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DEVELOPMENT OF ISLAMIC LAWS IN THE ARAB AND ISLAMIC WORLD

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ABSTRACT

This paper deals with the origins of Arabic and Islamic laws. It traces the efforts of theologians, jurists in the Arab and Islamic World of those who oppose any amendments to Allah's commandments on the one hand, and those who seek to adapt those commandments to the changing circumstances, on the other.

KEYWORDS: Islamic Laws, Islamic World, Al-Qada Fi Al-Islam, Amman, Al-Aqsa Brisbane

INTRODUCTION

The discussion aims firstly to explain the general legal principles that govern Islamic laws, and secondly to show that the environment in which Islamic laws were formulated and developed was very different from the environment in which the English case law gradually came into being. Indeed, there are a large number of Islamic legal terms, which have not been - and perhaps never will be – translated into English. Faruqi (1991) provides examples of these terms in the preface to his English Arabic Law Dictionary. He noted that in some famous English monolingual law dictionaries a number of terms of Islamic jurisprudence have been presented in their original Arabic forms on the assumption that no precisely corresponding terms exist in the English legal system terminology. He argues that in the majority of these terms, the assumption is erroneous, considering that, those terms has identical equivalents in the English language. Examples of these terms that Faruqi quotes include *haq* (right), *istimrar* (perpetuity), *qadi* (judge), *talaq* (divorce) and *shuf'a* (preemption). This paper, however, will show that even such terms can have different meanings in the two legal environments (including the all-ubiquitous *qadi*). Perhaps the respect and awe with which Muslims deal with the word of Allah are responsible for this feeling of constant failure to grasp the full meaning of the Quranic terms, and thus these terms are treated as symbols that can otherwise be referred to only by way of explanation, and thus can never have synonyms. It is perhaps this awe that has made many foreign lexicographers and terminologists, including those responsible for the famous dictionaries that Faruqi referred to in his preface; refrain from providing direct equivalents to many Islamic jurisprudence terms.

In these views, the present author refers to Islamic and Arabic laws and so forth as two separate entities, consciously trying to differentiate between the two in any relevant discussion. This, one admits, is not the general view of many Muslim Arab writers and intellectuals.

Islam and Arabic Inseparable

To the majority of Muslims Arabic, as the language of the Quran, is as sacred as the Quarnic verses, which were revealed to Prophet Mohammed (p.b.u.h.) in that language. These are the very principles, which the Muslim community is supposed to follow in order to secure the mercy of Allah in the "Hereafter".

> *"It becomes incumbent upon each and every person who seeks the dignity of this world and the bliss of the Hereafter to regulate his life according to [the Quran], to implement its commandments and to pay homage to the magnificence of the One Who revealed it. This can be an easy task for those favored with guidance from Allah, especially those blessed by an understanding of Arabic, the language of the divine communication, but for those not acquainted with Arabic, their ignorance is a barrier between them and this source and illumination."*
>
> *(Mushaf Al-Madinah Al-Nabawiyyah, n.d., p.iii)*

The argument that the Holy Quran is a source of regulating the life of the Muslim community in every respect is well -documented in a huge volume of literature by Muslim theologians and jurists. The above quotation reiterates this conviction and paves the way for the importance of translating the Holy Quran so that the mercy and blessing of Allah may be extended to as many people as possible. The quotation is also important because it emphasizes another conviction: namely, since Prophet Mohammed (p.b.u.h.) was an Arab, and since the Holy Quran was revealed to the Prophet in Arabic, then Arabic must be a favored language, and the Arab Muslims are accordingly blessed for being able to speak Arabic.

