Shari'a and Islamic Family Law: Transition and Transformation

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Abstract

This paper is an introduction to the book Islamic family law in a changing world edited by professor Abdullahi Ahmed An-Na'im. The introduction offers an overview of the nature and development of Shari`a in general and a clarification of the context in which the terms Shari`a and 'Islamic Law' are used. Through a historical review the paper offers an introduction to why Shar`ia became confined to family law in many Islamic countries. An-Nai`m argues for the transformation of family law into a normative system under the guidance of modern notions of social policy as well as Islamic precepts, without a representation that Shar`ia (in the context used in this paper) is binding this transformation. This introduction clearly sets the basics for a whole reform project.

نشرت هذه الورقة كمقدمة للكتاب

Islamic family law in a changing

تحرير الدكتور عبد الله أحمد النعيم . تغطى هذه المقدمة طبيعة تطور الشريعة عامة كما تقدم تعريفاً للسياق الذى تستخدم فيه عبارتى" شريعة" " وقانون إسلامى. كما يوضح دكتور/ النعيم ومن خلال مراجعة تاريخية كيف صارت كلمة شريعة وقفـاً علـى

قوانين الأحوال الشخصية فى البلاد الإسلامية ويطرح الكاتب رؤيته لكيفية إنتقال قوانين الأحوال الشخصية إلى نظام قانونى تحكمه بالإضافة للمفاهيم الإسلامية مفاهيم سياسية وإجتماعية تساير روح العصر دون تصوير هذا التحول كما لو أنه مقيد بالشريعة (المقصود بالشريعة هنا المعنى الوارد فى هذه الورقة).

Introduction:

We have simplified the system of transliterating Arabic terms in order make he book accessible to the widest possible range of readers, while also remaining faithful to the authentic pronunciation of Arabic terms. Many texts with Arabic terms use a simplified and modified system of transliteration, wherein they use just two diacritical marks: the single closing apostrophe' to represent hamza and single opening apostrophe ' to represent 'ayn. Both hamza and 'ayn are Arabic letters that do not have any correspondence in the Latin alphabet. Hamza is a letter that is not even pronounced other than as a stop. In this text, we have chosen to simplify natters further by representing both hamza and 'ayn by a single neutral, apostrophe mark'. The rationale for this pertains to the objectives of the text and the target audience for the book. It has been conceptualized as an information resource for academics in a range of disciplines and students at all levels of study, as well as laypersons.

The basic objective of the research project under which this volume has been prepared is to

explore the possibilities of reform in Islamic Family law (IFL) from a human rights perspective. In order to found that effort on the most factual and least controversial information, we have attempted to collect and organize in this volume a global overview of Islamic societies and aspects of the legal systems of their countries that are most relevant to family law. To provide some context for understanding this material in relation to the underlying objective of the project as a whole, I will present in this Introduction an overview of the nature and development of Shari'a in general, and its transition into being limited to family law matters in particular, as is the case today in most Islamic countries. By Islamic countries I mean those countries with majority Muslim populations, regardless of the nature of the state and its ideology and legal system. Against the background of this review of well-known and widely accepted developments, I will argue for the transformation of family law into a normative system that is guided by modern notions of social policy as well as Islamic precepts, but not bound by Shari'a, or represented as An understanding and justification of this transformation is critical for realization of the reform objectives of this project as a whole. But first, a clarification of the terms Shari'a and 'Islamic Law' as used in this book.

shari'a refers to the general normative system of Islam as historically understood and developed by Muslim jurists, especially during the first three centuries of Islam- the eighth to tenth centuries-CE. In this commonly used sense, Shari'a includes a much broader set of principles and norms than subject matter as such. While the term Islamic Law is generally used to refer to the legal aspects of Shari'a, it should also be noted that Muslims tend to believe that the legal quality of those principles and norms derives from their assumed religious authority. Yet, whenever enforced or applied by the state, Shari'a principles are legally binding by virtue of state action, through either enactment as law by the legislative organs of the state or enforcement by its courts. This critical point is clear from the fact that a particular view of Shari'a, whether of one school of Islamic jurisprudence (madhhab) or of a certain jurist within a given school, is applied by state

officials, to the exclusion of the views of other schools or jurists. Accordingly, Islamic Family Law is that part of Shari'a that applies to family relations (such as marriage, divorce and custody of children), also called Muslim Personal Status Law, Shari'at al 'ahwal al-shakhsiyah in Arabic, through the political will of the state.

But since this limited sense of Shari'a is a very recent phenomenon, generally emerging during the colonial period of the late nineteenth and early twentieth centuries, a broader understanding of the nature and development of Shari'a in general is necessary for addressing issues of IFL in particular. However, in view of the continued confinement of Shari'a to family law matters after independence in the vast majority of Islamic countries, the relationship between these limited principles and the broader framework of Shari'a becomes conceptually and legally, problematic. There arc serious risks of distortion and stagnation in maintaining the normative authority of IFL on the basis of a pre-modern system that is becoming increasingly unfamiliar to legal professionals, policy-makers and the public at large, and applying it within the radically different constitutional and legal framework of the modern nation-state. For example, a particular Shari'a view of maintenance (nafaqa) for a divorced woman, or which Parent is entitled to custody of children, is part of a wider network of legal and social relations as perceived by the jurists who articulated that view in the first place. The application of such views out of that broader context, and without the possibility of its revision and reformulation in the light of significant changes in those legal and social relationships, can be seriously counterproductive, even from the perspective of the founding jurists of Shari'a, let alone today's societies. Yet there is no possibility of legitimate and coherent revision and reformulation of such IFL principles in isolation from the broader understanding of Shari'a according to the jurist(s) who framed those principles in a totally different historical context.

