istrative; and penal. *Sadad* courts are the courts of first instance for Muslim and Jewish personal law. The *Sharîʿah* sections of the regional courts also hear personal status cases on appeal.

The Code of Personal Status 1957-1958 (major amendments made by Law no. 1.93.347 1993) is based on the Mâlikî school. [61]

6.10 Islamic Law in Nigeria

Federal Republic of Nigeria is a republic in West Africa on the Gulf of Guinea; gained independence from Britain in 1960; most populous African country. Nigeria gained independence from Britain in 1960. A military coup in 1966 marked beginning of long period of military rule punctuated by brief periods of civilian rule (1979-1983, 1999).

The colonial system was by and large continued after independence in 1960, only the names were changed. Native courts became local courts, but were still split into one system for non-Muslims in the sounth and another for Muslims in the north. The national or sate law, with addition of such statutes as were passed by legislative assemblies at federal or state level. Family law under the *fiqh* had imposed. The legal system is based on English common law, Islamic law, and customary law. Due to the system of indirect rule, traditional authorities retained powers over their communities. The British introduced statutory monogamous marriage with 1914 Marriage Act. About half the population is Muslim, about 40 percent Christian, and about 10 percent practice traditional indigenous religions or no religion.

The Muslim Fulani Usman dan Fodio led a *jihâd* (Fulani *Jihâd* or Sokoto *Jihâd*) against the Hausa aristocracy in the Kingdom of Gobir in northern Nigeria in the early 19th century, establishing a new empire with its capital at Sokoto under which an elaborate *Sharîʿah* court structure developed. The British adapted Emirs' Judicial Councils from the existing judicial structures in northern Nigeria; these continued to serve as appellate courts in the emirates until the establishment of the Sharîʿah Court of Appeal in 1959. Judicial reforms initiated in the late 1960s created grades of alkalis' (*qâdhîs*') courts; initially there were four grades and since reforms in the late 1970s, three grades. The first instance courts established were Area Courts Grades 2 and 1, then the Upper Area Court and the Upper Area Court of Appeal, with the highest state level appellate jurisdiction lying with the *Sharîʿah* Court of Appeal in each state.

The current Constitution was adopted in 1999. Six new states were established in 1996, bringing the total number of states to 36, in addition to the Federal Territory of

[61] Abdullahi Ahmad an-Naʿîm, *Islamic Family Law in a Changing World*, pp. 178-81; Taha Mahmood, "Morocco" in *Statutes of Personal Law in Islamic Countries*, pp. 33-5, 155-62.

Abuja. Part 2.10 of the Constitution states that "The Government of the Federation or of a State shall not adopt any religion as the State Religion."

The Supreme Court is the highest federal court, with appellate jurisdiction over the lower federal courts and the highest state courts. Each state has its own judicial system, including Magistrates' or District Courts (first instance in civil and criminal matters) and a High Court (original and appellate jurisdiction). The Constitution also provides that states may establish lower and appellate customary courts having limited civil jurisdiction. The northern states have separate *Sharî'ah* courts to administer Islamic personal law.

The Constitution provides for the establishment of higher *Sharî'ah* courts. Article 236(1) establishing a Court of Appeal provides that no less than three of at least 15 judges will be well-versed in Islamic law and no less than three in customary law. The Court of Appeal hears appeals from the Federal High Court, State High Courts, *Sharî'ah* Courts of Appeal, and Customary Courts of Appeal. Article 259(1) provides for *Sharî'ah* Courts of Appeal for any States requiring them. *Sharî'ah* Courts of Appeal consist of a Grand *Qâdhî* and as many *qâdhî*s as the State Assembly prescribes, with at least two *Qâdhî s* hearing appeals. The 1999 Constitution also provides that the federal government is to establish a Federal *Sharî'ah* Court of Appeal and Final Court of Appeal; however, the government had not yet established such courts.[62]

6.11 Islamic Law in Lebanon

Lebanon, officially the Republic of Lebanon or the Lebanese Republic, is an Arab country in Western Asia on the eastern shore of the Mediterranean Sea. Since 1943 Lebanon has had a unique political system known as confessionalism, based on a community-based power-sharing mechanism. It was created when the ruling French Mandate expanded the borders of the former autonomous Ottoman Mount Lebanon district that was populated mostly by Maronite Christians and Druze. The majority of Muslims are Hanafî or Ja'farî, with Druze, Ismai'lî and Alawi/Nusairi minorities. There are also several Christian denominations (including the Orthodox and Catholic Churches and one Protestant church) and a small Jewish minority.

Lebanon is a parliamentary democratic republic that implements a special system known as confessionalism. This system is intended to ensure that sectarian conflict is kept at bay and attempts to represent the demographic distribution of the eighteen recognized religious groups in the governing body fairly. As such, high-ranking offices are reserved for members of specific religious groups. The president, for example, has

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[62] Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 298-99; Vikør, *Between God and the Sultan*, pp. 247-50.

to be a Maronite Catholic Christian, the prime minister a Sunnî Muslim and the speaker of parliament a Shî'a Muslim. The constitution was adopted on 23 May 1926 and amended numerous times. There is no official state religion or recognition of *Sharî'ah* as a source of legislation.

Lebanon's *judicial system* is a mixture of Ottoman law, Napoleonic code, canon law and civil law. The Lebanese court system consists of three levels: courts of first instance, courts of appeal and the court of cassation. The Constitutional Council rules on the constitutionality of laws and electoral frauds. There also is a system of religious courts having jurisdiction over personal status matters within their own communities, with rules on matters such as marriage and inheritance. Lebanon was under Ottoman rule for three centuries from 1516 on with relative autonomy. Under French mandate from 1918 to 1943 French civil law greatly influenced the development of the Lebanese legal system and judiciary, but the French authorities did not affect substantive changes to the *Ottoman Law of Family Rights 1917* or to uncodified aspects of personal law.

The Republic of Lebanon was a part of the Ottoman Empire for about three hundred years. At the end of World War I it became a separate political entity under French mandate. It consisted of the historical Mount Lebanon and parts of other territories that the Ottoman Empire relinquished as a result of the war. In 1943 Lebanon gained full independence and sovereignty and later participated in the 1945 San Francisco Conference as a founding member of the United Nations.

During the Ottoman period Lebanon was governed directly by the Sublime Porte in Istanbul with special political status given to the historical Mount Lebanon, which constitutes the foundation of the present Republic of Lebanon. Afterwards, it became a parliamentary democratic republic governed in accordance with a written constitution issued in 1926. Upon gaining full independence in 1943, an unwritten national understanding arose according to which the office of president of the republic was reserved for a Maronite Christian, the office of prime minister for a Sunnî Muslim, and the office of speaker of the house for a Shi'îte Muslim. This unwritten national pact has its roots in article 95 of the 1926 Constitution that provided for equitable representation in public service positions among the various religious denominations.

During Ottoman rule the legal system applied in Lebanon was basically Islamic Law as formulated by the Hanafî school. In conformity with Islamic law, each religious community had the right to apply its own law on a wide range of legal issues and to maintain its own judicial system to resolve conflicts related to such issues.

Since the time of the French Mandate, Lebanon gradually started to adopt new laws and legislation modeled after the French law, which is a civil law system. However, the 18 religious communities officially recognized in Lebanon continued to enjoy

independence in applying their own laws and maintain their own judicial systems to deal with matters related to personal status, marriage, divorce and other family relations

The Lebanese Judiciary. The judiciary in Lebanon is divided horizontally into four main court systems, each having a multilevel hierarchical structure. These systems are: The first is the *judicial court system* known as *kadhâ'*. The judicial court system is composed of three court levels of general jurisdiction. Original jurisdiction is normally found in the courts of first instance, followed by the courts of appeal, and finally the Cassation Court. The second is the *administrative court system* known as *Majlis al-Shûrâ.* This system is composed of administrative tribunals and the State Consultative Council (*Majlis Shûrâ al-Dawla*). Third is *the military court system.* Fourth are the *religious court systems.* This system is composed of the court systems of the eighteen recognized denominations pertaining to the three main religions of Christianity, Islam and Judaism. The jurisdiction of these courts is limited to personal status and family law matters as authorized by law. Communal jurisdiction is awarded to Muslims, Druze, Christians and Jews. There are two levels of *Sharî'ah* Courts (with Sunnî and Ja'farî judges): *Sharî'ah courts* of First Instance and the Supreme *Sharî'ah* Court in Beirut with 3 *Qâdhîs* and a civil judge acting as Attorney-General. There are also two levels of Druze courts: Courts of First Instance and the Supreme Court of Appeal. Law on Organization of *Sharî'ah courts* 1962 recognizes Qadri Pasha's unofficial code of personal law as a residual source of law.

Some relevant legislation is the following:

- Ottoman Civil Code (*Majalla*) 1878
- (Ottoman) Law of Family Rights 1917; The Law of the Rights of the Family 1962 directs the application of Hanafî doctrine to Sunnî personal status cases (except for those matters covered by the specific provisions of the OLFR), and Ja'farî *fiqh* and provisions of the OLFR applicable to Ja'farîs in Ja'farî personal status cases. There is separate legislation applicable to Druze personal status
- Decree no. 3503 1926 (relevant to application of Ja'farî law)
- Codified (Druze) Personal Status Law 1948
- Law on the Rights of the Family 1962
- Law on Organization of the *Sharî'ah* Courts 1962.[63]

[63] Abdullahi Ahmed An-Na'im, *Islamic Family Law in a Changing World*, pp. 126-28.

6.12 Islamic Law in Syria

Syria was the center of the Umayyad caliphate until the Abbasid Revolution of 756. It was governed by a succession of Arab, Crusaders, Ayyubid rulers, and Mamluke rulers, then by the Ottomans from 1516 on. After the Ottomans, after WW I, the League of Nations declared a French Mandate over the region in 1922, from which Syria gained independence in 1946.

Syria has a Hanafî majority with Jaʿfarî, Druze, Ismaʿili and Alawi minorities; as well as several Christian denominations and very small Jewish communities in Damascus, al-Qamishli, and Aleppo.

The constitution was adopted on 13 March 1973. Article 3(1) declares that the religion of the president of the republic will be Islam, and Article 3 declares Islamic jurisprudence to be the main source of legislation.

Separate legal systems exist for civil and criminal matters and for personal status matters. The lowest courts for civil and criminal matters are peace courts, followed by courts of the first instance (1 in each of the 14 districts) with jurisdiction over civil and minor crimes. Courts with jurisdiction over personal status matters are *Sharîʿah* courts for Sunnî and Shiʿî Muslims, *madhhab* courts for Druze, and *ruhî* courts for Christians and Jews. There is one single-*Qâdhî Sharîʿah* court of first instance per district (except for Damascus and Aleppo, which have three each). Each of the three types of court has its own appellate courts. Final appeal lies with the Family Section of the Court of Cassation in Damascus. The Code of Personal Status is applied to Muslims by *Sharîʿah courts* with separate tribunals for Druze, Christians and Jews.

Some relevant legislation is the following:

- Law of Personal Status 1953; the Ottoman Law of Family Rights continued to apply to matters of personal status until 1953. The Syrian Law of Personal Status 1953 covers matters of personal status, family relations and intestate and testamentary succession. Article 305 states that residuary source of law is the most authoritative doctrine of Hanafî school. The Syrian Law of Personal Status (*Qânûn al-Ahwâl al-Shakhsiyyah*) 1953 produced by the commission covers matters of personal status, family relations and intestate and testamentary succession and was the most comprehensive code issued in the Arab world up until then
- Civil Code 1949; various Egyptian laws were enacted from 1920 to 1946, and there was the unofficial code prepared by Egyptian jurist Qadri Pasha
- Code of Civil Procedure 1953
- Code of Civil Status 1957

- Law of Judicial Authority 1965.[64]

6.13 Islamic Law in Iraq

Iraq, officially the Republic of Iraq, is a country in Western Asia spanning most of the northwestern end of the Zagros mountain range, the eastern part of the Syrian Desert and the northern part of the Arabian Desert. The capital city, Baghdad, is in the center of the eastern part. Iraq's rich history dates back to ancient Mesopotamia. The region between the Tigris and Euphrates rivers has been identified as the cradle of civilization and the birthplace of writing. During its long history, Iraq has been the center of the Akkadian, Assyrian, Babylonian and Abbasid empires and part of the Achaemenid, Macedonian, Parthian, Sassanid, Umayyad, Mongol, Ottoman and British empires. A multinational coalition of forces, mainly American and British, has occupied Iraq since an invasion in 2003 until 2009.

The Ja'farî and Hanafî are the predominant schools in Iraq. There are also Christian and small Jewish and Yezidi minorities.

Iraq has a mixed legal system that draws on both Sunnî and Shi'î *fiqh* for the law applied in *Sharî'ah* courts. The legal system as a whole also includes constitutional law, legislation and statutory provisions, usage and custom, judicial precedent and authoritative juridical opinions. Iraq, the birthplace of the Hanafî school of *fiqh*, came under Ottoman rule in the 17th century. From 1850 on a number of new civil, penal and commercial codes were adopted by the Ottomans, but the Ottoman Law of Family Rights 1917 was never implemented in Iraq since the Turks lost control over the region by the end of World War I when a British Mandate was established. The British administrators did not adopt the Family Law since it was not part of local law and because of the fact that Iraq had an almost equal proportion of Sunnî and Shi'î inhabitants.

A monarchy was established under King Faisal in 1921 following the Arab Revolt, and Iraq gained full independence from its Mandate status in 1932. A military coup in 1958 brought an end to the monarchy and Iraq became a republic.

The *Iraqi Law of Personal Status 1959* was based on the report of a commission appointed the previous year to draft a code of personal status and applies, according to Article 2, to all Iraqis except those specifically exempt by law, i.e. mainly Christian and Jewish minorities. The law provides that, in the absence of any textual provision, judgments should be passed on the basis of the principles of the Islamic *Sharî'ah*, in close keeping with the text of the law. Article 1 of the Civil Code also identifies Islamic

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[64] Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 138-41; Taha Mahmood, "Syria" in *Statutes of Personal Law in Islamic Countries*, pp. 39-41, 167-73.

Law as a formal source of law.

The provisional constitution was adopted on 22 September 1968 and came into effect on 16 July 1970. Article 4 of the current provisional constitution declares Islam the state religion.

Courts of Personal Status hear all cases involving Muslims, whether Iraqi or not. These Courts have jurisdiction over marriage, divorce, legitimacy, succession, *awqaf*, etc. *Sharî'ah* courts operate independently of the regular courts. The Law of Personal Status 1959 is a unified code applicable to Shî'a and Sunnî Iraqis. We should mention the Civil Code 1951 which was drafted by Abd al-Razzaq al-Sanhuri, an Egyptian jurist.[65]

6.14 Islamic Law in Jordan

Jordan remained part of the Ottoman Empire until World War I and was then placed under an indirect form of British Mandate rule. The Ottoman legal system was retained; in 1927 many Ottoman laws (including the Ottoman Law of Family Rights 1917) were re-enacted with some alterations. The Hashemite Kingdom of Jordan was established as a fully independent state in 1947, with Islam as the state religion. The first constitution was adopted the following year, and the state embarked on the process of developing a national legal system to replace the vestiges of Ottoman rule. The 1952 Constitution declares Islam to be the state religion. It does not specify the sources of legislation as a whole, although in regard to the *Sharî'ah* courts it states that "the *Sharî'ah courts* in the exercise of their jurisdiction shall apply the rulings of the *Sharî'ah* law." The Hanafî madhhab is the dominant school in Jordanian law.

