurist to come up with a legal device to sanction his policies. Thus, throughout the centuries, Islamic *Sharî'ah* developed into a variegated network of opinions, interpretations and judgments derived from various sources but always predicated on staying within divine law. In the last 100 years or so most Muslim states have, voluntarily or involuntarily, adopted "Western" codes while paying lip service to their Islamic laws. In most cases, they have found it much easier to circumvent Islamic rules than to change them. It was under the impact of foreign occupation and Westernization that European codes replaced *Sharî'ah* in all but matters of personal status.[7]

In the post-World War II period, newly independent Muslim countries, seeking to assert their identity, included in their constitutions such provisions as "*Islam is the official religion of the state*," "*the president of the republic must be a Muslim*" or "*the principles of Sharî'ah are the primary sources of legislation*," without ensuring that their laws were consistent with Islamic principles.[8]

There is tremendous variance in the interpretation and implementation of Islamic Law in Muslim societies today. Some movements within Islam have questioned the relevance and applicability of *Sharî'ah* from a variety of perspectives. Islamic feminism brings multiple points of view to the discussion. Several of the countries with the largest Muslim populations, including Indonesia, Bangladesh and Pakistan, have largely secular constitutions and laws, with only a few Islamic provisions in family law. Turkey has a constitution that is officially strongly secular. India and the Philippines are the only countries in the world that have separate Muslim civil laws framed by a Muslim personal law board, and based entirely on *Sharî'ah*, and the Code of Muslim personal law of the Philippines. However, the criminal laws are uniform. Some controversial *Sharî'ah* laws favor Muslim men, including polygamy and the rejection of alimony payments.

Most countries in the Middle East and North Africa maintain a dual system of secular courts and religious courts in which the religious courts regulate primarily marriage and inheritance. Saudi Arabia and Iran maintain religious courts for all aspects of jurisprudence, and religious police enforce social compliance. Laws derived from *Sharî'ah* are also applied in Afghanistan, Libya and Sudan. Some states in northern Nigeria have reintroduced *Sharî'ah courts*. In practice, the new *Sharî'ah courts* in Nigeria have most often meant the reintroduction of punishments. The punishments include amputation of one or both hands for theft, stoning for adultery and apostasy.

Many (including the European Court of Human Rights) consider the punishments

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[7] Roederer and Moellendorf, *Jurisprudence*, pp. 479ff; Berger, *Klassieke Sharî'a en Vernieuwing*, pp. 16-18.

[8] Fauzi M. Najjar, "Egypt's Laws of Personal Status," *Arab Studies Quarterly* 10/3 (1988): 319-45.

prescribed by *Sharîʿah* barbaric and cruel. Islamic scholars argue that, if implemented properly, the punishments serve as deterrents. In international media, practices by countries applying Islamic law have fallen under heavy criticism at times. This is particularly the case when the sentence carried out is seen to tilt very much away from European standards of international human rights. This is the same for the application of the death penalty, for the crime of adultery and other punishments such as amputations for the crime of theft and flogging for fornication or public intoxication.

Although some Islamic rules have been interpreted variously in different times and places and by scholars, to describe these different views as fundamentalist, literal and traditional interpretations or lines is not true. Muslim scholars believe Islamic law should be legally binding on all people of the Muslim faith and even on all people who live under Muslim rule. There is confusion between accepting and respecting Islamic law as a divine law and implementing it in Muslim or non-Muslim countries. As we will explain below, a Muslim individual could live according to Islamic law but cannot implement those rules as a Muslim individual in Muslim or non-Muslim country.

In the modern era Islamic Law and its institutions have been eclipsed by the secular law and institutions used by the colonial powers and modern nation-states. In most Muslim nations the endowment properties that supported legal education have been confiscated by the government and placed under the control of a government ministry. The professors and others who teach and work in these institutions have become government employees. Secular education has radically reduced the importance of the *madrasah*s in the contemporary world. There has been a widespread application of Western legal codes, either the Napoleonic code or the related Swiss one, to the law of modern nation-states in the Muslim world, especially in the areas of commercial and criminal law. The only areas that have remained under the purview of Islamic law in most countries are family law, including marriage, divorce, inheritance and related topics. In these areas the flexibility of the law has been radically reduced by attempts to establish a standard code. In British India, for example, the *Hidâyah* by al-Marghinani (1196), *Minhâj al-Tâlibîn* by al-Nawawi (1277) and *Sharâʾiʿ al-Islam* by al-Muhaqqiq al-Hilli (1276) were chosen to serve as the law codes for Hanafî, Shâfiʿî, and Twelver Shiʿîtes, respectively.

At the same time, beginning in the 19th century, Muslim reformers like Muhammad 'Abduh, Rashîd Ridhâ and others attempted to reform Islamic Law from within. Approaches have varied widely. Some thinkers have criticized the insularity of the individual *madhhab*s, arguing for a sustained study of comparative law (*fiqh muqâran*) within traditional institutions. Other methods include choosing freely (*takhayyur*) among the opinions of past authorities or combining the legal doctrines of various *madhhab*s to come up with an appropriate solution, a process termed *talfîq* (patching, piecing together). These latter methods have been used in many actual reforms of

Islamic family law, such as the well-known reform of Anglo-Muhammadan law that drew on the Mâlikî tradition to alter Hanafî marriage law in order to facilitate access to divorce for women in bad marriages.

Other, more radical thinkers have argued that the law of the *madhhab*s should be jettisoned altogether and that a new Islamic law should be derived directly from the scripture, from the Qur'an alone, or from that portion of the Qur'an that was revealed in Mecca.[9] These radical reforms have met with little success, since most movement in the Muslim world today seems to be in the opposite direction. Various forms of Islamic law have been applied in Saudi Arabia, Iran under the Islamic Republic, Afghanistan under the *Tâliban*, and Sudan. Moreover, some political groups throughout the Muslim world are clamoring for the application of the *Sharî'ah* in an attempt to fend off Western cultural influence, fight corruption, and engender public morality and social justice. The classical legal system has not lost its vitality and given the centrality of a divinely ordained law to Islam; it cannot easily be replaced or substituted. We will discuss these problems in the second book of this series.[10]

We believe, in fact, that

> Through the decree, *"A perspicuous Arabic Qur'an"*, Qur'an states that its meaning is clear. From beginning to end, the Divine address revolves around those meanings, corroborating them and making them self-evident. Not to accept those authoritative meanings suggests, denying Almighty God and insulting the Prophet's understanding. That is to say, those authoritative meanings have been taken successively from the source of Prophethood.[11]

> The Qur'an doesn't bring any new fundamentals or principal beliefs; it modifies and perfects existent ones; and it combines in itself the virtues of all the previous sacred books and the essentials of all the previous laws. It only establishes new ordinances in secondary matters, which are subject to change due to differences in time and place. For just as with the change of seasons, food and dress and many other things are changed; so too the stages of a person's life warrant changes in the manner of their education and upbringing. Similarly, as necessitated by wisdom and need, religious ordinances concerning secondary matters change in accordance with the stages of mankind's development. For very many of these are beneficial at one time yet harmful at another, and very many medicines were efficacious in mankind's infancy yet ceased be-

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[9] 'Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation Civil Liberties, Human Rights, and International Law*, (Syracuse: Syracuse University Press, 1996); cf. Salmi, Majul and Tanham, *Islam and Conflict Resolution: Theories and Practices*, pp. 103-7.

[10] Hallaq, *A History of Islamic Legal Theories*, pp. 207-54; Mawil Izzi Dien, *Islamic Law: From Historical Foundations to Contemporary Practice* (Edinburgh: Edinburgh University Press', 2004), pp. 125-35.

[11] Bediuzzmanan Said Nursi, "Twenty-Ninth Letter - First Section," *Letters,* (Istanbul: Sozler, 2002), p. 456.

ing remedies in its youth. This is the reason the Qur'an abrogated some of its secondary pronouncements. That is, it decreed that their time had finished and that the turn had come for other decrees.[12]

We think that we need urgently some classifications of Islamic rules to understand these different views about codification and reform of Islamic law.

## 6.2 The Classification of *Sharî'ah* Injunctions and the Reform or Renovation of *Sharî'ah* Law

According to Western scholars and some Reformers and Secularists in the Islamic world, Islamic family law reflected to a large extent the patriarchal scheme of Arabian tribal society in the early centuries of Islam. Not unnaturally, certain institutions and standards of that law were felt to be out of line with the circumstances of Muslim society in the 20th century, particularly in urban areas where tribal ties had disintegrated and movements for the emancipation of women had arisen.[13] At first this situation seemed to create the same apparent impasse between the changing circumstances of modern life and an allegedly immutable law that had caused the adoption of Western codes in civil and criminal matters. Hence, the only solution that seemed possible to Turkey in 1926 was the total abandonment of *Sharî'ah* and the adoption of Swiss family law as a replacement. No other Muslim country, however, has as yet followed this example. Instead, traditional *Sharî'ah* law has been adapted in a variety of ways to meet present social needs.[14]

For various reasons, we do not agree with the Secularists' and Reformers' view stated above. But in our response to and critique of both views we would like to classify *Sharî'ah* injunctions into some groups. Without these classifications, nobody can understand the nature of Islamic law and cannot criticize new interpretations.

### *6.2.1 Classification of Sharî'ah Injunctions According to Legal Authority*

All the provisions of regulations in Islamic Law are divided into two groups according to legal authority.

*First*, rules that were based directly on the Qur'an and the *Sunnah* and codified in

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[12] Bediuzzmanan, *Signs of Miraculousness, The Inimitability of the Qur'an's Conciseness*, (Istanbul Sozler Publications 2007), pp. 54-58.

[13] See, for example, Muhammad Arkoun, *The Unthought in Contemporary Islamic Thought* (London: Publisher, 2002); Cf. Abdullahi Ahmad an-Na'îm, Abd Allâhi, Islamic *family law in a changing world: a global resource book*, (London: Zed Books, 2002), pp. 1-22.

[14] Dien, *Islamic Law*, pp. 135-36.

books on *fiqh* (Islamic law) were called *Sharî'ah* rules, *Shar'-i Sharîf* or *Sharî'ah* law; these rules formed 85% of the legal system. For example, *al-Durar wa al-Ghurar* by Molla Khusraw and *Multaqâ al-Abhur* by Ibrahim of Aleppo were viewed as the civil code for the Ottoman State. The sources for *Sharî'ah* Law were classified into two groups:

a) Primary sources, also called *al-Adillah al-Shar'iyyah*, of which there are four, i.e. the Noble Qur'an, the *Sunnah*, *Ijmâ'* (general concurrence and agreement/consensus in opinion and decision of the legalists) and *Qiyâs* (analogy).

b) Secondary sources, i.e. traditional rules and customs, *istislâh* (facilitating), *Istihsân* (commendation), ancient legal regulations, narratives from *Ashâb al-Kirâm* (the Exalted Prophet's Companions) and similar sources.

The study of Shar'iyyah Records (*Shari'iyyah Sijilleri)* proves that in the Ottoman State *Sharî'ah* rules were taken as the basis for personal law, family law, inheritance law, *jus obligationum*, law of commodities, commercial law and all the branches of private law with respect to international private law; in the whole of law of procedures of public law, for 80% of penal law, the majority of financial law and in the general principles of *jus gentium*, administrative law and constitutional law. All the above account is for about 85% of the legal system.

*Second*, financial law, land law, *ta'zîr* penalties, arrangements concerning military law and administrative law in particular were based on the restricted legislative authority vested by *Sharî'ah* decrees and those jurisprudential decrees that were founded on secondary sources such as customs and traditions and public good, which fell under public law, *al-Siyâsah al-Shar'iyyah* (*Sharî'ah* policies), *Qânûn* (Legal Code), *Qânûnnâme* and the like. Since these could not exceed the limits of *Sharî'ah* principles either, they should not be reviewed as a legal system outside of Islamic Law.[15]

The analysis of the two essential sources of information regarding Ottoman law, viz. legal codices and Shar'iyyah Records, leads to the following irrefutable conclusion: The Ottoman legislative authorities only and solely codified administrative law, exceptionally various subjects of constitutional law, those subjects of law of property regarding state land, military law, law of finance, *ta'zîr* (punishment by way of reproof) crimes in criminal law and their penalties and decrees regarding some exceptional issues of private law. In issuing decrees on these it codified *Sharî'ah* principles – if any; since, concerning matters transferred to the rulers' arrangements would be made in consideration of such secondary sources as the public good, customs and traditions.

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[15] Ibn al-Qayyim al-Jawziyya, *I'lâm al-Muwaqqi'în 'an Rabb al-'Âlamîn*, vol. IV (Beirut: 1973), pp. 372-78; PA (Basbakanlik Osmanli Arsivi), Prime Ministerial Ottoman Archives, YEE, no. 14-1540, pp. 12f.; Ahmed Akgunduz and Halil Cin, *Turk Hukuk Tarihi*, vol. I (Qonya: Selcuk University 1989), pp. 140-157.

Because it could never be alleged that a state's legal system consisted solely in the above-mentioned subjects, it could not be claimed that the stated issues were arranged in disregard of *Shar'-i Sharîf*. The explanations below will clarify this matter. [16]

### 6.2.2 *Classification of Sharî'ah Injunctions from the Aspect of Their Nature*

Many Muslims or non-Muslims think that all injunctions in Islamic law, such as polygamy and slavery, were established by the Qur'an or the *Sunnah* directly, for which Islamic Law has been criticized severely. The supposition here is false. A further point that causes confusion is the view that there was no slavery, male or female, before Islam and Islam introduced it. However, there are two kinds of injunctions in Islamic law.

1. The ***first*** are injunctions that were laid down by Islam as principles for the first time since they did not exist in previous legal systems. .That is Islam established these principles, such as *zakâh, waqf* (endowments) and the shares of inheritance. Muslim scholars state that these are completely beneficial for humankind as a whole. They also contain many instances of wisdom and purpose, even if people are not aware of them.

2. The ***second*** are injunctions that Islam did not introduce; they already existed and Islam modified them. That is, Islam did not establish them down for the first time; rather, they were part of the law systems of other societies and were applied in a savage form. Since it would have been contrary to human nature to abolish injunctions of this kind suddenly and completely, Islamic law modified them, so that they were no longer barbaric but civilized. Slavery and polygamy are good examples of this.[17]

### 6.2.3 *Comprehensive (Mujmal) and Detailed (Mufassal) Injunctions*

Another perspective yields two kinds of legal rules in Islamic law.

