Continuity, Diversity and Change in the Islamic Legal Tradition

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Abstract

In the last few decades, Islamic law has experienced a revival and is exerting considerable influence on the legal systems of several countries in the Middle East and other parts of the world. Although the influence of the West on Islamic society brought about significant changes in many areas of the law and legal practice and there may be a greater or lesser degree of deviation from the core orthodox tenets of Islam, the law of Islamic countries cannot be said to have assimilated with Western law. Islamic law remains a living tradition which, like other traditions of law, has been dynamic to keep pace with the changing conditions and needs of the societies it serves. The present article outlines the historical origins of Islamic law and explores the cultural, socio-political and ideological factors that shaped its

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development. The nature of the sources of law is examined, with particular attention being paid to the role of Islamic jurisprudence in legal development. It is submitted that as Islamic societies continue to evolve, law will remain a central element in the ideological and political battle being fought between traditionalism and modernism under the impact of Western, international and transnational legal frameworks.

Keywords: Islam, Islamic law, sources of law, Islamic jurisprudence, schools of law, administration of justice, Western legal influence

Introduction

Islamic law is an expression of the religious faith and aspirations of the Muslim people. Total and unreserved submission to the will of Allah, the one true God and master, is the basic tenet of Islam. Islamic law defines the will of Allah in terms of a complete or comprehensive code of conduct covering all aspects of life. Known as 'Shari'a' ('path' or 'way' in Arabic), this law constitutes a divinely ordained path of life and conduct, guiding the Muslim towards the fulfilment of their religious belief in this life and reward from the Creator in the world to come.[1] Islamic law

1 Islam is translated in English as 'submission' or 'surrender' – the submission or surrender of individuals to the will of God. Shari'a provides the path to follow to achieve salvation. See J.L. Esposito (ed.), *The Oxford Dictionary of Islam*, Oxford, Oxford University Press, 2003, p. 144; J.L. Esposito, *Islam: The Straight Path*, New York, Oxford University Press, 1988, p. 14; C.B. Lombardi, 'Islamic Law as a Source of Constitutional Law in

offers an example of a system in which law and religion are inextricably linked. Unlike Western law, which distinguishes sharply between the religious and secular spheres, Islamic law is concerned both with the regulation of an individual's religious life and with the regulation of society.[2] In Islam the obligation to obey the law is not an obligation owed to the state or to another individual, but to Allah.[3] It is the duty of Muslims to live in accordance with the tenets of Islam and maintain harmony with God.[4] A further difference between the Western concept

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Egypt: The Constitutionalization of the Sharia in a Modern Arab State', *Columbia Journal of Transnational Law*, vol. 37, 1998, pp. 81–123 at p. 91; A.Z. Yamani, 'The Eternal Sharia', *New York University Journal of International Law and Politics*, vol. 12, no. 2, 1979, pp. 205–212.

2 As Bernard Weiss has remarked, "it is something of an oversimplification to equate the Shari'a with law. The Shari'a may indeed be said to contain law, but one must also recognize that it embraces elements and aspects that are not, strictly speaking, law." B. Weiss, *In Search of God's Law: Islamic jurisprudence in the writings of Sayf al-Dīn al-Āmidī,* Salt Lake City, University of Utah Press, 1992, p.1. According to Mohammed Iqbal, "In Islam it is the same reality which appears as Church looked at from one point of view and State from another. It is not true to say that Church and State are two sides or facets of the same thing. Islam is a single unanalyzable reality which is one or the other, as your point of view varies." M. Iqbal, *The Reconstruction of Religious Thought in Islam*, Gloucestershire, UK, Dodo Press, 2009, p. 181 (Original work published 1930).

3 As Noah Feldman has remarked: "Shariah, properly understood, is not just a set of legal rules. To believing Muslims, it is something deeper and higher, infused with moral and metaphysical purpose. At its core, Shariah represents the idea that all human beings – and all human governments – are subject to justice under the law. … The word "Shariah" connotes a connection to the divine, a set of unchanging beliefs and principles that order life in accordance with God's will." N. Feldman, 'Why Shariah?', *New York Times Magazine*, 16 March 2008, p. 46.

4 Islam teaches that human beings are distinguished from the other

of law and Islamic law is that the latter, like God Himself, is eternal and immutable, not in letter but in spirit. While human interpretations of Islamic law may vary, the actuality of the law remains constant.[5] As an expression of the divine will, the law exists independently of human structures, and cannot be altered by human action, such as by parliamentary enactment or government decree. This notion was long ago abandoned in the West, when the law was secularized and became the concern of the state rather than the church. Furthermore, the main focus of Islamic law is on the responsibilities of individuals, rather than on the protection of personal or property rights and interests.

Like other systems of law, the Islamic legal system is dynamic: in the course of its long history, it has evolved and adapted to meet the needs of the diverse societies it serves. Divine revelation furnishes the principles and mechanisms for its renewal in order for the system to adapt to changing social conditions. Since the advent of Islam in the early seventh century AD, Islamic jurists have constantly re-examined the

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creations of God by the fact that they alone have the capacity of rational thinking and thus also the ability to ascertain the divine dictates. Consider on this W.T. Chan, I.R. al Faruqi, and P.T. Raju, *The Great Asian Religions: An Anthology*, New York, Macmillan, 1969, p. 309.

5 See M.H. Kamali, 'Sources, Nature and Objectives of Shari'ah', *The Islamic Quarterly*, vol. 33, 1989, pp. 215–236 at pp. 216–217 and 230. According to Zweigert and Kötz, "Islamic law is in principle immutable, for it is the law revealed by God. Western legal systems generally recognize that the content of law alters as it is adapted to changing needs by the legislator, the judges, and all other social forces which have a part in the creation of law, but Islam starts from the proposition that all existing law comes from Allah who at a certain moment in history revealed it to man through his prophet Muhammad." K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd edn., Oxford, Clarendon Press, 1998, pp. 304.

application of the system to make sure that it remains a living and workable legal system.[6] Gradually, these jurists developed an impressive body of doctrine, and by the end of the tenth century, the Shari'a had been given a clear formulation in legal texts. Throughout the Middle Ages this basic doctrine was elaborated and systematized in legal manuals and commentaries, and the vast body of literature produced came to be regarded as an authoritative expression of Shari'a law. As an expression of the ideal Islamic way of life, this traditional Shari'a doctrine must be the focus of any inquiry into Islamic law. It should be noted, however, that for two main reasons, the medieval legal texts do not provide a complete picture of the laws governing Muslim communities today. First of all, law in contemporary Islam is not exclusively Islamic. Inevitably, in Islamic countries there has been a degree of tension between the idealism of religious doctrine and the demands of social, political and economic reality. Thus, out of practical necessity, Islamic states and societies have adopted and implemented laws whose terms do not fully correspond to the religious doctrine found in the medieval legal manuals. In most Islamic countries today, a large part of legal relations is governed by legal rules and principles derived from foreign, and especially European, sources. The second reason why the medieval Shari'a texts can no longer be regarded as full authorities in the context of modern law has to do with the fact that, in many Muslim countries, laws

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6　On the concepts of renewal (*tajdid*) and reform (*islah*) in the Islamic tradition consider J.O. Voll, 'Renewal and Reform in Islamic History: Tajdid and Islah', in J.L. Esposito (ed.), *Voices of Resurgent Islam*, New York, Oxford University Press, 1983, pp. 32–47. And see T. Ramadan, *Radical Reform: Islamic Ethics and Liberation*, New York, Oxford University Press, 2009, pp. 12–13.

are now in force which are at variance with the dictates of the traditional authorities – laws which, nevertheless, purport to represent a legitimate version of Allah's law. In other words, there are significant religious divisions within the Islamic world, such as the division between Sunni and Shia Islam.[7] Behind this complex diversity of current legal practice, the Shari'a stands as a symbol of the ideological unity of all Islamic communities and, in so far as it is applied in practice, can be regarded as the 'common law' of the Islamic world. As Asaf Fyzee has pointed out:

Islamic law is not a systematic code, but a living and growing organism; nevertheless there is amongst its different schools a large measure of agreement, because the starting point and the basic principles are identical. The differences that exist are due to historical, political, economic and cultural reasons, and it is, therefore, obvious that this system cannot be studied without a proper regard to its historical development.[8]

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7 The schism between these branches of Islam originated in a dispute over who should succeed the Prophet Muhammad as leader of the Islamic faith. The Shia insisted that the leadership should remain within the family of the Prophet (represented by his cousin Ali), while the Sunnis did not insist on this. Consider on this issue F.M. Donner, 'Muhammed and the Caliphate: Political History of the Islamic Empire up to the Mongol Conquest', in J.L. Esposito (ed.), *The Oxford History of Islam*, Oxford, Oxford University Press, 1999, pp. 1–62 at p. 1.