In 1947 a provisional Law of Family Rights was enacted and remained in force until it was replaced in 1951 by the new Law of Family Rights. By this time the Palestinian territory of the West Bank had come under Jordanian rule, including East Jerusalem, and, until 1994, even during the Israeli occupation from 1967, the *Sharî'ah* courts of the West Bank were under the authority of the Jordanian *Qâdhî al-Qudhât* and applied Jordanian law.

A *Civil Code* and *Civil Procedure Code* were enacted in 1952 and 1953, the former replacing the Ottoman Majalla of 1876. The 1952 Civil Code was replaced in 1976, the new code drawing from Syrian legislation (which was in turn modeled on the Egyptian Civil Code of 1948). The same year the Jordanian Law of Personal Status replaced pro-

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[65] Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 111-5; Mustafa Ahmad al-Zarqa, *al-Madkhal al-Fiqhi al-Âm ila al-Fiqh al-Islamî* (Damscus: Dar al-Qalam, 1998), vol. I, p. 245-56; Taha Mahmood, "Iraq" in *Statutes of Personal Law in Islamic Countries*, pp. 15ff, 116-29; Zaid, *Reformation of Islamic Thought*, pp. 40-41.

viding for a more comprehensive code, while retaining reference to the classical Hanafî rules in the absence of a specific reference in the text. Discussions continue on the draft text of a new personal status law.

The *Jordanian legal system* draws on the Ottoman heritage in the communal jurisdiction of the religious courts of different communities over matters of personal status. In its civil court system it follows the French model. The *Sharî'ah* courts are established in the constitution along with the religious tribunals of other recognized communities and include first instance courts with a single *Qâdhî* and the *Sharî'ah* Court of Appeal. The other two categories of courts established in the constitution are the civil or regular courts (*Nizâmiyya*) and "special tribunals." The constitution grants the *Sharî'ah courts* exclusive jurisdiction in matters of Muslim personal status. The precise jurisdiction of and procedure in the *Sharî'ah courts* is defined in the Law of *Shar'î* Procedure 1959; the rules governing qualification and functions of *shar'î Qâdhîs* and lawyers are to be found in the Law of Organization of *Sharî'ah* Courts 1972 and the Law of *Shar'î* Advocates 1952 respectively, both of which have been amended a number of times. [66]

6.15 Islamic Law in Kuwait

The Ottoman Empire ruled present-day Kuwait as part of the Basra province since the late 17th century, and the Ottoman legal and judicial system functioning in Iraq was applied to Kuwaiti territory. However, the local rulers adhered to the Mâlikî School. In the late 19th century, a Treaty of Protection placed Kuwait under British extra-territorial control, and Kuwait became an administrative subdivision of British India. While the British did establish a Western-style judicial administration, it served only the non-Arab inhabitants of Kuwait. The Mâlikî School is the official *madhhab* in Kuwait. There is also a significant Ja'farî Shî'a minority.

The British protectorate of Kuwait ended in 1961, by which time Shaykh 'Abdullah al-Salim al-Sabah had begun the process of legal and judicial reform. The process of codification was initiated by the country's leaders during the early 1960s. In 1959 Shaykh 'Abdullah enlisted the services of the renowned Arab jurist Abd al-Razzaq al-Sanhuri, leading to the enactment of a number of codes inspired by Egyptian and French models. While matters relating to civil and commercial law and procedure were codified in the 1960s, it was not until the 1980s that the Civil Code 1980 and the Kuwaiti Code of Personal Status 1984 were enacted.

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[66] Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 119-22; al-Zarqa, *al-Madkhal al-Fiqhi al-Âm ila al-Fiqh al-Islâmî*, vol. I, pp. 245-56; Mahmood, "Jordan" in *Statutes of Personal Law in Islamic Countries*, pp. 20-24, 129-36.

The constitution was adopted on 11 November 1962. Article 2 states that "the religion of the State is Islam, and the Islamic *Sharî'ah* shall be a main source of legislation." Article 1 of the Civil Code also states that, in the absence of a specific legislative provision, judges are to adjudicate according to custom (*'urf*) and, in the absence of an applicable principle of custom, be guided by the principles of Islamic jurisprudence (*fiqh*) most appropriate under the general and particular circumstances. Following the Iranian Revolution, Kuwait's rulers stated that they would begin Islamizing the law and enacting laws that were fully in agreement with *Sharî'ah*.

Under the 1959 Law Regulating the Judiciary, Kuwaiti courts are competent to hear all disputes concerning personal status, and civil, criminal and commercial matters. There are three levels of courts: courts of first instance (having several divisions, including personal status) in every judicial district; High Court (with five divisions, including personal status); and the Supreme Court (divided into the Division of High Appeal and the Cassation Division). For the application of personal status laws, there are three separate sections: Sunnî, Shi'î and non-Muslim (for the application of family laws of religious minorities). After judgments by the courts of first instance, appeals lie with the High Court, and then with the Cassation Division of the Supreme Court.[67]

6.16 Islamic Law in Sudan

Sudan (officially the Republic of Sudan) is a country in north east Africa. It is the largest in the African continent and the Arab world and the bay area. The Mâlikî School was the predominant *madhhab* in Sudan, although the dominant school is now the Hanafî, due to Egyptian and Ottoman influence.

The *legal system* is based on English common law and Islamic law. Sudan came under Egyptian-Ottoman rule from the time of the Egyptian defeat of the Funj Kingdom in 1822. After the opening of the Suez Canal in 1869, European interest in the region increased; the British General Charles Gordon was appointed a governor of Egyptian Sudan in 1873. The Mahdist revolt led by Muhammad Ahmad al-Mahdi in 1880 led to the capture of Khartoum from the Egyptians in 1885. The British re-established control over the region in 1898 under General Horatio Kitchener. The British and Egyptians shared sovereignty during the Condominium period from 1899 on. An agreement to allow for a three-year transition period to independence in 1953 led to self-rule in 1956.

Civil war between the north and south continues to plague Sudan. Three ex-

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[67] Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 123-25; al-Zarqa, *al-Madkhal al-Fiqhi al-Âm ila al-Fiqh al-Islâmî*, vol. I, pp. 245-56; Taha Mahmood, "Gulf" in *Statutes of Personal Law in Islamic Countries*, p. 85.

tended periods of military rule have been punctuated by briefer periods of multiparty parliamentary rule. The last elected government was suspended after a military coup on 30 June 1989. Sâdiq al-Mahdi was overthrown by the military and an Islamist coalition led by Lieutenant-General 'Umar al-Bashir and Dr. Hasan al-Turabi and martial law were imposed. As of 20 January 1991 the Revolutionary Command Council imposed Islamic law on all residents of the northern states regardless of religion.

On 1 July 1998, a new constitution came into force following a referendum the previous month. Lieutenant-General al-Bashir became president and Dr. al-TurAbu became the speaker of parliament. On 12 December 1999, President al-Bashir dissolved Parliament and declared a state of emergency. In April 2000, the state of emergency was extended through to the end of 2000.

Sources of law are Islamic Law, the consensus of the population, the constitution, and custom. In family law, judicial circulars (*manshûrat*) issued by *Qâdhî* al-*Qudâ* (first issued in 1916) served to institute reforms or instruct application of particular interpretations. The Family Code was passed in 1991, codifying *Sharî'ah* principles and interpretations of some *manshûrat* and abolishing others. Section 5 of the Code indicates Hanafî *fiqh* as the residual source of law; the Supreme Court (*Sharî'ah* Circuit) is vested with the power to issue interpretations of the code [68]

The *constitution* came into force on 1 July 1998, after being approved in a referendum the previous month; Article. 1 states that Islam is the religion of the majority of the population but does not proclaim it to be the state religion; Article 65 identifies the sources of law as *Sharî'ah*, the consensus of the people, the constitution, and custom. Prior to the enactment of the constitution, Sudan had largely been governed through a series of "constitutional decrees." Article 137 repealed all of the constitutional decrees except Constitutional Decree No. 14, which provides for implementation of the 21 April 1997 Peace Accord.

The court system consists of a Constitutional Court, a High Court, Court of Appeals and courts of first instance. During the Islamization campaign of 1983 the government reunified civil and *Sharî'ah* courts, which had been divided during the colonial period. There is nothing in the new constitution to suggest that there has been a change in the treatment of *Sharî'ah* in the courts.

- Relevant Legislation is the following:
- Constitutional Court Act 1998
- Muslim personal law Act 1991
- Sharî'ah Courts Act 1967

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[68] Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 82-6; Otto, *Sharî'a en Nationaal Recht*, pp. 113-36; Vikør, *Between God and the Sultan*, pp. 273-77.

- Judicial Authority Act 1971
- Organization of Laws Act 1973
- Judiciary Act 1976
- Local Courts Act 1977
- [September Laws; part of Ja'far al-Numayri's Islamization campaign during Sudan's previous period of military rule (1969-1985)]
- Civil Procedure Act 1983
- Civil Transactions Act 1983
- Criminal Procedure Act 1983
- Evidence Act 1983
- Judiciary Act 1983
- Penal Code 1983 (introducing *had* penalties)
- Sources of Judicial Decisions Act 1983
- Civil Code 1984
- Sudanese Criminal Act 1991 (reinstating *hadd* offences and law of *qisâs* and *diyât*).[69]

6.17 Islamic Law in Somalia

The Somali Republic was formed on 1st July 1960, upon the union of British Somaliland which gained independence on 26th June, and Italian Somaliland which gained independence from Italian-administered UN trusteeship on 1st July. Early legislation in British Somaliland was based on the importation of British-Indian legislation in the late 19th and early 20th century. The British promulgated later the Natives Betrothal and Marriage Ordinance 1928 and *Qâdhis'* Courts Ordinance 1937 specific to Somaliland. The Subordinate Courts Ordinance 1944 repealed 1937 Ordinance, limiting the jurisdiction of *Qâdhis'* Courts to matters of personal status. Under Italian rule in the south, there was a well developed system of *Qâdhis'* Courts which retained jurisdiction over civil and minor criminal matters.

Upon independence, the Republic was faced with the task of unifying legislation and judicial structures drawn from Italian, British, customary and Islamic legal traditions. After a military coup in 1969, the new regime embarked on a programme of legal reform based on scientific socialism. In the early to mid-1970s, debate regarding family law reform led to the appointment of a commission to prepare a draft code.

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[69] Fluehr-Lobban, *Islamic Law and Society in the Sudan* (London: Frank Cass, 1987); Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 82-86.

The draft produced by the commission was enacted in 1975 with significant modifications made by President Siad Barre and the Secretary of State for Justice and Religious Affairs Abdisalem Shaykh Hussain. The Code aimed to abolish customary laws, and abrogated previous British and Italian era legislation relating to family law. Article 1 of the Family Code 1975 provides that the leading doctrines of the Shâfi'î school, and general principles of Islamic law and social justice are to serve as residuary sources of law.

Civil war ensued after the ousting of Barre in January of 1991, with competition for power between various factions. The collapse of the UN peacekeeping mission led to a final pullout of international troops in spring 1995. In August 2000, a majority of Somali leaders signed a transitional charter, to be in force for 3 years, and elected a parliament for the transition period. Fighting continues in the south with some orderly government established in the north.

The majority of Muslims are Shâfi'î. There is a small Christian minority. The current Constitution was adopted in August 1979. Article 3 (Section 1, Chapter 1) declares Islam the state religion.

After independence, the *sharî'ah* and customary courts were formally recognized as Courts of *Qâdhis*. Their judicial role is very small and jurisdiction is limited to civil matters such as marriage and divorce.

The regular court system is constituted at four levels: Supreme Court, courts of appeal, regional courts and district courts. District courts have two sections, civil and criminal. The civil section has jurisdiction over all cases arising from *sharî'ah* or customary law or civil cases where the matter in dispute does not exceed 3000 Somali shillings. Judges are directed to consider *sharî'ah* or customary law in rendering decisions. Regional courts are divided into three sections, civil and criminal (first instance), assize, and labor. Courts of appeal are divided into two sections: general appeals and assize appeals.[70]

6.18 Islamic Law in Kenya

Republic of Kenya is a republic in eastern Africa; achieved independence from the United Kingdom in 1963; major archeological discoveries have been made in the Great Rift Valley in Kenya.

European colonial interest in Kenya began with Portuguese efforts to establish safe ports in the area of Mombasa from 1498. The Omanis captured Mombasa in 1696. British interests in the East African region in the mid to late 19th century led to

[70] Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 79-81.

the formation of the British East Africa Company. In 1895, within a decade of the founding of the East Africa Company, the area from the coast to the Rift Valley was declared the British East Africa Protectorate. Kenya gained independence in June 1963. Under the British protectorate, Kenya had parallel legal systems with African courts applying customary law, and appeals lying with the African Appeal Court, then with the District Officer and then a Court of Review. Muslim personal law was applied by Courts of *Liwalis*, *Mudirs* and *Qâdhis*, with appeals lying with the Supreme Court (renamed the High Court after independence). The process of integrating the judicial system began in 1962 when powers of administrative officers to review African Courts' proceedings were transferred to magistrates. The process was completed by the passage of two acts in 1967. The Magistrates' Courts Act 1967 abolished African Courts and the Court of Review and established District and Resident Magistrate's Courts and a High Court. The *Qâdhis'* Courts Act 1967 established six *Qâdhis'* Courts for the application of Muslim personal status law.

In 1967, two Presidentially-appointed commissions began looking into marriage and divorce law and inheritance law. The commissions produced drafts of uniform family and inheritance codes to replace the existing customary, statutory, Islamic and Hindu laws then in force. The commission dealing with inheritance laws recommended a uniform code applicable with certain exceptions for customary laws. The bill based on its recommendations led to much heated debate. Criticisms included that the proposed law was too foreign, anti-Muslim, and afforded too many rights to women and illegitimate children. The bill was eventually passed in 1972. The marriage and divorce laws commission produced a draft code that was as uniform as the commission deemed feasible, but since the 1970s efforts to enact a uniform marriage law have been unsuccessful. Marriage law continues to be governed by several regimes: civil, Christian, Hindu and Muslim marriages are governed by separate legislation and communal laws and customary law marriages are also afforded official recognition.

The protectorate-era legislation relating to application of Muslim personal law has been retained. The Acts in force basically afford recognition to marriages solemnized under Islamic law, provide for the registration of Muslim marriages and divorces, delineate the jurisdiction and procedure of *Kadhis'* Courts and instruct the application of the principles of personal law applicable to the parties involved, without substantive codification of that law.

