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EDITORIAL

The Third Asian Forum and the International-Shariah Conference on Shariah and Codification under the auspices of the South East Asia Shariah Association (SEASA) was held at Colombo, Sri Lanka from December 16 to 20, 1986. The Conference was also sponsored by the Ministry of Transport and Muslim Religious and Cultural Affairs, Sri Lanka and the Asia Foundation, Colombo, Sri Lanka.

The Conference was attended by delegates from Indonesia, Malaysia, the Philippines, Singapore, Sri Lanka and Thailand and by observers from Brunei Darussalam, the Maldives and Pakistan.

Two keynote papers were presented the first by the Hon. Munawir Sjadzali, the Minister of Religious Affairs, Indonesia and the second on an Overview of Shariah and Codification by Razali Haji Nawawi and Prof. Ahmad Ibrahim of Malaysia.

Country papers were presented by the delegates as follows:–

(a) Shariah and Codification, Malaysian Experience
by Prof Ahmad Ibrahim

(b) Shariah and Codification, Philippine Experience
by Datu Micheal O. Mastura

(c) Shariah and Codification, Singapore Experience
by Haji Abu Bakar bin Hashim and presented by Moulavi M.H Babu Sahib

(d) Shariah and Codification, Indonesian Experience
by the Hon. Basrani Basran, Judge of the Supreme Court, Indonesia and Haji Zaini Dahlan, Director General of Islamic Institutions, Ministry of Religious Affairs, Indonesia.

(e) Shariah and Codification, Thailand Experience
by Dr. Arong Suthasasna

(h) Shariah and Codification, The Maldives Experience
by the Hon. Ahamed Zaki, Attorney-General, Maldives.

(g) Shariah and Codification, Sri Lanka Experience
by A. Hilmy Mohideen.

There was a lively discussion and exchange of views between the delegates and observers.

At the end of the Conference a consensus was arrived at by Shura and among the matters agreed were –

1. That there is a need for the codification of the rules of the Shariah, particularly in the field of personal and family law, property and inheritance, and charitable endowments, either through the enactment of new legislation in the Asian States for their effective enforcement and administration, or through the compilation and codification of the rules and principles of Shariah for the guidance of the Bench and Bar.

2. That together with codification in the field of Shariah, there is an urgent need to provide judicial and administrative institutions which will carry out the effective implementation and enforcement of personal and family law, the judicial and administrative structure of which shall be drawn from the various experiences of the Asian countries to suit the particular needs and peculiarities of the Muslim communities concerned;

3. That in order to create a better understanding of Shariah and to bring about the well-being of all peoples in the Asian region, the SEASA hereby appeals to the various governments of the region to adopt and formulate as a matter of state policy that the Shariah shall form a part of the law of the land;

4. That in recognition of the Shariah as a living and dynamic legal system, suitable to all times and all nations, the SEASA appeals to all Muslim jurists and scholars of the Asian region to share and disseminate their knowledge and ideas on the general principles of justice and equity based on Shariah to all communities, irrespective of persuasion or politicial ideology, in order that Shariah will contribute and play a vital role in the enhancement of Asian solidarity and unity under the regime of law and justice;

5. That along the area of specific Shariah law reform, the SEASA has taken deep concern about the need and appeals to the various governments with Muslim communities to enact legislation governing the personal and family relations of said communities based on Shariah;

6. That the SEASA takes note with great appreciation the current legal reforms and developments along the lines of Shariah in Brunei Darussalam, Indonesia, Malaysia, the Maldives, Singapore and Sri Lanka;

7. That the SEASA takes note with appreciation the current legal and judicial reforms achieved by the Republic of Philippines in accordance with the Shariah in the field of personal and family law, and for initiating the First Shariah Regional Conference in Manila in August, 1983;

8. That the SEASA commends with great appreciation, the noble intentions and efforts of His Majesty's Government of Brunei Darussalam in reforming the laws of the country in line with the principles of Shariah;

9. That SEASA takes note of the follow-up and implementation of the agreements arrived at the Second Forum of SEASA held at Bangkok, Thailand, particularly the drafting of its Constitution and Bye-Laws by Prof. Datuk Ahmad Ibrahim and the convening of the Organizing Committee in Jakarta, Indonesia, by the Hon. Justice Prof. Haji Busthanul Arifin, its Secretary General, and the organizations of the respective national chapters of SEASA by the respective Vice-Presidents;

10. That the SEASA hereby welcomes the proposal to hold the next Conference of the Association in mid-August, 1986 to coincide with ASEAN Day in Kuala Lumpur, Malaysia; and it was also agreed that the officers meet in April, 1986 in Singapore, and for the Organizing Committee of the Conference to meet in Kuala Lumpur in July, 1986 the details of which will be worked by the SEASA Malaysian Chapter;

11. That the SEASA fully supports and endorses the programme of the International Islamic University in Kuala Lumpur, Malaysia, for conducting a continuing legal education for Shariah judges and lawyers; and also highly appreciates the programme of that University in serving as a Centre for Research and Information, and hereby calls upon all member countries to regularly provide the said University with their respective materials and Information in the field of Shariah Law;

12. That the SEASA fully endorses the proposals of its Secretary General to set up a law book publishing house for SEASA in Jakarta, Indonesia and commends the International Islamic University in Kuala Lumpur, Malaysia, for its efforts in publishing the Shariah Law Journal;

13. That the SEASA in recognition of their invaluable support and concern for the achievement of the objectives of the Association, confers upon the following officials, the honour and distinction of membership in the SEASA Advisory Board, namely:

(a) The Hon. Mohamed Hanifa Mohamed, MP
Minister of Transport, and Muslim Religous and Cultural Affairs, and Commercial & Industrial Security, Sri Lanka

(b) The Hon. Ali Said, S.H
Chief Justice of Indonesia

(c) H.E The Hon. Munawir Sjadzali, M.A
Minister of Religious Affairs Indonesia

(d) The Hon. Anwar Ibrahim
Minister of Agriculture
Chairman of the Consultative Council on Islamic Affairs Malaysia.

SHARIAH: A DYNAMIC LEGAL SYSTEM

by

H.E. Mr. Munawir Sjadzali

بسم الله الرّحمٰن الرّحيم

اَلْحَمْدُ لِلّٰهِ الَّذِىْ اَنْزَلَ الْقُرْاٰنَ هُدًى وَرَحْمَةً لِلْعَالَمِيْنَ الصَّلَاةُ وَالسَّلَامُ عَلٰى سَيِّدِنَا مُحَمَّدٍ خَاتَمِ الْاَنْبِيَاءِ وَالْمُرْسَلِيْنَ، وَعَلٰى اٰلِهٖ وَاَصْحَابِهٖ الْمُتَمَسِّكِيْنَ بِتَعَالِيْمِ الْقُرْاٰنِ وَالسُّنَّةِ فِى اُمُوْرِ الدُّنْيَا وَالدِّيْنِ

First of all I would like to thank my good friend, His Excellency Mr. M.H. Mohamed, the Minister of Transport and the Minister in Charge of the Muslim Religious and Cultural Affairs of the Republic of Sri Lanka, for his kind invitation to me to take part in this very important Islamic gathering, the Third Asian Forum of the International Shariah Conference; and I deem it an exceptional privilege and honour to be invited to address this forum, attended by prominent Islamic jurists and scholars, all with international repute. I am doubtful, though, that I shall be able to come up to the expectation, and to satisfy the intellectual curiosity of this professionally well informed audience.

I would like to congratulate the organisers of the Forum on the selection of its theme, namely "*Shariah and Codification.*" The theme is indeed both appropriate and timely, if only because at the present moment we the Muslims are confronted by a complexity of problems, political, economic, social as well as legal. The challenge is indeed formidable. That is how could we preserve the universal validity of the Islamic teachings and its systems of value, including those embodied in the Shariah, in this fast changing world, full of social and cultural diversities.

Indonesia, for one, is now busily engaged in the reconstruction of its national legal system, and in that framework the Supreme Court and the Ministry of Religious Affairs launched recently a joint project on the Compilation of Islamic Law, with the main objective of producing law books for the Indonesian Shariah judges. In carrying out that task we need a guiding principle in order to safely reach our objective without violating the universality of the Shariah. In our search for such a guiding principle along the history of Islamic jurisprudence, I would say that we have ample evidence

that the Shariah is truly a dynamic legal system, with a high degree of adaptability. In this speech, with all humility, I shall try briefly to substantiate the dynamic and adaptable nature of the Shariah.

To begin with, the predominant majority of the Muslim jurists are in general agreement that there is "*naskh*" both in Al Qur'an and in the Traditions of the Prophet. There are a number of Quranic verses the contents of which qualify or even abrogate the laws contained in some other verses revealed to the Prophet earlier. There are also many sayings of the Prophet that revoke some directives that he had given earlier. At this juncture I would like to relate to this Forum the comments of two outstanding Quranic commentators (*mufassirin*) on the verse 106, Surah Al-Baqarah (2) which is to the effect –

مَانَنْسَخْ مِنْ اٰيَةٍ اَوْنُنْسِهَا نَأْتِ بَخَيْرٍ مِنْهَا اَوْمِثْلِهَا اَلَمْ تَعْلَمْ اَنَّ اللّٰهَ عَلٰى كُلِّ شَيْءٍ قَدِيْرٌ

"Surely our revelations as we abrogate or cause to be forgotten, we bring (in place) one better or the like thereof. Knowest thou not that Allah is able to do all things." (Surah Al-Baqarah (2): 106).

Commenting on that verse, *Ibn Kathir* said to the effect:

فَاِنَّهُ لَيْسَ فِى الْعَقْلِ مَايَدُلُّ عَلَى امْتِنَاعِ النَّسْخِ فِى اَحْكَمِ اللّٰهِ تَعَالَى
(تفسير ابن كثير الجزءالاول ص ١٥١)

"Surely there is nothing in the human intellect that indicates the unacceptability (of the idea) of the abrogation in the laws of Allah the Most Supreme," (Ibn Kathir's *Quranic Commentary*, Part One, p. 151).

Ahmed Mustafa Al-Maragi, said to the effect:

اِنَّ الْاَحْكَامَ مَاشُرِعَتْ اِلاَ لِمَصْلَحَةِ النَّاسِ . وَهِيَ تَخْتَلِفُ بِاخْتِلَافِ الزَّمَانِ وَالْمَكَانِ. فَاِذَا شُرِعَ حُكْمٌ فِى وَقْتٍ كَانَتِ الْحَاجَةُ اِلَيْهِ مَاسَّةً ثُمَّ زَالَتِ الْحَاجَةُ فَمِنَ الْحِكْمَةِ نَسْخُهُ

وَتَبْدِيْلُهُ بِحُكْمٍ يُوَافِقُ الْوَقْتَ الْاٰخِرَ فَيَكُوْنُ خَيْرًا مِنَ الْاَوَّلِ اَوْمِثْلَهَا فِى فَائِدَتِهِ لِلْعِبَاد
(تفسير المراغى، الجزء الاول ص ١٨٧)

Surely the laws are legislated for the humanity's interest, and that interest differs in different eras and localities. So if a law is legislated at a time when the need is urgent, when the time comes where that law is no more needed, it is wise to abrogate it and to replace it with a (new) law more (suited) to the time. The new law will be better than the first or the like thereof from the point of view of the people's interest". (Al-Maragi's *Quranic Commentary*, Part One, p. 187).

As we all know, the Second Khalifah, *Umar b. Khattab r.a.* succeeded to the Khilafah hardly two years after the death of Prophet Muhammad. Yet during his rule he took quite a number of important decisions in the field of law which seem to represent a departure either from the texts of Al-Quran or from the Traditions of the Prophet. Below are few examples:

1. Despite the clear stipulation in *the verse 60, Surah Al-Taubah*, as to who the alms is to be distributed, which includes the newly converted Muslims "whose heart are still to be reconciled" (*al-muallaf qulubuhum*), yet *Umar b. Khattab* stopped allotting a portion of the alms to them.

2. In the administration of the spoils of war *Umar b. Khattab* did not follow literally the pattern dictated by *the verse 41, Surah Al-Anfal*, that one-fifth of the spoils is to be allotted to Allah, the Messenger, his relatives, the orphans, the needy and the wayfarer, and the rest to be distributed to those who take part in the war. *Umar* left the properties, particularly the lands of the newly conquered regions, to the original owners, and imposed on them some sort of taxes as a source of revenue to cover the state expenditures, including the allowances of the members of the "Standing Army."

3. In the time of the Prophet and Abu Bakar, in addition to the punishment of one hundred whiplashes as prescribed *in the verse 2, Surah Al-Nur*, an unmarried adulterer had to be banished for one full year. *Umar b. Khattab* abolished that additional penalty after he was informed that one adulterer went out to a non-Muslim country.

As to be expected, *Umar's* courageous policies in adjusting the original teaching of Islam to the new situation, different from the time when the verses were revealed, always caused heated arguments and even frictions between him and other senior companions of the Prophet. But at the end *Umar* always came out as the winner, because he succeeded in convincing the others that his departure from the Quranic texts and the Traditions of the Prophet did not mean deviation from the objectives of the Shariah. On the contrary, by departing from the Quranic texts and traditions in the changing situation *Umar* had served the true purposes of the application of the Islamic Law (*Maqasid al-Shariah*).

Khalifah Umar b. Abdul Aziz is another great personality in Islamic history. He is well known for his puritanical life, his deep devotion to the Islamic faith, and his determination to reconstruct the then corrupt society by reintroducing high morality and justice. The Muslims accorded him an honorary title خامس الخلفاء الراشدين "the fifth of the Khulafaurrashidin" despite the fact that he ruled the Muslim world at the end of the first century of *Hijriyah*.

In his effort to create a clean state administration, he prohibited the government officials from accepting gifts, although Islam, as it was practised by Prophet Muhammad, does not forbid the Muslims from accepting gifts. In response to the protest against the prohibition he reportedly said to the effect:

كَانَتِ الْهَدِيَّةُ فِي زَمَانِ رَسُوْلِ اللهِ (ص) هَدِيَّةً، وَالْيَوْمَ رَشْوَةٌ

"Gift in the time of the Messenger of God was gift, (but) now it is bribe."

Moreover *Umar b. Abdul Aziz* tolerated the diversity of legal opinions amongst the Muslim jurists. He saw that diversity as blessing to the people.

The differences of opinion amongst the earlier Muslim jurists reflect the extent of the Shariah's receptivity to the influence of human and other earthly factors such as the personality of the individual jurists, and the situation and condition in which they lived. For instance, the Sunni jurists were divided into two major groups: *Ahl-al-hadith* (the people of Traditions) and *Ahl-al-ra'yi* (the people of reason).

The first group mostly lived in Hijaz, with *Imam Malik* as the principal leader. This group chose to stick to the Traditions and was reluctant to resort to reason, partly because it was in Hijaz, and Madinah in particular, that the Prophet used to live, and there still lived his companions or those who knew the Traditions by heart. Moreover the pattern of social life there was relatively simple. So the community problems and issues could be easily solved by the directives found in Al-Quran and the Traditions, and by consultation or consensus amongst the (senior) residents of Madinah. The second group, the

people of reason, mostly lived in Irak. This region was much different from Madinah. The pattern of social life there was more developed. In addition, Irak had come under the influence of Greek rationalism. The other explanations as to why the members of this group relied more on intellectual reasoning rather than referring themselves to the Traditions were:

(a) the great distance between Irak and Madinah wherein lived the Traditionists (*Al-Muhaddithin*);

(b) the rampant falsification of the Traditions.

It is interesting to note that in commercial law *Imam Abu Hanifah* is more sensible than the other three great jurists – *Malik, Shafei and Ibn Hambal.* This might be due to the fact that unlike the three Imams, who by their occupation were not quite familiar with the commercial world, *Abu Hanifah* belonged to a family of traders. His father was a trader. He himself was a trader and lived in a very flourishing trading centre. So he was more appreciative of the complexity of the problems of commerce.

I would like to say a few words on Shafei's *Mazhab.* First, it can be safely said the Shafei's Mazhab is a kind of synthesis between the two Mazhabs, Hanafi and Maliki. Second, Shafei's Mazhab shows the moral courage of Imam Shafei to think independently. He agrees with Malik that *ijma'* is one of the principal sources of the Islamic Law after Al-Quran and the Traditions. But he disagrees with his former teacher on the definition of *ijma'.*

To Malik, *ijma'* is a consensus amongst the (senior) residents of Madinah, while to Shafei *ijma',* to have a validity as a source of law, must be a consensus of the whole Muslim community. Moreover, Shafei shows his reluctance to endorse Malik's idea of *istislah.* Shafei, on the other hand, is in accord with Abu Hanifah with regard to *qiyas* as another source of law. But he refuses Hanafi's theory of *istihsan.*

The development of Shafei's Mazhab signifies the ample influence of local conditions and circumstances on the application of law. In that Mazhab we know the term *Al-qoul al-qodim* and *Al-qoul al-jadid.* The first representing Shafei's views when he was in Iraq, and the second his views after he moved to Egypt. One researcher in Indonesia has succeeded in finding differences between the Iraqian views and the Egyptian views on around one hundred and twenty cases.

From amongst the jurists of the four *mazhabs,* despite their differences, there are outstanding personalities as *Al-izz b. Abdul Salam* (Shafei group), *Abu Ishaq Al-Satibi* (Maliki group) and *Ibn Qayyim Al-Jauziyyah* (Hambali group) who agree in classifying the laws into two categories: the laws that

are dealing with *ibadah mahdhi* (pure ritual matters) and those that are relating to *muamalah dunyawiyah* (worldly social matters). With regard to the first category there is little that the jurists can do. But as to the second category there is ample room for the jurists to exercise their intellectual reasoning, with the genuine interest of the people as their primary consideration. In this context *Ibn Qayyim Al-Jauziyah* confirms that the laws can change or differ due to the change of time and to the differences of locality, situation, objective and custom.

It is worth nothing that *Abu Yusuf* (Hanafi group), in apparent departure from Abu Hanifah's opinion, held the view that in the case when the law prescribed by a "*nas*" is based on a custom, that law will not remain valid once the custom has changed.

I hope that by this brief expose I have succeeded in sharing with you my limited informations which lead to the conclusion that *Shariah is truly a dynamic legal system with a high degree of adaptibility.*

In concluding my speech allow me to borrow the humble yet wise words of Imam Abu Hanifah which read as follows:

قَوْلِي هٰذَارَأْيٌ، وَهُوَ اَحْسَنُ مَاقَدَرْتُ عَلَيْهِ . فَمَنْ جَاءَنِي بِاَحْسَنَ مِنْ قَوْلِي فَهُوَ اَوْلَى بِالصَّوَابِ مِنِّي

"What I just said is an opinion, and that is the best I could produce. Whoever comes to me with an opinion better than mine, his (opinion) deserves better to be taken as the correct one."

والسلام عليكم ورحمة الله وبركاته

CODIFICATION OF SHARI'AH LAW: A HISTORICAL ACCOUNT

by
Razali Haji Nawawi and Ahmad Ibrahim

Codification of Shari'ah Law, from the academic point of view, has its positive and negative implications; positive in the sense that it makes Syari'ah Law clearer and to some extent precise; people may understand clearly their legal rights and duties and it may be easier for the state authorities to implement them and for the courts to decide accordingly on cases which are brought before them. On the other hand, codification may create negative implication in the sense that it may effectively reduce the mental activity of ijtihad which is very important in the development of Islamic legal science, and it may directly or indirectly lead the people and judges to follow one particular school of Law. This is considered as a form of limiting the development of Islamic Law. It may take a considerable long time to amend any part of the Law if it is so codified. There were pros and cons in Western world in regard to the codification of Law. The French were strongly for the codification and the British were against it.

In the Muslim world there appeared certain problems which contributed to the slow process of codification of Shariah Law. The primary sources of Islamic legislation are the Quran and the Sunnah of the Prophet (s.a.w) which contain general legal principles. The fuqaha or jurists interpreted these principles and in the process produced different legal opinions on a certain matter. They appeared to be reluctant to write down their opinions in a codified form, fearing that the ummah might rely on their opinions and neglect the Quran and Sunnah. However, in this process of interpretation there were established the schools of Law which put the authorities in Muslim states and Muslims at the crossroads of which particular school to follow.

The principle of ijtihad constituted another important problem. The fuqaha held that if Islamic Law was codified it would limit the activities of ijtihad and thus the fiqh would not grow. Ijtihad is a very important vehicle particularly in the development and the implementation of Islamic Law and for that matter in the process of codification.

Another problem is the issue of plural society and free religious denominations in Muslim countries. It was argued that Islamic Law could not be enforced on non-Muslim citizens because they were not obliged to follow Islamic Law. It was also argued that the Law of the land must be unified and applicable to all citizens, therefore, as some have argued, Islamic Law could not be included in the process of codification of the Law of the land. However, this issue is not real and thus some scholars propagate the idea of codification and implementation of Islamic Law for the Muslim citizens and non-Muslim citizens are free to choose any Law they wish.

Despite all these problems, in fact, Islamic Law had been codified in its own sense of the word from the very beginning of its inception and it has developed through various stages towards codification in the Western sense.

In the respect this paper discusses briefly the following periods of compiling and codifying of Shariah Law –

1. Period of compilation of the Quran.
2. Period of compilation of the Hadith.
3. Period of official adoption of a certain school of Law.
4. Period of voluntary efforts of compiling and documenting legal opinions of a certain mazhab.
5. Period of official compilation of a particular Mazhab.
6. Period of writing and compiling legal opinions without confining to a particular mazhab.
7. Period of codification in which some foreign Laws were adopted.

1. Period of Compilation of the Quran

It is important to stress that the process of codification of Shariah Law started with the compilation of the Quran, the first primary source of Shariah Law. In the early history of Muslim Ummah, they ruled according to the Quran and the Sunnah and referred their disputes to them; only after they could not find any provision anywhere in the Quran and the Sunnah they used their own reasoning guided by the spirit of the Quran and the Sunnah.

The Quran is the only Divine revelation which was written and compiled during the life-time of its Messenger. There are traditions explaining the manner in which the Quran was compiled.

The Prophet when something was revealed to him he called some people who could write and dictated to them: "Write this verse in the Surah which mentioned such and such. . . ."[1]

The Prophet said, "Jibrail came and asked me to place this verse in this place of this Surah".[2]

The whole of the Quran was completely written during the lifetime of the Prophet, but it was not collected in a single volume.[3] It was Abu Bakar who ordered it to be collected in a single volume.

It appeared that there were many people who wrote and read the Quran according to their dialects. To avoid confusion the Caliph "Uthman (r.a)

formed a four men committee headed by Zaid bin Thabit to make copies of the Quran and sent them to the provinces. He forbade the people from writing the Quran in the dialects other than that of Official script.[4]

The Quran does not contain Law in the codified form of the modern sense. For it is not merely a Book of Law but it is a Book of Guidance which covers all aspects of human life. However, it influences the formation of Islamic legal system in the following ways:

(i) The Prophet (s.a.w) was faced with legal problems and so were his companions and Muslim jurists in general, and the Quran provides them guidelines to solve those problems. Besides the general provisions which help to mould the good behaviour of the Muslim society, the Quran provides about five hundred specific texts (*nusus*) which contain legal elements.

(ii) Non-legal texts, moral exhortations and Divine promises and warnings in the Quran have been construed by reasoning to afford legal rules. Thus, for example, the texts, "Trade is like usury, but God hath permitted trade and forbidden usury," and "They ask you concerning wine and gambling. Say, "In them is great sin and some profits for men; but the sin is greater than the advantage," have contained legal doctrines of contract.

(iii) The interpretation of a legal text of the Quran is based on the principle of *istidlal* (deducing legal evidence from text).

The following are the important principles according to which words and phrases occurring in a text of the Quran are interpreted. The object is to derive the legal provisions contained therein:

(i) **The general and the specific**: A general word covers everything to which it is applicable. A general meaning of a text remains to be general except where it is limited by another text. If two propositions appear to be conflicting they should be reconciled. When the conflict cannot be resolved and the two texts are of general importance one of them sanctioning a certain thing and another prohibiting it; the prohibitive text will be prevail. In case both the texts are of the same character and conflict cannot be resolved, the latter will repeal the meaning of the former to the extent that one of them is distinct from what is laid down by the other when they are in conflict. When two propositions, one of general and the other of specific, conflict with each other, if the specific proposition is revealed later, the specific will be held to have repealed so much of what is laid down by the general to the extent of inconsistency and the general

proposition will retain its general character.

(ii) **The absolute and the qualified:** Where there are two propositions, one absolute and the other qualified, and what is laid down by one of them is distinct from what is laid down by the other, legal effect should be given to both. If two texts relate to a single injunction of Law with reference to the same facts, the one absolute in its term will be read subject to the qualified text.

(iii) **The proper and the secondary (haqiqi and majazi):** The words and verses of the Quran should be interpreted in their ordinary sense unless the context requires a secondary meaning which is more important and intended. If a word or a verse is used in its literal sense, it might be regarded as proper in connection with such application and, if that word or verse is used in another sense, it might convey technical or figurative meaning. The secondary application of the world or verse consists in its transference from its original to a new sense. After such transference has taken place, it is the new meaning which prevails, and both meanings cannot be assigned at one and the same time.

The early Muslim judges had made their legal decisions primarily based on the Quran, and the Quran as such was the code of conduct and behaviour for the Muslims.

2. The Period of Compilation of the Sunnah

The Quran had commanded the Muslims to follow the Prophet (s.a.w). Thus the Muslims particularly the Companions of the Prophet (s.a.w) had taken the Sunnah as binding authority and they were very anxious to learn it by heart for themselves and for the purpose of further transmission.

Some of the Companions of the Prophet (s.a.w) (*Sahabah*) wrote the Hadith during the life time of the Prophet (s.a.w). Abu Daud and Al-Darimiy, for instance have narrated from Abdullah bin Amr bin Al'aas as saying:

> "Whatever I heard from the Prophet (s.a.w) I used to write it and learn it by heart. Some persons from the Qureish objected to this and said that the Prophet (s.a.w) was a man and sometimes he was talking in anger and sometimes he was happy. At this I stopped writing and told this to the Prophet (s.a.w). He ordered me to continue writing and pointed with his finger towards his mouth and said after swearing in the name of Allah that nothing but the Truth comes of that.[6]

There is a Hadith attributed to the Prophet (s.a.w) which prohibited writing the Hadith. But this was not understood as a general prohibition of the Prophet (s.a.w). The prohibition was applicable only in two situations: (i) writing of the Hadith along with the Quran in the same document and (ii) writing of the Hadith by newly converted Muslims who could not differen-

tiate between the Hadith and the Quran. About this Khattabiy concluded:

> "The Prophet (s.a.w) only prohibited writing of the Hadith along with the Quran in the same document. The mixing up of the two could cause confusion to the reader."[7]

Hamidullah has explained the context of the prohibition:

> "All these Hadiths mean that round about the year 7 AH., the Prophet (s.a.w) made some important speeches. Some newly converted Muslims had come from Yemen. Some of them were literate. Some Surahs of the Quran were given to them to read and memorise. When they heard that speech of the Prophet (s.a.w) some of them wrote it on the same paper on which the Quran had been written. At this the Prophet (s.a.w) prohibited to write anything from him other than the Quran and ordered to cancel what had been so written.[8]

Some of the Hadiths were written in a codified form such as *Sahifah Madina* which is called by Hamidullah as *The First Written Constitution of the World.* The constitution consists of fifty-two clauses.[9] There are many other Hadiths which were written in legal form; such as agreements between the Prophet (s.a.w) and Arab tribes. Ibn Abd al-Bar said that, "The Prophet (s.a.w) dictated a book on the Law of taxation, monetary compensation, inheritance and general Law."[10]

Many Hadiths were compiled by the Companions such as *Sahifah Sadiqah* by Abdullah bin Amr bin Al-aas, *Sahifah Ali*, *Sahifah Abu Bakar*, *Sahifah Jabir* and *Sahifah Sahihah* by Abu Hurairah.

However, these documents were scatteredly kept and many Hadiths remained in the memory of very learned Muslims. Therefore the Caliph 'Umar bin Abdul Aziz (d. 101H) instructed Ibn Shihab al-Zuhriy (51–124H) and Abu Bakar bin Muhammad bin Amir bin Hizam to collect the scattered Hadiths. However the job was not completed. During this period the so called 'hadiths' were fabricated by enemies of Islam particularly the Jews. Then came the period of Al-Bukhariy who showed intelligence and ability to examine *isnad* by devising strict criteria for the transmitters. He succeeded in scrutinising Hadiths on the basis of isnad and incorporated them in his *al-Jami' al-Sahih*, which is known as *Sahih al-Bukhariy*. Al-Bukhariy arranged the Hadith according to the chapter system based on subject matter. There are other *Jawami'* compiled and arranged on the same basis as that of the *Sahih al-Bukhariy*, such as *Sahih Muslim*, *Sunan Nasaiy*, *Sunan Ibn Majah* and *Sunan Abu Daud.*

Legislative function of the Sunnah

The Sunnah has played a very important function in the legislative process of Shariah Law. In this function it has followed certain rules. Muslim jurists have discovered these rules which helped them in codifying their legal views:–

(i) The Quran conveys general meaning, and the Sunnah makes it specific and particular.

(ii) The Sunnah may add legal provisions to that of the Quran.

(iii) The meaning of certain verses of the Quran may be implicit and the Sunnah may explain it by providing essential details.

(iv) The meaning of the Quran may be absolute, and the Sunnah may qualify it.

(v) The Quranic verse may be general and the Sunnah provides exceptions.

(vi) The degree of legal strength of certain Quranic provisions as to whether it is applicable to either one of the five legal values (*al-ahkam al-khamsah*) is determined explicitly or implicitly by the Sunnah. An insight of the Sunnah makes a person capable to discover these values.

3. The period of official adoption of a particular school of law

During the early history of Islam particularly the time of the Prophet (s.a.w) and the Guided Caliphs, the differences of interpretation of legal provisions did not develop widely. Jurists and appointed qadis or judges referred to the Quran or Hadith when they wanted to decide in a certain case. Only when they could not find any provision in the Quran or Hadith they exercised their ijtihad. Moreover they did not endeavour into speculating legal problems which had not happened. They would give their opinion only when the case referred to them had actually happened. They were very able people. We read names such as Qadi Mu'az bin Jabal, Qadi Shuraih, Abdullah Ibn 'Umar and the like. Such persons obviqusly, were not at all in need of a compiled legal code of the modern form. They were absolute mujtahids.

However, with the passage of time, the Muslim territory had widened; the Muslim society had developed; a great number of aliens became Muslims, and with the conflict of cultural and educational backgrounds of the new members of Islamic Ummah, with the growing number of mujtahids and scholars, legal cases began to be speculated, the differences of opinions had become so widespread, particularly when the schools of Law were formed and the people were inclined to follow a particular school. Legal matters had become the topics of the day to the extent that laymen such as fruit sellers often discussed legal matters while they were selling their fruits.

In the 2nd century of Hijrah, observing these problems, Abdullah Ibn al-Muqaffa' strongly felt that it was necessary for the state and the Ummah to have a codified common Shariah Law. He then submitted a memorandum to that effect to the Abbaside Caliph Abu Ja'afar al-Mansur. He wrote:

"One problem which is spreading in these states and other provinces to which the Amir al-Mu'minin should give his deep thought is the divergence of conflicting legal opinions which have now reached the danger point. If the Amir al-Mu'minin is of the opinion that this problem should be resolved and the differences of opinion should be stopped, he should issue a decree requesting that these opinions be documented in a form of books, containing therein all arguments, their views to be supported with the Sunnah or reasoning and to submit them to the Amir al-Mu'minin. He may thereafter review the whole documents and give his own decision in each case. Based on this he can write a comprehensive legal book which is common to all and followed by all. We hope that Allah will bring about the conflicting views to one unified and right opinion".

In other words, Ibn al-Muqaffa' suggested that the Caliph should adopt a particular school as the official Law of the state.

Although the Caliph Abu Ja'afar did not immediately accept the proposal, however, it had been instilled in his mind. In the year 148 A.H when he went to perform the Hajj (pilgrimage) at Mecca, he discussed with Imam Malik the idea of codifying Shariah Law based on the latter's opinions and adopting it as the official state Law. But Imam Malik did not agree with the proposal and insisted that each individual Muslim should be allowed to follow any opinion of any jurist he prefers.

But Abu Ja'afar was convinced that there should be a common Law for all and he constantly wished that Shariah Law be codified. In 163 A.H when he went for Hajj again he commissioned Imam Malik to do the job. He said:

"O Abu Abdullah! (the family name of Imam Malik) Take the subject of jurisprudence in your own hands, and codify it in the form of different chapters. (In the process of your codification) avoid the strictness (of the opinion) of Abdullah Ibn 'Umar, the liberalism of Abdullah of Ibn Abbas and the individualities of Abdullah Ibn Mas'ud. Compile a code which should reflect the maxim 'the best of affairs is the middle course' and which should be a collection of the verdicts given by the Imams and the companions of the Prophet (s.a.w). When you complete this job, insha Allah we shall bring about a consensus of the Muslims on your school of jurisprudence and enforce it through our realm with a decree the contravention thereof shall be strictly avoided."[11]

It is generally believed that keeping in view the request of Abu Ja'afar al-Mansur, Imam Malik compiled his *Al-Muwatta'*, but he did not agree that it should be declared the official Law for all Muslims with the force of the government behind that sanction.

The jurists had discussed the issue of official adoption of a particular school in relation to the validity of the appointment of a qadi on condition that he should judge based on a certain school. Some said that such an appointment was void and some others said that the appointment was valid but the condition was void.

Although such adoption was not officially formalised, but the reality in most Islamic caliphates was that when a Caliph or a Governor or a qadi inclined to a certain school he effectively helped to spread the school in his sphere of influence. The Abbasides helped to spread the Hanafi school. The Fatimids helped Ismaili school in Egypt and when Ayubites came to power in Egypt they helped Shafii school; the Ottomans were Hanafites; they appointed their officers and qadis who followed Hanafi school. In the 11th century A.H the Sultan Salim 1 handed down a "*Firman*" (Royal Decree) that the Hanafi school was the official school of the Empire. In Malaysia it is believed that the first Muslim traders who spread Islam in the Malay world were followers of Shafii school, therefore all states except one in the federation of Malaysia had provided that the Shafii school was the official school of the states.

4. The period of voluntary compilation of legal opinions of Mahzab for references

State authorities felt that it was very useful to compile legal opinions of an official mazhab or mazhab which was followed by the majority of the Muslim population.

For instance the Ottoman Sultan known as Sultan Sulaiman al-Kabir in the middle of 11th century A.H commissioned Shaikh al-Islam Abu al-Sa'ud to compile all the Laws which had been issued by the Sultanate and arrange them in one volume known as *'Qanuni Namah'* of Sultan Sulaiman. Abu al-Sa'ud himself had another volume known as *'Ma'rudzat Abu al-Sa'ud Effendi'*. It consisted of fatawa which he gave on the cases referred to him. The Sultan also ordered Shaikh Ahmad al-Halabi, the Imam of Sultan Muhammad Khan's mosque to compile legal opinions in the form of a concise book. He successfully compiled four books based on the Hanafi school ie. *Mukhtasar al-Qaduri*, *al-Mukhtar*, *al-Wiqayah* and *al-Kanz*.

Sultan Muhammad Aurangzeb Alamgir in the 12th century A.H had taken the same positive step towards compiling of Shariah Law. He formed a working committee of five learned ulama of India chaired by Shaikh Nizam Burhan Buri to compile – in his own words – "a Comprehensive Book (*Kitabun Hamishun*) which should consist of such judgements which were approved and fatwas which were unanimously given by eminent ulamas. The Committee had successfully compiled a collection of legal fatwas based on well accepted books of Hanafi school. The collection was known as *'al-Fatawa al-Hindiah'* or *'Fatawa Alamgiri'*. The Hanafi books contain the views of Muhammad bin al-Hasan al-Shaibani, a disciple of Imam Abu Hanifah. They are: *al-Mabsut*, *al-Jami al-Saghir*, *al-Jami al-Kabir* and *al-Ziadat*. These books later were compiled in a book known as *al-Kafi*. It is elucidated by al-Sarakhsi known also as *al-Mabsut* which has thirteen volumes. *Fatawa al-Hindiah* has

six volumes. Although it was not an official compilation and was not enforced by the State and it was not compiled in the style of legal code known today, it has become one of the main and important references in Shariah Law.

It is relevant to note here the effort that had been made by the late Qadri Pasha of Egypt in the last century (14th century A.H). He had written a book on civil Law titled as "*Murshid al-Hiran Lima' rifati Ahwal al-Insan*'. It was written on the pattern of the *Majallate Ahkame Adliye*. He also wrote in a codified form a book on the Law of waqaf known as "*Qanun al-Adli Wal insaf 'Ala Mushkilat al-Awqaf.*" Another book by him "*Al-Ahkam al-Shari'iyah fi al-Ahwal al-Shakhsisyah*' is on family Law.

Although all these books had become important references for qadis and judges in the Arab world particularly in Egypt, Syria and Lebanon, but the government of these states did not officially adopt them as codes of Law. They remain as academic references.

It is relevant to note some important text books of the four Sunni schools:

Hanafi School

1. Abu Yusuf, *Kitab al-Kharaj.*
2. Al-Sarakhsiy, *Al-Mabsut.*
3. Abu 'Ubaid, *Kitab al-Amwal.*
4. Al-Tahawiy, *Mukhtasar al-Tahawi.*
5. Al-Samarqandiy, *Tuhfah al-Fuqaha.*
6. Al-Kasaniy, *Al-Bada'i.*
7. Ibn al-Hammam, *Fathu al-Qadir Sharhu al-Hidayyah.*
8. Al-Zaila'iy, *Tabyin al-Haqa'iq*
9. Ibn 'Abidin, *Radd al-Mukhtar.*
10. Ibn Najim, *Al-Ashbah Wa al-Naza'ir; Al-Bahr al-Ra'iq.*
11. Shah Waliyullah al-Dahlawiy, *Hujjatu'Lah al-Balighah.*

Maliki School

1. Imam Malik, *Al-Muwatta*; *Al-Mudawwanah al-Kubra* narrated by Sahnun.
2. Al-Babji al-Andalusiy, *Al-Muntaqa Sharh al-Muwatta'.*
3. Al-Qurtubiy, *Al-Muqaddimat al-Mumahhidat.*
4. Ibn Rushd, *Bidayah al-Mujtahid.*
5. Al-Hattab, *Mawahib al-Jalil.*
6. Al-Dardir, *Al-Sharh al-Kabir*; *Al-Sharh al-Saghir.*
7. Al-Qarafiy, *Al-Furuq.*
8. Ibn Juza, *Al-Qawanin al-Fiqhiyah.*
9. Shaikh M. Alish, *Sharh Manhaj al-Jalil 'Ala Mukhtasar Khalil.*

Shafii School

1. Imam Al-Shafii, *Al-Umm.*
2. A.I. Al-Shiraziy, *Al-Muhazzab.*
3. Al-Nawawiy, *al-Minhaj.*
4. Al-Sharbiniy al-Khatib, *Mughni al-Muhtaj Sharh al-Minhaj.*
5. Al-Ramliy, *Nihayah al-Muhtaj*
6. Al-Sayuti, *Al-Ashbah wa al-Nazair*
7. Al-Mawardiy, *Al-Ahkam al-Sultaniah*
8. Al-Sha'raniy, *Al-Mizan al-Kubra*
9. Abu Abdullah al-Damashqiy, *Rahmatul Ummah fi ikhtilaf al-A' immah.*

Hambali School

1. Ibn Qudama, *Al-Mughni.*
2. Aby Ya'la, *Al-Akam al-Sultaniyah.*
3. Abu Al-Barakat, *Al-Muharrar Fi al-Fiqh 'Ala Madhhab al-Imam Ahmad bin Hanbal*
4. Ibn Taimiyah, *Fatawa Ibn Taimiyah; Al-Siasah al-Shari'iyah.*
5. Ibn Qayyim al-Jawziyah, *Al-Turuq al-Hukmiyah Fi al-Siasah al-Shari'iyah; I'lam al-Muwaqqi'in 'Aun Rabbil 'Alamin*

Lately efforts have been made to compile legal opinions of various schools of Law in a form of encyclopedia, voluminous books, and codes. The Supreme Council of Islamic affairs of Egypt has produced *Mausu'ah al-Fiqh al-Islami*, Ministry of Waqaf and Islamic Affairs of Kuwait *al-Mausu'ah al-Fiqhiyyah*; Abu-u-Rahman al-Jizairi had written *Kitab al-Fiqh Ala al-Madhahib al-Arba'ah*, Dr. Abdul Wahhab al-Zahili *al-Fiqh al-Islami wa Adillatuhu*, Syed Sabiq *Fiqh al-Sunnah*, Jamil bin Khamis al-Sa'di *Qamus al-Shariah*, and Dr. Tanzil-u-Rahman *A Code of Muslim Personal Law.* This literature on fiqh has helped Muslims to easily refer to various opinions of the early learned Muslim jurists. However, a more comprehensive Shariah Code is yet needed.

It is proposed to deal in a little more detail with the jurists of the Shafii School.

Imam Shafii 140–204H, the founder of the Shafii School of Law, has left two principal books, the *Risalah*, a book on Islamic jurisprudence which also deals with the Law, and the monumental *Kitab al-Umm*, which is a valuable source for the study of the Law. Both the works refer to the Quran and the Hadith and seem to embody the teachings of Imam Shafii as he developed them for his students.

After his death a number of abridged versions (mukhtasar) of his doctrines were issued. Among them are the *Mukhtasar* of *Al-Buwayti* (d. 231H) and of Al-Muzani (d. 264). The *Mukhtasar* of Al-Muzani is not a true commentary as it is still large and often literally quotes the *Kitab al-Umm.* There is a

smaller compendium by Al-Muzani called *Nihayat al-Ikhtisar*, where he often indicates his own views which sometimes differ from those of al-Shafii. A number of commentaries have been written on the *Mukhtasar* of Al-Muzani, including those by Al-Tabari, (d. 445H), Al-Shashi (d. 507E) and Zakariya al-Ansari (d. 922H).

Al-Mawardi (d. 450H) produced an exhaustive treatise of fiqh called *Al-Hawi al-Kabir*, which he himself condensed in the *al-Iqna*. It is stated that the *Iqna'* was composed by al-Mawardi upon the order of the Caliph al-Qadir bi'Llah in competition with the Hanafi text, the *Mukhtasar* of al-Quduri.

