

1-1978

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### Recommended Citation

Noel J. Coulson, *Law and Religion in Contemporary Islam*, 29 HASTINGS L.J. 1447 (1978).

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# Law and Religion in Contemporary Islam

By NOEL J. COULSON\*

## Introduction

THE LAWS THAT GOVERN contemporary Muslim society are extremely complex, not merely because of the vast geographical expanse and the great number of Muslim countries and communities, but more particularly because of the radical conflicts and tensions between different standards and ideologies that are the formative elements of the Islamic legal systems. Accordingly, analytical studies tend to dissect the Islamic legal system into its various components. The most recent and exhaustive survey of the philosophy and effects of modern law reform in Islam<sup>1</sup> consistently divides the system in terms of the conflicts and tensions between several coexisting ideologies. This examination focuses on conflicts and tension between the traditionalist and the modernist approach, the theoretical doctrine and the actual legal practice, Islamic and Western values, and religious and secularist attitudes. Although any scholarly appreciation of current Islamic law necessarily involves the use of these polarities, the nonspecialist needs to be aware of two principal dangers. First, undue emphasis upon the heterogeneous nature of the different components of Islamic law may obscure the fundamental unity of the system. The distinction between two conflicting elements may be drawn too rigidly; it may be represented as either black or white when it should be viewed as a linear scale with black and white as its opposite extremities and varying shades of gray

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1. N. ANDERSON, *LAW REFORM IN THE MUSLIM WORLD* (1976) [hereinafter cited as ANDERSON]. Sir Norman Anderson is the Western doyen of modern Islamic legal studies.

as the great mass of the intermediate area. Second, each of the polarities may be regarded as an expression of one aspect of the paramount conflict between the religious and the secular approach to law. Traditional or orthodox doctrine, however, is not exclusively religious, nor is modern or Western legal practice necessarily secular.

In this last respect, the most crucial division within modern Islamic legal systems is generally regarded as that between the family law, which is Islamic and therefore religious, and the general civil and criminal law, which is western in inspiration and expression and therefore secular. By suggesting on the basis of historical precedent and current Islamic jurisprudential thought that this division is not rigid and clearcut, this Article will endeavor to suggest the correct perspective with which to view the relationship of law and religion in present day Islam.

### The Shari'a Doctrine

Until relatively recent times, western oriental scholars derived their notion of law in Islam from the manuals of Shari'a law.<sup>2</sup> This extensive body of Arabic literature dating from early medieval times was the only recognized literature on Islamic law. Enshrined in these Shari'a manuals is the purist doctrine of Islamic law as developed by the scholar-jurists. The code of conduct formulated by these manuals covers in meticulous detail every aspect of human behavior known to the scholar-jurists, from dietary rules to the criminal sanctions for highway robbery and from commercial contracts to the system of succession at death. The code provides for every detail of a person's activities, public or private, social or individual, and adherence to its provisions is required of all Muslims as an expression of their religious faith.

Shari'a law represented the command of Allah for Muslim society. Legal theorists ascertained that the Shari'a was based upon the expression of Allah's will contained in the Qur'an<sup>3</sup> and the divinely inspired precedents of behaviour of the Prophet Muhammad (*sunna*). Principles derived from these sources were extended by juristic reas-

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2. These Arabic texts are collected in J. SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 215-85 (1964) (bibliography) [hereinafter cited as SCHACHT].

3. The Qur'an is the Moslems' book of God. ANDERSON, *supra* note 1, at 5. The Qur'an is but one of the four major roots of Shari'a. *Id.* at 6.

oning (*ijtihad*) and used to regulate the whole field of human relationships. The validity of the total scheme as the expression of Allah's command was guaranteed by the infallible consensus of the scholars (*ijma'*). Thus, the fusion of law and religion is complete within the Shari'a texts. The external conduct of Muslim society, in every aspect, is the expression of its inner spiritual belief.

Three principal claims for the system known as Shari'a law were made by the scholar-jurists. First, the system was comprehensive, covering every eventuality and type of conduct. Second, it was the exclusive system for defining the Muslim State and society and for commanding the total allegiance of all Muslims. Third, the system was immutable, stamped with the seal of the infallible consensus (*ijma'*) as the final and perfect expression of the divine will.

