Research Notes

Islamization of "Muhammadan Law" in India

Syed Khalid Rashid

I. Introductory Remarks

One of the bounties bestowed on Muslims by Allah (SWT) is the *Sharī'ah*: the Divine guidance and code of conduct, necessary to achieve success in this world and the world hereafter. For the colonists who subjugated Muslim lands it appeared necessary therefore to first deprive Muslims of their source of sustenance and symbol of identity. The first target of their attack was the *Sharī'ah*; every aspect of which was ridiculed, belittled or truncated. It is difficult to improve upon Ismā'īl Rājī al Fārūqī's graphic description of this onslaught. He who wrote:

> By the colonialists directly, or by their native stooges, everything Islamic fell under attack. The integrity of the Qur'ānic text, the genuineness of the Prophet (SAAS), the veracity of his *Sunnah*, the perfection of the *Sharī'ah* the glories of Muslim achievements in culture and civilization—none of them was spared. The purpose was to inject doubt in the Muslim's confidence in himself . . . to subvert his Islamic personality . . . lacking the spiritual stamina necessary for resistance . . . the Muslim was turned into something neither Islamic nor Western, a cultural monstrosity of modern times.[1]

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This paper is dedicated to the memory of late Professor Ismā'īl Rājī al Fārūqī, Palestinian-born American Professor of Islamics who lived and died for the cause of Islamization of knowledge. He visited Sokoto in 1403 AH/1983 AC.

[1]Al Fārūqī, (ed.), Ismā'īl Rājī, *Islamization of Knowledge: General Principles and Work Plan* (Int. Inst. of Islamic Thought, Washington, 1402 AH/1982 AC), pp. 4.5.

In India, the British colonialists deprived the Muslims of their sense of identity by substituting a good part of the *Sharī'ah* with English law and systematically mutiliated the rest of it into a hybrid legal system they started calling with the meaningless name of "*Muhammadan Law*".

With a view to analyze the colonization of the *Sharī'ah* in India during the last century and to determine the extent of damage it suffered in the past and continues to endure to this day, this paper makes the following submissions:

1) That the law to govern Muslims anywhere in the world including India should be the *Sharī'ah*;
2) That the "Muhammadan law" (or Muslim Personal Law) which is applicable to Muslims in India materially differs from the *Sharī'ah*;
3) That the ill-effects of continued application of this law are serious and need certain corrective measures; and
4) That a complete re-appraisal of the Islamic legal education in the century is necessary to ensure proper understanding and judicial implementation of the *Sharī'ah* in India.

II. Why the Sharī'ah should Govern Muslims?

It is incumbent upon every Muslim to follow the *Sharī'ah*. Its beauty and superiority over other legal systems also make it desirable to be followed by every Muslim in his/her own self interest. There is thus both religious and temporal benefits for Muslims governed by the *Sharī'ah*.

In its literal meaning, the *Sharī'ah* is "the path leading to a watering place," but technically it means the path ordained by Allah (SWT) to achieve success in this world and the hereafter. Allah (SWT) says in the Qur'ān:

> We have set thee on a way by which the purpose (of faith) may be fulfilled *(Sharī'atin min al Amr)*: So follow thou this (way), and follow not the likes and dislikes of those who do not know (the truth). *Sūrah al Jāthīyah* (45):182[2]

> To thee we sent the Scripture in truth . . . to each among you have we prescribed a Law *(Shir'atan*=rules of practical conduct) and an Openway *(Minhājan*=things in the higher regions of the spirit, which is common to mankind, though laws and rules may

[2]Translation from Asad, Muhammad, *The Message of the Qur'ān* (Gibralter, 1400 AH/1980 AC), p. 767.

> take different forms among different peoples) . . . And this (He Commands): Judge thou between them by what Allah hath revealed, and follow not their vain desires, but beware of them lest they beguile thee from any of that (teaching) . . . . *Sūrah al Mā'idah* (5):51,52[3]

Based on these Divine commandments and Prophetic guidance[4] of Muhammad (ṢAAS) the *Sharī'ah* prescribes rules aimed at following the Way, ordained by Allah (SWT), in order to conduct the life to achieve the Divine Will. It is natural therefore to find the *Sharī'ah* regulates every aspect of a Muslim's life, and guides him down the 'Straight Path' *(al Sirāṭ al-Mustaqīm). Sharī'ah* stands unchanged, as asserted in the Qur'ān itself: There is no altering of the Way of Allah (SWT). (*Sūrah al Rūm* (30):29.)