1. **Fundamental and Comprehensive Principles of Law (*Ahkâm al-Mujmalah*)**. The Qur'an sometimes mentions certain fundamental principles of law and gives authority in detailed injunctions to *ulu al-amr* (the legislative organ=officials and judges,

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[16] Nu'man Effendi Dabbaghzadah, *Jâmi'al-Sak*, (Istanbul: 1214), pp. 288-91, 298-310, 312, 335; Ahmed Akgündüz, *Shar'iyyah Sijilleri*, vol. I (Private Law), vol. II (Public Law) (Istanbul: Turk Dunyasi, 1989); Fethi Gedikli, *XVI. ve XVII. Asır Osmanlı Şer'iyye Sicillerinde Mudârebe Ortaklığı: Galata Örneği*, PhD diss., Istanbul University, 1996.

[17] Ahmed Akgunduz, *Islam Hukukunda Kolelik ve Cariyelik Muessesesi ve Osmanli'da Harem* (Istanbul: OSAV, 2000), pp. 72-74; Bediuzzaman Said Nursi, *Munazarat* (Istanbul: Sozler Publications, 1990), pp. 74-75.

the rulers of the state, the powerful). For example *"Difficulty allows ease"* (*al-mashaqqah tajlibu l-taysîr*). Allah says: *"He has not put any constraint on you as far as the religion is concerned."*[18] A sick person, for example, does not have to fast. Allah says: *"And whoever among you is ill, or on a journey, [should fast] a [similar] number of other days. Allah wishes ease for you and do not wish difficulty for you."*[19] The Qur'an emphasizes *"the common good of mankind"*; it focuses on human responsibility because a focus on human rights can devolve into the selfishness of seeking to maximize one's own freedom to do whatever one wants at the expense of others: *"O ye who believe! Fulfill (all) obligations."*[20] It commands judges and state officials to implement the rules of justice and rightness: *"O you who believe! stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety: and fear Allah. For, Allah is well-acquainted with all that ye do."* [21] Then, as we will explain in public law, there is room for jurists to engage in *ijtihâd* and a limited legislation power for *ulu al-amr* (public authority). The Ottoman State enacted 760 legal codes using this power and called this type of regulation *'Urfî Law*.

2. **Detailed Injunctions (*Ahkâm al-Mufassalah*)**. Some injunctions are contained in the verses of the Qur'an or in the Sunnah with complete details of the commands. For this reason there is no room for *ijtihâd* concerning these injunctions. Examples of these are *hadd* punishments, rules concerning retaliation (*qisâs*), murder, theft, fornication and adultery (*zinâ*) and defamation (*qadhf*). The *Sunnah* is the interpreter of all undefined Qur'anic rules. Because the Qur'an is not only a law book, it has explained matters pertaining to worship jurisprudence, personal law and some penal rules especially and only indicated basic rules and general principles for other branches of law, e.g. penal law, constitutional law and administrative law. With this methodology the Qur'an maintained the dynamism of the Islamic legal system.[22]

### *6.2.4 Comprehensible and Incomprehensible Injunctions*

We should be aware that not everybody and sometimes no one can understand the meaning and wisdom of divine commands and prohibitions. Sometimes, these injunctions may become comprehensible after one or two or twenty centuries. Some-

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[18] The Qur'an 22:78.

[19] The Qur'an 2:185.

[20] The Qur'an 5:1.

[21] The Qur'an 5:8.

[22] Abdulkarim Zaidan, *al-Wajîz Fi Usûl al-Fiqh*, (Baghdad: 1961), pp. 128-30; Ahmed Akgunduz, *Mukayeseli Islam ve Osmanli Hukuku Kulliyâti* (Diyarbakır: Dijle University Law School, 1986), pp. 43-44; Sulayman al-Izmîrî, *Hâshiyah alâ Mir'ât al-Usûl* (Istanbul: Matba'a-i Âmire), vol. I, pp. 86-87.

times the true nature of the human intellect is dimmed and influenced by internal and external factors such as desires, motives, habits, environment and association and, as a result, it even fails to give us true knowledge of things that are within its own sphere. Hence, reason often requires the service of a guide and helper who will protect it from straying, lead it to the right path, help it understand delicate and mysterious affairs and know the truth. This guide is the divine revelation received by a prophet. If anyone denies the necessity of this divine guidance through revelation and claims that reason alone is capable of giving us all the knowledge we need, then he will certainly overburden his reason and oppress it quite unreasonably.

For this reason we should divide Sharî'ah rules into groups:

1. **Incomprehensible (*Ta'abbudî= Tawkîfî*=Divinely-Ordained*)* Injunctions:** There are certain matters in the *Sharî'ah* concerning worship that are incomprehensible and are done because they are commanded. The reason for doing or not doing them is because they are commanded. The number of prostrations (*rak'ah)* in five daily prayers is a good example for this kind of injunctions. We should remember the non-divinely-ordained (non- *tawqîfî*) judgments—and even the divinely-ordained (*tawqîfî*) judgments. It is established in Islamic law how exactly acts of worship are to be performed. This is known in the *Sharî' ah* as *tawqîfî*. Again, the arrangement of the verses of every *Sûrah* in the form as it is in now in the present script (*Mushaf*) was determined by the revelation (*tawqîfî*) from the Prophet transmitted to him by *Jibrîl* from Allah. According to this arrangement the *Ummah* transmitted the Qur'an from the Prophet and there is no dispute about this. The order of the verses within the chapters (*Sûrahs*) was in the same form as we see today. As for the arrangement of some of the chapters (*Sûrahs*) they were put together according to the *Ijtihâd* of Sahabah.[23]

2. **Comprehensible (*Ma'qûl al-Ma'nâ)* Injunctions:** There are others that have a comprehensible basis, i.e. they possess some wisdom or benefit by reason of which they have been incorporated into the *Sharî'ah*. But that is not the true reason or cause: the true reason is the Divine command and prohibition.

Instances of wisdom or benefit cannot change those matters of the marks (*sha'â'ir)* of Islam that pertain to worship; that they pertain to worship is dominant and one may not interfere with them. They may not be changed, even for the sake of a hundred thousand benefits. Similarly, it cannot be said that *"the benefits of the Sharî'ah are restricted to those that are known."* To suppose this is wrong. Those benefits may be only some instances of many instances of wisdom and purpose.

For instance, someone may say: "The wisdom and purpose of the call to prayer (*adhân*) is to summon Muslims to prayer; in which case firing a rifle would be suffi-

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[23] Cf. Robert Gleave, *Inevitable Doubt: Two Theories of Shî'î Jurisprudence*, (Leiden: Brill, 2000), pp.168-69.

cient." However, the person does not know that that is only one benefit out of the thousands of the call to prayer. Even if the sound of a rifle provides that benefit, how, in the name of humankind or in the name of the people of that town, can it take the place of the call to prayer, the means of proclaiming worship before Divine dominion and the proclamation of Divine Unity, which is the greatest purpose of the creation of the universe and of the creation of humankind?[24]

### *6.2.5 Possible Conclusion*

We could look at some reforms or renewals from these perspectives because most of them may be included in the limited legislative power. This belongs to *Sharîʿah* and does not lie outside its boundaries. Otherwise, Islamic law could not be a dynamic legal system. Islamic law allowed the political authority to make administrative regulations of two principal types.

The *first* type concerned procedure and evidence and restricted the jurisdiction of the *Sharîʿah* courts in the sense that they are instructed not to hear cases that do not fulfill defined evidential requirements. Thus, an Egyptian law was enacted in 1931 that no disputed claim of marriage was to be heard in court if the marriage could not be proved by an official certificate of registration, and no such certificate could be issued if the bride was younger than 16 or the bridegroom younger than 18 at the time of the contract. Accordingly, the marriage of a minor contracted by the guardian was still perfectly valid but would not, if disputed, be the subject of judicial relief from the courts. In theory the doctrine of the traditional authorities was not contradicted, but in practice an attempt was made to abolish the institution of child marriage.

The *second* type of administrative regulation was a directive to the courts as to which particular rule among existing variants they were to apply. This directive allowed the political authority to choose from among the views of the different schools and jurists that which was deemed best suited to the present social circumstances. For example, the Hanafî law in force in Egypt did not allow a wife to petition for divorce on the grounds of any matrimonial offense committed by the husband, a situation that caused great hardship to abandoned or mistreated wives. Mâlikî law, however, recognizes the wife's right to the judicial dissolution of her marriage on grounds such as the husband's cruelty, his failure to provide maintenance and support, and desertion. Accordingly, an Egyptian law of 1920 codified the Mâlikî law as the law to be applied henceforth in the *Sharîʿah* courts.

By way of comparison, codification in the matters of child marriage and divorce

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[24] Saʿd-al-Dîn Masʿud ibnʿUmar al-Taftâzani, *al-Talwîh li Kashf Haqâ'iq al-Tanqîh*, vol. II (Beirut: Dar al-Arqam), pp. 142-47; Bediuzzaman, "Twenty-Ninth Letter - First Section," *Letters*, p. 465.

was affected on the Indian subcontinent by statutory enactments that directly superseded the Hanafî law. The Child Marriage Restraint Act of 1929 prohibited the marriage of girls under 14 and boys under 16, while the Dissolution of Muslim Marriages Act of 1939, modeled on the English Matrimonial Causes Acts, allowed a Hanafî wife to obtain a judicial divorce on the standard grounds of cruelty, desertion, failure to maintain, etc.

In the Muslim world the potential for legal codification under the principle of *siyâsah* had been exhausted by the 1950s. Since that time the basic doctrine of *taqlîd* has been challenged to an ever-increasing degree. On many points the law recorded in the medieval manuals, insofar as it represents the interpretations the early jurists made of the Qur'an and the *Sunnah*, has been said to have a paramount and exclusive authority no longer. Contemporary jurisprudence has claimed the right to renounce those interpretations and to interpret for itself, independently and afresh in the light of modern social circumstances, the original texts of divine revelation – in short to reopen the door of *ijtihâd* that had been closed, in theory, since the 10th century.

The developing use of *ijtihâd* as a means for legal reform may be seen through a comparison of the terms of the Syrian Law of Personal Status (1953) with those of the Tunisian Law of Personal Status (1957) in relation to the two subjects of polygamy and divorce by repudiation (*talâq*).

With regard to polygamy, the Syrian reformers argued that the Qur'an itself urges husbands not to take additional wives unless they are financially able to make proper provision for their maintenance and support. Classical jurists had construed this verse as a moral exhortation binding only on the husband's conscience. But the Syrian reformers maintained that it should be regarded as a positive legal condition precedent to the exercise of polygamy and enforced as such by the courts. This novel interpretation was then coupled with a normal administrative regulation that required the due registration of marriages after the permission of the court to marry had been obtained. The Syrian Law accordingly enacts: "*The qâdhî may withhold permission for a man who is already married to marry a second wife, where it is established that he is not in a position to support them both.*" Far more extreme, however, is the approach of the Tunisian reformers. They argued that, in addition to a husband's financial ability to support several wives, the Qur'an also required that co-wives should be treated with complete impartiality. This Qur'anic injunction should also be construed not simply as a moral exhortation but as a legal condition precedent to polygamy in the sense that no second marriage should be permissible unless and until adequate evidence was forthcoming that the wives would in fact be treated impartially. But under modern social and economic conditions, such impartial treatment was a practical impossibility. And since the essential condition for polygamy could not be fulfilled, the Tunisian Law briefly declares: "*Polygamy is prohibited.*"

With regard to *talâq* the Syrian law provided that a wife who had been repudiated without just cause might be awarded compensation by the court from her former husband to the maximum extent of one year's maintenance. The reform was once again represented as giving practical effect to certain Qur'anic verses that had been generally regarded by traditional jurisprudence as moral rather than legally enforceable injunctions – namely, those verses that enjoin husbands to "make a fair provision" for repudiated wives and to "retain wives with kindness or release them with consideration." The effect of the Syrian law, then, is to subject the husband's motive for repudiation to the scrutiny of the court and to penalize him, albeit to a limited extent, for abuse of his power. Once again, however, the Tunisian *ijtihâd* concerning repudiation is far more radical. Here the reformers argued that the Qur'an orders the appointment of arbitrators in the event of discord between husband and wife. Clearly, a pronouncement of repudiation by a husband indicated a state of discord between the spouses. Just as clearly, the official courts were best suited to undertake the function of arbitration that then becomes necessary according to the Qur'an. It is on this broad basis that the Tunisian law abolishes the right of a husband to repudiate his wife extra judicially and enacts that *"Divorce outside a court of law is without legal effect."* Although the court must dissolve the marriage if the husband persists in his repudiation, it has an unlimited power to grant the wife compensation for any damages she has sustained from the divorce – although in practice this power has so far been used most sparingly. In regard to polygamy and *talâq*, therefore, Tunisia has, through the reinterpretation of the Qur'an, made reforms hardly less radical than those affected in Turkey some thirty years previously by the adoption of the Swiss Civil Code.

In Pakistan a new interpretation of the Qur'an and the *Sunnah* was declared the basis of the reforms introduced by the Muslim Family Laws Ordinance of 1961, although the provisions of the ordinance in relation to polygamy and *talâq* are much less radical than the corresponding Middle Eastern reforms, since a second marriage is simply made dependent on the consent of an Arbitration Council and the effect of a husband's repudiation is merely suspended for a period of three months to afford opportunity for reconciliation.

Judicial decisions in Pakistan have also unequivocally endorsed the right of the independent interpretation of the Qur'an. For example, in *Khurshîd Bîbî* v. *Muhammad Amîn* (1967) the Supreme Court held that a Muslim wife had the right to obtain a divorce simply by paying suitable compensation to her husband. This decision was based on the court's interpretation of a relevant Qur'anic verse. But under *Sharî'ah* law, this form of divorce, known as *khul'*, whereby a wife pays for her release, is a contract between the spouses and, as such, entirely dependent upon the husband's free consent.