Al-Jawayni, the Imam al-Haramayn (d. 478H) produced the *Nihayat al-Matlab*, an extensive work in forty parts. This work was condensed by Imam al-Ghazali (d. 505H) in the *al-Basit*, which was again condensed by the author himself in the *al-Wasit*. Imam al-Ghazali also produced *Al-Wajiz*, a condensed compendium of *al-Wasit*. This is the best known of his works of fiqh and is an excellent summary of the Shafii views. Among the commentaries on the *Wajiz* is the *Fath al-Aziz ala Kitab al-Wajiz* of al Rafii (d. 623H). This was abridged by Al-Nawawi (d. 676) in his *Al-Rawdah*. Al-Rafii also produced the *Muharrar*, based on the works of Imam Al-Ghazali. This was improved and condensed by Imam al-Nawawi in his well-known *Minhaj-et-Talibin*, which is a standard text, concise and clear. It has attracted a large number of commentators including –

(a) al-Mahalli (d. 864) whose work is known as *al-Mahalli*;

(b) Ibn Hajar (d. 973) who produced the *Tuhfat al-Muhtaj;*

(c) Al-Sharbini (d. 977) who produced the *Mughni al-Muhtaj;*

(d) Al-Ramli (d. 1004) who produced the *Nihayat al-Muhtaj*.

The gloss on *al-Mahalli* by Al-Qaliyubi (d. 1070) and Shaik 'Umairah is well-known as *Qaliyubi wa 'Umairah*. Zakariya al-Ansari (d. 926) produced an abridgment of the *Minhaj* called the *Manhaj al-Tullab*. The author himself wrote a commentary on it called *Fath al Wahhab*. Zakaria al-Ansari also wrote the *Takrir al-Tanqih*, an extract from the *Tanqih al-Lubab* of al-Iraqi (d. 826), which was itself a condensation of the *Lubab* of Al-Mahamili (d. 415H); the *Tuhfat al-Tullab*, a commentary on the *Tahrir*; and the *Asna al-Matalib*, a commentary on the *Rawd al-Talib* of Al-Muqri (d. 837).

Abu Shuja^{c} (d. 593) produced a brief and clear compendium in his *Al-Taqrib*. This again attracted a number of commentators including

(a) al-Sharbini (d. 977) who wrote *al-Iqna^{c}*;

(b) al-Ghazi (d. 981) who wrote *Fath al-Qarib*;

(c) Taqiuddin al-Hashani (d. 829 H)

Al-Bajuri (d. 1278) wrote glosses on the *Fath al-Qarib* based on his lectures at al-Azhar.

Taqiuddin al-Hashani (d. 829H) also wrote the *Kifayatul Akhyar*, a compendium of the law.

Zayn al-Din al-Malibari (d. 927H) wrote the *Qurrat al-Ayn* and a commentary on it, the *Fath al-Muᶜin*. A gloss on it is the *Ianat al-Talibin* of Sayyid Bakri al-Shatta (d. 1310H).

Among the well-known collections of fatwa are the *Fatwa al-Kubra* of Ibn Hajar (d. 973H) and the *Bughyat al-Mustarshidin* of Abdul Rahman Ba-Alawi al Hadrami (d. 1251H).

Jurists of the Shafii School also wrote on the differences between the schools. Among the best known works are the *Mizan al-Kubra* of al-Shaᶜrani (d. 973A.H) and the *Rahmat al-Ummah fi Ikhtilaf al-A'immah* of al-Dimashqi (d. 974H).

5. The Period of Codification on the Western Pattern of Code

This period began with the successful attempt towards codification of Islamic Law on the Western pattern of codes in the 13th century A.H under the auspices of the Ottoman rulers.

The Ottoman government constituted a committee of seven high ranking persons chaired by Ahmad Djevdet who was the Minister of Justice, with the specific object and procedures to be followed in compiling the code set forth in the committee report as follows:

> "The work of compiling religious principles to make a code containing provisions to satisfy the needs of our society was vested in us by a decree of the Sultan. We met in the office of the High Court and collected the opinions and ideas of the most eminent Hanafi jurists on the subject of Mu'amalat to suit the present conditions. The result and the code is called *Majallate Ahkame Adliye.*"[12]

Thus the *Majallat* was compiled based upon the Hanafi school of law. It did not introduce new principles of law, but codified the Shariah principles which had served as the civil law of the Ottoman Empire. The *Majallat* was submitted to the Sultan and after receiving his approval acquired an obligatory character. This was stated in the report of the committee as follows:–

> "According to Muslim doctrines, in a controversial matter the opinion held by the Sultan is the one to be obeyed; therefore, if the opinions expressed in this book are found acceptable it should be submitted to the Sultan for approval."[13]

The various parts of the *Majallat* were published and put into effect over

a period of several years. The first part containing an introductory section and a book on sale was published in 1870, the sixteenth and the last in 1877. The *Majallat* had the force of law and was applied as the civil code of the Ottoman Empire. The committee later codified the law of procedure, but it could not codify other branches of law because it was dissolved by the Sultan Abdul Hamid II in 1888.

Although the *Majallat* was the civil code of the Ottoman Empire, it did not contain all the provisions of a civil law. It consisted of an introductory section and sixteen books, each treating a different subject; sale, hire, guarantee, transfer of debt, pledges, trust and trusteeship, gifts, wrongful appropriation and destruction, interdiction, constraint and pre-emption, joint ownership, agency, settlement and release, admission, actions, evidence, and administration of oath and administration of justice by the Court. The total number of articles is 1,851.

The *Majallat* was implemented at that time in Turkey and other states which were under the sphere of influence of the Ottoman Empire with the exception of Egypt, the Arab Peninsula (now Saudi Arabia) and Yemen. It was implemented in Libya until the Italian occupation in 1923 A.D. It was implemented in other states for a few decades after the first world war. It had some influence on the "Undang-undang Johor" (the Law of Johore) a southern state in the Peninsula of Malaysia.

There is no doubt that the *Majallat* contained many sound principles which satisfactorily served the Muslim Ummah. The style and scope of the *Majallat* gave it an important place among other legal systems and it was favourably received by Western scholars too. The weakness of the *Majallat*, if there is any, lies in rigidity; since it was codified based on the Hanafi school of law, it was restricted to the opinion of the Hanafi jurists and could not make use of the opinions of the jurists of other schools. Some opinions of a certain school might be reasonably applicable in a certain period of time, in a certain place and vice-versa. Therefore, the *Majallat* was not acceptable in a state where a school of law other than the Hanafi was influential.

After the establishment of constitutional government in Turkey in 1908, when the influence of continental legal ideas in the mind of the people in power had increased and when the attitudes of Muslims towards Islam in general and Islamic Law in particular had changed, criticism was levelled at the *Majallat*. In 1920–21 a committee of experts began to prepare amendments to the *Majallat*. Although the committee's power was limited to the Islamic Law, it was not obliged to depend upon jurists of the Hanafi school for all the principles embodied in its revision. The committee altered many provisions especially those concerning the contract of sale and lease, but its proposal never came into effect. In 1923 A.D another committee was formed

with wider powers to prepare a new civil code based not only on Islamic principles, but on the modern civil law of Western countries. It had not finished its work when the Government of Turkey decided in 1926 to adopt the Swiss civil code and code of obligations. These codes replaced the *Majallat*, as well as other laws contrary to the new codes.

6. The Period of Compiling and codifying of Shariah Law based upon various opinions of various schools of law.

One of the characteristics in Islamic Law is the activity of ijtihad. The Shariah encourages Muslims to exercise their ijtihad. There is no provision in Shariah to confine them to stick to a particular school of law. For the Shariah itself is like 'an ocean without shore'. It does not subject itself to a mazhab and it is not the mazhab but it is the Shariah which grew flourishingly under its shade schools of law and legal opinions. Therefore authorities are free to select, in the process of codification, any legal opinion of any school. This was the procedure followed by the Ottoman authority in the codification of Muslim family law.

Tunisia, for instance before the protectorate of France, and even before the Ottoman government published the *Majallat*, had compiled her own law digest in 1861 called *Majallah al-Jinayat Wa al-Ahkam al-'Urfiyah*. This Tunisian *Majallah* did not confine itself to one particular school of law; it had taken from various schools, particular Maliki and Hanafi.

In the codification of the family law, the Ottoman authority had taken from various schools of law. In 1916 it published two codes which allowed the dissolution of marriages based on the application of the wife in two situations: disappearance of the husband without giving maintenance and where the husband suffered a dangerous disease. In 1917 the Ottoman government issued another code called *Qanun Huquq Al-A'ilah* (Code of Family Rights). It contained laws of marriage for Muslims, Christians and the Jews based on their laws and customs. This code was basically based on the Hanafi school but it had also taken from opinions of other schools of law. The following are few examples of opinions that had been incorporated in the *Qanun*:

1. Hanafi School held that the marriage and divorce of a person under duress and divorce of a person under the influence of liquor were valid. But other schools held that such a marriage and divorce were invalid. The *Qanun*, taking the view of other schools, stated that the marriage of a person under duress was invalid and divorce of a person under duress or under the influence of liquor was void.

2. The *Qanun* allowed the separation between the spouse because of the non reconciliation of dispute when one of them applied for it. This view was the view of Imam Malik.

In the case of a missing husband when there is no news about him whether or not he is alive, the *Qanun* followed the view of Imam Malik and others by allowing the wife to apply to court for divorce. This flexible attitude towards various schools of law represented a new phase of codification of the Shariah. In fact variety of opinions among Muslim jurists had given wider scope for the authority to choose.

The *Qanun* was not immediately implemented. In Lebanon, however later it was and is still implemented there by virtue of the law on the Reformation of the Shariah Courts of Lebanon passed in 1942.

The *Qanun* was also implemented in Syria until the Syrian Law of Personal Status was passed.

Syria and other Arab countries in codifying their Shariah Law had followed the same method by selecting opinions of various schools of law.

In Egypt, for instance, the Shariah judiciary had traditionally followed Hanafi school. But the law in 1920 and subsequent law of 1929 decided to follow also Maliki and Shafii schools and others.

Just after independence the Egyptian government decided to recodify its laws including the law of personal status. In 1936 it formed a committee to this effect and it was given the power to look at and take from all recognised schools whichever is best for the public.

The Committee had followed this procedure in its work. The Committee did not codify them in one code but in separate codes for different subjects of personal affairs. This was done to expedite the job. In 1943 it completed the *Qanun of Inheritance*, and in 1946 it issued the *law of waqaf and wills.*

This law had relied on Shafie school which considered the different domicile and different citizenship as one of the bars to inherit. It relied on Maliki which considered murder, not culpable homicide, as a bar to inherit. There are many other examples whereby the Egyptian law had taken from opinions of various schools of law.

In Jordan, there was originally issued the Family Law of 1927 and it was repealed by the law of 1951. This law was basically based on the Ottoman law of *Family Rights*, but opinions of other schools of law were also incorporated.

The Ottoman *Law of Family Rights* was also implemented in Syria up to 1953 when the Syrian *Law of Personal Affairs* was introduced. This law was also based upon opinions of various schools of law.

In Tunisia, the Tunisian *Digest of Personal Affairs* was published in 1956 and enforced in 1957. Although this *Digest* was based basically on Maliki school, but it had also taken from other schools.

7. The Period of Codification based on European Codes

Although Shariah Law was the law of the land in Muslim countries, but it was rapidly eroded. Such erosion began with the fall of Muslim countries to the Western influence and colonialism. Some Muslim countries had adopted European laws totally and some partially. All branches of law except family law of these countries had been influenced by the European laws. And even the Muslim family law seemed to have not been immune from this influence. The Iraqi *Law of Personal Status* 1956, for instance, provided that husband and wife, male and female agnates, whether they are primary or secondary heirs, would receive equal shares of inheritance. This is clearly contrary to the texts of the Quran and the opinions of all schools of law. It is in fact European. The new Iraqi *Law of Inheritance* does not rectify this anomaly but arranges the rightful heirs contrary to that of Shariah. It had met with strong criticism from Shariah Law jurists but it remains in force. It is not only Muslim Ummah who are living in the Muslim minority countries, but also Muslims who are living in the majority Muslim countries and controlling the power of the Muslim state who are forced willy nilly to obey the foreign secular laws.

The Arab Peninsula (now Saudi Arabia) did not implement the Ottoman Laws because it did not fall under the influence of Ottoman Empire. Saudi Laws were based on the Shariah Law of Hanbali school, for it was adopted as the official school of the State. The Arab Peninsula was the birthplace of Islam and the cradle of Shariah Law. It had followed Shariah Law all along and throughout it modern history. Despite all these, she had found it necessary to codify modern legal matters where there were not found exact legal provisions to deal with such matters in the Hanbali books. She had to codify laws dealing with commercial transactions, taxation, money markets, Naval, and labour, and traffic matters based on European laws. However, Islamic legal principles were taken into consideration in the process of codification of these laws.

In Egypt, after she secured her political independent in 1936, she later obtained judicial independence. In 1949, she abolished the pre-independent judicial system to introduce the new system. Meantime old laws were repealed and new laws were codified to suit the independent status of the state. She introduced laws on judicial system, on civil procedures and civil law. The Egyptian Civil Code was the first to have been introduced. Dr. Abd. Razzaq al-Sanhuri, a learned scholar both in Shariah Law and modern law, was involved actively in codifying the law. Egypt had taken the most recent theories

of European law at that time. However, she had taken also from the Shariah Law; she retained some provisions of the old law which the Egyptian jurists thought fit. It was provided in the clause 1 that in the event there is no provision anywhere in the Code the judges shall refer to the custom and the Shariah Law.

The influence of the movement for the codification of the law was felt in the Muslim countries which came under the influence of the European powers in the nineteenth century onwards. A large scale reception of European Law was effected in the Ottoman Empire by the Tanzimat Reforms of the period 1839–1876. The Commercial Code promulgated in 1850 was in part a direct translation of the French commercial Code and included provisions for the payment of interest. Under the Penal Code of 1858 which was a translation of the French Penal Code, the traditional *hadd* punishments were all abolished except that of the death penalty for apostacy. There followed a Code of Commercial Procedure in 1861 and a Code of Maritime Procedure in 1863, both of which were basically based on the French Law. To apply these Codes a new system of secular or Nizamiya Courts was established and it was because all civil jurisdiction (excepting cases of personal status) fell within the competence of these courts that the basic law of obligations was also codified between 1869 and 1876 in the compilation known as the *Majelat al-Ahkam*, the substance of which was derived from the Hanafi School of Law.

In Egypt from 1875 onwards Penal, Commercial, Maritime and even Civil Codes were promulgated basically modelled on the French Law and containing only a few provisions from the Shariah; and a system of secular courts was set up to apply them. In India although British policy had initially aimed at preserving the existing legal system, in 1862 was introduced the Penal Code, a codification of the English Criminal Law and the Code of Criminal Procedure. Later the Evidence Act and the Code of Civil Procedure was also promulgated. In the Sudan a Penal Code based on the Indian Penal Code was promulgated in 1899. In Algeria, after the completion of the French Conquest in 1850, the Muslims were subjected to the same Codes of Commercial and Civil Law as were then in force in France.

In Tunisia the qadis courts used to apply the traditional Muslim Law in matters relating to matrimonial relations but the rest of the civil and the whole of the criminal jurisdiction were in the heads of the secular tribunal of the *Quzarah*. The French reorganised the tribunal of the *Quzarah* on modern lines and in order to provide it with a civil code nominated a commission on whose behalf the late Prof. D. Santillana (died 1931, a specialist in Muslim Law and a practical lawyer) produced the draft of a Civil and Commercial Code of Tunisia in 1899 part of which was enacted as the Tunisian Code of Obligations and Contracts in 1906.

Thus in many Muslim countries only the family law remained to be administered by the Shariah Courts. Under the impact of modern conditions and the pressing need to bring the family law into line with the demands of society many changes were effected in the law as traditionally applied. In the early stages these reforms were justified on the juristic basis of the doctrine of *siyasah*, which in general terms defines the position of the political authority in relation to the Shariah Law and in particular enables him to make administrative regulations to define the jurisdiction of the courts. Such administrative regulations, for the purpose of the reforms, fall into two distinct categories. The first defines the jurisdiction of the courts in the sense that it orders them to apply one particular rule among several variant legal rules on the same question. The authority of the medieval handbooks of the Shariah Law was accepted but the political authority has been able to alter the traditionally applied law by choosing from among the authoritative opinions recorded in those handbooks and directing the courts to apply the opinion selected. For example in place of the traditionally dominant Hanafi law which confines a wife's petition for divorce to the one ground of setual impotence of her husband, the Maliki law, under which the wife's petition may be grounded on the husband's incurable and contagious disease, desertion, failure to maintain or cruelty, has been widely adopted. It is again by this process of selection that certain harsh details of the Hanafi law relating to repudiation of a wife or talaq has been whittled away. For example the rule that a repudiation pronounced in drunkenness was valid and effective was discarded in favour of the contrary opinion of the other schools. Similarly the Ottoman Law of Family Rights, 1917, followed by the later codifications in Syria and Jordan, adopted the Hanbali view that a husband who agreed in his marriage contract not to take a second wife during the continuance of the marriage would be bound by such a stipulation, so that the first wife would be entitled to a dissolution of the marriage in the event of its breach. The limits of this process of choosing the best opinion of the recognised schools of law are apparent and it was soon found necessary to go beyond the limits established by the general consensus. Doctrines of isolated jurists outside the four Sunni schools referred to in the texts as historical curiosities were selected and embodied in the modern modifications. In some cases it was necessary to 'patch up' legal rules by a procedure aptly termed *talfiq*, from a combination of the views or particular elements from the views, of different schools and jurists.

The second category of administrative regulations is that by which the sovereign defines the jurisdiction of the courts in the sense that he restricts their competence to certain cases. One of the formal devices (*hiyal*) used by the early Muslim jurists which has proved invaluable to the modern jurists is the restriction of the competence of qadis by political power. The competence of a qadi depends on the terms of his appointment and the qadis

have always been appointed each for a certain restricted sphere or to a certain tribunal. From a very early period too qadis have been appointed to hear within their respective spheres of authority certain classes of cases, for instance those concerning marriage or succession. This is the historical starting point of the doctrine of Muslim Law which declares that the Sultan or the Government is entitled to restrict the competence of the qadis with regard to place, time and subject matter. The earlier doctrine knew of restrictions with regard to persons, place and subject matter and restrictions with regard to time were added when the Ottoman Sultan Suleyman I in 1550 instructed his qadis not to hear actions which without a valid ground had not been brought for more than fifteen years, thereby introducing a uniform period of limitation. His Shaik-ul-Islam, Abdul Su'ud, who had himself suggested this measure gave legal opinions (fatwa) accordingly. Abdul Su'ud completed and consolidated a development which had started earlier. He formulated consciously and in sweeping terms the principle that the competence of the qadis derives from their appointment by the Sultan and that they are therefore bound to follow his directives in applying the Muslim Law.

A number of important reforms have been achieved by this method in the Middle East. Under traditional Hanafi law, for instance, a child born to a widow or divorcee within two years of the dissolution of her marriage was presumed legitimate, for such was the maximum period of gestation laid down in the Hanafi texts. The Egyptian Law No. 25 of 1920 declared that the courts would not entertain any disputed claim of legitimacy on behalf of a child born more than a year after the dissolution of the marriage of the child's mother and alleged father, and thus restricted jurisdiction in such matters to claims in which the factual situation involved was in accord with modern medical opinion concerning the gestation period. This procedural method has been used sparingly and only in regard to matters which are essentially matters of evidence. Thus in addition to the matter of the gestation period already mentioned, the Shariah Courts in Egypt have been forbidden to entertain suits involving disputed claims of a marriage or a repudiation which has not been registered. Such regulations though essentially dealing with matters of legal proof, have had the effect of altering substantive rights. Thus when in Egypt in 1923 officials competent to register marriages were forbidden to register marriages between parties below certain minimum prescribed ages, and the courts were precluded from entertaining claims dependent upon the existence of such a marriage, when it was disputed, this directly affected the substantive right of marriage guardians under the Muslim Law to contract their minor wards in marriage.

The first major example of reform through the method of issuing administrative regulations was provided by the Ottoman Law of Family Rights, 1917, which though it proved short lived in Turkey, was applied with minor

modifications at the end of the First World War in Syria and Lebanon and with further modifications in Jordan. Following that were the series of Egyptian reforms in the Decree Laws, No. 25 of 1920 and No. 25 of 1929 on the law of the family, Decree Law No. 78 of 1931 on the organization of the qadi's tribunals (incorporating further important modifications of the law of the family), Law No. 77 of 1943 on the law of succession, Law No. 48 of 1946 on the law of waqf, Law No. 71 of 1946 on legacies and finally an act of 1955 which abolished the qadi's tribunals (together with all denominational jurisdictions of personal status) and unified the administration of justice in the hands of the secular courts. These reforms were preceded, interspersed and followed by similar but much more piecemeal innovations in the Anglo Egyptian Sudan. Then came the Jordanian Law of Personal Status of 1951 and the Syrian Law of Personal Status of 1953.

But far reaching though some of the reforms introduced by the methods of issuing administrative regulations may have been these methods were limited in their scope and were in particular of no avail against the two institutions of the Shariah which were the concern of the modern reformer – the husband's rights of polygamy and repudiation or talaq. In order seriously to challenge the essence of these traditional rights of the husband some more extreme and incisive approach was required. Such as approach had been suggested by the great Egyptian reformer, Muhammad Abduh, as early as 1898. His argument was that the Quran may be so interpreted as to deny both the right of polygamy and the right of extra-judicial divorce by repudiation. In the first place the Quran qualifies its permission of polygamy by requiring that the husband should be financially capable of supporting a plurality of wives and that he should be able to treat them impartially. If these qualifications were interpreted not as mere moral injunctions, but as positive legal conditions precedent to the exercise of the right itself, then it would be open to a modern court, in the light of present social circumstances, to hold that these conditions were incapable of fulfilment and thus to refuse to sanction a second marriage. In the second place the Quran orders the appointment of arbitrators in the event of 'discord' between husband and wife. The pronouncement of a repudiation by the husband clearly gives rise to discord and the court can therefore assume the necessary function of arbitration. A repudiation should not therefore be effective in itself but should require at least the consent of the court. The court can consider the husband's motive and in giving its consent may do so upon such terms, particularly as to the financial provision for the divorced wife, as it sees fit.

The proposals of Muhammad Abduh were not immediately acceptable and it was not till 1953 that the first hesitant steps were taken in the actual implementation of this novel approach. The Syrian Law of Personal Status, 1953, required the consent of the qadi for a second marriage and such consent can only be given where the husband could establish financial ability to

support his wives adequately. In regard to talaq the approach was less extreme and the only provision is that which enables the court to award a repudiated wife compensation, with the maximum of one year's maintenance, where the repudiation was pronounced without just or proper motive and was injurious to the wife. Since then however further advances have been made. The Tunisian Law of Personal Status of 1956 carried the thesis of Muhammad Abduh to its logical conclusion, by prohibiting polygamy and making talaq dependent upon the consent of the court. The Moroccan Code of Personal Status, 1958, is less drastic than the Tunisian Law for it has contented itself with enunciating the principle that "if any injustice is to be feared between co-wives, polygamy is not permitted" and with providing that a wife whose husband concludes a second marriage may always (even where she has made no such stipulation or condition in the marriage contract) refer her case to the court to consider any injury which may have been caused to her. As regards talaq the Moroccan Code of Personal Status provides that every husband who takes the initiative in repudiating his wife must give her a consolatory gift (mut'ah) in proportion to his means and her circumstances. The Iraqi Code of Personal Status, 1959, provides that marriage with more than one wife is not permitted without the permission of the qadi and such permission will not be given except on the following two conditions (i) that the husband is financially competent to support more than one wife and (ii) that there is some lawful benefit involved. It is further provided that if any failure of equal treatment between co-wives is feared, then polygamy is not permitted and the determination of this matter is left to the discretion of the qadi.

Parallel with the tendency to modify the existing doctrine of the traditional family law, there has been a trend in the Arab countires of the Near East to create a modern law of contracts and obligations on the foundations of the basic principles of Muslim Law and jurisprudence, using the general principles which were elaborated by the early Muslim jurists. The Muslim jurists in the Near East tried to set forth the formal principles embodied in the traditional Muslim Law and jurisprudence, to compare them with the corresponding principles in Roman and in modern European Law and to present the Muslim Law of contract and obligations in the categories of modern legal thought. In Egypt three Committees were formed for the purpose of revising the Egyptian Civil Code on Islamic lines, the first in 1936, the second in 1938 and the third later in the same year under the Chairmanship of Dr. Abdul Razak al-Sanhuri. The result of the task of these Committees was the Egyptian Civil Code of 1949. The first article of the Code lays down that "in the absence of applicable legal provisions, the Judge shall pass judgement in accordance with the principles of Islamic Law".

Similar Civil Codes were subsequently issued in Syria in the Syrian Civil

Code of 1949, in Iraq in the Iraqi Civil Code of 1949 and in Libya in the Libyan Civil Code of 1954. Jordan too has recently issued a new Civil Code.

However the process of adopting Western Laws was continued. Turkey which had abandoned the Muslim Law in favour of a Civil Code based on the Swiss Civil Code promulgated a Criminal Code based on Italian Law in 1926 and a Code of Criminal Procedure based on the German Law in 1928. Italian Law was also adopted by Egypt in her Criminal Procedure Code of 1937 and was the predominant influence in the Lebanese Criminal Code while Italian Law and French Law were amalgamated in the Criminal Procedure of Libya.

The Moroccan Criminal Code of 1954 adopted the French Law. In Northern Nigeria the Penal Code was promulgated in 1959 and this was followed by the Code of Criminal Procedure in 1960; both codes were based on the Sudanese Codes and were thus descended from the English-Indian Law The law of Civil transactions and obligations has been westernised in Tunisia in the Code of Commerce (1960), Civil and Commercial Law (1960) and Maritime Commerce (1962).

In the Indian Sub-Continent the interaction of English and Muslim Law had moulded the Muslim Law into a unique form. When the East India Company decided in 1772 to claim sovereign rights and the power of jurisdiction outside its trading factories, the preservation of the institutions of Muslim Law concerning the law of the family, succession and other matters sanctioned by religion, was guaranteed to the Muslims. According to strict theory the whole of Muslim Law, including the rest of civil law, penal law and the law of evidence ought to be regarded as sanctioned by religion but no significant voice of dissent was raised when Muslim Law in these fields was superseded by codes of British inspiration in the course of the 19th century. This was a very important departure for it showed that the idea of secular law had for the first time been accepted by the leaders of an important Muslim community. In 1772 too British judges replaced the qadis in British India. The judges were originally assisted by legal officers or muftis chosen from among Muslim scholars whose duty it was to state the correct doctrine of the Muslim Law for the benefit of the judge but in time the judges came in the Muslim parts of India to be recruited from the Muslims themselves. These judges were trained in the English Law and English concepts such as the doctrine of precedent and general principles of English common law and equity infiltrated more and more into Muslim Law as applied in India. Muslim Law in India has grown in this manner into an independent legal system, in many ways different from pure Muslim Law. Out of this law, a new Anglo-Muhammadan jurisprudence has grown, a jurisprudence whose aim is not to evaluate a foreign body of legal raw material from the Muslim angle, but to apply, inspired by modern English jurisprudence, autonomous juridical principles to Anglo-Muhammadan law. The application of the law of the authoriatative

Hanafi texts was subject to the twin influences of the doctrine of precedent and overriding legislation, both of which were strictly foreign to the pure Shariah doctrine. Thus while the Middle Eastern countries have chosen to apply the Maliki law concerning the possible grounds of a wife's petition for dissolution of marriage, substantially the same reforms were effected in India by the direct and overriding legislation of the Dissolution of Muslim Marriages Act, 1939. Similarly while the Middle Eastern countries had used the procedural device of denying judicial relief, the Indian Evidence Act, 1872, superseded the traditional Hanafi law concerning the maximum period of gestation by adopting the English Law relating to presumptions of legitimacy; while the Child Marriage Restraint Act, 1929, imposed penalties in cases of child marriage (that is in the case of boys under eighteen years and girls under fourteen years) upon the male party if adult, the celebrant of the marriage and the guardian of the child concerned. Finally the practice of the courts in enforcing stipulations in marriage contracts, if they were "reasonable and not contrary to the provisions or policy of the law", would appear to be a case of judgemade law stemming from English influence.

The Muslim Family Laws Ordinance, 1961, of Pakistan, continues the particular tradition of Anglo-Muhammadan Law. It provides for the registration of marriages and for the setting of Arbitration Councils to deal with second marriages, repudiations and claims for maintenance. A second marriage during the subsistence of an existing marriage is prohibited without the written permission of the Arbitration Council. A repudiation or talak will not be effective until ninety days after delivery of notice to the Chairman of the Arbitration Council or where the repudiated wife is pregnant until delivery of the child, whichever period is longer. During such period the Arbitration Council is empowered to take all steps necessary to bring about reconciliation between the parties. The Arbitration Council is given power in case of disputes to determine what maintenance is adequate for the wife or wives and issue a certificate to that effect.

In Pakistan the Constitution provides for the setting of an Advisory Council of Islamic Ideology which was required under the Constitution –

(a) to make recommendations to Parliament and the Provincial Assemblies as to the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Quran and Sunnah;

(b) to advise the House, a Provincial Assembly, the President or a Governor on any question referred to the Council as to whether a proposed law is or is not repugnant to the Injunctions of Islam;

(c) to make recommendations as to the measures for bringing existing laws into conformity with the Injunctions of Islam and the stages by which such measures should be brought into effect; and

(d) to compile in a suitable form, for the guidance of parliament and the Provincial Assemblies, such injunctions of Islam as can be given legislative effect.

The Advisory Council of Islamic Ideology working under 1962 Constitution and the Council of Islamic Ideology set up under 1973 Constitution, before the present regime took over in July, 1977, made a number of recommendations for Islamization of laws and the Society, but the Government perhaps, lacked in sincerity of purpose and hence no headway in the achievement of the objectives for which Pakistan came into being could be made. When General Muhammad Zia-ul-Haq took over he showed keen interest in the working of the Council to accelerate the process of Islamization and assured full cooperation of his Government. In the appointment of the members of the Council when constituted in September, 1977 and reconstituted in May, 1981 special care was taken that it consists of proper and capable persons worthy of accomplishing the job of process of Islamization within the framework of Article 230 of the Constitution of 1973.

Through a Constitutional amendment made vide P.O No. 16 of 1980, the number of members of the Council has been increased from 15 to 20. Besides, the President has also approved five full time members to be appointed from amongst existing members of the Council. Further, in order to increase the efficiency of working of the Council it has been conferred autonomy within the permissible limits in the discharge of its constitutional obligations.

The President of Pakistan has also on the recommendation of the Council of Islamic Ideology and in implementation of his earlier declaration that all laws of the country that are repugnant to the Holy Quran and the Sunnah shall be struck down as null and void by the Superior Courts, promulgated on 2nd December, 1978, a Superior Courts Shariat Benches Order to take effect on the 12th of Rabi-ul-Awwal, 1399, A.H/10th February 1979, whereby five Shariat Benches were constituted in the country ie. each High Court to have a Shariat Bench at Lahore, Peshawar, Karachi and Quetta, and an Appellate Shariat Bench in the Supreme Court at Rawalpindi Islamabad. These Shariat Benches were empowered to strike down the existing and future laws, with the exception of the Constitution, Muslim Personal Law, any law relating to the procedure of any Court or tribunal or, until the expiration of three years from the commencement of the Constitution (Amendment) Order, 1979, any fiscal law or any law relating to the collection of taxes and fees or banking or insurance practice and procedure, that are repugnant to the injunctions of Islam as null and void. The Presi-

dential Order contemplated conferring exclusive jurisdiction on the Shariat Benches constituted under the Order, not only to declare existing as well as future laws, with the above exceptions, to be Islamic or un-Islamic; but, one step further, in the event of conclusion that it is not, to give a verdict as to what extent it was repugnant to Shariat and how best it can be reshaped in order to articulate it, as comprehensively as practicable, with the relevant injunctions of the Holy Quran and Sunnah, which the Government will be bound to implement. Later, on 27th May, 1980, the four Shariat Benches were replaced by establishing a Federal Shariat Court at the Capital of Pakistan, Islamabad, recently re-constituted in May, 1981 as that composed of five Judges and three traditional 'Ulama, well-versed in Islamic Law.

Recently the Government has increased the powers of the Federal Shariat Court. With the new powers, the Federal Shariat Court has been authorised suo motu to take up examination of any law over which it has jurisdiction and recommend amendments in the light of the Holy Quran and Sunnah. Moreover, the laws laid down by the Federal Shariat Court will be binding on the High Courts and the subordinate courts. Further the Federal Shariat Court has been conferred jurisdiction to hear appeals where an accused has been punished as a tazir under Hudud Laws and sentenced to imprisonment exceeding two years. Further the person acquitted by the lower court but sentenced to death or life imprisonment by the Federal Shariah Court may go on appeal before the Supreme Court.

The President of Pakistan again on the recommendation of the Council of Islamic Ideology has promulgated five Ordinances on the 12th Rabi-ul-Awwal, 1399 A.H, 10th February, 1979 amending the existing Pakistan Penal Code relating to certain offences affecting moveable property of the people and moral and social order of the society, so as to bring it in conformity with the Holy Quran and the Sunnah. By these Ordinances the existing laws relating to the offences of theft, robbery and dacoity, adultery, false accusation of adultery and wine-drinking were replaced by the Islamic provisions of Hudud.

(i) In case of theft, the punishment of imprisonment or fine, or both, as provided in the existing Pakistan Penal Code for such offence was substituted by the amputation of the right hand of the offender from the joint of the wrist by a surgeon, causing least pain, and with utmost care. This *Hadd* punishment, could be imposed provided the requisite conditions relating to the quantum of the property stolen out of the safe and protected custody or place be proved by confession or the evidence in court of at least two truthful persons free from major sins, after full scrutiny and proper cross-examination and to the full satisfaction of the trial Court are fulfilled, on the com-

plaint of the person whose property has been stolen. However, hadd is not imposed in cases where the property stolen falls within the exceptions, such as wild grass, fish, bird, dog, pig, intoxicants, musical instruments, perishable food-stuff (except where there is an arrangement for preserving the latter for a long period), or where the thief has a share in the stolen property, provided that the value of stolen property after the deduction of amount of his share is less than the fixed quantum (Nisab). Also where the requisite condition for theft relating to quantum of property stolen or the number of witnesses are not fulfilled, or the property stolen is returned by the thief before the owner's filing his complaint, the Court will not award the Hadd punishment.

The punishment of amputation of hand will not be imposed in cases when the thief is one of the progenitors or progeny of the owner of the property, or is the husband or wife, or when the guest steals from the home of the host, or when the servant or employee has committed a theft in his master's or employer's house where he is allowed free access, or when the creditor steals the debtor's property, provided that the value of stolen property after the deduction of the amount due to him is less than the fixed quantum (Nisab). The Hadd punishment of amputation of hand for theft will also not be awarded when the offender is entirely without the left hand or left thumb, or at least two fingers of the left hand or the right foot, or any of these is entirely unserviceable.

(ii) In case of robbery, liable to the hadd punishment the right hand from the wrist and left foot from the ankle of the offender shall be amputated by a surgeon.

If the offender commits murder while committing robbery, he shall be sentenced to death which shall not be remitted even if the murderer is pardoned by the heirs of the murdered person.

(iii) Section 497 of the Pakistan Penal Code dealing with the offence of adultery provided certain exceptions to the offence in as much as if the adultery is with the consent or connivance of the husband, no offence of adultery was deemed to have been committed in the eye of law. The wife, under the prevailing law, was also not to be punished as abettor. Islamic Law knows no such exception. It takes a very serious view of fornication and adultery because they damage the social norms and defeat the moral order of the human society which Islam wants to preserve for human dignity.

Thus, in terms of the Holy Quran and the Sunnah, the provision of law relating to adultery were replaced so that the woman and the man guilty of adultery will be flogged, each of them with hundred stripes, if unmarried. And if they are married they shall be stoned to death. The law, however, recognises duress and coercion as an exception to punishment in case of fornication and adultery and strict proof is required according to the Shariah requirements.

(iv) Drinking of wine (ie. all alcoholic drinks) was not a crime at all under the Pakistan Penal Code. In 1977, however, the drinking and selling of wine by Muslims was banned in Pakistan and the sentence of imprisonment of six months or a fine of Rs. 5000, or both, was provided in that law. But these provisions of law were replaced by Hadd punishment of eighty (80) stripes on which there is an ijma, consensus of the revered Companions of the Holy Prophet ever since the period of the second Caliph 'Umar.

It was provided that no Hadd punishment awarded by the Court will be executed or enforced unless it is confirmed by the Federal Shariat Court.

The Council of Islamic Ideology has also recommended a law on Qisas and Diyat, which has not yet been enacted. The Council also produced the draft of an Islamic Law of Evidence 1982 which departed from the Evidence Act and based the law of evidence strictly in accordance with the Quran and Sunnah. The draft Ordinance has taken a number of provisions from the Islamic juristic texts including the Majallah al-Ahkam. This draft has not been accepted in Pakistan and instead the Qanun-e-Shadat of 1984 based on the Evidence Act has been enacted.

In the economic sphere too efforts are being made to prepare a framework of Islamic Economic Order and the Government machinery is actively engaged in evolving an economic system based on Islamic injunctions, including interest-free banking. So is the case with texation system. In this respect, the President, as a first step to bring changes in the present economic system and tax structure, promulgated an Order for the levy of Zakat and 'Ushr as ordained in Article 31 of the Pakistan Constitution of 1973, making changes in the existing provision of Law relating to Wealth Tax, Income tax and Land Revenue. It has been provided that the amount of zakat paid through the authorities concerned will be deducted from the income of the assessee as an admissible expenditure and so will be the case with the wealth declared for the purpose of Zakat so that it will be exempted from the Wealth Tax. By this Order realistic approach in levying Zakat and 'Ushr and a practicable scheme for the collection and disbursement of Zakat was devised.

The Zakat and 'Ushr Ordinance, on the recommendations of the Council of Islamic Ideology, has been promulgated on 20th of June, 1980 whereby the Government has been empowered to make deduction at source at the rate of 2–1/2% from the Bank Deposits in Saving Accounts, Time-deposit Accounts, Fixed Deposit Accounts and the shares held in National Investment Trust, Investment Corporation of Pakistan and other companies of which the majority of shares are owned by the Muslims and also from Provident Funds, Insurance Policies and Annuities etc. The amount so recovered during the year 1980–81 and 1981–82 as Zakat in the sum of Rs. 150 crores (1500 million of Rupees) was spent on poor and needy people of the society through 32000 Local Zakat Committees. However, some people objected to the method of recovery of Zakat by the Government with the result that the Ordinance was amended on 29–10–1980, so as to make it acceptable to all sections of the Muslim society of Pakistan.

With a view to give relief to tax-payers, it has been provided in the Zakat and 'Ushr Ordinance XVIII of 1980 that, notwithstanding anything contained in any other law for the time being in force –

(a) in determining the tax liability of an assessee for an assessment year –

(i) under the Income-tax Ordinance, 1979, his taxable Income shall be reduced by the amount paid by him to a Zakat Fund during the previous year relevant to that assessment year; and

(ii) under the Wealth-tax Act, 1963, his assets in respect of which Zakat or contribution in lieu thereof, has been deducted at source during the year relevant to that assessment year shall be excluded from his taxable income; and

(b) land-revenue and development shall not be levied on land on the produce of which 'Ushr or contribution in lieu thereof, has been charged on compulsory basis.

The Council of Islamic Ideology in consultation with a penal of Experts in Economics and Banking, prepared a detailed report on the elimination of interest from the country's economy. The Government started implementing certain recommendations of the Council in as much as loans for house-building purposes were granted with effect from 1st of July, 1979 free of interest on profit and loss sharing basis. A number of financial institutions for example, National Investment Trust and Investment Corporation of Pakistan have been functioning on the basis of profit and loss sharing. The Council recommended a three-phased programme for the elimination of interest from the country's economy. Within the frame-work of the suggested time schedule, the interest will be eliminated at least from domestic transactions and the

commercial banks and other financial institutions have made advances on profit and loss sharing basis by the end of December, 1981. As far as the Government borrowing substantial amounts from various Governments and international financial institutions to finance its economy and development projects, the Council recommended that for the time being, it may continue but efforts should be made to foster greater economic cooperation among the Muslim countries so as to permit movement of capital on the basis of profit and loss sharing and other non-interest basis. The Council believes that with such increase in economic cooperation among Muslim countries, it is not unlikely that with the passage of time, other aid-giving countries and international financial institutions may also begin to deal with Pakistan on a basis compatible with Shariah. The Council however emphasised in its Report that efforts should be made to reduce dependence on foreign aid in general and interest bearing foreign assistance in particular.

From January 1, 1981, the Government has started interest-free counters at all the 7000 branches of the five Nationalized Commercial banks of Pakistan which has received a wide welcome from the public.

A further step has since been taken for the complete elimination of interest by the enactment of the Banking and Financial Services (Admendment of laws) Ordinance, 1984 and the Banking Tribunals Ordinance, 1984.

In considering the need for codification of the Islamic laws we must remember that there is a need for those who undertake the work of such codification to be trained and equipped for the task. In this regard we might ponder on the views of the late Abdul A'la Maududi in his paper on 'Islamic Law and its introduction to Pakistan.' He said – I have already mentioned that during the past centuries the various Muslim states which flourished over a large part of the then civilized world, had Islamic Fiqh as their 'law of the land'. Muslims of those days were not "barbarians". Rather, they had a highly advanced culture and their scholars of religious law had applied Islamic principles to all the problems of their civilization. Some of these experts of Islamic Fiqh held important positions as magistrates, judges and chief justices and their judgements, and decrees have produced a large volume of legal precedents. Indeed, these experts have made prodigious contributions to every branch of law. Their works evoke one's highest admiration not only when they discuss problems of Civil and Criminal Law but also when they deal with the problems of Constitutional and International Law. A persual of their writings and judgements gives us an idea of their deep insight in, and their intelligent and masterly grasp of, all these problems. What is really needed now is that a body of scholars should be deputed to take a detailed stock of all the writings left by our ancestors and to re-edit them in the form of modern books of law.

There are some books which must necessarily be translated into other languages particularly English:

1. The three books on *Ahkamul-Quran* (the Legal Injunctions of the Quran) by:–

(i) Al-Jassas;

(ii) Ibn al-'Arabi and

(iii) Al-Qurtubi

Their study will train our students to deduce injunctions and laws from the Quran. These books present a commentary on and an explanation of all the Quranic verses relating to legal commandments and also contain all the relevant details from ahadith (Prophet's Traditions) and the sayings and practices of the Companions of the Holy Prophet (s.a.w). Besides these they give us the various deductions made by the great jurists of the past along with their arguments in favour of those deductions.

2. Next to those three books on Quranic injunctions comes the great treasure of the commentaries on the books of Hadith. In these books, apart from commandments and laws, we find the best material on legal precedents and their explanations. From this treasure the following books should particularly be translated:

(i) On al-Bukhari: Aini and *Fath al-Bari*;

(ii) On Muslim: Nawawi and *Fath al-Muin*;

(iii) On Abu Daud: *Aunul-Ma'bud* and *Badhl al-Majhud*;

(iv) On Muwatta: Shah Waliullah's *Musawwa* and *Musaffa, and Aujaz al-Masalik* by a contemporary Indian scholar;

(v) On Muntaqa al-Akhbar: Shaukani's *Nail al-Awtar*;

(vi) On Mishkat: *Att'aliq-us-Sahih*;

(vii) On 'Ilm-al-Anathar: *Ma'ani al-Aatar* by Imam Tahawi.