8 Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, London, Oxford University Press, 1964, p. 1.

Origins, Evolution and Sources of Islamic Law

The first Muslim community was established in Medina, a city in Arabia, under the leadership of the Prophet Muhammad in 622 AD. To these early Muslims Islam meant obedience to the will of Allah as conveyed to them through his messenger, the Prophet Muhammad, in a series of revelations. These revelations, which occurred throughout Muhammad's lifetime, were collected and written down in the Qur'an (or Koran), the Muslim holy book.[9] A number of scholars assert that Muhammad composed the Qur'an himself, and recognize that the existing text is genuine and unaltered, that is, it is written exactly as it was dictated to the Prophet's scribes.[10] In the eyes of Muslims, the Qur'an is the actual verbatim revelation from Allah, sent down upon Muhammad through the agency of the angel Gabriel, as Muhammad was illiterate and could not have composed the work himself.[11] Muslims regard the Qur'an as the last revelation that God sent to mankind and as the culmination of a long evolutionary process of revelation.[12]

As the very word of Allah, the Qur'an is, historically and ideologically, the primary expression and source of Islamic law.[13] But the

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9 The Qur'an is divided into 30 main parts of approximately equal length, which together contain 114 chapters, or surahs, which in turn are divided into more than 6,616 verses, or ayahs, of a few lines each. See I.R. Faruqi and L.L. Faruqi, *The Cultural Atlas of Islam*, London, Macmillan, 1986, p. 100.

10 See W. Muir, *The Life of Mohammad*, Edinburgh, John Grant, 1923, p. xxviii.

11 See Donner, 'Muhammed and the Caliphate', pp. 6–7.

12 This process encompasses a series of revelations sent to earlier prophets, such as the Psalms of David, the Torah of Moses, and the Bible of Jesus. See Donner, 'Muhammed and the Caliphate', p. 7.

13 H. Ahmad, *The Early Development of Islamic Jurisprudence*, Islamabad,

Qur'an is not a legislative document – it can only be used, in combination with other sources, as a basis on which to construct a body of law.[14] The Qur'an lays down guidelines, moral precepts and principles of a general nature aiming at the realization of an ideal civilized society.[15] Most of its rules were concerned with providing practical solutions to concrete problems and were intended at modifying or reforming the customary tribal law of Arabia, rather than at replacing that law with an entirely new system.[16] It could be said that the existing institutions of customary

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Islamic Research Institute, 1970, pp. 12–20.

14 Only about 3 percent of the Qur'an deals with matters considered in the West to be related to law. Family relationships are regulated in 70 verses; private and commercial transactions are covered in about 70 verses; matters relating to crime and punishment are addressed in 30 verses; constitutional and fiscal matters are touched upon in 20 verses; and about the same number of verses can be considered to be related to international law. See M.H. Kamali, 'Law and Society: The Interplay of Revelation and Reason in the Shariah', in J.L. Esposito (ed.), *The Oxford History of Islam*, Oxford, Oxford University Press, 1999, pp. 107–153 at pp. 119–120.

15 The Qur'an describes certain acts as prohibited, obligatory, recommended, and discouraged. Among other things, it commands the believers to pray, to fast during the month of Ramadan, to return property held in trust to its rightful owner and to duly discharge one's contractual obligations. It also commands the believers to abstain from consuming wine, from gambling and from committing adultery. Polygamy is allowed (a husband could have up to four wives at the same time), provided that the husband treats his wives with equal respect. However, nothing is said about the precise legal significance of this norm or about the remedies that may be available to a wife in the event of its violation.

16 For example, under the patriarchal customary law of Arabia, the right of a husband to end his marriage at will by simply repudiating his wife was well established. The Qur'an makes no attempt to deprive the husband of this power. It simply urges the husband not to abuse it (it speaks of 'releasing wives with prudence' and of 'making a fair provision' for wives

law were subjected to new moral standards – standards which were directed primarily to the individual's conscience.

Until about 660 AD the community of Medina continued to be the center of Muslim activity. During his lifetime, Muhammad acted not only as the spiritual and temporal leader of the community, but also as its supreme judge and arbiter, offering solutions to legal problems as and when they arose by interpreting the relevant revelations in the Qur'an.[17] Muhammad also relied extensively on consultation with his companions and community elders in formulating legal opinions and providing advice. After the death of the Prophet in 632AD, judicial power was assumed by his companions, who extrapolated, inferred and deduced legal norms from their knowledge of the first principles of the Islamic belief system, especially those derived from the Qur'an and the ***Sunnah***, the precedents, practices and sayings of Prophet Muhammad enunciating and explaining the postulates of the Qur'an.[18] Included among them were the four caliphs,[19] who succeeded Muhammad to political leadership.[20] The

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who are repudiated).

17 See Fyzee, *Outlines of Muhammadan Law*, pp. 31–32; Faruqi and Faruqi, *The Cultural Atlas of Islam*, p. 274.

18 Consider Ahmad, *The Early Development of Islamic Jurisprudence*, p. xiv; Kamali, 'Law and Society', p. 111.

19 The term Khalifa Rasoul Allah or simply Khalifa denotes the successor of the messenger of God.

20 These caliphs, referred to in the Islamic tradition as 'patriarchal Caliphs', were Abu Bakr (reigned 632-634), Umar Bin Al-Khattab (reigned 634-644), Uthman Bin Affan (reigned 644-656) and Ali Bin Abi Talib (reigned 656-661). The age of these caliphs is regarded as the golden age of Islam. See Kamali, 'Law and Society', pp. 111–112. Umar Bin Al-Khattab, the second of the above-mentioned caliphs, designated the legal opinions of some of Prophet's companions as an additional source that could be drawn upon by

teaching and decisions of the Prophet's companions and the caliphs marked the beginning of the development of a vast body of legal norms, which supplemented and expanded the general precepts of the Qur'an.

A fundamental problem facing Muhammad and his successors in their judicial capacity was precisely determining the relationship between the rules of the Qur'an and the traditional norms and standards of Arab customary law. As scholars have observed, Qur'anic law was not a legislative revolution that sought to eliminate the entire body of norms known and applied by the Arabs before its emergence. Quite the opposite, the Prophet, in his capacity as Islam's supreme judge, issued innumerable rulings on diverse legal issues recognising and legalising Arab customary practices. In the domain of family law, especially in matters of marriage and divorce, the Prophet approved one of several systems that were known to the Arabs before the rise of Islam, while other systems were disapproved and hence declared illegal.[21]

One of the areas in which the conflict between Qur'anic law and Arab customary law was evident was inheritance. In pre-Islamic Arab tribal society, a tribe was patriarchal and patrilinear: its solidarity was derived from the ties of kinship existing among a group of males who traced their descent, through male links, from a common ancestor. In this system succession to property on death was traditionally limited to male agnate relatives. However, the Qur'an emphasized the close family ties that existed between parents and their children and envisioned a

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later jurists. See Faruqi and Faruqi, *The Cultural Atlas of Islam*, p 275; C.E. Bosworth, *New Islamic Dynasties: A Chronological and Genealogical Manual*, Edinburgh, Edinburgh University Press, 1996, pp. 1–2.