These are only a few examples of the many far-reaching changes that have been effected in Islamic family law. But the whole process of legal codification, as it has developed so far still involves great problems of principle and practice. Most Muslims still adamantly reject the validity of the process of reinterpretation of the basic texts of divine revelation. They argue that the texts are merely being manipulated to yield the meaning that suits the preconceived purposes of the reformers and that, therefore, contrary to fundamental Islamic rules, it is social desirability and not the will of Allah that is the ultimate determinant of the law.

As regards the practical effect of legal codification, in many Muslim countries there is a deep social gulf between a Westernized and modernist minority and the conservative mass of the population. Codifications that aim at satisfying the standards of progressive urban society have little significance for the traditionalist communities in rural areas or for the Muslims whose geographical and social distribution crosses all apparent boundaries.[25]

Having now provided this concise theoretical information, we will now explore the reality in some Muslim countries.

## 6.3 Anglo-Muhammadan Law (Indo-Muslim law)

Islam is the newest of South Asia's major religions and a highly visible presence in all the countries of the region, in the faith of nearly all the people of Pakistan and Bangladesh, as well as the national religion of the tiny island of Maldives. Muslims also make up important minorities in India, Nepal and Sri Lanka. The vast majority of Muslims in South Asia are Sunnî, holding to the Hanafî school of law, although followers of the Shâfi'î, Mâlikî and Hanbalî schools may also be found, as well as small groups of Shî'a and Ismâ'ilîs.[26]

Mohammedan (also spelled Muhammadan, Mahommedan, Mahomedan or Mahometan) is a term used both as a noun and an adjective meaning belonging or relating to either the religion of Islam or to that of the Islamic prophet Muhammad. The term is now largely superseded by the terms Muslim, Moslem or Islamic but was commonly used in Western literature until at least the mid-1960s.[27] Muslim is used more today than Moslem, and the term Mohammedan is generally considered archaic or in some cases even offensive. The term "Mohammedan" arose because Western

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[25] Al-Zarqa, *al-Fiqh al-Islamî Fi Sawbih al-Jadid*, vol. I, (Damascus: Dar al-Qalam, 1998), vol. 1, pp. 165-72.

[26] 'Abdullahi Ahmed An-Na'im, *Islamic Family Law in a Changing World*, pp. 201-5.

[27] See, for instance, the second edition of *A Dictionary of Modern English Usage* by H.W. Fowler, revised by Ernest Gowers (Oxford, 1965).

scholars believe that the source of Islamic Law was not revelation but Muhammad himself. This is completely wrong.[28]

The term Anglo-Muhammadan Law was applied especially in British colonial courts in India. It included criminal and civil law and was based on an interpretation of Islamic texts and practices. Since the establishment of the British goverment in India, the books by *Jinâyah* and *Hudûd* on *Fatâwâ al-'Âlemgiriyyah* have been translated into Persian. When the attention of the British government in India was first directed to the necessity and importance of procuring some authentic guide for aiding them in their supervision of native judicial matters, they started to codify Islamic law and the *Hidâyah* was translated into Persian too. This book has been translated into English by James Anderson at the request of Warren Hastings of the *Digests of Muhammadan law* in English, the first appears to be the chapter on *Criminal Law of the Muhammadus* as modified by regulations. *The Principles of Islamic Laws*, as in force in India, were laid down by Beaufort in his elaborate *Digest of Criminal Law* for the Presidency of Fort William. *The Principles and Precedents of Muhammadan Law*, written by Sir William Hay Macnagte, is the clearest and easiest. In 1865, Neil Baillie completed a *Digest of Muhammadan Law* on all the subjects to which Muhammadan law was usually applied by the British courts in India.[29]

But these works have become useless since the promulgation of the Indian Penal Code. The British government encouraged Muslim and Hindus to combine the principles and rules of Muhammadan and Hindu Laws. A comprehensive penal code (1860) ended the application of Islamic Law to criminal law, but it continued to be applied in personal status law until the Muslim Personal Law Application Act (1937).

Let us now briefly summarize the history of the adaptation of Islamic law as Muhammadan Law in India[30]. The *Sharî'ah* had been common practice in South Asia for centuries under the sultanates, the Mughal Empire and the successor states that arose during the eighteenth century. The decline of the Mughal Empire seems to have stimulated a moral and cultural competition among successor powers that led to an increase in Islamic legal scholarship. Sunnîs, predominantly of the Hanafî school, focused primarily on *al-Hidâyah*, a twelfth-century text of Central Asian origin that relied primarily on Abu-Yusuf and al-Shaybani, the two pupils of Abu-Hanîfa. Innovative

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[28] Asaf A. A. Fyzee, *Outlines of Muhammadan Law*, pp. 1-2.

[29] Shama Churun Sircar, *The Muhammadan Law: A Digest of the Law Applicable Especially to the Sunnîs of India*, (Calcutta: Thacker, Spink and Co., 1873), pp. 56-77.

[30] What follows is largely based on Michael R. Anderson, "Islamic Law and the Colonial Encounter in British India," in Chibli Mallat and Jane Frances Connors, *Islamic Family Law* (Leiden: Brill, 1990), pp. 205-23; cf. also Roland Wilson, *A Short History of Modern English Law*, (Place: Rivington's Historical Handbooks, 1874); William Markby, *An Introduction to Hindu and Mahommedan Law for the Use of Students* (Boston: Longwood Press, 1978).

scholars were not lacking, however. Shah Waliyyullah (1703-62) promoted an eclectic approach to the Sunnî schools, and argued for the practice of *Ijtihâd*. But Shi'îte scholarship was also active. Customary law also played a role here. Many communities, under the umbrella of imperial tolerance kept their localized institutions, practices, and norms. Local leaders seem to have settled disputes with varying degrees of deference to textual norms. The British were confronted with the problem of how to obtain reliable and accurate information on indigenous life. To do so, they turned to law and legal institutions, since the "the rule of law", aside from being ideological baggage and an arm of sovereignty, could also be employed as a "proto-sociology" that could guide policy.[31] The result was, already in the first century of colonial rule the birth of an Anglo-Muhammadan jurisprudence that comprised legal assumptions as well as law officers, translations, textbooks, codifications, and new legal technologies.

The founder of Anglo-Muhammadan Law was Warren Hastings (December 6, 1732-August 22, 1818), the first Governor-General of the Bangal Presidency, from 1773 to 1785. Hastings assumed that indigenous norms could simply be grafted into British-based legal institutions without the integrity of either being significantly compromised. Internal contractions in *Sharî'ah* were simply glossed over and it was applied a set of more or less homogenous rules. This entire approach, and Hastings' categorization of everything as either Hindu or Muslim, severely neglected the actual situation in South Asia, ignoring the differences between Shi'îte and Sunnî and the various schools within each, as well as the various different Hindu groups. The application of the Qur'an and more specifically legal texts like *al-Hidâyah* had always depended on a *Qâdhî* of personal moral rectitude and with knowledge of local customs.

A more sophisticated treatment of textual sources soon developed, but one that gave priority to text over actual practice. Before Anglo-Muhammadan law was codified, British judges could consult court-appointed *mawlawis*, presenting them with an abstract, hypothetical case. The *mawlawi* would then issue a fatwâ, also abstract, to apply to the case. The *mawlawis* were dispensed with in 1864, and thus the official administration of Anglo-Muhammadan law was cut off from men of moral rectitude.

**Translation of Original Islamic Law Texts.** The priority of texts and the distrust of native law officers make it obvious that Islamic texts in English were eagerly awaited so that British judges could apply the law directly. Hastings was asked to compile "*a complete Digest of Hindu and Muhammad laws after the model of Justinian's inestimable Pandects.*" Hastings insisted *al-Hidâyah*, be translated by three *mawlawis* from Arabic into Persian, and then into English by Charles Hamilton in 1791. Because *al-Hidâyah* did not treat inheritance in detailed, which the British saw as the most intrac-

[31] See: M. Anderson, "Islamic Law and the Colonial Encounter in British India," in C. Mallat and J. Conners (Eds.), *Islamic Family Law*, (London: Groham and Trotman, 1990), pp. 205-24.

table and politically important subject in Muhammadan law, *Al-Sirâjiyyah*, a treatise on inheritance, was translated in 1792 directly from the Arabic by Sir William Jones personally.

These translations' primary significance lay initially not in their impact on colonial administration but in promoting a view of Islam as essentialist, static and incapable of change from within. Their legal influence increased when judges started to rely on them more directly. A plan to translate a broader range of texts, including non-Hanafî texts, was never completed and finally canceled because of financial problems in 1808. There was only one additional major translation in the 19th century: a shortened version *Alamgiri* and a portion of an Ithnâ ʿAshʿarîya (Shiʿîte) text, translated by Neil Baillie and published in 1865 as *A Digest of Mohummudan Law*.

Although these three translations formed the textual basis for Anglo-Muhammadan law, they were rife with inadequacies and errors. These errors were partly recorded in court cases and commentaries, but there has been no investigation of their ideological biases. A basic text on the *usûl al-fiqh,* basic to any detailed understanding of Islamic law, did not appear until 1911. Thus it could only be expected that these texts would not be viewed as what they in fact were, i.e. parts of a larger scholarly debate but rather as authoritative codes.

**Legal Texts**. The textual basis of Anglo-Muhammadan law increasingly became a matter of compilations of materials ordered in a thematic way. W.H. Macnaghten compiled the earliest of these, a collection of a number of *fatwâ* produced by the court *Qâdhîs* that he published in 1825 as *Principles and Precedents of Muhammadan Law*. This work included his own generalizations, while claiming that it was an authoritative treatment of opinion on various subjects. Instead, he glossed over problematic areas and neglected genuine differences in doctrine. In the years following, the text books issued by the colonial administration discussed their subject with varying degrees of competence, but Macnaghten's book remained the basic model. This approach minimized doctrinal differences and portrayed *Sharîʿah* as something it was not: "a fixed body of immutable rules beyond the realm of interpretation and judicial discretion."[32]

**Customary law**. British administrators began to emphasize custom as a source of law in the latter half of the nineteenth century, and after the Punjab Laws Act of 1872 revenue collectors in the Punjab were to gather information concerning customs in each village. Although this emphasis on custom remained strongest in the Punjab, it did lead to a reconsideration of legal administration across India. Although the British law custom as ancient and stable in a static society, in truth what the British called "customary law" was not compatible at all with the notion of codification.

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[32] See Anderson, "Islamic Law and the Colonial Encounter in British India," pp. 205-24.

The determination of the content, validity, and applicability of custom was subject to a number of tests. Customs, in order to be legally binding, had to be enforceable, reasonable, and to have existed from time immemorial. Those that were viewed as immoral, illegal according to general legal principles or contrary to public policy could not be enforced.

In summary, the colonial administration was always marked by deference to indigenous family laws. Nonetheless, the latent contradictions of a non-Muslim government administering a Muslim law was always present, throwing up repeated cases of misunderstanding. There was a great deal of variety in the legal norms and institutions. The British relied on translations, text books and codifications, developing, as a result of financial constraints and limited scholarship, a legal system that could satisfy the indigenous elites and collect revenue. Anglo-Muhammadan Law ended up being a matter of certainty and uniformity than one of accuracy.

Anglo-Muhammadan jurisprudence revolved around the belief that Islam was a matter of religious rules, more or less inflexible, that applied to all Muslims everywhere. The internal contradictions, genuine differences and nuances regarding *Sharî'ah* norms were, in general, displaced by a legalistic legal system.[33]

### *6.3.1 Islamic Law in India*

India is a republic in the Asian subcontinent in southern Asia; second most populous country in the world; achieved independence from the United Kingdom in 1947. The Indian legal system is based in part on the English common law system. With respect to Muslim personal law as applied in India, the sources of law are Hanafî *fiqh* along with some recourse to other schools, legislation, precedent, certain juridical texts (both classical and modern) that are considered authoritative and customary.

During the British Raj, the colonial courts were directed, as we saw above, to apply "indigenous legal norms" in matters relating to family law and religion, with "native law officers" advising the courts on the determination of those norms. A number of Hanafî sources (notably *al-Hidâyah* and the *Fatâwâ al-'Âlemgiriyyah*) were translated into English. The advisory positions of legal experts on Hindu and Muslim law were abolished in 1864. Legal commentators on the development of the indigenous system of Anglo-Muhammadan law (now more commonly referred to as Indo-Muslim law) attach varying degrees of significance to the subsequently authoritative position of these works (and the quality of the translations), the absence of judicial expertise

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[33] Cf. Sir Roland Knyvet Wilson and Abdullah Yusuf Ali, *Anglo-Muhammadan Law: A Digest*, (India: Thacker, 1930); Ihsan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan*, (England: Ashgate Publishing, 1971), pp. 126-32.

in Muslim law, the introduction of principles of English law and procedure through judges trained in the English legal tradition and through interpretation of the residual formula of justice and right or justice, equity and good conscience to imply mainly English law, and to the position taken on customary law.[34]

The status of the personal laws of minority communities and the plurality of religious laws in general is much debated in India. Article 44 of the Constitution legislates a commitment to the gradual establishment of legal uniformity in India, the aim being that the state "shall endeavor to secure for the citizens a uniform civil code throughout the territory of India." This directive is considered a threat by elements of religious minority communities who continue to be governed by their own personal laws in family matters, as applied within the superstructure of the Indian legal system.

The predominant *madhhab* is the Hanafî, with sizeable Shâfi'î, Ja'farî and Isma'ili minorities. India's minority religious communities also include Sikhs, Jains, Buddhists, Christians and Jews.

The Indian constitution was adopted on 26 November 1949 and has been amended many times. The preamble of the constitution affirms that India is a "sovereign socialist secular democratic republic." India's secularity is framed in terms of neither favoring nor officially adopting any particular religion, and Article 26 guarantees the freedom to manage religious affairs (subject to constraints imposed by the requirements of public order, morality and health) for every recognized religious denomination or sect. The aforementioned Article 44 of the Constitution contains the Directive Provision stating that Indian legislators shall aim to establish a uniform civil code throughout India. For the time being, religious communities continue to be governed by their own personal laws (apart from Muslims, this applies to Christians, Zoroastrians, Jews and Hindus as well as Buddhists and Sikhs who, for legal purposes, are classified as Hindus). Although the option of civil marriage exists, it is not often the only type of wedding for Indians. The difficulty of reconciling the secularity of the Republic and the objective of establishing legal uniformity with the protection of minority rights (also enshrined in the constitution) has meant that, almost fifty years since the adoption of the constitution, the goal of the directive principle in Article 44 is still far from being realized.