The successful ones are only those who follow the "*Straight Path*". The Qur'ān is full of examples taken from the history of nations whose peoples perished or suffered because of their deviation from the "*Straight Path*". Such is the eternal law of life. It does not alter for individuals.[5]

> This was our way with the Apostles we have already sent before thee, and in this our way, thou shalt find no change. *Sūrah al Isrā'* (17):29.

The *Sharī'ah* perceives Allah (SWT) as the Sovereign of Universe, Sustainer, Cherisher, Nourisher, Regulator and Perfector, the Creator and The Ruler of universe. Since Allah (SWT) is Perfect, hence, His *Sharī'ah* should also be perfect, universal, and perpetual. As such, the *Sharī'ah* combines in itself not only what law "is" but also what law "ought to be," it concerns itself with *this world* as well as *hereafter*, and presents a perfect concept of justice which is lacking in the modern man-made legal systems. According to Friedman, the concept of justice keeps changing, from one political

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[3]Translation from Ali, Abdullah Yusuf, *The Holy Qur'ān* (Islamic Foundation, 1395 AH/1975 AC), pp. 258, 259. Every other citation unless otherwise indicated, is from this translation.

[4]Qur'ān testifies to the Divinely inspired nature of the Prophet's sayings, doings and tacit approvals at several places, e.g. "Nor does he (the Prophet) say of (his own) desire. It is no less than inspiration sent down to him. He was taught by one Mighty in Power, endowed with wisdom . . . " (Qur'ān *Sūrah al Najm* (53):2-6)

"And We have sent down unto thee (the Prophet) the Message that thou mayest explain clearly to me what is sent for them, and that they may give thought." (Qur'an, *Sūrah al Naḥl* (16): 44.)

". . . We have sent among you an Apostle of your own, rehearsing to you Our *Āyāt*, and Sanctifying you, and instructing you in Scripture and wisdom, and in new knowledge." (Qur'ān, *Sūrah al Baqarah* (2):151.

[5]Azad, Abdul Kalam *The Tarjumān al Qur'ān* Vol. i, Lahore, n.d. first published in India in 1382 AH/1962 AC), p. 88.

philosophy to another.

"What emerges from all these varying attempts", admits Friedman,"is the failure to establish (an) absolute standard of justice except on a religious basis. The philosophies which make knowledge of justice a matter of intuition are merely escapist. Their ultimate trust is not in everlasting principles of justice, but in the wisdom, goodness or the sheer power of men."[6]

Justice is essential in the maintaining a just balance between various competing interests. This balance is so difficult and delicate that only Allah (SWT) is capable of dispensing it through Divine commandments:

> "Is it Allah who has sent down the Book in right form with everything therein justly balanced" *Surah al Shūrā*, (42):17.

Purification of the soul *(Tazkīyah al nafs)* is the primary aim of the *Sharī'ah*. It regulates the desires, because these often cause man to deviate from the right path. In other words, its (purification) creates a sense of righteousness *(taqwā)* in the heart of the Muslim. Islam's equipoise in life is reflected in its law *(Sharī'ah)*. Consequently, antipathies which hamper law and order in the society are reconciled and harmonized. This is achieved by assigning a Divine value to every human action, so that everyone can himself judge the worth of his action, its beauty *(ḥusn)* or its ugliness *(qubḥ)*, through the doctrine of servitude *('ilm al Yaqīn)*. The commandments of Allah (SWT) *(al aḥkām)* are divided into five categories known as *al aḥkām al khamsah (farḍ, mandūb, makrūh, jā'iz/Mubaḥ* and *ḥarām)*. Based on these, every Muslim is placed under an obligation to respect, acknowledge and accede to the rights against him i.e. by 1) Allah (SWT), (2) by his ownself, (3) by other persons and (4) other living creatures.