This concept has developed into a sort of indispensable introduction for any book written or translated, as well as in Arabic monolingual and bilingual dictionaries alike. Thus, any work accomplished in Arabic is thought to be done in response to Allah's choice which made Arabic a blessed language through the Holy Quran, and more directly in an effort by Muslims to contribute to Allah's will to preserve the Holy Quran and its language:

> (إنّا نحن نزلنا الذكر وإنّا له لحافظون)
>
> *"We have without doubt sent down the message, and*
>
> *we will assuredly Guard (from corruption)."(Surat*
>
> *Alhijir,verse:9)*

Arab writers and linguists thus conceive of their works as heavenly ordained and rewarded, especially when their works directly contributes to preserving the words of the Holy Quran and guarding against corruption of the Arabic language. Al-'Adnani (1989) thus makes the point that he is

> *"merely a small link in a long and large chain of men,*
>
> *who have committed themselves to serve their*
>
> *language and correct the grammatical errors or try to*
>
> *belittle the status of the Arabic language, because an*
>
> *offence against that language is serious as offending*
>
> *against nationalism and Arabism" (Al-Adnani 1989; p. g).*

These sentiments are echoed throughout the Arabic dictionaries, linguistics books and publications. Another

theme is that Arabic can successfully be a medium of communicating science, culture and technology. Al-Khatib (1981), for instance, contends that the Arabic language,

> *"has demonstrated its ability to carry the scientific, technological and civilized mission accurately and comprehensively as it did in the past, when it continued and for many centuries to be the language of science and civilization" (Al-Khatib 1981: ix).*

The strong affinity with Arabic and the commitment to that language is not limited to Muslim writers. Christian Arabs have shown similar and occasionally even stronger enthusiasm for maintaining the purity of Arabic and at the same time reforming it to make it more effective to serve the Arab nation. Thus, Ul-Bustani (died 1883), a Christian Arab, in prefacing his famous Arabic monolingual dictionary, praises Allah for "bestowing Arabs with the most eloquent of words and for making Arabic a pearl in the midst of all other languages" (Ul-Bustani 1987: Preface). Such statements should not be misconstrued as an attempt by Christian Arabs to appease their Muslim rulers or to gain social acceptance and prestige in the Arab society. Opposed to this view is the idea that Christian Arabs in fact promoted pan-Arabism and Arab nationalism in the nineteenth century in order to guarantee their protection by ensuring the prevention of Islamic variety of Arab nationalism. But regardless of the political factors, the fact is that a large volume of work in Arabic in the last two centuries produced especially in Lebanon, has been originated by Christian writers, some of whom were even members of the clergy, such as Father Louis Sheikho (1859-1927), author of many books on Arabic literature and language. This zeal for Arabic among Arab Christian writers can perhaps only be explained by a genuine love for Arabic as a language.

A direct result of the preoccupation of Arabs with the maintenance of the purity of Arabic is that the majority of the work of lexicographer in the Arab World has been traditionally in the area of monolingual dictionaries. Al-Qasimi (1989) rightly points out that

> *"… bilingual dictionaries are new in Arabic, one century old at the most, and thus are not compiled on the basis of the long experience which has backed the Arabic monolingual dictionaries over many centuries of development until they have become the best in the world" (Al-Qasimi 1989: 41).*

It should be remembered that the greatest efforts in the monolingual dictionaries in Arabic were directed at explaining and interpreting the words and intentions of the Holy Quran, given its importance as a book for this world as well as for the 'Hereafter'. Its concern with the worldly affairs is directly linked to the fact that the Holy Quran is a source of legislation. In this respect, the Holy Quran generated an overwhelming interest right from the beginning. The effort to make it available to as many Muslims as possible led to committing it not only to writing from the very time it was revealed to Prophet Mohammed (p.b.u.h.), but also to the large number of Muslims whose duty was to memorize its verses.

Thus when during the rule of Caliph 'Othman the Holy Quran was compiled as one book, those early written verses of the revelations had to be corroborated by the memory of others. The large volume of books on the interpretation of the Holy Quran is an evidence of its proliferation in the community from an early stage. This is in sharp contrast to the situation of the Holy Bible in Christendom. Indeed the split, which rocked Christian Europe in the sixteenth century was directly, related to the long-standing tradition of the Catholic Church which "has always insisted that the Word of God is enshrined within the Church itself, as Christ's own foundation, whereas the Protestants [however,] seek the Word of God in the Bible" (Wilson 1958: 53). Accordingly, the history of Protestantism is also the history of making the Holy Bible accessible to the masses of believers, by making its language more readily understandable by the ordinary people, not only by the clergy. From a historical viewpoint, a vigorous translation movement could have fueled the translation of the Holy Bible during the Reformation.