Muslim personal law is applied by the regular *court system*. Since the majority of Muslims are Hanafî, the courts presume that the litigants are Hanafî unless established otherwise.

There are four levels of courts in the judiciary. The first are civil courts with jurisdiction over arbitration, marriage and divorce, guardianship, probate, etc. The next

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[34] 'Abdullahi Ahmed An-Na'im, *Islamic Family Law in a Changing World,* pp. 220-1.

level of courts is established in the subdivisions of each state, at the district level. Each district falls under the jurisdiction of a principal district civil court presided over by a district judge. There are State High Courts in each of the eighteen states of the federation. The Supreme Court is constituted by one chief justice and not more than seventeen judges.

The courts of first instance for personal status are generally the family courts, organized under the Family Courts Act of 1984. These courts are deemed to be the equivalent of any district or subordinate civil court. Their jurisdiction is enumerated in the Act and covers suits for decrees of nullity, restitution of conjugal rights, judicial separation or dissolution, validity of marriage, matrimonial property, orders or injunctions arising out of the circumstances of marriage, legitimacy, maintenance, guardianship, custody and access to minors. These courts have some criminal jurisdiction in terms of maintenance orders. Suits in these courts may be held *in camera* if the family court so desires or at the request of the parties to the case.[35]

### 6.3.2 *Islamic Law in Pakistan*

Islamic Republic of Pakistan is a Muslim republic that occupies the heartland of ancient south Asian civilization in the Indus River valley; formerly part of India; achieved independence from the United Kingdom in 1947. Islam is the official religion of the Islamic Republic of Pakistan. The 1998 census found that 96% of the total population were Muslims, and in 2007 96% (Sunnî 76%, Shi'î 20%). The estimated population of Muslims in Pakistan in 2008 was 169,800,000. Pakistan has the second largest Muslim population in the world, after Indonesia.

The predominant *madhhab* is the Hanafî, and there are sizeable Jafari and Isma'ili minorities. The legal status of the Ahmadîs is somewhat unclear. They identify themselves as Sunnî Muslims but were declared non-Muslims by the state. In 1974 then Prime Minister Zulfiqar 'Ali Bhutto finally conceded to a long-standing campaign waged by conservative religious elements agitating for the official designation of Ahmadîs as non-Muslims. There have been Ahmadi initiatives to adopt a modified version of the Muslim Family Laws Ordinance 1961 to be applied to Ahmadi personal status cases. Christian, Zoroastrian, Hindu, Sikh and Jewish minorities are also found in

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[35] Abdullahi Ahmad An-Na'îm, *Islamic Family Law in a Changing World*, pp. 220-45; Tahir Mahmood, *Statute Law Relating to Muslims in India: A Study in Constitutional and Islamic Perspectives* (New Delhi: India and Islam Research Council, 1995); Taha Mahmood, "India" in: *Statutes of Personal Law in Islamic Countries*, 2nd ed. (New Delhi: India and Islam Research Council, 1995); pp. 87-88, 224-29; Anees Ahmed, "Reforming Muslim Personal Law," *Economic and Political Weekly* 36/8 (24 February, 2 March, 2001): 618-19; Anderson, *Islamic Law and the Colonial Encounterin British India*, pp. 205-23.

Pakistan.

The legal system is based on English common law, with provisions to accommodate Pakistan's status as an Islamic state, most notably in the area of personal status but also to some extent in the areas of criminal and commercial law.

After the partition of India in 1947, legislation relating to Muslim family law introduced in British India continued to govern personal status. A seven-member Commission on Marriage and Family Laws was established in 1955 with a remit to consider the personal status laws applicable in the new state and to determine the areas needing reform. The Commission submitted its report in 1956, suggesting a number of reforms, including, for example, the consideration of all triple *talâq*s (except for the third of three) as single, revocable repudiations. The report led to much debate, with many leading *'ulamâ* (including *Mawlânâ Abu al'Alâ Mawdudi*, leader of the *Jamâ'at-i-Islami*) opposing its recommendations.

*The Muslim Family Laws Ordinance 1961* adopted some of the provisions of the Report of the Marriage and Family Laws Commission, aiming to reform divorce law and inheritance law relating to orphaned grandchildren, introduce compulsory marriage registration, place restrictions on the practice of polygamy, and reform the law relating to dowries and maintenance in marriage and divorce, as well as amend existing legislation with relation to marriageable age. Again, various sectors of the *'ulamâ* regarded this as an unjustified interference or tampering with classical law. When the first constitution of Pakistan was finally promulgated in 1956, it included a provision that came to be known as the repugnancy clause. This clause stated that no law repugnant to Islamic injunctions would be enacted and that all existing laws would be considered in light of this provision in order to institute appropriate amendments. This repugnancy provision has been retained and actually strengthened in the succeeding constitutions.

After a military takeover in 1999 the constitution was again suspended, and in 2000 discussions continued about possible amendments to it. The third constitution was adopted on 10 April 1973, suspended in 1977, and reinstituted in 1985. It has undergone numerous amendments over time, being suspended again in 1999 and still in that state at the time of writing.

Article 1 of the constitution declares that Pakistan will be known as "the Islamic Republic of Pakistan" and Article 2 declares Islam to be the state religion. In 1985 the Objectives Resolution contained in the preamble of the constitution was made a substantive provision by the insertion of Article 2A, thereby requiring all laws to be brought into consonance with the Qur'an and the *Sunnah*. Chapter 3A established the Federal *Sharî'ah* Court and stipulates that the Court will examine any law or provision that may be repugnant to the "injunctions of Islam, as laid down in the Holy Qur'an

and the *Sunnah.*" If a law or provision is determined to be repugnant, the Court is to provide notice to the federal or provincial government, specifying the reasons for the decision. The Court may also examine any decisions relating to the application of the *hudud* penalties that have been decided by any criminal court, and may suspend the sentence if there is any question as to the correctness, legality or propriety of any finding, sentence or order or the regularity of the proceedings. The Supreme Court also has a Sharî'ah Appellate Bench empowered to review the decisions of the Federal Sharî'ah Court and consists of three Muslim Supreme Court judges and up to two *ulamâ*. Part IX of the constitution is called Islamic Provisions and provides for the Islamization of all existing laws, reiterating that no laws will be enacted that are repugnant to the injunctions of Islam. An explanation appended to Part IX clarifies that, with respect to personal law, the expression "Qur'an and the *Sunnah*" means the laws of any sect as interpreted by that sect.

The Islamic provisions also provide for the creation of an Islamic Ideology Council of eight to twenty members appointed by the president. They must have "knowledge of the principles and philosophy of Islam as enunciated in the Holy Qur'an and *Sunnah*, or understanding of the economic, political, legal or administrative problems of Pakistan." The Islamic Council is meant to represent various schools of thought as far as that may be practical, and at least one woman should be appointed. Its function is to make recommendations to the *Majlis-i-Shûrâ* (Parliament) and the Provincial Assemblies "as to the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Qur'an and *Sunnah*." The Council also determines for the federal and provincial governments if proposed laws are repugnant, and compiles "such Injunctions of Islam as can be given legislative effect" for them in suitable form.

The judiciary is composed of three levels of federal courts, three divisions of lower courts and a *Supreme Judicial Council*. There are district courts in every district of each province, having both civil and criminal jurisdiction, although they deal mainly with civil matters. The High Court of each province has jurisdiction over civil and criminal appeals from the lower courts in the provinces. The Supreme Court is in Islamabad and has exclusive jurisdiction over disputes between or among federal and provincial governments and appellate jurisdiction over High Court decisions. There is also a Federal Sharî'ah Court established by Presidential Order on 26 May 1980. This court has exclusive jurisdiction to determine, upon petition by any citizen or the federal or provincial governments or on its own motion, if a law conforms to the injunctions of Islam. An Islamic advisory council of *'ulamâ* assists the Federal Sharî'ah Court in this capacity.

The *West Pakistan Family Courts Act 1964* continues to govern the jurisdiction

and functioning of the Pakistani Family Courts; the Act was never applied to East Pakistan before Bangladeshi independence. Appeals from the Family Courts lie with the High Court only. The Family Courts have exclusive jurisdiction over matters pertaining to the dissolution of marriage, dowries, financial support, the restitution of conjugal rights, the custody of children, and guardianship.

*The Pakistan Penal Code* or PPC is the basis for all legislation in Pakistan. It was instituted in 1860 by the British colonial government. It is similar in sections to the Indian Penal Code but is more religiously oriented. The Penal Code has been amended several times since the independence of Pakistan.

On 2 December 1978 General Muhammad Zia-ul-Haq delivered a nationwide address on the occasion of the first day of the Hijra calendar. He did this to usher in an Islamic system in Pakistan. In the speech he accused politicians of exploiting the name of Islam, saying that many rulers did what they pleased in the name of Islam.

After assuming power, the government took up its task of public commitment to the enforcement of *Nizâm-e-Mustafa* (the Islamic System). This was a 180-degree turn from Pakistan's predominantly Anglo-Saxon Law. As a preliminary measure to establish an Islamic society in Pakistan, General Zia announced the establishment of *Sharî'ah* Benches. Speaking about the jurisdiction of the *Sharî'ah Benche*s, he said, "Every citizen will have the right to present any law enforced by the government before the '*Sharî'ah* Bench' and obtain its verdict whether the law is wholly or partly Islamic or un-Islamic."

But General Zia did not mention that the *Sharî'ah* Benches' jurisdiction was curtailed by the following overriding clause: "(Any) law that does not include the constitution, Muslim personal law, any law relating to the procedure of any court or tribunal or, until the expiration of three years, any fiscal law, or any law relating to the collection of taxes and fees or insurance practice and procedure." It meant that all the important laws that affect each and every individual directly remained outside the purview of the *Sharî'ah Benche*s. However, the limited *Sharî'ah Benche*s did not produce smooth sailing. The Federal *Sharî'ah Bench* declared *rajm*, or stoning, to be un-Islamic; Ziaul Haq reconstituted the court, which then declared *rajm* to be Islamic.

Some laws that have been accepted in Pakistan according to *Sharî'ah* Law:

- Guardians and Wards Act 1890
- Child Marriage Restraint Act 1929
- Dissolution of Muslim Marriages Act 1939
- Muslim Family Law Ordinance 1961
- (West Pakistan Muslim personal law (*Sharî'ah*) Application Act 1962
- (West Pakistan) Family Courts Act 1964

- Dowry and Bridal Gifts (Restriction) Act 1976
- Prohibition (Enforcement of *Hudûd*) Order 1979
- Offence of *Qadhf* (Enforcement of *Hudûd*) Order 1979
- Offence of *Zinâ* (Enforcement of *Hudûd*) Ordinance 1979
- The *Zakâh* and *'Ushr* Ordinance promulgated on 20 June, 1980
- The *Zinâ* Ordinance in 1981
- Law of Evidence (*Qânûn-e-Shahadat*) Order 1984
- The *Qisâs* and *Diyât* Ordinance in 1990
- Enforcement of *Sharî'ah* Act 1991.[36]

### 6.3.3 *Islamic Law in Bangladesh*

People's Republic of Bangladesh is a Muslim republic in southern Asia bordered by India to the north and west and east and the Bay of Bengal to the south; formerly part of India and then part of Pakistan; it achieved independence in 1971. Following independence, the British-era legislation that had continued to be applied in Pakistan, as well as the post-1947 legislation enacted by Pakistan, remained the basis of Bangladeshi personal status laws. Pearl and Menski state that legal developments in Bangladesh and Pakistan since 1972 have been quite distinct. The prospect of a Uniform Family Code has been a subject attracting much lobbying by women's groups in Bangladesh, but there is no equivalent to India's constitutional directive regarding a Uniform Civil Code. The Hanafi school is the predominant *madhhab* in Bangladesh. There are also Hindu and Christian minorities.

The Constitution was adopted on 4 November 1972. An amendment to the Constitution under President Ziaur Rahman in 1977 removed the principle of secularism that had been enshrined in Part II, Fundamental State Policy, replacing it with "absolute trust and faith in Almighty Allah." The Eighth Amendment of 1988 inserted Article 2A, affirming that "[t]he state religion of the Republic is Islam, but other religions may be practiced in peace and harmony in the republic." Some women's groups challenged this move on the grounds that it risked exposing women to discriminatory laws.

At the same time, state law in South Asia has always afforded recognition to and left a sphere for the application of the family laws of different religious communities.

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[36] Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 229-37; Ahmed, "Reforming Muslim Personal Law," pp. 618-19; Rubya Mehdi, *The Islamization of the Law in Pakistan* (Richmond: 1994); Taha Mahmood, "Pakistan," in: *Statutes of Personal Law in Islamic Countries*, pp. 91. 234-40.

The constitutional protection of women's rights and the assertion of gender equality come under the Fundamental Principles of State Policy and is enshrined in Article 10 on the participation of women in national life as well as in Articles 26 to 29 of the section on Fundamental Rights affirming equality of all citizens before the law. This is balanced against the Constitutional protection of minority rights provided in Article 41 on freedom of religion and the freedom of every religious community or denomination to establish, manage and maintain its religious institutions (subject to law, public order and morality). This affects the significant Hindu minority in Bangladesh (roughly equivalent in proportion to India's Muslim minority) in addition to Christian and Buddhist minorities.

The judiciary is organized at two levels, with subordinate courts and a Supreme Court with Appellate and High Court Divisions. The Family Courts Ordinance 1985 governs the application of the personal laws of all Bangladeshis through the state judiciary by the creation of Family Courts. The Family Courts have jurisdiction over personal status cases of all communities, though religious minorities are governed by their own personal laws. The Family Courts are convened in Assistant Judges' Courts and have special procedures and reduced formalities. The Family Courts may hear suits in chambers at the request of both parties, and the court fees are nominal, but lawyers' and notaries' fees considerably increase the costs associated with going to court. Under the terms of the Ordinance, Family Courts have exclusive jurisdiction to try and dispose of suits relating to the dissolution of marriage, the restitution of conjugal rights, dower, maintenance, and guardianship and custody.