The science which derives the *Sharī'ah* values from the *Sharī'ah* sources (i.e. Qur'ān, *Sunnah, Ijmā'* and *Qiyās)* is called the science of *fiqh (uṣūl al fiqh)*. *Fiqh* is divisible into *Uṣūl* (roots) and *furū'* (branches). Whereas the edifice of the *Sharī'ah* rests on the commandments of Allah (SWT) and the *Sunnah* of the Prophet (ṢAAS) that is, *'ilm* (Knowledge), and the *fiqh* is a product of reasonings and deductions based upon *'ilm*. In *fiqh*, an action is legal or illegal, permissible or prohibited. The *Sharī'ah* has its own five-fold classifications of human actions.

The grand edifice of the *Sharī'ah* came to be established fourteen centuries ago, covering every facet of a Muslim's life. Fortunately for us, the *Sharī'ah* has its own rules of interpretation as is the case with any other developed legal system. A very brief exposition of these rules covering 38 pages can

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[6]Friedmann, *Legal Theory*, 5th ed. (London, 1967), p. 347.

be found in the principles of Muhammadan by Abdur Rahim.[7] It should be said in fairness that the Privy Council and other British courts, as well as the Indian Supreme Court and other High Courts, tried to follow, to the best of their ability, the pristine pure principles of the *Sharī'ah*. Sadly, however, their best efforts were not good enough and in their zeal to follow *taqlīd* they unconsciously created conditions for the fossilization of the *Sharī'ah*.

From the foregoing discussion it becomes clear that to follow the *Sharī'ah* is not only incumbent upon Muslims but also very beneficial, even for temporal considerations. The *Sharī'ah* possesses "certainty" and does not leave men to grope for their sovereign on the crutches of fictions,like the "Social Contract" of Locke and the "State of Nature" and Hobbes. By declaring that "Justice" is what Allah (SWT) has prescribed, the *Sharī'ah* gives much needed peace of mind to those who find grave injustice in the man-made justice system. Apart from justice, the *Sharī'ah* stands for impartiality, simplicity, straightforwardness, speed and inexpensiveness; qualities that are lacking in other legal systems. Notwithstanding the love of Muslims for the *Sharī'ah* the sacrosanct judicial pronouncements and governmental assurances to uphold *Sharī'ah*, certain historical developments took place that to a great extent, superseded the *Sharī'ah* and ultimately created its caricature under the name of "Anglo Muhammadan Law", which is even now being followed in India even though the early oppressors left the country long ago and every Indian is now master of his own destiny.

III. The Emergence of " Muhammadan Law" in India

Developments in British India, particularly between 1169 and 1274 AH/1765-1857 AC, adversely affected Muslim interests, including the *Sharī'ah*. Opportunities for employment were especially restricted; the *awqāf* "endowments" foundations maintaining the bulk of the educational programs were usurped or deprived of funds; their language was discarded and with it their wealth of knowledge. Their rent-free *madad-i-ma'āsh* holdings were also abolished and a new system of law and social norms was imposed on them.[8]

Initially, the British colonial power tolerated the application of the *Sharī'ah* as a matter of policy, which was dictated by three main considerations: First, they did not desire an abrupt break with the past; second, their chief object was to have security in social conditions so as to facilitate trade, and third,

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[7]Abdul Rahim, *The Principles of Muhammadan Jurisprudence* (Madras, 1330 AH/1911 AC) pp. 77-115.

[8]For details, see, Rashid, S. K., "Impact of Colonialism on the *Sharī'ah* in India", Islamic C.L.Q., Vol. III, No. 3 (1403 AH/1983 AC), pp. 161-176.

they had no desire to interfere with the religious susceptibilities of their subjects.[9] These policies were reflected in the charter of George II, granted in 1167 AH/1753 AC; the Judicial plan of 1186 AH/1772 AC; the Regulation of 1195 AC/1780 AC; the Act of settlement, 1196 AH/1781 AC; and the Regulation XII of 1208 AH/1793 AC. The British slowly abandoned this policy with the gradual consolidation of their power in India.

The erosion of the *Sharī'ah* started with the Bengal Regulation VII of 1248 AH/1832 AC. The third Law Commission was constituted in 1278 AH/1861 AC to frame "a body of substantive law, in preparing which the law of England should be used as a basis, but which once enacted should itself be the law of India on the subject it embraced."[10] As many as six enactments owe their origin to this Commission: The Indian Succession Act; the Indian Contract Act; the Negotiable Instruments Act; the Indian Evidence Act; the Transfer of Property Act, and; the Criminal Procedure Act. All these enactments generally superseded the principles of the *Sharī'ah* in their respective fields.