21 Consider on this matter T. Mahmood, 'Custom as a Source of Law in Islam', *Journal of Indian Law Institute*, vol. 7, 1965, pp. 102–106.

closer group or family unit – one in which the woman was given a higher and more responsible position – as the proper unit of Muslim society. Thus, the Qur'an gave inheritance rights to certain close female relatives – the wife, daughter, mother and sister – setting fixed fractional portions of the property as their entitlement. However, the absence in the Qur'an of specific regulations concerning the inheritance rights of male agnate relatives created problems regarding the relationship between the old traditional heirs and the new heirs nominated by the Qur'an. Because inheritance rights were closely connected with the structure of family ties and responsibilities, and because the influx of new wealth from military conquests had given rise to a popular concern about the rules governing the distribution of wealth, these problems were considered particularly important. The decisions of Muhammad and the caliphs in relevant cases shed light on the process of early legal development in this area. Out of these decisions emerged what is sometimes described as the golden rule of Islamic inheritance law, namely that those relatives designated by the Qur'an should get their prescribed portions first and the male agnates should then get what is left.[22] In this way the two distinct classes of heirs – the new Islamic heirs and the traditional

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22 To illustrate this point, reference may be made to the case of Sa'd, a close companion of the Prophet Muhammad, who died in battle defending Islam. Sa'd's widow appeared before the Prophet and complained that she and her daughters had no means to support themselves as her husband's entire estate went to his brother in accordance with the rules of customary law that prevailed at that time. Under divine inspiration, the Prophet determined that Sa'd's widow was entitled to one eighth of the estate, the two daughters to two thirds, and Sa'd's brother to the remaining share of the estate. Consider N.J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, Chicago, University of Chicago Press, 1969, pp. 10–11.

customary law heirs – were merged into one integrated system of succession. It should be added here that in case of uncertainty the early authorities saw fit to interpret the Qur'anic principles in the light of accepted standards of the customary law. Thus, the Qur'anic heirs were superimposed on the customary system and were confined to the portions prescribed for them by the Qur'an.[23] This restrictive interpretation of the Qur'anic provisions and the perpetuation of the traditional standards of customary law was not limited to the law of inheritance but was a central feature of legal progress in the early Islamic era. In this connection, some reference to the early development of Islamic criminal law can also be helpful.

The norms of pre-Islamic customary law relating to crimes allowed the victim's tribe to exact blood revenge against the tribe of the alleged offender (*talio* or *lex talionis*). Retaliation for murder was death; for theft, amputation of the hand; and for adultery, stoning to death. The form of retaliation exacted varied depending on the relative social status of the tribes concerned: a socially superior tribe could impose a more severe penalty on an inferior one. This system of blood revenge often resulted in escalating cycles of retaliation and tribal violence. Although the parties could choose to arbitrate the dispute and address the grievance through

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23 On the rules governing succession in Islamic law see generally H. Khan, *The Islamic Law of Inheritance*, Oxford, Oxford University Press, 2007; D.S. Powers, *Studies in Qur'ān and Ḥadīth: The formation of the Islamic law of inheritance*, Berkeley, University of California Press, 1986; D.S. Powers, 'The Islamic Inheritance System: A Socio-Historical Approach', *Arab Law Quarterly*, vol. 8, no. 1, 1993, pp. 13–29; S.S. Hussaini, *The Laws of Inheritance in Islam*, 2nd edn., Denver, Co, Outskirts Press, 2007; N.J. Coulson, *Succession in the Muslim Family*, Cambridge, Cambridge University Press, 2008.

mutually agreed upon compensation, arbitration was usually a last resort after a protracted conflict.[24] The norms and practices of Arab customary law provided the basis of much of Qur'anic criminal law and justice system. At the same time, however, Qur'anic law introduced significant reforms: blood revenge was abolished and uniform criminal offences, procedures and penalties were created, which emphasized individual rather than collective responsibility.[25]

During the late seventh and eight centuries, under the leadership of the Umayyad dynasty (661-750 AD), Islam was transformed from the small and closely-knit community of Medina into a vast military empire with its central government in the city of Damascus.[26] Governors were appointed to manage the affairs of the conquered provinces, and it became common practice for them to delegate their judicial powers to officials known as *qadis*, or judges.[27] The function of the *qadis* was limited to dealing with conflicts among Muslims within their territorial jurisdiction. Members of non-Muslim communities were subject to their own laws and established court systems. The *qadis'* decisions were based

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24 M. Sharif, *Crimes and Punishment in Islam*, Lahore, Institute of Islamic Culture, 1972, pp. 7–10.

25 Consider in general M. Khadduri, *The Islamic Conception of Justice*, Baltimore, Johns Hopkins University Press, 1984.

26 The Umayyad Dynasty, the first dynasty to assume the title of Caliphate, was established in 661 AD by Muawiya, who had served as governor of Syria after the death of the fourth caliph, Ali. The Umayyads ruled effectively and firmly established their political authority over an empire that comprised North Africa, Spain, parts of the Indian subcontinent and several islands in the Mediterranean. On the Umayyad Dynasty see Bosworth, *New Islamic Dynasties*, pp. 3–5.

27 See M. Shapiro, 'Islam and Appeal', *California Law Review*, vol. 68, no. 2, 1980, pp. 350–381 at p. 364.

on 'sound opinion' (*ra'y*) as derived from the precepts of the Qur'an, the rulings handed out by earlier religious leaders, administrative regulations and local customs and laws.[28] Each case was decided on its own merits, and no attempt was made to develop a consistent methodology or to meticulously follow precedent. It was the activities of these Islamic judges that created an increasing diversity in Islamic legal practice. This was due to the fact that the extent to which decisions were based on the text of the Qur'an, or on the precedents of the early authorities, depended on the degree of knowledge and piety possessed by the individual *qadi*. Moreover, the process of interpretation of the relevant rules often gave rise to differences of opinion, even among the judicial authorities of the same region.[29] Another reason behind the diversity that existed in legal practice had to do with the fact that the *qadis* saw

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28 The *qadis* had a duty to render a judgment consistent with the fundamental Qur'anic principles. Although there was no appeal from a *qadi*'s decision, a defendant found guilty in a criminal case could appeal to the ruler after the execution of the sentence. If it was determined that the defendant was wrongfully punished, the *qadi* was dismissed from office and the same penalty which was wrongfully imposed on the defendant was inflicted upon him; also, the defendant was compensated. See O.A. al-Saleh, 'The Right of the Individual to Personal Security in Islam', in C. Bassiouni (ed.), *The Islamic Criminal Justice System*, New York, Oceana Publications, 1982, pp. 55–90 at p. 84.

29 For example, Ibn Hujayra, who was *qadi* of Cairo from 680 to 702 AD, considered the Qur'anic rule requiring husbands to make a 'fair provision' for the wives they repudiated as obligatory and fixed the relevant amount at three dinars. In 733 AD another *qadi* of Cairo, Tawba ibn Namis, ruled that the Quranic injunction was directed only at the individual's conscience and that a husband who refused to pay compensation could not be compelled to do so. However, under Tawba's successor, payment once again became legally obligatory.

themselves as representatives of local customary law, which varied considerably from place to place.[30] It should be added here that it was largely through this recognition of local norms and standards that elements of Byzantine Roman law as well as Persian law were incorporated into Islamic legal practice in the lands conquered by the Arabs. As a result of these diverse influences and local standards, during the late seventh and eighth centuries Islamic legal practice lost much of the unity and cohesion it had enjoyed during the early Medinan age.