The jurisdiction of the Family Courts is restricted so that if any criminal offence arises in the context of a civil case, it comes under the jurisdiction of Criminal or Magistrates Courts. This has created some inconsistencies within the legal system with Magistrates still hearing maintenance claims under section 488 of the Criminal Procedure Code while Family Courts are supposed to retain exclusive jurisdiction to try and determine maintenance cases. The Bangladeshi legislation relating to family courts is quite similar to the legislation applicable in Pakistan; however, the Pakistani Family Courts have broader jurisdiction extending beyond civil suits.

As elsewhere in South Asia, much of the Muslim personal law is unlegislated, the basis for the law being classical Hanafi *fiqh* except where this has been amended by legislation.

The Muslim personal law (Shari'at) Application Act 1937 continues to govern the application of Muslim family law in Bangladesh. (The pre-independence legislation that replaced this Act in 1962 applied only to West Pakistan.) According to the Act, Bangladeshis are subject to local custom and usage in matters relating to wills, legacies or adoption, unless a person declares his or her express preference for being go-

verned by Islamic law. Thus, estates may validly devolve in proportions favouring women under customary law.

The Bangladeshi Muslim Family Laws Ordinance, based on the Pakistani MFLO of 1961, has incorporated some amendments to the original legislation. There are administrative differences in terms of the governmental bodies that apply the provisions of the MFLO at the local level. Applications, appeals and conciliation procedures go to the Union Parishad, Pourashava or Municipal Corporation. This includes the application process for contracting polygamous marriages, the application process itself remaining the same (i.e., requiring the reasons for wanting to contract a polygamous marriage and certification attesting to the existing wife's or wives' consent.

Since there are detailed rules for the division of estates according to classical law, there is little legislation in this area. In general, property devolves upon the heirs according to Hanafî or Ja'farî rules of succession. The Muslim Family Laws Ordinance 1961 also introduced obligatory bequests in favor of orphaned grandchildren, allowing them to inherit from their maternal or paternal grandparents in place of their deceased mothers or fathers.[37]

## 6.4 Islamic Law in Southeast Asia: *Syariah* or Anglo-Muhammadan Law

Southeast Asia encompasses the huge peninsula of Indochina and the East Indies. In this region lie the states of Burma, Brunei Darussalam, Thailand, Laos, Cambodia, Vietnam, Malaysia, Singapore, Indonesia and the Philippines. Islam is the religion of two-fifths of the region's people, most of them living in the Malay Peninsula and the Malay Archipelago, and on the Philippine island of Mindanao. Indonesia is the single largest Muslim country in the world, with a population of 250 million. Two-thirds of Malaysia's 23 million is Muslim. The first converts to Islam were local rulers. In general, Muslim communities in Southeast Asia are mainly Sunnî Muslims of the Shâfi'î school with vestiges of Sûfî influence in religious ceremonies.[38]

*Syariah, syari'ah, syariat, syari'at* means Islamic law. It may appear strange to scholars of classical Islam to conflate "originality" and *syariah*. But this conflation does not deny the universality of Islam nor does it question revelation. All it says is that in Indonesia and Malaysia the *syariah* is now expressed in forms that are particular to these places for the Muslims of these two countries. These forms of expression origi-

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[37] Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 214-19.

[38] Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 245-48.

nated in Southeast Asia.[39]

For all of the 19th and 20th centuries the originalities of Southeast Asian Islam have been ignored, underplayed or dismissed by Europeans. The reason is obvious. The British and the Dutch were in charge, not just politically, economically and military but intellectually as well. They set the agenda as to what Islam was and how it was to be formulated. It was thus possible to claim in early 20th-century British Malaya that "Islam has destroyed classical Malay culture," and, in the Dutch East Indies, that Indonesians are only "nominal Muslims." It was perceptions such as these that allowed, even made necessary, the reformulations of *syariah*. The result for contemporary *syariah* is its compression into the forms of code, statute and precedent derived from Europe.

Islam in what are now Indonesia, Malaysia and the southern Philippines, dates from the 15th century. It has left an extensive legacy in literature, philosophy and law. The *ummah* is one, but the expression of the faith is culturally defined. 19th-century European scholars, in the age of high imperialism, saw the material as a corruption of the "pure" Islamic Law. The reason is obvious: while the texts do certainly contain elements of Islamic Law, they also contain indigenous rules. This was thought to be a "corruption" of the classical heritage. This idea of corruption has persisted into the colonial and contemporary eras, with sometimes unfortunate results.[40]

A good example is the Malayan law text, *Undang-Undang Melak* which dates from the 17th century and was the most influential text for the succeeding two centuries. The text is short and contains three parts that deal with debt and debt bondage, marriage and divorce and property rights respectively. The first and the last represent local custom (*adat*) while marriage and divorce are recognizably derived from Islamic Law. Perhaps most interesting is an interpolated section that classifies the sources of law as (a) reason, (b) Islam and (c) customs of the country. A diversity of sources is recognized and, where there is conflict or inconsistency, the Islamic element is ranked lower than the other two. The evidence from this text and other later Malay-Muslim texts is that Islam was not the only source for law in the Muslim sultanates.

By the end of the 18th century there was a corpus of "Muslim" texts, produced in and for the royal courts that define sovereignty, rule and state. We would now call these "public order" or "public law" texts. In the earlier texts God's revealed message is subordinated to Islam used as a definition of sovereignty.

*The Colonial Reformulation of Islamic Law*. The success of European legal imperialism is nowhere demonstrated more clearly than in Dutch and British possessions in

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[39] M.B. Hooker, "Introduction: Islamic Law in South-east Asia," *Asian Law*, vol. 4, No: 3 (Australia: The Federation Press, 2002), pp. 213-31.

[40] Cf. Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 245-9.

Southeast Asia. Within two decades for the British, and slightly longer for the Dutch, Islam was reduced to a personal religion and confined to family law. How did this happen? The answer lies in the time (1800 to 1945) and the legal policies adopted by the colonial rulers. The consequence of these imperial policies remain alive and well into the 21st century. They still form foundations for Islamic law in contemporary Indonesia and Malaysia.[41]

1. *British Colonial Law.* From the late 18th century on colonial legal policy rested on the following principle (Act of Settlement, 1781): English law is the law of general application, subject to the religions, manners and cultures of the natives, provided these exceptions are not repugnant to justice, equity and good conscience.

Even a cursory reading of this passage indicates its very restrictive nature, and the judicial precedent developed throughout the 19th and 20th centuries confirms this. "Religions, manners and customs" come to be defined as family law and charitable trusts, and even within this narrow definition certain practices, valid in religion, were either restricted or forbidden under the "justice, equity and good conscience" provision (for example, child marriage and aspects of charitable trusts).

But there was an even more fundamental change occurring. This was the reformulation of *syariah* into English legal terms. Those principles of *syariah* permitted to exist now became described in precedent and their validity and meaning was decided following English legal reasoning. A new hybrid law was developed, the Anglo-Muhammadan or Anglo-Muslim law. (The same thing happened with the Anglo-Hindu, Burmese-Buddhist, Anglo-Chinese, and Malay-*Adat* laws.) The English judicial method absorbed the few principles of *syariah* permitted to continue and, by the late 19th century, the new hybrid had taken on a life of its own. It is not fanciful to suggest that the classical *syariah* is not the operative law and has not been that since the colonial period. "Islamic Law" is actually Anglo-Muslim law, i.e. the law that the state makes applicable to Muslims.[42]

2. *Dutch Colonial Law.* The Dutch also marginalized the classical *syariah*, although it did so by a different method. From the 1850s on it became a settled principle of Dutch colonial legal policy that each racial group should have its own law, applied only to members of that group. There were separate legal universes. Dutch law applied to Europeans or any persons assimilated to that status. *Adat* (custom) applied to natives. The *syariah* as such had no formal status, except to the degree or extent permitted by any of the *adat* laws. Its status was dependent on recognition by *adat*, that is, its "reception" into *adat* law. This so-called "reception theory" has since dominated the administration of Islamic Law in Indonesia.

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[41] Hooker, *Introduction*, pp. 213-19.

[42] Hooker, *Introduction*, pp. 213-19.

Within a few years, the Dutch colonial system of separate laws based on race began to break down, and even the invention of special conflict of laws rules (*hukum antargolongan*) to resolve differences proved a failure. To propose strict divisions based on race is not, in fact, a practical proposition. People from different law groups marry and contract across racial lines. An additional complicating factor was the success of the Christian missionary efforts by the end of the 19th century, creating a new class: the "Christian Native."

For the Muslims in the Dutch East Indies, however, the 19th-century Islamic reform movements, derived initially from the Middle East, exacerbated the legal uncertainties of religion vis-à-vis *adat* laws. To this chaotic pluralism we must also add the effect of Dutch legal scholarship (i.e. from 1870–1940), which was concerned to restate the indigenous laws of the Dutch East Indies in a form suitable for colonial administration. This involved the selection and redrafting of rules to make them consonant with legal pluralism and suitable for the newly emerging colonial economy. These are the contexts for s*yariah*, to which we now turn.

From the point of view of the colonial administration, the effective day-to-day law for the Muslim population was *adat,* which might or might not include reference to Islam. In fact the Islamic reference was much wider than was first thought, particularly in the area of family law. The response, therefore, was to establish a "Priest Court" (*Priesteraad*) in 1882 for Java and Madura with jurisdiction in marriage, divorce, inheritance and trusts (*waqf*). The judges were Muslims with some recognizable expertise, but the courts had only limited powers to enforce their own judgments. It does not appear not to have worked satisfactorily, and in 1937 a new Regulation on Religious Justice was enacted. This dealt largely with procedure, then as now a real difficulty; however, it also reduced jurisdiction, confining it to marriage and divorce. Most importantly, the enforcement of decisions (except in dowries, financial support and expenses) was a matter left to the secular (*Landraad*) courts. These courts might, and apparently often did, refuse enforcement, especially where immovable property was at stake.

Looking back from the perspective of a century, we can see that the response to the legal implications of Islam was to control and limit *syariah* while at the same time allowing it a minimal presence in a bureaucratic form. The religious courts were in fact executive institutions: the classical *syariah* was little, if at all, evident as a working system of religious jurisprudence. [43]

The Syariah Court system is one of the two separate systems of courts that exist in the Southeast Asian legal system. *Syariah* refers to *Sharî'ah* law in Islamic religious law and deals with exclusively Islamic laws, having jurisdiction over every Muslim in

[43] Hooker, *Introduction*, pp. 213-19.

Southeast Asia. The Syariah Court was also established by the Singapore government. The Select Committee was made up of lawyers, *Qâdhîs* and local religious leaders. As a result of a study, an act known as the Muslims' Ordinance came into effect on 30 May 1957, from which the Syariah Court derived its authority until 1966. In 1966 the Administration of Muslim Law Act (AMLA) was introduced, repealing the Muslims' Ordinance. This act was created to enhance the system of administration governing the Muslims in Singapore.

We can thus say that this was the reformulation of *syariah* into English legal terms. Those *syariah* principles permitted to exist now became described in precedent and their validity and meaning was decided on the basis of English legal reasoning. A new hybrid law was developed, the *Anglo-Muhammadan* or *Anglo-Muslim* law. (The same thing happened with the *Anglo-Hindu*, *Burmese-Buddhism*, *Anglo-Chinese*, and *Malay-Adat* laws.) The English judicial method absorbed the few principles of *syariah* that were permitted to continue and, by the late 19th century, the new hybrid had taken on a life of its own. If one wished to know what "Islamic" law was in British India or British Malaya, then one had to look to precedents. It was certainly not necessary to refer to the classic Islamic texts. One can even find cases at the highest level that actually reject classic Arabic texts if acceptance would have meant overturning existing local precedent. By 1900 a classically trained Islamic jurist would have been at a complete loss with this Anglo-Muslim law. At the same time, however, a common lawyer with no knowledge of Islam would have been perfectly comfortable with them.

### *6.4.1 Islamic Law in Indonesia*

The Republic of Indonesia is a country in Southeast Asia. Comprising 17,508 islands, it is the world's largest archipelagic state. With a population of 222 million people in 2006, it is the world's fourth most populous country and the most populous Muslim-majority nation. However, no reference is made to Islam in the Indonesian constitution. Indonesia is a republic with an elected legislature and president. The nation's capital city is Jakarta.[44]

The Republic of Indonesia underwent a bitter and bloody struggle for independence and one of its first acts was to establish a Ministry of Religion in 1946. For the first time Islam had a formal presence in the modern state.

Islamic political parties were also founded but the Republic of Indonesia was not an Islamic state; it was a secular state – as it remains today – with a constitution mod-

[44] Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 263-7; Zaid, *Reformation of Islamic Thought*, p. 19.

eled on those of Europe. The promulgation of that constitution in 1945 was not, however, uncontested. An intense debate was carried on between secular nationalists and those who advocated that Islam, in some way, be the foundation of the independent republic for which all were struggling.

A Ministry of Religion was established in 1946, thus giving Islam a formal bureaucratic presence for the first time. In addition, overtly Muslim political parties were permitted (political activity in religious terms was, of course, proscribed in the colonial period). These were considerable gains for Islam, but, on the other hand, the colonial regime of religious courts, with a severely restricted jurisdiction, continued and was extended in 1957 to all parts of the newly independent republic. These courts, the Pengadilan Agama, were under the jurisdiction of the Ministry of Religion, which was at odds with the Indonesian Supreme Court (*Mahkama Agung*) (and thus the Ministry of Justice) on this matter, a tension which has still not been resolved.

The religious court system underwent significant changes in 1989 with the promulgation of a new Law on Religious Justice (No 7/1989). The greater part of this statute is concerned with establishing procedural matters; these include staffing, forms for administration, costs and so on. For the rest, jurisdiction is the main subject, and in many ways this repeats the Dutch and later post-independence laws. Essentially, the religious courts are family law courts and the main subject is divorce and property settlement arising out of divorce. There is a useful survey of Islamic law administration in the New Order government by Cammack (1989) up to the mid-1980s. This has material on courts and judges and also deals with family law.