On the heel of these enactments came the Kazi Act in 1281 AH/1864 AC, abolishing the office of *Qāḍī*, the main functionary position in the administration of justice under *Sharī'ah*. When Muslims tried to elect *Qāḍīs* of their own, they were prevented from so doing by the British Courts.[11] The administration of the *Sharī'ah*, or rather what was left of it, was placed in the hands of English judges who had, at best, very scanty knowledge of the subject. According to Rankin, the judicial decisions of this period show contravention of the principles of the *Sharī'ah*.[12]

The development of the *Sharī'ah* in Algeria under French rule and in Nigeria under the British rule bears close resemblance to its development in British India. It is, however, noteworthy that in Algeria and Nigeria, even after the colonial domination, *Qāḍīs* continued to administer the *Sharī'ah*. In British India, however, neither the learned advocacy by Maulana Ashraf 'Ali Thanavi in his monograph *Al Ḥilat al Najizah* or the protest by Islamic organizations like *Jamī'yah al 'Ulamā' i Hind*, could bring the colonial power to accept the validity of the argument that a decree of divorce passed by a non-Muslim judge would be absolutely under the *Sharī'ah*. The demand to establish *Qāḍī* Courts and to entrust matrimonial disputes to them was rejected outright.[13]

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[9]Fyzee, A.A.A., *Outlines of Muhammadan Law*, 3rd ed. (Oxford, 1384 AH/1964 AC), pp. 53-54.

[10]Rankin, *Background to Indian Law* (1330 AH/1911 AC), p. 45

[11]See for example, *Muhammad AbūBakar V. Mir Ghulam Husain*, original suit no. 453 of 1286 AH/1869 AC decided by the Madras High Court in 1287 AH/1870 AC

[12]Rankin, *Supra* n. 11 at 113.

[13]See, Mahmood, Tahir, *Muslim Personal Law*, (Vikas, 1397 AH/1977 AC), pp. 36-37, and; Mian, Muhammad, *Jami'ah al 'Ulamā' Kya Hay*, (Delhi, 1366 AH/1946 AC) (Urdu).

Commenting on the slow but sure abrogation or abridgement of the *Sharī'ah* in British India, Joseph Schacht once remarked:[14]

> According to strict theory the whole of Islamic Law *(Sharī'ah)*, including the rest of Civil Law, penal law and law of evidence, ought to be regarded as sanctioned by religion but no significant voice of dissent was raised when Islamic Law in these fields was superseded by codes of British inspiration in the course of nineteenth century.
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> . . . it showed that the idea of a secular law had for the first time been accepted by the leaders of an important community of Muslims.

This observation of Schacht is merely a conjecture, unsupported by empirical evidence and opposed to commonsense. Said Shah Muhammad Ahmad Aj meri, President of *Jamīyah al 'Ulamā' i Hind*, in his Presidential address of 1349/1930[15]

> British policies were not based on the consent of the people, these rather were imposed on them by force. During the British period, Indian Muslims did not have the status of citizen, they were colonial subjects and had no constitutional rights or any other means to protect their religious laws. However, they strongly resented such interference in their religion and came to believe that their greatest enemy was Great Britain which, having India and her vast resources under her 'tyrannical' occupation, was the main cause of the degeneration in their religious life.

The replacement of *Qāḍīs* by English judges produced very unhealthy effects in the *Sharī'ah*. Here the words of Schacht deserve to be extensively quoted. It is the assessment of a non-Indian, non-Muslim Professor of Islamic law at Oxford. It gives the background in which "Muhammadan law" emerged and in what ways it differed from the *Sharī'ah:*

> The whole (of British Indian) judiciary was trained in English law and English legal concepts, such as the doctrine of precedent, and general principles of English Common law and equity inevitably infiltrated more and more into Islamic law as applied in India.

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[14]Schact, Joseph, *An Introduction to Islamic Law* (Oxford, 1964), pp. 94-95.