During the eighth century AD, the rising tide of hostility against the Umayyad regime, accused of losing sight of the fundamental principles of religion, found particular expression in legal thought. Muslim scholars concluded that the practices of the Umayyad courts had failed to implement the spirit of the Qur'an and its injunctions and began to give voice to their ideas about standards of behaviour that would represent the systematic fulfilment of true Islamic religious ethics. These scholars, often gathered in loose brotherhoods, formed what can be described as early schools of Islamic law. The rise of these scholars marks the beginning of Islamic jurisprudence (*fiqh*) and their role grew in importance after the rise to power of the Abbasid dynasty in the mid-8th century AD.[31] The Abbasids provided political support to the Islamic

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30 For example, in Medina, where society had retained the traditional standards of Arab tribal law, no woman could marry without the express permission of her guardian. In the most cosmopolitan Iraqi region of Kufa, on the other hand, women could marry without the intervention of their guardians.

31 The Abbasid dynasty headed a large section of the Muslim community for five centuries from its capital Baghdad. The fifth caliph of the Abbasid dynasty, Harun al-Rashid (786–809), is considered one of history's greatest patrons of the arts and sciences. Under his rule, Baghdad became the

schools and appointed religious scholars as *qadis* and as legal advisors to the caliphate. From that time legal scholars, referred to as *faqih*, were recognized as the architects of a new Islamic scheme of state and society, for it fell to them to systematize the legal doctrine to be applied by the *qadis*.[32]

Fiqh literally means profound understanding. In a broader sense, this term refers to the process of deducing and applying the principles and rules of Shari'a law in real or hypothetical situations. Furthermore, the same term is sometimes used to denote the entire body of laws derived from the Shari'a through the use of *fiqh* methodologies.[33] *Fiqh*'s objective is to demonstrate the practical application of Shari'a in all fields of social life and law, including religion, politics, civil relationships, criminal wrongdoing, the administration of justice and the conduct of war. According to classical Islamic scholars, *fiqh* has two aspects: (a) the science of jurisprudence (*usul al-fiqh*: the roots of *fiqh*), concerned with the primary sources from which the rules of human conduct are derived and the methods and principles of interpretation used in discovering the rules of law; and (b) the (changeable) rules of positive law governing social activities and the actual decisions deriving from the application of the

world's most important center for science, philosophy, medicine, and education. On the Abbasid Dynasty see Bosworth, *New Islamic Dynasties*, pp. 6–10.

32 Consider Kamali, 'Law and Society', pp 110–116

33 The principal difference between *fiqh*-based rules and Shari'a-based rules is that the latter are not changeable or even negotiable, whereas the former are flexible and changeable in accordance with different circumstances and customs, provided that such customs do not contradict the Shari'a.

usul al fiqh (*furu' al-fiqh*).[34]

Of the many schools of law that existed in the Islamic world at that time, the most influential were the ***Hanafi*** School, established in Kufa (Iraq), and the *Maliki* School, established in Medina.[35] The ultimate goal of these schools was the same: to formulate the ideal form of Islamic law. Thus, legal institutions and practices were systematically reviewed in the light of the fundamental principles enshrined in the Qur'an and early precedents, and were approved or rejected on that basis.[36] But because, within the limits set, individual jurists were free to exercise their personal reasoning, and because the thinking of jurists naturally depended on the social environment in which they lived, the body of legal doctrine developed in the school of Medina was different in some

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34 See Kamali, 'Law and Society', p. 110; Irshad Abdal-Haqq, 'Islamic Law: An Overview of is Origin and Elements', *Journal of Islamic Law and Culture*, vol. 7, no. 1, 2002, pp. 27–81 at p. 50; M.C. Bassiouni and G.M. Badr, 'The Shari'ah: Sources, Interpretation, and Rule-Making', *UCLA Journal of Islamic and Near Eastern Law*, vol. 1, 2002, pp. 135–181 at pp. 135–137. And see Wael B. Hallaq, 'Usul Al-Fiqh: Beyond Tradition', *Journal of Islamic Studies*, vol. 2, 1992, pp. 172–202.

35 According to the Islamic jurist Muhammad Iqbal, "[F]rom about the middle of the first century up to the beginning of the fourth not less than nineteen schools of law and legal opinion appeared in Islam. This fact alone is sufficient to show how incessantly our early doctors of law worked in order to meet the necessities of a growing civilization." Iqbal, *The Reconstruction of Religious Thought in Islam*, p. 131.

36 Islamic scholars embraced the view that humanity's understanding of the Shari'a, as the revealed word of God, is imperfect and fallible. According to them, the role of human reason is to rectify man's faulty understanding of the revealed truths. In this respect, no contradiction exists between revelation and reason. Consider Faruqi and Faruqi, *The Cultural Atlas of Islam*, p. 265.

important respects from that of Kufa. Thus, apart from the common ground established by the express provisions of the Qur'an and the precedents of the early authorities, local customs influenced legal thought and doctrine just as they had influenced the judgments of the *qadis* of the Umayyad era. The mutual tolerance of the various schools' divergent views was ensured by their common recognition of the four basic sources from which the rules of Islamic law could be derived, namely, the Qur'an, the *Sunnah*, the consensus of the scholars (*ijma*) and analogical reasoning (*Qiyas*). These sources of law were complemented by local custom (*urf*)[37] and the independent reasoning or intellectual endeavour (*ijtihad*) by individual jurists to extract solutions to problems not explicitly addressed in the primary sources.[38] The unity of the Islamic legal system was based on an agreement among the schools about the sources of law and an acceptance of a diversity of doctrine. It should be noted here that judicial decisions were not recognized as a source of Islamic law, ensuring that the development of the law would be grounded in theological and intellectual consistency rather than social utility

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37 Custom is defined as a body of unwritten norms formed by the recurrence of certain practices during a long period of time. These norms are incorporated into the law through judicial decisions and the consensus of the scholars (*ijma*). As indicated earlier, Islamic jurisprudence treats local custom as a source of law only when it does not contradict Islamic rules and principles derived from the primary sources. On the role of custom consider G. Libson, 'On the Development of Custom as a Source of Law in Islamic Law', *Islamic Law and Society*, vol. 4, no. 2, 1997, pp. 131–155; A. Shabana, *Custom in Islamic Law and Legal Theory: The Development of the Concepts of 'Urf and 'Ādah in the Islamic Legal Tradition*, New York, Palgrave Macmillan, 2010.

38 See Bassiouni and Badr, 'The Shari'ah', pp. 140–141.

considerations.

In the late eighth and ninth centuries special attention was given by jurists to the question of the authority of doctrine and the sources from which it came. This jurisprudential debate caused further conflict and difference of opinion both between and within the various schools. At its core, the debate focused on the scope to be allowed to the personal reasoning of the jurists in their attempt to ascertain or elucidate the terms of Allah's will.[39] The initially recognized freedom of speculation in the absence of any explicit text of divine revelation began to be questioned. Many argued that reasoning should become more disciplined and that it should be based on deduction by analogy from established norms. A very radical attitude was adopted by the so-called 'Defenders of Traditions.' This group of scholars argued that the use of legal reasoning in any form was both unwarranted and unnecessary. They insisted that, apart from the Qur'an, the only true source of legal injunctions lay in the recorded words and acts of the Prophet Muhammad (*Sunnah*), the chosen instrument of Allah and the only person qualified to interpret and explain Allah's will.[40] The *Sunnah* was witnessed, memorized and transmitted orally until the third century of Islam (816-913 AD), when it was compiled into collections of traditions referred to as *ahadith* (singular, *hadith*) describing what the Prophet had

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39 Islamic scholars believed that, unlike revelation, humanity's understanding of the fundamental precepts of the Shari'a is fallible. According to them, no contradiction exists between revelation and reason, whose task is to correct man's erroneous understanding of the revealed truths. See Faruqi and Faruqi, *The Cultural Atlas of Islam*, p. 265.

40 J. Schacht, *An Introduction to Islamic Law*, New York, Oxford University Press, 1982, pp. 34–36.

said or done on specific occasions. The ***ahadith*** draw on oral transmissions through a chain of named narrators back to one who may be considered a reliable witness of what the Prophet in fact said or did.[41] The jurist's task was simply to discover the ***Sunnah*** through the study of the ***ahadith*** rather than to engage in speculative reasoning about what Allah's law might be. The conflict between speculative jurisprudence and the 'Defenders of Traditions' was connected with the fundamental problem of Islamic jurisprudence, namely, the problem concerning the nature of the relationship between divine revelation and human reason in the sphere of law. It was at this point that the famous jurist Mohammed Al-Shafi'i – probably the most important figure in the history of Islamic jurisprudence – appeared on the scene.