Muslim and Christian theologians have had different tasks. While the former sought from an early stage to explain the word and meaning of the Holy Quran, the early Christian monks simply created a monopoly on the understanding of the gospel, which continued to be in Latin throughout Europe until the Reformation. The Reformists later preoccupied themselves with simplifying the language of the Holy Bible itself rather than embarking upon an exercise similar to that of the Muslim theologians, which would have left the Holy Bible in its original form.

The embracing of the Holy Quran by Muslims as a word of Allah, which had to be understood and complied with, meant that the words of the Holy Quran, through the frequent recitals and the daily five prayers, would become an integral part of the Muslims' vocabulary. This is not because the Holy Quran used a language far removed from the understanding of the Arabs in the sixth century, but the totality of the Holy Quran is perceived as beyond the ability of any humans and non-humans alike, an idea propagated by the Holy Quran itself:

> *"Say, if the whole of mankind and jinns were together to produce the like of this Quran, they could not produce the like thereof; even if they backed up each other with help and support" (Holy Quran Surat Al-Israa: 88)*

The Holy Quran as a Source of Legislation

In Common Law countries, lawyers and judges are usually concerned, not with the old English laws and their origin, but rather with the most recent precedents. Accordingly, and as described by

> *"western jurisprudence as a whole relegates the historical method of enquiry to a subsidiary and subordinate role; for it is primarily directed towards the study of law as it is or as it ought to be, not as it has been" (Coulson 1964: 1)*

Therefore, whilst Western jurisprudence grew out of its own community and developed along with it, Muslim

jurisprudence, in its traditional form, provides a much more extreme example of a legal science divorced from historical considerations.

> *"Law, in classical Islamic theory, is the revealed will of God, a divinely ordained system preceding and not preceded by the Muslim state, controlling and not controlled by Muslim society, there can thus be no notion of the law itself evolving as an historical phenomenon closely tied with the progress of society."*
> *(Coulson 1964: 1-2)*

Coulson further notes that upon the death of Prophet Mohammed (P.B.U.H) the Islamic law, commonly known as S*hari'ah*, was static and immutable since it was believed to have achieved perfection of expression. What followed was a direct application of the conviction that Muslim legal philosophy had been essentially the elaboration of the analysis of Shari'ah law rather than a body or science of law emanating from courts. In the majority of instances the role of Islamic jurisprudence was to tell the courts what ought to be done. This is a view not shared by Muslim theologians and writers, who explain that

> *"Islamic jurisprudence is a developing science … it deals with numerous and varied problems which are faced by people in their everyday lives, which problems require judges to exercise ijtihad [the exercise of human reason to ascertain a rule of Shari'ah law]. It has been natural that new rules are made by these judges which are added to the jurisprudential wealth treasured in the books" (Abou Fares, 1978:).*

Coulson, however, later (p. 76) acknowledges that there are four basic principles, which represent distinct but correlated manifestations of God's will. These manifestations, which are well- documented and exhaustively explained in books of Islamic jurisprudence, and which are usually known as the 'root of jurisprudence', are:

- The Holy Quran itself, which is the Word of God.
- *Sunnah*, which literally means 'the trodden path' and often refers to the utterances behavior and actions of Prophet Mohammed (p.b.u.h.), that is practices he endorsed and the precedents he set, although for the early schools of law it signified the generally accepted doctrines of the school (Coulson 1964: 240).
- Ijma', which literally and jurisprudentially means 'consensus of opinion', based on a saying by Prophet Mohammed that the Muslim community would never unanimously agree on anything that is false.

- *Ijtahad,* which literally means 'effort', is the fourth root of jurisprudence, with a well-defined course to be followed by the *mujtahidin* (theologians who apply *ijtihad*). It is there in response to the ever ubiquitous problems of a nature that simply had not existed, and as such there is nothing to deal with them explicitly by the holy Quran or *Sunnah,* and had not been settled by *ijma*.