[15]Cited in Mushir-ul-Haq, *Islam in Secular India* (Simla, 1332 AH/1972 AC), p. 54.

> Last but not least, the jurisdiction of the Privy Council as a final court of appeal could not fail to influence, much against its intentions, the law itself.
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> In this manner, more than by positive legal changes which were few, Islamic law in British India, which later became Pakistan and the Republic of India, has developed into an independent legal system, substantially different from the strict Islamic law of the *Sharī'ah*, and properly called Anglo-Muhammadan jurisprudence, the aim of which, in contrast with the formative period of Islamic law, is not to evaluate a given body of legal raw material from the Islamic angle, but to apply, inspired by modern English jurisprudence, autonomous jurisdical principles of *Anglo-Muhammadan law.* This law, and the jurisprudence based on it, is a unique and a most successful and viable result of the symbiosis of Islamic and of English legal thought in British India.

Nearly all of the many problems faced by the *Sharī'ah* in India today owe their origin to the above-mentioned travesty of the *Sharī'ah* and its fossilization into "Muhammadan law". It seems appropriate to briefly examine the adverse consequence of this historical development.

IV. The Ill-effects of the Conversion of the Sharī'ah into "Muhammadan Law"

Notwithstanding the dynamism, humanism and pragmatism of the *Sharī'ah*, it came to be stigmatized as archaic, static and barbaric, thanks to its conversion into "Muhammadan law". To list only a few, the following could be cited as the major setbacks suffered by the *Sharī'ah* under the impact of its "Anglo-Muhammadanization:"

1) Adoption of the theory of *stare decisis*, unknown to the *Sharī'ah*, made it a prisoner of *taqlīd* and robbed it of its dynamism;
2) Application of the principles of English law to the *Sharī'ah* anglocized it to the extent of being a hybrid legal system;
3) Non-Muslim judges started deciding the *Sharī'ah* cases against clear Islamic legal injunctions;
4) Judicial misinterpretation of the *Sharī'ah* started and gradually assumed disturbing dimensions; and
5) Islamic legal education suffered immensely and has become completely out of tune of the *Sharī'ah*.

A) *Theory of 'stare decisis' and Sharī'ah:*

The Common law principle of *stare decisis,* whereby lower courts are required to essentially follow the verdict of superior courts in parallel situations is something unknown to the *Sharī'ah.* However, under "Muhammadan law" this became the unquestioned principle of the administration of justice and a means of perpetrating even wrongly decided cases and a convenient means of indulging into judicial adverturism at the highest level with the assuring guarantee of blind following.

The influence of British common law and equity has been strongest in areas where the courts were staffed by British or British-trained judges, as in the case of India. The British did not allow the continuation of *Qāḍī* courts, consequently the courts of general jurisdiction applied what was left of Islamic law after its dismemberment through enactment of various extraneous statutes.

British courts in India placed absolute reliance upon some Islamic legal texts used authoritatively during the past and rejected any deductions made by contemporary jurists of new rules of law from the ancient texts. This tendency was due to the combined influence of *taqlīd* and the common law doctrine of *stare decisis.* The British judges apparently were inclined to equate *taqlīd* more or less with *stare decisis.* Many of the decisions or the Privy Council could be cited in support of this contention. In *Baker Ali Khan's Case,* [16] for example, it refused to agree with certain sound inferences drawn by Mahmood, J. in *Agha Ali Khan's Case,*[17] and held:

> . . . the danger was pointed out of relying upon ancient texts of the "Mahomedan law", and even the precepts of the Prophet himself, of taking them literally, and deducing from them new rules of law, especially when such proposed rules do not conduce to substantial justice. That danger is equally great whether reliance be placed upon fresh texts newly brought to light, or upon fresh old and undisputed texts. Their Lordships think it would be extremely dangerous to accept as a general rule that new rules of law are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions.

The above judicial attitude was maintained throughout the British period and continues even to this day in secular India. The *Sharī'ah* thus ceased

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[16] *Baker Ali Khan V. Anjuman Ara* (1321/1903)30 I.A. 94

[17] *Agha Ali Khan V. Altaf Hasan Khan,* I.L.R. 14 All, 129.

to be a growing organism responsive to progressive forces and changing needs. Conservatism and rigidity became the hall-marks of "Muhammadan law." This law is peculiar in itself and cannot readily be used as a guide to the rules of Islamic law as applied in countries which have been outside this system, such as, Saudi Arabia, Egypt, Syria, Iran, Nigeria, etc.