3. After this we should turn to the fundamental books of Fiqh from which the following must particularly be translated:

(i) On Hanafi Fiqh:
Al-Mabsut and *Sharh al-Siyar al-Kabir* by Imam Sarakhsi;
Bada'i al-Sana'i by Kashani;
Ibn Human's *Fath al-Qadir*;
Hidayah and
Fatawa Alamgiri;

(ii) On Shafii Fiqh:
Kitab al-Umm;

Sharh al-Muhadhdhab and
Mughni al-Muhtaj;

(iii) On Maliki Fiqh:
Al-Mudawwanah and any other important book that might be selected by scholars;

(iv) On Hanbali Fiqh:
Al-Mughni by Ibn Qudamah;

(v) On Zahiri Fiqh;
Al-Muhalla by Ibn Hazm;

(vi) On Madhahib-e-Arbaah (the Four Schools of Thought):
Bidayat al-Mujtahid by Ibn Rushd and
Al-Fiqh-fil-Madhahib al-Arba'ah compiled by Egyptian scholars;

(vii) On certain special problems;
Kitab al-Kharaj by Imam Abu Yusuf;
Al-Kharaj by Yahya Ibn Adam;
Kitab al-Amwal by Abu 'Ubaid al-Qasim;
Ahkam al-Waqf by Hilal Ibn Yahya and
Ahkam al-Muwarith by Dimyati.

4. We must also translate some important books on Jurisprudence and on the philosophy of law, so that our legal experts may acquire a deep insight into and gain a correct understanding of the spirit of Islamic Fiqh. In my opinion the following books should be selected for this purpose:

(i) *Usul al-Ahkam* by Ibn Hazm;

(ii) *Al-Ihkam li-Usul al-Ahkam* by Amidi;

(iii) *Usul al-Fiqh* by Khadari;

(iv) *Al-Muwafaqat* by Imam Shatibi;

(v) *I'lam al-Muwaqqi'in* by Ibn Al-Qayyim;

(vi) *Hujjat Allah al-Balighah* by Shah Waliulluh.

As I have already said, our need is not only to translate these books but also to rearrange their contents on the pattern of modern books of law. New headings will have to be set, scattered discussions on legal problems will have to be gathered and collected under relevant headings, and indices will have to be prepared. Unless we take pains to effect these improvements these books will not become fully useful for our present day needs. The method of compiling a book in olden days was quite different from that of the present age. Moreover, in those days such detailed classifications of law as exist today had not yet come into existence. For instance our jurists had no separate branch of Constitutional Law or International Law. No doubt, they dealt with these problems but under headings like Jihad (Laws of War and Peace),

Kharaj (Revenue and Finance), Marriage and Inheritance. Likewise, they had no separate branch of Criminal Law. They dealt with such problems under the headings of Hudud (Punishments), Jaraim (Crimes) and Diyat (fine money or blood money). They were used to discuss a subject at different places, therefore material on a certain subject is often scattered under so many headings. They also did not discuss Economics and Finance as separate subjects. They severally dealt with these subjects under headings like: 'the book of sales', 'the book of land cultivation' etc. In the same way, they did not use modern terms like Law of Evidence, Civil Procedure Code, Penal Code, Criminal Procedure Code etc. Questions relating to these aspects of law were discussed by them under headings like 'the etiquette for the judges', 'the book of claims', 'the book of agreements' and so on. Now if these books are merely translated they cannot be of much use to us. It is, therefore, imperative, that persons having knowledge of modern legal systems should work on all such materials and rearrange them to fulfill the modern requirements. If this is considered to be a very laborious and lengthy task, we should at least prepare complete and exhaustive indices of all these works and should also compile detailed bibliographies for the guidance of a student of law. These should cover all the branches of modern law so that one may not experience any difficulty in finding out material on a required topic.

The next important step in this connection is to appoint a body of Islamic scholars and experts of modern legal thought who should be entrusted with the task of codification of the Islamic Law section and clausewise according to the modern patterns. In my discourse on the Islamic Law, I have already explained at length that, from academic and Islamic points of view, it is not binding to accept any and every saying or expression of opinion by an authority on Fiqh, or anything and everything written in a book of Fiqh. This is so because everything contained in a book of Fiqh does not constitute Islamic Law. It is only the following four things that constitute Islamic Law –

(i) An explicit commandment of God laid down in the Quran; or

(ii) An explanation or elucidation of a Quranic commandment or an explicit order or prohibition from the Holy Prophet (s.a.w); or

(iii) An interpretation, inference, qiyas (analogy), ijtihad, or istehsan (juristic preference) on which there has been a consensus (ijma') of the ummah; or it may be a majority decision of the 'ulama' which has been accepted by an overwhelming majority of our own people; or

(iv) An ijma or a majority decision of the nature discussed in (iii) above arrived at by our own men of learning and authority.

My proposal is that a body of experts of Islamic Laws should compile the first three categories of laws and commandments into a Code. Additions to it will continue to be made as fresh laws are framed by general consent or majority decision. If and when such an exhaustive code has been compiled, it will be the basic book of law and all the current books of Fiqh will serve as commentaries for this book. Thus the enforcement of Islamic Law by our courts and its teaching in our Law Colleges will be greatly facilitated."

When we consider the digests of Islamic Laws in the textbooks produced by the Muslim jurists and the legislation in the Muslim States we should remember that such laws are made by human beings and do not have the status of the Holy Quran and the Sunnah which are based on revelation from Allah. The efforts made should be appreciated as the exercise of Ijtihad to formulate a law in line with the teachings of the Holy Quran and the Sunnah but they should not be accepted as final and must be weighed in the light of the ultimate sources of the Islamic Law. If found wanting they can be amended or repealed. In this respect it would seem to be the task of the jurists and the judges in the courts to examine these laws from time to time in their study, research or decisions and point out the shortcomings of the law, if such laws should in any way deviate from the requirements of the Holy Quran and the Sunnah.

In his last Sermon the Holy Prophet (s.a.w) said

"I am leaving you with the Book of God and the Sunnah of His Prophet. If you follow them you will never go astray".

The Holy Quran too reminds us to the effect –

"O you who believe! Obey God and obey the Prophet and those charged with authority among you. If you differ in anything among yourselves refer it to God and His Prophet, if you do believe in God and the Last Day. That is best and most suitable for final determination".
(Surah An-Nisa'a (4): 59)

1. *Mukhtasar Kanzil' Ummal*, Vol. 2, p. 48.
2. *Musnad Ahmad*, Vol. 2, p. 40.
3. Al-Kattaniy, *Kitab Taratib al-Idariyyah*, Vol. II, p. 384
4. Salih al-Jaraiiy, *Tibyan fi Mabahith al-Qur'an*, p. 44
5. For instance the case of waiting period (*'iddah*) of the widows. It has been provided in the Qur'an that, "For those who carry (life within their wombs), their period is until they deliver their burdens, "(Surah 64:4) and if any of you die and leave widows behind they shall wait concerning themselves four months and ten days." (Surah 2: 234). The two texts could be reconciled by holding that the *'iddah* period for a pregnant widow whose husband is dead is the longest of two: i.e. delivery or four months and ten days, as the case may be.
6. M. Hamidullah, *Sahifah Hamam bin Munabbih*, p. 9.
7. Khattabiy, *Jami' Bayan al-'Ilm*, Vol. 1, p. 71.

8. M. Hamidullah, *op. cit.*, p. 9.
9. M. Hamidullah, *The First Written Constitution of the World.*
10. Ibn Abd. al-Bar, *Al-Istiaab*, Vol. II, p. 437.
11. A.A. Islahi, *Islamic Law: Concept and Codification*, p. 30.
12. S.S. Omar, "The Majallah" in M. Khadduri and H.J. Liebesny, *Law in the Middle East*, Vol. I, p. 295.
13. Ibid. p. 295.

THE SHARIAH AND CODIFICATION: MALAYSIA EXPERIENCE

by
Professor Ahmad Ibrahim

Although the basis of the Islamic Law is to be found in the Holy Quran and the Hadith, which lay down the basic principles of the law, there were attempts to codify the law in the form of law codes as a guide to the qadis and scholars. The most ambitious of these attempts was in the Hanafi school under the quidance of Imam Abu Hanifah. He appointed a consultative assembly for the codification of the law at Kufah. Headed by the Imam himself it comprised forty eminent experts of Fiqh, tafsir, hadith, grammar, language and other branches of learning. In this assembly individual opinions were discussed and resolved in the spirit of *Shura* and a set of rules drafted to make the law and jurisprudence coherent, certain and definite. Eventually a code on Islamic Law was prepared but it is a pity that the complete code has not come down to us. In the Maliki school, the Muwatta of Imam Malik was compiled at the initiation of Mansur, the Abbasid Caliph. The Caliph wanted to introduce it as a uniform civil code for Muslims and when he died his successor the Caliph Harun al-Rashid also desired to implement the Muwatta as a uniform code for all Muslim territories. The official use of the Muwatta was however resisted by Imam Malik himself who said "the Companions of the Prophet (s.a.w) went here and there carrying with them what they had heard and seen during the lifetime of the Prophet. They also carried with them different opinions on many details. Difference of opinion among Muslim scholars is but a Divine Mercy for this nation. Each of them is following what he considers to be right and each of them has his argument and all of them are sincerely striving in the way of God". In the Shafei school too there were attempts at codification of the law like the Minhaj-et-Talibin of Imam Nawawi and the Taqrib of Kadi Abu Shuja'. The codes were not laws enacted by the legislature but were authoritative statements of the law by the jurists to be used as guides by qadis and scholars.

It is convenient to deal with the codification of the Islamic Law in Malaysia in three phases – the early Muslim – Malay period, the period of British Colonial rule and the period since independence. In the early Muslim – Malay period a number of legal digests and translations from legal digests were produced. The earliest codification of laws is the Trengganu inscription, written in Jawi and containing a short list of ten rules, breach of which was punished. The date of the inscription has been suggested to be Friday 4th Rejab 702 AH/February 1303 A.D.

There were also a number of legal digests, the most significant of them being the Risalah Hukum Kanun or the Malacca Digest. As it has come down to use the Digest consist of four main elements (a) the Malacca Law

proper; (b) the maritime law; (c) a Muslim family law; (d) a Muslim Law of obligations and two additions (e) the laws of the State and (f) the Johore laws. The first portion, the Malacca Law proper, sets out the Kanun or customary law stated to be the gift of the Sultan "the first ruler to embrace Islam and to codify royal customs and rules – who laid down the laws and rules of the land". The Malay customary rules set out are often supplemented by the Islamic Law. As an example the penalty for illegal sexual intercourse is given as a fine and also a forced marriage and a wedding gift. In addition it is stated that if the man is a *muhsan* he shall be stoned to death. Again the penalty for a false accusation of unlawful intercourse is a fine at local law but a flogging according to God's law. The second portion sets out the customary maritime law of the Malacca. The third portion deals with the Muslim Marriage Law and sets out a simplified version of the Shafei rules. It sets out the regulations governing the necessity for the function of the wali. The wali of a virgin is, in order of preference, a father, grandfather, and brother. It is not necessary that a virgin's consent to her marriage be obtained, but it is recommended (sunat) to ask for it. A father or a paternal grandfather can marry off his virgin grandaugther without her consent because he is her wali mujbir, i.e. guardian with the power of coercion, but in the case of a young widow her consent is necessary. An unmarried girl who is not a virgin (thayyib) and is under age connot be married until she comes of age. The state of majority is dependent upon three matters: (1) having reached the age of fifteen (for both sexes), (2) having monthly periods in the case of girls, or (3) ejaculation at night in the case of boys.

A judge may act as a guardian (a) when there are no wali akrab (close relative) (b) when the guardian is absent from the country at least a day and a night's journey, and (c) when the girl has no relatives. If the above conditions are fulfilled, then the marriage will take place 'according to the rules in God's book.'

The section then deals with the formalities of marriage: there must be offer (ijab) and acceptance (qabul). If the woman's father is fasik (sinner) ie. guilty of unlawful intercourse, drinking alcohol, or of similar offences forbidden by religion, he is not permitted to act as her guardian, nor is a brother who is fasik. In this case she must have a judge for her guardian.

There is a short passage dealing with marriage witnesses. The chapter specifies four witnesses, although two are sufficient; less than two invalidates the marriage. To serve as a witness a man must be of age, sane, of good character, pious, and a free man. Lack of piety or the status of slavery disqualifies a witness. Similarly, a woman's capacity to act as a witness is confined to testimony concerning (a) menstruation and (b) pregnancy. With regard to a marriage contract a woman, a slave, or a person who is fasik cannot be a witness.

There is a long section concerned with khiyar, the rules governing rescission of marriage, that is the conditions under which it is voidable. The chapter lists five defects: (1) lunacy, (2) elephantiasis and leprosy (applying to both male and female) (3) abnormal fleshy growth in the vagina (ratak) (4) abnormal growth of bone in the womb (karan) and finally (5) castration and impotence on the part of the man. If any of these impediments are discovered only after marriage the contract of marriage can be annulled (faskh), although in the case of impotence the wife must wait for a year. Alternatively, either party can consent to accept the other with the impediment and then the question of khiyar does not arise.

The next section deals with talak, and again the rules stated are a summary of the Islamic position. Talak is of two types; the talak ba'in three-fold repudiation, is irrevocable and results in divorce. It the husband wishes to take his wife back, she must first be married to a man other than her former husband who then divorces her, and after the iddah (one hundred days) she is free to remarry her first husband. The second, talak raj'i, is a single or twofold repudiation and can be revoked.

It is stated that a man may marry a fire-worshipper or an unbeliever who has been converted to Islam. It is not permissible to marry an idolatress, but a man may marry a woman who belongs to 'possessors of the sacred Books'.

The fourth section deals with the Muslim law of obligations and procedure. The section begins by repeating the prohibition against the taking of interest. It is not valid to trade with one who is insane, not of age or drunk. The section also provides that the article for trade must be pure (i.e. not alcohol, dogs, pigs). A sale is constituted by respective statements: 'I sell you this thing; I buy this thing'. The seller must be able to deliver and the property must be his own or that of which he is rightfully in possession, for example as an agent. The article sold must match its description, and all articles should be inspected before the purchase is completed. The chapter ends by providing that it is invalid to exchange a like article for a like, e.g. gold for gold. In the sale of a house that which is movable is not included in the sale.

A sale, donation, or enfranchisement made by a bankrupt remains suspended. There is a long discussion on the principle of amicable settlement (sulh) or compromise. These settlements are arrived at by the way of agreement, and the section specifies proportions of prices or debts to be paid, depending upon the nature of the transaction and of the property involved. The rules on standing surety for debt also repeat the substance of Islamic provisions, for example the question of future obligation and debts due on a certain date. The rules on borrowing provide that a borrower must replace an article lost, even though without negligence on his part. There is a chapter on *mudarabah* and *amanah*.

The section reproduces the Islamic rules on apostasy and the testimony of witnesses respectively. An apostate may be killed but he is not to be buried with Islamic rites nor in a Muslim graveyard. Similarly, a person who refuses to perform or believe in the obligatory prayer may also be killed but he may be buried like a Muslim. The rules governing the testimony of witnesses are given; a witness to qualify as such must know what is lawful and what is forbidden, what is commendable and what is obligatory, what is wrong and what is right, and what is good and what is bad. A witness must be a Muslim, of age, sane, of good character, avoiding sins against the law. The section then goes on to detail the number and quality of witnesses needed to prove a number of different offences, Two male witnesses are needed in cases involving a hadd punishment arising in cases such as drinking, murder, apostasy, marriage, divorce, evidence of being a Muslim, trust, agency, and legacy. Evidence cannot be established unless there are two male witnesses or one male witness and two female witnesses. Evidence cannot be established on the testimony of female witnesses, however great their number, except in such matters as child-birth and virginity, and 'those womanly defects which are normally known only to women'.

There is a long section concerning the general process of legal action and the taking of oaths. The section begins with the hadith of the Prophet, 'The burden of proof lies upon the one who makes the allegation and the oath belongs to him who denies'. Then follow rules specifying the procedure for claiming various types of goods (eg. gold and precious stones), the position on witnesses, and claims against insane persons, minors and slaves. There are two sorts of oath which can be taken: the greater is taken in the mosque and is applicable in such cases as marriage, divorce, reconciliation, matters concerning property including slaves, and valuable articles. The lesser oath is applied in cases not involving a hadd punishment or when the matter is of small value. It consists of a simple swearing: 'By God Most High I have (not) done . . . .' The oath-taking is only appropriate in cases of violation of the rights of a human being (hak manusia). Such a form of testimony concerning a violation of God's commands (hak Allah) is not acceptable. A witness who lies suffers the ta'zir punishment and the judge has discretion as to punishment. Decisions made by the judge are based upon the evidence of witnesses. A judge is forbidden to accept gifts from any person, and he must pronounce his judgment when in a proper state to do so, i.e. neither hot nor cold, tired or hungry, angry or sleepy.

There is a section which deals with killing: any person who is sane and of age and who wilfully kills a Muslim shall himself be killed. It is not permissible to kill a Muslim for killing an infidel, nor a father be killed for killing his son.

The next section deals with unlawful intercourse and persons punished for the crime (zinah) are classified as muhsan married and non-muhsan unmarried.

Muhsan must also be a believing Muslim, of age, and sane. The following section deals with the punishment for sodomy and bestiality, and also sets out the rules for witnesses necessary to prove the offence of unlawful intercourse that is four male witnesses. Provision is made for the penalty of flogging for slander and the same punishment is provided for drinking alcohol.

There is an additional section dealing with the laws of the State (Undang-undang Negri). This is a short text; and in content appears to be an elaboration of the Malacca Law 'proper' with special emphasis upon the rights and duties of the ruling classes and the offences which they must take particular care to punish. The text begins with the invocation to God, followed by the Quranic injunction 'Obey Allah and obey the Messenger and those of you who have the command over you'. The ministers and the court officers are enjoined to act in accordance with the words of God in the Quran. The minister is likened to a shepherd to whose care God has consigned the people again in accordance with the hadith of the Prophet (s.a.w.). He must be just and brave and carry out the ruler's proper commands and protect the country. The rest of the section sets out local rules, and some of Islamic origin, on the care and protection of buffaloes, on finding goats, robbery, gambling, and debt.

The text contains an addition on the Law of Johore. This is a short section setting out the system of fines applicable to royal children and the penalties for violation of Court commands.

The Undang-Undang Melaka was not all written at the same time, It has been continually added to but its nucleus appears to have been a decree issued by Sultan Muhammad Shah (1424 – 1444). It was completed during the reign of Sultan Muzaffar Shah (1445 – 1458). The section on maritime law was said to have compiled in the time of Sultan Muhammad Shah. The Muslim law of marriage and of sale and procedure was added subsequently probably in the reign of Sultan Abdul Jalil Shah (1699 – 1718). They consist of translations from Nawawi's Minhaj-et-Talibin, Abu Shuja's Taqrib, Ibn Qasim al-Ghazzi's Fath al-Qarib and Ibrahim al-Bajuri's Hashiya alá Fath al-Qarib. The section on the Undang-undang Negeri was compiled at the beginning of the sixteen century, when the Portuguese first came to Malacca. The Johore law might have been compiled at the order of Sultan Mahmud Shah (1761 – 1812).

Similar laws based on the Risalah Hukum Kanun of Malacca were enacted in the other Malay States. For example in Pahang during the reign of Sultan Abdul Ghafar (1592 – 1614 A.D), the Pahang Legal Digest was issued. In this Digest we find provisions based on the Islamic Law dealing with *qisas*, illegal sexual intercourse, sodomy, false accusation, drinking, intoxicating

liquor, theft, robbery, apostacy, omission to pray, jihad, procedure, witnesses and others. There are also provisions dealing with trade, sale, security, guaranty, partnership, labour, land, gifts and wakafs.

In Perak there existed the Undang-undang Kerajaan or Law of the Monarchy, the Undang-undang Dua Belas and the Perak Code Ninety-Nine Laws of Perak. The Perak Code was probably pieced together by a Dato or Arab Syed who relied on the Malacca Code and the Malay Custom. It has some connection with the Persian Law and like it is stated in the form of question and answer.

The Kedah Digest again is based on the Malacca Law. A large portion of this Digest deals with port regulations, weights and measures and taxation.

The Johore Laws too follow the Risalah Hukum Kanun and in addition at the beginning of the twentieth century the codifications of Islamic Law which were made in Turkey and Egypt were translated into Malay and adopted.

Thus the Majallat al-Ahkam was translated as the Majallah Ahkam Johore and the Hanafite Code of Qadri Pasha was adapted and translated as the Akham Shariyyah Johore. In 1895 too a Constitution was drafted for Johore and this while showing the influence of its drafting by English lawyers shows some influences of the Islamic Law.

In Trengganu too a constitution was promulgated in 1911 and this again shows influences of the Islamic Law. In addition there exists a law relating to the constitution of the courts issued in 1885 which appears to provide for the administration of the Islamic Law in Trengganu.

In addition to the Malay digests the standard Shafii texts were circulated in the form of the Arabic texts and commentaries or translations into Malay. There were a number of Malay scholars who wrote commentaries or translated them. Among them was Shaik Daud Abdullah bin Idris, known popularly as Shaik Daud Fatani, who produced a number of translations in the early years of the 19th Century. These include the *Furu'al Masa'il wa Usul al Masail* taken from the Fatwa of Ramli and a treatise on marriage compiled from Minhaj et Talibin of An-Nawawi, the Fath al-Wahhab of Zakaria al-Ansari and the Tuhfah of Ibn Hajar. These and other texts formed the textbooks for the scholars and practitioners in the Shariah.

In the period of British occupation the place of the Islamic Law as the basic Law of the country was affected by the introduction of the English Law. The result was that the administration of the Islamic Law was confined to matters of family law and certain offences against religion. The legislation

provided for the administration of the Islamic Law by the Kathis. The earliest legislation in the Straits Settlements was the Mahomedan Marriage Ordinance, 1880. This made provision for the registration of Muslim marriage and divorce and for the distribution of the property of a Muslim on death. The Ordinance was amended a number of times and included as Chapter 57 in the Revised Edition of the Laws of the Straits Settlements 1936 which applied to Penang and Malacca. It is significant that it was not until 1923 that it was provided that the estate and effects of a Muslim dying intestate shall be administered according to the Islamic Law. Previous to that the English Law applied and this law continued to apply in the case of wills and in the interpretation of wills and trusts.

In the Federated Malay States which came under the control of the British through treaties made between the Malay Rulers and the British legislation was introduced for the administration of the Muslim Family Law and for the punishment of offences against religion. In Perak the earliest laws relating to the administration of the Muslim Family Law were the Registration of Muhammedan Marriages and Divorces Order in Council, 1885 and the Muhammedan Divorce Rules, 1889. In Selangor was enacted the Registration of Muhammedan Marriages and Divorces Order in Council 1885. In Negeri Sembilan the laws were the Mas Kahwin Order in Council, 1886 and the Muhammedan Inheritance Order in Council 1893.

These early laws were replaced by the Muhammedan Marriage and Divorce Registration Enactment, 1900 in each of the four States of Perak, Selangor, Pahang and Negeri Sembilan. The Enactments of 1900 were replaced by the Muhammedan Marriage and Divorce Registration Enactment, 1930. This was included in the Revised Edition laws of the Federated Malay States 1935.

In regard to offences against religion there were some early Orders in Council like the Perak Adultery by Muhammedans Order in Council 1894, the Perak Muhammedan to Pray in Mosques on Fridays Order in Council 1885, the Selangor Prevention of adultery among Muhammedans Regulations, 1894 and the Negeri Sembilan Mosque Attendance Order in Council, 1887. These early laws were replaced by the Muhammedan Laws Enactment, 1904 in all the four States. These enactments were amended from time to time and in Pahang it was replaced by the Muhammedan Laws Enactment, 1933. In 1937 all the earlier laws were replaced by the Muhammedan Offences Enactment, 1937.

The Malay States also enacted legislation to constitute Councils of Muslim Religion and Malay Custom. The enactments were first enacted in Perak, Selangor, Negeri Sembilan and Pahang in 1949. In Perak this enactment was replaced in 1951 by the Council of Muslim Religion and Malay Custom Enactment 1951 and this was further amended in 1959 and 1962.

Perak also had a Baitulmal, Zakat and Fitrah Enactment enacted in 1951.

In Kedah a Muhammedan Marriages (Separation) Enactment was passed in 1913/1332 which set out the detailed provisions for divorce especially in regard to the process of Shiqaq. This was amended a number of times and as amended was included in the Revised Lawsof Kedah. Kedah also had a Shariah Courts Enactment, first enacted in 1918 and the Religious Observance Enactment, first enacted in 1911 and a Council of the Religion of Islam and Malay Custom, first enacted in 1948. Perlis had legislation based on the Kedah laws.

In Trengganu a number of proclamations and notices were issued relating to the Islamic Law including the Courts Enactment, 1930, the Prohibition of improper intercourse Enactment, 1342, Punishment for Non-observance of Friday Prayers, 1341, Baitul-Mal Enactment, 1356, Suspended Marriage Notice 1345, Return of Conjugal Marriage Notice 1346, Rules for Kathis Courts 1348, Rules during Puasa, 1351, and Rates of Maskahwin, 1353. These were replaced in 1937 by the Muhammedan Marriage and Divorce Enactment, 1937.

In Kelantan there were a number of early laws including the Shariah Courts Enactment, 1327, the Majlis Ugama Islam dan Adat Istiadat Melayu Enactment 1915, and the Muhammedan Marriage and Divorce Enactment, 1911. The Muhammedan Marriage and Divorce Enactment was amended a number of times and replaced by the Muhammedan Marriage and Divorce Enactment, 1938. A Muhammedan Offences Enactment was also enacted in 1938 replacing earlier legislation on compulsory attendance at Friday prayers, consumption of alcohol and breach of the fasting in Ramadan. The Majlis Agama Islam and Istiadat Melayu Enactment, 1938 replaced the Majlis Enactment of 1915. There was also a Mosques Enactment of 1938.

In Johore there was the Wakaf Enactment, 1914 and the Registration of Marriage and Divorce Enactment, 1914. In 1919 were enacted the Offences by Muhammedans Enactment and the Determination of Muslim Law Enactment. There was also a Baitulmal Enactment, 1934 and a Zakat and Fitrah Enactment 1957. The Registration of Muslim Marriage and Divorce Enactment was amended several times and included in the Revised Laws of Johore. So was the Muhammedan Offences Enactment.

The first Council of Muslim Religion and Malay Custom was constituted in Kelantan on 24th December 1915 and this was followed by Kedah and the other States in 1949. Thus Perak had the Council of Religion Enactment 1949, Negeri Sembilan the Council of Religion and Malay Custom Enactment, 1949, Selangor the Council of Religion and Malay Custom Enactment, 1949

and Pahang the Council of Religion and Malay Custom Enactment, 1949. Some States like Johore had a religious department, first constituted in the 1880s. Other states had religious departments attached as administrative authorities to the Majlis. The Majlis was the body which gave advice to the Ruler on matters relating to Muslim affairs.

During the period of British occupation the power of legislation was vested in the State Councils and in the Federal Council which were controlled by the British officers, although the Councils had representatives from the Malays and other races. Although in theory the Rulers were the head of the Muslim religion in the States, in practice the legislation relating to the Muslim Religion and Muslim law had to be enacted in the State Council or Federal Council. The laws which were enacted dealt for the most part with administrative matters and did not affect the basic Islamic law. However the jurisdiction and powers of the Shariah Courts were restricted and the Civil Courts become the principal and superior courts in the Country.

In Sabah and Sarawak the basic law was Native Customary Law and in the early days Islamic Law was administrated as part of the native customary law. In Sarawak the law was codified to some extent in the Undang-undang Mahkamah Melayu, which was first drafted in 1915. The bulk of the law is concerned with betrothal, marriage, divorce and sexual misconduct. In Sabah there is a law text purporting to be a model or guide for the native courts. The Undang-undang Mahkamah Adat Orang Islam was drafted in 1936. The bulk of the rules deal with sexual offences.

After independence in 1957 the legislative authority in relation to the Muslim religion and Muslim Law was given by the Federal Constitution to the States. The head of the religion of Islam in each State continued to be the Rulers and in the States which had no ruler, the Yang di Pertuan Agung was constituted the head of the religion of Islam. The Yang di Pertuan Agung is also the head of the religion of Islam in the Federal Territory established in 1937. In all the states including the Federal Territory, a Council of Muslim religion, was contituted to advise the Ruler or the Yang di Pertuan Agung on matters relating to the religion of Islam. The power to make laws however was vested in the State Legislative Councils or the Federal Parliament. The Federal Parliament had generally no power to enact laws in any matters of Islamic law as the power to enact such laws was vested in the State Legislative Councils. However the Federal Parliament can enact such laws for the Federal Territory and it can propose or suggest legislation which can be adopted by the States.

In the early years after independence, the influence of the British administrators and legal draftsmen was still strong and therefore there was no

significant change in the laws enacted. These laws dealt for the most part with administrative matters, including the jurisdiction and power of the Shariah Courts.

New laws for the administration of the Islamic law were enacted in the various States. These provided for the constitution and powers of the Majlis Ugama Islam and the Religious Department, the constitution and powers of the Shariah Courts, the solemization and registration of marriages, the grant and registration of divorces, maintenance and the division of matrimonial property, the custody and maintenance of children, the administration of the baitul-mal and zakat and the collection and disbursement of zakat and fitrah. The laws enacted included –

Selangor Administration of Muslim Law Enactment, 1952

Trengganu Administration of Islamic Law Enactment, 1955

Pahang Administration of the Law of the Religion of Islam Enactment, 1956

Penang Administration of Muslim Law Enactment, 1959

Malacca Administration of Muslim Law Enactment, 1959

Negeri Sembilan Administraiton of Muslim Law Enactment, 1960

Kedah Administration of Muslim Law Enactment, 1962

Perlis Administration of Muslim Law Enactment, 1964

Kelantan Shariyah Centre and Muslim Matrimonial Courts Enactment, 1966

Kelantan Council of Religious and Malay Custom Enactment, 1966

Johore Administration of Muslim Law Enactment, 1978

Sabah Administration of Muslim Law Enactment, 1978

Pahang Administration of the Religion of Islam and Malay Custom Enactment, 1982.

In more recent times especially in the 1980s efforts have been made in the various States in Malaysia to improve the administration of the Islamic Law and to clarify, reform and codify the Islamic Law.

In Kedah a Pan-Malaysian Conference was held to discuss certain aspects of the Islamic Law, especially in relation to the criminal law. A Committee was set up consisting of Shariah Law experts and members of the Legal Service to consider amendments to the law and members of this Committee were sent to various Islamic countries to study the Islamic law and its implementaiton in those countries. Apart from the Family Law and Criminal Law matters of civil and criminal procedure were also considered. The Federal Government itself began to take an interest in the codification of the Islamic Law. It set up a Committee to consider the structure, jurisdiction

and powers of the Shariah Courts. The Committee was composed of Shariah Law experts, civil lawyers and administrators, and was under the Chairmanship of the late Tan Sri Syed Nasir Ismail who was a Member of Parliament and a prominent member of UMNO. The Committee recommended the setting up of a Shariah Court structure independent of the Majlis Ugama Islam and giving more authority and prestige to the Judges of the Shariah Court. At the same time a Committee was set up to consider a new Islamic Family Law Code mainly to clarify and reform the law and to promote uniformity of the laws of the States in Malaysia. This Committee which was again constituted of Shariah Law experts and the Legal officers of the Attorney-General's Department was able to produce a model law for adoption by the States. In Kelantan a Committee was set up to consider proposals for amendment of the laws, including the proposed structure of the Shariah Courts and the proposed Family Law Code. This Committee also had on it Shariah Law experts, lawyers from the Civil courts and teachers of law in the University of Malaya. This Committee also considered proposals for adapting the laws of criminal procedure and civil procedure for the Shariah Courts. The Federal Territory also set up a Committee consisting of Shariah Law experts, law professors and the Mufti and Chief Kadhi to consider proposals for the amendment of the laws. Some members of this Committee were also sent to Pakistan, Saudi Arabia, Kuwait and Egypt to study the Islamic Law and its implementation in those States. As a result of all thses efforts a number of laws have been enacted recently. These include –

(1) **Administration of Islamic Law**

(a) Kelantan Administration of the Shariah Court Enactment, 1982

(b) Kedah Mahkamah Shariah Enactment, 1983

(c) Federal Territory Administration of Islamic Law Bill, 1985

(2) **Family Law**

(a) Kelantan Islamic Family Law Enactment, 1983

(b) Negeri Sembilan Islamic Family Law Enactment, 1983

(c) Malacca Islamic Family Law Enactment, 1983

(d) Selangor Islamic Family Law Enactment, 1984

(e) Perak Islamic Family Law Enactment, 1984

(f) Kedah Islamic Family Law Enactment, 1979 (1984)

(g) Islamic Family Law (Federal Territory) Act, 1984

(h) Penang Islamic Family Law Enactment, 1985

(i) Trengganu Islamic Family Law Enactment, 1985.

(3) **Criminal Procedure**

(a) Kelantan Syariah Criminal Procedure Enactment, 1983

(b) Federal Territory Syariah Criminal Procedure Bill

(4) **Civil Procedure**

(a) Kelantan Syariah Civil Procedure Enactment, 1984

(b) Kedah Islamic Civil Procedure Enactment, 1979/1984.

(5) **Evidence**

Federal Territory Syariah Court Evidence Bill.

(6) **Baitul-Mal**

Federal Territory Baitul Mal Bill.

Although these laws were drafted with the help of Shariah experts the influence of the civil lawyers and legal draftsmen was still strong. Most of the laws were based on already existing laws and these laws were modified so as to be in accord with the teachings of the Shariah. Thus the Family Law Enactments followed the draft of the Law Reform (Marriage and Divorce) Act, 1966 which consolidated the family law applicable to the non-Muslims and many of the provisions in the enactments have their parallel in the Act. However where it was necessary to do so, as in the case of divorce and custody of children, provisions in accordance with the Shariah took the place of those in the Act. Similary the Syariah Court Enactments followed the pattern of the Courts of Judicature and Subordinate Courts Acts; the Syariah Criminal Procedure Code Enactment followed the Criminal Procedure Code; the Syariah Civil Produre Enactment followed the Subordinate Courts Rules; and the Syariah Court Evidence Bill follows the Evidence Act. Thus existing models were adapted and modified to meet the needs of the Shariah. In certain cases provisions from the legislation in India as in the Dissolution of Muslim Marriages Act, 1939, from the legislation in Pakistan as in the Muslim Family Law Ordinance, 1961 and from the legislation in Egypt as in the Egyptian Family Laws 1920-1979 were incorporated. However no attempt was made to draft the law only on the basis of the Quran, Sunnah and the Shariah text books.

Recently too in Malaysia attempts have been made to introduce an Islamic form of banking and of takaful (or insurance). In the case of the Islamic bank a Working Party was set up consisting of Shariah experts, civil lawyers and law professors and experts in banking. There were three sub-committees set up, the Shariah Committee, the Legal Committee and the Operations Committee. The report of the Working Party begins with an examination of

the teachings of the Holy Quran and the Sunnah and the Muslim jurists on matters connected with banking business, especially in relation to the prohibition of riba, mudarabah, wadiah, murabahah or bai bi tamin ajil, ijara and so on. The framework for the setting up of the Islamic Bank was sought in the existing Banking Act but this was modified to enable the Islamic Bank to take part in commercial transactions not forbidden by the Shariah and to set up a Shariah Advisory Board to advise the management of the bank and to ensure that the transactions of the Bank are not carried out in a manner contrary to the Shariah.

The same procedure was followed for the setting up of the Takaful Company. Again the report of the Committee set up for the purpose begins with a statement of the teachings of the Quran and the Sunnah and the Muslim jurists. The framework for the setting up of the Takaful Company was found in the existing Insurance Act but this was modified to ensure that none of the transactions of the company and in particular its investments were carried out contrary to the Shariah. A Shariah Advisory Board was also set up to advise the management and to ensure that its transactions are not carried out in a manner contrary to the Shariah.

Neither the Islamic Banking Act nor the Takaful Act sets out the details of the commercial transactions allowed in the Shariah, like mudarabah, wadiah, bai, bai salam, bai bi tamin ajil, ijara and so on. These follow the Shariah and are carried on in accordance with the Shariah. One problem is that as disputes in regard to commercial matters are brought to the civil courts and not to the Shariah Courts, such disputes continue to be dealt with according to common law priciples. Thus in a recent case relating to a leasing transaction entered into by the Islamic Bank with a trader the dispute was dealt with by the Civil Courts on the principles applicable to the common law of leasing. So far no serious problem has arisen as the English Common Law principles relating to partnership, deposit and leasing can be applied to the Islamic mudarabah, wadiah and ijara. The agreements entered into state where necessary the Islamic principles and as these agreements are entered into freely with the consent of all parties, they can be given effect to in the civil courts. This is also in line with the Quranic injunction to the effect "O you who believe! Fulfil all your obligations" (Surah al Maida (5) : 1)

In Malaysia the English Law has been and continues to be applied in most fields of legislation and jurisprudence. Indeed the Civil Law Act, 1956, provides that in the absence of any written law in Malaysia, the Civil Courts should follow the English Common law and rules of equity. Islamic Law therefore applies only in a limited field, that of family relations and offences against religion, and it applies only to Muslims. The legislative changes that have been made therefore cover a limited field. Even in the field of Family

Law, the civil courts sometimes have jurisdiction especially in matters of property, inheritance and custody of infants and in such cases where there is a conflict between the civil courts and the Shariah Court, the decision of the Civil court will prevail. In recent times the Government in Malaysia has adopted the policy of integrating Islamic principles in all aspects of life and administration, including the law. A Committee has therefore been proposed to look into all the existing laws in Malaysia to see how these can be brought into line with the Shariah. If the Committee is set up it will be able to have a more comprehensive and integrated approach to the codification of the Shariah in Malaysia. At present the efforts made are limited in extent and effect and there is a need for a comprehensive examination and legislation so as to make the Islamic Law effective in Malaysia.

Legislation alone will not be sufficient as we still need independent and efficient courts to administer the legislation and ensure that it is truly Islamic. In Malaysia therefore efforts have been made to improve the position and status of the Shariah Courts. Recently a professional diploma course for the judges of the Shariah Courts has been instituted at the International Islamic University. It is hoped that when the candidates complete the course they will be regarded as professional officers and given due status and recognition. It is hoped that the Shariah Courts will therefore be able to play their part in the interpretation and application of the Shariah legislation, so as to attain justice in line with the injunctions of the Holy Quran – "God commands you to render your trusts to those to whom they are due and when you judge between man and man that you judge with justice. Verily how excellent is the teaching which He gives you. For God is He who hears and sees all things. (Surah an-Nisaa' (4) : 58)

SHARI'AH AND CODIFICATION : ISLAMIC LEGISLATION IN RELATION TO LEGAL REFORMS IN THE PHILIPPINES

by
DATU M.O. MASTURA

Introduction

The idea of the codification of Shari'ah legal rules developed out of the continuing role placed on Islamic legislation by contemporary Muslim jurists and scholars. A modern government is of course differently situated with regard to the Islamic tradition that conceives of law as an eternal set of rules which no human agent can legislate, alter, nor change. It might be said however that hte concern of our present day lawmakers has been to enact regulatory measures which treat of the formalized Islamic law as derived from its primary sources and its pragmatic application or implementation in society.

This paper examines the contributions made by Muslims scholars (*ulama*) and judges (*qadi*) in Mindanao and Sulu in the founding of a Shari'ah policy relative to changing societal needs and development in law reforms. By "Shari'ah policy" here we refer to direct human legislation laid down by "those in authority" in affirmance of the sources of the Shari'ah and as a development need. This approach is consistent with the theme of our conference to examine the scope of 'legal imperatives' or the extent in which statutory law can in fact be codified in administering Shari'ah rule.

We intend to make a summary treatment of the Islamic philosophy of legislation in order to demonstrate how our Muslim jurists have grappled with the problem of codification. We shall attempt as well to make a comparative update on the movement for the codification of Muslims laws in other countries. Our concluding section will give a survey of the constructive work for the enforcement of Shari'ah rules within the existing legal system and legal culture of the Philippines.

I – THE IDEA OF CODIFICATION: THREE VIEWPOINTS

The idea of codification may be approached from three viewpoints. A general explanation makes it possible for us to assign the works already done based on Islamic conceptual thinking of law.

1. THE JURISTIC CONCEPT

One view is founded in the Islamic classical legal theory represented by Umar ibn al-Khatab in the following statement: "The Book of God is sufficient for us," when confronted with the idea of the compilation of the Sunnah. But there is a statement of similar import by Imam al-Shafei: "No book on earth after the Book of God is more accurate than the book of Malik", referring to the *ahadith* compilation *al-Muwatta* by Imam bin Anas. The gist of this view is that the whole of the Islamic legal system has already been established on these two principal sources. Shafei himself was to lay down the essentials of the classical theory of Muslim law by the explicit recognition of two other jurisprudential sources: the consensus (*ijma*) and the analogical deduction (*qiyas*) as gradually evolved.

Advocates of the first theory contend, therefore, that unique in the phenomenology of law is the legal science of jurisprudence (fiqh) without the state operatus playing as legislature. For it was the juristic conception of the law that led to the founding of the Sunni four schools of thought (*madhahib*). The underlying policy is that the problem can be defined only on the issue of resuscitating the principle of *ijtihad* (independent reasoning).

We are thus left, as far as this approach is concerned, with the Qur'an and the Sunnah and the standard jurist manuals or handbooks. An authenticated official codification of the Qur'an in one book and text version (*mushaf*) took place during the region of Uthman ibn Affan. Direct codal provisions (*tadwini*) are identified by fiqh technique as follows:[1]

> Regarding family law, they are laid down in 70 injunctions; civil law in another 70; penal law in 30; jurisdiction and procedure in 13; constitutional law in 10; international relations in 25; and economic and financial order in 10.

The legal bearing of some provisions overlap and apply to more than one sphere of law. As the Qur'an itself states: "For every one of you, We have ordained a Divine Law (*shir'ah*) and a traced-out way (*minhaj*)". (*Surah* al-Maidah (5) : 48). The Qur'an is also *al-furqan* (criterion) which applies to "human reason" in order to discern right from wrong.

As for the authenticated *ahadith*, there are six great collections of traditions:[2]

1. *Jami as-Salih al-Bukhari* by Muhammad bin Ismail al-Bukhari;
2. *Sahih al-Muslim* by Muslim ibn al-Hajjaj;
3. *Jami' at-Tirmidhi by Abu Isa Muhammad at-Tirmidhi;*
4. *Sunan Abu Da'ud* by Abu Da'ud as-Sijistani;
5. *Sunan Nasai* by Abd ar-Rahman an-Nasaf; and

6. *Sunan Ibn Majah* by Abu Abd Allah Muhammad Ibn Majah.