Kenya has a very diverse Muslim population due to Arab and South Asian settlement, local conversion and intermarriage, thus various schools represented. The majority is Shafi'î, and there are also sizeable Hanafî communities as well as Ja'farî, Isma'ilî, Zaydî and Ahmadî minority communities.

The Constitution was adopted on 12th December 1963, and has been amended several times; most notably in 1964 when Kenya became a Republic and in 1991 when

a multiparty system was restored. The Constitution does not provide for any official state religion. Article 66 (1) to (5) provides for the establishment of *Qâdhis'* Courts.

Local courts applying customary law were abolished in 1967 when reform and unification of the judiciary was completed. There are four levels of courts: Resident and District Magistrates' Courts (1st, 2nd and 3rd classes), Senior Resident and Chief Magistrates' Courts; a High Court, and the Court of Appeal.

Islamic law is applied by *Qâdhis'* Courts where "all the parties profess the Muslim religion" in suits relating to "questions of Muslim law relating to personal status, marriage, divorce or inheritance". There are eight *Qâdhis'* Courts in Kenya, presided over by a Chief *Qâdhi* or a *Qâdhi* appointed by the Judicial Services Commission. Appeals lie to the High Court, sitting with the Chief *Qâdhi* or two other *Qâdhis* as assessor(s).[71]

6.19 Islamic Law in Ethiopia

Ethiopia was occupied by Italy from 1936 to 1941, although Eritrea came under Italian rule from 1886 to 1941. During WWII, the British defeated the Italians and established a protectorate over Eritrea. The 1950 UN Resolution to unify Eritrea and Ethiopia was implemented in 1952. The movement for Eritrean independence developed into an armed struggle in 1961. A Civil Code passed in 1960 governs civil, religious and customary law marriages. Emperor Haile Selassie I (1930-1974) attempted to modernize the state, but the nation was struck by famine and a long-standing conflict with Eritrea; both factors are considered to have contributed to the 1974 military coup ending Selassie's rule.

Lieutenant Col. Mengistu Haile Mariam became the head of state and the government was oriented towards Marxism. All religions, including Ethiopian Orthodox Christianity, were officially placed on equal footing under new regime. The Eritrean People's Liberation Front won several strategic successes against Ethiopian in late the late 1980s and early 1990s, declaring the Provisional Government of Eritrea in May 1991. At the same time, 17 years of military rule under a junta ended in 1991 amidst growing pressure from democratic opposition forces. From 1991 to 1995 a Transitional Government, a coalition of 27 political parties, ruled Ethiopia. A 1993 referendum in Eritrea resulted in a massive vote for independence.

A new Ethiopian Constitution was adopted in 1994 and elections were held in 1995 leading to election of Meles Zenawi as Prime Minister and Negasso Gidada as President. Federal Democratic Republic of Ethiopia established in August 1995.

The majority of Muslims are Shâfi'î. The other major religion is Ethiopian Ortho-

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[71] Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 54-56.

dox (or Monophysite) Christianity. There are also small Jewish and Animist minority communities.

The current Constitution was adopted in 1995. Article 34 (on Marital, Personal and Family Rights), section 5 states: "This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute." Article 78(5) also provides for the establishment or recognition of religious or customary courts, pursuant to Article 34(5).

Regular courts are organized at four levels. The Supreme Court has appellate jurisdiction and sits in Addis Ababa. The High Courts sits in the 14 provincial capitals have original and appellate jurisdiction. The awraja courts are convened in each of the 102 administrative subdivisions. Woreda courts are established in each of the 556 districts.

Under the 1944 legislation, sharî'ah courts are organised into three levels: Naiba Councils serve as courts of first instance, *qadhis'* Councils as intermediate courts and the Court of *sharî'ah* as highest court.

Sharî'ah courts have jurisdiction in two kinds of cases. The first are: marriage, divorce, maintenance, guardianship of minors, and family relationships; provided that the marriage to which the case pertains was concluded under Islamic law or the parties are all Muslims. The second are: cases concerning *awqaf*, gifts, succession, or wills, provided that donor is a Muslim or deceased was a Muslim at the time of his/her death.

Sharî'ah courts have unclear legal status as the Muhammadan Courts Act 1944 establishing them was never actually repealed and yet the 1960 Civil Code makes no exceptions for Muslims or Muslim personal law. The Court of *Sharî'ah* continues to sit as a division of the Supreme Court.[72]

6.20 Islamic Law in Algeria

Algeria (al-Jazâ'ir, officially the People's Democratic Republic of Algeria, is an Arabic country located in North Africa. It is the largest country on the Mediterranean Sea, the second largest on the African continent. The Mâlikî School is the predominant *madhhab* in Algeria. There is an Ibâdhî minority and small Christian and Jewish minorities.

The Algerian legal system is based on French and Islamic law. Algeria remained under French rule for 132 years, constituting the longest direct European colonization

[72] Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 76-78.

of any region in North Africa. After a brutal eight-year struggle for independence, Algeria became a sovereign state in July 1962.

Under French rule, courts applied Mâlikî principles in matters relating to personal status and succession (unless the parties were Ibâdhî). Commentators note that the process of adjudication and interpretation in the Franco-Algerian courts led to distinctive developments in the area of family law. In 1916, a commission headed by the French jurist Marcel Morand was appointed to formulate a draft code of Muslim law. The draft code, *Avan-project de code du droit Musûlman Algerien*, based mainly on Mâlikî principles but incorporating some non-Mâlikî (mainly Hanafî) provisions, was never formally passed into law although it did influence the application and administration of family law in Algeria. The government eventually issued a Marriage Ordinance in 1959, enacting some Mâlikî principles relating to family matters; the Ibâdhî minority was initially exempted from the ordinance. The legislation may have been inspired by the codification of family law in Tunisia and Morocco in 1956 and 1958 under newly independent national governments. Although the Marriage Ordinance did not introduce substantial changes to family law, there were some provisions based on Hanafî principles. The Ordinance established rules for the solemnization and registration of marriage, raised the minimum marriage age for both parties, and established certain regulations relating to judicial dissolution and court orders for post-divorce relief. Its application was specific to those who registered their option for state legislation.

The *first* constitution promulgated in 1964 declared Islam to be the state religion. The new regime also amended the Marriage Ordinance of 1959, repealing or amending certain provisions, such as the exemption of *Ibadhî* marital relations from the terms of the ordinance and the minimum marriage age. The *second* constitution adopted in 1976 reaffirmed Islam as the state religion. Periodic demands for the comprehensive codification of personal status and inheritance laws eventually led to a draft code being presented to the National Assembly in 1980. After several years of debate, discussion and protest, the Family Code was enacted in 1984.

The current *constitution* was adopted on 19 November 1976 and has been amended several times, with the last revisions approved by referendum in November and signed into law in December 1996. Article 2 provides that Islam is the religion of the state.

The *judiciary* in Algeria is organized into three levels. *Daira* tribunals (numbering 183 in the late 1980s) are the courts of first instance for civil and certain criminal matters. The 48 *Wilaya* Courts in each province are organized into four chambers (civil, criminal, administrative and accusation) and are constituted by three-judge panels that must hear all cases. In civil suits, these courts have appellate jurisdiction over the decisions of lower courts. The highest level of the judiciary is the Supreme Court (with

a Private Law chamber for civil and commercial cases, Social Division for social security and labor cases, a Criminal Court and an Administrative Division).[73]

6.21 Islamic Law in Tunisia

Tunisia (officially the Tunisian Republic) is a Berber-Arab country located in North Africa. The Mâlikî School is the predominant *madhhab* in Tunisia.

The legal system is based on the French civil law system and Islamic Law. During the time that it was an autonomous province of the Ottoman Empire from 1574 on, Hanafî *fiqh* was influential but never displaced the position of the Mâlikî School. Tunisia became a French Protectorate in 1881 and attained full independence in March 1956. The Law of Personal Status (LPS), inspired by unofficial draft codes of Mâlikî and Hanafî family law, was passed soon after independence. The LPS was extended to apply to all Tunisian citizens in 1957, thus ending the application of rabbinical law to Jewish personal status cases and the French Civil Code to personal status cases relating to non-Muslim Tunisians. Among the most controversial provisions of the LPS were those banning polygamy and extrajudicial divorce.

The constitution was adopted 1 June 1959. Article 1 declares Islam to be the state religion, and Article 38 provides that the president of the republic must be a Muslim. *Sharî'ah* courts were abolished in 1956. There are four levels of courts in the judiciary. Cantonal courts have limited criminal jurisdiction. Courts of first instance have civil, commercial, correctional, social and personal status chambers. Three courts of appeal (in Tunis, Sousse and Sfax) have civil, correctional, criminal and accusation chambers (the final one being similar to a grand jury). The Court of Cassation in Tunis is the highest court of appeal, with three civil and commercial chambers and a criminal chamber.[74]

6.22 Islamic Law in United Arab Emirates

The UAE is a federation of seven emirates: Abu Dhabi, Sharjah, Ajman, Fujayrah, Umm al-Qawain, Dubai and Ra's al-Khaymah. The sources of law are Islamic law, constitutional law, and legislation.

The area now known as the United Arab Emirates was known as the *pirate coast* by the early 19th century. Beginning in the 1820s, the British entered into a number of

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[73] Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 164-8; Alan Christelow, *Muslim Law Courts and the French Colonial State in Algeria* (Princeton: Princeton University Press, 1985).

[74] Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 182-6.

treaties with local rules in order to protect their shipping interests. A perpetual maritime truce signed in 1853 gave the British remit over handling of foreign relations for the region. Full independence was attained in December 1971, with Ra's al-Khaymah, the last Emirate to join the federation, becoming a part of the union the following year.

The majority of Emiriti nationals are Sunnî Muslim; there is a significant Shî'a minority, as well as small Christian and Hindu minorities. The federation has a very high proportion of expatriates.

Article 7 of the Provisional Constitution, adopted 2 December 1971 and made permanent in 1996, declares Islam to be the official state religion of the union and that Islamic *sharî'ah* will be a principal source of legislation.

The Abu Dhabi Courts Law 1968 regulates the jurisdiction of *sharî'ah* courts, although personal status law remains uncodified. The other six emirates do not have similar legislation or organized judiciaries, so *sharî'ah* courts are not regulated. Important civil and criminal cases are brought before the ruler in person.

The Sharjah Courts Law 1971 created civil courts competent to hear commercial and labour disputes, with limited criminal jurisdiction. The Law Establishing the Union Supreme Court 1973 and the Union Law 1978 established the Union Courts of First Instance and Appeal and transferred jurisdiction from tribunals in Abu Dhabi, Sharjah, Ajman and Fujayrah to these courts. Union Courts of First Instance deal with civil, commercial and administrative disputes, including personal status cases, arising in the permanent capital.[75]

6.23 Islamic Law in Yemen

Yemen (officially the Republic of Yemen) is an Arab country located in the Arabian Peninsula in southwest Asia. Islamic caliphs began to exert control over the area in the 7th century. After the caliphate broke up, the former North Yemen came under the control of Imâms of various dynasties, usually of the Zaidî sect, who established a theocratic political structure that has survived until modern times. Egyptian Sunnî caliphs occupied much of North Yemen throughout the eleventh century. By the sixteenth century and again in the nineteenth century, North Yemen was part of the Ottoman State, and its Imâms exerted control over South Yemen for a long time.

In 1839 the British occupied the port of Aden and established it as a colony in September of that year. They also set up a zone of loose alliances (known as protectorates) around Aden to act as a protective buffer. North Yemen gained independence

[75] Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 142-3.

from the Ottoman Empire in 1918 and became a republic in 1962. In 1967 the British withdrew and gave Aden back to Yemen due to the extreme pressure of battles with the North and its Egyptian allies. After the British withdrawal, this area became known as South Yemen. The two countries were formally united as the Republic of Yemen on 22 May 1990. The Shâfi'î and Zaidî schools are the predominant *madhâhib* in Yemen.

Following the unification of the two Yemens, Republic Decree Law no. 20, constituting the *Yemeni Law of Personal Status*, was passed in 1992. The legislation followed a presidential decree abolishing the 1978 code of personal status of the Yemeni Arab Republic and the 1974 code of personal status of the People's Democratic Republic of Yemen. The post-unification Law of Personal Status closely resembles the former Yemeni Arab Republic's legislation. Article 349 provides that the strongest proofs in the Islamic *Sharî'ah* are to serve as the residual source of law in the absence of specific textual provision. The penal law of the unified Yemen also provides for the application of *hadd* penalties for certain crimes, although such penalties are not often applied in practice.

The Constitution was adopted on 16 May 1991 and amended 29 September 1994. Article 1 declares Yemen an "Arab Islamic State" and Article 2 declares Islam to be the official state religion. Article 3 states that "Islamic *Sharî'ah* will be the source of all legislation." Article 23 states that inheritance is regulated by *Sharî'ah*. Article 26 states that the family is the basis of society and its pillars are religion, custom and love of the homeland. Article 31 states that women have rights and duties that are guaranteed and assigned by *Sharî'ah* and stipulated by law.

Courts of first instance in each district have jurisdiction over personal status, civil, criminal and commercial cases. Appeals go to the Courts of Appeal in each of the 18 provinces with civil, criminal, matrimonial and commercial divisions, each consisting of three-judge benches. The Supreme Court is the highest court of appeal and sits in San'a. It has eight divisions: constitutional, appeals scrutiny, criminal, military, civil, family, commercial and administrative. [76]

6.24 Islamic Law in Turkey

Turkey (*Türkiye*), known officially as the Republic of Turkey (*Türkiye Cumhuriyeti*), is a Eurasian country that stretches across the Anatolian peninsula in western Asia and Thrace (*Rumelia*) in the Balkan region of southeastern Europe. Due to its strategic location astride two continents, Turkey's culture has a unique blend of Eastern and Western traditions. A powerful regional presence in the Eurasian landmass with strong historical, cultural and economic influence in the area between Europe in the

[76] Abdullahi Ahmad an-Na'îm, *Islamic Family Law in a Changing World*, pp. 144-47

west and Central Asia in the east, Russia in the north and the Middle East in the south, Turkey has come to acquire increasing strategic significance.

Turkey is a democratic, secular, unitary, constitutional republic whose political system was established in 1923 under the leadership of Mustafa Kemal, following the fall of the Ottoman State in the aftermath of World War I.[77]

The legal history of Turkey until 1923 is the legal history of at least thirty Muslim states because the Ottoman State governed many of these states. For this reason, we can state that the legal system during the Ottoman State was *Sharî'ah*, but after Mustafa Kemal no trace of Islamic Law in Turkey remained. Now all regulations and legislation are completely similar to the European legal system.

Despite the fact that 99.8 per cent of the population is Muslim, the legal system in Turkey is completely secular. The religion is not mentioned in the Constitution at all and is not afforded the satus as a source of law for the relevant legislative bodies nor in respect of judicial reasoning by the national tribunals.[78]

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[77] See Otto, *Sharî'a en Nationaal Recht*, pp. 145-73.