The approach of the British courts in India and of the Privy Council has been criticized in Pakistan by the Commission[18] appointed in 1376 AH/1956 AC. The recommendations of the Commission found favor with the judiciary as is evident from the judgement in a well known case[19] in which the following significant principles were laid down:[20]

> . . . the courts must be given the right to interpret for themselves the Qur'ān and the *Sunnah*; and they may also differ from the views of the earlier juris-consults of Muslim Law on grounds of *istihsan* (equity) or *istiṣlah* (public good) in matters not governed by a Qur'ānic or Traditional text or *ijmā'* or a binding *qiyās*. At the same time it must be reiterated that the views of the earlier jurists and *Imāms* are entitled to the utmost respect and cannot be lightly disturbed, but the right to differ from them must not be denied to the present-day courts functioning in Pakistan, as such a denial will not only be a negation of the true spirit of Islam, but also of the constitutional and legal obligation resting on all courts to interpret the law they are called upon to administer and apply in cases coming before them.

In India, however, it is not possible, for the time being, to adopt such a course of action without first ensuring far reaching reforms in the machinery administering Islamic law and the availability of Muslim judges well qualified in the *Sharī'ah*. As a first step, however, towards this goal, it has to be recognized in princile that the present judicial attitude towards the *Sharī'ah* is faulty and needs modification to bring it in tune with the Islamic law. No one should, in fairness, accuse the *Sharī'ah* of being static and unprogressive. Indeed it is the judicial attitude towards the *Sharī'ah* that can be rightfully so accused and that has produced this unhealthy effect.

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[18]The Commission on Marriage and family Laws in its Report published in the Official Gazette of Pakistan, 20 June, 1376 AH/1956 AC, 1197 at p. 1203.

[19]*Khurshid Tan V. Fazal Dad* (1385 AH/1965 AC) PLR (West Pakistan) I, 312.

[20]*Id* at 399, cited in Liebesny, Herbert J., *The Law of the Near & Middle East: Readings, Cases, and Materials* (Albany, 1975).

B) *Anglicization of the Sharī'ah*:

In the early thirteenth century AH (nineteenth century AC) a liberal reform movement was strong in England, and Jermy Bentham, one of the greatest English law reformers, advocated codification of the law. Bentham himself was interested in applying his ideas to the Indian legal system. He never had an opportunity, however, to initiate law reform in India but his ideas were influential in starting and carrying through the preparation of codes. When the Charter Act of 1249 AH/1833 AC, which established one legislature for the whole of British India, was debated in the Parliament, Thomas Babington Macaulay, a British lawyer and politician, stressed the need for codification in India and said:[21]

> This seems to me . . . to be precisely that point of time at which the advantage of a complete written code of laws may most easily be conferred on India . . . It is a work which especially belongs to a government like that of India, to an enlightened and paternal despotism.

Macaulay became the chairman of the first Indian Law Commission and became instrumental in starting the process of statutory replacement of various aspects of *Sharī'ah* through codes based on English law. In quick succession came the Indian Penal Code, the Indian Code of Civil Procedure, the Indian Code of Criminal Procedure, etc.

The provisions of the Regulations of 1131 AH/1718 AC for the judges to apply justice, equity and good conscience, were copied from Regulation to Regulation, and from Regulation to Statute, and this residual source of law is now firmly entrenched in India.[22] Privy Council's dictum in *Waghela V. Sheikh* 1304 AH/1887 AC,[23] is often cited in support of the contention that in India, English law will first be consulted wherever the context so demands. In Asia *Bano V. Muhammad Ibrahim*[24] it was held that a choice most consistent with justice, equity and good conscience could be made between the conflicting opinions in Islamic law.

On the basis of these principles and statutes a very large body of case-law developed. These developments gave a new color to the *Sharī'ah*: it was the *Sharī'ah* (appropriately called Anglo-Muhammadan Law) as seen by English

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[21]Macauly, T.B. *Miscellanies* (Boston, 1901), cited in Liebesny, *loc. cit. supra* at 120

[22]Derrett, D.M., "Justice, Equity and Good Conscience", pp. 139-140 (Reprinted by permission of George Allen and Unwin, London, 1963).