Another root, *taqlid* (literally means imitation), that started, according to Coulson, in the early part of the tenth century. after it had been decided to "close the door of *ijtihad*". This date is important because it rebuts claims that *taqlid* arose out of the peculiar circumstances of the Mongol invasions in the thirteenth century, when as an effort to safeguard the treasured heritage of Shari'ah law from the marauding conquerors, that heritage was embalmed and hidden (Watt 1961; pp. 207,243), thus leaving Muslim jurists no choice but to imitate their predecessors.

Under normal circumstances, one would have thought that *taqlid* was to develop in Islamic jurisprudence to something similar to Common Law in the English speaking countries. This, however, did not happen, as jurisprudential activities were then confined to the elaboration and detailed analysis of established rules and jurists thus became commentators upon the works of the past masters; their energies were then expended "in scholasticism which on occasions attained a remarkable degree of casuistry" (Coulson 1964; p. 81).

Islamic Schools of Law

A natural result of the *ijma'*, *ihtihad* and then *taqlid* as sources of jurisprudence in the four schools of law in Sunnite Islam emerged from an early date and has continued until today. Although many Muslims would not be able to tell whether they belong to the Hanafi, Shafi'I, Maliki or Hanbali schools (named after well- established and highly respected theologians), the division in the past caused a large amount of dispute among followers of these schools not unlike the competition witnessed earlier between the Arabic grammarian schools of Basra and Kufah in Iraq. The competition in this case was in the name of God, as each of the four schools struggled for recognition as the superior expression of God's law.

Although there were no disputes in relation to the main principles that governed Islamic law, the great extent of details and conditions that were laid down by each school in almost all areas of Islamic jurisprudence have meant deep differences not only at the theoretical level, but also in application. The resulting complications and restrictions are incalculable. In corporate law in Islam, for instance, each of the four schools has clear definitions of what a company is allowed to be in Islam and the form it can take without contravening the roots of jurisprudence. Furthermore, they also specify the manner in which partners are allowed to dispose of the assets of a company, with detailed stipulation of what should be closely followed and what should be avoided (Abdo 1976; pp. 73-79).

Another interesting example is related to the question of using interpreters in Islamic courts. While it is

> *"Desirable that a judge use an interpreter to interpret the allegations, statements and matters put in defence, especially if the claimant is non-Arab and cannot speak in Arabic or if the witnesses are fluent only in their foreign tongue, then the need arises for an interpreter" (Abou Fares 1978; p. 58).*

Moreover, while the qualification of the interpreter are beyond dispute (all four schools require that interpreter be legally competent and pious), the number of interpreters in each case is in dispute. The Hanafis, for instance, contend that it suffices to have one competent interpreter, while the Shafi'is maintain that the interpreting can be accepted only if it is provided by two such competent interpreters, the Malikis, on the other hand, adopt a middle-of-the-road approach: one Muslim interpreter is acceptable, but two interpreters are more desirable. Should a male interpreter be not available, and the subject under discussion is such that interpretation by a female is acceptable, then a female interpreter can be used; however, it is more desirable to have a man and two women (Abou Fares 197; p. 59).

The Holy Quran as a Source of Law

Muslim writers' intellectuals are unanimous in their agreement that the Holy Quran encompasses a whole, undiminished doctrine for the Muslim community. Upon the death of the Prophet Mohammed (p.b.u.h.), the whole message of Allah had been revealed to him, and no additions, deletions or amendments where or will ever be necessary. They maintain that the Holy Quran cannot be simply a creation of the Arab society, given its content of matters beyond the conception or imagination not only of the Arabs in the sixth century, but of the entire human race ever (Hawwa 1976; p. 262). The infallibility of the Holy Quran as well as its uniqueness in matter of style and choice of words, notwithstanding the fact that the Arabs were then a very eloquent and well spoken people, were complemented by another fact, namely the logical sequence of its suras which provided for its solidly knit structure (Hawwa 1976; p. 230).