[78] Akgunduz and Cin, *Turk Hukuk Tarihi*, v. I, pp. 136-50; Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study*, (London: BIICL, 2008), p. 44.

7 THE SYSTEM AND METHODOLOGY OF ISLAMIC LAW

7.1 The System of Islamic Law

A legal system in actual operation is a complex organism in which structure, substance, and culture interact. From the point of view of "system", which means the arrangement and classification of legal rules according to the relationships set by positive law, the system of Islamic Law is a special one. Islamic Law is truly an original system, having a particular system of arrangement and classification. All books of Islamic law follow a system that was more important and practical for ancient jurists, instead of the separation between public and private laws based on Roman law. In fact, an effort was made to establish a legal and logical link between books, chapters and sections in the written works. Since Islamic Law is not secular in nature, the devotions that arrange the rules between Allah and His servants have also been studied within the legal system.[1]

Most books on Islamic law were compiled according to methodologies that may be ascribed to each school of law, which represent distinctive modes of compilation. Some legal topics were placed in differing order, depending on the particular school. But the differences are not huge. We could summarize the ways in which *fiqh* is divided as follows:

The Hanafî school	*'Ibâdât* (Devotions); *Munâkahât* (Marriage); *Mu'âmalât* (Civil Law); *'Uqûbât* (Penal Law).
The Shâfi'î School	*'Ibâdât* (Devotions); *Mu'âmalât* (Civil Law); *Munâkahât* (Marriage); *'Uqûbât* (Penal Law); Disputes (*Qadhâ*).
The Mâlikî School	*'Ibâdât* (Devotions); *Munâkahât* (Marriage); *Mu'âmalât* (Civil Law); *'Uqûbât* (Penal Law); Disputes (*Qadhâ*).
The Hanbalî school	*'Ibâdât* (Devotions); *Mu'âmalât* (Civil Law); *Munâkahât* (Marriage); *'Uqûbât* (Penal Law); Disputes (*Qadhâ*).

[1] Cf. Jasser Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law: A Systems Approach,* (London: The International Institute of Islamic Thought, 2008), pp. 46-55.

Now we shall give some brief information about the Islamic legal system on which *Majalla* was also based.

The earlier Islamic law was classified into four major groups, which are as follows.

1) *'Ibâdât (*Devotions=Worship*).* These are mentioned at the beginning of books on law and contain rules on devotions that are related to life in the hereafter. However, the rules regarding the *zakâh* (poor tax, alms), which is regarded as devotion, also form a noteworthy part of Islamic finance law. Briefly, this chapter deals with the relations between Allah and His Servants. The other three chapters focus on inter-human relations.

2) *Munâkahât (*Marriage*).* This constitutes rules concerning family law, dealing with issues like marriage, divorce, guardianship, tutelage, lineage, alimony, etc., but not inheritance law.

3) *Mu'âmalât (*Civil Law*). Mu'âmalât* is the most comprehensive chapter of earlier Islamic law. Despite the fact that *Majalla* introduced family law as a separate chapter, earlier jurists deemed *Munâkahât* to be a sub-branch of this chapter. *Sharî'ah* rules that arrange all the relations among people for the sake of the balanced and regular continuation of social life are called *Mu'âmalât* decrees. Provisions concerning - which today fall under private law - the law of obligations, property law, law of persons in part, commercial law and private international law, and - falling under public law - general international law and procedural law were studied in the chapter on *Mu'âmalât* (Procedures). This subject was studied separately among the provisions of the inheritance law, *Mu'âmalât* (Procedures) or under *Ilm al-Farâ'idh* (Science of inheritance law). Islamic jurists in recent times placed international law under *Siyar*, the provisions regarding the constitution or administrative law under *Ahkâm al-Sultâniyyah* (Sultan's Decrees) or *Siyâsah al-Shar'iyyah* (Sharî'ah Politics).[2]

4) *'Uqûbât* (Penal Law*),* the Islamic Penal Codes.[3]

We also wish to draw particular attention to an Abstract Division, which is given content from the point of view of the history of Islamic Law. Of the aforesaid legal rules, those that are based upon the Noble Qur'an and the *Sunnah* (Traditions of

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[2] Cf. Irshad Abdal-Haqq, "Islamic Law: An Overview of its Origin and Elements," Hisham M. Ramadan, *Understanding Islamic Law: from Classical to Contemporary*, (Lanham: Rowman Altamira, 2006), pp. 22ff.

[3] *Majalla*, Article I; Ali Haydar, *Durar al-Hukkâm Sharhu Majalla al-Ahkâm,* (trans. into Arabic by Fahmi al-Husayni) vol. I (Beirut: D al-Kutub al-'Ilmiyyah, n.d), pp. 15-21; Zerka, *Al-Fiqh al-Islamî fî Thawbihal-Jadîd,* vol. I, pp. 61ff; Akgündüz, *Kulliyât,* pp. 59-60; Muhammad Amin ibn 'Âbidîn, *Radd al-Muhtar,* vol. I (Cairo: Maktaba al-Halabî, 1966), 1/79; Karaman, *Mukayeseli İslâm Hukuku* (Comparative Islamic Law), (Istanbul: 1974), vol. I, pp. 20-28; Abdulkarim Zaidan, *al-Madkhal Li Dirâsah al-Sharî'ah al-Islâmiyyah* (Baghdad: 1977), pp. 57-61; Mawil Izzi Dien, *Islamic Law: from Historical Foundations to Contemporary Practice* (Edinburgh: Edinburgh University Press 2004), pp. 25-27.

Prophet Muhammad) and are included in books of *fiqh* (Islamic jurisprudence) are called *shar', shar' al-sharîf* or *Sharî'ah* law. On the other hand, certain regulatory dispositions concerning the constitution and administrative law called *Siyâsah al-Shar'iyyah* or *Ahkâm al-Sultâniyyah*, codices that are arranged concerning especially financial law, land law and *ta'zîr* penalties based on the limited legislative power recognized by *Sharî'ah* rules , and rules of *Ijtihâd* (interpretation) based on usages and public interest are treated under *Public Law, Politics,* or *Law*.

Some scholars have divided *Sharî'ah* law into two main sections.

First are the acts of worship, or *al-Ibâdât*; these include:

- Ritual Purification (*wudhu'*)
- Prayers (*salâh*)
- Fasts (*sawm* and *Ramadhan*)
- Charities (*zakâh*)
- Pilgrimage to Mecca (*hajj*).

The second covers instances of human interaction, or *al-mu'âmalât*:

- Financial transactions, contracts
- Endowments
- Laws of inheritance
- Marriage, divorce and child care
- Foods and drinks (including ritual slaughtering and hunting)
- Penal punishments
- Warfare and peace
- Judicial matters (including witnesses and forms of evidence).

Although it might be deemed reasonable at first glance to expect that the information concerning the history of Islamic Law is given on the basis of the aforementioned division, it would be better, in our view, for didactic purposes to introduce the developments and brief rules in the history of Islamic Law as a separation between public law and private law, which is deemed appropriate in contemporary law. For this reason, we will present the rest of this discussion in two other books, the first of which will be composed of the information on public law while the second will be consist of information on and the historical development of private law. In the meantime, in each branch of law, the basic principles of both *Sharî'ah* law and public law will be explored. In addition, the noteworthy legal activities in the history of Islamic Law will also be elaborated separately. Our purpose is to give students and researchers enlightening data on how Islamic legal life of 1429 years developed from the pers-

pective of legal rules and institutions.

We would like to quote Article 1 of *Majalla* in relation to this:

> The science of Islamic law (*fiqh*) consists of knowledge of the precepts of the Divine Legislator in their relation to human affairs.
>
> The questions of Islamic law either concern the next world, being known as rules relating to worship, or to this world, being divided into sections dealing with domestic relations, civil obligations and punishments. Thus Allah decreed the continuation of the world until the appointed time. This, however, can only occur by mankind being perpetuated, which is dependent upon marriage of male and female with a view to procreation. Moreover, the continuation of the human species is assured by individuals association together. Man, however, is view of the weakness of his nature is dependent upon food, clothing, housing and the industries for his subsistence. In other words, in view of the fact that man is a civilized being, he cannot live in attitude like the other animals, but is in need of co-operation and association in work with his fellowmen in order to live in a state of civilization. Every person, however, asks for the things which he likes and avoids things which are disagreeable to him. As a result, it has been necessary to establish laws of a nature likely to maintain order and justice as regards marriage, mutual help and social relations, which are the basis of all civilizations.
>
> The first division of Islamic law is the section dealing with domestic relations. The second is the section dealing with civil obligations. In view of the fact that the continuance of civilization on this basis necessitates the drawing up of certain matters relating to punishments, the third section of Islamic jurisprudence deals with punishments.
>
> As regards the section dealing with civil obligations, the questions which are of the most frequent occurrence have been collected together from reliable works and set out in this Code in the form of Books. These Books have been divided into Chapters and the Chapters into Sections. The questions of detail which will be applied in the courts are those questions which are set out in the following Chapters and Sections. Islamic jurists, however, have grouped questions of Islamic law under certain general rules, each one of which embraces a large number of questions and which, in the treatises on Islamic jurisprudence, are taken as justification to prove these questions (sic).[4]

System theorists have distinguished between open and closed systems. The open systems are living systems, but closed systems are static. The system of Islamic Law is an open system. As is well-known, a few jurists are calling for the gate of *Ijtihâd* to be closed on the *usûl* level, which would transform Islamic Law into a closed system. But all recognized Islamic schools of law and the vast majority of jurists over the centuries have decided that *Ijtihâd* is necessary for Islamic Law.[5]

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[4] Ali Haydar, *Durar al-Hukkâm*, vol. I, pp. 15-16; *al-Majalla al-Ahkâm al-Adliyyah* (The Ottoman Courts Manual (Hanafî)), Article 1; http://www.iiu.edu.my/deed/lawbase/al_majalle/al_majalleintro. html (1 of 7).

[5] Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law*, pp. 47-48.

Before proceeding to the first book, it will be useful to give brief information on the method of codification in early Islamic law.

7.2 A Brief History of Codification in Islamic Law

Codification is the process of collecting and restating the law of a jurisdiction in certain areas, usually by subject, forming a legal code, i.e. a codex (book) of law. The first civilization to codify its laws was ancient Babylon. The first real set of codified laws, the Code of Hammurabi, was compiled *circa* 1760 BC by the Babylonian king Hammurabi, and is the earliest known civil code. Besides religious laws such as the Torah, important codifications were developed in the ancient Roman Empire, with the Corpus Iuris Civilis. The first *permanent* system of codified laws could be found in China, with the compilation of the *Tang Code* in CE 624. A very influential example in Europe was the French Napoleonic code of 1804.

Muslim scholars have described the period of *mujtahidîn* (738-960) as "the Golden Age of Islamic Law," "The Age of the Codification of *Fiqh*," and the "Blossoming Age of *Fiqh*." The *tadwîn* means codification. *Al-Mudawwanah al-Kubrâ* should be understood as "the greatest codification of Mâlikî school". The full literary period of Islamic law started at the end of the 8th century. Apart from the legal books by Shaibânî and Abu Yusuf, some other works such as *Muwatta'*, the *Umm* and the *Majmû'* entered the picture, marking a new era of the legal writing. Some of al-Shaibânî's works can be demonstrated as corpus, especially the *al-Mabsût* from *Zâhir al-Riwâyah* corresponds to the *Corpus Juris Civilis*[6] by Justinian I. Just like Tribonian[7] and his colleagues, al-Shaibânî and Abu Yusuf certainly deserve to be called state jurists. We know that Harun al-Rashîd has promoted Abu Yusuf about composing *Kitâb al-Kharâj*.[8]

Islamic law is certainly general and exhaustive and it dates from the first centuries of Islam. According to Muslim Scholars and Muslim communities, the wide-ranging interest in the codification of the heritage of *fiqh* (Islamic jurisprudence) accentuates two points.

1. The Islamic *Sharî'ah* is a living and valid law that is applicable at all times and in all places, with all that it embraces of flexibility, vitality and capacity for development

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[6] The Corpus Juris (or Iuris) Civilis ("Body of Civil Law") is the modern name for a collection of fundamental works in jurisprudence, issued from 529 to 534 by order of Justinian I, Eastern Roman Emperor.

[7] Tribonian (c. 500–547) was a jurist during the reign of the Emperor Justinian I, who revised the legal code of the Roman Empire.

[8] Benjamin Jokisch, *Islamic Imperial Law: Harun-al-Rashid's Codification Project*, (Berlin: Gruyter Gmbh, 2007), p. 279ff.

regarding the exposition of rulings for the new life situations according to the fixed principles, totality, and objectives of *Sharî'ah*. This is the realistic, dynamic *fiqh*.

2. The Islamic *Sharî'ah* is the source of legislative independence – independence that we consider inevitable for the preservation of the identity of the *Ummah* and its cultural peculiarity. Indeed, the independence of an *Ummah* cannot be fulfilled if such an *Ummah* has replaced its eternal *Sharî'ah* with imported laws. Moreover, there are only three avenues of escape from the current crisis for the *fiqhî* (jurisprudential) Muslim mentality: thorough adherence to the absolute (conclusive) text, increasing employment of *Ijtihâd* (personal reasoning), and conscious respect for reality. [9]

We could say that 'Abbasids codified Islamic Law. The state jurists Shaybânî and Abu Yusuf produced an imperial code that consisted of six parts (*Kutub Zâhir al-Riwâyah*). This code was presented as part of the Islamic law and intended to be more or less binding for the Muslims in the Caliphate. As we have mentioned before, the first legal arrangement on hand is a legal code on private law called *al-Masâil al-Mâlikshâhiyah Fil-Qawa'id al-Shar'iyyah*, which was prepared by the Seljuqid Sultan Malikshah in (485/1092),[10] and was followed later by *Fatâwâ al-Tatarkhâniyyah*. But we should not forget Nizâm al-Mulk who prepared his voluminous treatise on Islamic politics called *Siyâsatnâmah* (The Book of Government).[11]

The *Memoirs* and *Institutes* (*Malfûzât* and *Tuzukât*) of Temur first appeared in Persian. These two works were supposed to have been dictated originally by Temur himself. Alamgir I was the ruler, the sixth, of the Mughal Empire from 1658 until his death and he espoused an interpretation of Islam and a behavior based on the *Sharî'ah* (Islamic Law), which he set about codifying through edicts and policies. Aurangzeb took a personal interest in the compilation of the *Fatâwâ-e-Alamgiri* or *Fatâwâ Hindiyyah*, a digest of Muslim law.

The codification that started in the era of the Anatolian Seljuqids and continued in the Ottoman State were the essential legal arrangements that were taken as the official basis at the courts and at the other state offices, including those legal codes of Fâtih (the Conqueror), Qânûni (the Lawmaker), Tawqi'î Abdurrahman Pasha (1087/1676), Ahmed III and Murad IV should certainly not be overlooked. In point of fact, these legal codes and the books of Islamic jurisprudence (*Qânûnnâme*, *Qawânîn*) were accepted as the written legislation of the Ottoman State until *Tanzîmât* (The Reforms). We could say that before proclamation of the imperial decree of 1839, there existed two different forms of codification in the Ottoman State, collections of *fatwâs* and *qanunnâmes* (legal codes). In each case compilations made by different

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[9] Muḥammad Sa'âd 'Ashmâwî, *Islam and the Political Order*, (Wahington: CRVP, 1994), pp. 95ff.