Insofar as *ahadith* seemingly contradictory, we have in the Shafei school *Ikhtilaf al Hadith* by Imam Shafei himself to reconcile them. There is also the *Ikhtilaf al-Fuqaha* by the Shafite jurist Jarir al-Tabari to deal with conflict of views between the schools of law.

2. THE IMITATIVE THEORY OF JURAL RULES

2.1 The Fatwa-i-Alamgiri of the Mogul Empire

The second view is represented by Aurengzeb, who is better known as Alamgir, and some jurists of the imitative theory (*taqlid*) of jural rules such as Shaykh Nizam Burhanpuri of Delhi and Burhan al-Din al-Marghinani of Jampuri. Proponents of this view were moved by a legal formulae grounded on political necessities and sociological reasons. The appeal to an authoritative standard which was matched by the procedure for consulting legal specialists known as *Muftis* gave impetus to the practice of written legal opinions (*fatwa*).

Jurisprudential models took yet another turn with the collection of the *Fatwa-i-Alamgiri* arranged on the model of the Hanafi digests *Hedaya-i-Fiqh* by al-Marghinani. The six volumes of semi-official compilation of *fatwa* were not intended to be binding and generally applicable like the modern legal codes. It merely formalized judicial rules and juridical precedents which become the concerns of the administrators of justice. The digest models such as the *Hedaya* and the *Sirajiyah* by Siraj Muhammad al Sijawandi differed in another respect from the *Fatawa-i-Alamgiri* in that the latter was the work of a committee headed by the jurist Shaykh Nizam. The task of revising the *Fatawa-i-Alamgiri* was entrusted by the Emperor Alanagir to Shah Abd Al-Rahim, father of the more notable Shah Wali Allah of Delhi. The *fatwa* become an important source for the study of legal usage and development of legal issues in which shari'ah value-sets and customary laws (adat) were reconciled. For this reason, Muslim law evolved beyond the confines of the standard handbooks of the *madhahib.*[3]

2.2 The Luwaran of Magindanao

We are now in a position to link the discussion to the electic approach of the Mindanao and Sulu jurists. Acting independently but on the same general lines, the suzerain rulers of Sulu and of Magindanao promulgated respectively the *Diwan Taosug* and tha *Luwaran sa Magindanao*. These two written codes served as an affirmation of sovereign status in juridical matters. The original Sulu Code was promulagated by Sultan Alimudin around 1740, but the old Sulu Code used by Sultan Muhammad "Pulalon" Fadl (A.D. 1844–1862) was more in conformity with the Quranic sources. The *Diwan*

of 1878 promulgated during the reign of his son Sultan Jamalul Alam gained wider acceptance.

Magindanao historians ascribe the genesis of the *Luwaran* to the reign of Sultan "Faqih Maulana" Hamza Khair ud-Din (1710–1778) who was a known jurist. Although the marginal Arabic quotations of the Old Magindanao Code were more nearly correct and better written, the main text was a little inferior to that of the copy of his great-grandson Datu Mastura Hijab bin Qudratullah. According to Najeeb Saleeby who translated the code into English in 1905:

> The term Luwaran, which the Mindanao Moros apply to their code of law, means "selection" or "selected". The laws that are embodied in the Luwaran are selections from Old Arabic Law and were translated and compiled for the guidance and information of the Mindanao datus, judges, and *pandita* who do not understand Arabic. The Mindanao copies of the Luwaran give no dates at all, and nobody seems to know when this code was made. They say it was prepared by the Mindanao judges some time ago, but none of those judges is known by name. Datu Mastura's copy of this code was written about 1896, and it is undoubtedly copied from older manuscript. The original manuscript accompanying this code is older still, but it bears no date at all.[4]

The principal books quoted in the *Luwaran* was the *Minhaj at-Talibin* by the leading Shafite jurist Zakariya Yahya bin Sharaf al-Nawawi and its condensed form entitled *Minhaj'-ul Arifin*. The grammatical and syntactical details were guided by the *Fath-ul-Qarib* by Muhammad ibn Qasim al-Ghazzi, *Mirat-ut-Tullab*, an abridgment of the classical *Minhaj-al-Tullah* by Zakaria al-Ansari who extracted it from the *Tufah* and *Nihayah*, standard manuals of the Shafei school.

The *Luwaran* is more comprehensive than the *Diwan Taosug*. It comprises 85 articles arranged according to subject matter covering transactions and property claims, marriage and divorces, procedure and evidence, inheritance and partition of estate. The code contains also *ta'azir* penalties and classifies *diyat* according to 12 categories. The marginal quotations from Shafei texts consist of 108 effective clauses which are used as authority for the corresponding Magindanao articles promulgated.

3. THE GENESIS AND CONCEPT OF PERSONAL LAW

3.1 The Majallat of the Ottoman Empire

The third view is represented by the Ottoman Code (qanun) patterned after the civil law system. There is little we can say about statutory enactments on Muslim law administration until the Ottoman empire decided to decree the *Majallat al-Ahkam al-Adliyah* in 1876. The way for this corpus of juridical rules was paved by the seven-man committee of jurists led by

Ahmad Jawdat Pasha. The new idea of codification enacted by royal decree (*iradah*) was patterned on the European models. In order to clearly trace the successive development of this third approach, it is imperative to understand that the movement for legislation was stamped with the features of modern influence. Thus, in contrast to the early compilations of *fiqh*, the *Majallah* excluded religious observances and the criminal justice system. Its scope was restricted to rules of law in civil transactions arranged in 1,851 articles of 16 books. The first 100 articles are general principles of Muslim jurisprudence.

The codifiers of the *Majallah* explained the objective of the project as follows:

> The science of jurisprudence is an infinite sea with no shore to it. The deduction of the most worthy opinions for the solution of judicial problems requires considerable intellectual skill and thorough grasp (of the subject) particularly so in the Hanafi school were many interpreters of varying calibre have given conflicting opinions. Despite this fact no attempt has been made, as in the Shafii school, to sift and crystalize the subject matter. It is difficult to discover the correct rules and to apply them to specific cases. Moreover, the changing times give rise to problems that must be built upon custom or usage.[5]

Unlike the Shafei school, the *Majallah* did not consider beneficial use as a valuable thing; it cured this defect later by laying down the principle of freedom of contract in Ottoman law. And so it was that the concept of *al-huquq al-madaniyah* or civil rights entered into the Muslim legal terminology. The Majallah did not also deal with questions relating to personal status, except by implication from its provision on civil interdiction, a salient feature which has given rise to the concept of Muslim personal law system.

3.2 The Judicial Plan of the East India Company

To assert that the Muslim law in Southest Asia had not become well established by the felt necessities of the time is an exaggeration. The recognition of Muslim personal law came early in 1772 under the judicial plan of the English East India Company. The ideas of Warren Hastings found expression in Section 23 of the judicial plan that, "in suits of inheritance, marriage . . . and other religious usages and institutions, the laws of the Koran with respect to the Mohammedans . . . will be invariably adhered to". And, in all such occasions, "Maulavis . . . shall respectively attend the courts to expound the law and they shall sign the report and assist in passing the decree".[6] No notice however was taken in it of the fact that certain schools of Islamic law prevailed among Muslims in different parts but this amounted to an implied protection of the "Laws of the Koran".

This question eventually attracted the attention of the British Parliament which passed the Act of Settlement of 1781. The Act provided that, "all matters arising out of succession" and matters of contract and dealing

between party and party shall be determined in the case of Muhammedans by the laws and usages of Muhammedans" (Section 17). The provision marked the first statutory recognition by the British Parliament of the principle introduced in 1772; it firmly established by statute that the "Laws of the Koran" were to form the "Rules of Decision" of cases involving personal status and succession. Such basic principle of administration of justice came to Southeast Asia in the English Straits Settlements through the Charters of Justice.

The issue of codification was first tackled in South Asia by the first Law Commission appointed under the Charter Act of 1833 which expressed hope that Muslim law would be codified. But the second Law Commission appointed under the Charter Act of 1853 strongly opposed the idea of codifying Muslim personal laws. It was reasoned out the such a British legislation "might tend to obstruct rather than promote the gradual process of improvement in the state of the population". In the opinion of the Commission, the report states:

> It is open to another objection which seems to us decisive. The Hindu law and Muhammadan law derive authority respectively from the Hindu and Muhammadan religion. It follows that,as the British legislature cannot make Muhammadan or Hindu religion, so neither can it make Muhammadan or Hindu law.[7]

In respect to the nature of Muslim personal law, the report clarified this point:

> A code of Muhammadan law or a digest of any part of that law, if it were enacted as such by the Legislative Council of India, would not be entitled to be regarded by Muhammadans as the every law itself, but merely as an exposition of law, which possibly might be incorrect. We think it clear that it is not advisable to make any enactment which would stand on such a footing.[8]

3.2 The Muhammadan Law Enactment of 1904

A survey of constitutional documents dealing with the Malay states in Malaysia point to the fact that a conprehensive codification of either Muslim personal law (*hukum shara*) or customary usages (*adat*) was generally not favored or achieved. For example, the State Councils of Perak and Negeri Sembilan studied drafts of a codification of 'Muhammadan Law' between 1895 and 1899 but no unanimity on the subject was attained among the Sultans and their British advisers. The difficulties were eventually overcome when a legislation was adopted known as "The Muhammadan Laws Enactment of 1904". This led to the movement towards Islamic legislative standardization in all the Federated Malay States.[9]

In contrast in Southeast Asia, the Governor General at Batavia directed a short Code to be framed for use of the V.O.C. (Netherlands East India

Company). This Code no. 8 known as *Bysonders Wetten aangaade Mooren or Mahometanen en endere Inlandsche Natien* (Special Laws relating to Moors or Mohammedans and other Natice races) was applied by the Dutch in Colombo.[10] Early enough, the basic structure of Muslim personal law system was justified by the Dutch jurist L.W.C. van den Berg under the *receptio en complexu* doctrine by which Islamic law was to be applied to Muslims who, since they professed the religion of Islam, were deemed to have embraced it as a whole complex.[11] But the Dutch in Indonesia also introduced the *adat rechtskringen*(adat law areas) which set up boundaries between different systems based on cultural and geographical consideration. The development of note is that even with English rule taking over Colombo from the Dutch in 1799 the Special Laws on Moors were given legislative protection. Not even the English East India Company's intervention in Manila from 1762, nor brief adventure in Mindanao in 1775, or the British interregnum in Batavia and Bantam between 1811 and 1816 were to erase the stamp of the salient features of Muslim law. This may even help to explain why the Magindanao *Luwaran* and *Diwan* of Sulu were contemporaneously promulgated around this period.[12]

Broadly speaking, the applicable statutory ordinances before the advent of contemporary legislation known as "Administration of Muslim Law Enactments" in the Malay States may be grouped into four categories.[13]

(1) Statutes which affect the various aspect of marriages and divorces;

(2) Statutes which pertain to the rules of inheritance and succession;

(3) Statutes which cover customary land tenure and communal property holding; and

(4) Regulatory measures which relate to administration of religious affairs, including the social institutions of *wakf*, *zakat* collection, *hajj* administration, and religious offenses.

II. CONTEMPORARY LEGAL REFORMS:THE CRISIS SITUATION

In the Philippines, the idea of codifying Muslim personal laws was envisioned in Act No. 787 of the Philippine Commission in 1903. Under Section 13 of this Act, it was provided that it was within the competence of the Legislative Council of the Moro Province:

(1) To enact laws which shall collect and codify the customary laws of the Moros as they . . . are enforced in the various parts of the Moro province among the Moros . . . and to provide for the printing of such codification, when completed, in English, Arabic or the local Moro dialects as may be deemed wise;

(2) To enact laws for the organization and procedure of district courts, to

consider and decide civil and criminal actions arising between Moros, between members of non-Christian tribes, and between Moros and members of other non-Christian tribes.[14]

These provisions were subsequently superseded by the provisions of Act No. 1283. The statement of objective was "to enact laws amending and modifying the substantive civil and criminal law of the Philippine islands to suit local conditions among the Moros . . . and to cause such laws to conform to, when practicable to the local customs and usages of such inhabitants" (Section 6, Act No. 1283). Substantive law, as thus amended and modified, would then apply "in all actions in which each of the parties is either a Moro or a member of some non-Christian tribe." in furtherance of this objective, it was aimed to provide the organization and procedure of local "tribal ward courts" to consider and decide minor civil actions in which the parties in interest, or any of them are Moros or members of non-Christian tribe. The same was to apply in minor criminal actions in which the accused, or any of them are Moros or members of some other non-Christian tribe.

The Philippine Government has undoubtedly always recognized the nature of the Muslim personal law and principles of customary law. The major statutory provisions under the Commonwealth regime (1935-1945) and the Republican era (since 1946) include the following:

1. *Mohammedan Laws and Customs.* Judges of the Courts of First instance and Justices of the Peace deciding cases in which the parties are Mohammedans or pagans, when such action is deemed wise, may modify the application of the law of the Philippine Islands, taking into account local laws and customs (Section 3 of Act No. 2520, Administrative Code of Mindanao and Sulu).

2. *Effect and Application of Laws.* Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines (Atr 8). No judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws (Art. 9). In case of doubt in the interpretation or application of laws, it is presumed that the lawmaking body intended right and justice to prevail (Art. 10 New Civil Code, Rep. Act No. 386).

3. *Customs in General.* Customs which are contrary to law, public order or public policy shall not be countenanced (Act. 11). A Custom must proved as a fact, according to the rules of evidence (Art 12). No custom, practice or agreement which is destructive of the family shall be recognized or given any effect (Art. 218, New Civil Code, R.A. No. 386).

4. *Marriages of Exceptional Character* Marriages between Mohammedans or pagans who live in the non-Christian provinces may be performed in accordance with their customs, rites or practices. No marriage licence or formal requisites shall be necessary. Nor shall the persons solemnizing these marriages be obliged to comply with article 92 (Art. 78, New Civil Code, R.A. No. 386).

5. *Moslem Divorce Act.* For a period of twenty years from the date of approval of this Act, divorce among Moslems residing in Non-Christian provinces shall be recognized and be governed by Moslem customs and practices (Section 1 of R.A. No. 394, Moslem Divorce Law).

The Moslem Divorce Act was approved on June 17, 1949 and had expired by 1969. Congressman Indanan Anni introduced H. Bill No. 343 to seek the extension for another twenty years of the period, subject to certain conditions. It was not acted upon and was overtaken by the abolition of the Congress of the Philippines under the 1973 Constitution. Meanwhile, at the 1971 Constitutional Convention, we already called attention to the State policy which has circumsribed the Muslim personal law system only for a given generation. What was the idea behind the 20-year limitation? We questioned the fact that the real legislaive motive was to prohibit it until the conditions have changed among Muslims who were expected to adopt a uniform civil code or adhere to Christian value orientation.[15]

Thus, we read this intent from the second paragraph of Art. 79 of the New Civil Code:

> However, twenty years after the approval of this Code, all marriages performed between Mohammedans or Pagans shall be solemnized in accordance with the provisions of this Code. But the President of the Philippines, upon recommendation of the Secretary of the Interior, may at any time before the expiration of said period, by proclamation, make any of provisions applicable to the Mohammedans and non-Christian inhabitants of any of the non-Christian provinces.[16]

This provision was taken from Section 25 of the Marriage Law otherwise known as Act No. 3613, exempting from formal requirements the marriages performed between Mohammedans or Pagans. The provision was extended by Republic Act No. 231 for twenty years after its approval on June 12, 1948. But the President of the Philippines was also empowered by proclamation, to make any or all of the provisions on marriage applicable to Mohammedans or Pagan inhabitants, before the expiration of said period. Since the New Civil Code which incorporated it under Art. 78, was signed into law on June 18, 1949, this provision had expired by 1969. The rule of decision on Muslim personal status therefore was at this critical point in need of a crystallized form. This crisis pointed the way towards the Codification Project of 1973.

III – THE RESEARCH PROJECT FOR CODIFICATION OF PHILIPPINE MUSLIM PERSONAL LAW

We shall say a little now about the gap that had to be bridged. The codifcation of Muslim personal law was initiated in 1973 under the auspices of the Presidential Task Force for the Reconstruction and Development of Mindanao. There was created by the Office of the President and Prime Minister a Research Staff for the Codification of Philippine Muslim Laws on August 13, 1973. Among its function was to undertake the following activities:[17]

(1) To survey, collect and gather materials on Muslim laws from all available sources with particular emphasis on a current Philippine laws affected by Islamic laws;

(2) To collect and reconcile Philippine laws with Muslim laws; and finally,

(3) To prepare a preliminary draft of the proposed Code of Philippine Muslim Laws (Shariah, Fiqh, Adat, etc.) and its implementating agencies.

A. THE RESEARCH STAFF FOR CODIFICATION

The Research Staff, with this writer as the Project Director, begun its work by seeking consultation with the leading *ulama* and known traditional *kadi, panglima* and *pandita*. Controversy set in as to the legal methods of approach to the project. On one hand, there were those who opined that it was not feasible to codify Muslim law and customary usages (adat). The Muslim minority in the Philippine secular state were not only in the status of adhering to *taqlid* (doctrine of imitation), but they were devoid also of *ijtihad*. The body of Islamic law already shaped and formulated by *fiqh* of the four Sunni schools, as applied to the Philippine situation as a matter of Shari'ah policy, necessitated only an administrative enactment. It was then suggested that we follow the model of the Administration of Muslim Law Enactments in Malaysia and Singapore.

On the other hand, there were those who argued that the Muslim minority in the Philippines live in a state of *darul aman* (contractual status) where laws are laid down according to the Constitution based on public policy (*siyasa*). The body of personal laws cannot properly speaking be designated as *Shari'ah* but can be the object of a legislation in its procedural aspects. It was then suggested that, as a matter of law reform, a simple decree governing the needs of Muslim family relations and *agama* arbitration would be sufficient. The solution therefore pointed to the legal experience of Muslim minorities in India or Singapore where a Shariat Act governing personal status has been operative. The law reforms in Pakistan were more material references for the Islamic concepts of legislation in contemporary context.

The Research Staff took the arduous task of tracing, unearthing, collating and organizing the research materials on Philippine Muslim personal laws. By mid-March 1974, we completed the "Draft Administration of Muslim Code" covering only the administration of "personal law" system as distinguished from the general "law of the land". We were confident by then that this work had constitutional basis under the 1935 and 1973 Constitutions. Having been a Delegate to the 1971 Constitutional Convention, it became my own principal task to sponsor a provision which found expression in Article XV, Section 11 of the New Constitution:

> The State shall consider the customs, traditions, beliefs and interests of national cultural communities in the formulation and implementation of state policies.[18]

This was a fresh mandate. It dispelled any serious doubt in out minds that there was no legal imperative for a *shari'ah* policy.

The Draft Code was submitted to the President of the Philippines. In the explanatory note to the Draft Code, we highlighted the following points: It must be understood that the Draft Code does not seek to codify Muslim or Islamic Substantive Law for this could be another product of the codification effort, a second stage. The Draft Code merely proposed to establish the administrative mechanism to administer Muslim personal law and to advise the Government on matters relating to Muslim affairs. The Research Staff had taken in every respect Muslim law (*fiqh* in this sense) as modified, where applicable, by customary (adat) law to be its point of reference. The Draft Code considered the four *madhahib* (i.e. Hanafi, Maliki, Shafei and Hanbali), although it has stressed the Shafei school of law as prevailing in our jurisdiction.

B. THE JUDICIARY CODE COMMITTEE

In a matter of strategy, we subjected the Draft Code to *shura-ijma* among the Muslim communities in the Mindanao and Sulu region. On July 22, 1974, the Judiciary Code Committee in the Supreme Court invited former Senator Mamintal A. Tamano. lawyer Musib M. Buat, the Assistant Project Director, and myself to appear before the Committee. The late Chief Justice Fred Ruiz Castro and the incumbent Chief Justice Felix V. Makasiar proposed to us the possibility of the integration of the Draft Code into the Draft Judiciary Code which was then under discussion. Mr. Justice Castro raised the following questions:[19]

(1) If we do adopt your recommendations to the extent that it is feasible, would these recommendations fit within the framework of our present Constitution?

(2) If my impression is correct . . . that you do not want a complete

separate judicial system and I think you want to try to achieve an integrated juridicial system that we have now . . . what is the extent of the integration that you propose?

(3) There has been an impression all over the Committee, as well as among people who have read your thoroughly prepared Muslim Code, that you, gentlemen, who are Muslims, would rather secede than integrate.

(4) What kind of rules of procedure do you want included in the Rules of Courts?

(5) Would you want a separate penal system and if you do or do not, what is the precise law system that you want adopted?

(6) And finally, while you mention something about appeals, you were not precise about the extent, nature, substantive aspect of the problem.

The problematical situation was aptly summarized by a member of the Judiciary Code Committee as follows:

> When you really integrate this (Muslim) system of law, the basis of which is entirely different from ours, are we not asking to curb out an exception? As it is different, I think we can integrate or curb out exceptions. Now, if it is because of the system's non-integrative nature, then we really want an exception. If it is an exception, then there is necessarily a creation of peculiarity leading to the unavoidable consequence of divisiveness. I noticed that the code creates a rather complete system. Are we not again tending to have a state within a state?[20]

The bone of contentions was narrowed down when Senator Tamano proposed a reform by simple legislation on the model suggested by A.A. Fyzee for Law Reform in India. It was then our contention that to insist on resolving the question of which should come first . . . the enabling legislation or the substantive legislation . . . is missing the whole point. The full significance of the position we have taken in deference to the Tamano position may be better appreciated in the celebrated issue: Can the gates of *ijtihad* and *ijma* be opened to legislative activity and men who possess no knowledge of "the subtleties of Muslim Law"?

This brought us back to the idea of convening a Code Commission which would detail some substantive provisions in the form of a complete code of personal law (qanun ahwal al-shakhsiyya). Thus, on December 23, 1974, Executive Order No. 442 created "The Presidential Code Commission to Review the Code of Filipino Muslim Laws". The Commission was composed of nine members under the chairmanship of Dr.Cesar Adib Majul, Dean of the Institute of Islamic Studies, Philippine Center for Advanced Studies. As Project Officer of the Research Staff, I become a member and chairman of the Sub-Committee on Substantive Provisions.[21] It remains here to

discuss the work of the Code Commission that was decreed by President Ferdinand E. Marcos as P.D. No. 1083 on February 4, 1977 otherwise known as "Code of Muslim Personal Laws of the Philippines".

IV – ISLAMIC PHILOSOPHY OF LEGISLATION

The Philippines has adhered to the theory of separation of judicial from other forms of constitutional power as in the American tradition. The conceptual thinking of the Presidential Code Commission was affected by this classical constitutional theory. As chairman of the sub-Committee on Substantive Provision, it fell on my shoulder to reconcile this existential phenomenon of law with the Islamic classical juristic theory of authority above the legal and political system itself. But Dr. C.A. Majul set up the general guidelines.

A. Governing Principles in the Codification

In reviewing the "Proposed Code on the Administration of Philippine Muslim laws of 1974" prepared by the Research Staff, as well as in drafting of the "Code of Muslim Personal Laws of the Philippines", the Commission was guided principally by the following fundamental criteria, namely:

(1) Of the Islaimc Legal System, which is considered a complete system comprising civil, criminal, commercial, political, international and purely religious law, only those that are fundamentally personal in nature were to be codified;

(2) Of the personal laws, those relative to acts the practice of which are absolute duties under Muslim law were to be included, and those which according to Muslim law are forbidden and demand unconditional punishment were to remain prohibited;

(3) Where the provisions of the law on certain subjects were too complicated for a Code, only the fundamental principle were to be stated, and the details left to the judges for proper implementation;

(4) No precept, fundamental though it might be, was to be incorporated in the Code where it appeared to be contrary to the principles of the Constitution of the Philippines; and

(5) No precept was to be included unless it was based on the principles of Islamic Law as expounded by the four orthodox (Sunni) schools.[22]

For this reason, the Draft Code and the Code finally adopted came out with an entirely different form of legisltion. The approved Code is primarily substantive whereas the Draft Code was principally adminstrative in nature and content.

We may clarify at this point that in the classical theory of jurisprudence (*fiqh*), it has been declared that the Rule of Decision (*Hukm*) to be valid must be derived by legal deduction and analogy (*qiyas*) from the *Qur'an* and *Sunnah* and sanctioned by the consensus (*ijma*) of the Muslim community (*Ummah*). We followed the following strategy:

First. The theoretical framework was facilitated by the early recognition at research stage that the legislative intent is (a) to recognize the Muslim legal system in the Philippines as part of the law of the land, and (b) to seek ways and means to make Islamic institutions more effective, as well as, (c) to provide for an effective administration and enforcement of Muslim personal law. These ideas are now incorporated under Book One, Title I of the General Provisions of P.D. 1083.

Second. The legal premises proceeded from the assumption that for practical considerations the terms of law reference are (a) the primary sources of *shari'ah*, including but not limited to (b) the standard treatises and works on *fiqh*, and (c) the statutory and case law as well as proven customary law or *adat*. As a matter of legal procedure, these sources are put into legal practice by statutory and judicial construction. These ideas are now embodied in Book One, Title II of the General Provisions of P.D. 1083.

B. The Proofs of Muslim Law

In order to appreciate the recognition of the Shari'ah Law as distinct from Roman Law or Civil Law systems, it is important to consider that the Islamic legal system differs from the other with respect to its religious basis, sources of law, specific legal prescriptions, and methodological approach. It makes sense to recall that the delegates of Al-Azhar University to the International Conference on Comparative Law held in 1937 at the Hague precisely upheld the Shari'ah legal system independently of Roman jurisprudence as amenable to contemporary developments.

A summary statement on the classification of sources of Islamic law, if we are to follow Ramadan and Hamidullah, amply cover the following scopes of legislation:[23]

According to juristic classification

1. The Qur'an, or the Holy Book of Islam
2. The Sunnah, or the authentic Traditions of Muhammad (s.a.w.)
3. The *Ijma*, or the consensus of opinions.
4. The Qiyas, or deduction by analogy which also includes the principle of independent reasoning of *Ijtihad*.

Supplementary sources:

i. *Istihsan*, or the principle of juristic preference of the Hanafi school.
ii. *Istislah*, or unprecedented judgment necessitated by maslaha or public interest of the Maliki school.
iii. *Istidlal*, or juristic preference which may be based on the principle of Istishab-ul hal of the Shafei school.
iv. *'Urf* or *Adat*, or custom and usage of society and usage of society.

According to the roots (usul) and sources

1. The Qur'an
2. The Sunnah of the Prophet
3. The orthodox practice of the early caliphs.
4. The practices of other Muslim rulers not repudiated by jurisconsults.
5. The opinions of celebrated Muslim jurists:

1. consensus of opinion or *Ijmah*.
ii. Individual opinion or *Qiyas*.

6. The arbitral awards.
7. The treaties, pacts and other conventions.
8. The official instructions to commanders, admirals, ambassadors and other state officials.
9. The internal legislation for conduct regarding foreign relations and foreigners.

It is noteworthy that Hanafi writers on jurisprudence include custom as a source of law under *Istihsan* but it cannot be extended by parity of reasoning. The Shafei school equate *istihsan* with *ra'y* and reject it; hence custom falls under the category of *Istishab* or deduction by presumption of continuity of the old situation.

C. The Philosophic Foundation of Islamic Legislation

The main characteristics of Islamic philosophy of legislation can be outlined as follows:[24]

1. The Quranic spirit of communicating general rules of application, without indulging in great detail.
2. The Quranic directive principle meant to deal with actual events, and not by conjectural means, entailing deliberate rather than coincidental determination of issues.

3. The Fiqhi rule of jurisprudence of permissibility in everything that is not prohibited, thus giving room for flexibility to avoid human paralysis and intellectual stagnation.

4. The Quranic gradual application of rule akin to leniency even in the context of prohibition, thereby emphasizing moral persuasion and human motivation for social change.

5. The Shari'ah maxim of facility to render the forbidden permissible on account of compelling necessity.

6. The Shari'ah maxim of openness toward adaptation to anything of utility insofar as it is not in contravention of the Qur'an and Sunnah.

The philosophic foundation of Islamic constitutionalism can be formulated as follows:[25]

1. The absolute legal Sovereignty of Allah and the finality of the Prophethood of Muhammad (s.a.w.) as enunciated in the Qur'an and Sunnah.

2. The derivative Vicegerency of the Muslim Community or *ijma al-Ummah* to identify the Shari'ah from its sources for implementation.

3. The inviolate sanctity of the Shariah as the veritable repository of actual sovereignty and ideal constitution and fundamental law.

4. The delegation of authority or *wilayat* to those in whose hands rest the power to "loosen and bind" based on consultation or *shura* principle.

The relationship between the sources of shari'ah and the bases of Islamic legislation is to define the scope of human legislation. Classical constitutional theory establishes the source of authority and presupposes the existence of a Law-Giver: Cursory readings from the Qur'an reveal: "Behold God ordains in accordance with His will" (Surah al-Maidah(5) : 1). "Verily, His is all creation and all commandment" (Surah al-A'araf(7) : 1). "And not an atom's weight in the earth or in the sky escapes your Lord, nor what is less than that or greater than that, but it is decreed in a clear Book" (Surah Yunus(10) : 61). In the phenomenon of the universe, Quranic verdict is portent in nature, as for example in the parable of the "bee" in *Surah al-Nahl*: "In this behold, there is a message indeed for people who reflect (*li-qaumin yatafakkarun*)" (Surah al-Nahl (16) : 68). For the Qur'an refers men to the natural laws which the rationalists school represented by Iman Muhammad Abduh tried to interpret. Rational explanation is allowed with shari'ah guidance: "And We have placed you (mankind) with authority on earth and appointed for you therein a livelihood" (Surah al-A'araf(7) : 10).

The idea of law being always associated with justice can be gleaned in *Surah al-Hadid* in which the Balance, the Book, and the Iron are mentioned:

> We verily sent Our messengers with clear proofs and revealed with them the Book and the Balance (i.e. authority to establish justice), that mankind may observe justice and the right measure; and He revealed iron (i.e. *ba's shadid* or coercive power) wherein is mighty power and many uses for mankind and that God may see who helps Him and His messengers, though unseen" (Surah Al-Hadid(57) : 25)

For practical purposes, that "God enjoins justice and equity" as a theme in *Surah an-Nahl* ((16): 90) has been recited at the end of every Friday sermon in all Sunni schools since the time of the Ummayad Caliph Omar.

C. THE VALUE SYSTEM AND AXIOLOGICAL FRAMEWORK

In the Islamic legal system, substantial justice expressed into scale of values may be extracted from Quranic axiological frameworks. First of all, there is the criteria of *Ma'rufat* and *Munqarat.* We are reminded in the Qur'an: "And (think of) the day when we raise to every nation a witness against them, from amongst themselves, and we sent you (O Muhammad) as a witness against these. And we revealed the Book unto you as an exposition of all things, and a Guidance (*al-Hudan*) and a Mercy and Glad Tidings to all *Muslimin* (i.e. those who submit themselves to God (Surah Al-Nahl(16) : 89)). For Muslims are "those who, if we give them power in the land, establish *salat* (prayer) and *zakat* (alms), enjoin *al-ma'ruf* and forbid *al-munqar.* With God rest the end (and decision) of all affairs" (Surah al-Hajj(22) : 41).

Thus far we have identified two value systems which arise within the framework of shari'ah Rule of Decision:

1. *Ma'rufat*, or that which is right action and accepted upright conduct. These include the things rendered lawful and permissible. The Shari'ah classified the *Ma'rufat* into mandatory (*wajib*), recommendatory (*sunnah*), and permissible (*mu'bah*).

2. *Munqarat*, or that which is morally wrong and action rejected by the right mind. These include the things rendered prohibited (*haram*) absolutely and the reprehensible (*makruh*).

Jurists thus qualified acts according to its effects or validity into (a) *sahih* or valid; (b) *batil* or void; and (c) *fasid* or irregular. The Shafei school however equated *fasid* with *batil.* Here we can invoke Shafei's dictum: "For everything that touches the life of a Muslim there is a binding decision (*hukm*) or an indication as to the right action. If there is a decision, it should be followed; if there is no indication as to the right answer, it should be sought by ijtihad, and *ijtihad* is *qiyas* (legal analogy)".[25]

In the second place, there is the axiological framework in the Qur'an of ayat *Muhkamat* and *Mutashabihat*. We read in the Qur'an: "He it is who has revealed unto the (O Muhammad) the Scripture wherein are clear revelation (*ayat muhkamat*) – and these are the substance of the Book – as well as others which are allegorical (*mutashabih*)" (Surah Al i-Imran (3) : 7). The axiological frameworks are two:

1. *Ayat Mukhamat*, or the messages which are clear in and by themselves. These are the substance and essence of the divine writ. Tabari identifies this axiological framework with what the jurists define as explicit rule (*nass*) of the text and what the philologists call self-evident (*zahir*).

2. *Ayat Mutashabihat*, or the passages which are expressed in a metaphorical way. These are the formulations accessible to people with exercised mind. This axiological framework corresponds to what the jurists define as implicit rule (*'aimma*) of the text and what the philologists call intrinsic meaning (*batin*).

Muhammad Asad notes that this statement occurs only once in the Qur'an and qualified it as "the key-phrase of all its key-phrases".[26] Here again, Imam Shafei is instructive: "For everything on which God has provided a clear textual evidence in His Book or (a Sunnah) of the Prophet disagreement among those to whom these (texts) are known is unlawful". But elsewhere he states the dictum: "Everything (in the Sunnah of the Prophet) is a clear explanation (*bayan*) for the divine communication in the Book of God.)[27]

Now this axiological systematization of the Qur'an takes on a more methodical framework when we correlate some verses relevant to our discussion. Following the Quranic approach: "Thus, by the Scripture which makes things clear (Surah Zukhruf(43) : 2), and "whereupon every wise command is made evident" (Surah ad-Dukhan(44) : 44), we are made to realize that "in the Source of Decrees, which we possess, (the Qur'an) is indeed sublime, decisive" (Surah Zukhruf(43) : 44). We then proceed to learn that, "(this is) a Scripture the revelations whereof are perfected and then expounded. It emanates from One, Wise, Informed" (Surah Hud(11) : 1). And yet the guidance of Prophetic mission is made a reality: "And (it is) a Qur'an that we have divided, that you may recite it unto the people at intervals, and we have revealed it in successive portions (i.e. step by step)" (Surah Bani Israil(17) : 106). "Verily, we have made (this Qur'an) easy to understand" (Surah ad-Dukhan(44) : 58), and "easy to remember" (Surah al-Qamar (54) : 17). This is the principle of the Quranic methodology of *Tadrij* or gradualism.

V – ELEMENT OF JURISTIC RULE-CREATION

In the sociology of law, the development of the *Fiqh* sciences as a 'legist

rule-creation' is a unique legal culture subscribed to by the Muslim community It also provides the phenomenology of legal science in which doctors of Islam (*ulama*) produced scholarly handbooks and compendiums having the force of law independent of state legislative structures. As already hinted, the development of Muslim jurisprudence (*fiqh*) was accompanied by the role played by the classical jurists in whose name the four Sunni schools of law were established. This was accomplished by the crystalization of their legal conceptualism. Each school of legal thought is the resultant of the choices made by the various members of the Muslim communities as effected by their geographical propinquity to the centres of Prophetic tradition. The predominance of the Shafei school in our geographic region of Southeast Asia can be reviewed in this light. The spread of Islam into our region has distinctively been preserved in the Shafei heritage of *fiqh*.

A. THE DEVELOPMENT OF THE SUNNI SCHOOLS

There developed two centres of learning in Muslim conflict of a model of law and society after the Prophet's death. One was the group known as the 'People of Opinion' (*ahl ar-ra'y*) in Kufa and Basra in Iraq with Abu Hanifa as the leading figure. The other was the group identified as the 'People of Traditions' (*ahl al-hadith*) based in Makka and Madina in the Hijaz with Malik bin Anas as the principal figure. The school of thoughts of the latter group was noted for its meticulous adherence to the sunnah of the Prophet. This orientation may be explained from the fact that its jurists were located in the cradle of Prophetic tradition and the home base of the Companions of the Prophet. The living *sunnah* or traditions were adequate therefore for the settlement of disputes. The situation was different in the Kufic centre of learning where recourse to deduction by analogy evolved in difference to unauthenticated *hadith* at that time. The jurists were remote from the direct sources or the transmitters of Prophetic traditions. In the consideration of geographic environment and cultural relativity, we have much to learn from these thought realms.

1. Abu Hanifa and Malik bin Anas

Abu Hanifa (AH 80–150/AD 699–767), in whose name our first Sunni school of law was gradually established, extensively used *qiyas* as a codal construct. He left only one small book entitled *al-Fiqh al-Akbar*, but his students compiled his Musnad which contains the *hadith* that the Imam relied upon. As a theoretical systematizer, he conceived of *Qiyas* as a theory of analogical construct against inordinate and arbitrary use of personal opinion (*ra'y*). But this technique was rather very delicate for one reason. Since it involved the use of human reasoning in the handling of materials provided by revelation, there was some apprehension about excesses in the proper limits even of considered legal opinions. Then, there was also the

logical implications of the rule-finding principle introduced by Abu Hanifa to deal with jurisdication problems and questions of practical needs and necessity. This is known as the juristic preference (*istihsan*). Significantly, it is not accidental that the utilization of legal devises (*hiyal*) as an application of juristic inference was ascribed to the Hanafi jurists.

The school of which Malik ibn Anas (AH 95–179/AD 713–795) was the founder stood in opposition to the Hanafi systematic legal logic, but utlimately accepted the legal mode of reasoning known as *Qiyas*. Malik occupies a clear linkage in the chain of transmitters of *ahadith*. His major work, *Muwatta*, actually established the foundation for the topical arrangement of the principles underlying the collection of *ahadith*. Because it makes praiseworthy reading Caliph Harun al-Rashid even proposed the *Muwatta* as a general legal code throughout the Islamic State. The main body of the book is in itself a record of the practices of the people of Madina. However, when it came to social complexity and the practical application of law, Malik introduced yet another rule-finding principle. This is known as unprecedented judgement (*istislah*). Interestingly, when the Maliki jurists confront policy questions, *maslaha mursala* became a utilitarian framework for social change.

2. Al-Shafei and Ibn Hanbal

The task of 'code harmonization' of the classical legal thoughts resulted in the formulation of the sources of Muslim law by Muhammad bin Idris as-Shafei (AH 150–204/AD 767–820). He founded our third Sunni school and established the essentials of the theory of *fiqh* which has put forward the science of principles of rule-creation from authentic sources known as *usul-al-fiqh*. This explains the fact that Shafei carried to an unparalleled degree the investigation of the bases of Islamic Law. Shafei left 113 works bearing on *tafsir and fiqh* treatises, the major ones being *Kitab al-Umm*, *Iktilaf al-Hadith* and *Risalah*. A glance at these books reveals that Shafei made the authenticated traditions from the Prophet, to the exclusion of the living traditions, the ground on which Muslim legal theory stood. It was to become the cornerstone of the authentication rule of *hadith* compendium to which the works of Bukhari, Muslim, Abu Dawud, Tirmidhi, Nasai and Ibn Majah were subjected by later jurists.

By a remarkable twist of history, it was Shafei's leading disciple Ahmad Ibn Hanbal (AH 164–241/AD 780–855), the founder of our fourth school of law, who relied essentially on the Quran and *ahadith*. Ibn Hanbal's strict adherence to text of the Qur'an and Sunnah led him to discount not only *qiyas* but to his aversion for *ra'y*. For this reason, there are those who classify him a *muhaddith* rather than a *mujtahid* along with Bukhari and Muslim. That his school of thought was rejuvenated by Ahmad Ibn Taymiyya (AD 1263–1321) and his pupil Ibn Qayyim al-Jawizyah (AD 1292–1350) has

been vindicated further by Muhammad Ibn Abd al-Wahhab (AD 1703–1787) in contemporary Saudi Arabia. While Shafei may be credited with sytematizing the use of *Qiyas* as code harmonizer, Hanbal's strict adherence to Qur'an and Sunnah set the momentum for 'closing the gates of ijtihad' after him.

3. Ibn Taimiyya and His Followers

The groundwork for the reinterpretations to old juridical problems retraced its steps in Ibn Taimiyya (AH 661–782/AD 1263–1321) and his followers. Reared in the tradition of the Hanbali school, he felt hedged by the degrees of *ijtihad* confined within the four established Sunni schools. The thesis of Ibn Taimiyya was two pronged. At one point, he refuted the Mu'tazilites and the Zahirites who rejected *Qiyas* as a means of developing the teachings of the Qur'an and Sunnah into a comprehensive body of law. At another point, he equally reacted to the extremism of the adherents of *Ra'y* who, in Ibn Taimiyya's view, were prone to abuse *ijtihad* under the reasoned approach. The theory of *salaf* which for him originally structured the Muslim law and society, called for overturning the concept of *taqlid.* The formulation attendant to his legal theory's practical application is that "substantiated narratives in the Shari'ah are always in conformity with the dictates of reason".[28]

Ibn Taimiyya was confronted with the value-sets of the rule-creation principle not based simply on *ijma.* He established his legal theory by "coupling authority" (*'amr jami*) with the precedents set by the early forerunners (*salaf*). The *Salafiyah* school stood for the unification of the various Islamic schools. According to observers, "Ibn Taimiyya has managed to identify the *qiyas* of jurists with the syllogism of philosophers".[29] Some of Ibn Taimiyya's views were crystalized by his brilliant student Ibn Qayyim. However, influenced by the rapid changing conditions of his time, Ibn Qayyim exemplified the dictum in *fatwa* that, "legal interpretation should change with the change in time, places, conditions, intentions and customs". Thus, for Ibn Qayyim, "the foundation of shari'ah is wisdom (*hikmat*) and the safeguarding of people's interests" and *maslaha* is the specific term of *hikmat.* Shari'ah is God's justice and mercy among his people.[30]

The generation following Ibn Tamiyya was locked in a debate on the permissibility of *siyasa shari'ah* or policy. The Maliki Imam Shihab a-Din al-Qarafi al-Misri developed the use of *qiyas* along more carefully defined lines with the Shafei jurists Izz al-Din bin Abd all Salam. For instance, he treats of "suitability" (*munasaba*) as a function *qiyas* by applying the conduciveness of a rule to the promotion of *maslaha.* Qarafi proceeded to classify the preference of the "suitability rule" by *istislah* on grounds of (a) compelling necessity (*darurat*) (b) important need (*hajjat*), or (c) supplementary em-

bellishment (*tathimma*) in that order. In his view, *darurat* is extended to the protection of what the great Shafiite philosopher Imam Muhammad al-Ghazali (AH 450–478/AD 1058–1085) and the Spanish Malik jurist Abu Ishaq Ibrahim al-Shatibi identified as five universals: *Din* (religion), *Nafs* (life), *Aql* (intellect), *Mal* (property) and *Nasb* (posterity).