As I will argue later in this chapter, these problems can be addressed only through a transformation of the nature and content of family law in Islamic countries. In my view, this

transformation is already happening because family law in the vast majoriry of these countries today is enacted in statutory form by the stale, rather than being derived from traditional sources of Shari'a as such. Moreover whether a judgment is based on a statute or a selection by a judge, it is legally binding and enforceable only by the authority of the state. This is of course quite different from voluntary compliance out of religious commitment, which is the realm of moral sanction, not the administration of justice by the state. Instead of purporting to base the legal authority of family law on a Shari'a jurisprudence that has ceased to exist as a living and evolving system, I argue, it is better to recognize openly that this field, like all other laws derives its authority from the political will of the state. A clear acknowledgement of this reality will open the door for more innovative approaches to family law reform that may still be guided by Islamic principles, without being confined to outdated understandings of Shari'a. This will enable Islamic countries to make family law more consistent with other aspects of, their legal systems, including their constitutional and international law obligation to protect the human rights of women.

It may appear that such recognition and opening of possibilities for more innovative approaches will by themselves resolve the most critical family law issues, such as equality between spouses during marriage and at its termination. In particular, it may be argued that to accept the unavoidability of the foundational role of human choice and interpretation in the formulation of any aspect of the normative system of Islam does not address the question of what to do about categorical and explicit texts of the Qur'an and *Sunna* of the Prophet on marriage, divorce, inheritance, and so forth. In my view however, these ideas will in fact make it possible to found family law on sound social policy for present-day Islamic societies, even if that means the non-application of apparently categorical and explicit texts of the Qur'an and *Sunna*. The role of human agency therefore means, I suggest, reflection on the policy rationale and meaning of those texts in the context of seventh-century Arabia, rather than their acceptance as immediately and literally applicable in all social settings for eternity. In other words, human agency today should

decide how to realize the underlying rationale of those texts as sound social policy in that historical context, and seek to articulate an equivalent purpose in the modern context.

I have attempted to make a more detailed and substantiated argument for these admittedly controversial propositions elsewhere, drawing on the work of the late Sudanese Islamic reformer Ustadh Mahmoud Mohamed Taha (An-Na'im 1990: Chapters 2 and 3). In this Introduction, I will try to highlight some aspects of that argument in terms of the nature and development of Shari'a in relation to family law in particular. From this perspective it seems to me that much of the confusion about the role of Shari'a in the modern context is caused by two factors. First, there is a lack of appreciation of the critical role of human agency in the conception and development of any normative system of Islam. Moreover, there is also a grossly exaggerated sense of the practical application of Shari'a as a comprehensive, self-contained and immutable normative system in the pre-colonial period. The critical role of human agency in the interpretation of the Qur'an and *Sunna* (traditions of the Prophet) is evident from the fact that these divine sources were revealed in a human language (Arabic) and can be understood and applied only in the specific context of the time and place. That obvious reality is clearly reflected in the extreme diversity of opinion among and within various schools of Islamic jurisprudence (*maddahib*), thereby forcing rulers and subjects alike to select from competing views that are deemed to be equally valid from a Shari'a point of view:, This point can also be demonstrated from a review of the actual history of Shari'a and its application throughout Islamic history.

Historical Overview of Shari'a and its Application:

To begin with, I do accept the general conclusion of earlier Western scholars of Islam that there was little systematic development the methodology and general principles of Shari'a during the Medina state of the first four Khulafa (632-61 CE), and the Umayyad state(661-750) (Schacht 1959; Coulson 1964). I also appreciate more recent scholarship that is improving our knowledge

of that early period and refining and qualifying some of the conclusions of earlier scholars (Al-Azmeh 1988; Burton 1990, 1994.; Calder 1993; Hallaq 1997; Mel-chert 1997). However, these insights do not repudiate the main thrust of earlier conclusions about the timing of the systematic development Shari'a, as explained below. It is true as one would expect that some general principles began to emerge during the first century of Islam' through the practice of community leaders and provincial governors and judges, as well as the view of leading scholars of that period. But it is equally dear to me that the more systemic development of Shari'a, as it came to be known and accepted by Muslims today, began with the early Abbasid (after 750 CE).

This view of the relatively late evolution of Shari'a as a coherent and systematic normative order in Islamic history is clear from the time-frame for the emergence of the major schools of thought (madhahib, singular madhhab), the authoritative collection of Sunna as the second and more detailed source of Shari'a, and the development of its essential methodology(usul al-fiqh). All These developments took place about I50 to 250 years after the Prophet's death. In other words, the first several generations of Muslims could not have known and applied Shari'a as it came to be accepted by the majority of Muslims for the last one thousand years. Since those early generation are also generally accepted by the majority of Muslims to be more devout than subsequent generations, it follows that the application of Shari'a in that historical sense is not essential for the piety or religious fidelity of an Islamic community

The early Abbasid era witnessed the emergence-of the main surviving schools of Islamic jurisprudence, especially the Sunni schools of Abu Hanifah (d. 855), and Ja'far al Sadiq(d.765-the founder of the main school of Shi'a jurisprudence). However the subsequent development and spread of these schools has been influenced by a variety of political, social and demographic factors. These factors some misleads to shifting the influence of some schools from' one region to another, con-fining them to certain parts, as in the case with Shi'a school at present, or even to the total extinction of some schools, such as those of al-Thawri and al-Tabari in the Sunni tradition.

The initial geographical spread and present-day status of the main surviving Sunni schools can be briefly outlined as follows.