Despite its unity of structure, style and imagery, its content of legal topics, in the strict sense of the term, are expressed in "no more than approximately eighty verses … couched in brief and simple terms - as was the case with the Twelve Tables of Roman law (Coulson 1964; p. 12). Coulson argues that the Holy Quran does not attempt to cover in any way all the basic elements of a given legal relationship, and that this piecemeal nature of the Quranic legislation follows perhaps from the circumstances in which the Holy Quran was revealed. It has been argued by many people, Muslims and non-Muslims alike, that the Holy Quran is aptly self-contradictory, claiming equal treatment to all and yet allowing a man to have four wives at the same time and restricting the share of women from their parents' inheritance to half that of their brothers. Another example is the contradiction in the verses prohibiting the consumption only for those about to go for their prayers, in another drinking is attributed to the hideous work of the Devil and Muslims are encouraged to shun it, and yet in another verse the prohibition is completed. The counter argument put forward by Muslim theologians and writers relies in principle on the fact that verses of the Holy Quran were revealed not as a whole but on a 'need-to-know' basis, to use the vernacular; the Prophet Mohammed (p.b.u.h.) received these verses to deal with situations as they arose. The second part of the counter argument has to do with the psychological 'tactics', as it were, of the Holy Quran to encourage Arabs to espouse Islam. Hence the gradual prohibition of alcohol, or the many qualifications that restrict the choice of men contemplating having more than one wife, and so on.

Jurisdiction and Islamic Law

Whether we admit that the Holy Quran contains verses that have universal application in all matters past, present and future, or whether, on the contrary, we agree that it provided guidance only in matters that arose during the life of the Prophet Mohammed (p.b.u.h.), and despite the large volume of literature by Islamic theologians and jurists, the application of the Word of Allah in the Muslim societies has never been complete and universal. This is a fact that is readily admitted, although lamented by Muslim scholars who pine for the rekindling of Islamic law:

> *"Darkness will certainly come to an end, and light will inevitably shine bright with the rebirth of the light of Islam which will engulf the whole world. Humanity will thus enjoy the fairness and integrity of the judiciary in Islam, in which believers will rejoice Allah's victory." (Abou Fares 1978; p. 11) (My Translation.)*

To understand why it has not been possible to apply Islam as an all-encompassing law after the Prophet (p.b.u.h) and the four Caliphs, we have to discuss the question of jurisdiction. The Umayyads were overtly inclined to strengthen at any cost their military position and maintain a firm grip on the populace of the lands they conquered. It was more suitable for them to maintain the task of applying the law as they saw fit.

Accordingly, the Umayyad caliph himself assumed the role of supreme judge. And likewise the rulers he appointed to the various regions exercised the same role under his authority and name. Disputes of a private nature were left to the *qadis* (judges), and this situation continued to the end of the Umayyad era, but the decisions of these *qadis* were not final by any standard.

> *"their judgment were subject to review by the political superior who had appointed them, and upon his support they were entirely dependent for the enforcement of their decisions." (Coulson 1964: 120-121)*

This had also been the case during the rule of the Four Caliphs, when *qadis* were entrusted with settling civil disputes while offences which necessitated the *hadd* (fixed penalties specified by Islam) were relegated to the Caliphs themselves or their appointed governors (Abou Fares 1978; p. 70).

Abou Fares argues that during the Abbasid rule it was due to the preoccupation of the caliphs with serious matters that the mandate of judges was expanded to include three jurisdictions, although he lists only two:

- *Al-Hisbah*, which is equivalent to the continued practice of 'urging good deeds and prohibiting wrongdoings' currently undertaken by the *Mutawwa's* (religious police) in Saudi Arabia.
- *Madhalim Divan*, where Wali AL Madhalim could execute judicial decrees that the court awarding it could not execute it. (Abou Fares 1978: 70-72).

Coulson, on the other hand, argues that from the beginning *qadis* were left with only matters of individual concern, that their role in the Umayyad era was one of regulating the relationship between individuals and their creator, and that in the Abbasid era their role was theoretically strengthened initially but then weakened with the rise of parallel positions to settle other disputes of more serious implication on the life of the state. *Qadis*, for instance, did not have the power to deal effectively with claims against high officials of the state. On other occasions their judgments were simply

overturned by the sovereign. Summarizing Coulson, we can identify three areas of competence of Islamic law courts in the Muslim state during the Abbasid dynasty:

- The *qadi* courts, with competence in matters of individual nature and at the lower scale of seriousness.
- *Madhalim* courts, the jurisdiction of which was more expansive, and covered the equivalent of appeals from the *qadi* courts, but also included complaints against *qadis* themselves; and
- *Al-hisbah.*

Of interest is that Abou Fares classified *madhalim* courts as *qadi* courts although he admits, perhaps inadvertently, that they are presided over by the caliph or his appointees, which people who are more powerful than the *qadis* (p. 71). On the other hand, there was no clear distinction between civil and criminal jurisdictions in the Islamic state, and the criminal law, if it then existed, concerned itself with the six specific offences for which Allah prescribed specific punishment, namely illicit sexual relations, *qazf*)slanderous allegations of unchastity), theft, alcohol drinking, armed robbery and apostasy.