Al-Shafi'i (767-820 AD) was the first jurist to systematically and unequivocally articulate the principle that certain knowledge of Allah's law could only be gained through divine revelation. He argued that apart from the Qur'an, the only other legitimate source of legal norms was the ***Sunnah*** of the Prophet Muhammad, that is, the totality of what the Prophet did, said or consented to during his lifetime.[42] In cases involving problems not clearly resolved by the Qur'an or the ***Sunnah***, Al-Shafi'i accepted the need for reasoning, but only in the strictly disciplined and

41 The *ahadith* are ranked according to their presumed degree of reliability and authenticity as sound (*sahih*), good (*hasan*) and weak (*daif*). See M. Ruthven, *Islam in the World*, New York, Oxford University Press, 1984, pp. 148–156. In the course of time, six *ahadith* were recognized as the most authoritative (*sihah*), namely, those of al-Bukhari, Muslim, Abu Dawud, al-Tirmidhi, al-Nasa'i, Ibn Majah. Consider Faruqi and Faruqi, *The Cultural Atlas of Islam*, p. 114.

42 See Esposito, *The Oxford Dictionary of Islam*, p. 305.

subsidiary form of reasoning by analogy (*Qiyas*), and the role of scholarly consensus (*Ijma*). According to him, the function of jurisprudence was not to create new law, but merely to discover the law from the substance of divine revelation and, where necessary, to apply its principles to new cases by analogical reasoning. By formulating a general theory about the sources of law, Al-Shafi'i brought to Islamic jurisprudence a degree of uniformity, which was lacking in earlier epochs. As mentioned earlier, legal diversity was the result of the recognition in early jurisprudence and the practice of law of local and personal criteria. Al-Shafi'i was able to replace the local and limited elements in jurisprudence with concepts of a universal validity and application.[43]

Following Al-Shafi'i's approach, scholars devoted themselves to the task of documenting the *Sunnah* (Muhammad's practice), through the collection and systematization of the traditions (*ahadiths*). After Al-Shafi'i's death, two new schools of law were established, in addition to the existing ones. Those who were willing to accept unconditionally the exact terms of Al-Shafi'i's doctrine formed the Shafii School. On the other hand, jurists who sought to carry the doctrine of the authority of the

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43 The following is an extract from Al-Shafi'i's *Risala*, a work he composed in Cairo at the beginning of the ninth century AD: "On all matters concerning which God provided clear textual evidence in His Book or [a sunna] uttered by the Prophet's tongue, disagreement among those to whom these [texts] are known is unlawful. As to matters that are liable to different interpretations or derived from analogy, so that he who interprets or applies analogy arrives at a decision different from that arrived at by another, I do not hold that [disagreement] of this kind constitutes such strictness as that *arising from textual* [evidence]." See M. Khadduri (trans.), *al-Shafii's Risala: Treatise on the Foundation of Islamic Jurisprudence*, 2nd. edn., Cambridge, Islamic Texts Society, 1961, reprinted 1997, p. 333.

traditions (*ahadiths*) to even more rigid extremes formed the Hanbali School. The founder of the latter School, Ahmad ben Hanbal (9th century AD) rejected the role of human reason in any form (including reasoning by analogy) in the legal process and insisted that every legal rule must be supported by an authority that could be found only in the Qur'an or the *Sunnah*. Over time, however, the jurists of the Hanbali School gradually modified their original position and came to recognize that analogical reasoning was a necessary tool for the elaboration of law. Earlier schools of thought, such as the Maliki School and the Hanafi School, also managed to reconcile their approach to law with the fundamental tenets of Al-Shafi'i's doctrine. By the end of the ninth century AD, Islamic jurisprudence as a whole had managed to absorb Al-Shafi'i's teaching in a form acceptable to all the major schools (*mathhabs*).[44] The four principal schools of Islamic jurisprudence (Hanafi, Maliki, Shafii and Hanbali) exerted a strong influence on legal thought and practice, and courts in various regions of Islam gradually began to apply the doctrine or approach of one school or another. The Hanafi school prevailed in the Middle East and the Indian subcontinent; the Maliki School was particularly influential in North, West and Central Africa; and the Shafii School played a dominant role in East Africa, parts

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44 George Makdisi observes that the scholastic method of disputation and instruction developed by Islamic scholars in the ninth century was later employed by jurists in the universities of Bologna, Paris, Oxford and other early European universities. See G. Makdisi, 'The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court', *Cleveland State Law Review*, vol. 34, no. 3, 1985, pp. 3–18. And see G. Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West*, Edinburgh, Edinburgh University Press, 1981.

of the Arabian Peninsula, Malaysia and Indonesia. In the eighteenth century the doctrine of the Hanbali School was accepted and applied by the courts in most of the Arabian Peninsula.[45]

The process of endeavouring to comprehend the commands of divine law and construct rules consistent with the first principles of Islam was called *ijtihad*.[46] In determining the course that this process should follow, Muslim jurists followed Al-Shafi'i's doctrine. The *mujtahid* – the scholar exercising *ijtihad* – must first seek the solution to a legal problem in the Qur'an or *Sunnah* and, if no solution could be found there, must use the method of reasoning by analogy (*qiyas*). *Qiyas* was defined as the process of reasoning from a known injunction to a new injunction. By applying this method, jurists could extend the rulings of the Qur'an and *Sunnah* to new problems, provided that the earlier case or precedent and the new problem shared the same operative or effective cause.[47]

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45 On the schools of Islamic jurisprudence see in general Kamali, 'Law and Society', pp. 112–113; V.J. Cornell, 'Fruit of the Tree of Knowledge: The Relationship Between Faith and Practice in Islam' in J.L. Esposito (ed.), *The Oxford History of Islam*, Oxford, Oxford University Press, 1999, 63-106 at 94-95; P. Bearman, R. Peters, and F. Vogel (eds.), *The Islamic School of Law: Evolution, Devolution and Progress*, Cambridge MA, Harvard University Press, 2005.

46 On the role of *ijtihad* see Bassiouni and Badr, 'The Shari'ah', p. 173.

47 See J. Makdisi, 'Legal Logic and Equity in Islamic Law', *The American Journal of Comparative Law*, vol. 33, 1985, pp. 63–78. On the nature and role of *qiyas* see generally A. Hasan, 'The Definition of Qiyas in Islamic Jurisprudence', *Islamic Studies*, vol. 19, no. 1, 1980, pp. 1–28; W.B. Hallaq, 'Legal Reasoning in Islamic Law and the Common Law: Logic and Method', *Cleveland State Law Review*, vol. 34, 1985, pp. 79–96.

Qiyas encompassed argument *a fortiori*,[48] *reductio ad absurdum*,[49] and induction.[50] When exercising *ijtihad*, a scholar had to take into account the six higher purposes or objectives of the Shari'a (*maqasid al shari'a*), namely, the preservation of life, property, family, religion, honour or dignity and reason.[51] In regulating the effect of *ijtihad* and assessing its results, jurists extended Al-Shafi'i's doctrine by adding the doctrine of *ijma*. *Ijma*, as defined by classical jurists, is the agreement of the qualified scholars in a given generation on issues on which neither the Qur'an nor *Sunnah* provides guidance. A consensus of opinion was accepted to produce certain knowledge of Allah's will.[52] But where no consensus is actually reached, differing views are recognized as equally valid attempts

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48 Argument *a fortiori* is a form of argument that draws upon another argument that is so strong as to make it unanswerable. This kind of argument has two versions, namely, argument *a maiore ad minus*, and argument *a minore ad maius*. The argument *a maiore ad minus* describes an argument from the bigger or more general to the smaller ore more specific. The argument *a minore ad maius*, on the other hand, claims that what is true on a small or specific scale is true on a larger or more general scale.