The Hanafi and Maliki schools, in addition to being the first to develop, also became the most geographically widespread. Having originated in Iraq, the centre of power of the Abbasid dynasty, the Hanafi school enjoyed the important advantage of the official support of the state, and was subsequently brought to Afghanistan and later to the Indian subcontinent, while emigrants from India brought it to East Africa. This connection with the ruling authority was to remain characteristic of the Hanafi school down to the period of the Ottoman Empire (Weiss and Green 1987: 155; Melchert 1999: 318-47)'Thus Hanafi law is currently followed in Turkey, Iraq (together with the Shi'a Ja'fari School), Syria, the Balkan states, Cyprus, Jordan, Sudan (via Egypt), Israel and Palestine (together with the Shafi school), Egypt and the Indian subcontinent. The Maliki school grew out of the city of Medina, and spread to Sudan, Eritrea, Libya, Tunisia, Algeria, Morocco, Gambia, Ghana, Nigeria and Senegal to the eastern coastal territories of Arabia on the Gulf, such as Kuwait. The Shaf'i school started in Cairo, where its founder lived for the last five years of his life, spread to Yemen (together with the Ja'fari school) and the, Indian coastline, and then via the Arab trade routes to East Africa and, Southeast Asia. Currently, Shaf'i views predominate in Malaysia, Indonesia, Singapore, the Philippines, Sri Lanka and the Maldives. The Hanbali school was always the least popular of the Sunni schools, and was on the verge of extinction when it was revived by the puritanical movement of Ibn Abdel Wahab in Arabia in the late eighteenth century. It remains limited to that region to the present day.

Two points should be emphasized hereabout the preceding review of the current followings of these schools that are relevant to the argument of this Introduction. First is the difference between the popular followings of the school in specific societies, on the one hand, and the application of Shari'a by the state, on the other. Due to the confinement of the latter to family law matters, the popular following of a school relates to religious rituals or rites such as prayer and

fasting. This raises the question of the meaning and legitimacy of Shari'a itself in the modern context, when the religious belief of the community of believers in the unity and inviolability of so-called religious and legal matters in Shari'a is impossible to maintain in the actual practice of those communities or the law and administration of justice by their government Second, as explained below not only is the application of Shari'a principles by the state in family law matters done through statutory enactment, but also the content of those slates has become strongly and openly eclectic, combining views within a school (madhhab),and from different schools (madhahib), mixing Sunni and Shi'a views, so that the end result would nor be acceptable to any of the scholars, schools or traditions whose 'authority' is involved in support of the application of a given principle or rule. In other words, legislation and judges first decide what the rule ought to be, and then go into an increasingly arbitrary 'fishing' expedition for nominal support among any of the schools or scholars of Shari'a they can find for their personal preferences or official judgment and political expediency's am nor concerned here with the correctness or validity of the outcome of such processes. My point is simply that this cannot legitimately be called an application of Shari'a, is historically understood. Before returning to this analysis let us continue with describing the history and background of these current social and official practices.

The timing of the emergence and the carry dynamics of each school also seem to have influenced the content and orientation of their views on Shari'a. For instance, the Hanafi and Maliki schools drew more on pre-existing practice than did the Shafi and Hanbali schools, which elaborated their views from he theory of Shari'a. These differences reflect the influence the timing and intellectual context in which each school emerged and developed. This may also explain the similarities in the views of the latter two schools, in comparison of the earlier two, and the stronger influence of reasoning and social and economic experience on the Hanafi and Maliki schools in contrast to the other Sunni schools .However, the principle of consensus(ijm`a)apparently acted as a unifying force that tended to draw the substantive content of all these four Sunni schools together

through the use of independent juristic reasoning (ijtihad).Moreover, the consensus of all the main schools has always been that, if there are two or more variant opinions on an issue, they should all be accepted as equally legitimate attempt to express the particular rule (hukm) (Weiss 1998: 122-7; Kamali 1991: 168-72.)

But a negative subsequent consequence of the strong emphasis on consensus is the notion that all possibilities of ijtihad had ended by the tenth century because Shari'a had been fully and exhaustively elaborated by that time. This rigidity was probably necessary for maintaining the stability of the system during the decline, even breakdown, of the social and political institutions of Islamic societies. As with the issue of the timing of the systematic development of Shari'a mentioned above, more recent scholarship is questioning this commonly held view about the diminishing possibilities of ijtihad(Hallaq 1994; Gerber 1999: 'Introduction').But the point is of course relative . It is true that there have been subsequent developments and adaptations of Shari'a through legal opinions (fatwa) and judicial developments, as outlined below. But it is also clear that these took place firmly within the framework of already established broader principles and methodology rather than radical innovation in either regard. It is simply untenable to claim that there has been any change in the basic structure and methodology of Shari'a as determined through the process outlined above. Specialists will probably continue to contest the precise extent or scope of belief in the immutability of Shari'a over the last thousand years or so, and to refine our knowledge of how the system worked in practice at different stages of the history (Al-Azmeh 1988a, 1988b; Hallaq 1997).But the fact remains that the core content of Shari'a has continued to reflect the social, political and economic conditions of the eighth to tenth centuries, there, by growing more and more out of touch with subsequent developments and realities of society, and state, especially in the modern context(Schacht 1974:394-5).