[10] The Comittee, *al-Urâdah Fi'l-Hikayah al-Saljuqiyyah* (Istanbul: MTM), vol.2, pp. 249ff.

[11] Jokisch, *Islamic Imperial Law,* p. 619.

authors from time to time and distributed throughout Ottoman state. The fatwâs were classified according to their contents on the basis of the *sharî'ah* and pasted in notebooks under different chapters and headings. They were then collected in four large volumes and preserved in the *Fatwâ-khâne*, the special burou which assisted the mufti in preparing decisions until abolition of the office of the *Sheikh al-Islam*.[12]

The Ottoman jurists have made use of their opinions and of their customs ('urf) only in fields where the *sharî'ah* had been silent. For example, the first penal code in Ottoman State was introduced simply because there were no definite penalties for some crimes (*ta'zîr*) in the *sharî'ah*. The right to determine such penalties was granted to the *ulu al-amr* (Sultan and other statesmen). Similarly, through legal invasions the *sharî'ah* law for agricultural land were replaced by the introduction of *Arazi Qanunu* (land law), inspired by and in conformity with the *'urf*.[13]

The codification in its modern meaning started with the proclamation of *Khatt-i Sharîf of Gulkhâne*, 1839, which marks the beginning of the *Tanzîmât* in the Ottoman state. This decree of reform, published by the government, indicates that a new order had replaced the old. The factors which played a role in this fundamental change included governing social and economic relations, the strengthening of the central government, and the trends towards bringing the law in accord with new circumstances. In the nineteenth and twentieth centuries, there were numerous attempts to resurrect and implement Islamic law in many Muslim countries, especially in Ottoman State. Demands for the official codification of Islamic *fiqh* in the modern sense began during the last years of the Ottoman state, which laid the foundations of this crucial step by calling it *Majalla al-Ahkâm al-'Adliyyah*, a codification of the Hanafî school of law, especially its civil and judiciary aspects, during the period 1286-1293 A.H. We will give detailed information about this when discussing Islamic Contracts Law.[14]

The *Majalla al-Ahkâm al-'Adliyyah* (Legal Rulings) constitutes the first attempt at laying down an integrated juristic collection that applies to both the substantive and procedural aspects and is derived directly from *Sharî'ah* and formulated by a number of major scholars of the Hanafî madhhab. The appearance of the first issue of this journal on 26 Sha'ban, 1293/1876, lends prominence to that day, making it a memorable day in the history of modern Islamic legislation. Moreover, *Majalla al-Ahkâm al-'Adliyyah* embodies a comprehensive set of *Shar'î* transactions or, more precisely, of Islamic civil laws. Yet it is incomplete because it does not encompass the personal sta-

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[12] Abu al-Ula Mardin, "Development of the Sharia under the Ottoman Empire," Majid Khadduri and Herbert J. Liebesny, Origin and *Development of Islamic Law; Law in the Middle East,* (Clark: The Lawbook Exchange, Ltd., 2008), pp. 279-80.

[13] Abu al-Ula Mardin, "Development of the Sharia under the Ottoman Empire,", pp. 283.

[14] Abu al-Ula Mardin, "Development of the Sharia under the Ottoman Empire,", pp. 284.

tus law, which remained unsettled until the enactment of the Ottoman Family Law in 1914.

The *Majalla al-Ahkâm al-ʿAdliyyah*'s approach employed in inferring the legal rulings can be specified as follows:

1. It is in essence a codification of the Hanafî madhhab, because it was the official *madhhab* of the Ottoman Empire.

2. The Committee of the *Majalla* gave preference to the legal opinions that suited the then current conventions. As an example of this attitude, Article 207 stipulated the permissibility of selling what is nonexistent (whose constituents do not emerge all at the same time but successively, one after another). Such an opinion gives preference to Muhammad ibn al-Hassan, whose view is not dominant in the Hanafî *madhhab*. Ibn al-Hassan's view permitted selling according to *Istihsân* (juristic preference) and on the grounds of making what is existent original and what is nonexistent subordinate to it. Another example is that in which the opinion of Abu Yusuf is adopted in the rulings on *Istisnâʿ* (a contract according to which a person buys on the spot something that is to be manufactured, which the seller undertakes to provide after manufacturing the same, using materials of his own according to designated specifications against a determined price) in favor of what is of interest, while Abu Hanîfa's view, which is dominant in the *madhhab*, is abandoned.

3. The *Majalla* limited itself to the introduction that embodied the rules of *Usûl al-Fiqh* (fundamentals of jurisprudence) and of *fiqh*, deeming this introduction sufficient. Thus, the scholars of the *Majalla* did not attempt to lay down a general theory on commitments, a shortcoming that was later supplied in the Tunisian *Majalla ll-tizâmât*. This Tunisian journal was interested in establishing a general theory on commitments. Such methodological progress in the art of legislative formulation is ascribed by some people to the influence of Santillana David and a number of French scholars.[15]

Majalla al-Ahkâm al-ʿAdliyyah represented a significant event in the history of legislation because of the subsequent codifications and individual attempts at codification through which the journal was taken as a model for the preparation of the law, such as the attempt of Qadri Pasha in his collection of *fiqh* books, through which the dominant Hanafî opinions were set in a receptacle of arranged articles.

During the colonial interregnum in the Muslim world, efforts at the codification of Islamic law had begun and continued during different stages of autonomous period until independence. Then individual efforts, such as those of Muhammad Qadri Pa-

[15] For this article see Muhammad Kamal-ud-Deen Imâm, *On the Methodology of Codification* (trans. by Tal'at Farouq), http://www.islamonline.net/servlet/Satellite?c=Article_C&pagename =Zone – English-Living _Sharî'ah%2FLSELayout&cid=1209357573452 (accessed 4.7.2009).

sha[16] (1306/1889), appeared. He wrote three books on the issue of the codification of Islamic law: *Murshid al-Hayrân* (Guide of the Confused), which consists of 1,045 articles; *al-'Adl Wal Insâf Fi Hal Mushkilât al-Awqâf* (Justice and Equity in Solving the Problems of Endowments), which consists of 343 articles; and *al-Ahkâm al-Shar'iyyah Fi al-Ahwâl al-Shakhsiyyah* (Legal Rulings on Personal Status Law), which consists of 647 articles. This effort was an attempt that relied on the Hanafî madhhab but went beyond the scope of *Majalla al-Ahkâm al-'Adliyyah* in the superiority of formulation and comprehensiveness of topics discussed.[17]

The Ottomans adopted some Western codes verbatim between 1850 and 1863 mainly in administrative and commercial law. The trend toward Europeanization stopped short of replacing civil law and personal status law which continued to be within the jurisdiction of *Shar'iyyah* courts. To promote uniformity a solution was sought in the codification of the Islamic law rules. There was much more opposition to this than to outright replacement of Islamic law by European law. This is why Ottoman Civil Code of 1869-1876 was so radical. It codified Hanafî civil law and applied it in all the Islamic courts of Ottoman state. Personal status law was done in the codification of Hanafî law in the Law of Family Rights of 1917. These two pieces of legislation marked a watershed in the development of Islamic law. The remainder of this period saw a continuation of these two developments.[18]

In this context we can refer to the attempt at codification by the Libyan judge Muhammad 'Amer in his *Mulakhkhas al-Ahkâm Ash-Shar'iyyah 'Ala al-Mu'tamad Min Madhhab Mâlik* (Outline of Legal Rulings Based on the Authentic Opinions in Ma-

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[16] 1769-1849, Pasha of Egypt after 1805. He was a common soldier who rose to leadership through his military skill and political acumen. In 1799 he commanded a Turkish army in an unsuccessful attempt to drive Napoleon from Egypt. As *pasha*, he was virtually independent of his nominal overlord, the Ottoman sultan. He modernized his armed forces and administration, created schools, and began many public works, particularly irrigation projects. The cost of these reforms bore heavily on the peasants and brought them few benefits. In 1811 he exterminated the leaders of the Mamluks, who had ruled Egypt almost uninterruptedly since 1250. With his son, Ibrahim Pasha, Muhammad Ali conducted successful campaigns in Arabia against the Wahhabis. In 1820 he sent armies to conquer Sudan and scored great successes fighting for the Ottoman sultan in Greece until the British, French and Russians combined to defeat his fleet at Navarino in 1827. To gain his intervention in the Greek revolt, the sultan, Mahmud II, promised to make him governor of Syria. When the sultan refused to hand over the province, Muhammad Ali successfully invaded Syria. In 1839 he attacked his overlord in Asia Minor but was forced to desist when he lost the support of France and was threatened by united European opposition. In a compromise arrangement, the Ottoman sultan made the governorship of Egypt hereditary for Muhammad Ali's descendents. He retired from office in 1848. Muhammad Ali is credited for his many domestic reforms, which hastened the foundation of an independent Egypt.

[17] Rushdi al-Sarraj, *Kitâb Majmû'at al-Qawânîn al-Shar'î yya* (Jaffa, 1944).

[18] Christopher Toll and Jakob Skovgaard-Petersen, *Law and the Islamic World Past and Present,* (Copenhagen: Royal Danish Academy, 1995), pp. 16-9.

lik's *Madhhab*) and to the attempt of the Meccan reciter of the Qur'an, Ahmad ibn ʿAbdullah ibn Muhammad ibn Bashir Khan in *Majalla al-Ahkâm Ash-Sharʿiyyah ʿAlâ al-Madhhab al-Hanbalî* (Journal of Legal Rulings According to the Hanbalî Madhhab).

Then, in Egypt, there was Professor 'Abd al-Razzaq al-Sanhuri (1971), who wrote the Egyptian Civil Law, along with other laws for different Arab countries as well. After that, many other Islamic countries started to write juristic laws, most of which were concerned with the Personal Status Law. He prepared the Iraqi Civil Code of 1951 too. The two legal doctrines of neorevivalism and Islamization have become very prominent in modern Islamic law but had a limited place in traditional legal theory. We could see the effects of the Islamization method in the works of reform-minded jurists who made an impact in Islamic world, such as Muhammad 'Abduh, Rashîd Ridhâ, and 'Abd al-Wahhâb al-Khallâf (1956). This is true for some institutions like al-Azhar University in Cairo, the Zaytuna in Fezx, and at universities in Jordan, Syria, Iraq, Kuwait, and Saudi Arabia. The neorevivalist approach to law can be summarized as making constant reference to the primary sources.[19]

Some guiding rules should be taken into consideration before endeavoring to codify *fiqh*:

1) This task should be handled by experienced scholars who know what is suitable for societies in the modern world and its problems.

2) The codification should be innovative with respect to the ordering of its chapters, the formation of its articles and the choice of its phrases in a way that appropriately fits and suits the spirit of the time.

3) The necessity of constant revision and development of the articles of the law should be kept in mind.

There are many advantages to codification:

1) It makes it easy to return to the *Sharîʿah*-based rulings and to understand them;

2) It unifies judicial resolutions and lifts some of the burdens that overcome courts and judges;

3) Codification represents, in one way or another, the application of *Sharîʿah*, the preservation of the Muslim heritage and helps to develop the *fiqhî* structure.[20]

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[19] Ravindra S. Khare, *Perspectives on Islamic Law, Justice, and Society*, (Oxford: Rowman&Littlefield Publishers, 1999), pp. 164-68.

[20] Oussama Arabi, *Studies in Modern Islamic Law and Jurisprudence* (Leiden: Brill, 2001), p. 136; Yahya Muhammad Owdh al-Khalailah, *Codification Of Islamic Law: Theory And Practice,* Ph.D. thesis, International Islamic University, Islamabad, 2001.

The study of Islamic Law in recent times reminds one immediately of the distinction between the pre- and post-*Tanzîmât* periods of the Ottoman State. The legal regulations in the field of *Sharî'ah* law – perhaps not officially but practically – before the *Tanzîmât* were books of *fiqh* and *fatâwâ*. In fact, *Qâdhîs* used them like laws to such an extent that they even determined according to the interpretations of the *madhhab* concerned the appointments that were to be decided. As a matter of fact, we pointed out earlier that the work called *Multaqâ al-Abhur* by Ibrahim of Aleppo was accepted as the official legal codification of the Ottoman State from the early 17th century onwards, as *al-Hidâyah* was accepted as an official code in Anglo-Muhammadan Law. On the other hand, the majority of the regulations in common law constituted the laws that had been prepared in administrative, financial and penal fields. After *Tanzîmât*, as in every Muslim country, the movement toward legalization started in the Ottoman State in a way similar to that of modern times. The most noteworthy instance of this was *Majalla*, which was the most important *Sharî'ah* law, followed by hundreds of legal arrangements in different fields.

The echoes of the Ottoman *Majalla al-Ahkâm al-'Adliyyah* resulted in legal codifications in non-Muslim countries or legal codes by colonial authorities in some Muslim countries, such as that achieved by the Russian government in 1909 when it enacted a law for the Muslims in Turkistan embodying the personal status law and inheritance rulings. In Algeria as well, in 1898, the French Orientalist Armand-Pierre Caussin de Perceval published a civil Islamic codification in line with the French model of codification and according to the Mâlikî *madhab*, while he took a collection of texts excerpted from al-Khalil's *Mukhtasar* (the abridged edition) and systematically arranged them in articles. He then placed his work at the disposal of a committee formed in 1905 for the sake of codifying the rulings of Islamic *Sharî'ah* that were applied to the Muslim citizens in Algeria.

Surprisingly enough, the work of that committee in the field of codification was restricted to the Sunnî, Hanafî and Mâlikî *fiqh*. It disregarded the 'Ibâdî *fiqh*, which occupied a broad area on the map of Algerian reality. This is surprising and calls for more research to clarify the reasons for this. In addition, in 1907 an Islamic codification was set up for the British courts in West Africa.

However, I do not intend to elaborate on the academic echo of this *Majalla al-Ahkâm al-'Adliyyah*, since its issuance and application in many Arab countries (then subordinate to the Ottoman Empire) set the stagnant pond of Islamic *fiqh* in motion and induced attempts to renew its systems and institutions. This was embodied in judicial reforms and in a scientific movement that revolved around the multiple annotations of *Majalla al-Ahkâm al-'Adliyyah* issued in both Arabic and Turkish. It is sufficient to refer to the annotations by 'Ali Haydar, 'Abdul Sattar al-Quraymi, Ahmad Jawdat Pasha, Khalid al-Atasi, Sulaym Rustum, 'Umar Hilmi and Munir al-Qâdhî .