The Hanbali Imam Najm al-Din ibn Abd al Qawiy-al Tufi advocated placing *maslaha* before the texts and consensus as a proviso when "public interest requires otherwise". For Tufi, "*maslaha* is itself one of the indications of the Law, and in fact the strongest and most specific of them", so it must be given precedence to uphold public interest. Tufi qualified this view to state that "the texts and consensus must be relied upon in questions of religious observances and rites", but "*maslaha mursala* should be relied upon in questions of transactions and other rules". Again, the implication of his theory of *maslaha* is that in the method of selection of norms perference must be given to the ruling that would secure "as many benefits as possible". The rationale is that "consideration of the *masalah* is necessary on the part of God (*wajib min Allah*), but not obligatory on him (*wajib 'alaih*)"[31]

B. THE VICIOUS CIRCLE OF TAQLID

For a long time, extending between AH 700–1400/AD 1200–1900, the Muslim world has been at pains to reopen the purposive gateway of *ijtihad.* The intellectual capacities and environment resources available to the Muslim community and the consequential events stemming from their legal cultures profoundly conditioned the narrowing scope of the shari'ah-derived rulings and the great inroads made by secular law into its field. This makes it understandable that the parallel doctrine of *taqlid* (i.e. following the opinion of another person without knowledge of the authority for such opinion) has become the stranglehold of Muslim intellectual life. Let us briefly examine what these networks of framework contributed to 'code harmonization' of shari'ah rules.

1. The Modernist Drift

In Asia among those who were breaking new ground in shari'ah policy was Ahmad bin Abdu-r-Rahim who is better known as Shah Wali-Allah al-Dihlawi (AH 1104–1176/AD 1703–1762). He was influenced at first by Imam al-Ghazali and the Sheikh-ul Islam Izz al-Din bin Abd-al-Salam a Shafei jurist contemporary of al-Qarafi. The Shari'ah in Shah Wali-Allah's view, aims at giving an institutional shape to the indeterminate and vague notions of the purpose of society for which he coined a term *irtifaqat* (social institutions) The achievement of social justice is central to his legal theory in which he attaches great importance to social phenomena. Thus, a major statement attributed to Shah Wali-Allah in one of his works is that, "a new era begins with every century or every millenium in which God introduces a reformed

shari'ah according to the needs and requirements of the age".[32] This is a thesis which assumes their peoples or things familiar to them". No doubt reformations were made but it was indispensable to treat also the customs, *ulum* (sciences) and *irtifaqat* (social institutions) of the people as a substantive base of the shari'ah. But only those customs of other people that can be accepted as the natural beliefs (*al-madhab al-tabii*) of the enlightened world (*al aqalim al-salihah*) are to be taken into consideration.

For our purpose here, we can isolate Shah Wali-Allah's view that pertains to *fiqh*. He advocated the shari'ah policy of confining oneself within the framework of the four Sunni schools but mitigated the use of *taqlid*. He wrote:

> The general practice with regard to the framing to Fiqh law is that either deductions are directly based upon the Hadith or they are drawn in the light of the principles enunciated by the jurists. The scholars of every age have been following these two courses, some stressing the former, others stressing the latter . . . It is unfair to tilt the balance to one side only and neglect the other altogether . . . The right procedure is to harmonize them. Both these methods should be employed for raising the superstructure of Islamic jurisprudence.[33]

In another generation more, the fulcrum would swing between the traditionalist and the modernist who identified with his views. At another spectrum, the distinguished Salafist Sayyid Jamal al-Din al-Afghani (1839–1897) and his colleague Shaykh Muhammad Abduh (1849–1905) carried the movement to a point of reinterpreting Islam vis-a-vis 'modern ideas' and realities while purging it of 'alien accrestions'.

2. The Natural Law School: Abduh and Reda

Shaykh Abduh himself described his espounsing two great causes in the following terms:

> The first of these was the liberation of thought from the chains of imitations and the understanding of religious faith as the members of the early community understood it before dissension arose, and the return of religious learning to its original sources, and consideration of religion in the scales of human intelligence that God created to repel the excesses of faith and diminish its errors and stumblings, so that the human social order prescribed by God in His wisdom may be attained. In this way religion may be counted the true friend of science, a stimulus for inquiry into the secrets of the universe, and an appeal to respect established truths and rely upon them in cultivating our spirits and reforming our actions. All this I have considered to be a single matter . . . The second cause I adopted was the reform of the Arabic language.[34]

The principal methodological tools for bringing these about were for him: first, the principle of *istislah* or *maslahah* (i.e. the overriding public interest as the norm to deduce laws from the Qur'an and Sunnah); and second, the method of *ikhtiyar* or *talfiq* (i.e. the synthesis of the good points of all the Sunni schools and comparison of the independent judgements of the recog-

nized jurists). Some consider the reforms of Abduh as peripheral. However, as Grand Mufti of Egypt, he rendered three legal opinions (*fatwa*) which are considered landmarks in Muslim attitude towards modernity:

> The first of these authorized the Muslims to receive interest and dividends; the second authorized them while living in non-Muslim countries, to eat the meat of animals slaughtered by non-Muslims; and the third permitted them, if the occasion arose, to wear clothes other than their traditional costume.[35]

Abduh's efforts against 'blind imitation' were to end in the hands of his adherent Rashid Reda who sought to recast his utilitarian interpretation. Still, Rashid Reda affirmed "that God permitted legislation (*ishtira*) in Islam, "delegating it to the community to decide upon by those possessing knowledge and judgement in consultation among themselves.

What seems significant for Southeast Asia during this period is that *taklid buta* (blind imitation) became an important issue at the turn of the current century. The periodical in Malay entitled *Al-Imam* which made its first appearance in Singapore begun to carry the reformist ideas. A regular section of the journal was devoted to readers' questions and answers and to *fatwa* on disputed matters of religious interpretation. More specifically, for instance, the piece by Shaykh Abduh on *riba* appeared in the June 1, 1907 issue in translation to Malay. In the 1920s a long-drawan debate for the acceptance of savings bank and cooperative societies based on interest was sustained. And it was reported in the papers that "no fatwas from the 'Religious Authorities' produced by the Department could move" the Yang di-Pertuan Besar of Negeri Sembilan, not even Abduh's famous *fatwa* on interest.[36]

3. The Call for Ijtihadiyya Movement

Contemporary Muslim scholars have just begun to recast the limited exercise of *ijtihad* by eclection. Code harmonization methods such as *Takhayyur* (which means 'to select" that which is *khayr* or of good advantage), and *Talfiq* (which signifies 'to piece together' a synthesis of the good points) have become the key-models for value-choice of all the Sunni legal theories. These patch up techniques are essentially forms of juristic preference or *istihsan.* Despite some assimilative advantage derived from these methods, it has been cyclic in other respects. Currently, the study of collected, organized qiyas or *ijtihad* and *ijma* are being refined by contemporary *ijtihadiyya* movement whose ideas take the form of decision-making process through advice and consent (*shura-ijma*) at all levels of government and social activity.[37]

In terms of modern legal reforms there have been intermediate stages. There was in 1940 the committee organized by the late rector of al-Azhar University, Shaykh Muhammad Mustafa al-Maraghi, to effect reform of the

system governing personal status and the codification of its rules along modern lines. The committee was to derive rulings from the Sunni schools and not restrict itself to the interpretation of any particular school. Here, we are merely concerned about the fact that moves have been taken to reconcile the various schools which for us in Southeast Asia has never been a major issue.

At any rate, it would be good to end this section with a summary statement of Subhi Mahmasani who advocated the return to original sources as a means of unifying the various schools. Such a return should consider the following points:

(a) To adopt the provisions of the Qur'an as the first basis for Islamic teachings and jurisprudence; to distinguish in this respect between compulsory and voluntary or directive provisions on the lines already attempted by interpreters of the Qur'an and scholars of the Science of Legal Sources; and then to apply these provisions in accordance with their respective significance.

(b) To adopt the Sunnah in all obligatory religious provisions, provided that this Sunnah is authentic and acceptable in the various Muslim schools and that it is not inconsistent with the text of the Qur'an.

(c) To adopt the rest of the Sunnah, that is to say the traditional teachings and precepts whose authenticity had been disputed by reliable leaders of the schools, provided they are consistent with reason and acceptable to jurists and scholars of the Science of Legal Sources (Ilm al Usul) on the basis of the principle mentioned above, namely that the truly traditional is always consistent with the truly rational.

(d) To choose from the legal rules based on interpretations of jurists those which are most suitable to the needs of modern society, public interest and principles of justice and equity.[38]

Such are the practical considerations thought of as would lead towards the unification of the Muslim schools.

Perhpas, it is hardly necessary to chart here a detailed guideline for our school of law. So much is instructive from the collection of works of Imam Shafei. It is admitted that the *Muharrar* by Imam Abdal Karim bin Muhammad al-Rafi'i and *Minhaj* by Imam Zakariya Yahaya bin Sharaf an-Nawawi, together with its commentaries, the *Tufah* and the *Nihayah*, are considered as the Law books of the Shafei school. The several treatises of Imam Shafei is his *Kitab-al Umm* already was his way of codifying systematically the divergence of opinions between his school and the other schools.

VI – SHARI'AH POLICY: THE FUNCTION OF HUMAN LEGISLATION

If the Shari'ah Rule of Decision makes for axiomatic legislation by juridical interpretation, civil law remains inoperative without positive legislation. What we call *fiqh* is actually the human understanding of shari'ah law proper historically conditioned. But an institutional framework for legislative interpretation has not been ruled out by our established schools of law; it is a preserve of shari'ah policy or *siyasa shari'ah*. The complexity of law in contemporary nation-states have so much fostered fresh outlook at the present state of *fiqh* as being a form of legislative intent rather than as the exercised effort by jurists for independent judgement.

In Sayyid Abu 'Ala Maududi, we find the treatment of such matters as are within the competence of human legislative authority. We may now proceed to consider two shari'ah policies as presented by Maududi in one of his writings:

1. Function of Human Legislation

If we are to follow Maududi, there is room for positive approach in the following fields of human endeavpr:[39]

(a) To find out exactly and precisely what the law is: its nature and extent;

(b) To determine its meaning and intent;

(c) To investigate the conditions for which it is intended and the way in which it is to be applied to the practical problems;

(d) To work out minor details in the case of such laws as are too brief for a straightaway application in actual life; and

(e) To determine the extent of its applicability or non-applicability in case of exceptional circumstances.

It will have occured to us by now that the scope of human legislation is largely the parts of Shari'ah rules defined as jurisprudential sources. In matters of worship (*ibadat*) there is no room for positive legislation because this is directly related to the clear commandment of God. It was Imam Shafei who made the fine distinction between religious sanctions (*huquq al-dinniyah*) and civil rights (*huquq al-adamiyin*); the former is derived from *hudud Allah* (divine limits). So that in the field of individual and social affairs (*mu'amalat*) there is a limited scope for legislation in transactions about which the primary sources, the Qur'an and Sunnah, are silent. This is the field of the permissibles.

2. The Function of the Legislature

We may seize upon that classical Islamic legal theory and build upon the scope of human legislation. This approach fits into the number of functions which Maududi identified as areas of legislative concerns:[40]

(a) Where the explicit directives of God and his Prophet (s.a.w) are available, although the legislature cannot alter or amend them, yet the legislature alone will be competent to enact them in the shape of sections, devise relevant definitions and details and make rules and regulations for the purpose of enforcing them.

(b) Where the directives of the Qur'an and the Sunnah are capable of more than one interpretation the legislature should decide which of these interpretations should be placed on the Statute books.

(c) Wherever there is no explicit provision in the Qur'an and Sunnah, the function of the legislature would be to enact laws relating to the same, of course always keeping in view the general spirit of Islam, and where previously enacted laws are present in the books of *Fiqh*, to adopt any one of them.

(d) Wherever and in whatever matters even basic guidance is not available from the Qur'an or the Sunnah, or the conventions of the Righteous Caliphs, it would be taken to mean that God has left us free to legislate on those points according to our best lights.

It is in this last paragraph that the legislature can formulate laws without much restriction, provided such enactments do not contravene the letter and spirit of the Shari'ah – the principle here being that whatever has not been disallowed is allowed (i.e. *al-ibaha asl-un fil-l-ashya*). In respect of paragraph (b), for Maududi's rule-creation theory, it is indispensable that "the legislature should consist of a body of such learned men who have the ability and capacity to interpret Quranic injunctions and who, in giving decisions, would not take liberties with the spirit or the letter of the Shari'ah".

The thrust of this conceptual process was to remove the law from undue tampering but at the same time bringing in the coercive expression of State power. The implication of this thesis is that essentially it will have to be accepted that "for the purposes of legislation, a legislature has the authority to accord preference to one or the other of the various interpretations and to enact the one preferred by it into law". This does not mean a deviation (*bida'a*). The fact of the matter as Maududi has posited, is that Islam does not totally exclude human legislation; it only puts the limit to its scope and guides its texture on the right lines.

3. The Forms of Rule-Creation Restated

This preceding point brings us to the four ways in which legislative forms of rule-creation may be allowed. Here we have again restated them as standards against which to measure human legislation.[41]

(a) *Ta'wil* or Exegetical Interpretation.
This consists of the discernment of the system and meaning of a *nass* or explicit text of the Qur'an and Hadith in respect of clear Rule of Decision (*hukm*) in the nature of a commandment (*'amr*) or a prohibition (*nahy*). The criterion of legality and derived set of authoritative standards is unalterable since the Qur'an and Sunnah continue to have legislative effect at all time and space.

(b) *Qiyas* or Analogical Deduction.
This method consist of the application of analogical reasoning to a certain case by means of deduction from a specific Rule of Decision in a similar or analogous case with identical attribute. Legal analogy is done by ascertaining first the *illat* (efficient cause) of a specific ruling to apply it by *ta'lil* (reasoning based on that cause) due to the suitability of its attribute to the law.

(c) *Ijtihad* or Disciplined Reasoning.
This method has the effect of legislating on matters for which no explicit injunctions or legal analogy exist by the use of systematic original thinking to ascertain, in a given situation or issue, the injunction of Shari'ah value and its real intent. Resource to *ijtihad* requires exercised mind and sound judgement as well as expertise in rule-derivation according to the values and goals of Islam.

(d) Derivative Rules and Equity Doctrines.
These represent the principles of *Istihsan* (juristic preference), *Istidlal* (juristic inference), *Istislah* or *maslaha* (public interest), which are residuary creative elements in the development of equity doctirines in non-prohibited areas. All these have been reduced to a pattern of principles within which to operate juristic value-choice in the texture of law.

We might explain here that in the choice of fundamental norms of validity there is little that can be possibly legislated upon. In any case, Maududi after perceiving the function of these residuary or subsidiary methods, justified their essential utility as a tool only for "expediential legislation". Since he advocated the positive role of a Islamic state such as happend in the creation of Pakistan, Sayyid Maududi could later argue that rules derived therein would never acquire the force of law without being accepted either by community consensus (*ijma*) or by approval of the majority (*jamhur*). Again here we are more interested in the fact that Maududi charted a fresh *ijtihad* from

a mere juridical value-consensus to the legislative domain of State power. So he did after all buttress Muhammad Iqbal's famous postulate that *ijtihad* is "the principle of movement in the structure of Islam".[42]

MODEL LEGISLATION IN ISLAMIC BANKING AND INVESTMENT HOUSE

It must be realized at this juncture that we are passing from the field of juristic interpretation to the legislative process. For comparative reasons, we can take it that unlike Rashid Reda who almost mistakenly equated *shura* to *ijma*, Maududi has not done so. The case for legislative interpretation has been argued upon and won in the field of piecemeal legislation that operationalize model Islamic banks. This current trend in legislation rest heavily on the conceptualization of Islamically accepted modes of business transactions at the same time eliminating *riba*. Prince Muhammad al-Faisal bin Abdul Aziz stands out as the leading figure in this movement. The new approach has already contributed legal terminologies to commercial and banking laws. There are affinities between the idea of juristic interpretation by *ijtihad* and legislative intent by *siyasa* as we see it.

These bank charters are not ideal imperatives expressed in modern statutes, but are legal imperatives for implementing operative value-choices in transactions (*mu'amalat*). The matter of legal interpretation provides the causal linkage between the normative requirements and operative needs of the bank. The *shura* has been formalized into a 'shari'ah supervisory body' composed of a number of members chosen from Islamic scholars and jurists of comparative law studies. The tasks of this "legitimate control bodies" is to offer advice and undertake reviews as concerns the application of the provisions of the Islamic shari'ah to the banks' transactions.

Such a practice in the application of law has paved the way for an institutional procedure for convening a consensus at the international level by the "legitimate control bodies" for the association of Islamic banks. By this means, the authoritative validation by *ijma* of particular interpretations has been achieved. The growing number of enabling enactments under which the Islamic banks are chartered or incorporated needs a 'code harmonization'. The statutory provisions of the charters are sources of legal transactions in Malaysia, Pakistan, Bangladesh, Egypt, Iran, Sudan, Nigeria and the Gulf States and in a limited scope in the Philippines. The conceptual framework of *mudaraba*, *musharaka*, *murabaha* and *mudaraba*, has gone beyond the interaction of formal legal structure and thought realm. It is bound to develop a jurisprudence of its own.

VII – JUDICIAL INTERPRETATION IN COMTEMPORARY COURTS

The modern national state framework provide formal structures for contesting issues of law for which we shall devote a part of our discussion. In effect, courts and judges have assumed a creative role to apply the welter of statutes enacted by the legislative bodies for the administration of Islamic laws and customary laws. Apart from this, the tradition of judicial review has upheld the rule-making power of the Supreme Court or Court of Cassation. This process is readily illustrated in the contrast between the precedent system of civil-law countries and case laws of common-law countries.

In comman-law jurisdictions such as Malaysia, Singapore, Brunei or Sri Lanka, the judgement in decided cases enjoy a peculiar status as authoritative pronouncements of the law. This has opened the way for the development of a kind of indirect legislation which is not unfamiliar to Islam. But in the civil-law jurisdictions such as obtaining in the Philippines, only a line of judicial precedents are considered completely binding. This adherence to judicial precedents is known as the doctrine of *stare decisis*. As we can see, judicial interpretation is essential in a common-law system where the bulk of statutory laws still remain uncodified. Because of existing codification of the basic principles of law, under the civil-law system the rules on statutory construction have become both a technical and mechanical process in aid of judicial decisions.

Now under the Constitution of the Philippines, the power to define, prescribe and apportion the jurisdiction of the various courts is vested in the National Assembly. But the Supreme Court cannot be deprived of its jurisdiction over certain cases. Included herein is the power to promulgate rules concerning pleading, practice, and procedure of all courts, the admission to the practice of law, and the integration of the Bar. There is thus provided in the Code of Muslim Personal Laws of the Philippines that the Shari'ah District Courts and Shari'ah Circuit Courts shall be governed by such special rules of procedure as the Supreme Court may promulgate (Arts 148 and 158, P.D. 1083). Pursuant thereto, and in order to achieve an expeditious and inexpensive determination of the cases before them, the Supreme Court resolved to promulgate the Special Rules of Procedure in the Shari'ah Courts (*Ijra-at al Mahkim al Shari'ah*). This was approved enbanc by the Supreme Court on September 20, 1985.

This development is all the more significant since under the Islamic legal system the rules of procedure are closely intertwined with the rules of decision (i.e. substantive law). Judicial review is unknown to the Islamic classical juridical apparatus (*qada*) of administration of justice. The cardinal rule that

a *mujtahid* is not allowed to change his opinion concerning the same case (although he may reverse it in another case) applies to independent reasoning or *ijtihad*. But as a matter of *siyasa shari'ah*, we have deemed it of compelling necessity that an appeal on questions of law fall directly within the competent jurisdiction of the Supreme Court. By its collegiate composition and its university-derived tradition, it is nearest to an institutional, collectively responsible body of learned men in law for the administration of justice. The Office of Mufti is in fact attached to the Supreme Court rather than the Executive Branch of the government to preserve its independence and public integrity (Art. 164, P.D. 1083).

It should be added that if a problem arises in a court of law the judge is required first to interpret the Code of Muslim Personal Laws taking into consideration the primary sources of Muslim law, (Art 4, 1 and 2, P.D. 1083). In case of conflict among the Sunni Muslim school public order, public policy and public interest are to be given effect which virtually sanctions *istislah*, *istihsan* and *istishab* (Arts. 5 and 6, P.D. 1083). The Shafei school of law however is given preference together with the special rule of procedure adopted pursuant to the Code (Art. 134, para 2, P.D. 1083), Adjudication and settlement of disputes is established, in appropriate cases, by *Agama* Arbitration proceedings (Arts. 106–163, Rule IV, Rules, Section 19).

The court is required to adhere to the sources of Muslim law relating to reception of evidence, the number, status or quality of witness required to prove any fact. It was our intention in the drafting committee to adopt flexibility. We were most cautious and conscious of the established broad principles of practice and known *fiqh* rulings. Thus, it would be completely wrong for the Court on a point of law to ignore, these established *fiqh* rulings and attempt to put forward their own contruction on the primary sources in opposition to explicit rules of application (*furu al fiqh*) in our great law tradition.[43] In fact, according to Imam al-Nawawi, a person wishing to obtain a certain amount of authority in matters of law should also know:[44]

(1) The Arabic language, both as to the employment of words and as to grammatical rules; and also the opinions of jurists, beginning with the companions of the Prophet (s.a.w.).

(2) whether these opinions are in harmony with one another, or if there is some divergence between them.

(3) The reasonings upon which these opinions are based.

In this light, we considered it of outmost urgency to increase the intellectual acumen of our shari'ah court judges as a concern for their continuing

legal education. Towares this end, we sent the Philippine judges for training at the National Center for Judicial Studies in Egypt this year. They went through a program prepared by the Center in coordination with Sheikh-ul Azhar Jadel Haqq. We view the program of the International Islamic University in Malaysia initiated by Shaik Ahmad Ibrahim as a similar positive action towards the *qada al-shariah* center for the Southeast Asian Region.

SUMMARY STATEMENT

The Philippine experience in codification of Muslim personal law is a case study in shari'ah policy. The idea we gathered from the survey of the development of *fiqh*, associated with the human understanding of the shari'ah Rule of Decision, has served a useful purpose. We have identified the broad outlines of the body of shari'ah law which derive sources from the science of first principles of fiqh (*usul-al fiqh*), as distinguished from the rules of actual application (*ilm al furu*) of jurisprudence. In turn, we are aware that the sources of Muslim personal laws called legal imperatives are derived from (a) *shari'ah* and *fiqh* proper; (b) the enabling legislation and implementing enactments; (c) the binding court precedents and case law; (d) the customary usage or *adat* as proved by judicial interpretation. These are within the scope of human legislation and are amenable to codification or code harmonization.

The Shafei school of law is said to have crystalized the differences of opinion in the other schools. In this sense, the commonality of purpose in the South East Asian region is suitable for code harmonization of personal law system. But far more feasible is the systematized collection of *fatwa* and the reporting of cases as a project for the South East Asia Shariah Law Association (SEASA). There is also the growing legislative interpretation of economic-based transactions (*mu'amalat*) which can be explored by SEASA for code harmonization.

FOOTNOTES

1 S. Ramadan, *Islamic Law:* Its Scope and Equity 43 (2nd Ed. 1970).

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SHARI'AH AND CODIFICATION SINGAPORE EXPERIENCE

by

Abu Bakar bin Hashim

Shari'ah, as is known today, is the legal manifestation of Islam, though its literal meaning, in the Arabic language, is more general, i.e. to ordain or institute or appoint any law on the basis of a beaten path of conduct, for it more primarily conveys the meaning of "Trodden path or road". In Islam the trodden path is that of the Messenger of Allah, Muhammad (s.a.w). Therefore, one cannot say or write anything at all about the Shari'ah without having to say or write about Islam and one cannot know anything about the Shari'ah without knowing what Islam is.

Islam means "submission to the Will of Allah", irrespective of whether the Will is expressed or unexpressed. Expression is to represent or make known in word or by gestures, conduct and so on. The unexpressed Will of Allah manifests in the form of the law of nature in submission to which all things in the universe, however big or small, must willynilly operate, irrespective of whether the operation is voluntary or involuntary. This is known as the Fitri (Nature) aspect of Islam and all those things which submit to the unexpressed Will of Allah, i.e. the Fitri aspect of Islam are Muslims in this sense of the term Islam. In this sense of the term Islam even all the atoms which go to make the body of an avowed non-Muslim are Muslims. And all these laws, i.e. the laws of nature, however numerous, do not form part of the Shari'ah, and humanity in its entirety is completely incapable of making any effort at codification of these laws of nature. And the expressed Will of Allah manifests in the form of answers given by Allah, out of His Grace, to the questions which occured in the minds of the rational beings such as "Whence I am?", Whither I am bound?", What is the purpose of my being?", "What I ought to do?", "What I ought not to do?" and so on. This is because, no source of knowledge could legitimately come forward to answer questions of this type except reason and revelation. But reason has to base its findings on the sense of perception which are capable of erring. It is a known thing that anything which is based on another thing which is capable of erring becomes itself capable of erring. Therefore, reason becomes incapable of providing unmistakeable answers for man's quests. But revelation does not suffer that defect, because it is from Allah who knows the hidden and the manifest. And the answers given by Allah through revelations clearly spelt out whence man is, where he is bound to, what is the purpose of his being, what he ought to do and what he ought not to do in the various aspects and conditions of his life. Those answers were given to man by Allah through His Messengers and Pro-

phets by way of revelation and they in their turn conveyed them to their respective Ummah. We Muslims believe that all such Messengers other than Muhammad were sent with messages only to their respective ethnic communities whereas the Prophet of Islam was sent as the Final Messenger of Allah to the entire mankind ever afterwards. Muhammad (s.a.w) was constantly under inspiration ever since he was given the first revelations and he received Divine Messages through direct communication with Allah as well as through the intermediation of angel Jibril. Those that came through the intermediation of Jibril made up the contents of the Holy Qur'an and those that came through his direct communication with Allah are known as Hadith Qudsi. His conduct of life as an individual, as a member of his society, as the head of his family, as the head of his nation and as the leader of the entire universe, again were based on Divine inspiration. Therefore, he guided his Ummah through peaching to them the Qur'an by setting up his own manners and modes of conduct as a pattern for them to follow and emulate. Thereby he moulded his whole family and his entire companionship as a model family, a model society and a model nation to be followed ever afterwards by human beings. No single important aspect of human life was left without his guidance therein. All his words, deeds and tacit approvals were taken as the interpretation of the Qur'anic message of guidance to man. Therefore, all these teachings and model patterns set by him together with the Qur'an made the basic sources of the Shari'ah or the Trodden Path for the Muslims.

So long as the Prophet was alive his community, i.e. the companions of the Prophet had nothing to worry about, for he was there to guide them and to meet new situations with fresh revelations he obtained from Allah. But with the passing away of the Prophet the revelations stopped and the companions had to strive hard to extract rules of law from the texts, i.e. the Qur'an and the Sunnah (i.e. the way shown by the Prophet). The companions in extracting the rules of law from these sources followed the principles of analogy (Qiyas) and consensus (Ijma) which were the only legitimate fields left in the absence of the Prophet. They did not use their own opinion or reason. Therefore, analogy and consensus became further sources of law, in the absence of anything clear-cut in the primary sources of law. But they are subordinate to the primary sources, the Qur'an and the Sunnah. An analogical deduction by a person qualified to do so becomes 'Ijma' if it is supported by general agreement. It is an extension of law from the original texts to a particular case by means of a common cause ('Illah) and it is not a new source of law on its own. From these four sources the Mujtahids (i.e. the interpreters of law) who are known as Imams discovered the details of law. Ijtihad or Interpretation, technically, is an effort to discover the law from its sources. There were several such sincere and dedicated savants of Islam who, by keeping themselves free from all the political tides of their

time, sincerely strived to reduce law from the said sources to the needs of the situations and for hypothetical situations. The most prominent among them were Imam Abu Hanifah, Imam Malik, Imam Ash-Shafi'i and Imam Ahmad Ibnu Hanbal, May Allah be pleased with them. The Islamic Law or Shari'ah, through the strivings and efforts of these Imams developed into a comprehensive all-embrasive system of law for all human beings of all conditions. Such laws were written in a systematic way and recorded in the books of Fiqh or Jurisprudence.

Therefore, when we are to speak about codification, we cannot but attribute the credit for the very first attempts at codification to these great savants of Islam, because codification, according to English lexicons, means a systematization of laws into a code, and what they did was exactly this in addition to their painstaking efforts at interpretation.

But their codification was only sufficient to meet the needs of their time, though the laws themselves, as revealed by Allah and elucidated by Prophet and interpreted by the Imams, were perfect and comprehensive. Their codification was a mere collection and systematization of the laws of Islam under chapters and section according to an order of succession which seemed most logical to each one of them. In codifying as they did they had in their mind only the political structure of their time and their situation. They only saw three types of political situations, one as Muslims alone being the ruling community of a state and all the non-Muslims there being reduced to the status of Dhimmis who enjoyed religious liberties and protection under an Islamic government, the second is as Muslims being the subjects of an enemy state where they enjoyed little or no religious liberties and the third is as Muslims in a non-Muslim state which has entered into a covenant with an Islamic state. They did not envisage the possibilities of Muslim states being colonized by non-Muslim powers who would give them some form of freedom of religion under their rule or of the evolving of parlimentary democracies where Muslims and non-Muslims live in peace, enjoying equal rights and liberties. Therefore, their codification was simple and unsophisticated. But the needs of our time vary far from their needs. We Muslims of the present day need, irrespective of whether we are of an Islamic state or a Muslim majority country or a Muslim minority country statutes and codes to administer those laws in order to make them part and parcel of the legal system of the country we live in, to give the Islamic Laws their bite.

For if not, the laws will lose their effectiveness, especially, in countries where Muslims and non-Muslims coexist, irrespective of whether the Muslims there are a majority or a minority. This created a need for a further codification over and above the codification done by our revered Imams.

The term "codification" simply means systematization, but technically it means "to render laws into a code". It is a noun derived from the term "code". The term "code" has a number of meanings: 1. A systematic collection of statutes made by a sovereign or a legislative authority. 2. A system of rules or regulation on any subject. 3. A digest of the laws of a country or those relating to any subject. 4. A collection of writings forming a book or volume. Of these four meanings of the term "code" all except the first apply to the codification done by the revered Imams of the schools of Islamic Jurisprudence. But the first meaning does not apply to the codification done by them, because it revolves round the words "statutes made by a sovereign or a legislative authority". The Islamic Law or Shari'ah is a Divine Law, therefore, it cannot suffer going under the decision of any earthly sovereign or legislature. However, man can make laws to administer that law or any part thereof whenever such a need arises. In the time of the great Imams such a need was not there and in our days such a need is present.

It is because of this need being felt by us Muslims of Singapore we made every effort to persuade the Government of Singapore to legislate a law for the administration of the Islamic Personal and Family Laws, by making representations individually and through Muslim Associations uninterruptedly for years until finally in the year 1966 the Government introduced a bill of the Parliament and passed the Administration of Muslim Law Act 1966. Before passing the bill the Muslims of Singapore of varying ethnic origins and Madhahib were given ample opportunity to make representations and to appear before a Parliamentary Select Committee to express their feelings about the act.

And after the bill was passed and the Administration of the Muslim Law Act 1966 came into effect it has undergone a number of amendments in accordance with the recommendations put forward by the Muslim Religious Council set up under the Act. A number of ordinances were also added on thereafter.

The Administration of Muslim Law Act (AMLA) is an enactment of Islamic Law. It is however, not an Islamic Law by it self. As such it provides flexibilities to the Muslim Religious Council, the Shari'ah Court and the Registry of Muslim Marriages, in the implementation of the Shari'ah Law.

1. Solemnization of Marriages

AMLA has stipulated that those persons who intend to get married should first have attained the age of 16. This is because marriage is a commitment of responsibilities which require physical as well as mental maturity. However, for the marriage application of those below the age of 16 years, the Kadi is empowered to approve such applications under certain exceptional circum-

stances and if the applicant has attained the adulthood (Bulugh). (Vide AMLA Section 90(4).

In order to facilitate the administration all the applications for marriages have to be made in advance and on the prescribed forms. All the data collected would then be fed in the computer for record and other official purposes. The registry also takes the opportunity to enforce a system in which all applications would be made only at the Registry of Muslim Marriages. Each couple who intend to get married would be interviewed to determine their background and religious knowledge. Those who are found to have insufficient religious knowledge would be advised to attend the religious class before their date of solemnization was fixed. These classes are conducted by marriage counsellors operating from the various mosques in Singapore. These counsellors have been specially trained by the officers from the Registry of Muslim Marriages, the Shari'ah Court and the Ministry of Community Development. Moreover, all the young couple who intend to get married are also encouraged to attend classes and talks on marriage counselling conducted by various mosques and Muslim bodies, hopefully to inculate an harmonious atmosphere in the married life of the couples. Such courses have been conducted since 1969 and the total participants for the year 1984/85 were estimated to be at more than 8,000 would-be-married couples.

AMLA also provides a regulation whereby a husband who wishes to marry more than one wife would have to make a special application giving reasons and making a declaration as to whether he could afford to maintain two or more wives. (Vide AMLA Section 90(2). Apart from the above stated regulation all the rules and regulations concerning Muslim Marriages are perfectly in accordance with the Islamic Law (Fiqh).

2. Divorce

From the administration point of view, AMLA has stipulated that each pronouncement of the talaq has to be reported within a week in order to register the divorce. The couple are also required to fill in a prescribed form. (Vide AMLA Section 96(2)). AMLA also states that the Kadi should satisfy himself before the divorce could be registered. (Vide AMLA Section 96(3)).

This section led to the formation of a counselling unit within the Shari'ah Court thereby enhancing its function of providing counselling for the couples with marriage disputes. With its creation this counselling unit managed to settle and reconcile nearly 40% of the couples with marriage disputes which would otherwise have ended in divorce. For a period of one year about 1,400 couples benefit from this counselling unit. AMLA also stipulates that the Kadi can only register the divorce by mutual consent of the parties and that should either party disagree then the matter would be referred to the

President of the Shari'ah Court for his decision. There are four important matters to be discussed when considering the registration of a divorce:–

(1) Payment for 'Iddah.

(2) Muta'ah (Consolatory Gift).

(3) Custody of Children.

(4) Division of (jointly earned or owned) property, if any, after the Divorce.

The Shari'ah Court has been empowered to consider the total amount of payment for the 'Iddah period and the Consolatory Gift. Usually the amount payable is quite normal and often it is agreed upon by both parties. As for the payment of Muta'ah (consolatory Gift) it is difficult to arrive at a figure agreeable to both parties. Since 1984 it has been suggested that the rate of Muta'ah be calculated at $1.00 per day from the day of their marriage to the day of divorce. This means that if they were married for 10 years and then the husband divorced without any justification then the wife has the right to claim a Muta'ah of $3,650/–. This rate will probably be increased in the future.

3. Collection of Zakat and Mosque Building Fund (MBF)

AMLA has given the Muslim Religious Council the power to collect zakat and fitrah annually. The collection of zakat and fitrah is done through appointment of Amils by the Muslim Religious Council and distributed according to the requirements of the Shari'ah.

Singapore has undergone a very sweeping and rapid development project under the present government. A lot of old buildings were demolished and new ones were built. Some mosques were effected in the redevelopment projects. However, some of these mosques were substituted with bigger capacity mosques in the new satellite towns where people have moved into. The building of a new mosque requires an enormous amount of money and to finance such a project is beyond the means of any individual, because the building of a mosque costs anything between one to three million Singapore dollars (US $500,000 to US $1,500.000).

This was made possible by collecting a donation of $1.00 per head monthly from every Muslim Employee, deductable from their salary by making use of Government Central Provident Fund Board facilities. In the first phase of the project which started in 1975 six new mosques were completed and now in the second phase of the project in which eight mosques were projected to be completed some have already been built and the others are under various stages of construction. This would not have been possible without the collectin of donation for the Mosque Building Fund being enforced through the AMLA.

SYARIAH COURT

CASES WITH CHILDREN
FOR THE PERIOD OF JAN '84 TO DEC '84

1. TOTAL NO. OF CASES = 1592

   CASES WITHOUT ANY CHILDREN = 261 (16.39%)

   CASES WITH CHILDREN (From previous and current marriage) = 1331 (83.60%)

   NUMBER OF CASES WITHOUT COUNSELLING RECORD = 0 (.00%)

2. CASES WITH CHILDREN BELOW 18 YEARS OF AGE

NO. OF CHILDREN	NO. OF CASES
1	461
2	398
3	242
4	103
5	48
6	24
7	10
8	2
9 & ABOVE	8
TOTAL	1296

3. TOTAL NUMBER OF CASES PREVIOUSLY MARRIED = 357

   NUMBER WITH CHILDREN FROM PREVIOUS MARRIAGE = 208 (58.26%)

SHARI'AH AND CODIFICATION

The Indonesian Experience
by
M. Masrani Basran and Zaini Dachlan

INTRODUCTION

We are certainly very delighted and happy to have been invited to be participants of the Indonesian Delegation and to have opportunity to be present at this Conference, as well as at the BANGKOK CONFERENCE exactly one year ago.

We are most thankful to GOD ALMIGHTY and take this opportunity to express personally our sincere gratitude to our brother: Honourable Mr. A. Hilmy Mohideen of Sri Lanka, Vice-President S.E.A.S.A, for his great interest in having us to attend this conference and likewise to the Committee of the Conference (Third Asian Forum International Shari'ah Conference on Shari'ah and Codification) for having invited us to deliver this paper.

This paper describes our experiences in Indonesia during the early stages of launching efforts for Development of Islamic Law through Jurisprudence (Compilation of Islamic Law) a national project sponsored by the Supreme Court and the Ministry of Religious Affairs of the Republic Indonesia.

From this Conference's participants we also expect to obtain valuable input to our information and experience relating to experiences we are sure you have had and to plans that are being implemented in your countries.

We are confident that exchanging our experiences and information will enable us to make our respective measures and efforts more perfect for reaching the goals to which we aim.

In Indonesia in particular the goals of the project called "Development of Islamic Law through Jurisprudence" (Compilation of Islamic Law) are to obtain legal security in the realm of mu'amalah, that is the jurisdiction of the Islamic Courts in our country, legal security for those who seek justice, and above all legal security for the Muslim community in Indonesia.

This paper is divided into 3 chapters:

Chapter One : a brief history of the Islamic Courts in Indonesia during:

- the era of Dutch colonialism, and
- the era of the Indonesian

Independence from 17th August 1945 until the present.

Chapter Two : decelopment of Islamic tribunals.

Chapter Three : the project : Development of Islamic Law through Jurisprudence (Compilation of Islamic Law)

CHAPTER ONE: A BRIEF DESCRIPTION OF THE ISLAMIC COURTS IN INDONESIA.

The era of Dutch Colonialism:

In 1982 the Department of Religious Affairs commemorated the one hundredth (100th) anniversary of the Islamic Courts decreed by the colonial government through Gazette No. 152/1882 declaring that Islamic Law was to be enforced and administered by the Islamic Courts.

In fact, long before that, Islamic Law had been applied to the Islamic community in Indonesia, the application of which was perfcrmed through: TAHKIM (entrusting matters to a trustworthy Kiyai (Muslim Scholar/Ulama) and through the Qadhies (Judges) appointed by the Islamic Kingdom).

Islamic Law was administered in such a way that a well known Dutch Scholar, Prof. Snouck Hurgronye, said as follows: "Islam is a religion of Law in the full meaning of the word." The attitude of the Dutch Government at that time was influenced by the theory "receptio in complex", i.e. the law applied to an individual is the law that agrees with the religion he or she professes. Snouck Hurgronye further said: "It does not follow that Islamic Law is applicable to Moslems; the law applicable to them is the Adat Law (Law based on Custom)". Islamic Law is not applicable until it has been accepted by Adat Law (the reception theory).

There was a time (before 1882), that the receptio in complex doctrine had official acceptance and therefore all kinds of disputes between the Muslim people were within the jurisdiction of the Islamic Courts throughout Indonesia. The receptio in complexu doctrine introduced by a well known Dutch jurist L.W.C.van den Berg who stated, that the Islamic Law had to be applied to the Muslims, because those who professed a religion, accepted it as a whole.

But when the colonial regime wanted to intensify its administration of the colony (Indonesia), the doctrine receptio in complexu had to be replaced. The Dutch intorduced the unification theory, that means they wanted to impose the Dutch legal system (continental system) on the people of Indonesia. This policy met massive opposition by a Dutch Scholar Van

Vollenhoven who introduced the adat law system. These adat-law jurists were against the unification system, because that would be an artificial law implementation and therefore would never be in accordance to the social law awareness of the Indonesia people. Every community has its own system that regulates the relationship between individuals as members of the community, a law system anchored deep within their history and therefore the only one that is just and right for that community. Other law systems must be rejected, as that will harm the harmony in the community.

With that way of thinking, the adat jurists opposed not only the unification programme of the colonial regime, but also opposed the Islamic Law. In this respect they used a theory of receptio, that means only those parts of Islamic law are valid, that were already absorbed (recepted) by the adat law.

In 1937 through Gazette No. 116/1937 the Dutch government revoked the authority of the Islamic Courts to deal with cases of inheritance. This authority was extended to the Ordinary Courts and has remained with those courts in Java and Madura up to this moment.

After the Independence Proclamation (August 17th 1945):

After Indonesia attained independence, the thoughts about Islamic Courts were continued and developed both by the Government of the Republic of Indonesia and by the Islamic Leaders and Ulamas. As a result, in 1957 Government Regulation No. 45/1957 was issued, which regulated the Islamic Courts for the regions outside the islands of Java and Madura. This Government Regulation gave more jurisdiction to the Islamic Courts outside Java and Madura i.e. in addition to cases regarding marital disputes, these Islamic Courts also had the jurisdiction over cases involving inheritance, hadhanah (guardianship of children), waqaf (property donated for religious or community use), sadaqah (alms) and baitulmal (treasury). But the regulation that the decision of the Islamic Courts muct be confirmed by the ordinary (general) Courts, remained in operation.

Only in 1970 was the regulation about the Islamic Courts really strengthened by Act No. 14/1970. Because this Act has now become the basic regulation for the Islamic Courts, let us look into it further.

ACT NO. 14/1970

This Act stipulates that there are four branches of the judiciary: General Courts, Islamic Courts, Military Courts, and Administrative Courts. The Supreme Court is their summit as a Court of Cassation for all four branches.

All the judges are state judges appointed and dismissed by the Head of

State. The Act also stipulates the requirements for the appointment and discharge of the judges to guarantee the independence of the judiciary as provided in the Act.

Act No. 14/1970 also states that each branch of the judiciary is to be administered by the respective department, which means that the Islamic Courts are under the Department of Religious Affairs in matters of personnel, organization and finance. Concerning their technical judicial aspects, all four branches are under the Supreme Court.

The supervision of the Supreme Court concerns two things:

- supervision by means of cassation and
- supervision to ensure that all branches of the judiciary carry out the administration of justice justly and rightly.