The Abbasid rulers inherited the legacy of Umayyad legal Developments mainly in the areas of government administration and judicial decisions that, were founded on judges' personal

opinions of the relevance and meaning of principles of the Qur'an and Arab or local customary practice (Esposito 1984: their successful challenge to the Amway dynasty, the Abbasid rulers also actively encouraged the application of Shari'a by state-appointed judges. To that end, they created the position of chief judge (qadi al-quda), who had the responsibility of appointing and dismissing other judges, subject to the overriding authority of the Khalifa, of course. A notable occupant of that office was Abu Yusuf (d.798), the leading Hanafi jurist of the time (Weiss and Green 1987:85).In that way, the Abbasid stares sought to transform Shari'a into positive law through the judiciary But as agents of the state, Shari'a judges did not have complete monopoly over the judicial process. A variety of other openly 'secular'(mazalim)courts also had jurisdiction in a wide variety of fields of the administration, while the Khalifa retained ultimate judicial authority even over matters formally assigned to judges (Weiss and Green 1987:152). The religious nature of Shari'a, and its focus on regulating the relationship between God and human beings, was probably one of the main reasons for the persistence and growth of secular courts to regulate a wide range of practical matters in the administration of justice and process of government in general (Al-Mawardi 1996/2000). As Noel Coulson has observed, the distinction between the jurisdiction of the mazalim and Shari'a courts at that time came very close to the philosophy of a division between secular and religious courts (Coulson 1964: 122). That early acceptance of 'division of labour' between different kinds of courts has probably contributed, among other actors, to the eventual confinement of Shari'a jurisdiction to family law matters
in the modern era, as discussed below.

Another aspect of the legal history of Islamic societies that is associated with the religious nature of Shari'a is the development of private legal consultation (ifta).Scholars who were independent of the state were issuing legal opinions at the request of provincial governors and state judges, in addition to providing advice for individual persons from the very beginning of Islam (Masud et al. 1996: 8-9). These activities expanded in scope and geographical reach as the

jurisprudence of the various schools evolved and the sources and techniques of Shari'a developed during the early Abbasid era. This type of private advice persisted through subsequent stages of Islamic history and became institutionalized in the mid-Ottoman period, as indicated below. Such private advice will probably continue into the future to satisfy the religious needs of Islamic communities. But there is a significant difference between this sort of moral and social influence of private actors, and the enforcement of Shari'a by the state, which is the main concern of this Introduction.

The balance between the practical needs of state and society, on the one hand, and the moral imperatives of Shari'a as historically understood, on the other hand, was not easy to maintain in practice. The traditional approach here has always been a delicate division of juristic labour between official judges and independent scholars providing moral guidance to their communities on private voluntary basis. On the one hand, matters of legal procedure and evidence in the adjudication of adversarial cases through binding and enforceable judgments fell within the jurisdiction of state judges and courts. On the other hand, non-binding advisory fatwa continued to be pronounced by learned scholars of Shari'a to individuals seeking advice (see Masud et al. 1996: 3).As the corpus of substantive law and jurisprudence grew, the accumulation of fatwa issued by scholars of Shari'a (muftis) in different settings served to stimulate the development of Shari'a 'from below, in response to the specific needs of Islamic communities, albeit within the confines of the established framework(Masud et al. 1996:4). Still, that degree of practical adaptability did not succeed in preventing the encroachment of European codes from the mid-nineteenth century. As openly secular state courts applying those colonial codes began to take over civil and criminal matters, the domain of Shari'a was progressively limited to the family law field. Whatever the reasons may have been, family law remained the primary aspect of Shari'a that successfully resisted displacement by European codes during the colonial period, and survived and outlasted various degrees or forms of secularization of the state and its institutions in a number of Islamic

countries. As such, IFL has become for most Muslims the symbol of their Islamic identity the hard irreducible core of what it means to be a Muslim today.

The critical factor in this transition that is particularly relevant to our purpose here is the role of the state in mediating the relevance of Shari'a as part of broader legal and political systems of government and social organization; because that is the role the state is playing today.. But the need to transform IFL as pan of the legal system of modern Islamic states can be better appreciated in the light of an understanding of the nature and process of transition into this modern context .While the case for the transformation of the basis of family law I am proposing draws on those earlier experiences, it is probably more urgent today than it was in the recent past.

Transition into the Modern Era:

The main changes in the above-mentioned approach to division of labor between state judges and advice by independent scholars (ifta) in the modern era have been the progressive expansion of the secular jurisdiction of the courts and institutionalization of ifta. I will first review the latter phenomenon before turning to the expansion of secular jurisdiction of state courts, which is the main focus of the rest of this section. However, I will deal with these developments with special reference to the Ottoman experience because of its strong influence on similar developments in many Islamic countries today.

During the Mamluk period (1250-1516)in Egypt and Syria, ifta was largely still a private activity that was independent of state control or regulation. In other words, the authority of those independent scholars was derived from their standing among their peers and the confidence of the general public in heir competence and piety This was the same process through which the main Sunni schools evolved in the first place, except that the content and methodology of the legal and religious opinion being issued was confined to the established schools of Shari'a from the tenth century as indicated above. It was not uncommon for muftis to attend Shari'a courts where judges might consult with them before issuing their judgments, especially in difficult cases. The Mamluks

did not appointing muftis as judges in Shari'a courts, although they lid appoint a relatively small number to serve in the secular (*mazalim*) courts that were established by the Sultan and his governor. The Mamluk Sultans also apparently employed a small number of muftis to advise them on matters of policy, there by reinforcing their own political legitimacy among their Muslim subjects (Masud et al. 1996:10)

The independence of muftis continued into the early Ottoman period, but as the state expanded and developed into an empire, they were gradually incorporated into an increasingly centralized judicial administration. Begin-ring with the reign of Murad II(1421-51) a single mufti, designated as Shaykh el-Islam (the wise and learned scholar of Islam) came to be recognized as the ultimate source of authority in matters relating to Shari'a, By the time of Selim I (1512-20), the Shaykh al-Islam exercised considerable moral influence n the capital city of Istanbul. These developments culminated in the reign of Sulayman (1520-66),when the Shaykh al Islam became responsible for a complex hierarchy of jurists scattered throughout the empire. As the demand for fatwa increased, the Sultan established an official department for issuing *fatwas*, with a professional staff headed by the fatwas supervisor, thereby beginning the process of institutionalization and bureaucratization of this function (Masud et al. 1996: 11-12).