It is interesting to note that homicide is not included in this short list and that it was treated as a private offence, rather than an offence against the people or the state in the modern sense (Coulson 1964: 124). The background lies not in the Islamic legal doctrine or practice but rather in the tribal self-made legal traditions of the Era of *jahiliyyah*, or Era of Ignorance (before Islam), when the tribe of a deceased person became in charge of the homicide case, and where the murderer was allowed to be set free if a suitable *diyyah* (blood money for compensation) was paid by the murderer or his tribe and accepted by the tribe of the deceased, this is the case in Sudan now Section130 of the Sudanese Criminal Act 1996, where blood money can be paid in lieu of capital punishment if the heirs of the deceased will accept it. Blood money can also be awarded for the wrongful death of the deceased where the case was not decide as a case of murder.(Sec 131 of S.C.A 1996). More interesting is the fact that the tradition continues in some parts of the Arab world. When in 1995, a Filipino maid in the United Arab Emirates charged with murdering her employer while trying to rape her was sentenced to death and the sentence sparked a political row between the Emirates and the Philippines, the Arab ruler offered the family of the deceased blood money to buy their approval to quash the sentence and substitute it with a lesser punishment.

According to Coulson (1964: 155), the Sudanese penal code of 1899, despite its adopting large sections from the Indian Penal Code, itself modeled on Western codes, retained the Islamic institution of blood money, which was payable "in cases of accidental homicide among communities still organized on a tribal basis". A similar situation was prevailing in Saudi Arabia in the mid-1970s, and it is assumed it is still the case now, given that that country along with Yemen and the Gulf states continued to apply the full Islamic Shari'ah law until the mid-1960s. Later only Yemen and Kuwait started to amend their laws in accordance with Western applications among other Arab countries. This was mainly due to political reasons, including the war and change of the form of government in Yemen, and to economic changes, including Kuwait's extensive commercial life in that country.

The following observations were made on the situation of jurisdiction in the Islamic state:

- There was no clear distinction between the criminal and civil jurisdictions in the Islamic state. The *qadis* (judges), for instance, dealt with matters from both domains provided they were of minor, personal nature. Likewise, in serious matters of criminal offences which required the *hadd*, as well as in cases of breach of the Shari'ah law

pertaining to *zakat* (legal tax or alms), it was the Caliph or his appointees (*madhalim* courts) who decided them. Although it appears at first glance that the *qadi* courts and the *madhalim* courts represented respectively what we may call these days 'lower courts' (local courts, court of petty sessions, magistrates' court and similar names) and 'higher courts' (county courts, district or supreme courts or similar names), the distinction even at that time was not clear. In fact, the *qadis* sometimes "exercised *Shari'ah* and m*adhalim* jurisdictions concurrently, but as a general rule their province was that of private laws – family law, inheritance, civil transactions and injuries, and *waqf* "endowments" (Coulson 1964: 132). Besides, as well as these two levels, so to speak of courts, there also existed auxiliary bodies, which we may also call courts: *wali al-jaraim* (official in charge of criminal offences), the Master of Treasury, and the *sahib al-radd* (official in charge of rejected cases). The three courts actually existed to deal with matters referred to *wali al-jaraim*; ordinary matters of fiscal litigation were brought before the Master of Treasury, while cases initially heard by the *qadis* but whose evidence did not satisfy Shari'ah requirements were referred to *sahib al-radd.* The latter may be likened to a modern court of appeal.

The intricate system of courts and officials was laid down, however, to serve one principle which has no application in the Western World, and that is the Shari'ah law, and the competence of courts was decided based on whether a particular case fell within or outside the shari'ah.