Moreover, a number of major heralds of the renaissance and scholars of *Sharîʿah* and *fiqh* participated in teaching the material of the *Majalla al-Ahkâm al-ʿAdliyyah* in Iraq, Lebanon, Syria and Turkey, including Imâm Muhammad ʿAbduh, who had taught *Majalla al-Ahkâm al-ʿAdliyyah* at the Beirut School of Law, Muhammad Saʿid al-Mahmasani, teacher at the Damascus Institute of Law, ʿAli Haydar, teacher at the School of Law in Constantinople, and ʿAbd al-Razzaq al-Sanhuri, teacher at the Iraqi Faculty of Law at the beginning of the 1930s.

This movement had a noticeable impact on directing the political decision toward adopting the application of Islamic *Sharîʿah* and also on drawing an integrated map for a judicial renaissance that included establishing institutions, writing theses and working out curricula for comparative studies. It also had an impact on introducing the Islamic *Sharîʿah* at conferences on comparative law and on acknowledging it as a judicial system among contemporary judicial families. Moreover, with regards to efficiency, it was ahead of the Latin and Anglo-Saxon collections.

In recent decades, however, the movement of Islamic codification has become active, especially after the voices of those calling for legislative independence and for attempts to apply Islamic *Sharîʿah* were raised. This codification has become embodied in constitutional texts in several Arab and Islamic countries.[21]

7.3 The Method of Codification in Islamic Law

The term codification, within its historical meaning, is the reduction to writing of a law previously only extant in oral form. In this sense the concept of codification does not differ substantially from legislation. In time, however, the concept of codification came to acquire a different meaning; namely, that whereas legislation serves to lay down a specific normative instruction – with the object either of innovating a legal norm where none had previously existed or of varying and amending an already existing legal norm, codification is concerned with circumscribing a whole legal system, or at least a branch of it.[22] We should make distinction between two kinds of codifications: classical codification and modern codification. Codification of the 19th century was a unique socio-historical phenomenon that emerged with the impulse of the French Revolution and the rise of philosophical doctrines such as, iusnaturalism, rationalism and the Enlightenment. However, by the turn of the 19th century, the "clas-

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[21] Cf. Mohammad Abdul Aleem Siddiqui, *The History of The Codification of Islamic Law: Being An Illuminating Exposition of the Conformist View-Point Accepted by the Overwhelming Majority of the Islamic World*, (Anjuman sunnat-wal-jama'at, 1950), pp. 5ff.

[22] Cf. Courtenay Ilbert, *Legislative Methods and Forms*, (Clark: The Lawbook Exchange, Ltd., 2008), pp. 122ff; Maria Luisa Murillo, "The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification," *J. Transnational Law & Policy* [Vol. 11:1 Fall, 2001], pp. 1ff.

sical" Codification had been subjected to new forces that gradually changed the legal and social order with crucial consequences on the civil law tradition.[23]

We don't agree that the *Sharî'ah* is a jurists' law only.[24] We have explained above that every *fiqh* book like *al-Jâmi' al-Saghîr* is a codification of rules. For example, if you numerate the sentences of *Multaqâ al-Abhur* as the articles of a legal code, you could reach a codified law like *Majalla*. For this reason, Ottoman state has declared *Multaqâ al-Abhur* as Ottoman civil code (*firman* dated 1648 and 1687).[25]

The fundamental question is this: Which method was pursued in the preparation of the aforesaid Islamic regulations?[26] As is well known, a legislator can choose between two major methods when preparing a law.

7.3.1 The Casuistic Method

A particular legal rule is expressed in the form of a factual case and not by a simple statement of the legal principle without embodiment in a concrete example. Thus, for instance, the normative principle that a person – even when acting in his own domain – must guard against causing harm to his neighbor, is expressed by way of a long series of practical instances of prohibitions or injunctions: that a man must not dig a pit near his neighbor's property, or that he must remove his salt or lime from his neighbor's wall, etc. This method, which requires that all matters should be arranged only by law, the best example of which is the *"Public Laws of Prussian States,"* dated 1794, consisting of over 17,000 Articles.[27] The laws in the *Mishnah*[28] are mostly formulated in a casuistic too. Casuistry in Christian theory is a term in applied ethics term referring to case-based reasoning. It is used in juridical and ethical discussions on law and ethics, and is often a critique of principle or rule-based reasoning. Critics use the term pejoratively for the use of clever but unsound reasoning, especially in relation to moral questions (cf. sophistry). Casuistry is reasoning used to resolve moral problems

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[23] Maria Luisa Murillo, "The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification," *J. Transnational Law & Policy* [Vol. 11:1 Fall, 2001], pp. 1-2.

[24] Cf. Rudolph Peters, "From Jurists' Law to Statute Law or What Happens When the Shari'a is codified," *Mediterranean Politics*, Volume 7, Issue 3 Autumn 2002, pages 82 - 95.

[25] Akgunduz, Ahmet, *Osmanli Qanunnameleri ve Hukuki Tahlilleri*, (Istanbul: OSAV, 2006), vol. I, p. 270.

[26] Ashk Dahlén, *Islamic law, Epistemology and Modernity: Legal Philosophy in Contemporary Iran* (New York: Routledge, 2003), pp. 38-48.

[27] Zâhit İmre, *Medenî Hukuka Giriş* (Introduction to Civil Law) (Istanbul: Filiz Kitâbevi, 1976), pp. 70-71; Akgündüz, *Kulliyât,* p. 366.

[28] The Mishnah or Mishna is the first major written redaction of the Jewish oral traditions called the "Oral Torah" and the first major work of Rabbinic Judaism.

by applying theoretical rules to particular instances.[29]

According to some scholars, irrespective of the particular theoretical inclination favored, there is no doubt that multiple norms will be generated in any interpretive undertaking, a fact that is amply observed by the term *ta'addud al-ahkâm* in traditional Islamic literature. The basis of this contention can be traced, with some effort, back to Islamic legal history and literature. After the post-recognition phase of *madhabs* (the schools of Islamic Law), Muslim jurists found it increasingly hard to espouse the concept of *Ijtihâd* "proper" through the medium of *iftâ*, thereby limiting the response of an independent jurist to the ambit of his own juridical school. At times some of these jurists resorted to quasi-artificial casuistic methods to achieve equity between presumed universality of complete legal paradigm, i.e. *Sharî'ah*, and its practical manifestation with respect to the application of law to facilitate the functions of a society. Most of these casuistic developments - for instance *Istihsân* (juristic preference), *istishâb* (presumption of continuity), *'urf* (custom) - in medieval times were arguably instigated by the desire to achieve a rational character for the law, thereby circumventing an almost subjective and probably mistakenly understood and emphasized universality of norms. And if all these developments and the enormous literary genre that evolved from them achieved a kind of "practical wisdom" in line with social reality of times, it seemed rationally inconsistent to a modern critical mind.[30]

It has been alleged that the methods of earlier laws, especially of *Majalla*, were casuistic,[31] a view that may not find complete agreement. As far as we can gather, the Islamic system of legislation does not fully resemble either method. The method followed by *Majalla* is the method of books of Islamic jurisprudence (particularly texts of Islamic jurisprudence). Both texts of Islamic jurisprudence (for instance, *Gurar* by Molla Khusraw) and *Majalla* followed a mixed method that we could call abstract - casuistic. The quality of being abstract outweighs the other. Those that call the method of *Majalla* "casuistic" cite as a reason that a civil code must not be made up of 1851 Articles. More than 400 articles of the *Majalla* concern procedural law while 250-plus articles concern commercial law. If 200 Articles are subtracted for goods and loans, more than 1100 articles remain. On the other hand, the number of the articles in our Law of Loans and Civil Code related to the two above-mentioned branches of law is more than 900. We hold that the difference of 200 articles does not require a difference in method. In short, if the regulations are studied closely, it can easily be seen that an abstract - casuistic method was followed in the former regulation. Nonethe-

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[29] Herbert J. Liebesny, *The Law of the Near & Middle East: Readings, Cases, & Materials*, (New York: SUNY Press, 1975), pp. 31-33.

[30] Imran Ahsan Khan Nyazee, *Islamic Jurisprudence: Usûl al-Fiqh*, (January 2005).

[31] Imre, *Medenî Hukuka Giriş*, p. 94, and the majority of contemporary jurists.

less, it may not be alleged that the former regulations were written like current modern laws are written.[32]

We should add that much academic research on Islamic law has been carried out under the shadow of Max Weber's elusive notion of "rationality", that uniquely Western propensity for being detached, formal, logical, legal, bureaucratic, capitalistic, scientific and secular, which takes its history as the norm for universal sociology. Needless to say, from the Weberian perspective, modern, secular law appears to be the supreme embodiment of this salubrious rationality that is presumed to be lacking in other legal traditions. Islamic *fiqh,* which regards divine revelation as its source and derives its norms from it, is, accordingly, adduced as a paradigm of sacred law that is not amenable to rational legal calculus and mundane logic. Even the practice of Islamic law is deemed to be symptomatic of *Qâdhî* justice (casuistic), the erratic and subjective form of adjudication on the basis of extralegal - ethical, religious, political, sentimental and utilitarian - considerations, which is the reverse of the legal formalism and substantive rationality of the West. Islamic Law, being unstructured and transcendent, sustained more by faith and intuition, and driven by culture and mores than by formality and procedure, is thus the complete antithesis of Western law.[33]

Although Weber himself may not have been responsible for the derisive term *casuistic* and may not have regarded it as paradigmatic for the Islamic tradition, its hold on the Western imagination is certainly due to his standing as the ideologue of modernity and rationality. Little wonder that it became part of the cultural consciousness of the West and gave its legal practitioners some cause for self-acclaim. Lord Justice Goddard of the English Court of Appeals, for instance, complained that "the court is really put very much in the position of the *Qâdhî* under the palm tree. There are no principles on which he is directed to act. He has to do the best in the circumstances, having no rules to guide him." Justice Felix Frankfurter, for his part, remarked that the Supreme Court of the United States is not a tribunal unbounded by rules: We do not sit under a tree like a *Qâdhî* dispensing justice according to considerations of individual expediency.[34]

Some non-Muslim scholars have claimed that Islamic law is a typical jurist' law and argued that no political authority ever discussed the issue of its constitution and no such authority decided anything about its creation or inauguration; it developed

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[32] Akgündüz, *Külliyât*, pp. 366-67.

[33] Cf. Rudolph Peters, "From Jurists' Law to Statute Law or What Happens When the Shari'a is codified," *Mediterranean Politics*, Volume 7, Issue 3 Autumn 2002, pages 82 - 95.

[34] S. Parvez Manzoor, "Legal Rationality vs. Arbitrary Judgement: Re-Examining the Tradition of Islamic Law, printed In *Muslim World Book Review* (Leicester: Islamic Foundation, 2003), vol. 21, no: 1, pp. 3-12.

solely through the work of individual experts. I think these scholars are not aware of *usûl al-fiqh* and the process of improvement and codification of Islamic law.[35]

7.3.2 The Abstract (Normative) Method in Law

The second method is the a*bstract* one, which stipulates general rules according to the nature of affairs during the preparation process of laws. Islamic law has a kind of "formal jurisprudence," employing all the tools of discursive logic yet envisaging the use of universal principles and clearly pronounced norms. This is a direct method for obtaining the differential conservation laws in the field theory from which the principle of stationary action is proposed. The method is based on a variation of field functions through a small local transformation of a special kind. The abstract method advocates general principles and rules that should be implemented. We could use the term of normative too. In law, as an academic discipline, the term "normative" is used to describe the way something ought to be done according to a value position.

We can compare this method with moral absolutism, which is the meta-ethical view that certain actions are absolutely right or wrong, regardless of the context of the act. The word absolute is a very interesting term that is quite often used unreflectively. Thus lying, for instance, might be considered to be always immoral even if it is done to promote some other good (e.g., saving a life). Moral absolutism stands in contrast to categories of ethical theories like consequentialism and situational ethics, which hold that the morality of an act depends on the consequences or the context of the act. Ethical theories that place strong emphasis on rights, such as the deontological ethics of Immanuel Kant, are often forms of moral absolutism, as are many religious moral codes, particularly those of the Abrahamic religions.[36]

The term abstract method is used in many disciplines, ranging from physics to philosophy. In this context we can define the abstract method as follows: in object-oriented programming, the term method refers to a subroutine that is exclusively associated either with a class (called class methods, static methods or factory methods) or with an object (called instance methods). Like a procedure in procedural programming languages, a method usually consists of a sequence of statements to perform an action, a set of input parameters to customize those actions and possibly an output value (called return value) of some kind. The purpose of methods is to provide a mechanism for accessing (for both reading and writing) the private data stored in an object or a class.

I think the term "abstract method" is to be preferred. Most of the modern read-

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[35] Haim Gerber. *Islamic Law and Culture, 1600-1840.* (Leiden: Brill, 1999), pp. 23-4.

[36] Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden: Brill, 2000), p. 192.

ings of Islamic law generally fail to acknowledge these subtle distinctions but so does the modern jurist who remains caught, on the one hand, between the pursuit of both the legal and ethical applications of law in society on the one hand and the quest to achieve a formalized rationality of jurisprudential method on the other.[37]

We believe that Islamic Law has a mixed method. It has some features of the casuistic method because we cannot deny that Islamic Law is partly case law (*mas'alah*). But Islamic law also has some features of the abstract method because it has general legal principles that should be implemented. Based on theological and rational arguments, the juridical authority of what *mujtahid*s called holistic evidence (*al-dalîl al-kullî*) is considered one of the fundamentals (*usûl)* to which *mujtahid*s had given priority over single and partial rulings. If one investigates the articles of *Majalla*, these features can be observed together. If one looks at the code of Khalil from the Mâlikî School or the code of *Multaqâ al-Abhur* from the Hanafî school, one realizes that two types of rules, the very specific and the very general, exist side by side. It would be very surprising indeed if one were to find a code that could be described as "concrete." Such a code would be absolute upon its very completion. The very fact that *Mukhtasar* or *Multaqâ* survived hundreds of years in locations as different as Andalusia, Africa, Egypt and the Ottoman State, indicates that they must have had sufficient generality to allow it to withstand changes in both time and place. For example, one cannot accurately describe the concrete rules in *Mukhtasar* as actual rules; instead, *Mukhtasar* may cite concrete examples as instances of a general rule, especially if that example's inclusion within the general rule has been controversial, or if that case is likely to recur before a judge or *muftî*. A clear example of this is in the chapter of sale, where *Mukhtasar* says: "The sold item must be pure, unlike dung and unlike oil which has been polluted."[38]

Finally, we should explain that we do not agree with Weber's classification of the Islamic legal system as substantially irrational because it far from reflects the realities of Islamic legal practices, at least the ones on which we have data. In fact, the data based on actual court records reveal that the proceedings in the courts were quite different from what Weber described as "*qâdhî* justice."[39]

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[37] Geoffrey Samuel, *Epistemology and Method in Law* (Farnham: Ashgate Publishing, Ltd., 2003), pp. 252-55; Herbert J. Liebesny, *The Law of the Near & Middle East: Readings, Cases, and Materials* (Albany: SUNY Press, 1975), pp. 31-33.