A related significant development during that period was the patron age of the Hanafi school by the Ottoman dynasty. From the earliest days of their rule, the Ottoman Sultans appear to have given official status to this school, presumably because it was already established in the cities of pre-Ottoman Anatolia that provided the first judges and jurists in the Ottoman realms. By the mid-sixteenth century, the Hanafi school had spread with the Ottoman conquest to the Balkan peninsula and Hungary and had become the predominant school in the Middle East to the west of Iran, both in the practice of the course and in the curriculum old the colleges. However, there was a tension between that reality and the need to maintain the traditional independence of Shari'a - since rulers are supposed only to foster the development of Shari'a, without claiming or appearing

to create or control it (Imber 1997:25).Like all members of higher ranks of the religious-legal profession, the Shaykh al-Islam reached his position through direct royal patronage, and relied for his promotion on the support of a family or faction. He was never, in reality, out of and above everyday politics.

Ebu's-Su'ud, who served as Shaykh al-Islam from nearly thirty years(1545-74)is credited with having attempted to reconcile the supremacy of Shari'a with the sovereignty of the Sultan, But that must have been more a matter of personality and the relative standing of the Shari'a scholar in relation to the particular Sultan while both claims are essentially political in any social setting the religious authority of Shari'a is fundamentally different from the temporal authority of the Sultan. The point can clearly be illustrated from pre-Reformation Europe to post-Khomeini Iran.

The need for systematic reasoning and citation of sources and precedents in the expanding field of ifta gave rise to a form of legal literature that consisted almost entirely of quotations arranged in ways that lent authority to the author's arguments. The majority of fatwas survive in the collections devoted to the opinions of either a single or several Shaykh al-Islam. The compilers of these volumes organized the fatwa under legal headings and subheadings such as marriage, lease, trust or lawsuits, i.e., procedure-there by making them a practical source of reference for students, judges, muftis and others with an interest in the law. But the basic legal concepts and methodology, as they had been established by the eleventh century, remained unchanged, as jurists continued to follow the doctrine and techniques of their *madhhab*, although some adaptation must have taken place for the fatwas to be relevant and useful. On the question of land, for example, a number of Hanafi jurists from the time of the Transoxanian jurist Qadikhan (d.1196)onwards adapted the classical theory of land ownership and taxation to describe the forms of tax and tenure that were prevalent in their own day. Ebu's-Su'ud came to draw on this tradition in the sixteenth century for his own formulation of Ottoman land law (Imber 1997:37; Hallaq

1994:31).

Similar developments can also be observed in Safavid Iran from 1501 to 1722, where Twelver Shi'ism (Ja'fari school) became the state religion, and .Shari'a scholars occupied a range of positions some of which may have included public fatwa-issuing functions. In Timurid Central Asia and the Indian subcontinent an official bearing the tide Shaykh al-Islam its equivalent was in charge of all religious matters, including the issuing of fatwas (Masud et al. 1996:13-15). Throughout these areas, earlier efforts to reconcile and negotiate the relationship between Shari'a and secular administration of justice continued, subject to regional context and theological variations between Sunni and Shi'a approaches.

In the Ottoman Empire, as elsewhere, Shari'a was the law of religious community, while *qanun* was the law of the state. The two systems had grown independently of one another, Shari'a as the outcome of juristic speculation that reached its maturation two centuries before the emergence of the Ottoman imperial state, while *qanun* was a systematization of specifically Ottoman feudal practice that in many essential areas, such as land tenure and taxation, ran counter to the doctrines of Shari'a jurists. As noted above, Ebu's-Su'ud is credited with having redefined the basic laws of land tenure and taxation in terms that he borrowed from the Hanafi tradition, in an effort to reconcile the two. The synthesis he developed remained in force until the promulgation of a new Ottoman code of land law in 1858 (Imber 1997:51). Thus, despite the purported intellectual and ideological hegemony of Shari'a throughout the Islamic world, secular law 'that derived its authority from either custom or the will of a human political actor had to be devised and applied. This was simply unavoidable then, and would be even more compelling in today's complex world, because Shari'a did not provide all the tools and material required for a comprehensive and sustainable practical legal system (Gerber 1999:29; Imber 1997: Chapter 2).

Moreover, with the rise of European imperial powers since the sixteenth century, a new dimension was added to the dynamics of transition. In the Ottoman Empire, this took the form of

granting the consular courts of European powers jurisdiction over cases involving their nationals and also Ottoman nationals belonging to the religious communities taken under the Protection of these foreign states. This system developed into a powerful political structure that, combined with military and economic pressure from European imperial powers, including loss of territory, became the motivating force behind the *Tanzimat* reforms of the Ottoman law and the legal system in the second half of the nineteenth century. Initially this consisted of formally removing from Shari'a jurisdiction whole areas of law where its ultimate authority used to be at least nominally acknowledged, even where its principles had been mixed with customary and *qanun* law for centuries. "This process began after the Egyptian occupation of Palestine and Syria between 1831 and 1840, when criminal and administrative matters began to be transferred to local councils set up in districts, leaving Shari'a courts to deal with personal status/family law and property matters.