Because the Act on Civil Procedure of the Islamic Courts has not yet been enacted, the Supreme Court has issued a Supreme Court Regulation No. 1/1977 concerning the procedure of cassation for the decisions of the Islamic Courts. Additionally, in 1982 the Supreme Court and the Department of Religious Affairs issued a joint decision concerning the management and development of the Islamic Courts in pursuance of the above-mentioned Act No. 14/1970. Therefore, beginning in February 1982, there has been a Deputy Chairman of the Supreme Court appointed to supervise the Islamic Courts.

Act No. 14/1970 and all the activities of the Government and the Supreme Court can be seen as the efforts of the Indonesian Government to integrate the Islamic Courts into the national legal system and into the mechanism of the national administration of justice.

It has been our policy in the field of law making to codify and unify the law, if possible.

In 1974 a Government Ordinance was issued on waqaf, which was enforced throughout Indonesia.

This Government Ordinance regulates the ways to establish a waqaf, to manage it, etc. All cases on waqaf come under the complicated laws, partly influenced by the policy of law of the colonial period. In the law of inheritance three systems of laws confront each other: the Western Law System, the Adat Law System and the Islamic Law System.

Our National Law Development Centre has conducted research, seminars and the like to collect as much data as possible for the compilation now of a

codification of inheritance law.

If more areas of law can be codified, more traditional conflicts within the schools can be resolved.

It is also equally important that the judges of the Islamic Courts are those who in addition to being experts in Islamic Laws, are experts in the general laws and adat laws.

We in Indonesia are now working hard in this direction.

Only if we understand the situation of the Courts as above mentioned clearly, we could then understand the reason why Court Institutions should be renovated.

CHAPTER TWO : DEVELOPMENT OF ISLAMIC TRIBUNALS

The development of the Islamic Tribunals in Indonesia has concentrated on 2 (two) areas, viz. (1) PHYSICAL MEANS, and (2) JUDICIAL TECHNIQUE.

(1) The area of PHYSICAL MEANS involves issues of:

- providing an adequate number of buildings and office equipment;
- providing means of mobility for Islamic Court Judges;
- appointing new Islamic Court Judges to succeed those due to retire and increasing the number of Islamic Court Judges throughout Indonesia to enable the Islamic Courts to deal with the growing influx of cases;
- establishing new Islamic Courts in towns where there are District Courts. Generally, there should be one in the capital of each Regency as required by the Basic Act of Judiciary (14/1970);
- conducting circulating sessions, i.e. Islamic Court Judges should visit remote small towns which are far away from the Regency capital, in compliance with the principle of affording equal justice to all people;
- improving the well being of Islamic Court Judges, i.e. increasing their salary and allowances.

All the above mentioned things are supposed to be the responsibility of the Ministry of Religious Affairs.

(2) The area of JUDICIAL TECHNIQUE involves the development of the technical skills of judicial decision-making, i.e. the knowledge

and expertise of Islamic Court Judges primarily concerning:

- the law of Procedure;
- substantive Law within the jurisdiction of the Islamic Court;
- methods of conducting court sessions;
- judicial techniques of making court decisions by means of proper and justifiable judgments (Court decisions in Indonesia must bear the following heading : IN THE NAME OF JUSTICE BASED ON GOD THE ALMIGHTY;
- supervision of the conduct of Judges.

All the above lie within the competence and responsibility of the Supreme Court.

Relevant to this task, the Supreme Court:

- gives judicial guidance;
- conducts courses in continuining legal education;
- renders advice on judicial technique through circulars issued by the Supreme Court to achieve uniformity in interpretation of the Act;
- gives guidance on judicial technique through Supreme Court Decisions;
- conducts executive meetings among Judges of Islamic Courts, as well as joint executive meetings also attended by Judges of the Ordinary and Military Courts;
- prepare Draft Bills on:
  "The Structure and Authority of Islamic Courts"
  and
  "The Act of the Procedure for Islamic Courts"

All these activities are coordinated and administered by the Deputy Chairman of the Supreme Court, Honourable Prof. H. Buthanul Arifin, in his capacity as Supervisor of the Islamic Courts.

The development of the Islamic tribunals described above implements the decision of the National Consultative Assembly (Majelis Permusyawaratan Rakyat) as contained in the Broad Outlines of the National (State) Policy (G.B.H.N.).

CHAPTER THREE : THE PROJECT : DEVELOPMENT OF ISLAMIC COURTS THROUGH JURISPRUDENCE (COMPILATION OF ISLAMIC LAW)

The Supreme Court has been in charge of technically developing the

Islamic Courts for approximately three years now and in fact constitutes the summit of the Islamic Courts in Indonesia. Therefore, the time appears to be ripe for the Supreme Court to consider matters that have not, as yet, been throughly and professionally discussed and resolved i.e. the problems of Syari'ah Islam that has become positive law in Indonesia.

Article 2 of Act No. 1/1974 (Act on Marriage Affairs) stipulates that a legal marriage is that brought about in accordance with the *religious law* of the couple. However, how can the (Islamic) law on marital affairs be executed when there is not a single Act or Regulation setting out the Islamic Law on marriage. The execution is being left entirely to the judgment of the Islamic Court Judges.

The Act on donation of land property likewise does not stipulate what and how the law of donation will be executed.

Government Regulation No. 45/1957 governing the jurisdiction of Islamic Courts outside Java and Madura states that the jurisdiction of such tribunals comprises: marriage, repudiation, recall of divorce, guardianship of children, grant, treasury, waris mal waris (inheritance) etc. However, there are no state regulations or law stipulating the content and extent of the principles of Syari'ah Islam.

Even a law of procedure for Islamic Courts has not been devised yet, as if it is simply left to the respective Judges of the Islamic Courts to devise it.

It stands to reason that such a condition cannot be allowed to continue, for it causes uncertainty of the law and confuses the perception of the Islamic community regarding Syari'ah Islam itself.

The existence of diverse and possibly conflicting perceptions of Syari'ah deviates from the intentions and objectives of building this state. On the other hand, should we manage to lay the foundation for a uniform perception of Syari'ah, it will bring spiritual rest and peace to each Muslim in worshiping Allah SWT., and in turn bring peace and well-being for the Indonesian society as a whole.

To achieve the objective of uniformity the Supreme Court has presented a proposal to the forums of Indonesia Ulamas, conscious that a problem of Syari'ah Islam should be discussed among Umaras and Ulamas.

COMPILATION/CODIFICATION OF ISLAMIC LAW

Islamic Law in Indonesia is not different from that in other countries, i.e. it is recorded in the socalled "Fiqh books", books containing articles and

studies by Kiyai (Muslim Scholars).

Because the articles are the result of studies (ijtihad) by individuals, each Fiqh book reflects each author's view point and opinion.

It is not so difficult to provide religious advice (fatwa) as a basis, since carrying out such religious advice depends on the wish of the person asking for it.

It is different, however, in the case of Judges of the Islamic Courts who are called upon to decide the law in a dispute between two parties. Such a situation is complicated by the fact that the result may damage the sense of justice held by the party defeated in the case.

In 1958 the Ministry of Religious Affairs gave some guidance regarding uniformity in the law for Islamic Courts, i.e. it indicated 12 books that must be used as guidance in deciding cases.

Now, it is high time such books were increased in rank so that the decisions of the Religious Courts are perceived to be in harmony with the legal sensibilities of those who seek justice.

The time is also right for Islamic laws to be organized systematically so that the Islamic society, which is not familiar with either the law or with Arabic (the language of books), can also know their rights and obligations according to Islamic Courts.

Our national policy on law is indeed leading up to codification, but the urgent needs of Islamic Court Judges and of Muslims seeking justice demand that efforts to codify Islamic law begin right now.

The Supreme Court, as the supreme judicial body of Indonesia, is the functional summit of all the other Courts of Justice (the Ordinary Court, the Religious Court, the Military Court and the Administrative Court) whose final judgments are reviewed on cassation by the Supreme Court.

It is high time the Supreme Court took concrete steps to have explicit Islamic law regulations within the realm of the Islamic Courts jurisdiction compiled in books.

The existence of such books would constitute guidance for:

a. Judges of the Islamic Courts and Judges of other Courts, and
b. The Muslim society in general regarding their rights and obligations.

The Supreme Court realized that the compilation of Islamic law regulations can not possibly produce the desired result unless the Ulemas are asked to participate, since the Ulemas are the most competent in matters concerning Islamic law and its significance.

THE PROJECT OF COMPILING ISLAMIC LAW

Because there are no compilation and codification yet of Islamic law in Indonesia to provide legal security for the Indonesian Muslim community, the Government has set up a project to compile and codify Islamic Law. The compilation and codification of Islamic law is to provide guidance for the Judges of Islamic Courts to resolve cases concerning the interests of Moslems in our country.

On the 21st of March 1985, a Joint Resolution between the Justice of the Supreme Court of Indonesia and the Department of the Ministry of Religious Affairs of Indonesia was signed in Yogyakarta by the Chief Justice of Indonesia and the Minister of Religious Affairs of Indonesia.

We call this project, authorized by the Joint Resolution, the "Development of Islamic law through Jurisprudence" Project or the "Islamic Law Compilation" Project. The goal of the project is to compile Islamic law regulation (the domain of mu'amalah included in the jurisdiction of the Islamic Court) in 3 (three) book, viz:

1. Book one dealing with MARITAL AFFAIRS;
2. Book two dealing with INHERITANCE; and
3. Book three dealing with WAQAF (property donated for religious or community use), SADAQAH (alms), HIBAH (grant), BAITUL MAL (treasury).

PROCEDURE:

The execution of this project is by means of:

- interviews with prominent and well-respected Ulemas;
- compilation of decisions of Islamic Courts throughout Indonesia;
- collection and selection of juridical arguments applied in decisions of Islamic Courts;
- collection of arguments from the Fiqh Books of Imams of Mazhab (schools of thought concerning Islamic Law), particularly those of authority and great influence in Indonesia (Syafi'i);
- draft Islamic rules of law in the 3 (three) designated subject areas marital affairs, inheritance, and property donated for religious or

community use and the like;

- comparative studies in countries where Islamic Fiqh is applied, including the study of the judicial system and Court decisions;
- studies regarding the extent to which the rules and principles of the Fiqh Books are effected, whether deviations should be allowed, and on what principles deviation should be based;
- formulation of temporary conclusions (hypotheses) by the CENTRAL TEAM, and formulation of conclusions reached through seminars of Ulemas where lawyers of General Law are invited to participate;
- the purpose of such seminars is to reach a CONSENSUS yielding FINAL CONCLUSIONS so that:

  a. Judges of the Islamic Court are in a possession of an explicit guide to substantive law that must be applied; and

  b. The way is paved for the policy of National Law on CODIFICATION.

The general objective which is more significant is:

The establishment of a firm foundation on which to build the Indonesian nation, by eliminating the factors that make the law-minded citizen of Indonesia divided between himself as a Muslim and himself as a PANCASILA citizen.

Considering the above analysis I would like to explain or state that to us in Indonesia codification should absolutely be carried out.

I also find it necessary to inform this distinguished forum of the following things:

1. After the Chief Justice of the Republic of Indonesia, the Honorable Atty. ALI SAID (who presented the keynote speech at the Bangkok Seminar), delivered a welcome speech at the Nahdatul Ulama Congress in Situbondo, East Java on the 4th of December 1984, the Congress in one of its decisions urged the necessity for having books on law and Islamic Law regulations composed, particulary those within the jurisdiction of Islamic Courts, and the necessity for the participation of the Indonesian Ulemas in order to enhance the authority of Islamic Courts with the fullest support of the Indonesian Ulemas.

2. Interviews have been made in 10 (ten) provinces. The interviews were conducted neither in a formal nor stiff atmosphere, but in a family spirit and in communicative intimacy, between the interviewers composed of Judges of Islamic Court of the Central Team and those of Pro-

vincial Team and Ulemas interviewed.

There was not any debate at all regarding the questions of Islamic Law put to the repondents but they collected the opinions and arguments and principles on which the viewpoints and opinions of the Ulemas' were based, including the opinions and juridical arguments stated in the books to which they referred. The responses have been incorporated systematically into the 3 (three) books previously mentioned, viz.:

I. MARITAL AFFAIRS;

II. INHERITANCE;

III. WAQAF, HIBAH, SADAQAH and the like.

It stands to reason that juridical questions explicit in the 1974 Act on Marriage are not to be questioned anymore, but only those lacking uniformity and unification.

Such as among other things:

- on marriage affairs: the sentence of thalaq being valid only when pronounced in a session of the Islamic Court;
- the significance of witnesses claimed in Islam;
- on wali nikah (guardian or male relative of bride);
- thalaq tiga (triple irrevocable repudication) pronounced once, implying whether the sentence is to be pronounced three times or only once;
- permission of doing polygamy granted by Islamic Court upon approval of the first wife;
- granting permission or dispensation to get married;
- prevention and revocation of marriage;
- Istbat nikah (confirmation of marriage);
- Law of marriage upon pregnancy, one who must marry the woman getting pregnant on his account;

On Legacy:

- Shirkah;
- Washiat wajibah, mawali, ashabah system, etc.

The question put forward was: What is the opinion of the Ulemas on such matters? and other questions made and prepared in advance by the Central Team.

Generally, our Ulemas gave their full support to this project, which considerably encouraged us to make it a success.

Yet, there were here and there a few Ulemas who although not very prominent, expressed false utterances. Such utterances, however, were due primarily to their narrow-mindedness. Moreover, these utterances were made by only a small group of Ulemas who are not Fuqaha; indeed, only Ulemas who are Fuqaha will be able to know, understand, totally perceive and realize simultaneously the idea of this compilation.

Some of them consider the idea of COMPILATION as one that radically alters the Islamic Law and thus matters that are already QATH'IY, i.e. that are not allowed to be questioned any longer. What we mean by this compilation of Islamic law, however, is nothing else but the discovery of values and formulas of Islamic law agreeable to the cultural backgroud and legal sensibilities of the Indonesian Muslim Community.

CONCLUSIONS AND RECOMMENDATIONS

From the explanation set forth in this paper, it may be noticed that we, in Indonesia, are still struggling to overcome our arrears in law and justice resulting from the colonial policy, particularly where the jurisdiction of the Islamic Court is concerned, and also resulting from the absence of uniformity of substantive law in the field of mu'amalah within the jurisdiction of the Islamic Court.

We are still striving to elevate the position of Islamic Courts to the same level as the other Courts, pursuant to the provisions of the Basic Act of the Judiciary (14/1970).

Also from this explanation, the following conclusions may be drawn:

- That the codification of Syari'ah Law in the field of mu'amalah, which comprises the juridiction of the Islamic Court, is a conditio sine qua non;
- That the purpose of such codification is to reduce and eventually eliminate the diverse perceptions of the Muslim community concerning Syari'ah Islam;
- That such codification is to provide legal certainty for the Judges of the Islamic Courts, for those seeking justice, and likewise for the whole Indonesian nation through the establishment of a firm foundation on which to support the national development of our country;
- That the compilation we are launching is the first step towards codification of Islamic Law;

- That, although we will encounter slight difficulties here and there, our greatest challenge will be to change the thinking of a small circle of Ulemas who are too tied in the taqlid manner to the extent that passages from the Fiqh books written by certain Ulamas constitute qath'i, i.e. unalterable definitions and religious teaching, even though they were written in the era when Islam was on the decline.

I am of the opinion that we in Indonesia, particulary the Deputy Chairman of the Supreme Court of Indonesia, Profesor H. Busthanul Arifin, and the Director General for Development of Islamic Institution of the Ministry of Religious Affairs, Zaini Dahlan, M.A., who are respectively the Chairman and the Deputy Chariman of the project COMPILATION OF ISLAMIC LAW, have no pretentions that the methods we undertake are perfect and exact. However, we are earnestly trying our best at this moment to compile the 3 (three) books on Law, as described in the previous explanation, in the 2 year operational period. Information and experience from any other country would be very valuable for us and warmly welcomed.

We also propose the following recommendations:

I. That information and experience from the respective countries be exchanged regularly;

II. That programmes for comparative studies through executive visits be scheduled to facilitate an exchange of research;

and

III. That the respective State Governments actively participate, assist, and contribute to the implementation of codification as it materializes.

IV. The periodical annual executive – meeting among Syari'ah Judges of respective countries.

As further information to this distinguished forum, the Project COMPILATION OF ISLAMIC LAW IN INDONESIA is financed by a special fund provided by President of Republic of Indonesia.

I want to proceed now to present the summary of this paper:

- Broadly speaking, Islam is the basic moral force of the identity of the Indonesian Nation before and during the struggle of our independence, and because of that, we make it as eternal source of inspiration in our daily life, in family life as well as in the state affairs;
- Our state ideology: *PANCASILA* is the official basis of the Indonesian State and Nation and our *CONSTITUTION 1945* are two gates that accomodate the Shari'ah Laws into the legal system of Indonesia;

- we differentiate in Shari'ah between Ubudiyah and Mu'amalah: the latter we accept it as the equivalent of law in the modern meaning, and so our Islamic Courts has only to do with mu'amalah and in this field of Shari'ah that we try to impose as law for the Indonesian Muslims;
- we are now in Indonesia, working hard in explaining and presenting the Shari'ah laws in a national forum;
- we are struggling to get rid of the influence of the policy of the laws of the colonial period and also we are struggling to get rid of our ignorance and backwardness concerning Shari'ah laws;
- after the freedom and after we got a national government we began to develop the Islamic Courts within the national court system;
- because, as we know we inherited from the colonial period the Islamic Courts with lack of proper court procedure and also lack of good court management, far behind the quality of the Ordinary Court;
- the concrete steps really began in 1970 by the Act 1970 number 14, by which the Islamic Courts were strengthened; This Act stipulated that there are four branches of judiciary:
  - Ordinary Courts,
  - Islamic Courts,
  - Military Courts and
  - Administration Courts

  The Supreme Court becomes their summit as a Court of Cassation for all branches as above mentioned;
- our national policy in the field of law making is to make codification and also unification if possible;
- we have the Act of Marriage (Act 1/1974) now become our marriage Act, which decided that all the disputes in the marriages and other legal consequences of the marriage of Muslims will be under the jurisdiction of the Islamic Courts; with this Act special decisions are made for the Muslims which all at once are really the personal law also in Indonesia;
- we adjust the Islamic Courts into the national legal system and into the mechanism of the national administration of justice. We have now the proposals on two Acts: Act on the Structure and Jurisdiction of the Islamic Courts, and Act on Civil Procedure of the Islamic Courts;
- we have only one system of law, i.e. national law system and the various fields of law wherever possible are to be codified and unified;
- Islamic laws are included in a national law system and the Islamic Courts are also subordinated under the national Court system.

Ultimately, we hope that this distinguished forum of neighbouring countries provides us with information, experiences and measures (both those being planned and those already implemented) all of which, we are confident, will certainly be a valuable contribution to our undertakings and activities.

Let us pray to Allah S.W.T. for the achievement of our objectives.

SHARI'AH AND CODIFICATION – THAILAND EXPERIENCE

by
Dr. Arong Suthasasna

The Muslim has a relatively long history in Thai Kingdom. Their interaction with Thai people, and their roles in the country, could be traced as far back as the earlier period of Ayuthaya Kingdom in the 13th century when two Persian brothers named Sheik Ahmad and Muhammad Said, known at that time as "Khaek Chao Sen" (a branch of Shiite sect), settled down in the country and did a presumably extensive business. Probably due to his favourable contribution to the Kingdom as well as personal service to the King, Sheik Ahmad was promoted to one of the highest official positions in the country and attained the title of Phraya Sheik Ahmad Ratana Raja Setthi, whose main responsibility had to do with foreign and custom affairs. It was believed that Sheik Ahmad was, in fact, the ancestor of many of the present Thai influential families, all of which had turned to Buddhism for some reason or other. The descendents of this stream of Muslims are at present scattered mostly in the central region of Thailand.

Another stream of Muslims which constitutes the majority of Muslim population in the country today is now settled in the so called four southern provinces, namely, Pattani, Yala, Naratiwat and Satul including an adjoining part of Songkhla. These provinces were collectively known as Pattani Kingdom around the 12th century, that is, the time before the Sukhotai Kingdom came into existence. This group is of Malay stock and still observes Malay type of culture and language in every day life. Pattani Kingdom was recorded as one of most prosperious and influential states in Southeast Asia.

It was not until the beginning of the present century that the Pattani Kingdom has become a part of Thailand, politically and administratively. This annexation was, in fact, the birth of the hitherto perennial problem of Muslim minority in Thailand. It is noteworthy that a significant number of Pattani Muslims were brought to Bangkok as prisoners of war by the Thai army in its early war with Pattani. These Muslims are a major part of the present central Muslims, some of whom still retain their original culture and language.

The third major stream of Muslims are northerners or those who are known as chinese Ho. Although this group is not significant numerically, it is playing a major role in northern business, especially in Chiangmai province. Also well known in the North are Muslims of Indian stock, or Pathan, who share a large part of Muslim business in this area.

In sum, Muslims in Thailand have existed since the beginning of Thai state and played through the history a significant role in the society. As far as the size of the population is concerned due to lack of up-to-date census on religious category, it is still controversial. According to official count, Thai Muslims at present umber from 2 to 3 millions. This figure is believed to be extremely under estimated even by simple speculation. Considering from various demographic factors, the size of Thai Muslim population should have doubled the officially quoted figure mentioned above and it should be at present as large as 5 millions.

Thailand and Southern Muslims

It was because of the existence of Thai Muslim in the South that the Muslim ethnic problem has risen and stayed ever since as the central concern of the majority. No major problem in itself, ethnicwise, is felt among Thai Muslims in other areas except that which is related to or expressed for the southern Muslims.

The historically long interaction, and struggles, between southern Muslims and Thai authority have given rise to certain governmental decisions and awareness which work for and against Muslim existence as a group. The government, on the one hand, has invariably conceded religious freedom and related practices. However, the government is expressedly unhappy with such concession and thus take, explicitly or implicitly, certain actions from time to time to reverse such concession. On the other hand, Muslims in the south have consistently expressed disapproval of whatever action or policy which might undermine their religious stand.

It is advisable to examine briefly the kind of polemic situations between the Thai and Islamic principles in order to justify the claim for Shariah application in Muslim society.

Religio-Cultural Identity of Thai Muslim

Religio-culture is the most important identity in the network of Muslim-Buddhist interrelations in Thailand. Before we turn to the subject a few words on the use of the term is necessary. In order to avoid conceptual insufficiency, or even objection by some serious Muslim Scholars, the present author intentionally and consciously uses the term religio-culture to include the whole possible range of normative system of the southern Thai Muslim society. It includes the strictly Islamic teaching, or that which is believed to be the one, and the non Islamic tradition which is popularly regarded as Islamic and is incorporated as an integral part of the normative system.

Islam, or what is believed to be Islam, is the most important factor determining the southern Muslim's patterns of behaviour and thought. To them, it is only in terms of Islam that the institutions of their society can be legitimized. Furthermore, what is considered to be proper relations with outside groups must be also viewed in this perspective. Before examining the interrelationship between the Islamic religio-culture and the Muslim's pattern of behaviour and thought in the perspective of majority-minority relations, a description of some characteristics of Islam as believed by the southern Muslims is in order.

1) Islam is a total way of life. It is complete and includes in its scope virtually every aspect of universe: economic, political ethnical, educational, scientific, natural, etc.: Theoretically speaking, as some classes of Muslims believe, there is nothing in this universe that may possibly fall outside Islamic domain. Therefore, every thought or action of man can be always classified in terms of either sin or virtue (dusa or pahala). All prescriptions about these codes of behaviour can be found in Qur'an and Hadith, the details of which can be found more in the latter than the former.

2) The value of the religion is highest. It is held by Muslims that Islam is the only religion which is perfect in all aspects. It is kindly given to human beings by Allah Almighty. Islam is, therefore, so valuable that each Muslim must seriously assume as his or her duty to protect it from being upset or threatened. The Muslims hold that they can always sacrifice all kinds of property, even that as dear as their own lives, for the sake of religion or, as a matter of fact, for the sake of Allah. In some circumstances, it is even desirable to do so. The act of risking one's own life for the sake of religion or Allah is known as sabi-lillah literally means "in the cause of Allah". According to popular understanding in the South, Sabi-lillah is the struggle or fight in the name of God against the non-Muslim who is destroying or threatening Islam. It is further believed that the Muslim who died or is killed in Sabi-lillah will be pardoned by God of all the previous sins he has committed, and will be satisfactorily rewarded by him in the hereafter. So, whenever a Muslim understands that he or she is fighting in this way, i.e., in order to protect Islam from being jeopardized, he or she will not be frightened by death of whatever manner. On the contrary, in such a situation death is something to be wished for. This phenomena has been generally observed during the great demonstration in the province of Pattani as mentioned earlier. Thus we have seen that Islam is so highly valued by the Muslims that all other things become uncomparable. It is so precious because it is the only property dearly given by God to man; without it man would be lost and helpless.

3) Islam is believed to be always right, practical, and applicable over time and space. There is no question about its ambiguity. Should a conflict arise between Islamic and non-Islamic principles, the Muslims always choose

the former and disregard the latter; simply because the Islamic principle is always correct and proper. This claim needs no proof. If it is found in any particular time and place that an Islamic tenet does not seem to be practical, there is nothing wrong with the tenet, as a Muslim would argue. The mistake might lie in its application, interpretation, or even the conceptualization about the phenomena.

The theory behind this belief is simple. The argument goes something like this. Islam, or what is thought to be Islam, was created by God. The teaching of Islam is, in fact, the teaching of God. And God guarantees in the Qur'an that Islam is always perfect and truthful. Since God possesses the quality of All knowing, All hearing, and All seeing what happens in the past, at present, and in the future, and what happens in the open or in secret, God's guarantee about the perfection of Islam, therefore, must be truthful. The Muslim believes, if you suspected about Islam, it meant you suspected about God. Being suspicious of God, as a rule, you become kufur or no more a Muslim.

4) This life is superficial and insignificant. The Muslims in the south believe that the world we live in is just a contemporary rendezvous which briefly precedes the real and eternal world hereafter. Our permanent habitat lies in the next world, not this one. So, as the southern Muslims would suggest, do not be so serious and so dependent upon the present world. Its period is so very brief compared to the next world. So, the Muslims would usually be highly tolerant should they find the lives in this world miserable. It might be a test by God to see whether they are patient enough to be rewarded with a happy next world, heaven.

Since Muslims usually strive for the next world destination they, naturally, emphasize the ritual and sacred aspects of life rather than the practical and secular ones. They tend to look at the worldly activities as being insignificant, if not irrelevant to the Islamic worshippers.

5) All Muslims are brothers and belong to the same Ummah, or Muslim world community, of Prophet Muhammad (s.a.w.). This feeling is relatively strong among Muslims, probably stronger than among other religious communities in this world. It is a spiritual commitment of the Muslims. This tie knows no physical or socio-cultural boundary. By virtue of being a Muslim, one would feel more spiritually intimate with another Muslim in a different country, for example, than with non-Muslim in the same country, or even the same community. The author had asked the subject to answer the question which were put in the form of so called social distance scale. To put it in a simple way, each subject was supposed to rate how close or how intimate his or her feeling was toward various groups of people of different nationality or ethnicity. Then average score is computed for each of the rated group of people. Interestingly enough, the score turned out to be relatively high for

the Muslim groups, no matter who and where and the score attached to the non-Muslim categories, including those in the four southern provinces, turned out to be relatively low.

Certainly, this kind of fact has been grudgingly recognised by some Thais and has caused them to jump to the conclusion that the southern Thai Muslims were more intimate, for instance, to Malay expatriates than to Thai compatriots. And the conclusion would go on as a matter of course that the Thai Muslims were more loyal to the Malay Kingdom than to the Thai Kingdom. A little reflection will tell us that such a conclusion is not legitimate. For, a national commitment and a social commitment a distinction should be made. The former is based more on religio-cultural considerations, such as convenience in living and performing religious ceremony together, so on and so forth. Besides, the southern Thai Muslims developed their ethnic identity based on their own history which, as we have seen, existed even before the emergence of the Malacca sultanate. So, there is no reason to believe in the existence of a common political consciousness between the Thai Muslims and Malays in Malaysia.

The five religio-cultural characteristics or beliefs just mentioned are pervasive and persistent among the southern Thai Muslims. Whether such beliefs are in agreement with the true principles of Islam is not the concern of this study. What is of scientific significance here is the impact of such characteristics, once they are held, on the problem of minority-majority relations in Thailand. The impact itself is rather a complex process. What will be done at this point, however, is only to point out some of the immediate consequences of the characteristics. They may also be considered as further characteristics of the religio-cultural identity.

Firstly, the Muslims are regarded by outside observers as being over religious. Some even use the term fanaticism to characterize the state of religious worshipping in the south. By non-Islamic standards, however, such characterization might be right. Religious study is much favored over worldly study. The children start learning Qur'an as early as the age of five or, at the latest, at the same age as they start the compulsory Thai elementary education, the age of seven. At this age also, Malay language (in Jawi character) will be taught as part of religious education. This language is considered to be religious in the South because it is the only language through which Islam has been known. Without the knowledge of Malay language the knowledge of Islam for the southern Muslims will be very difficult or even impossible. So, the child of this age, usually, will have three kinds of education simultaneously. Qur'an, Malay language, and Thai elementary education.

Malay and Qur'an studies are usually done before or after school hours at the teacher's home. In each community there will be a number of religiously

educated persons who can and volunteer to teach Qur'an and Malay language to the children in their respective areas. Each of these tok'gurus, or teachers, usually runs the schools at his home. Some tok'gurus charge each of his students a minimum fee; but most of them do it free of charge.

In the community where Pondok (traditional religious school) exists, the Qur'an and Malay education might be assigned to Pondok, although most of them prefer to teach religion in the true sense of the word rather than just reciting Qur'an or mastering Malay language. In this case, Pondok will open special sessions for young children in the community.

When students have completed Thai elementary education, which is around the age of 11 though 13, they will normally be divided into two groups. One group will pursue religious education in Pondok, the other Thai secondary education. However, the high proportion, about two thirds, of the total, is in favour of religious education, or go to Pondok.

Since Pondok in southern Thailand has been widely commented, let us have a closer look at some of its aspects. Pondok, literally means cottage, and is a kind of religious training institution which exists mostly in Malay culture, such as traditional Malaysia and Indonesia. As of late, the official record shows that there are altogether 256 Pondoks in the four southern provinces. The real number must be much higher, since there are many Pondoks which operated without normal registration with the government.

Usually, a Pondok compound covers several acres of land in which is situated the teacher's house and student's cottages. The students are composed of Muslims of various ages. Although *pondok* students are usually male, female students are not uncommon. The comprise over 30 percent of the total students. As far as the programme of study is concerned, usually there is no fixed curriculum or schedule. Some teachers teach their students, both full time and part time, around the clock. Interestingly enough, the *pondok* education covers no charge whatsoever. The teacher survives on the community support, mostly in the form of donations, and, in some cases, on labours of his students helping in his plantation, if any

Sociologically speaking, Pondok has been doing a vital function for the Muslim community. That is the function of transmitting moral system from one generation to another, so that the order of the Muslim society could be maintained. This function must be performed in any society if it is to persist. *Pondok* is, in fact, an important educational agent of socialization for the Muslim society in the south. But one might argue: now that modern Thai school has been established with efficient teachers and facilities, can it not take over the function of moral socialization in the Muslim society? The

answer is, no. The reason for this is that the content of the Thai education has not represented the Muslim value system or interest. Historically, the content has been heavily loaded with the Thai Buddhist history and, in many circumstances, are against the historical consciousness of the Muslims. Culturally, the content has represented the Thai and especially Buddhist system which is not acceptable to Islam, such as idolatry, entering monkhood, codes of ethic, Buddhist oriented folklores, etc. when such traditions are taught to the Muslim children, most parents would not be happy for fear that their children's moral being would be jeopardized. In addition, some texts contain the pictures of Buddha images, monks, and Buddhist ceremonies. To many Muslims, to have such pictures in the house is equal to idolatry which according to Islam is gravely sinful. Sometimes the children are asked to leave such texts outside the house when returning from school. This practice has caused a popular charge by the outside scholars as well as laymen that the Muslims in the south regarded Thai language as sinful and, therefore forbade their children from bringing it into the house. Clearly, this charge is unforgivably mistaken. For, as we have seen, it is not the language itself, but the content of the text used at school which is rejected and considered sinful. The Muslims' rejection of the Thai modern education, especially towards its introductory period, caused the Thai authority to recruit children to school by the use of force. Even worse, such action so frightened some Muslims that they sent their children away from home and would not get them back until they were well over the school ages.

Secondly, the Islamic religio-cultural characteristics tend to make Muslims more conservative in the sense that change is considered to be the last choice. This personality is partly the consequence of the belief that the present Islamic patterns of behaviour is most perfect and do not need any change, since it is so guaranteed by God the All-Knowing. Any effort to change them, as the Muslims would argue, is considered not only to be acting against the will of God, but also to be acting against righteousness. Change could occur only, as a general rule, when it is clearly proved that it is not against God's will or, for the better, it supports God's will. Birth control illustrates the case in point. Birth control is not accepted because it is considered to be an action against God's will, since life and death are exlusively the business of God, not of man. However, if the Muslims are convinced that birth control, in fact, is not against God's will or, better still, supports God's will in certain circumstances, they will accept the measure with eagerness. But, again, this initiative of change must be done via religion and by a religiously accepted authority only.

Another illustrative incident was the interference of the government with *pondok* activities a couple of decades ago. Formerly, as we have known, *pondok* conducted the teaching in a traditional way. There was no fixed

curriculum or schedule of instruction, and there was no completion of course work. One may stay in Pondok for one year, thirty years, or even up to one's own life. The first change took place in 1961 when the government encouraged all pondoks to adopt a modern system of education, that is, to include in the curriculum Thai language and vocational studies. Furthermore, *pondok* is suggested to include the whole curriculum of the Thai elementary education for the children in each *pondok* region. Together with the encouragement for such change or transformation of *pondok*, the government promised a certain amount of financial reward to those tok gurus who accepted the government initiative. As one might expect, the initiative of the government was, at first, reacted not too favorably by most Muslims. In fact, it was taken as a threat to the religious system. One of the reasons was simply because the innovator, the government, was not primarily an Islamic agent, which might easily mishandle the complex matter such as Islam. However, as the time passed by, and it was gradually proved that the transformation of *Pondok* was not affecting the religious principle in a negative way, *tok gurus* became more and more receptive to the change. And as of late, out 256 *Pondoks*, 142 or 55.5 per cent were transformed into the new system. However, there are also several *Pondoks* which perceive the change as threatening and thus, continue to run their activities in the traditional way.

Finally, being "overreligious and conservative", the Muslims are almost unadjustable to a non-Islamic atmosphere. At least, this is what they are observed by non-Muslims. They have dietary restriction; do not drink intoxicants; can not involve with most of other religious rituals and ceremonies; do not donate in support of other religious causes; so forth and so on. These religious restrictions make the Muslims association with non-Muslims rather casual, unless with those who are understanding and willing to adjust to their Muslim friends' restrictions. Furthermore, some Muslims are quite reluctant to join in any activities with their non-Muslim friends unless it is proved that, joining such activities do not create difficulty because of such religious restrictions. Travelling is another problem; most of the Muslims feel especially difficult when they have to travel to non-Muslim communities, especially in the Thai up countries such as north or north-east. This social difficulty is realized not only by the Muslims, but very much so by their Buddhist counterparts. Thus it makes association between the two parties to become superficial and impersonal. Compared with the Chinese, as stated by one Muslim, Muslims are legally defined as Thai both by nationality and by race whereas Chinese only by nationality. But in practice, however, Thais feel more of a companionship with a Chinese than a Muslim.

Change in the Muslim Communities

The Muslims' religio-cultural characteristics described above make us feel that the Muslim society is too rigid to change. Such is not always the case.

In fact, change in the southern Muslim society, like other societies, has been in the process. Sometimes, change, even in religious sphere, was so abrupt that the whole community was suddenly split into antagonistic factions. Usually, change has occured at least under three conditions.

1) Change occurs in the sphere which is religiously premitted. According to popular understanding, the Islamic principles can be divided broadly into two categories:

(a) The actions which are called wajib and haram. Wajib is understood to mean the rule which is compulsory over an individual to uphold, for example, to uphold prayers 5 times a day. Contrary to *wajib* is haram which is taken to mean the things prohibited. e.g., the consumption of liquor, the practice of adultery etc. In such cases, there will be no exception modification of the rules whatsoever.

(b) There are also certain actions which might be upheld or restrained, but with different consequences. For some actions, it is no sin to ignore, but full of merit to practise. This is called Sunna. For other actions, by contrast, there is neither merit nor sin to practice, but to ignore from them is meritful. This is called *makroh*. Thus as far as change is concerned, if religious consideration is to be involved, it can occur only in the *sunnah* and *makroh* categories. However, the change must be proceeded with caution, otherwise one's religious quality becomes contaminated, which is particularly feared by Muslims.

2) The change can occur easily and abruptly when and if Muslims are convinced that it is consistent with Islamic principles. Once in a while there emerge a new religious man who claims to be highly knowledgeable about Islam. He might come with a new interpretation of the so called genuine Islam. In this way, if he is accepted, he can cause a drastic and sweeping change among the Muslims. A precise example is happening in Patani. There is a Pondok *tok guru* who is claimed by some to be the greatest religious teacher in this era and is exerting a forceful influence over tens of thousands of Muslims in the four southern province, and is now gaining more and more followers. He came with almost a new interpretation and caused a considerable part of the traditional practice obsolescent. Because of his being well versed, his new interpretation was accepted quickly. As a consequence, a conflict is suddenly generated between the followers of the old and new interpretations. The conflict become so deep that many of the relations between parent and children, husband and wife, and between relatives, because one party or another follows the new order, was broken off. Many communities were also broken into two antagonistic sub-communities.

The government used to employ this religious approach to introduce change by sending into the Muslim society in the south a group of Muslim leaders with good religious knowledge from Bangkok. These leaders tried to popularize what they took as the real principles of Islam, for examples, "worldly education is required by Islam" or "loyality to the country in which one lives is part of Islamic faith", so forth and so on. Interestingly enough, the result of such effort was unfavourable. For, as explained earlier, most Muslims in the South never had faith in the central Muslims in terms of religious capacity, theoretical or practical. Furthermore, the government relying too much on the central Muslim has caused also an unexpected effect, that is, a negative attitude towards the government in the sense that it employed the central Muslims to corrupt Islam in the south.

Over the past two decades, a great number of young Southern Muslims completed religious education from many Islamic countries, such as Pakistan, Middle East countries, Malaysia, and Indonesia. Thousands of them are still studying in this countries at present. These young religious scholars are introducing change in the Muslim society by proposing what they call "the real meaning of Islam". Some of them were so deviant from the traditional interpretation that they were contemptuously labelled as *kaum muda* (new group). At present, these two factions are in the process of conflict, the degree and direction of which can not yet be predicted.

3) Change in the Muslim society is also occuring through the process of secularization. By secularization we mean the process by which "worldly" institutions, influences, and beliefs supersede religious institutions, influences, and beliefs in society. Thus the diminishing of religiousity of the individual member of society is one form of secularization. In the Muslim society this has been a tendency among young people who, after primary or secondary education from their localities, pursue their Thai education in Bangkok or in other provinces. Usually, these young Muslims have had a very limited education of Islam and, accordingly, observed few of the religious requirements. Furthermore, they tend to look at those devout persons as something less than practical.

These young Muslims are one of the important sources of change, as well as conflict, in the traditional Muslim society. They come back from Bangkok with a new style of life and value. The younger generation at home always look up to them for innovation. However, this phenomena is far from pleasing to the older generation. In sum, the young Muslims who are educated in Thai and in Bangkok, according to them, also present a threat to Islamic identity. As one elder Muslim has put it, "This is the price we have to pay for modern and worldly education".

In summary, the southern Thai Muslims, hold their identities rather strongly and consistently despite the changing environment and, to some extent, the governments' consistent effort to alter them. The religio-cultural identity, Islam in combination with Malay tradition, is the most stable one. It is regarded as the perfect model of life and also the revelation of the universe, the deviation from or the modification of which cannot be tolerated except where it is clearly permitted. Another important identity is the Malay language. This language is held not only as a normal means of communication, but also, probably more importantly, as a functional language for the continuity and integrity of the Islamic as well as Malay tradition in the four Southern provinces. Finally, there is historical identity. The Muslims in this area are found to be conscious of their Malay and Islamic origin. Their past, in the consciousness of the most the Muslims, was derived radically differently from that of Thais with which they share the nation today.

These three types of identity, more often than not, do not express themselves independently from each other. Rather, they are interrelated and form a complex ethnic consciousness. The existence of the religio-cultural consciousness, for example, is highly related to the existence of the historical and linguistic consciousnesses.

Strangely enough, identity consciousness persists for more than expected. Although many people are not much informed about Islam and its related tradition, Malay language, and history of their origin, their consciousness about them strongly continues as indicated by their defensive attitude of pressure being put on their children to learn them.

THAI RESPONSE TO DIFFERENCE

The Muslim's identity consciousness has been explained in detail in the preceeding part. One of the questions which may be immediately asked in this connection is "how do the Thais feel and, accordingly, respond toward such consciousness?" To put it in more general terms, given the characteristics of Thai society, how are the Thais going to respond to the Muslim ethnicity? This question is important since, as we mentioned earlier, the nature of minority problem depends significanty on the nature of its majority counterpart. In order to answer the question with some justification, it is necessary to preface with a brief examination of the basic structure of Thai society.

Basic Philosophy in Politics

Jacobs has characterized Thai society as Patrimonialistic society. According to him, the power of the ruler is absolute and must not be challenged by other groups. Decision making is necessarily unitary. It is not decentralized, though it is deconcentrated to some extent. Any challenge to power or

even to share the decision making is not usually tolerated, except what is carefully permitted by the ruler or the centre. Yet the relationship between the leader and follower is personal and paternalistic. The patrimonial leadership defines its own role and value, and ignores counter definitions from outside. Observance of this definition will be rewarded and the violation will be harshly punished.

The partrimonialist leader utilizes various measures to insure the conformity of the periphery and keep the countervailing power in check. The measures range from using spy system, assigning and transferring field personnel at will and assigning officials to their native area in the first instance. One official can not be stationed long in one place, otherwise he will be too secure and influential. The central authority is never happy if a particular official for one reason or another is popular among the people. Usually, if such case happens, the official will sooner or later find himself transferred to other places. In this way the centre is less threatened by the accumulation of countervailing power.

Along the same lines, Thai polity is also characterized by the excessive role of Bureaucracy. Thai society has been termed by one political scientist as "Bureaucratic Polity", by which it is meant the complete control by the government of the people's life. Even the digging of the ditch in paddy field, for example requires an official involvement. Kukrit Prakoje had concluded the nature of Thai life as follows:

> . . . . There is one thing which was called royal affairs of the land (bureaucracy) had a complete, control over the life almost every moment. No period (of life) could be free from that control. The welfare of the people as well as various societal interests depended solely on official. Happiness became true only when official allowed. And all kinds of dangers could be avoided only with the help of official. It was also official which brought about sufference. People had to part from one another because of official taking away . . . .