The second significant change occurred in 1991 with the publication of the Compilation of Islamic Law (*Kompilasi*) by presidential instruction. It is a code of law for the religious courts, although it describes itself as a "guide." It sets out the basic sources of law and then follows these with a summary version of the classical law on marriage, inheritance and trusts.[45]

We could say that the *Indonesian legal system* is based on Roman-Dutch law, modified by custom and Islamic law. The sources of law are Islamic law, statutory legislation, presidential instructions and official compilations of Islamic law. The majority of the population is Shâfi'î Muslim, and there are also Ahmadî minorities. The other recognized religious minorities are Roman Catholic, Protestant, Hindu and Buddhist. There are also significant minorities of adherents of tribal religions; they are not afforded any official recognition.

European explorers arrived in the region in the 16th century, and the Dutch East India Company was founded in 1602. The Dutch established a trading post on the

[45] Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 263-67; Hooker, *Introduction*, pp. 219-21.

north coast of Java, later named Jakarta. The Dutch gradually asserted political and military control beyond Java from the 18th century until most of archipelago was under Dutch rule by the start of the 20th century.

Under Dutch rule, the Dutch East Indies' population was divided into Europeans, Natives, and Foreign Orientals. The Dutch established separate tribunals for Europeans and Natives. Indonesians were subject to *adat* law, with the Dutch East Indies divided into several jurisdictions based on cultural and linguistic criteria. Dutch scholars identified and classified nineteen different systems of customary law in the region. In areas under direct rule there were European courts, native courts and general courts for all of the population. In areas under indirect rule, there were native courts applying *adat* with very limited criminal jurisdiction and no jurisdiction over Europeans or foreigners. The basic principle was dominance of the received civil law system, and application of *adat* for natives as far as it was not replaced by statute.

The *first legislation relating to the application of Islamic law* was an 1882 Royal Decree establishing a Priest Court for Java and Madura, although the decree acknowledged that most Indonesians were also subject to *adat* law administered by native courts. The Priest Court had jurisdiction over Muslim family and inheritance law where all parties were Muslim and *awqâf* and had concurrent jurisdiction with the native courts of Java and Madura. The Priest Court was composed of a president selected from the native courts' officers and three to eight *Qâdhîs*, all appointed by the governor-general. Subsequent legislation by Dutch authorities was also of a largely regulatory and administrative nature. Independence was declared two days after the Japanese occupying forces withdrew in 1945. Calls for the reform of marriage laws led to various proposals from members of government, women's groups and the National Institute for Law Reform from 1945 to 1973, but conflicting interests prevented any consensus being reached. The only statutory reform regarding Muslim personal status in that period was the enactment of the Muslim Marriage and Divorce Registration Law 1946 requiring registration. A new marriage law, the first that was applicable to all Indonesians, was eventually passed in 1974 amid much controversy, particularly with regard to such issues as permission for divorce and polygamy. Some compromises made by the government included increasing the jurisdiction of *Sharî'ah* courts and eliminating registration as a requirement for the validity of a marriage. The marriage law is applied by the regular court system to religious minorities and by *Sharî'ah courts* to Muslim Indonesians. [46]

Following the controversy over the marriage law, *Compilations of Islamic Law in Indonesia* (*Kompilasi Hukum Islam di Indonesia*) authored by officials from the Minis-

[46] See Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 263-67; Otto, *Sharî'a en Nationaal Recht*, pp. 269-92; Zaid, *Reformation of Islamic Thought*, pp. 42-43.

try of Religion and Supreme Court judges have been used since the mid-1980s to clarify points on personal law and inheritance law for application by *Sharîʿah* courts. They are based on arguments from various schools, comparisons of application of Islamic law in different countries, decisions by religious courts, etc. The *Compilations* are presented as presidential instructions which have a lower status than statutes in the Indonesian legal system. A *1991 Compilation of Islamic Law* directed the restriction of *hiba* (gifts) to a maximum of one third of the donor's estate. While this represents a reassertion of classical interpretations, the *Compilations* also draw from eclectic sources, and Supreme Court judgments on appeal from the religious appellate courts diverge from classical law in many areas.

Aceh is the only part of Indonesia that has the legal right to apply Islamic Law (*Sharîʿah*) in full. Since 1999, it has begun slowly to put an institutional framework in place for the enforcement of *Sharîʿah*. Islamic courts in Aceh had handled cases of marriage, divorce and inheritance for a long time.

The constitution was promulgated in August 1945. It does not adopt any official religion, but Article 29 provides that "the State is based upon the belief in the One, Supreme God," also embodied in *Pancasila*. Article 29 guarantees freedom of religion. It was abrogated by the Federal Constitution of 1949 and the Provisional Constitution of 1950, but restored after President Sukarno's decree on 5 July, 1959. During the 32 years of Suharto's administration, the constitution was never amended. Suharto refused to countenance any changes to the constitution and the People's Consultative Assembly passed a law in 1985 requiring a national referendum for any constitutional amendments.

There are four judicial branches outlined in the Basic Law on Judicial Power 1970: general, religious, military and administrative courts. General courts include District Courts of First Instance, High Courts of Appeal and the Supreme Court (*Mahkama Agung*). Religious courts (*Pengadilan Agama*) are established side by side with District Courts. Religious courts are organized at two levels: courts of first instance in each district and appellate courts in all provinces (approximately 300 and 25, respectively [figures as of mid-1990s]) and have jurisdiction over civil cases between Muslim spouses on matters concerning marriage, divorce, reconciliation and alimony. Appeals from the religious appeals court (*Mahkama Islam Tinggi*) go to the Supreme Court, although the supervisory jurisdiction of regular courts over religious courts ended with the passing of the Law on Religious Courts 1989. Religious courts have limited or special jurisdiction and secular courts have general jurisdiction. The competence of religious courts is not exclusive, and parties can apply to District Courts for adjudication on the basis of civil law derived from Dutch law or local *adat*.

Contemporary Indonesia is an especially rich source of insight into the diverse understandings and uses of the Islamic legal tradition in the modern world. Indone-

sian Muslims are engaged in vibrant and far-reaching debates on the terms, relevance and developmental limits of Islamic law, and Indonesia is home to a variety of dynamic state and non-state institutional structures for the generation and application of Islamic doctrine.

Indonesia was established in 1945 by Sukarno as a secular nation under so-called *Pancasila*, a Sanskrit word meaning five principles. These include national unity, internationalism, representative democracy, social justice and secular theism. In addition, the country has not one but three officially acknowledged justice systems. The most common is the civil continental system, a derivative of the European or continental legal system. The second is the native *adat* or tribal system, a complex system of community rights common throughout Southeast Asia. The third is *Sharî'ah*, which holds that there is an absolute body of laws outside the realm of human beings, ordained by God whose final verdicts can never be contested. as an example of the latter we can mention the Compilation of Islamic Law

The Republic of Indonesia had a bitter and bloody struggle for independence, and one of its first acts was to establish a Ministry of Religion in 1946. We can mention two very important changes here.

**First**, the *Religious Court system* underwent significant change in 1989 with the promulgation of a new Law on Religious Justice (No. 7/1989). The larger part of this statute is concerned with establishing procedural matters; these include staffing, forms for administration, costs and so on. For the rest, jurisdiction is the main subject and this, in many ways, repeats the Dutch and later post-independence laws. Essentially, the religious courts are family law courts and their main areas are divorce and property settlement arising from divorce.

The **second** significant change occurred in 1991 with the publication of *The Compilation of Islamic Law (Kompilasi)* by presidential instruction. It is a code of law for the religious courts, even though it describes itself as a "guide." It sets out the basic sources of law and then follows these with a summary version of the classical law on marriage, inheritance and trusts.[47]

### *6.4.2 Islamic Law in Malaysia*

Malaysia is a country that consists of thirteen states and three federal territories in Southeast Asia with a total land mass of 329,847 square kilometers. The capital city is Kuala Lumpur, while Putrajaya is the seat of the federal government. The popula-

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[47] R. Michael Feener and Mark E. Cammack, *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Cambridge: Harward University Press, 2007), pp. 5ff; R. Michael Feener, *Muslim Legal Thought in Modern Indonesia,* (Cambridge: Cambridge University Press, 2007) pp. 24-104.

tion stands at over 25 million. The country is separated into two regions: Peninsular Malaysia and Malaysian Borneo by the South China Sea. Malaysia did not exist as a unified state until 1963. Previously, a set of colonies had been established by the United Kingdom in the late-18th century, and the western half of modern Malaysia was composed of several separate kingdoms. This group of colonies was known as British Malaya until its dissolution in 1946, when it was reorganized as the Malayan Union. Due to widespread opposition, it was reorganised again as the Federation of Malaya in 1948 and later gained independence on 31 August 1957. Islam is the largest as well as the official religion of the federation.

The colonial legacy in Malaysia was the Anglo-Muslim precedent and, from the 1950s, legislation (Administration of Islamic [sometimes Muslim] Law) in each of the states of the Federation. The Federal Constitution of 1957 declares Islam to be the "Religion of the Federation." The Ninth schedule, List I, gives power to the states to legislate with respect to religion.

Malaysia is a federal, constitutional, elective monarchy. Its system of government is closely modeled on that of the Westminster parliamentary system, a legacy of British colonial rule. In practice however, more power is vested in the executive branch of government than in the legislative, and the judiciary has been weakened through sustained attacks by the government during the Mahathir era.

Malaysian legal history has been determined by events spanning a period of some six hundred years. Of these, three major periods were largely responsible for shaping the current Malaysian system. The first was the founding of the Melaka Sultanate at the beginning of the 15th century. The second was the spread of Islam in the indigenous culture. Finally, and perhaps the most significant period in modern Malaysia, was British colonial rule, which brought with it constitutional government and the common law system.

The majority of Muslims are Shâfi'î, with Hanafî minorities. There are also significant Buddhist, Hindu and Christian minorities and a high proportion of followers of indigenous religions; particularly in Sabah and Sarawak (both states have Muslim minorities). [48]

The legal system is based on English common law, with both Islamic law and *adat* constituting significant sources of law, particularly in matters of personal status. Malaysia has a *unified judicial system*, and all courts take cognizance of both federal and state laws. The legal system is founded on British common law. Most cases come before magistrates and sessions courts. *Religious courts* decide questions of Islamic law

[48] For more information see Abdul Monir Yaacob, *The Influence of Islamic law on Malay Law During the Pre-independent Period*, dissertation submitted for Postgraduate Diploma in Law. School of Oriental and African Studies, University of London, 1977.

and custom.

Parts of present-day Malaysia were under Portuguese and Dutch control, and starting from Penang in the late 18th century, the region eventually came under British rule, formalized by the Anglo-Dutch Treaty 1824. Malaysia and Singapore were the eventual successor states to the Straits Settlements (Penang, Singapore, Malacca), Federated Malay States (Selangor, Perak, Pahang, and Negri Sembilan) and Unfederated Malay States (Perlis, Kedah, Kelantan, Trengganu, and Johor). Sabah and Sarawak, formerly constituents of British Borneo, later joined Malaysia.

Under British rule, the first legislation regulating Islamic marriage in the Straits Settlements was the Mohammedan Marriage Ordinance 1880, mainly procedural in content. The ordinance was amended in 1908 to make registration of marriage and divorce compulsory, non-compliance being punishable by fine or imprisonment. A 1923 amendment directed the application of Islamic law to intestate succession of Muslims insofar as local custom would permit and without disinheriting non-Muslim kin. The ordinance continued to be applied in Penang and Malacca until the State Acts were passed in 1959. The first codification of Malay customary law (a mixture of *adat* and Islamic law) came in 1915 with the enactment of the Laws of the Malay Courts 1915 in Sarawak.

The region was occupied by Japanese forces from 1942 to 1945, with control reverting to the British after WW II. A legislative assembly was established in 1955 and independence achieved in 1957. As of 1948, the states were granted jurisdiction over application and legislation of *Sharî'ah*, and from 1952 to 1978, new laws were promulgated in the eleven Muslim majority states of Malaysia and Sabah, generally called Administration of Islamic/Muslim Law Enactments and covering the official determination of Islamic law, explanation of substantive law, and the jurisdiction of *Sharî'ah* courts. New laws relating to personal law were enacted in most states between 1983 and 1987.[49]

Efforts by the Kelantan State to pass a *Sharî'ah* Criminal Code Enactment 1993 relating to the application of *hadd* penalties resulted in a stand-off between the federal and state governments. It was passed by the state legislature but never brought into force. It was a matter of much controversy since criminal matters fall under federal and not state legislatures' jurisdiction.

The constitution was adopted on 31 August 1957 and has been amended several times. Article 3 declares Islam to be the official state religion and also guarantees religious freedom. Articles 3 and 5 provide that the ruler of each state is the head of the

[49] See Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 268-72; Arskal Salim and Azyumardi Azra, *Sharî'ah and Politics in Modern Indonesia*, (Singapure: Institute of Southeast Asian Studies, 2003), pp. 1-120; Otto, *Sharî'a en Nationaal Recht*, pp. 303-26.

religion of Islam by the constitution of that state. In the absence of a Muslim ruler (in the states of Malacca, Penang, Sabah and Sarawak) or in the Federal Territories (Kuala Lumpur and Labuan) the *Yang di-Pertuan Agong* (Head of State) is declared the head of the religion of Islam.

The Ninth Schedule of the constitution outlines the legislative lists. Malaysia is a federation of thirteen states with executive and legislative powers on both state and federal level; civil law (and family law as a subset of civil law) fall under the federal legislature's jurisdiction, but persons of the Malay race are defined as Muslims under the constitution, and the states are empowered to make personal laws governing Muslims and laws relating to religious offences and to establish and regulate *Sharî'ah* courts for the application of Islamic law. Personal status law relating to non-Muslims falls under the federal legislature's jurisdiction (governed by the Malaysian Law Reform [Marriage and Divorce] Act 1976 that repealed all previous statutes on marriage and divorce governing non-Muslims). Clarification of points of Islamic law belongs to the jurisdiction of each state's *Majlis* (Council of Religion and Malay Custom). The *Majlis* generally issue *fatâwâ* that are in keeping with Shâfi'î tenets except where such may conflict with public interest. In such instances the councils may (with the approval of the state authorities) follow minority Shâfi'î views or interpretations from the other three major Sunnî *madhâhib*.