49 The refutation of a proposition by showing that the conclusion to which it would logically lead would be absurd.

50 Induction is a method of reasoning from a part to a whole, from the specific to the general, or from the individual to the universal.

51 Kamali, 'Sources, Nature and Objectives of Shari'ah', pp. 224 and 229.

52 True consensus presupposes: (a) participation of a reasonable number of qualified scholars; (b) a unanimous decision; and (c) an unequivocal statement of agreement by each jurist. See Schacht, *An Introduction to Islamic Law*, p. 30. On the concept of *ijma* consider also B.K. Freamon, 'Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence', *Harvard Human Rights Journal*, vol. 11, no. 1, 1998, pp. 1–64; I.A.K. Nyazee, *Islamic Jurisprudence*, Islamabad, International Institute of Islamic Thought, 2000, pp. 182–194.

at discovering the divine will.[53]

As stated earlier, the doctrines of the four major schools of Islamic jurisprudence were considered equally legitimate, under the doctrine of *ijma* or consensus. But *ijma* also functioned as a prohibitive and exclusive principle. Once *ijma* had cast its umbrella of infallible authority not only over those points which were the subject of consensus, but also over existing divergent opinions, the situation was deemed irrevocably validated and any other variation of opinion was considered contrary to *ijma* – the infallible expression of God's will. Those who held such an opinion were guilty of heresy. Thus, the right to seek through an independent effort (*ijtihad*) the law of Allah withered away. By the end of the tenth century Islamic jurisprudence had recognized that the creative

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53　It should be noted here that, since the time of the Prophet and his companions, a universal consensus has proven impossible to reach due to the social and political divisions in the Muslim world. Although a universal *ijma* cannot be attained, a limited consensus can be reached within a particular geographic area or school of thought (*madhhab*). Islamic jurisprudence's recognition of the existence of different versions of Shari'a law depending on a diversity of changing circumstances is said to be based on Prophet Muhammad's alleged saying that "difference of opinion within my community is a sign of the bounty of Allah." Reference should be made at this point to the notion of *Istihsan*, defined as the process of selecting one alternative solution to a problem over another because the selected solution is more suitable for the case at hand, even though the rejected solution may be technically more correct. *Istihsan* allows jurists a measure of flexibility in interpreting the law by giving priority to the spirit or essence of the law over its letter (in this sense, it can be understood as equity or fairness or a departure from the strict letter of the law to promote public welfare). *Istihsan* is sometimes referred to as hidden *qiyas* in contradistinction to the apparent *qiyas*, which requires strict application of the law. See Makdisi, 'Legal Logic and Equity in Islamic Law', pp. 73 and 92.

power of *ijtihad* had been exhausted. This so-called closing of the door of *ijtihad* ushered in the era of *taqlid* or imitation. From then on jurists no longer had the right of *ijtihad*, but were simply considered 'imitators', obliged to accept and follow the doctrine established by their predecessors. As Joseph Schacht has observed:

the point had been reached when the scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law, and that all future activity would have to be confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down once and for all.[54]

By the end of the fourteenth century various legal texts had appeared which represented, for each school, the authoritative statement of the law as validated by the doctrine of consensus (*ijma*). Through this doctrine, every legal rule was identified with a command of Allah. Thus, classical jurisprudence eventually obliterated the true origins of much of the Shari'a doctrine, which, as we have seen, lay in local custom and the personal reasoning of individual scholars. Law was now seen as something that had been imposed on society from above, rather as something that grew out of social conditions and customs. Knowledge of

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54 Schacht, *An Introduction to Islamic Law*, pp. 70–71. According to some commentators, however, Islamic scholars may still rely on *ijtihad* in addressing legal problems. See W. Hallaq, 'On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihad', *Studia Islamica*, vol. 63, 1986, pp. 129–144.

true values and standards of behaviour could not be attained through human reason and experience, but only through divine revelation. Actions were good or evil only because Allah had given them that quality. And the law of Allah, as found in the authoritative Shari'a texts, was an immutable system, for after the death of the Prophet Muhammad there could be no further communication of the divine will to men. In other words, the law, as expressed in the Shari'a texts, was seen as a divinely ordained, comprehensive and eternally valid code of conduct binding all Muslim communities.

As regards the administration of justice, by the time of the Abbasid dynasty, the *qadis* had become full-time judicial officials, who could carry out their duties in principle free from governmental interference. In practice, however, they were subject to dismissal by the central government, which also supervised their jurisdiction and was responsible for executing their judgments. Although the Shari'a was considered the official law of the state, in reality the jurisdiction of the Shari'a courts was always subject to such limits as the political sovereign saw fit to set. When a conflict occurred between the terms of the Shari'a and the interests of the sovereign, the latter could limit the powers of the Shari'a courts and recognize alternative jurisdictional bodies. A significant limitation to the practical efficiency of the Shari'a courts was related to the limited scope of Qur'anic law and the rigid system of procedure and evidence, in both civil and criminal cases, by which the they were bound.[55] As political rulers could not tolerate the cumbersome nature of

55 The burden of proof was strict, and the party who bore it, usually the plaintiff, was required to produce two adult male Muslim witnesses, whose moral integrity and religious devotion were unquestionable, to testify orally

the Shari'a procedure, the power to try cases falling within certain areas of the law was delegated to officials other than the *qadis*. In this way there arose a new form of jurisdiction, referred to as *Mazalim* (complaints) jurisdiction, with concurrent jurisdiction over Shari'a crimes and supplementary jurisdiction over newly introduced secular offences. Exercised by an official known as *Sahib al Mazalim*, this jurisdiction developed so far that it became a serious competitor to the Shari'a courts and created a clear division in Islamic legal practice. Although all the functions of the Islamic state were theoretically religious in nature, the distinction between the *Mazalim* and Shari'a jurisdictions came close to a division between secular and religious courts. The *quadi* was regarded as the representative of Allah's law and the *Sahib al Mazalim* as the exponent of the ruler's law. By the close of the Abbasid period in the thirteenth century the *Mazalim* courts adjudicated most legal matters, while the jurisdiction of the Shari'a courts was restricted to matters relating to marriage, divorce and the devolution of property.[56] The

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to their direct knowledge of the truth of his claim. If the plaintiff or the accuser failed to discharge this burden, the defendant was offered the oath of denial. Sworn properly on the Qur'an, such an oath secured judgment in his favour. If the defendant failed to take the oath, the judgment would go in favour of the plaintiff or the accuser provided, in some cases, that they also took the oath. This system of procedure made it difficult for Shari'a courts to administer justice in certain areas of the law.

56 With respect to matters of civil law, judicial power was delegated to a number of officials: The Inspector of the Marketplace (*Muhtasib*) had summary jurisdiction over minor commercial disputes and could impose summary punishment on thieves and other minor offenders; the Master of Complaints (*Sahib al-Mazalim*) had jurisdiction over matters concerning real property; and the Master of the Treasury dealt with tax-related issues. Furthermore, a form of secular criminal jurisdiction fell into the hands of

secular law applied by the ***Mazalim*** tribunals was an amalgam of Shari'a law, customary law, administrative decrees and principles derived from other legal systems.[57]

The Development of Islamic Law in the Modern Age

By the early sixteenth century, three powerful Muslim empires had emerged: the Sunni Ottoman Empire in Western Asia, Northern Africa and Eastern Europe, the Shia Safavid Empire in Persia, and the Sunni Mughal Empire in the Indian subcontinent. Although the Shari'a continued to be regarded as the official law of the empire, the jurisdiction of the Shari'a courts was restricted to family and inheritance matters, while most other cases were adjudicated by the ***Mazalim*** tribunals.