In addition to justifying these changes in the name of strengthening the state and preserving Islam, *Hatt-i Humayun* (an imperial edict) also emphasized the need to ensure equality among Ottoman subjects, thereby laying the foundation for a major reconstruction of the legal system regarding the rights of non-Muslims. This edict provided for secular or *nizamiyah* mixed courts composed of Muslim and non-Muslim judges to hear commercial and criminal cases between people of all religions. It also stipulated that non-Muslims of recognized communities could take inheritance issues to their own religious court, rather than to Shari'a courts as had been the practice. This was more than a mere reaffirmation of the *Millet* policy of communal religious jurisdiction in matters of personal status/family law, under which Shari'a courts had exercised a far wider jurisdiction ,including residual jurisdiction, and heard all

mixed cases. The competence of non-Muslims to testify in judicial proceedings was validated, another significant departure from traditional Shari'a doctrine and *nizamiyah* courts applied European (mostly French) codes, thereby excluding Shari'a jurisdiction (Welchman 2000:34-66). These *Tanzimat* reforms, inspired largely by political motives, introduced into Ottoman law a

Commercial Code of 1850,a Penal Code of 1858, a Commercial Procedure of 1879,a Code of Civil Procedure of 1880, and a Code of Maritime Commerce. In form, all Ottoman codes followed the European civil law model of attempting a comprehensive enactment of all relevant rules. Although Shari'a jurisdiction was significantly displaced in these ways, an attempt was still made to retain some elements of it, such as the right of the victim's family to blood money (*diya*) in cases of homicide by virtue of Article I of the Penal Code.

The Majallah, which came to be known as the Civil Code of 1876, although it was not devised as such, was promulgated over a ten-year period (1867-77) to codify the rules of contract and tort according to the Hanafi school, combining European form with Shari'a content. It did not cover non-contractual obligations, family law or real property, but did include some procedural rules applicable to those subjects. This major codification of Shari'a simplified a huge part of Islamic law (legal aspects of Shari'a), and made it more easily accessible to litigants and jurists/lawyers alike, especially as the latter group became increasingly less familiar with Shari'a principles and methodology.

Although it was not originally seen as exclusive, the *Majallah* acquired a position of supreme authority soon after its enactment. The reasons for that may include the fact that it represented the earliest and politically authoritative example of an official promulgation of large parts of Shari'a by the authority of a modern state, thereby transforming Shari'a into law. (Messick 1993:57).Moreover, that legislation was immediately applied in a wide range of Islamic societies throughout the Ottoman Empire and continued to apply in some parts into the second half of the twentieth century.

Second, it included some provisions drawn from other sources than the consensus of Hanafi law, thereby expanding possibilities of "acceptable" selectivity from within the Islamic tradition. This selectivity (*takhayyur*) among equally legitimate doctrines of Shari'a was already acceptable in principle, but not done in practice. By applying the principle to include minority

views within the Hanafi school, the *Majallah* opened the door for more wide-reaching subsequent reforms, despite their initially limited purpose (Pearl and Menski 1998: 19-20; Welchman 2000:36-7). Subsequent reforms began to incorporate views from other schools, and even individual views of early jurists not adopted by any of the Sunni school, and all of this was justified by reference to the Sultan's (the state's) established power to select some juristic views over others for practical enforcement.

Important reforms of family law matters in particular began with an imperial edict in 1915 that granted wives a limited right to petition for divorce (*faskh*), contrary to the doctrine of the Hanafi school. These reforms were extended and consolidated for application as law in Shari'a courts, as promulgated in the Ottoman Law of Family Rights of 1917, and included rules of procedure that did not exist in the Hanafi School. The significance of that process lay not only in its impact for the law applicable throughout the domains of the Ottoman Empire in the Middle East and North Africa, but in its establishment of a reform methodology beyond the confines of any particular school (*madhhab*).

This trend towards increased eclecticism in the selection of sources and the synthesis of Islamic and Western legal concepts and institutions not only became irreversible, but was carried further, especially through the work of the Egyptian jurist Abd al-Razzaq al-Sanhuri (d. 1971). The pragmatic premise of al-Sanhuri's work was that the Shari'a could not be reintroduced in its totality and could not be applied in any way, especially in matters relating to land law and commercial law, without strong adaptation to the needs of modern Islamic societies. He applied these ideas in drafting of the Egyptian Civil Code of 1848, the Iraqi Code of 1951, the Libyan Code of 1953, and the Kuwait Code and Commercial Law of 1960.

One significant consequence of these developments has been making the entire corpus of Shari principles available and accessible to judges, other state officials and opinion leaders of Islamic societies everywhere .Paradoxically, that same openness and accessibility of Shari'a

emphasizes the impossibility of its consistent and legitimate application in the modern context, by exposing major theoretical problems and differences within and between different schools and traditions of Islamic societies. Besides obvious difficulties of agreement between Sunni and Shi'a communities that sometimes coexist within the same country, as in Iraq, Lebanon, Saudi Arabia, Syria and Pakistan, different *madhahib* and opinions may be followed by the Muslim community within the same country, though not formally applied by the courts. In addition, judicial practice may not necessarily be in accordance with the *madhhab* followed by the majority of the Muslim population in the country, as in North African countries that inherited official Ottoman preference for the Hanafi *madhhab*, while popular religious practice (as opposed to state family law-enforcement) is according to the Maliki *madhhab*. Given the imperatives of certainty and general application of law the immediate and compelling questions raised by the realities of profound difference among and within Shari'a schools include the question of how selection from conflicting opinions can be made, by whom, and according to which criteria.