There are three levels of *Sharî'ah* courts in a system parallel to and independent of the civil courts: *Sharî'ah* Subordinate Courts, *Sharî'ah* High Court and *Sharî'ah* Appeal Court.

1. *Sharî'ah* Subordinate Courts have jurisdiction as indicated by state legislation over criminal suits liable to punishment up to 2,000 *ringgit* and/or imprisonment up to two years and civil suits in which the value of the subject in dispute is up to 100,000 *ringgit* or not estimable in cash.

2. The *Sharî'ah* High Court has appellate jurisdiction over Subordinate Court decisions in civil suits of 500 *ringgit* or more and criminal suits. The *Sharî'ah* High Court has original jurisdiction as indicated by state legislation in criminal suits and civil jurisdiction over betrothal and marriage, divorce, nullification or separation, marital property claims, maintenance of dependants, legitimacy, guardianship and custody, testate and intestate succession, gifts *inter vivos* and *awqaf*, in cases where all parties are Muslims.

3. The *Sharî'ah* Appeal Court has appellate jurisdiction over decisions arising out of the *Sharî'ah* High Courts original jurisdiction; all appeals are heard by the Chief *Sharî'ah* Judge and two other members and decisions are by majority opinion.

In September 2000, the government announced that it would establish a separate family court.

All the legislation in Malaysia deals with three areas of law.

1. The **first** is what one might describe as the "official determination" of principle. Here the legislation establishes a *Majlis* (Council) that oversees finances, courts and, most importantly, establishes *fatwâ* committees. These committees issue opinions on points of principle relating to law and dogma. Its opinion is binding in the state for which it is issued. The status of *fatâwâ* has always been contentious in Anglo-Muslim precedent. While the terms on which *fatâwâ* may be issued are set down in the State Enactments, that is, the sources for them are in the classical jurisprudence of the four Sunnî schools, which are not "known" in the English law sense (that is, in the rules of evidence). Admissibility, therefore, depends on the existing rules of evidence, the precedent on which had already decided that "Muslim" law was a "local law" that could not simply be "found" but had to be proved. In addition, the constitutions of 1957 (Federation of Malaya) and 1963 (Malaysia) distinguished between the secular and religious courts, and it was the former that had ultimate authority.

2. The **second** part of the States' Enactments establishes the religious courts and sets out jurisdiction, which is essentially in family law and trusts. Again, this raised difficulties with the secular courts that, in a series of decisions from the 1960s to the 1980s, reiterated their overriding jurisdiction, relying on federal statutes made under federal constitutional authority. To be sure, very few cases came to the High Courts or the Federal Court in Muslim family law matters. The vast majority of applicants to the religious courts were poor and mostly women. But there were enough appeals at the higher level to demonstrate the inequality of the two respective jurisdictions.

3. The **final** part of the State Enactments sets out the substantive principles of *Sharî'ah*. These are family law, parts of the law of property and offences against religion. The actual rules are accurate short summaries from *fiqh* textbooks. The notable feature is that while the rules certainly state principles, they are drafted in a form that recognizes bureaucratic administration. In this they are like any other statute. The result is that the success or otherwise of any action depends as much on forms and formality as it does on its correctness in *fiqh* principle.

The legislation has been much elaborated since the 1980s in all the states. There are now several enactments in each state, which go into each of these three aspects of syariah administration in increasing detail.

In particular, the subject of offences has been widened to include such areas as apostasy. In fact, in the past 20 years *Sharî'ah* has become increasingly defined in criminal law terms. In 1993 the state of Kelantan even proposed the introduction of the seventh-century Arab penalties of mutilation and amputation for a variety of offences. Unhappily, this is largely politically driven. Nothing has come of it in practice, however, due to the Federal Constitution and the separation of jurisdiction, which

have rendered such initiatives unenforceable.

The Federal Constitution is central and nowhere more so than in the vexed issue of secular court - religious court jurisdiction. There was a new article included, 121(IA), that states: "[The secular courts] shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts."

There is a precedent for what this article means from both the High Courts and the Federal Courts. The conclusion is that the religious courts have exclusive jurisdiction in respect of the matters specified in the Ninth Schedule to the constitution. While this solves the jurisdiction issue and could dispose of the Anglo-Muslim precedent, the fact remains that the definition of "religious"/"religion" is still a matter for the secular courts.

But what actually is the *Sharîʿah* in the religious courts – is it *fiqh* or something else or both? Recent data show that while the courts certainly rely on the classic texts of *fiqh*, the way in which they deal with them, especially at the Appeal Board level, is through methods of legal analysis derived from English law. Thus, we have "precedent," "persuasive," and the practice of "distinguishing" and so on. The earlier Anglo-Muslim precedent is not cited. Instead we now have a new, indigenous form being created. It even has its own law reports of records, the *Jurnal Hukum*.[50]

## 6.5 Islamic Law in Saudi Arabia

The Kingdom of Saudi Arabia or KSA is an Arab country and the largest country in the Arabian Peninsula. The Hanbalî school is the official *madhhab* in Saudi Arabia. There is also a Shiʿî minority that adheres to the Jaʿfarî school.

Saudi Arabia was never directly colonized, although parts of the present-day state came under nominal or intermittent Ottoman control since the 16th century. Turkish garrisons were at times stationed in Mecca, Medina, Jeddah and other centers, but the Ottomans exercised only limited powers, and local rulers had a high degree of autonomy in internal affairs. The Ottomans' final efforts at ruling eastern Arabia in 1871 to forestall the growing British influence at their borders in the Arabian Gulf eventually failed. The basis of the Wahhâbi state of Saudi Arabia was established in 1902 when Abd al-Azîz al-Saʿud and his followers gained control of Riyadh, signaling the beginning of the third period of Saudi Wahhâbi dominance in the region. Abd al-Azîz consolidated his territorial gains over the next decade, expanding out of the surroundings of Riyadh and the eastern part of the region into the areas where the Ottomans had been expelled. The Kingdom of Saudi Arabia was declared on 22 Septem-

[50] Abdullahi Ahmad an-Naʿîm, *Islamic Family Law in a Changing World*, pp. 268-72; Hooker, *Introduction*, pp. 221-23.

ber 1933 over those countries that had come under Abd al-Azîz's control by conquest and by forging numerous alliances.

Following the 1979 seizure of the Grand Mosque in Mecca, the decline in oil prices in the 1980s, and the effects of the Second Gulf War, tentative efforts have been made to establish a more representative form of governance. A *Majlis al-Shûrâ* (Consultative Council) was introduced by King Fahd in 1993. The *Majlis* had 61 appointed members; in 1996 this was increased to 90. Although the *Majlis* has no legislative powers, it may examine government policies and propose laws or amendments to existing laws. Decisions or suggestions from the *Majlis* are first sent to the Council of Ministers for review and then to the king for his approval.

The main sources of Saudi law are *Hanbalî fiqh* as set out in a number of specified classical scholarly treatises by authoritative jurists, other Hanbalî sources, other schools of law, state regulations and royal decrees (where these are relevant), and custom and practice. Royal decrees have been used to direct courts to base judgments on several authoritative classical treatises by Hanbalî jurists (e.g., *al-Mughnî* by ibn Qudamah). A resolution of the Supreme Judicial Council passed in 1928 also directed the courts to rely on particular Hanbalî sources in civil matters, ranked as follows: *Sharh Muntahâ al-Irâdât* and *Kashshâf al-Qinâ' an Matn al-Iknâ'* (both by al-Bahuti), commentaries by al-Zad, commentaries by al-Dalîl and, if no suitable provision is found, then secondary sources in Hanbalî legal manuals, and lastly, reference to authorities of other *madhahib*. If no answer is found in officially sanctioned sources, then one may resort to *Ijtihâd*. Traditional areas of law continue to be governed by *Sharî'ah* law while certain spheres of law relating to corporate, tax, oil and gas, immigration law, etc. have been regulated by royal decrees and codes.[51]

Saudi Arabia has no formal constitution, the functions of which are served by the Basic Law articulating the government's rights and responsibilities issued by King Fahd in March 1992. Article 1 of the Basic Law declares Islam to be the official state religion and the Qur'an and the *Sunnah* its constitution. The Basic Law also provides that "the state protects the rights of the people in line with the Islamic *Sharî'ah*," affirms the independence of the judiciary and states that the administration of justice is based on "*Sharî'ah* rules according to the teachings of the holy Qur'an, the *sunnah*, and the regulations set by the ruler provided that they do not contradict the holy Qur'an and *Sunnah*." Article 9 of the Basic Law states that "the family is the kernel of Saudi society, and its members shall be brought up on the basis of the Islamic faith." Article 26 provides that the state protects human rights "in accordance with the Islamic *Sharî'ah*."

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[51] See Otto, *Sharî'a en Nationaal Recht*, pp. 85-105; Cf. Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 136-38; Vikør, *Between God and the Sultan*, pp. 264-68.

*Sharîʿah courts* have general and residual jurisdiction, i.e. jurisdiction over any case or matter over which the jurisdiction has not been expressly assigned to another tribunal. There are four levels of *Sharîʿah courts*: Minor Courts, General Courts, Cassation Court and the Supreme Judicial Council. Civil claims may also go to the Amarah, in which case the Amir attempts to guide the disputing parties to a compromise. The case is ultimately referred to the courts if a settlement is not reached. There are also a number of specialized tribunals for settling disputes in specific areas, such as commercial or labor law; these specialized tribunals are formed under various ministries outside of the Ministry of Justice. The highest appellate tribunal in all matters, the Board of Grievances, is also independent of the Ministry of Justice and, since its reorganization in 1982, has been made directly responsible to the king.

*Criminal cases* are tried in *Sharîʿah* courts in the country. These courts exercise authority over the entire population including foreigners (regardless of religion). Cases involving small penalties are tried in *Sharîʿah* summary courts. More serious crimes are adjudicated in *Sharîʿah courts* of common pleas. Courts of appeal handle appeals from *Sharîʿah courts*.

*Civil cases* may also be heard in *Sharîʿah* courts with one exception: Shiʿî may try such cases in their own courts. Other civil proceedings, including those involving claims against the government and the enforcement of foreign judgments, are heard by specialized administrative tribunals, such as the Commission for the Settlement of Labor Disputes and the Board of Grievances.

The Saudi legal system prescribes capital punishment or corporal punishment, including amputations of hands and feet, for certain crimes such as murder, robbery, rape, drug smuggling, homosexual activity and adultery. The courts may impose less severe punishments, such as floggings, for less serious crimes against public morality such as drunkenness.

Murder, accidental death and bodily harm are open to punishment by the victim's family. Retribution may be sought in kind or through blood money. The blood money payable for a woman's accidental death is half as much as that for a man. The main reason for this is that, according to Islamic law, men are expected to be providers for their families and are therefore expected to earn more money. The blood money for a man would be expected to be able to sustain his family, at least a for short time. This generally stems from the fact that honor killings occur within a family and are done to compensate for some dishonorable act that was committed. Slavery was abolished in 1962.[52]

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[52] Taha Mahmood, "Gulf," in *Statutes of Personal Law in Islamic Countries*; Aba-Namay, p. 85: "The New Saudi Representative Assembly," in *Islamic Law and Society* 5/1 (1998): 235-65; S.H. Amin,

## 6.6 Islamic Law in Iran

Islamic Republic of Iran is a Islamic republic in the Middle East in western Asia; Iran was the core of the ancient empire that was known as Persia until 1935. Iran was ruled by a series of dynasties for 2,500 years and Shi'ism became the official religion under Safavid rule (1501-1722). The increasing influence of foreign powers in the region under the Qajars (1795-1925) began with a series of capitulations to Europeans, beginning with the Russians, in the 19th century. In 1906 the first constitution was promulgated and a series of laws were enacted thereafter dealing with criminal, civil, commercial and family law. By 1936 legislation made secular education a requisite for serving judges. Major changes were introduced into the area of family law under Reza Shah with the passage of Family Protection Law 1967 (significantly amended in 1975) abolishing extrajudicial divorce, requiring judicial permission for polygamy – and then only under specific circumstances – and establishing special family courts for the application of the new personal status legislation. The 1979 Revolution brought an end to the Pahlavi dynasty (1925-1979). The Supreme Judicial Council issued a proclamation directing courts that all non-Islamic legislation was suspended and it was given a remit to revise all existing laws in order to Islamize the legal system, with Ayatollah Khomeini's *Fatâwâ* serving as "transitional laws."[53]

The sources of law are Islamic Law, constitutional law, legislation, informed sources such as custom, revolutionary principles, etc.

The Ja'farî school is the predominant *madhhab* in Iran. There are also Hanafî Muslim minorities, as well as Zoroastrian, Baha'i, Christian and Jewish minorities. The officially recognized religions are Sunnî Islam, Zoroastrianism, Judaism and various Christian denominations. Under a 1933 law relating to the rights of non-Shi'îte Iranians, courts are to apply the personal status laws applicable to the litigants belonging to the officially recognized religions.

The current constitution was adopted on 2-3 December 1979, with significant revisions expanding presidential powers and eliminating the prime ministerial position in 1989. Article 4 provides that all civil, penal, financial, economic, administrative, cultural, military, political and any other laws must be based on Islamic criteria. Article 12 provides that the official state religion is Islam and the Twelver Ja'farî school; other

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*Middle East Legal Systems* (Glasgow: Royston Limited, 1985); Alexei Vassiliev, *The History of Saudi Arabia* (London: Saqi Press, 1998).

[53] Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 108-111; Cf. Ashk Dahlén, *Islamic Law, Epistemology and Modernity: Legal Philosophy in Contemporary Iran*, (New York: Routledge, 2003) pp. 39-54.

schools of law are to be accorded full respect and freedom of religious practice, including matters of personal status.

The special courts established by the Family Protection Act 1967 were disbanded after the Revolution. The 1979 Constitution provides that the chief of the Supreme Court and the Prosecutor General must be *mujtahids*. The Special Civil Courts were established in 1979 to adjudicate on matters relating to family law, succession and *awqâf*. The court structure since the Revolution is as follows (numbers as of 1984): Revolutionary Courts (70 branches); Public Courts: Civil Courts (205), Special Civil Courts (99), 1st Class Criminal Courts (86), 2nd Class Criminal Courts (156); Courts of Peace: Ordinary Courts of Peace (124), Independent Courts of Peace (125), Supreme Court of Cassation (22).