[23]14 I.A. 89 at 96.

[24](1925) 47 All. 823

judges and interpreted by them with the help of English law, without always fully grasping it and thereby always aligning it with English principles of equitable justice. As such, "Muhammadan law" is at best be called a specific growth or a hybrid system of law, which in the words of Fyzee has a bias towards common law doctrines, "which in those times seemed to the British-trained judges to be more in accord with justice than the letter of the *Sharī'ah*."[25]

C) *Non-Muslim Judges sitting in Judgement over Sharī'ah* Matters.

All the schools of Islamic jurisprudence are unanimous that only a *Muslim*, possessing specific qualifications could be a *Qāḍī* or judge to decide cases under the *Sharī'ah*[26]

Emphasis is placed on competence and knowledge but above all on *Imān* (faith). The *Qāḍī* should believe in whatever he is administering, and should himself be equally affected by the outcome of the dispute before him. He should be a Muslim in name alone but a practicing one, in tune with the social aspirations of Muslims and the spirit of Islam.

In 1186 AH/1772 AC, English judges replaced *Qāḍīs* in British India; *Muftis* continued to "advise" them but not for long. In 1281 AH/1864 AC, the office of *Qāḍī* as judicial officer was abolished by an enactment. All this was done in total disregard of the *Sharī'ah* provisions and Muslim sentiments. The persistent demand of Muslims for the restoration of the office of *Qāḍī* did not move the British government, except to allow the appointment of *Qāḍīs* under the Kazi Act, 1298 AH/1880 AC. They possessed no judicial powers and were good for nothing. This Act still exists but is one of the least known of legislation in the country. Muslims did not and do not want an "ornamental *Qāḍī*", but a real one.

There is a view that "scholarship of any personal law is not the exclusive preserve of only those who are themselves subject to that law. It is a matter of one's personal study".[27] "Scholarship", however, should not be confused with "legal competence" under the *Sharī'ah* to sit in Judgement as *Qāḍī*. One is tempted here to quote Krishna Iyer, J. in *Shaulameedu's Case:*[28]

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[25]Fyzee, A.A.A., Cases in the *Muhammadan Law of India* and Pakistan (Oxford, 1385 AH/1965 AC), p.xxiii (Introduction).

[26]Only a sampling of authorities are given here. See, for example, *Hedaya* (tr. by Hamilton), p. 334; *Fatāwā Alamgiri*, Part 29, p. 60 (Urdu tr. Deoband, n.d.); *Bahr ul-Raiq*, Vol. VI, pp. 257-258; *Al Dardir, Al Sharh al Saghīr* Vol. iv, pp. 187-188; *Minhāj et-Talebin of Nawawi*, tr. by Howard, p. 500; Abul Qabin Hilli, *Shara'i ul-Islam*, Vol. ii, p. 375 (urdu tr. Lahore, 1979); Ghazi, Mahmud Ahmad, *Adāla ul-Qaḍi* (Islamabad, 1403 AH/1983 AC) (Urdu).

[27]Nagpal, R.C., "Religion of a Judge and Personal Laws", (1974) 16 J.9.L.9., 123

[28]*Shahulameedu V. Subaidu Beevi* (1970) K.L.T.4

"The soul of a culture – law is largely the formalized and enforceable expression of a community's cultural norms cannot be fully understood by alien minds".

The fact that this remark was made with reference to Privy Councils "distortions" of the *Sharī'ah* testifies to the validity of the point under discussion.

The colonial subjugation of India made it *dār ul ḥarb* in which it was expected that Muslim institutions would be discarded and discredited. When their demand for the restoration of the institution of *Qāḍī* was not accepted, Muslims turned to the *'Ulamā'*, referring, to them nearly all of their socio-legal problems for an out-of the-court abjudication. In 1286 AH/1869 AC, a *Dār al Iftā'* (seat of juristic verdicts) was established at Deoband for the issuance of *Fatāwā* in thousands of cases referred to it by Muslims from all over British India.[29] Many trusted *muftīs* in different parts of India came to be so consulted. The *fatāwā*-literature which thus came into being gained much currency among Muslims of British India and continues to be popular even now. Some of the well-known published fatāwā collections are: *Fatāwāi Aziz* by Shah Abdul Aziz; *Fatāwāi-Rashidia* by Rashid Ahmad Gangohi; *Imdad al-Fātāwa* by Abdul Haie Firanghi Mahli; *Fatāwā Aziziyah* by Mufti Azizur Rahman; *Kifayah al Mufti* by Mufti Kifayah Allah (in 10 volumes); and *Fatāwā Deoband* (in 12 volumes)