- The clear difference that exists in the level of proof needed for the two jurisdictions in contemporary laws did not exist in the Islamic state. Civil claims, now decided on the balance of proofs were simply decided in accordance with Shari'ah law by providing two male witnesses to support the claims of either litigant. The same applied in criminal matters, except in the case of the offence of *zina* (fornication, adultery) which required four male eyewitnesses to prove it.

- The references are silent about the right or desirability to have legal representatives for offenders or litigants, matters that are these days stipulated in laws or in the constitution (Sixth Amendment of the US Constitution). The application of shari'ah law seems to have followed what is known in modern terms as 'the inquisitorial system', where the judge or presiding official conducts the hearing, including asking questions, interrogating, deciding the facts, and determining what Shari'ah rule is to be applied in each case.

There is similarity, however, between the Shari'ah legal practice and modern laws in the area of the onus of proof. As a matter of general principle in contemporary laws, the accused is presumed to be innocent until the prosecution has successfully proved the offence against him or her. Likewise, a claimant in the civil jurisdiction bringing a matter before a court of law has the onus to prove his or her claim. This was also the case according to Shari'ah law and in its application under the Abbasid dynasty. Furthermore, according to Islamic legal practice then, once a defendant had put anything as a counter-claim, the onus of proof shifted to the plaintiff, who thus became a defendant.

- A direct evidence of the distinction between the jurisdiction of the *qadi* as a dispenser of justice strictly according to Shari'ah law and that of the *wali al-madhalim* as an appointee and delegate of the ruler's law can be seen from a practice in Egypt in the ninth century, when in the absence of a *qadi* the latter was appointed temporarily as a gadi. In those cases, *wali al-madhalim* held his court not in the mosque as the *qadis* did but rather in a private building (Coulson 1964; p. 129). In fact, the Maliki, Hanafi and Hanbali schools of Islamic jurisprudence are clear about this point, as they maintain that the best place for the *gadi* to hold his court is the mosque (Abou Fares 1978: 67-68).

Development of the Modern Arabic Laws

Coulson makes the point that during

> *"The Middle Ages the structure of Muslim states and society had remained basically static, and for this reason Shari'ah law had proved able to accommodate itself successfully to such internal requirements as the passage of time had produced" (Coulson 1964: 149).*

This is a true contention, given the wide, although divided powers given to the *qadi* and other officials empowered to dispense justice. According to Al-Farra (Al-Faqi 1966:. 65-66) and other Muslim theologians the duties of *qadis* included settling disputes; securing the rights for their correct claimants; declaring mentally or otherwise incompetent people as wards; executing wills; marrying off competent female persons who have no custodians; uttering the *hadd* against perpetrators of offences against the Word of Allah or against fellow beings; dealing with encroachments upon roads, buildings, canals and so on; as well as attending to administrative matters, such as examining witnesses and determining their competence (Abou Fares 1978; pp. 73-74).

This list seems to cover a wide range of matters, and the need for widening the scope of judges did not appear until the Arabs came in direct contact with Western civilization, namely through the French invasion of Egypt towards the end of the eighteenth century. In many ways the defeat of Egypt by the French had been eclipsed by the tremendous advances of life as a result of this defeat and the efforts by Mohammed Ali to modernize the state. Schools of higher education were established in Egypt, the first printing press was built, and many Egyptians were sent to Europe not only to study, but also with a mandate to transfer the product of centuries of Western scientific and cultural advances to Egypt (Al-Fahham 1984; p. 692).

Arabs soon realized that the Western civilization was based on principles and institutions not previously experienced in the Islamic state. It should be remembered that Continental Europe had then just witnessed a major shake up towards democracy which found its ideal expression in the French Revolution, which followed a similarly significant change over three centuries earlier when the authority of the Church was challenged in Europe and then reduced to a subservient role in the state with Henry VIII declaring the Church of England as an entity outside the traditional authority of Rome. The effect of all these changes had been the introduction of such principles as equality, freedom and democracy as viably applicable doctrines, through coded laws, rather than theoretical slogans. Coupled with all this was also the reorganization of the political institutions, with emphasis on regulating relationships between the state and citizens.