Iran signed the ICCPR and ICESCR in 1968 and ratified both covenants in 1975 without reservation. Iran signed the CRC in 1991 and ratified it in 1994 with a general declaration and reservation to the effect that the Islamic Republic reserves its rights regarding the articles and provisions that might be contradictory to *Sharî'ah*, thus reserving the right not to apply any provisions incompatible with Islamic Laws and the international legislation in effect.[54]

## 6.7 Islamic Law in Egypt

Arab Republic of Egypt is a republic in northeastern Africa known as the United Arab Republic until 1971; site of an ancient civilization that flourished from 2600 to 30 BC. The legal system is based on Islamic law and French codes. A reformist movement developed in the late nineteenth century, led by such prominent thinkers and commentators as the Grand Muftî Muhammad 'Abduh and Rahsîd Ridhâ. Egypt was among the first countries after France to establish a judicial institution. This began in 1875 with the enactment of the modern codification under which mixed tribunals were established. Ottoman rule reinforced the public and political roles of the *'ulamâ* (religious scholars) because Islam was the state religion and because political divisions in the country were based on religious divisions. During the nineteenth and twentieth centuries, successive governments made extensive efforts to limit the role of the *'ulamâ* in public life and to bring religious institutions under closer state control. The secular transformation of public life in Egypt depended on the development of a civil

54 'Abdullâhi Abdullahi Ahmad An-Na'îm, *Islamic Family Law in a Changing World*, pp. 108-11; *Lawyers Committee for Human Rights*, Report by The Justice System of the Islamic Republic of Iran (Washington DC: May 1993); Taha Mahmood, "Iran," in: *Statutes of Personal Law in Islamic Countries*, pp. 65-69, 193-94; Vikør, *Between God and the Sultan*, pp. 269-71.

bureaucracy that would absorb many of the *ulamâ*'s responsibilities in the country.[55]

The Egyptian judicial institution that existed in the mid-19th century was characterized by the following.

Courts at that time were not entirely national: there were courts for foreigners known as "consular courts."

The judicial authority at that time was not the only authority entrusted with giving rulings on disputes, but there was another system that enabled members of the executive authority to issue rulings in certain cases.

The unified judicial system that had existed since the Ottoman rule of Egypt was abandoned. During the Ottoman era judiciary power was assumed by one person known as the Chief Justice, assisted by four deputies representing the four schools of Islamic jurisprudence: Hanafî, Shâfi'î, Mâlikî and Hanbalî. During Mohamed Ali's reign over Egypt and his attempt to build a modern Egyptian state, two significant developments took place in Egypt, leading to the existence of various bodies of civil judiciary in the country.

In summary, Egyptian law was based on Islamic Law and civil law (particularly French codes). Egypt attained independence from the Ottoman Empire in matters of legal and judicial administration in 1874. Judicial reform began in 1875, leading to the establishment of *mukhtalatat* (mixed) and *ahli* (national) courts. As Egypt increasingly came under foreign influence, the legal system began increasingly to resemble European systems.[56]

Let us look at this in detail.

1. ***The Egyptian Judicial System*** (or judicial branch) is an independent branch of the government that includes both secular and religious courts. The Egyptian judicial system is based on European – primarily French – legal concepts and methods. Under the several governments during the presidency of Hosni Mubarak, the courts have demonstrated increasing independence, and the principles of due process and judicial review have gained greater respect. *Sharî'ah* courts were integrated into the national court system in 1956. Family law is applied within the national courts by judges trained in *Sharî'ah* (separate family courts for Copts). Appeals go through the regular courts to the Court of Appeals and then to the Court of Cassation.

The legal code is derived largely from the Napoleonic Code. Marriage and personal status are based primarily on the religious law of the individual concerned. Thus,

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[55] Daisy Hilse Dwyer (ed.), *Law and Islam in the Middle East*, (New York: Bergin & Garway, 1990), pp. 1-40.

[56] See J.M. Otto, *Sharî'a en Nationaal Recht*, pp. 19-38; 'Abdullahi Ahmed An-Na'im, *Islamic Family Law in a Changing World*, p. 169.

there are three forms of family law in Egypt: Islamic, Christian and secular (based on the French family laws).

2. ***The Egyptian Civil Code*** is the primary source of civil law for the Egypt. The first version of this code was written in 1949, and its primary author was Abdel-Razzak al-Sanhuri, who was assisted by Dean Edouard Lambert of the University of Lille. Perhaps due to Lambert's influence, the 1949 code followed the French civil law model, focusing on the regulation of business and commerce and excluding any provisions regarding family law. The code also provides for Islamic law to have a role in its enforcement and interpretation. Article 1 of the code provides that "in the absence of any applicable legislation, the judge shall decide according to custom and failing custom, according to the principles of Islamic Law. In the absence of these principles, the judge shall have recourse to natural law and the rules of equity." Despite this invocation of Islamic law, one commentator argued that 1949 code reflected a "hodgepodge of socialist doctrine and sociological jurisprudence."

The Egyptian Civil Code has been the source of law and inspiration for numerous other Middle Eastern jurisdictions, including the pre-dictatorship kingdoms of Libya, Jordan and Iraq (both drafted by El-Sanhuri himself and a team of native jurists under his guidance), Bahrain, as well as Qatar (the last two merely inspired by his notions) and the commercial code of Kuwait (drafted by al-Sanhuri).

3. **Criminal Code.** Egypt based its criminal codes and court operations primarily on British, Italian, and Napoleonic models. Criminal court procedures had been substantially modified by the heritage of Islamic legal and social patterns and the legacy of numerous kinds of courts that formerly existed. The divergent sources and philosophical origins of these laws and the inapplicability of many borrowed Western legal concepts occasioned difficulties in administering Egyptian law.

4. **Family and Personal Status Law.** According to a 1995 law, the application of family law, including marriage, divorce, alimony, child custody, inheritance, and burial, is based on an individual's religion. In the practice of family law, the state recognizes only the three "heavenly religions": Islam, Christianity and Judaism. Muslim families are subject to the Personal Status Law, which draws on *Sharî'ah* (Islamic Law). Christian families are subject to canon law, and Jewish families are subject to Jewish law. In cases of family law, disputes involving a marriage between a Christian woman and a Muslim man, the courts apply the Personal Status Law.

In most Arab countries the personal status laws are based on the provisions of *Sharî'ah*. Yet, they differ according to the established Islamic doctrines. The Islamic *Sharî'ah* retains a great deal of diversity and flexibility and compatibility with the conditions of society in every age according to certain *Fiqh* rules highlighted in the Qur'an and the *Sunnah*. These laws were set down in Egypt in the first quarter of the 20th

century. Legislators at that time followed the most conservative *fiqh* traditions.

Organizing the personal status of Muslims in Egypt started in the early 20th century through a regulation for the organization of the *Sharî'ah* courts and other measures concerned. Two royal decrees were issued, dated 10 December, 1920, regarding family financing and some personal status matters and law no. 25 for the year 1929. Personal status laws have not changed since that times, although a number of amendments were introduced, the last by-law no. 100 for the year 1985.[57]

## 6.8 Islamic Law in Libya

Socialist People's Libyan Arab Jamahiriya is a military state in northern Africa on the Mediterranean; consists almost entirely of desert; a major exporter of petroleum. The legal system includes elements of French, Islamic and Italian law. Libya became a part of the Ottoman Empire in 1551. Following the Italia-Turkish War (1911-1912), Italy annexed Libya in 1934 after exiling the most resistant elements of Libyan society, led by the Sanusiyya. Libya remained an Italian colony until World War II when the Allied forces and Libyan returnee fighters ousted German and Italian forces, following which the British and French shared control over the region. Libya gained independence in 1951, under its first king, Syed Idris al-Sanusi. A military coup in 1969 brought an end to the monarchy, and a republic was established under Colonel Muammar al-Qaddafi. The Revolutionary Command Council established a Committee for the Codification of Personal Law in the early years following the revolution.

The Maliki school is the predominant *madhhab* in Libya. Libya also has a small Christian minority.

While the Committee was still in deliberation, the RCC issued a decree identifying *Sharî'ah* as the principal source of all legislation and establishing a High Commission to examine all existing legislation in order to make it consistent with *shar'î* principles. Legal provisions for the purpose of bringing legislation into accord with *Sharî'ah* were to be based on *takhayyur, maslahah*, and custom and usage where the Malikî is the predominant school. Some of the recommendations of the Personal Law Codification Committee lead to the passage of the Law on Women's Rights in Marriage and Divorce in 1972, introducing innovative provisions on *khul'*. The Penal Code 1953 was also amended by several laws passed in the early 1970s, making Libya the first country

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[57] Abdullahi Ahmed An-Na'im, *Islamic Family Law in a Changing World*, pp. 169-74; Yvonne Yazbeck Haddad and Barbara Freyer Stowasser, *Islamic Law and the Challenges of Modernity*, (Creek, CA: Alta Mira Press, 2004), pp. 21-99; Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge: Cambridge University Press, 1997); Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharî'ah into Egyptian Constitutional Law* (Leiden: Brill Academic Publishers, 2006); Zaid, *Reformation of Islamic Thought*, pp. 38-40.

to introduce *hadd* punishments by state legislation. Penalties for various crimes such as theft, *zinâ*, *qadhf* and artificial insemination, were introduced by the amendments, although commentators note that the punishments have rarely been applied in practice.

A new Family Law was enacted in 1984 which raised the marriage age, restricted polygamy and divorce, and to a lesser extent gave the spouses' equal mutual rights and obligations. Article 72 of the Family Law directs recourse to the sources of the *Sharî'ah* as a residual source of law in the absence of specific provisions in the legislation. Constitutional Status of Islamic Law: A Constitutional Proclamation was issued on 11th December 1969 and amended on 2 March 1977. Article 2 declares Islam the official state religion. The state also protects religious freedoms "in accordance with established customs". Article 37 of the Proclamation states that a permanent constitution is to be drafted, but it has yet to be produced. Article 2 of The Declaration on the Establishment of the Authority of the People issued in March 1977 provides that "[t]he Holy Qur'an is the Constitution of the Socialist People's Libyan Arab Jamahiriya". Colonel Qaddafi also elucidates his own political and social theories in the Green Book, based on a speech delivered in April 1975.

After the Revolution, Qaddafi abolished the dual system, and civil and *Sharî'ah* courts were merged in 1973. There are four levels of courts: summary courts, courts of first instance, appeal courts, and the Supreme Court. Courts of first instance have numerous divisions, including a personal status division. The courts of appeal (numbering three in 1987, at Tripoli, Benghazi and Sabha) and the courts of first instance are both constituted by three-judge panels with judgments confirmed by majority decisions. The *Sharî'ah* judges who once would have constituted the personnel of the *Sharî'ah* Court of Appeals now sit in the regular courts of appeal, specializing in *Sharî'ah* appellate cases. The Supreme Court has five chambers: civil and commercial, criminal, administrative, constitutional, and *Sharî'ah*.[58]

## 6.9 Islamic Law in Morocco

Morocco "*al-Maghreb*," officially the Kingdom of Morocco, is a country located in North Africa with a population of 33,757,175. It has a coast that stretches from the Atlantic Ocean past the Strait of Gibraltar into the Mediterranean Sea.[59]

Morocco has a dual legal system consisting of secular courts based on the French legal tradition and courts based on the Jewish and Islamic traditions.

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[58] Abdullahi Ahmed An-Na'im, *Islamic Family Law in a Changing World*, pp. 174-77.

[59] For a detailed information about Marocco, see: Jamil M. Abun-Nasr, *A History of the Maghrib in the Islamic Period*, (Cambridge: Cambridge University Press, 1987).

*The secular system* includes communal and district courts, courts of first instance, appellate courts and a Supreme Court. The Supreme Court is divided into five chambers: criminal, correctional (civil) appeals, social, administrative and constitutional. The Special Court of Justice may try officials on charges raised by a two-thirds majority of the full *Majlis*. There is also a military court for cases involving military personnel and occasionally matters pertaining to state security. The Supreme Council of the Judiciary regulates the judiciary and is presided over by the king. Judges are appointed on the advice of the council and judges in the secular system are university-trained lawyers. As of 1965 only Moroccans may be appointed as judges and Arabic is the official language of the courts.

Under French and Spanish rule, the colonial legal systems influenced local developments outside of the sphere of family law. *Sharî'ah* courts continued to apply Mâlikî *fiqh* during the first half of the century (in addition to local tribunals applying customary law). Following independence in 1956, a Law Reform Commission was established to draft a code of personal status. A code was passed into law within the next year, based on dominant Mâlikî doctrines as well as on *takhayyur*, *maslahah* and legislation from other Muslim countries (perhaps, most importantly, the Tunisian Code of Personal Status 1956). Article 82 of the Code states that "[w]ith regard to anything not covered by this law, reference shall be made to the most appropriate or accepted opinion or prevailing practice of the school of Imâm Malik." Major amendments to the Code's provisions relating to marriage guardianship, polygamy, *talaq* and *mut'ah al-talaq* were made in 1993 [60]

We can summarize the situation as follows:

The colonial legal system influenced the development of Morocco's legal system while *Sharî'ah* courts continued to apply Mâlikî *fiqh* to matters of family law, with local tribunals also applying customary law. Following independence in 1956, a Code of Personal Status (*al-Mudawwana*) was issued based on the dominant Mâlikî doctrine, adopting some provisions from other schools and legislation in neighboring countries. Major amendments were made to the MCPS in 1993.

The constitution was adopted on 10 March 1972 with major revisions in 1992 and 1996. Article 6 declares Islam to be the official state religion and guarantees freedom of worship for all citizens.

There are four levels of courts: 27 *sadad* courts, 30 regional courts, 9 courts of appeal and Supreme Court in Rabat [figures as of late 1980s]. The *sadad* and regional courts are divided into four sections: *Sharî'ah*; rabbinical; civil, commercial and admin-

[60] See Abdullahi Ahmad an-Na'îm, *Islamic Islamic Family Law in a Changing World*, pp. 178-81; Otto, *Sharî'a en Nationaal Recht*, pp. 43-78.