[38] Auda, *Maqâsid al-Sharî'ah as Philosophy of Islamic Law*, pp. 46-47; Robert Gleave and Eugenia Kermeli, *Islamic Law: Theory and Practice* (New York: I.B.Tauris, 2001), p. 74.

[39] Gleave and Kermeli, *Islamic Law*, p. 74.

7.3.3 Special Aspects of the Codification of Islamic Law

With respect to the preparation of Islamic laws codification followed two directions.[40]

The first was that taken by *Majalla al-Ahkâm al-ʿAdliyyah*, Qadri Pasha's attempts, and the Islamic legislations done by the Hanafî madhhab in Pakistan, as well as the Islamic Research Academy in Egypt with respect to its attempt to classify the *fiqh* of the Four *Imâm*s within a methodological framework. This direction formulates the *fiqh* of a certain *madhhab* or adopts that *fiqh* as a basis for preparing such codification, taking other *fiqhî* approaches into account when necessary. The approach has the disadvantage, however, that codification us thus confined to a denominational framework that fails to include the movement of reality, thereby causing restriction in the formulation.

The *second* is to formulate the Islamic *fiqh* as a whole and viewing it as such, thus ignoring denomination differences.. This approach adopts selections and *Ijtihâd* opinions or aims at formulating new opinions when necessary, without limiting oneself to a certain *madhhab*. This approach is viewed as realistic because it transcends sectarian bigotry, removes restriction in case of narrowness of the (assumed) *madhhab*, and gives legitimacy to the *fiqh* of Islamic *madhhab*s. The positive side of this approach is that it embraces the multiplicity of *fiqhî madhhab*s, thus confirming the importance of the different branches of with a single Sharîʿah. It displays openness to other *madhhab*s, wanting to understand them, assimilate their sources and study their texts.

The scientific aspect and its development and the practical aspect and its development are perhaps the most important.

Scientific Aspect. After two centuries the *fiqhî* mentality adopted an approach the acceptable in almost all scientific circles. It uses the following methodological bases:

1) It views *fiqh* an integrated whole, making selections from all the *madhhab*s, preferring ones through rules that depend only on more than the preponderance of evidence.

2) It ratifies *talfîq* (synthesis) in legislation, i.e a ruler makes a selection of rulings from the different admissible *madhhab*s, with the result that these rulings constitute a law acknowledged by the subjects of that ruler. Therefore *talfîq* should observe the following rules:

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[40] What follows is based on Muhammad Kamal-ud-Deen Imâm, "On the Methodology of Codification," (trans. by Talʿat Farouq), http://www.islamonline.net/servlet/Satellite?c =Article _C& pagename=Zone-English-Living_Sharîʿah%2FLSELayout&cid=1209357573452 (accessed 4.7.2009). This is a paper presented to a seminar on "The Codification and Renewal of Contemporary Islamic *Fiqh*," held in Muscat, Oman, 5-8 April 2008.

a) select the weightiest opinion and deviate from it only in case of necessity;

b) view *al-Maslahah al-Mursalah* as an element of weight concerning legislative selection;

c) adhere to the principles of facilitation and removal of restriction in legislative selection. This is necessary, with respect to method, since these principles are among the principles and objectives of Sharî'ah.

Substantively, *talfîq* depends on the fact that obedience to the ruler is obligatory as long as it does not prohibits a permissible act nor command what is prohibited and it has the welfare of the *Ummah* in view. Procedurally, *talfîq* depends on the authority of the ruler with respect to designating judicature. A ruler can preclude some cases being heard except through a special regulation: complete preclusion would imply juristically and judicially impermissible confiscation of the right to litigation.[41]

Here attention should be drawn to the phenomenon of gradation in applying codification, i.e. applying codification in some fields before others. This is acceptable, since it would avoid encumbering the ruler and society through the immediate application of laws, thus closing the door to adversaries of *Sharî'ah*. But, as a transitory application, gradation should not go contrary to an integrated codification because *Sharî'ah* is an indissoluble whole. Gradation is thus nothing else than paving the way for the *Ummah* for its return to its original law. All the circles of *Sharî'ah* are related to an integrated way of life that guarantees soul and body, individual and society. Worldly interests are preserved by this way of life and it also has a positive effect in the hereafter.

There has been a great deal of controversy in the authorized committees regarding approaches to the codification of Islamic *Sharî'ah*.

Three approaches should be mentioned here:

1) The first approach is limited to reviewing the established texts by retaining only what is consonant with *Sharî'ah* and correcting what contradicts it.

2) The second approach, taken up at the end of the 19th century in some Islamic countries looks at the entire established legal system that has been derived from the Roman, Anglo-Saxon, and Germanic laws and turns it upside down.

3) The third approach was used by the committees formed in Egypt after the Permanent Constitution of 1971 was enacted. This constitution stated that *Sharî'ah* was the main source of legislation. Here *Sharî'ah* is viewed as the main source of legislation, thereby dismissing any positive law that contradicts it.

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[41] Cf. Ralph H. Salmi, Cesar Adib Majul and George Kilpatrick Tanham, *Islam and Conflict Resolution: Theories and Practices*, (University Press of America, 1998), pp. 107-8.

This third approach also entails a review of all the laws, to bring everything into accordance with the principles of *Sharî'ah*, preserving what conforms to them, and introducing new rulings that agree with them. Thus, laws that do not contradict *Sharî'ah* may be preserved and be linked to Shar'î principles and *fiqhi* rules, severing their relationship from the laws from which they were derived and thus making the codification an integrated whole.

On the other hand, Egyptian legislation set draft laws that have not yet been enacted, because of the following principles:

1) The codification should be linked to its *Shar'î* sources in the Noble Qur'an, the *Sunnah* of the Prophet, *Ijmâ'* (consensus), or any juristic opinions recorded in the books of Islamic *fiqh*. If there are differences regarding interpretation or application, the judge or jurist can then refer to those sources and their Islamic referential authority rather than foreign laws.

2) Adherence to a certain *fiqhî madhhab* is to be avoided, even if it is the Hanafî *madhhab* so that the narrowness of a single *madhhab* will be transcended to include the whole of Islamic Sharî'ah with its different *madhhab*s. The Islamic *madhhab*s are nothing more than the result of individual viewpoints that are binding for others only when corroborated by proof of their validity and of the validity of their legal benefits.

3) The material that deals with unprecedented affairs that have no *Shar'î* origins (but do not contradict the origins of Sharî'ah) should be established on the basis of the rule of *al-Masâlih al-Mursalah* (i.e. the public welfare connected this is neither enjoined nor prohibited in any Islamic source, as a source of Islamic *Sharî'ah*.).

4) The investigation of minor details or the stipulation of their rulings should be avoided. The obligation of flexibility is fulfilled through settling for generalities and *fiqh* and the judicature can thus fulfill their roles of employing generalities and applying them to occurrences, in accordance with the established rules of Islamic *fiqh*.

7.4 Some Perceptions of Islamic Law

Many modern scholars have accepted the views of Joseph Schacht, who argued that the idea of the *Sunnah* and the theory of the sources of Islamic Law did not really develop until the 9th century and that Islamic Law is not really derived from the Qur'an and the *Sunnah*. Many Western scholars have agreed with him without academic proofs. Rather, according to this view, it evolved gradually from a variety of sources (such as earlier legal systems and decisions made by early Arab rulers), and the classical Muslim theory of the sources of Islamic Law was developed by the early Muslim scholars (culminating in the work of al-Shâfi'î) in order to give the positive law that had evolved in the first centuries of Islam a proper Islamic basis. These scholars,

it is argued, looked at the law as it existed in their own day, reformed, rejected or accepted it and then sought to portray it as derived from the Qur'an, the *Sunnah* or one of the other classical sources. Since there was a limit to what could be attributed to the Qur'an (which is relatively short and only partly concerned with establishing legal rules on a few questions), it was the *Sunnah* (as reported in the *hadîth*s) that was, in practice, most important. Since there was virtually no limit to the way in which *hadîth*s could be interpreted or reworded and new ones put into circulation, it was usually easier to find a *hadîth* to support a particular legal rule than it was to find a Qur'anic text.[42]

Most Western scholars do generally view Islam with respect to law in the biased and exaggerated reporting on *jihâd* (here the word is equated with "terrorism"), the subjugation of women (the reality is more complex), "Islamic penalties" (seen simplistically as physical mutilation), and *fatwâ* (equated, with gross inaccuracy, with the death sentence). These are crude and obvious examples. They are primitive constructions of the "other," the East. At the same time, however, the temptation to construct remains and there are quite sophisticated forms in circulation today. According to them there are many hurdles to compatibility of *Sharî'ah* and Human Rights. They have based their views either on non-existing examples like honor killings, or misunderstandings like the claim about "no limits in Islamic law about implementation of punishments" or extremist examples from Muslim world like fatwa of Khumaini about Salman Rushdi. In recent years this point of view has started to change. They have accepted that Islamic law recognizes the legal power of state authorities (*siyâsah*) to enact legislation for the regulation of the society. As we will explain in constitutional law, many fields of public and private law have been left to *ulu al-amr* (statesmen and authorities).[43]

Unfortunately, we cannot devote time and space to an evaluation of these opinions. Some Muslim scholars have already criticized them.[44]

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[42] J. Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon, 1986), pp. 1-5, 199-211; Haim Gerber, *Islamic Law and Culture, 1600-1840*, (Leiden: Brill, 1999), pp. 23-24.

[43] M.B. Hooker, "Introduction: Islamic Law in South-east Asia," *Asian Law*, vol. 4, No: 3 (Australia: The Federation Press, 2002), pp. 225-30; cf. Jan Michiel Otto, *Sharia and National Law in Muslim Countries: Tensions and Opportunities for Dutch and EU Foreign Policy*, (Amsterdam University Press, 2008), pp. 27ff.

[44] Cf. for instance, Muhammad M. al-A'zami, *On Schacht's Origins of Muhammadan jurisprudence*, (Riyadh: King Saud University, 1985).

8 THE IMPLEMENTATION OF ISLAMIC LAW AND ITS FUTURE

8.1 The Implementation of Islamic Law

There are many contemporary debates on the implementation of the *Sharî'ah*. These debates are a rich source of insight into the diverse understandings and uses of the Islamic legal tradition in the modern world. Some Muslim communities are engaged in vibrant and far-reaching debates on the terms, relevance, and developmental limits of Islamic law.[1]

In Islamic law, *ihqâq-i haq* is forbidden completely. That means a Muslim individual cannot implement any punishment in Islamic Penal Law by his own power. Anyone who did so must be punished according to Islamic Law. Punishments in Islamic Law can be carried out only by a Muslim State through the decision of a court. Even more, Muslims must live as citizens or migrants in Western states in peace and harmony only according to the rules of the "land of peace" (*Dâr al-Amân*). To teach these religious rules to Muslims living outside the Islamic world - in the hope of avoiding the violation local regulations and respect local laws - is a crucial point in the direction of the real integration and peaceful and harmonious life. As Muslim individuals, our responsibility is indicated by two phrases: *mâ'nawî jihâd*, that is, "*jihâd* of the word" or "non-physical *jihâd*," and "positive action." We should insist on these words to avoid any use of force and disruptive action. Through "positive action" and the maintenance of public order and security, the damage caused by radical forces could be "repaired" by the healing truths of the Qur'an.[2]

In the past, the Muslim states applied *Sharî'ah* or Islamic Law to all areas of Muslims' lives: public, private and international relations. With colonization, Western countries imported their secular legal systems (common law or civil law) into Islamic countries. Even after independence, Islamic countries continued to practice the legal systems of their colonial masters. There are different historical, cultural, social, political and economic differences that clearly influence the implementation of Islamic law among Islamic countries. As we mentioned about classification of Islamic rules, there are certain fundamental precepts of Islamic law, founded on clear and unambiguous

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1 R. Michael Feener and Mark E. Cammack, *Islamic Law in Contemporary Indonesia: Ideas and Institutions*, (Cambridge: Harvard University Press, 2007), p. 9.

2 Sukran Vahide, "Bediuzzaman Said Nursi's Approach to Religious Renewal and its Impact on Aspects of Contemporary Turkish Society," in *Contemporary Islamic Thought*, edit. By Ibrahim M. Abu-Rabi', (Blackwell Publishing Ltd, 2006), pp.55-7.

Qur'anic injunctions and generally accepted by most Islamic countries.[3]

We should now explain some principles concerning the implementation of Islamic Law generally. Many Western people fear that Muslims may enforce Islamic law in the future in their countries or think that Muslim individuals may implement some rules of Islamic law themselves. This is not a correct assumption.

We should narrate some Islamic rules relating to this issue.

1. We could say that only sovereign Muslim states/governments have legal authority to implement Islamic Law, and individual Muslims have no legal authority or power to implement Islamic Law. Surely Islamic Law does not state that every Muslim is obliged to implement Islamic Law. It does not matter how efficient and popular that individual may be as a brave warrior or a meticulous planner of unlawful and immoral schemes of hatred, terror and destruction. Only those who are properly qualified and trained and have been licensed by Muslim governmental authorities have the authority to issue *fatwâs*. Not every Muslim individual qualifies as a *muftî* (a juristic consultant or legal scholar who has been given a license to issue *fatwâs*). For this reason Bediuzzaman says: *"And we know that the fundamental aims of the Qur'an and its essential elements are fourfold: divine unity (al-tawhîd), prophethood (al-nubuwwah), the resurrection of the dead (al-hashr), and justice (al-'adâlah)."*[4] *Al-'Adâlah* means law. He adds in another treatise: *"Let our ulul-amr (official authorities) think over implementing these rules."*

With respect to the means for removing the *munkar* (evil), and not remaining silent when faced with it, *Sharî'ah* has demonstrated that in the *hadîths* that Muslims told about Abu Said al-Khudari, where the Prophet said; *"Whoever of you has seen a munkar let him change it with his hand, if he cannot then by his tongue, and if he cannot then by his heart and this is the weakest îmân."* Another version says that *"after that there is not an atom of îmân."*[5]

This means that if the *munkar* is not denied in the heart then there is no atom of *Îmân* in the heart of that Muslim. So if the Muslim is able to remove the *munkar* by his hand, then he is obligated to remove it by himself. If he cannot do that but can deny it

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[3] Abdul Ghafur Hamid and Khin Maung Sein, "Reservations to CEDAW and the Implementation Of Islamic Family Law: Issues And Challenges," *Asian Journal of International Law* 1 (2006): 121-55; for more information see: Maurits Berger, "Sahrî'ah Law in Canada- Also Possible in the Netherlands?" in Paulien van der Grinten, Ton Heukels, F. J. A. van der Velden, *Crossing Borders: Essays in European and Private International Law, Natioanlity Law and Islamic Law*, (Amsterdam: Kluwer Rechtswetenschapelijk Publicaties, 2006), pp. 173-83..

[4] Bediuzzaman Said Nursi, Introduction, *Signs of Miraculousness: The Inimitability of the Qur'an's Conciseness* (Istanbul: Sozler Publications, 2007), p. 18.