During the nineteenth and twentieth centuries, the influence of the West on Islamic society brought about significant changes in many areas of the law, especially the law governing civil and commercial transactions.[58] European law codes were frequently used in disputes between Muslims and westerners and, in the course of time, Islamic

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an official called *Wali al-jara'im* (official in charge of crimes). The relevant court was not bound by Qur'anic standards of evidence, procedure and punishment but could take such measures to discover the truth as it saw fit. See N. Coulson, *A History of Islamic Law*, Edinburgh, Edinburgh University Press., 1964, reprinted 2005, pp. 127–128.

57 Schacht, *An Introduction to Islamic Law*, pp. 76–85.

58 The influence of Western law was first felt through a series of treaties (capitulations) by means of which European citizens residing in the territory of the Ottoman empire were allowed to be governed by the laws of their own countries.

jurists and lawyers gained familiarity with foreign legal systems. Expanding commercial and political relations between Europe and the Middle East gradually led to the wholesale adoption of European legal models.[59] This was, to a considerable extent, due to the fact that the Shari'a law of civil obligations, which was based on the relatively simple system of commercial relations of early Arab society and included a complete prohibition of all forms of interest on capital investment, was unable to accommodate modern systems of trade and economic development. Equally untenable in the context of a modern state was much of the Shari'a criminal law. Firstly, the prescribed penalties for certain offences, such as hand amputation for theft and stoning to death for adulterous wives, were no longer acceptable on humanitarian grounds. Secondly, homicide under Shari'a law is closer to a civil tort than a crime, as the prosecution of the offence depends on the wishes of the victim's relatives. The relatives can either demand the death of the perpetrator as retribution, or demand that he pay a sum of money as compensation, or forgive him completely. While this approach to homicide may make sense in a tribal society (a similar approach was adopted in the West during the Middle Ages), it does not fit a modern state. Finally, apart from the six specified offences, namely wine-drinking, fornication, theft, slander, highway robbery and apostacy, Shari'a law allows the judge almost unlimited discretion in defining and punishing offences. Such arbitrary judicial power appeared unacceptable in many Islamic states influenced by Western models of criminal justice. As a result, during the nineteenth and twentieth centuries the Shari'a criminal law and the law of civil transactions was abrogated or limited in scope

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59 Coulson, *A History of Islamic Law*, pp. 149–151.

and was replaced by new laws largely based on European models.

Far-reaching reception of European legal concepts and rules occurred in the Ottoman empire during the nineteenth century. French law codes provided the model for the 1850 Ottoman commercial code, which provided for the payment of interest, and for the 1858 Ottoman Penal Code, which put an end to most of the harsh Qur'anic punishments. The French codes of commercial procedure and maritime commerce were adopted in 1861 and 1863 respectively, and a new system of secular civil courts was introduced in the latter half of the nineteenth century. Furthermore, through a series of legislative enactments beginning in 1875, Egypt adopted the French Penal, Civil, Commercial and Maritime codes and instituted a system of secular courts to apply the relevant rules. In the course of time, French, German, Italian, English and Swiss law codes spread throughout the Middle East and, as a result, the application of Shari'a law was limited to family law, inheritance law, charitable endowment (*waqf*) and matters of personal status. Outside the Middle East, Western law spread primarily through colonialism to many countries in Africa and Asia. The French implemented their civil and penal codes in Algeria, and a similar policy was followed by the Dutch in Indonesia. In India and parts of Africa the British initially preserved the indigenous legal systems, but in time they introduced the English common law system. The co-existence of Islamic and English laws led to the development of unique 'hybrid' legal systems, such as the Anglo-Muhammadan law, which applied in British colonial India between the eighteenth and twentieth centuries. As a result of the above-described processes, laws of European origin today form an integral part of many contemporary Muslim states.

Nevertheless, there are still a number of countries, such as Saudi

Arabia, Qatar, United Arab Emirates, Iran and Afghanistan, where the Shari'a law remains formally supreme in most areas of law. In general, with respect to Shari'a law, what is tolerated by the state varies from one Islamic state to another. Some of these states are practically secular and Islam is treated as just one religion among many, such as Tunisia, Albania and Turkey for example. The opposite extreme cases include Saudi Arabia and Iran, where the state is viewed as completely subservient to religion and as a mere tool for its implementation. In these countries the Shari'a rules are automatically enforced by the state. Between these two extremes there are countries in which the government applies secular law, even though practicing Muslims may still choose to bring any familial and financial disputes to the Shari'a courts for resolution. While this approach prevails in the majority of Islamic states, including Malaysia, Lebanon, Jordan and Morocco, the precise reach of the Shari'a courts' jurisdiction varies from country to country. In most Islamic countries Islam is declared to be the state religion, but this simply means that it is the state that decides if, when and how the Shari'a is or may be implemented.

It should be noted here that within the recognized limits of their jurisdiction, the Shari'a courts may deviate to some extent from the strict doctrine of the Shari'a texts for reasons of social or economic necessity. In fact, despite its supposed rigidity, Islamic law can be a very flexible system of rules, as long as the court or authority applying it strives to achieve flexibility. This is due to the fact that many of its rules are very broadly worded. Moreover, in some cases the courts adopt certain devices designed to circumvent the strict rules of the Shari'a doctrine, which have been shown to be untenable in practice, without formally abolishing them. For example, a well-known rule provides that a

marriage can be dissolved unilaterally by the husband, which occurs when he says to his wife three times “I divorce you”. However, in some Islamic countries this form of divorce is recognized under the condition that a court or other authority has investigated the circumstances and basis of the relevant action, although in theory the investigation is supposed to be conducted in order to make sure that the divorce is requested voluntarily and seriously by the husband. Another example is polygamy, the right of a man to marry more than one woman at the same time. Polygamy is currently banned in many Islamic countries and this has been accomplished without violating the Shari’a. Islamic law does not make polygamy compulsory, but only makes it permissible on the condition that the husband treats all his wives fairly and equally, something which no man, according to certain statements in the sources, can possibly do. In addition, it is recognized that the husband in a marriage contract at the time of the first marriage can renounce his right to enter into further marriages. Another example concerns the Islamic law’s prohibition against taking interest, which is equated with usury. One way that is often used to circumvent this prohibition is to engage in a fictitious sale and repurchase transaction. Furthermore, reasoning by analogy (*qiyas*) plays an important role in addressing situations not directly covered by the primary sources. In such cases, an analogy is drawn with a similar type of situation for which instructions can be found. For example, the prohibition of drinking alcohol in Islamic law is based on analogy on the Qur’anic prohibition of drinking wine. The ban on alcohol was further extended by analogy to cover certain hard narcotics.[60]

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60 See Makdisi, ‘Legal Logic and Equity in Islamic Law’, pp. 63 ff.

Concluding Remarks

The question to be addressed at this point is this: how much has the influence of Islamic law been affected by the reception of Western legal ideas in Islamic countries? As previously indicated, a general answer to this question is difficult to give because of the differences that exist among these countries. Scholars have observed that most Islamic countries have been able to merge the various parts of their existing law, whether of traditional or Western origin, in a manner consistent with the traditions and mentality of their peoples. Concepts and institutions borrowed from Western legal systems have been, and are being, synthesized with methods of reasoning and an outlook shaped by the Islamic legal tradition. It is worth remembering here what happened in the former Soviet Union: a systematic attempt was made to repudiate or eliminate tradition in order to build an entirely new social and political order and legal system. But experience has shown that the past cannot be erased with the stroke of a pen. A different system of law governed by a different ideology may have been introduced, but people's attitudes towards law and traditional ways of thinking and acting remained largely unaffected. It is therefore unsurprising that Islamic law has experienced a revival and is exerting considerable influence on the legal systems of some of the states that emerged after the breakup of the Soviet Union, as several of these countries have overwhelmingly Muslim populations. Experience in other Islamic countries suggests a similar outcome. New branches of law based on Western models may have been introduced, and there may be a greater or lesser degree of deviation from the core orthodox tenets of Islam, in some cases even to the point of secularizing or abandoning fundamental concepts of Islamic law. However, the law of

Islamic countries cannot be said to have assimilated with Western law. Apart from any considerations concerning the substance and structure of the law, jurists in these countries tend to cling to their traditional ways of reasoning and thinking. These are the ways of the society and culture in which they live.