Shari'a doctrine, both legal theory and substantive law, was the work of idealist scholars. Far from merely documenting existing legal practice, it was at the outset a system elaborated essentially in opposition to that practice. The doctrine was an alternative scheme designed to represent the true translation of the religious ethic of Islam into rules of actual conduct. Initially it developed without official government activities or sponsorship. Later, however, Islamic governments supported its development and application with varying amounts of zeal. How ever great might be the influence that the Shari'a was later to achieve, this influence was not the result of any unequivocal directive of divine revelation. The fundamental principles of the Shari'a doctrine were essentially self-asserted principles from the ivory tower of academic idealism, the result of juristic speculation (*ijtihad*) over minimal amount of divine revelation, and consecration of the results by the consensus (*ijma'*).<sup>4</sup>

At the time it was created, therefore, Shari'a doctrine was merely one ingredient of the law in Islam. The other ingredient was the law applied by the courts in actual practice. This dichotomy continued throughout the centuries to be the central feature of Islamic legal systems. As a result, legal history is largely an account of the extent to which the Shari'a law, over the course of time, succeeded in supplanting the legal practice for which it was originally to be an alternative. The Shari'a, however, has never been the exclusive system of Islamic law as claimed by the scholar-jurists.

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4. Coulson, *Doctrine and Practice in Islamic Law*, in BULLETIN OF THE SCHOOL OF ORIENTAL AND AFRICAN STUDIES (BSOAS) (1956).

## Shari'a Doctrine and the Court System

The Shari'a law was applied in the qadis' courts which were traditionally bound to apply only the doctrine of the Shari'a manuals. The qadis' courts were not the only law courts of the Muslim communities, but the extent of the "non-Shari'a" courts' jurisdiction is not easily defined because of the lack of relevant unbiased contemporary documentation. As noted above,<sup>5</sup> the proponents of Shari'a doctrine gained a monopoly over legal literature, and their writings referred to the non-Shari'a jurisdictions only in general and hostile terms.<sup>6</sup> Nevertheless, other sources reveal that non-Shari'a courts had broad jurisdiction over criminal and commercial law matters.

The governmental justification, indeed the necessity, for the non-Shari'a courts was essentially procedural. Shari'a courts were bound by their own rigid system of procedure and evidence. Under that system, the burden of proof could be discharged only by two trustworthy witnesses testifying orally to the facts in issue. Circumstantial evidence, however compelling, was inadmissible, and if the proper testimony was not produced by the prosecution or the plaintiff, the defendant's solemn religious oath of denial would secure judgment in defendant's favor. The effective administration of justice in criminal and commercial matters required a more flexible system of evidence and procedure, and the only way for the government to achieve that goal was through non-Shari'a jurisdictions.

These courts did not necessarily apply a substantive law wholly alien to Shari'a doctrine, although at certain times and in certain places they may have done so. For example, some Islamic tribunals applied law customary in the field of family law to cases based on the traditional law of the tribunal's locality, even though it diverged radically from Shari'a doctrine.<sup>7</sup> In addition, commercial tribunals, from medieval times, have developed and applied a system of legal devices designed to protect trading activities from the stultifying influence of the Shari'a prohibitions against any form of interest on capital loans and speculative transactions in general (*riba*).<sup>8</sup>

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5. See text accompanying note 4, *supra*.

6. See SCHACHT, *supra* note 2, at 85.

7. See particularly the works of the Fernch Orientalist, G.-H. Bousquet (quoted in ANDERSON, *supra* note 1, at 10-13 n.13).

8. SCHACHT, *supra* note 2, at 78-85.

These examples illustrate extreme cases deviating from the general rule that substantive Shari'a doctrine was recognized and applied in non-Shari'a jurisdictions whenever possible and practical. Eventually the scholar-jurists recognized the legitimacy of the non-Shari'a tribunals under the broad doctrine of *siyasa*, the principle that the Ruler has the right, or more properly the duty, to provide for the effective administration of law in the public interest (*maslaha*) by organizing, where necessary, jurisdictions alternative to the Shari'a courts. The *siyasa* doctrine ultimately rests upon the text of the Qur'an itself: "Obey Allah, His prophet and those at the head of your affairs."