Coulson summarizes the legislative needs of the Muslim countries in the following terms:

> *"In the relationships between Muslim and Western states it was naturally the fields of public law (constitutional and criminal law) and of civil and commercial transactions which proved particularly*

> *prominent. And it was precisely here that the deficiencies of the traditional Islamic system, from the standpoint of modern conditions, were most apparent."*
> *(Coulson 1964: 150)*

An unchallenged theory is that the conquered are usually readily influenced by the conquerors, except when the conquerors have nothing to offer, such as in the case of the Mongol invasion of the Arab countries. Although some readers may construe this latter statement as an instance of Arab chauvinism, the fact is that it would be very hard for any researcher to prove any contribution of value to Arabic by the Mongols. Europeans had just gone through a significant process of transformation, which generated the principles of human rights and civil liberties, and which consequently made any interaction between the West and the Islamic Arab states possible only if the Arabs changed some of their practices inherited either from their tribal heritage or from the Shari'ah. Some penalties imposed by the Islamic law, for instance, were considered barbaric by Western standards. Besides, the growing commercial transactions between the Arab states and the West had meant that the Arabs needed to adopt the commercial codes of the West, due to the conquered-conqueror theory and also due to the fact that such transactions all over the world outside the nation of Islam were obviously done according to substantive, non-shari'ah law.

Thus, as well as the psychological conditions, there was also a real need for the adoption of law from the Western countries in almost all areas except family law matters, such as marriage, divorce, adoption and probates, which have so far continued to be regulated in accordance with rules established by Shari'ah. Interestingly, contemporary Muslim communities in the Western countries still do not recognize the substantive family law acts as legal and binding. In European countries for instance, the *imam* (Muslim religious leader) readily accepts to conclude and solemnize a marriage contract between a married man and an unmarried woman, although the man may still be considered married according to the Family Law Act in these countries. In such cases, the *imam's* view is that while this marriage is considered bigamous according to the Western law, which is the law of the land, it is allowable according to Shari'ah based on the Holy Quran:

> *"If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four: but if ye fear that ye shall not be able to deal justly (with them), then only one, or that which your right hands possess. That will be more suitable, to prevent you from doing injustice." (Holy Quran, Surat An-Nisa, 3)*

According to Coulson (1964: 152-157), starting from the middle of the nineteenth century, the Arab countries gradually started to adopt Western laws instead of their own based on Islamic law, albeit sometimes with the retention of parts of Shari'ah principles:

- In Egypt, penal, commercial, civil and maritime laws modeled on the French laws were promulgated, starting from 1875, together with setting up of secular courts to apply them. Later on though, in 1937 Egypt directly adopted the Italian criminal law in lieu of the older French-influenced version. The Egyptian civil law was later used as a basis for its counterpart in Syria. Even the Shari'a family law matters are now administered by the unified national court system.
- In Lebanon, the existing criminal law has its roots in the Egyptian criminal law of Italian origin, while its civil law *'Qanun al-Moujibat wa al-'Uqud'* (the Law of Obligations and Contracts) was adopted from the French law in 1932.
- Libya's criminal code until the end of the monarchy was an amalgamation of the Italian and French criminal laws, while its civil law is derived from the Western-influenced Egyptian law.
- The Sudan in 1899 promulgated a criminal law largely based on the Indian Penal Code, which in turn was influenced largely by the British code. In 1983, the Sudan Penal Code was amended to be in conformity with the Shari'ah rules. In 1984, the civil law was also turned into a law in conformity with Shari'ah rules (the Civil Transaction Act 1984)
- Morocco and Tunisia were late to adopt Western laws despite the fact that they were under colonial rule for long periods. The French laws were later used as a basis for the Moroccan criminal code of 1954, and the Tunisian commercial, civil and maritime laws (1960-1962). Furthermore, in Tunisia the family law courts were abolished in 1956.

CONCLUSIONS

In this research, the author attempts to differentiate between the Islamic and Arabic laws as two separate entities, and to explain the general legal principles that govern Islamic laws, besides to show the different environment in which Islamic laws were formulated and developed compared with the environment of English law.

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