Another consequence of the exposure of the true nature of Shari'a is the challenge of keeping it intellectually and normatively alive in a radically transformed world (Masud et al. 1996; 26-7). In particular, the most significant impact of European colonialism and global Western influence is the fundamental transformation in the essential character of knowledge and its means of transmission. Curricular changes in educational institutions meant that Shari'a, formerly the centerpiece of advanced instruction in Islamic knowledge, was displaced by a spectrum of secular subjects, many derived from Western models. The study of Islamic jurisprudence (*fiqh*) was removed to pure Islamic institutions or to specialized law schools, where it competes with offerings in secular/Western law. In contrast to the extremely limited degree of literacy and the privileged position of scholars of Shari'a (*ulama*) in the past, modern Islamic societies are well on their way to achieving mass basic literacy and reliance on a variety of new expertise. Consequently, the scholars of Shari'a have not only lost their monopoly on knowledge of the

'sacred' sources of Shari'a, but a large part of those sources was no longer viewed as sacred or unquestionable by an increasing number of ordinary lay Muslims.

But the most significant transformation of Islamic societies for our purposes here relates to the nature of the state itself in its local and global context. Although there are serious objections to the manner in which it happened under colonial auspices, the establishment of European model nation-states for all Islamic societies, as part of a global system based on the same model, has radically transformed political, economic, and social relations throughout the region (Piscatori 1986). By retaining this specific form of political and social organization after independence from colonial rule, Islamic societies have freely chosen to be bound by a minimum set of national and international obligations of membership in a world community of nation-states. While there are clear differences in the level of their social development and political stability all Islamic societies today live under national constitutional regimes (even where there is no written constitution) and legal systems that require respect for certain minimum rights of equality and non-discrimination for all their citizens. Even where national constitutions and legal systems fail to acknowledge and effectively provide for these obligations, a minimum degree of practical compliance is ensured by the political, economic, security, legal and other unavoidable realities of international relations. I am not suggesting here that the majority of Islamic countries are already living up to these obligations. Rather, the point is that these countries openly acknowledged these principles as being applicable to them. Moreover, if these countries were to live in accordance with Shari'a, they would have to transform themselves totally, from their political boundaries to the nature of government, and live in almost total economic and political isolation from the rest of the world.

Towards Transformation of the Basis of Family Law:

Against the background of these conclusions I will now focus on the need to transform the basis of family law in Islamic countries. This argument is based on the following propositions, which, I believe, are substantiated by the preceding review and analysis. First, the

notion of an immutable body of principles of Shari'a as universally binding on all Muslims for eternity is simply not supported by the actual practice of Muslim societies and their states throughout history. Second, Shari'a has not had exclusive jurisdiction in the administration of justice throughout Islamic history as the state always exercised secular jurisdiction, nor was Shari'a free from state supervision wherever the state permitted it to be enforced. Third, the ability of individual Muslims to seek and act upon independent *fatwa* has always been a valuable resource for addressing the personal religious needs of believers, even regarding what might technically be 'legal subject matter'. The institutionalization of this function does not exhaust the possibilities of independent legal advice, which believers can observe voluntarily without state enforcement or control. Fourth, recent Islamic law reforms and social developments that made the entire corpus of-Shari'a available and accessible to all concerned also exposed the moral and political problems of selective enactment and enforcement of some of these norms over others.

The question I wish to discuss in this final section is whether family law can continue to be presumably governed by Shari'a when all other aspects of the legal system are subject to secular state law. I will address this broad question through an examination of the following issues. Why has family law remained within the domain of Shari'a, and how can that situation be justified? Does this really mean that this field is governed by 'divine law', or is it really a matter of human opinion that is represented by its authors, as the sole expression of divine will? What might be a better alternative to the current situation that would achieve equality and fairness for Muslim women within an Islamic perspective, without compromising the religious identity of Islamic societies and personal piety of individual believers?

As explained above, all aspects of the legal systems of most Islamic countries are now governed by secular legislation, except, what has come to be known as personal status/family law, inheritance (*mirath*) and religious endowment (*waqf*), where Shari'a jurisdiction has been retained. Reasons often cited for this situation include the following (Mirr-Hosseini 1993: 10-11). First,

these have traditionally been the most developed areas of Shari'a, over which the *ulama* had the highest monopoly. In particular, it is claimed that since the Qur'an and *Sunna* regulate matters of family law and inheritance in more explicit detail than that devoted to subjects such as commercial and land law, it was therefore possible and more practical to introduce radical changes and reforms in other areas where no major rival jurisdiction existed. Second, the governments of Islamic countries apparently deployed, whether consciously or unconsciously, the Western liberal distinction between public and private domains. Family law could then be left in the hands of the *ulama*, as it was deemed to be a private matter of religion and therefore politically less significant. In other words, national governments followed the lead of colonial powers in taking away from Shari'a jurisdiction matters of state interest in the fields of public law, economy and administration, and avoided any confrontation on family law that was deemed to be politically insignificant.

In addition to scholarly refutations of these arguments (Messick 1993), each of these reasons raises more questions than it answers. Thus, generally speaking the extent to which any government succeeded in: reforming the pre-existing legal system was conditioned by a variety of factors, including the balance of powers between conservative and modernist groups that continues to fluctuate to the present time. In such political calculation, governments have so far opted against bidding for control over family law to appease conservative and fundamentalist forces. But why should these forces accept that, and not demand the same for commercial and criminal law? In other words, such policies of appeasement are only likely to encourage those forces to settle for nothing less than total control over the state and its institutions.

However, as indicated above, because of the diversity and fluidity of its doctrines and principles Shari'a cannot be captured within the framework of formal enactment and enforced by the state as part of a unified legal system. As a moral code for the individual's relationship with God, it does not maintain a dear distinction between moral and legal aspects of human behavior.

As an ideal moral order extrapolated from a premise in legal science (*usul al-fiqh*), rather than pragmatic human experience, Shari'a defies containment in clearly defined legal principles of general application. As Schacht puts it, the development of Shari'a was a 'unique phenomenon of legal science not the state playing the part of legislator' (Schacht 1964: 210). Its provisions were open-ended and flexible, with built-in variations on the consequences of its principles on the basis of individual moral choices that cannot be evaluated by an impersonal institution such as a court of law in the modern sense of the term. In short, Shari'a ceases to be what it is supposed to be by the very act of enacting it as the positive law of the state (An-Na'im1998-99: 29-42).