### Shari 'a Doctrine Today

History thus reveals the Islamic legal system to be an amalgam of Shari'a law and various alternative jurisdictions, which will hereafter be referred to as the Ruler's law. From the purist scholar's point of view, the non-Shari'a jurisdictions may have appeared as a reluctant concession to practical necessity, but from a realist and official standpoint, both components of the system were equally Islamic. The latter view regarded the whole system, not only the Shari'a courts, as a system of religious law, organized and applied by Muslim rulers and judges for their Muslim communities.

There is little doubt that today the purist Shari'a doctrine plays a much smaller role in the Islamic legal system than at any previous time. No longer can any realistic claim be made that the Shari'a represents the comprehensive, exclusive, and immutable system described by the medieval scholars.

Today material and organizational circumstances exist which lie wholly outside the purview of the medieval legal manuals, belying any claim to comprehensiveness. Limited attempts were made, particularly in conservative Muslim countries such as Saudi Arabia and the Gulf States, to classify such modern phenomena as telecommunications, air freight, and oil exploitation within broadly parallel situations known to and regulated by the medieval authorities. For example, air freight was analogized to carriage of goods by camel so that the rules concerning such carriage could be applied. Such attempts to retain the Shari'a claim of comprehensiveness, however, had an air of unreality bordering on desperation. Finally, it became apparent that the only practical way to deal with modern Western

civilization was to adopt rules and regulations based on Western models.<sup>9</sup> Accordingly, recent years have witnessed the proliferation of legislation in most Muslim countries, including labor regulations and traffic laws.

These developments entailed an expansion of the non-Shari'a jurisdictions which effectively undermined the purist claim that Shari'a doctrine was exclusively applied in Muslim society. By the end of the nineteenth century, new court systems fashioned after Western models were applying Western-inspired codes of criminal, commercial, and general civil law as a matter of established and accepted Islamic law. By this time Shari'a doctrine, as applied in the qadis' courts, was confined to family law matters. Developments in family law during the present century, moreover, firmly and finally repudiate the last major claim of the purists—the claim that Shari'a doctrine as recorded in the medieval legal manuals was fixed and immutable as the perfect expression of an eternally valid code of conduct.

The most notable developments in the family law sphere of Islamic tradition have affected the legal status of polygamy and *talaq* (divorce by a husband's unilateral repudiation of his marriage), two institutions historically regarded as the hallmarks of the patriarchal Islamic family. Today, polygamy is prohibited in Turkey and Tunisia and among the Ismaili communities of East Africa.<sup>10</sup> Other Muslim countries require a husband to obtain court or other official permission prior to marrying a second or further wife.<sup>11</sup> The principal effect of this reform is to entitle the wife of a polygamous husband who has flouted the law to a dissolution of her marriage. Indeed, in Morocco and Iran she may obtain such relief whether or not the husband's other marriage was duly authorized.

The vesting of the courts with broad discretion in their consideration of the propriety of a polygamous union was motivated by legislative concern for the feelings of women in general, and the first wife in particular. This shift in focus by the traditionally patriarchal

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9. See ARBITRATION BETWEEN THE ROYAL GOVERNMENT OF SAUDI ARABIA AND ARABIAN AMERICAN OIL COMPANY, FINAL MEMORIAL OF ARABIAN AMERICAN OIL COMPANY 360-64 (1956).

10. ANDERSON, *supra* note 1, at 110-11; N. COULSON, A HISTORY OF ISLAMIC LAW 210, 215-16 (1964) [hereinafter cited as COULSON].

11. Such permission, granted with regard to varying criteria, is required in Iran, Iraq, Morocco, Pakistan, Singapore, Somalia, South Yemen, and Syria. ANDERSON, *supra* note 1, at 112-14; COULSON, *supra* note 10, at 207-15.

Muslim society is indicative of the ultimate disappearance of the traditional male prerogative of polygamy.

Developments in the law of divorce are even more profound. A husband's power to terminate his marriage unilaterally, by *talaq*, was made subject to court scrutiny. In the event of a judicial finding that no proper motive for repudiation existed, the court could award compensation to the wife. A correlative trend expanded a wife's ability to obtain dissolution of her marriage. These two developments have represented complete reform in Iran, Somalia, and South Yemen. Those countries recognize only those divorces obtained by court decree, and the grounds for a divorce are the same whether the husband or the wife is the petitioner.