In the last several decades, the Islamic world has been witnessing a resurgence of Islamic fundamentalism.[61] While the majority of Muslim people take part in some of the facets of today's globalizing world without abandoning their own cultural practices and values, there are also those who attempt to isolate themselves from the global Western influences in order to protect their culture from external forces that might change or 'contaminate' it.[62] According to Benjamin Barber the

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61 For a general account of this phenomenon see G.H. Jansen, *Militant Islam*, New York, Harper and Row, 1979; B. Tibi, *The Challenge of Fundamentalism*: *Political Islam and the New World Disorder*, Berkeley, University of California Press, 1998; G. Kepel, *Muslim Extremism in Egypt: The Prophet and Pharaoh*, Berkeley, University of California Press, 2003.

62 Scholars use the term 'cultural differentialism' to draw attention to the fact that there is a real and lasting uniqueness to individual cultures that can persist separate from globalization. The idea of cultural differentialism is addressed in Samuel Huntington's famous work *Clash of Civilizations*. Huntington uses the word 'civilizations' to describe the coherent cultural identities which exist in the world and identifies eight such cultures: Western, Sino/Confucian, Japanese, Islamic, Hindu, Slavic-Orthodox, Latin American, and (possibly) African. According to him, "The great divisions among humankind and the dominating source of conflict will be cultural. Nation states will remain the most powerful actors in world affairs, but the principal conflicts of global politics will occur between nations and groups of different civilizations. The clash of civilizations will dominate global politics. The fault lines between civilizations will be the battle lines of the future." S. Huntington, 'The Clash of Civilizations?', *Foreign Affairs*, vol. 72,

global pressures for uniformity produce cultural and political forces of resistance, which he terms '*jihad*'. In contrast to the homogenizing forces of uniformity, *jihad* is a fragmenting force that pits culture against culture and rejects any kind of interdependence and cooperation.[63] A central tenet of Islamic fundamentalist movements is the rejection of the secularism and corruption of contemporary Moslem regimes and the creation of a social order based on the fundamental Qur'anic principles. These movements maintain that, when the government fails to observe these principles, the obligation of political obedience withers away and is replaced by a duty of disobedience and defiance.[64] Fundamentalists argue that only a return to the true values of Islam will safeguard Muslims

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no. 3, 1993, pp. 22–49 at p. 22. The Islamic, Confucian and Hindu civilizations are identified in direct relation to the dominant religion of their members. In general, Huntington emphasizes the continued importance of religion as the principal force that motivates and mobilizes people.

63 B.R. Barber, 'Jihad vs. McWorld', *The Atlantic Monthly*, vol. 269, no. 3, 1992, pp. 53–65. Barber regards both *Jihad* and the product of the forces pushing for integration and uniformity (McWorld) as antidemocratic forces that undermine civil liberties. He advocates for a form of government that protects and accommodates local communities, while also helping them to become more tolerant and participatory. It should be noted here that scholars take different positions regarding the effects of cultural globalization. These disagreements are due in part to the fact that cultural flows are complex, and, as such, their results are uneven and contradictory. In some contexts, local cultures may largely be replaced by Western cultural products; in other cases, global pressures may lead to a resurgence of local cultures; in still others, cultural exchanges result in new forms of cultural hybridity.

64 As Edward Mortimer remarks, the history of Islam "is full of movements that sought simultaneously to restore what they saw as the true doctrine of Islam and to overthrow the existing political order." E. Mortimer, *Faith and Power: The Politics of Islam*, New York, Random House, 1982, p. 40.

against the influence of Western mass media, consumerism, economic exploitation and nationalism, all of which threaten to submerge the Islamic world under a wave of “conspicuous consumption and the cult of economic growth, hedonism and permissiveness.”[65] According to them, the solution lies neither in nationalism nor in pan-Arabism, but in the creation of a community of believers united by the Islamic faith and a revived Shari’a law.[66] Contemporary regimes across the Muslim world find themselves under increasing pressure to respond to these popular calls for Islamization. This poses significant problems for legal practice and legal scholarship, as certain aspects of Shari’a law are arguably incompatible with international human rights standards. In response to this, some commentators have argued that international human rights standards should be construed and applied in the light of domestic cultural and religious values, norms and practises.[67] Others are prepared

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65 See E. Sivan, ***Radical Islam: Medieval Theology and Modern Politics***, New Heaven, Yale University Press, 1985, p. 45

66 As Sivan notes, "The linchpin of this reformatory enterprise is the slogan of the 'application of Muslim law' ***(tatbiq al-Shari'a)***, or in its up-to-date, and somewhat pared-down form, 'codification of Muslim Law' ***(taqnin al-Shari'a)***.” Sivan, ***Radical Islam***, p. 143.

67 From this point of view, it has been argued that human rights are a Western cultural construct and should not be imposed on regions of the world that do not share the culture and values of the West. An expression of this perspective can be found in the ‘Statement on Human Rights’ of the American Anthropological Association (1947), which stressed the need to study and honor the values of other cultures and warned against the making of a Universal Declaration of Human Rights that reflects only Western values. On this issue see in general A.D. Renteln, ‘The Unanswered Challenge of Relativism and the Consequences for Human Rights’, ***Human Rights Quarterly***, vol. 7, no. 4, 1985, pp. 514–540.

to acknowledge that certain rights may be overridden on the grounds of cultural relativism – the theory which claims that norms and values are specific or relative to a particular culture and cannot be judged according to the standards of another culture.[68] Several scholars have argued, however, that care should be taken not to overstate the force of the cultural relativist argument, for such argument opens the way to abuse and the subordination of individuals by oppressive regimes cynically wrapping themselves in the mantle of Islamic traditionalism.[69] Notwithstanding the profound differences between Islam and the West, the repudiation or curtailment of human rights on the grounds of religious ideology or doctrine is too high a price to pay in the name of cultural relativism.[70]

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68 J. Donnelly, 'Cultural Relativism and Universal Human Rights', *Human Rights Quarterly*, vol. 6, no. 4, 1984, pp. 400–419.

69 Consider R. Howard-Hassmann, 'The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa', *Human Rights Quarterly*, vol. 5, no. 4, 1983, pp. 467–490. And see generally R. Wright, *Sacred Rage: The Wrath of Militant Islam*, New York and London, Simon and Shuster, 2001.

70 The cultural relativist critique exemplifies the so-called naturalistic fallacy, which assumes that the way things are now (people hold different values) determines how things should be (they should always continue to hold such values). However, one can argue that, even if it were true that human rights are a Western cultural construct, this is no reason why people from other parts of the world cannot culturally embrace and benefit from them. The term 'naturalistic fallacy' was coined by G.E. Moore in his work *Principia Ethica*, published in 1903 by Cambridge University Press. On the naturalistic fallacy consider, in general: A.N. Prior, *Logic and the Basis of Ethics*, Oxford, Clarendon Press, 1956, Chapter 1; N. Sinclair (ed.), *The Naturalistic Fallacy*, Cambridge, Cambridge University Press, 2019; R. Crisp, 'Naturalism and Non-Naturalism in Ethics', in S. Lovibond and S.G. Williams

As Islamic societies continue to evolve and face new challenges in an ever-changing world, law will undoubtedly remain a central element in the ongoing ideological and political battle being fought between traditionalism and modernism under the impact of Western, international and transnational legal frameworks. The legitimacy and acceptability of the outcomes of this process will depend on the extent to which the process is grounded in the universal and eternal values of Islam as adjusted to diverse social and cultural conditions. Observance of these values will shield the resultant changes in law and society against the unavoidable attacks from extremist elements, who will undoubtedly condemn them as foreign or Western impositions.

(eds.), *Identity, Truth and Value*, Malden, MA, Blackwell Publishers, 1996, pp. 113–129.