The characteristics of Thai polity as described above are necessarily followed by the fact that in general Thais were highly conformist. No doubt of any sort should be raised against the order or the decision made by the ruler. The people are obliged to follow whatever they are told if they want to remain happy and peaceful. Initiative among people is absolutely absent; even if there was one, it was unlikely to be appreciated, let alone to be accepted, by the ruler.

Disagreement is discouraged not only between the superior and inferior, but also between the equals. One should not disagree or comment on one's friend or colleague. By so doing he will "lose face" and, consequently, lose

influence or potential influence, too. It is generally known in Thailand, that personal relation can be easily broken or become casual simply because one comments on the other.

The socio-political characteristics just described have a great implication for the minority situation. Some elaboration will be done later on. At this point, it suffices to say that it requires a homogeneous society if the Thai basic philosophy is to be carried out smoothly and effectively. Heterogeneity simply threatens the typical power, especially if the group has entirely different identity or identities. The existence of countervailing force is a potential threat. This could never be tolerated by the Thai polity unless the deviant group, intentionally or unintentionally, completely concedes to the requirement by, for instance, altering or masking its identity so that the difference is not discernible. And, still better, if the changed group demonstrates a full support for the Thai integrity, that is the stability of the central power, it can then fully enjoy the same status as all Thais. This is precisely what happens lately to Chinese in Thailand, for example.

Thainess: The National Ideology

Prime Minister Field Marshal Pibul Songkhram introduced the notorious policy of Nationalism or Rattaniyom. At the same time the name of the country was changed from Prathet Siam to Prathet Thai or Thailand. And the word "Thai" has become extremely important ever since, the analysis of which we will now turn to.

The concept "Thai" has many connotations. Legally, of course, the Thais are those who are defined by law as holding Thai nationality (sanchart Thai) and, rather loosely defined, Thai race or ethnicity (or chuachart Thai). However, chuachart is not a permanent characteristic. If certain conditions set by law are met, other chuacharts will legally become chuachart Thai, or Thai race. In other instances, one holds chuachart Thai simply because the law defines so. The Muslim in the south is the one so defined. Chineses are somewhat different. They are legally divided into three catagories: Alien or Chinese by sanchart and chuachart; Thai by sanchart but not chuachart; and Thai both by sanchart and shuachart.

What has been just described is the legal aspect of the term. It has given rise to no difficulty and confusion, since it is not the meaning which is popularly used. The Thainess as has been popularly used is the cultural and nationalistic aspect. It implies strongly, and in some occasions exclusively, Buddhist religion and Siamese culture. In other words, a real Thai or a "one hundred per cent" Thai is held to be the one who has a Siamese origin and accepts Buddhism. In popular term, Thainess is used more in the sense of ethnicity rather than legal-nationality. Thus the "real" Thai as is being used

automatically excludes, intentionally or unintentionally, Muslims and other ethnic groups which fall outside one or both of the criteria, Siamese and or Buddhistic.

The meaning of Thainess is clearly seen from the frequently referred tri-words *chart, sasna, pramahakasatra,* meaning nation, religion, and monarchy, respectively. They are, in fact, symbolized by the three-hue national flag. These three concepts, or "institutions", have been used in connection with ideal Thainess. The most familiar phrases in daily usage run something like these: "A Thai must adorn Chart Sasna Pramahakasatra"; or "sacrifice one's life for Chart Sasna Pramahakasatra"; "Thainess is based on Chart Sasna Pramahakasatra"; so forth and so on. These are the three "institutions" which have been being worshipped by the Thais. The rejection of even one of them is considered as treason or its equivalent.

We have seen now that both basic political philosophy and national idelogy, as symbolized by Thainess, are not too favorable to the existence of other ethnic group different from the Thais. Firstly, patrimonialistic type of polity does not tolerate the existence of different factions. The minority group, if any, has to live up to the standard of the majority. Failure to conform might on occasion be interpreted as potential threat or even, as happened occasionally in the four southern provinces, rebellion. This was why the petitions submitted by Haji Sulong or Tengku Yala Nasae definitely could not be tolerated by Thai personality. In the case of Haji Sulong although his action was finally determined by the Nakornseithammarat Law Court that he was not guilty of secessionism whatsoever, but guilty only of allegedly "libelling the government" which resulted in mild sentence of only three years, the bureaucratic politicians still took it as a direct threat to the national security. Thus instead of imprisonment, he was reportedly taken away and made to disappear by being drawn in the lake of Songkla.

The government used to concede special privileges to the Muslim provinces in the last three decades, such as, Friday as official holiday; Malay study in elementary school, Islamic family and inheritance laws for Muslim subjects; so forth and so on. All these priviledges, however, underwent periodic criticism by the Thais as unduly deviating from Thai standard and, seen as a consequence, potentially disrupting to the Thai integrity. Thus most of these privileges were called off later on; only some of the most necessary ones were grudgingly allowed to continue, but not without recurrent complaint from the Thai public, however.

Secondly, the ethnic Muslim was unlikely to be regarded as real Thai or, as a popular term goes, "One hundred percent Thai", because of his religion and culture. As one Muslim remarked: "when the Thais hold that Buddhism

and the Thai way of life are the measure of Thainess, they automatically hold that the Muslims are not Thai or, at best, only partly Thai. This is contrary to what the constitutions, new or old, state that every Thai people has freedom in worshipping religion or creed". He remarked further: "When you go to a government agency, such as district office, you may see before you a large image of Buddha. In this way, how could you not feel that you are contacting a strangers' agency? This is contrary to what the government wants it to be".

It should be noted, however, that the second term, Sasna or religion, is taken to mean exclusively Buddhism, both theoretically and practically. Buddhism is, as a matter of fact, an integral part of Thainess. In other words, a good Thai citizen means a good Buddhist and vice versa. The close relationship between Thainess and Buddhism can be observed also from various government programmes, such as, to cite only two examples, the Thammathut and the Thammacarik programmes. The Thammathut (literally means Darmic ambassador) was established by the Department of Religious Affairs, Ministry of Education, in 1965; and in the same period, 1964 – 1965, the Department of Public Welfare, Ministry of Interior, initiated a similar programme called Thammacarik (literally means wandering Dharma). Both of these programmes had more or less similar objectives, that is, to integrate the people in the outlying area – tribal area covered particularly by Thammacarik – into Thai social system by making them Buddhists or intensifying their knowledge of Buddhism. The tasks of instruction were performed by assigned monks mostly from Bangkok region.

In addition, Buddhism is also expressed in Thai ritual, ceremonial, and ethical structure, organizational or individual alike. Bureaucratic ceremony, which has been part of the Thai organizational structure, for example, is exclusively Buddhistic performed by monks. Furthermore, somewhere in each of these organizations, in the meeting room, at the entrance, at the corner of the compound, etc., is usually placed with Buddhistic symbols. All these can effectively prevent other religious members from a full sense of participation or sense of belonging.

In addition to the role of Buddhism, way of life has effectively served as a criterion for Thainess. Dress is one of good examples. Although it was never explicit as to what kind of dress is associated with Thainess, the dress as is worn by the Southern Muslim, or Chinese, or Indian, is definitely un Thai and stereotypically ridiculed in various ways, such as Khaek, Bang, Emae, Sim (Chinese) etc . . .

At this point we will consider the question of whether or not Thais are tolerant towards others, e.g. other ethnic groups. This could be one of the controversial issues about Thai society. Most social scientists have regarded

as a fact that the Thais, due to Buddhism, are highly tolerant towards different groups in the society. This characteristic of Thai people was claimed to have been realized by foreign religious missionaries since the beginning of their entering the country. No pressure was ever exerted upon their observance or propagating activities. However, the view that Thai is highly tolerant toward differences is only one side of the coin. In fact, on many occasions Thais do not have much toleration towards foreign elements. Those who speak and dress differently, to take but one simple example, are promptly rejected by Thais. The ex-Prime Minister Kukrit Pramo has said that some governors in the southern provinces took very seriously about the Muslims' dresses. One governor reported to him: "Mr. Prime Minister, Sir, I don't know what to do, I have trained my people and succeeded in getting them wearing pants. But three days after they came back from Mecca they go back to their Sarong again". The same thing happens to those who think and behave differently from Thais. They are criticized, suspected, sabotaged, or even on occasions attacked by force. In the light of modern politics, the opposition to the traditionally political ideology is frequently labelled as leftist and cannot be tolerated. The appointment of a Muslim or a Chinese to high ranking position in the Bureaucracy is never happily welcomed by Thais unless the appointed person conceals all his identities and, better still, incorporate the Thai identities. Under the regime of Prime Minister Sarit Dhonarat, effort was reportedly taken to impose sanctions one way or another on those Thai nationals who still retain their foreign names. In Universities, for example, a degree would not be conferred to the graduate unless he or she had a Thai name. In sum, all these phenomena are pointing to the conclusion that the familiar thesis that Thais are highly tolerant is most unlikely or needs qualification. Jacobs is one who started a mild challenge: "Although Thais are tolerant enough on matters of difference among people, this does not imply that Thailand and Thai segmented community system coincide with a plural society i.e. a society in which individuals participate in both national and their own distinctive, possible minority, social orbit". In other words if different segments are to function smoothly as part of Thai society, they have to either assimilate themselves or comply completely with the Thai systems.

The continuous petition by southern Muslim regarding their religious freedom and authority has resulted in certain concessions by the government. However, some concessions have been with drawn for some reason or another. After all, what are presently enjoyed by Muslims as a whole relating to Islamic status might be considered from the following organizations:

1. Office of Chularajamontri or Sheikul Islam. This is considered to be the highest office of Islamic society in the country. Chularajamontri is

elected by the 26 chairman of Provincial Committees who represent 26 provinces which have sizeable number of Thai Muslims. The elected Chula must be approved and subsequently endorsed by the king.

The position of Chularajamontri has symbolic administrative power rather than real, for its stated function is consultation to the Religious Department of the Ministry of Education as far as Islam is concerned. In actuality, however his informal leadership is recognized and exercised to some extent. He settles some of the religious conflicts in Islamic community; he leads religious functions at the national level; he even gives certain *fatwa* when the issues involve the state and Muslim community etc. However, his decisions or decrees have no legal binding force whatsoever unless they are subsequently legalized by the state, which it usually refrains from doing.

2. National Islamic Committee. This is supposedly the highest body of the Islamic affairs administration of the country. Chaired ex-officio by Chularajamontri, the committee is composed of the Chairman of the 26 Provincial Islamic Committees and some appointed individuals.

3. Provincial Islamic Committee. These are the committee of each of the 26 provinces where there are significant number of Muslim population. The body is elected from the Imams in the province, one of whom is elected as chairman.

4. Masjid Committee. This is the committee of each Masjid, Chaired by its Imam, selected and appointed by the whole community members. There are at present 2336 in all, equal to the number of Masjids in the country.

The last three committees are under the control of the Ministry of Interior. All are functioning primarily related to the Masjid Affairs, although some of them do perform other religious duties on informal or individual basis. Thus outside the Masjid affairs, however, there is no legal or institutional binding organizations whatsoever.

All organizations mentioned above function throughout the whole country. In the four southern provinces, namely, Pattani, Yala, Narathiwat, and Satul, there is an additional office as well as extra legal function which is significant for Shariah application. This is the office of Dato Yuttitham or Islamic Justice and, further, some of the Islamic practices, such as marriage, divorce, etc. are automatically bound by the laws of the state. This will be discussed next.

How Shari'ah is Practised

Except in the four sothern province, Shari'ah law practice is not recogniz-

ed in Thailand. Matters concerning family and inheritance, for instance, are practiced on individual basis. Usually, they are performed by Imams or religiously recognized persons personally selected by the parties involved. If the parties want their contract to have a legal binding force, they have to go to the concerned state agencies which utilize exclusively the modern laws of the state which, expectedly, are in great variance with the Shari'ah laws. This is especially the case when unnegotiable disputes arose when the contract which is based on Shari'ah is totally dropped and the parties involved approach the state laws.

The separately individual practice of Shari'ah laws if further complicated by individually different applications of the laws. Due to lack of the commonly accepted set of Shari'ah codification, not to mention the commonly accepted religious authority, the parties involved are faced, first of all, with the problem of selection of the religious authority and procedure acceptable to all. This controversy sometimes functions to worsen the conflict within the Muslim community or even within the same family.

In the four southern provinces, the situation is somewhat different. Shari'ah is allowed to be practised and officially recognized to some extent. First of all, there is a more or less instutionalized Islamic Justice called Dato Yuttitham. The provincial state court in each province provides two Dato Yuttithams, first and second in rank, who are appointed by election by Imams of all Masjid in the province. The stated function of Dato Yuttitham is to judge by the court authority when an Islamic dispute regarding family and inheritance is brought up. All decisions, of course, have certain legal binding force in the four southern provinces, if not elsewhere.

However, the legal binding of the Islamic laws is limited in subject matter. For example, Islamic marriage which is performed by Dato Yuttitham or Imam, or divorce for that matter is legally valid. The contract produced there from, therefore, can be used as official reference in the area of four southern provinces. However, the marriage of subsequent wife or wives and their off springs are not recognized. The laws of the state provides categorically that a man is entitled do marry only one wife. Any registration other than with the first one is invalid. For those Muslims who practise polygamy, as a consequence, the subsequent wives and their offsprings are legally deprived of the rights and priveleges, such as discount on educational or medical fees, etc., secured by the husband.

Another limitation of the Shari'ah in the four southern provinces is the nature of its legal status. Although some of the Shari'ah practices regarding family and inheritance have a certain degree of legal binding force, it does not have legal status in a legal sense. Rather, it is still at a policy level which very much depend on the discretion of individual official or institution.

Thus, while a Shari'ah documentation is well recognized by one official or institution, it can be categorically denied by the other. For example, a marriage license is officially recognized by the local office of the Ministry of Interior which is directly responsible in this matter, but to use it for other reference outside this ministry is quite problematic. This is also true, more or less, for other Shari'ah contracts.

How do the Muslims in the four southern province solve the problem? Inevitably, the only solution is to practise both ways: Islamic for religious legitimacy and official way for official and nation-wide usage. As for the Muslims in other provinces where the Shari'ah has no legal status, official measure is the only way if their affairs need legal validity.

This double practice on family regulation sometimes worsens rather than solves the problem. Suppose a husband divorces his wife and the action is effective from Shari'ah consideration. An Imam or religious authority, then, issues a divorce certificate. But this is only part of the story. The couple has to go to their respective district office in order to secure a divorce certificate, since the certificate produced by the Imam or Dato Yuttitham is not widely applicable. However, to get an official divorce is not always easy; other than mutual consent of the couple, sufficient grounds have to be produced and officially approved. If they fail to do so, the couple remain a double familial status, divorced religiously and married officially. This situation unnecessarily complicates the life of a Muslim especially when official affairs are concerned.

The Codification of Shari'ah

The systematic codification of Shari'ah in Thailand has started in the 1940's to be used by Muslims in the four southern provinces. It is now contained in the Thai Civil Laws dealing with family and inheritance. The content of Shari'ah in this regard is inclusive enough to adjudicate the case between Muslim parties in this regard. However, the whole system pertains directly to Shafi'i Jurisprudence, since the majority of Thai Muslims follow this Madhab. Disputes arising between other Madhabs have no room in the court system, although Dato Yuttitham is supposedly competent enough to deal with them, since there is only the legally codified Shari'ah Law to be followed.

However, ever since the codification of the present Shari'ah and its administration, no effective reexamination has taken place. Its status and nature remain the same. This leads to some questions of reliability and applicability since the nature of religious worshipping and approach have markedly changed in the four southern provinces. Probably because of these reasons, the

cases brought up to Dato Yuttitham have been very rare. In some areas, there is no single case applicable to the Islamic Law in the span of 6 years. In most areas, the cases brought up to the court are no more than 5 cases per year over the last decade. Most of the cases took place in Pattani where on the average 10 cases per year were dealt with.

Another reason which causes the rarity of the cases is probably the qualification of the Islamic judges or Dato Yuttitham. So far, no minimum religiously educational standard is specified for this position except a general statement that the incumbent shall have a sufficient knowledge in Shari'ah. This lack of standardized qualification might well lead to disregard and distrust in terms of reliability and validity among the Muslim public.

However, this does not necessarily indicate that Shari'ah in the Thai legal system is not needed. On the contrary, it is needed for variety of reasons, some of which will elaborated next.

Benefit of the Codification of Shari'ah for Thai Muslim and the Nation as a whole.

A systematic codification and its inclusive application in Thailand could certainly benefit the Muslim community and the society as a whole. The following show some of the positive effects which will result from such undertaking.

1. Reduction of internal conflict. As mentioned earlier, the codification of the Shari'ah law in Thailand has never been reexamined in order to satisfy the new Islamic scholars form various institutions and approaches. This causes reluctance for either or both of the conflicting parties to rely on. If such is the case, both parties will have to resolve the conflict by relying on un Islamic measure, i.e., the law of the state. This obviously discourages the Muslims from observing Islamic principles although they, in fact, would like to. Even if the parties agree to use the existing codified Shari'ah and accept the court decision, if any, further conflict in the same matter can always be anticipated, since the decision is only partly legal. When the decision is brought outside the area or institutions, the decision may be disregarded by one or both of the parties, hence further conflict. Futhermore, when the conflict is involved between a southerner and a non-southerner, there is no way that the codified Shari'ah can exert its role.

2. At present, the conflicts between Muslims and any contracts regarding family affairs as well as inheritance, if Shari'ah is to be applied, are conducted mostly on an individual basis, and off-record. From the bureaucratic perspective, this kind of situation is undesirable; for it will generate a lot of

administrative difficulties from lack of standardized practice and incomplete record of civil life. At political level, any policy formulation regarding the Muslim sector of the population becomes equally difficult.

3. The codification and systematic administration as well as a wider application of Shari'ah laws will certainly create more sense of belonging to the Kingdom. At present, due to an individual application of Shari'ah, a Muslim might feel detached from the legal service of the state, or feel being under a separate unitary system. This might considerably reduce what is called political loyalty.

SHARIAH AND CODIFICATION

SRI LANKA EXPERIENCE

by
A. Hilmy Mohideen

Islam means peace and the adherents of Islam must by definition live in peace in their submission to the Will of the Almighty. But they have to live in a political entity the modern state, either as a minority or as a majority. In Sri Lanka the Muslims form about eight per cent of the population and they belong to the Shafei school of the community of Sunnis. They are believed and assiduously continue to believe, as an article of faith and of honour and of life itself in the Quranic decree "For each of you we have appointed a Divine Law and a traced out way" (Surah Al-Maida(5): 51), and "and now we have set you on a clear road of our commandments; so follow it, and follow not the whims of those who know not" (Surah Al Jathiya (45): 18). These verses are peremptory to the faith and conviction of a Muslim in that he should conform to the imperative Ordinances of the Shariah. It also imposes upon him the duty not to follow the rules of those who are unaware of the Shariah. Shariah for a Muslim is a matter of conviction, of faith and of total belief to which he is unequivocally committed. For him, it is an infallible doctrine of ethics and religion which of necessity governs his political, social, economic, cultural, domestic and private life.

Al Ghazzali describing the sacred law of the Shariah, (vide Hurgronje, "Selected Works" (Leyden 1957). "The law is the indispensable daily bread of life for all Muslims because it contains the rules which are binding on everyone. He who denies the validity of the main regulations of the law is a Kafir and deserves death as an apostate (but not otherwise). The required measure of knowledge of the law varies from person to person; because it has value only as a guide to right living, the study of fine distinctions is in itself worthless. The Fiqh is a science of this world since the man who observes all its rules meticulously may give the outward impression of being a true Muslim; but what is within, whether he possesses the belief necessary for salvation, is another question."

The changing world of today demands from every Muslim a reappraisal of himself and his surrounding environment. Imam Ghazzali so long ago had understood the problems of the Muslims living in any particular time and he directed every Muslim, when he came of age, that he should renew his faith by rationalization and see to it that he did not accept anything and everything blindly.

As things are a Muslim is reputed to owe allegiance to anyone of the four Sunni schools of thought, or jurisprudence, namely the Hanafi, the Maliki,

the Shafei, the Hanbali or the Shiah schools like the Imamiyah. But every-one of these schools are given to the definition and the statement of the Shariah, which is a single code of life.

In the Islamic world there have been tremendous pressures which have been brought to bear on the Shariah. One extreme has been the replacement of the Shariah Code by the Swiss Civil and Criminal Codes as in Turkey. There was a limited experiment effected by Bourgiba in Tunisia. On the other extreme we find new Constitutions emerging like in Afghanistan which prior to the recent turmoil had a clause in the Constitution which stated, "The State disposes of religious matters in accordance whith the Hanafi Commandments. . . . The King shall be a Muslim and a follower of the Hanafi faith".

Dr. Mohamed Iqbal in 1934 in "The Reconstruction of Religious Thought in Islam", observes . . . "It is worthy of note that round about the middle of the first century, up to the beginning of the fourth, not less than 19 schools of law and legal opinion appeared in Islam. This fact alone is sufficient to show how incessantly our early doctors of law worked in order to meet the necessities of life. A careful study of the various schools of legal opinion in the light of contemporary social and political history reveals that they gradually passed from the deductive to the inductive attitude in their attempts at interpretation".

As we are aware, the Shariah Ordinances emerge by way of commandments in the Quran, the Hadith or the recorded manner in which these Quranic commandments were lived in and interpreted by the Holy Prophet in his life time, Ijma, or the "Consensus Communis" of the great Islamic jurists and companions of the Prophet, and Qiyas, that vast body of deductive reasoning from the first three sources. These four sources proclaimed the Shariah Ordinances which a Muslim, so long as he lives by the tenets of Islam, must conform to and obey in his lifetime.

Although the Shariah is a single system of law, its interpretation and application differs depending on whether the adherents have elected to be guided by any one of the schools of jurisprudence or Madzhabs. The Imamiyah school of jurisprudence governs Shia Muslims while the community of the "Sunnah Wa'l-Jamaat" is sub-divided into four schools of law.

The Hanafi school of jurisprudence is the oldest, having been founded by Imam Abu Hanifa (d. 767 AD) whose thesis inspire the Muslim peoples or the Soviet Central Asian Republics, Chinese Turkestan, India, Pakistan and Bangladesh, Turkey, Afghanistan, Egypt and Syria. His thesis was marked by what Ameer Ali states, "By the latitude which he allows to private judgment in the interpretation of law". This was the Baghdad school which claims nearly one half of the Sunni Muslim population.

The second or the Maliki or the Medina school of jurisprudence was founded by Imam Malik Ibn Anas (d. 795 AD). His interpretative work relied more on Hadith and less on deductive reasoning or Qiyas. His interpretation of the Shariah is followed in Libya, Tunisia, Algeria, Morocco, Mauritania, Upper Egypt, the Sudan, the UAE., Kuwait and Oman, and the small Sheikhdoms of Arabia.

The third or Shafei school of jurisprudence was founded by Imam Shafei (d. 819 AD) who preferred to rely very heavily on the authenticated Hadiths as the source of the Shariah and after his demise the Al-Azhar University became renowned in disseminating Shafei learning. The followers of the Shafei school are found in lower Egypt, Arabia as well as the countries of the South East Asian region, namely, Philippines, Brunei, Malaysia, Singapore, Indonesia, Thailand, Burma, Sri Lanka and the Maldives. There are small pockets of Shafies in India, Pakistan and Bangladesh.

Finally, the fourth school of jurisprudence, the Hanbali was founded by Imam Ibn Hanbal (d. 855 AD). His schools of jurisprudence is known for the insistence on the strict interpretation of the sources of the law and his uncompromising puritanism. Any form of innovative reasoning had no place in his scheme. Most of those who follow his teachings are found in Syria, Iraq and Saudi Arabia, where some of his followers are called Wahabis.

The Shia or Imamiyah school of jurisprudence rejects the interpretation of the four great Sunni Imams, and places a separate and distinctive interpretation on the legal principles of the Shariah as laid down by their own jurist and traditions based on the life and teachings of Hazrat Ali, the companion of the Prophet.

It will be helpful for our own purpose to understand how Imam Shafi approached the Shariah interpretation. According to Ameer Ali, "Shafi, Malik, Ibn Hanbal, almost entirely exclude the exercise of private judgment in the exposition of legal principles. They are wholly governed by the force of precedents; they also do not admit the validity of a recourse to analogical deduction of such an interpretation of the law whereby its spirit is adapted to the special circumstances of any special case. Their followers are accordingly designated as "Ahl al-Hadith", or ("traditionalists par excellance"), while the followers of Abu Hanifa are called "Ahl al-Ra'y Wa'l-Qiyas", "the people of the judgment and the reason". "The exercise of private judgment consecrated by Prophet Mohamed, and adhered to strictly by his immediate successor had caused to develop the liberal spirit, and this had its legitimate influence on the mind of Abu Hanifa".

Why alignment with countries of the Sub-continent is not possible

The Muslim laws of Sri Lanka are traditionally and historically Shafei of the category "Ahl al-Hadith", or "traditionalist par excellance", as opposed to the bulk of the Muslims who are Hanafis in India, Pakistan and Bangladesh who are therefore Ahl al-Ra'y wa'l-Qiyas or the "people of judgment and the reason". Hence the paramount need for a Shafi Code for the people of this country.

There are fundamental and basic differences in the Indian and Pakistan Shariah law and that which prevails in Sri Lanka.

In Sri Lanka therefore it was only Shafi law which mattered from very early times and it continues to be so now. There was and is only one Madzhab as far as the vast majority of Muslims in this country are concerned and there was therefore never a necessity for any academic dissertation of the conflict of Madzhabs or opinions of Ulemas or Fatwas asked, for purposes of judicial application.

It is only in the Indian sub-continent, which today consists of Pakistan, India and Bangladesh, that the term "Mohamedan Law" has been used to describe that vast body of Shariah legal imperatives applicable to a compact and homogenous group of Muslims who belong to the Hanafi Sunnite school and who are largely united in language, race and religion and therefore have a common cultural heritage and whose lingua franca is largely Urdu. The vast majority of Muslims on the sub-continent being of the Hanafi-Sunnite school, rely on the Hedaya of Burhan al Din al Marghinani, a Hanafi Treatise translated into English by Hamilton. Today Mohamedan law is defined as that personal code under the Constitution of India.

There is also a sizeable minority belonging to the Fatimid Shiite sect or the Imamiyyah school who rely on the Da'a'im al Islam of Abu Hanafa al Numan for their interpretation of the Shariah law and as translated into English by Hamilton.

The Mohamedan Law of the Hanafi and sometimes the Shia school in the Sub-Continent were considerably influenced by English Common Law and the English rules of equity, they being the laws of the conqueror and administered in the courts of the conqueror by them. In consequence there was a mass of judicial precedents of the courts which became part of the Shariah law of the Sub-Continent. These consisted of the decisions of the Privy Council in England, the decisions of the Indian and Pakistan Supreme Courts, the decisions of the High Courts delivered in Bombay, Calcutta, Madras, Allahabad, Lucknow, Punjab and Nagpur. These decisions took note of the Hanafi positions set out in the Hedaya, and the Fatwa Alamgiri and the Shariah treatises of the English and Indian classical writers. Of these, the

Fatwa Alamgiri, a monumental collection of Hanafi judicial opinion prepared on the orders of Aurangzeb (1707), was outstanding.

The Sub-Continent of India now possesses a vast body of Shariah law wherein the main points have been clarified and made law in the juridical precedents. The Hanafi doctrine is now a living dynamic and legal factor for nearly 360 million people in the Sub-Continent. A curious fact was that in the Sub-Continent a lack or want of a knowledge of Arabic did not retard the growth and the application of the Shariah to the Islamic people. Arabic was not a sine qua non for the study and application of the Shariah in the courts of law. This is very true of the situation in Sri Lanka, also.

This however cannot be said of the people who now inhabit the traditional Shafie areas of our South East Asian region, which is now covered by the South East Asia Shariah Association.

Muslims in Ceylon (Sri Lanka), historically of Shafei origin

From the 8th century onwards Islam flourished particularly in the littoral areas of Ceylon or Sri Lanka. The Sinhalese Kings of the North Central, North Western and the Central regions of Sri Lanka and the Tamil Kings in the North extended their tolerance to Muslims, Christians and Jews, in more or less the same measure as they extended their patronage to the Buddhist and the Hindus of the country. The Muslims were accorded complete freedom of worship and they were governed by their own Shariah laws and usages. The "whole range of civilian commitments from marriage contracts to commercial obligations" (Ceylon Historical Journal III No. 2 p. 141) were derived from the Shariah from which was also evolved the respective legal systems for purposes of internal jurisdiction.

When the Portuguese arrived in Ceylon in 1505 AD, there was already a Shariah Court of Justice in Colombo to settle disputes according to Muslim law (Vide Father S.G. Perera's History of Ceylon, Vol. I).

Chief Justice Alexander Johnston observed in 1827 that Muslim Arabs who had settled in Ceylon from ancient times had implanted the Mohamedan law as contained in the many original works in Arabic and also the Arabic translations of the Greek and Roman classics in medicine science and literature. There was also a Maritime Code of Laws which was administered by a Tribunal or Court in Colombo which tried commercial and maritime cases, and the judges were made up of knowledgeable scholars, merchants and mariners. This was possible due to the tolerance preached by the local rulers in the interior of the country, whose sovereignty did not forcefully extend to the coastal areas where the Muslims lived.

Although the ethnic proportion of the Muslims of Sri Lanka may be described as Semitic-Dravido Aryan, the calculated annihilation of the Muslims and destruction of their religion by the Portuguese and their consequent dispersion under the Dutch, caused them to scatter themselves throughout the length and breadth of the island and settle down in isolated pockets among the Sinhalese and Tamil population. It is in these communities that the Shariah law was kept alive in the early colonial times and the local mosques were the nucleus of the congregations which administered the Shariah according to the opinions of the local Ulema. These people came to be designated as the Moors of Ceylon by the Portuguese and the Dutch and the English, and who in 1953 numbered 463,963. The Malays who belong to a different ethnic group were brought by the Dutch and the British as soldiers or exiles from Indonesia, Malaysia and Sumatra and in 1953 they numbered 25,464. In addition to these groups there was another ethnic community of Indian Moors who in 1953 numbered about 50,000, of whom nearly half were Shafeis and the rest were Hanafis.

There was also a very small group of Shiites of the Imamiyyah school. So that out of a population of 8,817,895, Muslims constituted about 7.5 per cent of the population in 1953. Today the population has doubled to nearly 16 million and Muslims number about 1.2 million, roughly 7.5 per cent of the population.

From pre-colonial times (ante 1505 AD) and after, it was through the Ulemas that the sacred Shariah law was kept alive through the institution of the Jamaat (congregation) of the mosques which were scattered throughout the country. It was these Ulemas who took portions of the standard works of Shafie's law to the congregations and spread the knowledge which they had gained in the Hedjaz (Arabia) and India, the most influential from Ceylon being Hatim Musa As Ceylani (Zailani) who received his scholarship in Baghdad in 877 AD and Ismail Bin al Colambavi. The "Kitabs" from foreign centres of learning were taken to the congregations of the mosques by generation after generation of the Ulemas so that whenever the occasion arose the Ulemas were able to expound the principles of the Shariah. This was the picture of the scholarship and learning in the period before the Portuguese holocaust after 1505 AD.

With the coming of the Portuguese colonialism into this country from 1507 AD., apart from the genocide of the Islamic people, there was a total and complete collapse of the centres of learning and scholarship called Madrasas which were mini universities. Places of worship were completely destroyed, the congregation decimated and dispersed, and the Ulemas tortured and killed with inquisitorial fury. The study of the law in the established madrasas attached to each mosque ceased and scholarship from abroad failed.

From this point onwards the dissemination of knowledge and learning of Shafie jurisprudence totally collapsed, never to recover up to date and the Muslim population in the littoral areas disappeared and suffered annihilation during the Portuguese period.

Establishment of Shafei Law by Statutes

The Protestant colonial powers like the Dutch and the English who ruled this country from 1650 AD onwards were more tolerant and receptive and they were diametrically opposed to their colonial predecessors. They permitted and encouraged the resettlement of the Muslims in their habitat. Consequently there was a considerable increase in the population, but there were no scholars and teachers of the Shariah as in the past because they were all put to the sword. Consequently there was stagnation and malaise in the scholarship and the application of the Shariah law.

The situation was so critical that the Dutch Governor of Ceylon, Willem Falck (1765 – 85) pleaded with the Governor-General of Batavia that "There were no persons in this island well versed in the Mohamedan law" and that there was no person competent to make decisions for the people of the Mohamedan faith who were totally ignorant of what was their law. He also complained that the Muslims were subject to great oppression from their own people who decided cases according to their own partial or corrupt opinion. The result was the first Shafei Code of Law No. 8 which was drawn up in Batavia and in September 1770 was submitted to Governor Falck who sought the approval of the Muslim Headmen and inhabitants of the Dutch possessions in the island. These Shafie rules embodied the 'Civil Laws and Customs relating to succession, inheritance, marriage, divorce and other matters selected from the Shafie law books which were used at that time in Batavia and which was approved by the Governor-General there". The Muslim inhabitants of Ceylon readily accepted this Code as it enunciated the Shafie law with which they were conversant.

With the capture of Ceylon by the British, the continuance of this Code No. 8 and the Mussulman law based on Shafie interpretation were guaranteed both by the Proclamation of 23 September 1799 and by the Charter of 1801. It was provided "that in the case of the Singalese and Mussalman natives their inheritance and succession to lands, rents and goods and all matters of contract and dealings between party and party shall be determined in the case of the Mussalmans by the laws and the usages of the Mussalmans and when one of the parties shall be a Cingalese or a Mussalman, by the laws and usages of the defendant". This was in effect the decree of the Sovereign that the Shafie law which was current in Dutch times shall henceforth be applicable to the Muslim inhabitants of this country.

To give efect to the policy declaration in the Proclamation of 1799 and the Charter of 1801 Sir Alexander Johnston presented to the British Governor-in-Council a slightly modified translated version of the Batavian Code No. 8. Of this Code, Sections 1 – 63 dealt with succession and inheritance and Sections 64 – 102 with marriage and divorce. This was known as the Mohamedan Code of 1806 and after 1852 this Code was applicable to the rest of the island.

Establishment of Shafei Law by Judgments of our Courts

It is a precedent of judicial deliberation and culture that these Muslim people irrespective of their ethnic origins have always belonged to the Shafie Sunnite school and have been followers of "one of the greatest jurists of Islam", Iman Shafie (767 – 820 AD), who "elaborated a structure of law that is from the point of logical perfection, one of the most brilliant essays of human reasoning" Dr. Joseph Schacht "Origins of Mohamedan Jurisprudence" (1950).

The Mohamedan Code remained in the Statute Book as part of the laws of this country until it was repealed in 1931. Subsequently the legal imperatives of the Shariah came to be enacted in different and separate pieces of legislation covering the Shafie personal laws and systems, such as marriage and divorce, gifts, intestate successions, age of marriage, etc.

In the relationship of the Shariah vis-a-vis the State, there has been no question as to what a State should or should not be according to the Shariah. But what is significant is that the State from colonial times up to now has always recognised the right of the Muslim minority to be governed by the Shariah so much so that it is now a fundamental right. This recognition had an evolutionary growth in the past and there was a growth of an Islamic institutional system and Islamic jurisprudence (Fiqh) as is evidenced today in our country. These have been incorporated into a workable legal ground though at times there were problems of communal accommodation and conflict. It was left to the judiciary of the country to lay down the rules and precedents for the interpretation of the Shariah in its relations with the Constitution of the country, the legal enactments and legislation, consonant with the aspirations of the Muslim minority. The task of our judges had been to find a way by which the principles of Muslim law which the courts decided to adopt by way of an eclectic process could be worked into the common law of the country. In this way it fitted in with the Constitution and other laws of the country such as the English law, the Roman Dutch Law and the Criminal Law.

The main source of the Shafei legal doctrine as is applied in our courts

within the framework of our legal system is the English paraphrase of the Shariah doctrine called the Minhaj et Talibin of Al Nawawi (676 AH), which was first condensed into French by Van den Berg and published in Batavia in 1883. This was further translated in London in 1914. This was based on the commentaries in Arabic of Al Mahalli (864 AH) on the Minhaj and of Al Ramli (1004 AH) who authored the Arabic work Nihayet al Mukhyaj. A shorter compilation in Arabic Tamil of Shafie's work was published in Bombay in 1874 by Ahmed Alim who is known in Sri Lanka as Mapilay Lebbe Alim Sahib. His work, the Fath-ud-Dayan has been made available in Sri Lanka for purposes of study and scholarship to the Arabic Tamil speaking Ulemas of this country. This work is also a paraphrase of only a small portion of the great works of Shafie.

Our courts, in their many decisions on Muslim law, have always taken the view that Imam Shafei was never a law giver but only an interpreter of the Shariah, and that his views were of great persuasive value which were greatly respected. The system of our eclectic processing of our courts had infused Islamic jurisprudence with a dynamism which was distinctive to Sri Lanka in that it suited its modern conditions and changing circumstances. Hence Shafei principles are today a living tradition.

It is indeed most remarkable to find that the principles of English and Dutch laws enforced in this country by the conquering colonial powers, and which now form part of the legal system of this country, are identical, if not similar to the principles enjoined by the Shariah.

The Supreme Court of the island established as a precedent the rule that the Islamic people in the island "were governed by their own laws and customs of inheritance and marriage which are founded on the religion" (1851 Ramanathan Report 163). This was basically Shafie Law.

The Supreme Court, in case reported in 26 NLR 235 (1925), paid a tribute to Shafei jurisprudence and stated that the Code was a "very rough codification of certain portions of a very great system of jurisprudence". Judicial precedents also laid down the following rules, viz.,

(a) where the Muslim law stated in the several text books were in conflict with the Code, the Statute law contained in the Mohammedan Code took precedence over the opinion of the jurists;

(b) the interpretations in Muslim law texts became applicable if, and only if they were consistent with the principles contained in the Code;

(c) the interpretations in the standard Muslim law texts shall be used only to elucidate and not to contradict the Code which was deemed to be the Statute law of the country;

(d) where the Code was silent, the rule was laid down in 1912 by the Supreme Court that the standard Muslim law texts must be used to decide a matter, and never the opinion of Ulemas or "experts" who had proved themselves to be unreliable and inconsistent.

Since Imam Shafei is the Jurist of the Islamic Shariah in our South East Asia region, and more particularly in Sri Lanka, and as we now pose the question of codifying his legal principles, it will be appropriate at this stage to review in brief his early life of scholarship.

Imam Shafei was born in Gaza in AH 150 and grew up in Mecca. At Medina he studied law under Imam Malik. At the age of 30 he went to Baghdad to study Hanafi law. Thereafter he taught law in Baghdad. In AH 198 he went to Egypt and he became an authority on Shariah Law. During this period called "the second period" he changed some details of his system. He died in AH 204. His legal treatise and theory was set out in his original work the "Risala". There were several Arabic works which reflected his teachings in part, but the source of the Shafei doctrine is unmatched as paraphrased in the Minhaj et Talibin by Al Nawawi (676 AH). To provide the guidelines of Shafei Law for the administration of justice in the Dutch colonies of the Far East, Van de Berg published a French translation of the Minjaj) in 1883 in Batavia, Java. This was then translated into English by E.C. Howard, a judge of the Singapore District Court for use in Malaya and the Straits settlements among the Muslims of the Shafei sect and was published in London in 1914. In Ceylon (Sri Lanka) this English translation of the Minhaj has been the only standard Muslim law text of the Shafei School in English, cited in our courts. Therefore, they came to rely on it very heavily practically for all decisions on the Muslim Law.

There is a tremendous need therefore for the codification of the Shariah personal laws, particularly where Muslims are a minority. The urgency has lifted this problem above dissertations of local Ulemas and fatwas issued by dubious personnel. The problem has to be assessed afresh by trained legal and research workers, adopting a scientific scheme of evaluation and restatement of the selected Shafei principles. This is rendered easy if we rely, as our courts have done in the 19th and 20th centuries, on the Minhaj Et Talibin, which has been translated into English.

At a time when we have gathered to formulate a Shariah Code we cannot but be fascinated by the words Moulana Maududi uttered in 1948 at Lahore: ". . . . a lamentable factor in the long story of our misfortune, is that not even our enemies, but also the Muslims themselves are ignorant of and estranged from their glorious religious legacy and splendid ancestral inheritance. Circumstances and environment in the present age have unfortunately given the reins of Government in most Muslim countries into the hands of those Muslim

jurists, statesmen and administrators and executives who are ignorant of and unsympathetic to the teachings of Islam, but who are the faithful replicas of the mental and practical prototypes of Western non-Islamic civilization and culture. Consequently the Governments of most of the independent Muslim countries today are fashioned on the models of the so-called "Secular States" of the irreligious West. And it is a deplorable fact that within their own countries the Muslims have obtained one such religious right – in the shape of their personal law – as has been granted to the Dhimmis in early Islam. If however, our brethren in authority are a little more informed of the Shariah and provided there is a will and an intention to work out the programme of Muslim life on the lines suggested by the Islamic Law, there is no difficulty that cannot be surmounted by them in its application to the Muslim lands".

A codified body of the Shariah Law and unified tribunals easily accessible to the people have now become a priority in the administration of justice in our South East Asian region. The clarification and verification of the personal and family law must be available as a text, for disposal by the judges in the language of the administered law. There must not be any room in the mind of the judge as to what legal decision was right out of several from among the hundreds of judicial precedents available and proferred by sources of the Shariah and the Schools of Jurisprudence, and the Islamic Courts in the past 13 centuries. That the Shariah and Code be committed to a single school of jurisprudence arises from the necessity to deny to a party litigant the right to choose between the Maliki, Hanafi, Shafei or Hanbali or Imamiyya interpretation whenever and wherever he considers his best interest lay. In a court of law, a litigant is covered by the common law of the country in which he lives, not by the common law of another country though that may be advantageous to him.

Shafei, when he established his Jurisprudence, taught first how the law should be classified. The classification table in the Minhaj is indeed a classic. It is incredible that the principles of Shafei Law, as was taught and evolved by him, are included and defined in the statutes of the conquerer, not as Shafei Law, but as the Roman Dutch Law which is the common law of the country, and the English Law and statute law, all of which have remained as a reservoir for all subsequent legislation. That the Shafei Law was taught and practised in the Maghrib and Muslim Spain from where it vitally influenced European and English legal thinking, particularly the Protestant legal reformation in the Low country and England is now established. Hence the remarkable affinity of the Roman Dutch Law and the English Law, particularly the English Law of Trusts with the Shafei interpretations which made them readily adaptable to the needs of the local Muslim peoples. These foreign laws were well received and were adopted so long as they were not inconsistent with or were repugnant to Shafei Law.