Although not as well developed, the same divorce system exists in other Muslim countries. In Tunisia and Pakistan, for example, a husband who insists upon his right to terminate the marriage by *talaq* may do so provided he observes certain formal requirements and fulfills any necessary conditions. In Pakistan he must give notice to a properly constituted Arbitration Council, and in Tunisia, apart from obtaining the court's decree, he must pay such compensation to the wife as the court decrees. In this regard, Tunisian legislation has given the wife a position of exact parity with her husband, but judicial decisions in Pakistan have firmly established the principle that a wife's right to judicial dissolution of her marriage is contingent upon the return to her husband of the dower she received in consideration of her marriage.

In sum, there has developed in Muslim countries a philosophy that accepts divorce as a solution to the irreconcilable breakdown of marriage, including the case in which either spouse insists unilaterally upon ending the union. Although *talaq* and the conditions under which it may be effective are still discussed in legal circles, the very essence of the traditional institution of *talaq* as the discretionary right of the husband alone has been overwhelmed and submerged by the modern reforms.

### Sharī'a Doctrine and General Islamic Jurisprudence

Paralleling the radical changes in substantive family law, and perhaps even surpassing them in significance, are those changes that have occurred in general Islamic jurisprudential theory. According

to traditional Shari'a legal theory, each and every detail of the law represents the divine will. This theory is true, however, only to the extent the law is based directly upon some text of divine revelation or is derived by analogy to such a text. Because of this traditional ideology, attempts were made in the early stages of family law reform to justify the changes as interpretations of divine revelation. Thus, the various changes relating to polygamy were explained as a new, more restrictive interpretation of the Qur'anic verse to the effect that Muslims should take only one wife if a plurality of wives may possibly result in unequal treatment among them. Similarly, explanatory memoranda accompanying legislative reforms in the law of divorce referred repeatedly to the implications to be drawn from the verses of the Qur'an, which state that wives should be "retained with kindness or released with consideration," and from the well known saying of the prophet, "of all things permissible, repudiation (*talaq*) is the most abominable."<sup>12</sup>

Gradually, this concern with the reconciliation of reform with traditional purist Shari'a legal theory has become less important. Social desirability in itself has been increasingly recognized as a proper and sufficient reason for reform. Indeed, the preamble to an important reform on the law of bequests, introduced into the Sudan in 1945, states that the reform was adopted simply because the people were in need of it.<sup>13</sup>

There is much support for the view that, from the very beginning of the reform movement, social desirability had always been its real impetus and that presentation of the reforms in the garb of traditional jurisprudential principles was formal window-dressing to placate conservative religious sentiment.<sup>14</sup> In any event, an immense difference exists between contemporary and traditional legal theory. The law is still, as it always must be for the Muslim, Allah's command for Muslim society. Whereas in the past the religious law was identified with explicit statements of divine revelation, however, today the concept of what constitutes the will of Allah is much less rigid.

The Islamic law certainly no longer is seen as a code of conduct that is eternally valid and therefore immutable. The restrictions on

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12. COULSON, *supra* note 10, at 217.

13. For the full text of the Judicial Circular that introduced the reform, see COULSON, *SUCCESSION IN THE MUSLIM FAMILY* 255 (1971).

14. See ANDERSON, *supra* note 1, at 75.

polygamy and *talaq* today are regarded as a legitimate expression of the religious law, and those restrictions are based upon social desirability as conceived by the reformers. Thus, current Islamic jurisprudence must rest upon the notion that the Islamic community, through its governmental administration, will ultimately order its affairs in conformity with the divine will. The notion of a divinely ordained law, therefore, is now replaced by that of a divinely guided society. Although it may seem to be the height of paradox to any student of Western legal theory, contemporary Islamic jurisprudence appears to be moving toward a theory of a natural religious law.