The sad irony is that, by 'failing to face the real issue here, the so-called, modernizing elite in control of the state in Islamic societies chose to sacrifice the basic human dignity and rights of women for the sake of political expediency. By conceding family law to the control of the *ulama*, that elite made IFL the 'last bastion of religion' in the administration of justice. That is, the secularization of all other aspects of the law has had the effect of reinforcing the religious tone of family law as the only remaining field left for the domain of Shari'a. Paradoxically, it is precisely because there was little opposition to the abrupt abandonment of Shari'a in other areas of the law that family law became a sensitive and disputed issue. As a result, the debate over family law is a sore spot in the Muslim psyche and a highly symbolic location of the struggle between the forces of traditionalism and modernism in the Muslim world.

There are two important dimensions to this debate. First, it is conducted almost entirely within the Islamic framework, whereby the possibility of state enactment and enforcement of Shari'a is taken for granted. Second, the debate has acquired a sharp political edge, and in some instances family law reforms had to be withdrawn for fear of a 'religious backlash' against governments desperate for political legitimacy and support at any cost. The debate is thus the product of its time, bearing traces of the underlying tensions between differing world-views. At the root of the debate is the shift in the balance of power between religion and state, brought about by

a host of factors, such as the failure of nationalist leaders to deliver on the promise of political independence and development after independence.

There is nothing new about this political manipulation of religious legitimacy since the beginning of Islamic history. What is novel is the ways in which gender relations have now become an integral part of this politics, a reflection of the changed position of women in the Muslim world (Kandiyoti 1991: Introduction). In the earlier parts of the twentieth century the modernists had the upper hand and aimed to change the gender relations in favor of greater autonomy and equality for women. But by the end of the century, fundamentalists had a stronger political platform, and chose to make stopping and reversing any advances towards equality for women the symbol of their political power. The issue at both ends of the century was the same question of women's liberation and emancipation. Whereas fundamentalists construe the abandonment of Shari'a in the family law field as the final blow to an Islamic order that is distinctly patriarchal, modernist see such abandonment as a necessary step towards a more egalitarian society. The basic fallacy of casting the issues in these terms is equating family law as applied in Islamic societies today, with historical understandings of Shari'a, let alone Islam as a religion.

It may appear that in the vast majority of Islamic countries, as shown in the material contained in this volume, family law is at least nominally derived from Shari'a. But in fact the substance and mode of application of this law has little to do with the essential nature of Shari'a, as envisioned by its founding jurists. The very premise of the debate is flawed, and it is bound to remain polemical unless it addresses more pertinent questions that have hitherto been overlooked, if not deliberately suppressed. To what extent is IFL relevant to the life of today's Muslims, and if it is, how far and through what processes is it translated into social reality (Mir-Hosseini: 1993 12-13)? We know little of the ways in which Shari'a-based family law, this so-called last bastion of the Islamic ideal and identity of social relations operates in today's world. That is why this project

seeks to provide a detailed description the current situation in as many Islamic societies as possible.

The perspective presented in this Introduction is intended to offer a framework through which the issues discussed can be clarified in the specific contexts of countries and regions where Shari'a-based family law operates. Thus, in the information provided, the reader can appreciate the relationships (or sets of relationships) between statutory law, Shari'a-based family law, the history of Islam in a region, customary social practices, the impact of colonialism, and other, and more recent, political events. But the perspective in which this information is presented can also, it is to be hoped, highlight the tensions between the legacies of historical events, political and administrative systems, and concrete practices, as well as the mode and nature of possible mediations of these tensions. By seeking to facilitate comparison of the legal profiles of two or more nation-states within the same region, the structure and content of this book emphasizes the point I have made earlier, namely that *human agency* plays a critical role in the conception and development of any normative system of Islam. For example, while both Tunisia and Egypt are North African countries, sharing much in common by way of a regional history, IFL in Tunisia is conceived and operates in markedly different ways from those of Egypt. As the information in this book makes clear, this is a result of *human actions* and *decisions* whether informed by the project of post-colonial nation-building or by subsequent events in the country's political history. Since the emphasis on context is as much geographical as historical -indeed, the two are inseparable -the focus here is on showing how both the historical and geographical dimensions, in addition to the political, need to be taken into account in understanding IFL in each country of the region.

To summarize, the content of each chapter and schematic of the book as a whole provide a point of departure and contort for assessing the information on each country and region. This arrangement and presentation of the material, and the perspective that guides it, demonstrate the futility of adopting a reductive approach to the study of Shari'a-based family law. The detailed

description of IFL in the world today is intended not only to serve as a 'resource book', but also to encourage a more candid and thorough examination of the underlying issues.

For my part, I am hereby calling for a clear and categorical acknowledgement of the fact that family law in Islamic countries today is not, and indeed cannot and should not be, founded on Shari'a. Like all aspect of the legal system of each country family law is really based on the political will of the state, and not on the will of God. After all, there is no way of discovering and attempting to live by the will of God except through the agency of human beings. Since that is the case, those responsible for the enactment and application of family law must be politically and legally accountable for their actions, instead of being allowed to hide behind claims of divine command.

In conclusion, I wish to emphasize that I am proposing these admittedly controversial views under my personal responsibility, without detracting from the factual nature of the material presented in this book, or implying that these are necessarily the views of any of the researchers who contributed to its preparation. Instead of holding back on expressing these views at this stage, I am putting them forward in the hope that readers will reflect on them as they examine the contents of this book.

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