The classification of the Shariah rules have been made by different jurists. One classification which is very broad, falls into three heads, namely (1) religious and cultural matters (Ibadat), (2) criminal and penal matters (uqubat) and (3) civil and legal matters (mu'amalat). Another classification makes a distinction of the rules of what is lawful and what is unlawful. Thus, under the head, "what is lawful", is included (1) divine duty (fardh or fardu), (2) "what is necessary" (wajib), (3) "what is customary" (as exemplified by the Prophet's practices in the Hadith), (4) "what is desirable" (mustahab), and (5) "what is permitted" (mubah). Under the head "what is unlawful" are the two types of injunctions, namely (1) what is strictly forbidden and punishable by the Almighty and the State (haram), such as murder, theft, adultery etc., and (2) what is improper (makruh), for which a penalty is not imposed.

The, structure of the Shafei statement of the law in the Minhaj-et-Talibin is made up of 78 heads or books wherein the principles of law have been clearly stated from the basic sources of the Quran, Hadiths, Ijma and the Qiyas. For purposes of legal application, we in Sri Lanka purported to use this Shafei Law to interpret and give meaning to the Batavian Code introduced into this country by the Dutch and the Muhammedan Code of 1806. The Muhammedan Code was repealed in 1931 and in its place, was enacted the Muslim Intestate Succession and Wakfs Ordinance and the Muslim Marriage and Divorce Ordinance of 1929.

These Codes and Ordinances were applicable to Muslims in Sri Lanka on a guarantee by the conquerer to the subject people by the respective Charters of Rights. . . . The Muslim Laws were administered in the civil courts of the country, presided over by non-Muslim judges, in the absence of Shariah Courts. In the course of time our courts in influencing the course of justice, laid down precedents in their decisions which achieved finality on several matters and these now remain as law. It was those decisions of our judges, who had a sound legal training that contained the landmarks of Shafei Jurisprudence in its application to present trends.

These decisions which amplified and refined the Muslim Law, wholly ignored the religious opinion of the local scholars or Ulemas for several reasons. Fatwas, opinions and assertions of the local scholars did not reflect a sound judicial mind or temperament, were often biased and partisan, authorities which were dubious were cited and the sources were cited out of context. Further, the local Ulemas were of not competent training and scholarship. For these reasons our courts wholly ignored local scholarly opinion, but were wholly guided by recognised Muslim Law texts. Indian and Pakistani decisions were only of persuasive value in that our courts always kept in mind that the hundreds of decisions of the courts in the sub-Continent were basically Hanafi interpretations of the law, very ofter at

variance with each other, and were therefore not authoritative for the interpretation of Shafei Law.

The impact of Shafei rules has been directly or indirectly in the following areas. They are very briefly as follows.

Marriage and Divorce

It is in the field of Muslim marriage and divorce that the genius of Imam Shafie's interpretation is brought out. His interpretations have been used with great acclaim by our civil courts and subsequently the established Shariah courts which now have exclusive Islamic matrimonial jurisdiction called Quazi Courts, and its appellate court, the Board of Quazis. The Muslim Marriage and Divorce Acts have imported the principles of the Shafie school, and our courts have always looked to Shafie rules of construction to formulate judicial precedents in Muslim Law. These precedents show the pattern of legal thinking and growth of our law which is made consistent with the general law of the land.

The Muslim Marriage and Divorce laws have from time to time been amplified and strengthened by our courts with the guidance of Shafie interpretations. The acceptance of only the Ahsan form of Talaq or divorce (three repudiations each followed by three attempts at reconciliation which are mandatory), the recovery of mahar or the bride's dower, of maintenance of wife and child, iddat maintenance, lying-in expenses, maintenance of children up to the age of puberty, fasah divorce which is at the instance of the wife, divorce by mutual consent (mubarat), and the divorce on payment of compensation (khula), nullity or annullment of marriage, the right of the wali, or guardian of the bride to give her in marriage with her consent, the absolute requirement of two witnesses, the contractual nature of the marriage, the registration of a Muslim marriage or divorce in the records of the State, the court of competent jurisdiction in which the judges have to be Muslims, and who are appointed to office by the State through the competent appointing authority of all judges, the Judicial Services Commission, are the more fundamental features. Since there was a specific need to compel a husband to pay a kind of indemnity to an innocent wife to make him more circumspect and act as a restraint on his discretionary power to repudiate his wife without giving any reasons, a Quranic remedy is now envisaged in the draft Amendment to the Marriage and Divorce Act. It is the compulsory payment of Mutah or Matah, a "consolation present" as decreed by the Quran Surah Al-Baqarah (2): 241 "For divorced women matah should be provided on a reasonable scale. This is a duty on the righteous". Under the Shafie law the payment of matah is a very strict obligation and therefore it is a very important feature in the law.

The Shafie requirement that a repudiation of his wife by a man who must be of a sound mind and unrestrained will, the unequivocal pronouncement amounting to one repudiation at three different times followed immediately by attempts at reconciliation, the prohibition of all other conditions and hypothetical eventualities due to publicity, and consideration for the physiological cycle of the wife are now part of the laws of this country.

By such means the strict legal control of repudiation has been achieved. The question of any "modernistic" reforms do not arise since every safeguard against the abuse of the husband's discretion has been seen to in the present legislation. A repudiation has in every instance to be made according to the unwavering requirements of the law in a forum especially set up to administer that law, namely the Qazi Court.

Khul' divorce by mutual consent has always been available to a wife in the sub-Continent as both Shafei and Hanafi doctrines guarantee that right. The Minhaj et Talibin only touches on this aspect when dealing with the quantum of compensation payable by the wife and there is limited recognition in our marriage laws in Sri Lanka under which only a court of competent jurisdiction can pronounce that divorce. This, it would appear, is an appropriate matter for codification because it will be a divorce "pronounced by the court on the demand of two partners who have agreed to separate and not as heretofore, of a Repudiation pronounced by the husband at the demand of a wife quite independent of any intervention on the part of the judge".

Fasah

Fasah divorce invests a legal right in a Muslim wife to leave an unhappy union by applying to the Qazi or judge for a divorce when the husband is present and is guilty of a "fault", as for instance when he does not perform his duty of maintaining her.

In Sri Lanka this right, is part of the law for a very long period of time although it was part of the Maliki teachings from early times in other regions. However, this legal right of a Muslim woman has been recognised only recently in Egypt, Morocco, Syria and Iraq. Our judicial precedents in the Shariah Court (Board of Qazis) and the Civil and Appellate courts have laid down further grounds for fasah in amplification of the "faults" of the husband in order to enable a wife to demand a divorce, such as impotency, incurable diseases like leprosy, cruelty in so many different ways and so forth. The exploration of every way to reconcile the estranged parties together with assessors, relations, parents and others is now a fundamental legal duty of the judges or Qazi. It is a prerequisite which has to be carefully recorded in a Talaq or Fasah proceedings, and failure by the Qazi to record the attempts at reconciliation results in the proceedings being declared null and void by an appeal court.

Law of Trusts

The Law of Trusts is founded on Surah 5, Verse 8 "O you who believe, be steadfast witnesses for Allah in equity, and let not hatred of any people seduce you that you deal not justly. Deal justly that is nearer to your duty. Observe your duty to Allah". And again, Surah 4, Verse 58: "Lo Allah comandeth you to restore the trusts to those entitled to them (the rightful owners), and if you judge between mankind, that you judge justly. Lo, comely is this which Allah admonisheth you".

Wakf or Awkaf 23 Minhaj

The law governing endowments or Wakfs had always been the Shafei law for centuries past. Endowments were a species of Sadaqa made in the name of Allah, as a religious obligation and duty. Upon such endowment to a mosque (public Wakf) or for the eradication of poverty, for the orphan, the needy, the family, the wayfarer etc. (private Wakf), the right, interest or title of the person in that endowment is completely extinguished or terminated.

At the same time he must transfer that endowment to a person whom he trusts to carry out the objects of that endowment, that is for the benefit of the mosque, or for the poor, the needy the family, and the orphan. On to this basic structure of Shafei Law of Wakf as had been applicable in the past, the Dutch Mussalman Code of 1778, the Mohamedan Code of 1806, and thereafter the English Law of Trusts, were all superimposed. The English Law of Trusts had its origins in England only in the 17th and 18th centuries. When we examine the Shafie Law of Wakf in book 23 of the Minhaj et Talibin as was evolved in the 8th century and the English Law of Trusts in the 17th and 18th century, the parallels and similarities are so identical that the obvious conclusion is inescapable, however incredible it may sound namely that the English Law of Trusts which is now made part of our Statute Law" owes its origin entirely to Mohamedan Law" once over.

Indeed it is with great humility and awe that it is recounted that the principles of the Dutch and English law pertaining to the following fields which were formulated by the Protestant Christian jurists in the 17th and 18th centuries and which were transmitted to the colonies like Ceylon where they were applied as the laws of the conquerer, had as their bedrock the Shafie principles of law, systematized tabulated and coded from the Quran, Hadiths, Qiyas and Ijma in the 8th century. It is incredible, yet true that the founding laws now in use in this country and imposed by the colonial powers bear testimony to their parallel origin in Shariah or the Muslim Law. Thus these laws which are currently in use correspond in great detail to the Shafie law so clearly set out in the Minhaj. (Vide schedule setting out the correspond-

ing Shafie Book of Law and the law currently in use). Thus, in Minhaj p. 232 we read "The ownership of the thing immobilised is transferred to God; which means that such object ceases for men, to be subject to the right of private property, and that it henceforth belongs neither to the founder nor to the beneficiary. To the latter belongs the usufruct alone".

It is indeed amazing to note the development of the English law of trusts which is now part of our law. Except, that it is identical with the Shariah law of Awkaf or Wakf which was used before 1500 AD. The term Wakf is a legal concept which is also almost identical in practical utility as the English Trust, equally applicable for the benefit of the beneficiary, family entail or charitable purposes. The principle of the Wakf is the transference of the legal title of the owner of the Almighty and the immediate appointment of a trustee or Mutawali to manage and administer the property for a particular beneficiary. Thus there is a separation of ownership and usufruct and the settlor vests the usufruct in a succession of beneficiaries so that the property in question becomes inalienable. The "Wakf" as was developed in the 8th and 9th centuries belonged to the category of Sadaqa or religious gift which are directly authorised by the Quran. "They will ask you what they are to spend in alms: Say, whatever good you expend, it should be for parents and kinsman (private Wakfs) and the orphan and the poor and the wayfarer" (public Wakfs). So that the legal theory or Wakfs or trusts was part of the Shariah law and it was enforced from the 7th century when the first Wakfs was established by the Holy Prophet according to Imam Bukhari.

Thus the institution of the English Trust and the Shariah Wakfs were almost identical – the "settlor, the trust or Wakf property, the trustee or Mutawalli and the beneficiaries and their rights. What is most important is that in both these institutions, there is the separation of the ownership from the usufruct. Thus the English Law of Trust, when it was introduced into this country, was nothing new to the Shariah law of Wakf as applied here. It was consistent, legitimate and on all fours with the Shariah. Equally the Sri Lanka Wakf laws enacted today as a separate statute is applicable to a special type of Sadaqa, both public and private because the Shariah Wakf remained the parental pattern of the trust as it developed in England.

The Wakf law as it is being developed in Sri Lanka is on the principle that Wakfs being in essence for charitable purposes for the public and national good should be perpetual, and the more recent English rule against perpetuities, can find no place in the Wakf scheme. The Wakf Law in order to eliminate the injurious effects which a Wakf in perpetuity might entail, has introduced the necessary legal safeguards by enabling a trustee or mutawalli to terminate a Wakf with the permission of the Shariah court or Wakf Board. The question for Sri Lanka therefore, is how much should the State interfere

or terminate or modify the perpetual nature of public charitable Wakfs and the private, semi religious or family Wakfs, all of which are now being administered.

Mercantile Law and Commercial Law

The law of limited partnership (qirad) and certain principles of mercantile law have as their sources certain basic Shariah rules. European trade with the Levant and Muslim Spain before 1498 was very pronounced and this enabled the transmission. The transference of a debt or obligation in a commercial transaction by "Hawala" or novation, cheque or hundi, the concept of a commercial agreement in writing, the responsibilities of the obligor, the debtor and the creditor, the concept of damages or "awar" – these and several other concepts are identical with the Shariah concepts which were evolved and were in common use in the pre 1498 era. These principles became current in medieval Europe and were worked into the European legal system in the period after 1498.

The concept of a Bill of Exchange, contract and mutual obligations of the contracting parties as recognised by law is another essential feature. That these concepts and institutions were being used by the Muslim people under their own Shariah rules greatly assisted in the re-imposition of these very rules under the Dutch law and the English law by the colonial masters who administered them in their own courts. Hence they did not cause any antagonism. The people felt that the colonial laws and their principles were the same as their own Shariah law. For instance, in the Indian sub-Continent the term "Hawalain" in the Hedaya, signifies a removal or transfer of a debt by way of security or corroboration from that of the original debtor to that person to whom it is transferred.

The Law of Contract, Commerce and International Law

The Quranic source for these laws were the following: Surah 2, Verse 282 and 283 "O you who believe, when you contract a debt for a fixed term, record it in writing. Let a scribe record it in writing between you in terms of equity . . . and call to witness from among your men two witnesses. And if two men be not at hand, then a man and two women of such as you approve as witnesses, so that if one erreth through forgetfulness, the other will remember. Be not averse in writing down the contract, whether it be small or great with the record of the terms thereof . . . and the best way of avoiding doubt between you; save only in the case when it is actual merchandise which you transfer among yourselves from hand to hand. In that case it is no sin for you if you write it not. And have witnesses when you sell one to another. . ."

And further (Surah 6, Verse 153)" and approach not the wealth of the orphan save with that which is better; Till he reaches maturity. Give full measure and full weight in justice. We task not any soul beyond its scope. And if you give your word, do justice thereunto, even though it be against a kinsman; and fulfil the covenant of Allah. This he commandeth you that haply you may remember". (ie. if a person commits a breach of his written obligation, contract, promise, agreement or trust, apart from being penalised by the Civil law as may be, he ignores his conscience and therefore his covenant to Allah. He therefore commits a sin).

These Quranic injunctions subsequently developed by Shafie have been laid down 13 centuries ago as the substantive Shariah Law and the rules of procedure and evidence to be followed in a court. Thus all contracts, entered into by Muslims are required to be reduced into writing, except sale of goods in daily use. It is the duty of the person who incurs the debt, not the creditor to cause such an obligation to be written down, or his legal guardian. Witnesses to this obligation or contract are mandatory. The protection and the administration of the orphan's property, the high standard of justice and impartiality that must be maintained by a Shariah judge, and the dignity of his juridical office and his complete independence and impartiality are obligations which he covenants with the Almighty. The duty of the judge was to adhere to the strictest standards of justice with the relevant evidence required to established a fact, even when one party was the head of the State itself in his private capacity. Such then are some of the Islamic values which a codified Shariah Law must set out because it involves the concept in Islam in which the Almighty although not present, is a necessary party.

The Law of Intestate Succession

The law of intestate succession (Book 28 – "Feraid and the law of endowments of Wakfs, Book 23 Minhaj). Our legislation, the Mohamedan Code of 1806, the earlier Dutch Code of 1778 and the 20th century statutes like the Muslim Intestate Succession and Wakfs Ordinance No 10 of 1931 and all the subsequent amendments like the Wakfs Act 51 of 1956 and Act No 33 of 1982 were wholly based on Shafie principles. These statute laws have been interpreted by our courts which have relied on standard text books on the Shariah. The estate of a deceased Muslim upon intestacy is divided and disposed of according to the law applicable to the sect to which the deceased belonged which in most cases is the Shafie sect. But the distribution is by decree of the civil court. Before the Wills Ordinance in 1884 a Muslim was legally bound by the Shafie rule that he could by a will dispose only one-third of his estate and that he must keep the other two-thirds of his estate for his lawful heirs. But after the Wills Ordinance the courts held that a

Muslim was bound by the Wills Ordinance and that he was free to dispose of his entire estate in any manner he wishes to or even ignore his natural heirs. This anomaly has to be urgently corrected because unless otherwise it would amount to a breach of the Shariah brought about by the State.

Gifts and Donations

(Hiba – Minhaj Book 24). Before 1931 the Shafie law relating to gifts of movable or immovable property as made by a Muslim, was used by our courts to help arrive at their decisions. However, there were certain uncertainties of the law which the courts left untouched. Once again the matter was clarified by the Ordinance of 1931 which laid down that a gift of immovable property by a Muslim shall be according to the law governing the sect to which he belonged. But if a Muslim made gifts known to other systems of law like Fidei Commissum, usufruct or trusts that other law such as the Roman Dutch Law and the English law shall apply. However, the Shafie rule applicable earlier such as the delivery of the deed as evidence of possession, and that certain classes of gifts were irrevocable, were not provided for by this Ordinance.

Guardianship

According to Shafie law as has always been current in this country, custody of a Muslim minor has always been with the mother and failing her to the maternal grand-mother in preference to the father. For non-Muslims, the age of majority is 21 years as determined by the Age of Majority Ordinance, but in the case of Muslims the Privy Council upheld the Muslim law rule that for marriage a Muslim attains majority upon attaining puberty which according to Shafie law is 15 years. The same reasoning applies to the general legal capacity of a Muslim which is also in line with Shafie law, that for several other matters like entering into contract or disposing of property, the Muslim law shall apply.

Pre emption

Shafie's rules of pre emption (Book 18 – "Shefaa" in the Minhaj) have not influenced any body of customary of laws in most parts of the world, but in Sri Lanka in the north it has given rise to the Thesavalamai law of pre-emption. This law is applicable to land in the northern part of the island of Jaffna which is possessed by Tamil inhabitants who are Hindus by religion. The laws of pre-emption as developed by Shafei were extensively used earlier by Muslim inhabitants of Jaffna before Dutch times so that they became the "Valamai" or customary unwritten law of the Jaffna peninsula and widely adopted by the Hindu population. Today it governs the Hindu Tamil inhabitants of Jaffna in respect of the sale and disposition of their lands in Jaffna according to the Treatise by Balasingham who stated "The Thesavalamai

law of pre-emption owes its origin entirely to Mohamedan law".

International Law

If Grotius (1583 – 1645 AD) is regarded as the father of modern international law, his work "De Jure Belli et Pacis", may be said to be a precis of Mohamed Al Shaybani's classic on International Law (770 AD) called Al-Siyar al Kabir. The difference is that in Grotius's work, "International Law" was one which was applicable to only "Christian" nations. However the Shariah international law of the jurists who wrote their theses before 1250 AD were made applicable to all States, Muslim and non-Muslim. In our country it may be said that the Shafie principles of International law as well as numerous other laws have come back for application and administration via the English and Dutch laws.

Evidence & Criminal Law

There is a very great similarity between the Shariah and English criminal jurisprudence, so much that there has been no great objection whatsoever to the substantive and procedural rules of English criminal justice on which is founded the entire criminal jurisdiction of this country. For instance in our courts, the quality and quantum of evidence does not depend entirely on absolute certainty (haqq al yaqin) although it is welcome, nor on the other extreme, mere suspicions (zann), but rather on the degree of probability and minimum moral certainty (al yaqin) as would convince a reasonable and just man.

One way say that in such cases like adultery, fornication and incest circumstantial evidence is of no avail unless the testimony of qualified eye witnesses reveal that they actually saw the deed. This must be corroborated. For such offences only the standard of absolute certainty (haqq al yaqin) is imposed. The early British legislators and judges therefore preferred to rely on the English rules of evidence as they took the erroneous view that the Shariah law had been framed "with more care to provide for the escape of the criminals than to found conviction on sufficient evidence and to secure adequate punishment".

In conclusion, it is well to remember the words of Abu Hanifa (699 AD) to the judicial academy which he founded. "I take first the Quran, and if it is silent I take the Sunnah of the Prophet as reported by trustworthy narrators; if that is also silent, I refer to the opinions of the companions of the Prophet; (consensus communis – Ijma); and if there were conflict of opinion among them I decide who to follow on the merit of individual cases. It is only when there is a question of my senior or junior contemporaties then I take the liberty of analogical deduction (Qiyas) even as they have liberty,

and do not feel myself bound by their opinion".

And further "analogical deduction is not useful except in matters perceptible by human opinion; the Qiyas is useless for proving the fundamentals of faith or finding out the exact reasons of a Divine ordinance but only for finding out what things to do and what not do do".

Equally in the treatment of false testimony (imprecation – "lian"), the Quran is most vehement. In Surah An Nur (24:4) "And those who accuse honourable women but bring not four witnesses, scourge them eighty stripes and never accept their testimony afterwards".

This requirement of four witnesses however, although it is of a very high moral and legal value, has been disregarded by the English Law of Evidence which now prevails in this country, because no particular number of witnesses arensisted upon. The guilt or innocence of an accused person may be established on the testimony of only a single witness or on circumstansial evidence which is not sanctioned by the Shariah.

In addition to the English translation of the Minhaj et Talibin of Nawawi the Arabic texts like Quduri and the Risalah of Shafei were also helpful.

The establishment of Shafei rules by judgement of our courts, the growth of Shafei Law by judicial decisions of our courts. Shafei insisted on following precedents whether as founded in the Hadiths or established by Judicial process. In interpreting the Dutch (Muslim) Code of 1770 and the Mohamedan Code 1806, the Dutch and English Judges had in fact in their ownway laid down judicial procedents and judgements whcich confirmed Shafei principles. According to an English Judge, the Mohameddan Code of 1806 was "a very rough codification of certain portions of a very great system of jurisprudence" (26 NLR 330). Though this was done by non Muslim Judges up to 1931 and after, it was in some way a recourse to Ijtihad because it constituted sound and independent reasoning based on the statutory law of the country, the Shariah, and the principles of Shafie interpretation contained in the recognised standard text such as the Minhaj Et Talibin of Nawawi.

The very manner of interpretation and how the Shafei Law should grow and relate to modern circumstances are themselves set out in the decided landmark cases of our Courts. (16 NLR 235 and 19 NLR 178). The Supreme court in a key decision laid down in 1912 the rule that where the Mohameddan Code and the Muslim Law as applicable in Sri Lanka were silent, the standard Islamic legal texts must be consulted. The decision henceforth after 1912 shut out the opinions and the Fatwas of Ulemas or Muftis from being used in any Court in Sri Lanka. They were unable to meet or face the strain of examination in a civil court if and when the Fatwas were in question. They

came to recognise gradually the value of a well reasoned, impartial and learned decision of a civil court delivered by a non-Muslim Judge who had consulted all the possible Shafei texts.

In the Mohameddan Code of 1806, the first 63 Sections dealt with the intestate succession and the rules of inheritance while Sections 64 to 102 governed Marriages and Divorce. In effect, on closer examination they reflected the basic Shafei principles.

The Minhaj, as we are aware, was derived from the Shafei Law as was used in Egypt so that it was translated from the original Arabic as was used in that country. It was not that Codification must mean "reform". Far be it.

Fortunately, our Courts were called upon to apply the Shafei Law unlike in the Indian Sub-Continent where the multiplicity of Mazhabs aggravated the conflicts among the Ulemas in regard to "ijtihad" (or to define by personal effort to get at the principle of the law) and to "Taqlid" (or imitation of precedents). This task was in Sri Lanka done by our own Courts and were written down as judgements and precedents of our courts. It was therefore our courts which attempted to resolve the crisis of Shariah administration and modernism.

But the moment the Muslim law of a country is based on all the madzhabs such as in the Philippines which tried to administer Presidential Decree 1083 of 1977, then there are problems. For instance, Article 6 states "The Muslim schools of law shall for purposes of this code, be the Hanafi, the Hanbali, the Maliki and the Shafei. . .". With great respect to the framers of that law, here we open the door to a very wide range of conflict, and import into the system the antagonisms of the Ulemas of each Sect, so that there will be a multiplicity of interpretations of the different Madzhabs necessitating intense research to discover what shall be the law for a given situation.

In Sri Lanka the Judges do not have this problem. Sometimes they relied on Indian Law Reports which reported Indian Court decisions where the Shariah Law were interpreted according to Hanafi rules. But they did not follow those decisions.

There were several other problems which can be rectified by Codification. Religious servility to conservatism and orthodoxy have in some way retarded the natural growth of the Shariah Law in the field of Qiyas, (analogical reasoning). But happily the Fatwas and Dicta of Ulemas are seldom relied on in the Judicial Forums which are called upon the decide Muslim Law matters. Muftis however are not quite known to our Courts. The Courts in this country have from the Dutch and British times made the legal imperatives of the Shariah adaptable and flexible in a manner which harmonised them and their

basic principles with the Civil Law system and the Civil Court system of Sri Lanka. This has proved conclusively that the Shariah has adapted itself to suit the legal and constitutional framework of our country and its core of ethical principles are lasting and effective for any age, for any country or any environment. It is in this context that the principles of "ijtihad" were freely resorted to, not by the Ulemas or Muslims of this country but by trained legal persons as Judges of our Courts, (although unfortunately the Judges in the past had not been Muslims). Ijtihad is the process whereby a scholar or a person exercises his intellect and his intelligence, to form an opinion or the interpretation or application of a provision in the Shariah or to formulate the Law to be applied to a case which is not expressly covered by a provision of the Shariah. Therefore, our Courts have kept alive the legal traditions of Shafei more particularly in the legal field mentioned. Needless to say, the type of Ijtihad pursued by the Courts was very much different to that adopted by the early Muslim jurists.

Problems

In our attempts to codify the Shafei doctrine we have to ask ourselves whether through Ijtihad we should bring the Shariah into line with modern usages and principles as in the case of the Hanbalis (Ibn Qayyim Al Jawziyyah) or whether we should relegate this trend as something inimical to the Shariah. Or even whether we should increase the sources of the Shariah to include "Istihsan" or preferences as advocated by the Hanafis, or "Public interest" (Al Masalith al Mursala) as suggested by the Malikis. Or whether in evolving a Shafei Code we should rely on the injunction of our Prophet, that is, on our own intellect and conscience which are the hallmarks of justice and fairness as our only plank.

For, even as early as 1406 AD. Ibn Khaldun observed "the conditions of the world and those of Nations and people, and their customs and habits, do not remain the same always, nor do they stay on the same basis. Changes in all these come with the passage of time and with the transition from one era or condition to another. It is the rule laid down by the Almighty as to his servants. . ."

This is absolutely true today in the world over and in our South East Asia Region in particular. The principle that "a law based upon a course changes with its course in its presence and absence" was manifest in perhaps all the Islamic codes in the past. Equally, in the words of Al-Ghazzali (1099 AD). "All things that are forbidden may be allowed on proof of necessity". This has influenced early Shafei interpretations.

Shafei opinion in the past always held that it was never permissible to change the Nass, the sacred and unchanging principles of Shariah. The pleas

of necesity or flexibility or cause can arise only in manner in which those fundamental principles are made applicable in a changing situation. It is here that Ijtihad is permissible, and Taqlid, the imitative reasoning, discouraged.

On the other hand, the Code must emphasize that Shariah justice demands the complete eradication of any discrimination whether it be between one nation or another, between one foreigner and another, that women, and children, the sick and the aged, non-combatants cannot be killed or destroyed, the retaliation cannot be inflicted on the non-combatants of the enemy, and that International treaties must be honoured at all costs. This is because the restatements of the Shariah Law, on these aspects are founded on the Quran and the Hadith in consonance with the commands of the sovereign authority of the State. This will then be purposeful and the basis of private International law will then be that which was developed by Shafei.

The Shariah imposes a fundamental duty on the State and those who administered it. That is, the duty to do absolute justice without any limitations being imposed upon that duty whatsoever. No contradiction of that fundamental rule is permissible whether in reference to the parties in dispute or whether as between Muslims or non-Muslims or whether as between friend or enemy. The standard of human conduct the preservation and the judicial safeguard relating to testimony, the dignity and the safeguards of judicial office, the independence of the judiciary, these Shariah rules have all been scrupulously followed for nearly 13 centuries and must be restated in any codification of the Shafei Law.

The dismantling of this unique system of jurisprudence occured in the South East Asia region in those areas where European Colonial powers established sovereignty. For instance, up to 1791 in the Sub-Continent of India, even under the British, the Shariah Criminal Law and the appropriate punishments were meted out. But from that point onwards, the Shariah came to be gradually eroded until about the time of the mutiny in the mid 19th century, when British Criminal Law supplanted the Shariah although the Shariah personal law was allowed to continue. The tragedy in the 19th and early 20th centuries was that even Islamic States mutilated and truncated the Shariah Law. They even went further and they adopted the British, French, Swiss, Italian and Dutch Civil and Criminal Codes. For instance, in Sri Lanka, the common law of the country is the Roman Dutch Law, while the Criminal Law is modelled on the British system.

The question now arises as to whether the codification should restrict itself only to legal matters or should it also extend to religious and ethical matters as fasting (Sawm), Prayer (Salat), Poor Tax (Zakat), Piligrimage (Haj), and War (Jihad).

It would be prudent and expedient to refrain from confusing the moral with the legal injunctions and binding rules. The rules governing the duties of Muslim judges or Qazis clearly set out in the Hidaya of the Hanafis and the Minhaj of the Shafeis are invaluable in any condification.

What is most relevant today for Sri Lanka is the codification of the Shariah as interpreted by the Sunnite Shafei School of Jurisprudence, because (1) it has been the bedrock of Islamic civilisation in this country from the 8th century (2) it brought into existence a legal system peculiar to this country and which has survived the genocide and the destruction of the past conquerors, (3) it is now the source law for Muslim Marriages and Divorce and the public and private Wakfs (religious Trusts) as administered by their own respective Shariah Courts in this country, (4) it is the common law of the Muslims of this country and from which our Courts in the reported cases from 1806 had drawn for their reasoning for their decisions. It is the Muslim Law which was applicable always to Marriage and Divorce, maintenance of wife and child dower or Mahar, legitimacy, adoption, intestate succession, donations and gifts of immovable property, Sadaqa (Wakfs), maintenance of parent and child, etc. It was in these fields that Shafei jurisprudence provided the knowledge and the inspiration.

For these reasons, what is most relevant is the re-codification of the Shariah on Shafei guidelines, not merely as a blue print for future Muslim Law legislation by the State for its subject Muslim people, but also to acquaint the ordinary Muslim for whom the observance of the Shariah Law is as much a part of its very life, his conduct, his worship, his faith in the Almighty, his culture, and his social organization, his political, social economic and cultural growth and, above all, his moral stature as a determinant of his personality.

Several attempts were made in the past as even now by non-Muslim sources and some Muslims themselves to disregard the Proclamation of 1799, which was re-enacted in 1835, the Charter of 1801 and the subsequent statutes, under all of which Muslim Law was distinctly made part of the law of the land and made applicable to the Muslim population. This was to supplant Muslim Law or to substitute it with English Law and the Roman Dutch Law on the specious ground that the Muslim community was alleged to be a "backward community", that its women folk had to be liberated, that the Protestant Christian values contained in the European legal system (which were evolved only after the 16th century in Europe), were superior to those evolved by the Shafei School in the 9th century. As a matter of fact, there was no system of law other than the Shariah Law in any other part of the world from the 7th to 16th centuries which pretended to protect the wife, the mother and the child by law, nor vest them with legal and justiciable rights as regards their property, their person, their inheritance, the rights to

dower, to maintenance, their right to marriage and divorce, the consequences of divorce and the imposition of deterrent punishment and penalties on anyone who violated their rights. Such then is the significance of the Shafei Law pursued by the Muslim inhabitants of this country form the 9th century onwards.

It is in the application and the judicial administration of the Shafei Laws of marriage and divorce that Sri Lanka offers itself as a unique model of adjustments and achievements. Every canon of the Shafei doctrine is now current and is used by the Shariah courts which have established several judicial precedents as reported in the Muslim Marriage and Divorce Law Reports in four volumes. Hence a special note on this successful experiment will not be out of place.

In regard to the Quranic requirements to reduce an obligation to writing in the presence of two witnesses, we find the Shafei interpretation of this rule had been scrupulously observed by the person who led the daily congregation prayers in the Mosque – the Priest who registered a marriage in the "Kadutham". This practice served as a basis of Muslim marriages for centuries past in every part of the country. So was every contractual obligation, whether gifts, estate disposition, commercial agreements and the law pertaining to it. Contracts which form the basis of many forms of economic and social intercourse were all bound by this cardinal rule. So much so that a British administrator in 1885, speaking on this system, stated that it "has answered its purpose remarkably well on the whole, and has been the means of preserving the Mohameddan from much social strife and disorder, connected with questions of inheritance and succession".

Under Shafei Law the Muslim wife is vested with the legal right to go before a Muslim Judge or Qazi who is learned in the law and claim a divorce from her husband on the grounds of ill treatment, non-maintenance, desertion, impotence of her husband etc. Before a divorce can be effected the attempts by the Qazi at reconciling the husband and wife are mandatory and the attempts have to be on record. For the exercise of that right of the wife as equally of that of the husband or the right to maintenance by the children of the union a Qazi, a Muslim Judge, is vital. A divorce in any other way or by any other manner or mode cannot be acted upon or be effectual in law, and if there was such a divorce in any other manner then it was not recognised by the community of Muslims or by parties themselves.

This has been the rule in this country as is evidenced by historical records. We believe that this has been the case from the 9th century onwards, even during the Portuguese inquisition in this country. Though not recognised, the Imams of the Mosques did play a part as a Qazi before the 19th century. On the other hand, in the Indian sub-Continent the British abolished the

institution of the Qazi and so was destroyed the legal means by which the Shariah could be applied.

The most important landmark was the Muslim Marriage and Divorce Registration Ordinance No. 27 of 1929 which, for the first time, dropped the term "Mohammedanism", in legislation and promulgated that it applied only to subjects of the Ruler professing Islam. It also laid down "the Muslim Law of Marriage and Divorce and the rights of Muslims there under". The courts of law interpreted this rule subsequently to mean that the Muslim Law which shall be applicable shall be that Law of that particular sect to which that person belonged and that in Ceylon the people by and large belonged to the Shafei Sunni School. This in effect meant the statutory recognition of the pure law of Marriage and Divorce according to the Shafei School of Law. And subsequent amending statutes had the legal guarantee that "in all matters relating to any Muslim marriage or divorce the status and the mutual rights and obligations of the parties shall be determined according to the Muslim Law governing the sect to which the parties belong".

Thus, the basic principles of pure Shafei Law of Marriage and Divorce are given statutory sanction and woven into the laws of the country by Act No. 13 of 1951, as subsequently amended in 1954, 1955, 1965 and 1969.

Most important it elevated the status of the Qazi, who is now a judicial officer appointed by that independent authority which appoints all other judges in the country – the Judicial Services Commission. Every valid Muslim marriage is required to be registered by a Muslim Registrar of Marriages on a special registration form which embodies the Shafei requirements of marriage and giving particulars of the Nikah. Such registration was the "best evidence" of marriage.

The registration of the Nikah or the divorce was compulsory, and the duty to so register, was legally imposed on the bridegroom, the Wali of the bride and the Registrar, who conducted the Nikah. A breach of that duty was declared to be a punishable offence.

The Shafei prohibition of certain classes of marriage was also expressly enacted, for instance the marriage of a Muslim woman during her observance of the period of Iddat, the marriage of a Shafei woman without the express consent of a Wali, or if the Wali refuses to give his consent, of the Qazi or the marriage of a woman where a person who purports to be her Wali, was not in fact her Wali, the marriage of a girl who was below the age of discernment or puberty, (which by consensus and judicial precedent for marriage is established at 12 years of age) and the second or subsequent marriage of a Muslim man, whose first wife was alive, unless a month's

notice of such second marriage had been given to the Qazi. The Shafei prohibition of certain categories of marriage, whether by affinity or consanguinity were also observed and any breach of this rule was liable to severe punishment and penalities.

The statutory rule is that a father, the natural Wali, shall not give away his daughter in marriage without her consent, or and it is the duty of a non-parental Wali, or Qazi at the Nikah to convey the bride's consent to the marriage.

The rule against polygamous marriage by the Muslim male beyond four marriages was enforced, (Section 24). The registration of the second and subsequent marriage, where the first wife was alive and married to the man, was prohibited until there was compliance with certain statutory requirements like compulsory notice of his intention to marry a second, third or fourth time to the Quazi, then to his first or other wives as well as exhibition of his intention to marry at the Jummah Mosque. These were only to mobilise public opinion to discourage plural marriages in certain cases and for the better protection of families. The failure to notify the Quazi of a subsequent marriage was a penal offence punishable by a fine or a term of imprisonment. That this was a very effective and solid measure was proved by the words of a previous Registrar General who observed, "during the five years ended 1960, not more than two or three in every thousand marriages registered, were polygamous, the annual average of Muslim marriages-registered being 5400".

The question of child marriages among Muslims has been grossly misunderstood and distorted in the hostile press, through ignorance or design. In Sri Lanka, the Shafei rule is operative. It is contained in the Minhaj et Talibin (p. 284) as follows: "where a father (or Wali) disposes of his daughter's hand during her minority, (that is before attained puberty), she cannot be delivered to her husband before she attains puberty". The rule which was developed by Shafei in the 8th century and consistently followed by adherents of that school, for centuries, was that in cases where evidence of puberty is lacking the rule in the Minhaj stated "the age of puberty is fixed by law for both sexes at 15 years completed" (p. 167). This rule is slightly modified by legislation (Section 23), according to which the marriage of a Muslim girl who is 12 years of age is prohibited by law, and any person who abets the registration of such marriage, the Registrar or the Wali included, is deemed to have committed a penal offence and was liable to imprisonment or fine. A judicial inquiry by the Quazi is a requirement and his consent is mandatory for the registration of a marriage of a girl who has not attained the age of puberty (child marriage).

It is a fact that Quazi's permission was sought to register a child's marriage only in 12 cases in 1955. Today it remains at nil and the average age of marriage for a Muslim woman is estimated to be 19 and 20 years at present.

The pre-eminent safeguards of a wife, of a child, legitimate or illegitimate were made into specific legal guarantees by Shafei in the 8th century. It is indeed remarkable that from the 8th century up to the 18th century in no other country in the world, except where Shariah rules of Law were observed as a matter of religous faith, was ever thought given to the fundamental rights of a wife to her separate property, her dower, her contractual status, her rights and her obligations in marriage, her legal right to receive maintenance for herself and her children, the right to maintenance during her period of legal retirement (or Iddat), her right to marry with or without the permission of her father or Wali, provided she obtains the consent of the Quazi (if a Wali unreasonably withholds his consent), her legal right to have her marriage terminated or even declared null and void. These were sound principles of Shariah Law as developed by Shafei, so clearly set out in the Minhaj and now made part of the Muslim Law applicable in this country. The Law governing Talaq or divorce by the husband, where Shafei advocated "Ahsan" form is woven into and it is mandatory that three attempts at reconciliation be made before Talaq is given.

The Second Schedule to the Act, which clearly sets down the step by step procedure to obtain a Talaq imports the Quranic injunctions, in the Quran Surah Al-Rum (30): 21. "He created for you help spouses from yourselves that you might find rest in them and he ordained between you, love and mercy", which is read with Surah An-Nisaa (4): 35. "And if you fear a breach between them twain, (the man and the wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment, Allah will make them of one mind". The arbiter pre-supposes a court, a Qazi and the Law. Our amending legislation is calculated to make Talaq sinful so as to conform to our Holy Prophet's saying, "with Allah of all things legally permissible, Talaq is the most balmeworthy". To retard unilateral and unthinking utterance of Talaq on the wife, further legislation is now before Parliament to impose the payment of "Matah" by the husband on order by the Qazi. It is approximately one year's additional maintenance and support. In Tunisia, such payment is without limit, but in Syria it is one year's maintenance. In Malaysia and Singapore, the Law orders the payment by Shariah Court. According to Shafei compensatory and conciliatory "Matah" is mandatory upon Talaq and this requirement was grounded on the Quranic verses, Sura al-Baqarah(2): 241; Sura Al-Ahzab(33): 49 and Sura Al-Talaq(55): 1 – 2.

On the Shafei concept of Qazi is built the forum is which a Muslim marriage shall be dissolved upon proper adjudication. Presently, there are

nearly 52 Qazis, of whom nearly 20 per cent are trained legal personnel being Attorneys-at-Law whilst 70 per cent are laymen and only three of them can claim to be Ulemas. However, they tried to emulate the Qazis during the time of Omar who laid down the etiquette and the rules of conduct for a judge. Amending legislation is now contemplated by Parliament to have permanent paid judicial officers as Qazis equal in rank and status as any other judge of the Civil Court.

An appeal from the Qazi can be made to an Appeal Court called the Board of Qazis which traditionally had consisted of five Muslim lawyers who had been advocates or proctors, with a few exceptions. A further appeal from the decision of the Board would lie to the Court of Appeal and the Supreme Court.

Since the establishment of the Board of Qazis in 1931, the Shafei Law gained a new stature. Several judicial precedents having the force of Law and collected in the Muslim Marriage and Divorce Law Reports in four published volumes have set down the more important guidelines of the Law. The fifth volume is now in preparation.

Schedule 1

Sri Lanka General Law English and Dutch Law		Shafei Law – the Minhaj MINHAJ ET TALIBIN
1. Sale of Goods. Buyers and Sellers. Cancellation. Obligations. Unjust Enrichment. Ordinary Transfer.	...	Book 9 – Sale or Exchange (Bia)
2. Forward Sale, and Part Payment.	...	Book 10 – Advance Sale (Salam)
3. Law of Pledge and Mortgage	...	Book 11 – Pledge and Security (Rahn)
4. Law of Insolvency (English Law)	...	Book 12 – Bankruptcy (Taflis) (including incapacity, compromise, right of way, transference of debuts; Guarantee)
5. Law of Partnership	...	Book 13 – Partnership (Sherka)

6.	Law of Principal and Agent	... Book 14 – Principal and Agent. (Wakale)
7.	Law of Evidence – relating to Admissions.	... Book 15 – Admissions (Ikrar)
8.	Law relating to Lending and Borrowing. Creditor and Debtor.	... Book 16 – Loan (Aariya)
9.	Law relating to Joint Stock Companies.	... Book 19 – Joint Stock Companies. (Kirad)
10.	Law relating to Share cropping and lease of land.	... Book 20 – Farming Leases (Mosaka)
11.	Law of Letting and Hiring (Landlord and Tenant)	... Book 21 – Contract of hiring (Ijeira)
12.	Law of Servitudes – Water rights, rivering rights, mining, rights, right of way, grazing rights.	... Book 22 – Occupation of Land (Ahia al muat)
13.	Law of Trusts	... Book 23 – Endowments (Wakaf)
14.	Law of Donation	... Book 24 – Gifts (Hiba)
15.	Law of Testamentary and disposition.	... Book 29 – Wills (Wasaya)
16.	Law of Contracts of Maintenance, Marriage, Alimony, Guardianship. Adultery and Carnal knowledge. The Law of Evidence in relation to witnesses, the Administration of Justice, Criminal Procedure and Crimes against the perons.	... (Dealt with precisely in the other Books of the Minhaj)