The question arises whether there is a fundamental difference of philosophy, within Islamic jurisprudence, between family law on the one hand and criminal and commercial law on the other. Both legal fields have adopted new standards of conduct that originated outside Islam.<sup>15</sup> Whether the new standards are borrowed directly from relevant Western laws or whether they are formally represented as a new interpretation and modern version of Shari'a law seems to be of comparatively minor significance. Regardless of origin and field of legal application, these standards have become an integral part of the legal system followed in the Muslim countries today. The totality of the system within any given national boundary is what constitutes "Islamic law."

### Conclusion

Today, as has always been the case, Islamic law is a compound system. In the earliest stages of legal development in Islam, the scholar-jurists interpreted the divine revelation according to the circumstances existing in their own geographical locality, while the rulers adopted, to the degree they found necessary, foreign legal institutions from the territories conquered outside Arabia. During this process, usually referred to as the "Islamization" of the law, the whole legal system rested firmly on a religious basis. It continues to do so today because it is a system of law promulgated and applied by the recognized authorities of a Muslim State for the Muslim population it serves and embraces.

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15. Marxist doctrines, for example, are now represented as "not inconsistent with Islamic Shari'a" and they have given a unique flavor to the new Family Law in the People's Democratic Republic of Yemen (Law No. I of 1974). See GHANEM 3 ARABIAN STUDIES 191-96 (1976).

To identify Islamic law with the traditional Shari'a, as the pure theorists did, is a cardinal error that leads to the categorization of any law not within the traditional Shari'a as non-Islamic or secular. The Shari'a has, however, never been synonymous with Islamic law, and now it is even less so.

Certainly, the traditional Shari'a doctrine forms a proper and a convenient focal point from which to assess the nature of any Islamic legal system, and perhaps the simplest distinction apparent within the system is the one between theory and practice. Theory is represented by the traditional Shari'a doctrine, and practice is represented by any other rules or institutions that are recognized and applied by the courts. As Schacht says, however:

We must think of the relationship of theory and practice in Islamic law not as a clear division of spheres but as one of interaction and mutual interference, a relationship in which the theory showed a great assimilating power, the power of imposing its spiritual ascendancy even when it could not control the material conditions.<sup>16</sup>

A good example of such interaction in contemporary Islam is the present legal system of Saudi Arabia. Today the Shari'a courts in Saudi Arabia have general jurisdiction, but a fairly extensive system of supplementary jurisdictions also exists. The committees for the settlement of commercial disputes at Riyadh, Jeddah, and Dammam were created by a decision of the Saudi Council of Ministers in 1967. Initially, these committees were staffed at least in part by commercial experts, but they now consist only of two experts in Shari'a law. Furthermore, even though committees should apply only the procedures outlined in the Commercial Law of 1931, they also apply traditional Shari'a rules of procedure and evidence.<sup>17</sup> Under these circumstances, traditional and modern substantive laws and procedures have become so closely interwoven that they are now inseparable aspects of a legal system that has a profoundly religious character.

Other Muslim governments are much more "progressive" than the government of Saudi Arabia. In Egypt and Tunisia, for example, the Shari'a courts as a separate entity have been abolished altogether. Nevertheless, whatever the composition of their individual legal sys-

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16. SCHACHT, *supra* note 2, at 84.

17. COULSON, *supra* note 10, at 154.

tems in terms of traditional Shari'a and other elements, Muslim governments today are becoming increasingly conscious of their Muslim identity. They see themselves, as the Qur'anic phrase puts it, "at the head of affairs" of a Muslim State and therefore bound to organize and administer a system of Islamic law.

Islamic law is no longer religious in the traditional Shari'a sense that each and every detail of conduct is explicitly regulated by the divine will. Islamic government and society, however, continue to be based on the Qur'anic injunction to "obey Allah, his Prophet and those at the head of your affairs." Thus, every existing Islamic legal system is, by definition, a system of law based on religion.

From this standpoint, the current and continuing debate in Muslim communities, as reflected in the wide variety of laws that govern the lives of Muslims, may be seen quite simply in terms of an internal religious debate between conservative and modernist elements and attitudes. The conflict is one which an outside observer must recognize and may assess in terms of its legal results. The external observer, however, is not qualified to decide whether one attitude or the other is more or less "Islamic" or "religious." This question is one that can be answered only by the Muslim religious conscience.