[5] Abu al-Husayn Muslim ibn al-Hajjaj Al-Naysaburi, *al-Jâmi' al-Sahîh*, (Cairo: Dâr Ihyâ al-Turâth al-Islamî, 1954).

openly and attack it verbally in public, then he must do that. If he cannot do that, then he is obligated to deny the *munkar* in his heart, and he can do this by saying to himself, for example, "O my Lord, this is truly a *munkar* that doesn't please you."

We will explain in the chapter on Islamic Administrative Law (in the book on Public Law) that the implementation of Islamic Law belongs to the tasks of the caliph or the Muslim state. We can summarize some tasks of a caliph. They are: 1) to protect religion; 2) to apply Islamic rules; 3) to implement Islamic penal law, especially *hudûd*.[6]

2. Islamic international law has paid primary attention to the state's jurisdiction in prescribing law in criminal matters. There are numerous theories of jurisdiction to be prescribed.

The *territorial theory* allows for jurisdiction over persons, things or acts that take place within the territorial boundaries of the state. Under the nationality theory, a state may prescribe law over persons or things that share its nationality. Moreover, customary international law, under the nationality theory, permits a state to exercise jurisdiction over its subjects wherever they may be located. The protective principle expands these traditional bases of jurisdiction by emphasizing the effect of an offense committed outside the territory of a state and allows the exercise of jurisdiction where conduct is deemed harmful to the national interests of the forum state. Most European countries have accepted this approach, including Austria, Denmark, Finland, France, Spain, Sweden and Greece. Thus, any state may impose liability, even among non-citizens, for conduct outside its borders that affects and has consequences that the state reprehends within its borders. We can summarize by saying that the territorial principle allows for the exercise of jurisdiction over acts occurring within a state's territory. Sunnîs and specially Hanafîs have preferred this principle.

The second theory is the *extraterritorial jurisdiction* theory that allows for the exercise of jurisdiction over acts occurring within and outside of a state's territory. The Shi'îte schools of law prefer extraterritorial theory. It means that it allows for Islamic Law on apostates to be applied in non-Muslim countries. The majority of "Sunnîs do not believe in extraterritorial jurisdiction." So Muslims who live in a non-Muslim country are not morally responsible to their native Muslim state for acts of fornication, apostasy, etc.

3. The most important thing we have looked at is the relationships between Muslims and non-Muslims in non-Muslim countries. An issue that we must look at now is that of the abode: the *dâr*. Although there may be some people who are educated in

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[6] Abu al-Hasan Ali ibn Muhammad al-Mawardi, *al-Ahkâm al-Sultaniyyah fi al-Wilayat al-Diniyyah* (Kuwait City: Dar ibn Qutaybah, 1989), pp. 22-23; Zafir al-Qasimi, *Nizâm al-Hukm fi al-Sharî'ah wa al-Târîkh al-Islamî* (Beirut: Dar al-Nafa'is, 1990), pp. 352-53.

Islam who are aware of this issue of the abode, there are many who are not. In fact, even some *fuqahâ*, scholars in Islamic law and the legal system, can be found who are unfamiliar with this issue. The issue is this: most people believe that Muslims think that the world is divided into two abodes, the abode of peace and the abode of war. The abode of peace is the country of the Muslims, *dâr al-Islam*, and the abode of war (*dâr al-kufr)* is everywhere else. This is held to be one of the most fundamental problems with the Muslims: viewing the world as a dichotomy of these two abodes. Thus, the central aspect of international relationships with the Muslims is aggression, one of war. This view is wrong. There are three abodes: the abode of peace, the abode of war and the abode of treaty (*dâr al-'ahd)* where there is a contractual agreement between the other two abodes.

For instance, when I came to the Netherlands, I was issued a visa, and I signed a document. In the issuance of the visa and my signing of it a legally binding contract occurred, a *sulh*. It was an agreement that when I came into this country, I would obey its laws and follow the restrictions that this visa demanded I follow. This was a contractual agreement that is legally binding even according to divine law. Thus, we have to understand that the relationship between the Muslims living in this country and the dominant authorities here is a relationship of peace and the contractual agreement of a treaty. This is a relationship of dialogue and a relationship of give and take.[7]

4. The interpretation and application of even a religious directive pertaining to the state affairs, it is consultation (*shûrâ*) that should be the procedure (*majlis al-shûrâ*)[8]. Experts of Islamic sciences may proffer their opinions. It is their right to express their viewpoints, but their opinions become legally binding on people only when the majority of the elected representatives of people (*majlis al-shûrâ*) accept them. It is the right of the people to disagree with decisions of the *majlis al-shûrâ* and to express their viewpoints to rectify its mistakes. However, no one as an individual has the right to violate the laws enacted by the *majlis al-shûrâ* or to defy the system. Neither the *'ulamâ* nor the judiciary is superior to the *majlis al-shûrâ*. Each institution has the obligation to comply with the *shûrâ* decisions even if it has differences of opinion with

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[7] Abdulkarim Zaidan, *Ahkâm al-Dhimmiyyin wal Musta'manin*, (Baghdad: 1963), pp. 20-21; Ahmad Al-Sarakhsi, *Sharh al-Siyar al-Kabir*, I-IV, (Cairo: Ma'had al-Makhtutat, 1971), vol, 4. pp. 302-20.

[8] *Majlis al-Shûrâ* is a transliteration of the Arabic which means approximately "consultative council". The noun shura alone means "consultation" and refers to (among other things) a topic in Islamic law. The expression *Shûrâ* Council as a partial translation of "Majlis *al-Shûrâ*" is the conventional English rendering of the name of the upper house of the Egyptian parliament. We will explain the legal authority and functions of this *Majlis* in Public Law.

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We will explain this in detail in book three (on Public Law).

8.2 The Future of Islamic Law

8.2.1 The Future of Islamic Law in Muslim Countries

The place of Islamic law in the modern world is part and parcel of the fate of the religion that gave birth to and nourished the law. It appears that the outcome of the debate on the future of Islamic law would, to a great extent, depend upon finding the right answer to difficulties in the Muslim world. The proper context for the study of the relationship between the theory and practice of Islamic law is social history. The Ottoman State is a good example for this.

We could say that the nature of Islamic Law is such that it can operate as an organic law, even when the large tree of the organization collapses and fails to function. History relates that this is what happened when the Mongols ravaged Baghdad and the Turkish defenders of the empire were not able to continue their role as the guardians and custodians of Islam. This is due to the nature of Islamic Law, which is not a law in the Western sense of the word. *Fiqh* is a "praxis understanding" that provides an internal view into how one is to act and live as a Muslim. It is obvious that the future of the Islamic law cannot be separated from the economic, political and social future of the countries in which it is applied. The course of legal development in Muslim countries in the last two hundred years shows that Islamic law is alive and doing well in the modern world, and enhancement of its integration in modern state structures.[10]

The background of the Western invaders in the period 1750-2004 was different from that of the Mongols. They came with the ideals of democracy, pluralism, tolerance, human rights and secularism, which were not simply beautiful but were dictated by the need of the modern state. However, these modern states required colonization to expand, and that meant the colonization of agrarian societies into ones producing raw materials and exporting their goods. The ideals of democracy, tolerance and human rights were valid within the state but seemed to be totally void concepts when Western states had to subject their colonized countries. Undoubtedly, this led to mas-

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[9] Cf. Abû al-A'lâ Mawdûdî, *Tafhîm al-Qur'ân*, vol. 4, (Lahore: Maktabah-i ta'mîr-i insâniyyat, 1972), pp. 509-10.

[10] Anita M. Weiss, *Islamic Reassertion in Pakistan: the Application of Islamic Laws in a Modern State*, (Syracuse: Syracuse University Press, 1986), p. 107; Oussama Arabi, *Studies in Modern Islamic Law and Jurisprudence*, (Leiden: Brill, 2001), pp. 188-89.

sive cultural problems in societies where industrialization was being developed.[11]

With respect to learning Islamic Law in the Western world, the current state of affairs is rather interesting. One ought to realize that the Islamic legal tradition, however, is neither monolithic nor static. It is a dynamic tradition that rises to new challenges but refuses to abandon its core characteristics. In what might be called the "Islamic Renaissance," numerous Islamic legal approaches have emerged, each claiming authenticity and superiority over the others.[12]

We should accept that Islamic law referred to basic principles or to verses in the holy texts, or used inductive and deductive methods developed in debates between jurists and schools of law. The method of its production changed: law was no longer produced in jurist debates and writings but enacted by a political legislator, the state. The hierarchy of norms changed. The legal norms were recognized not because they referred in the last instance to the Qur'an and the *Sunnah* or to recognized methods of norm justification, but because they were promulgated by the political legislator.

When the end of the colonial period approached, the creation of a national law was high on the agenda of most Arab states, as it was in Pakistan. But in the Arab world few people thought of reintroducing Islamic law as the dominant law. Even fewer thought it would be useful to reproduce Islamic law , with its two levels of legal and ethical discussions, the debate between jurists as the means of non-production, and the interpretation of the different points of view expressed in the legal literature by a judiciary that was not hierarchically ordered. Efforts were rather concentrated on the creation of national codes and a hierarchically ordered judiciary. Law was conceived generally and obtains for a majority up until the present as codified law enacted by the political legislator.

What is at stake today is the content of these codes? This question is decided in a situation where religious scholars have lost control over the normative structure of Islam, and the new interpretations of Islamic law and religion has occurred. Jurists trained in modern law schools, sociologists, anthropologists, in short, academically trained intellectuals of all sorts, interact with the public on the question, "What is the normative structure of Islam? What is it that we want to see realized by Islam?" The debates take place no longer between factions and schools of religious scholars but between different religious movements within civil society, and also outside and against civil society. There is no other instance representing consensus and authority

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[11] 'Izz al-Dîn, Mu'il Yusuf, *Islamic law: From Historical Foundations to Contemporary Practice*. (Edinburgh: Edinburgh University Press, 2004), pp. 154-58; Oussama Arabi, *Studies in Modern Islamic Law,* pp. 19-38.

[12] Hisham M. Ramadan, "Toward Honest and Principled Islamic Law Scholarship," *Michigan State Law Review* (2006): 1573.

beyond the public at large.

We could see in Ottoman Constitution of 1876 and in some modern Muslim states (like United Arab Emirates), they have used the *Sharî'ah* as a reference for vetting laws. The laws of the country are than decided in a codified form in a legislative assembly as today. The laws are then passed on to an Islamic instance of examination or a supreme court of Islamic scholars who can reject the laws and send them back to the legislature in they consider them to be contrary to the *Sharî'ah.*[13]

One of the earliest and most successful efforts to develop a modern civil law was undertaken by Muslim jurists such as Ottoman scholar Ahmed Jawdat Pasha, who has headed to Majalla Committee, and Egyptian 'Abd al-Razzaq al-Sanhuri, who were well-trained in Islamic and in French law and who used the means of the comparative law to analyze the aims and functions of the norms of modern European and Islamic law. The latter constructed the Egyptian civil law code that has served as the basis for a common Arab civil law that is much more unified than European civil law. Since 1949 the Egyptian civil code has been received by almost all states in the Arab League: Iraq in 1951; Libya in 1953; Qatar in 1971; Sudan in 1971; Somalia in 1973; Algeria in 1975; Jordan in 1976; and Kuwait in 1980.

Some Muslim scholars are now discussing the use of comparative law methods for a comparison between Islamic and European norms and principles – and Islamic and European legal principles. They have established a new legal tool for the analysis of Islamic law that opened up the horizon for a reconstruction of Islamic law as an instrument for a new form of Islamic legality. This explains the great attraction of comparative law for a whole generation of the best Muslim jurists.

The end of the colonial era also brought an era of constitutionalism to the newly independent Muslim countries and to newly founded Pakistan. Colonial administrators had had little interest in encouraging the constitutionalist movement and constitutional forms of government. The newly independent national states found a welcome symbol of independence and statehood in constitutions. During the first twenty years or so most countries changed constitutions quickly and often, mostly when a coup d'etat occurred.

In 1979 the Pakistani General Zia-ul-Haq created an addition to the Supreme Court and the four provincial high courts that existed in Pakistan since its foundation: a new federal *Sharî'ah* court that was empowered to invalidate laws it deemed to be un-Islamic, and that, together with the *Sharî'ah Bench* of the Supreme Court, has become the most effective instrument for an Islamization of Pakistani law outside of the Pakistani parliament.

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[13] Cf. Knut S. Vikør, *Between God and the Sultan: a History of Islamic Law*, (London: C. Hurst & Co. Publishers, 2005), pp. 254-59.

Much as in Western Europe and in other parts of the world, the foundation of such a constitutional judiciary brings about a growing control of the elected legislator by the nominated high judges. But the affect of this change depends very much on the institutional setting in which and the political background against which it takes place.

The principles of the Islamic *Sharî'ah* are supralegislative norms, but they are not above the text of the constitution. They have to be harmonized with the public and private freedoms guaranteed by it. The Constitutional Court has developed a position on interpretation in which the classical principles of legal interpretation, the doctrine of the aims of the *Sharî'ah*, the reference to principles of the *Sharî'ah*, and the difference between norms that are unchangeable because they are based on unequivocally revealed texts, and thus changeable because they are based on conjectural legal reasoning, constantly occur in the texts of the decisions. The court uses them to legitimize its own reinterpretation of Islamic law.

The constitutions of 1956 and 1962, while containing articles on the Islamization of state and law, did not make these articles actionable as tools to invalidate laws enacted by Parliament, let alone to render null and void the constitution. The various attempts of provincial high courts and Supreme Court justices to raise the Objectives Resolution to the status of Pakistan's supreme norm remained unsuccessful until the middle of the 1970s. The situation changed dramatically with the military putsch of General Zia-ul-Haq in 1977, who ruled through martial law from 1977 to 1985. His coup d'etat toppled the government of Zulfikar 'Ali Bhutto, whom he had executed in 1979. Pakistan's Supreme Court not only legitimated Zia-ul-Haq's putsch by the Doctrine of Necessity in 1977 but in 1979 also approved the hanging of the imprisoned former prime minister.

Zia-ul-Haq also brought about the specific structure of Pakistan's judiciary through creating the Federal *Sharî'ah* Court of Pakistan in 1979. With all these measures he also weakened the political legislator vis-à-vis the judiciary, and in particular vis-à-vis the Islamic courts. The role of the Federal *Sharî'ah* Court was strengthened in 1983, when it was given the power to examine all existing laws with respect to their compatibility with an Islamic legal system, employing a further step in the disempowerment of the elected legislator in favor of the appointed justices of the Federal *Sharî'ah* Court.

The Federal *Sharî'ah* Court's application of the principles thus derived was in no way universal. The principle of equality is clearly not applied to gender relations. Decisions on women under the *Hudûd* Ordinances often break the law and the constitution by their shocking disrespect of the woman's status as autonomous legal actors. In many cases they fall below the standard of the more than 1,000 years doctrine of the Hanafî school that was dominant on the Indian subcontinent. This doctrine gave women the right to marry without the permission or interference of a legal guardian,