The whole of the *Fatāwā* literature, only a part of which is collected and published, is symptomatic of the deep urge of Muslims in British India, and even now, to get their disputes settled out of courts of law presided over by non-Muslim judges. The same thinking went onto the establishment in 1340 AH/1921 AC of *Amarat al Sharī'ah* in Bihar under which *Mahkamah al Qaḍā'* presided over by a *Qāḍī Sharī* settled thousands of civil disputes referred to it.[30]

This system is still working in Bihar and Orissa and has been extended to certain other parts of the country in the wake of *Shah Bano's* case. The *Jami'īyah 'Ulamī Hind* has also recently established a separate *Amarat al Sharī'ah* at an all-India level.

One of the lesser known facts of the Indian legal history relates to an Amendment which Mohammad Ahmad Kazmi moved in the Central Legislative Council in 1361 AH/1942 AC seeking attachment into the Dissolution of Muslim Marriages Act, 1358 AH/1939 AC, to the effect that only a Muslim judge could take cognizance of matters covered by the Act. The British government refused to support it and thus the bill did not pass. The State of Kashmir , however, accepted the plea for Muslim judges and

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[29] *See*, Tayyab, Qari Muhammad, *Darul Uloom Deoband* (Deoband, 1385 AH/1965 AC), p. 99 (Urdu).

[30] Rahmani, A.S. and Rahmani, Minatullah, *Muḳma-e-Qaḍā'* (1379 AH/1959 AC) (Urdu)

passed the Jammu and Kashmir Dissolution of Muslim Marriages Act in 1361 AH/1942 AC.[31]

Earlier in 1360 AH/1941 AC, *Mawlānā* Ashraf Ali Thanvi and *Mawlānā* Abdul Karim Gumthauli were instrumental in drafting a bill aimed at establishing a system of *Qāḍī courts* to decide matrimonial disputes among Muslims. The bill was removed in the Central Legislative Council, but did not pass due to opposition from the government.[32]

D) *Judicial Misinterpretation of the Sharī'ah:*

In a recent judgement of the Supreme Court, it was painfully admitted by Mr. Justice Murtaza Fazle Ali that all the lower and superior "courts before whom the disputes come up for decision handed down judgements which were not strictly in accordance with the *Sharī'ah* and the essentials of the (Islamic) law."[33] K.P. Saksena gives a list of judgements in which Islamic law had been misinterpreted. In his opinion, "the validity and correctness of many noted judicial decisions are...questionable."[34] Latest addition to the list of such judgements is that in *Shah Bano's Case.*[35] Under the garb of so called "judicial adventurism" the judges have embarked upon an "operation secularization" of Islamic law in which they do not hesitate in putting their own gloss on the Qur'ān while betraying their sheer ignorance by saying that the author of the Qur'ān is Muhammad (SAAS). Tahir Mahmood wrote, "All this would indeed amount to a virtual destruction of the Qur'ān."[36]

A detailed discussion of the adverse effects of this activism and attitude of the judiciary on the *Sharī'ah* from the colonial period to the modern day, has already been undertaken by this author elsewhere[37] and need not be repeated

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[31]*See*, Mahmood, Ṭāhir, Supra n. 12 at 55-57.

[32]Mian, Maulana Muhammad, *Jami'at Ulama Kya Hai* (Delhi, 1384 AH/1964 AC), p. 68 (Urdu).

[33]*Mohd. Labbai V. Mohd. Hanifa*, AIR 1976 SC. 1389 AH/1969 AC.

[34]Saksena, K.P., "Need for a Code of Muslim Law", in Mahmood, Tahir (ed,), *Islamic Law in Modern India* (Bombay, 1392 AH/1972 AC), p. 134.

[35]AIR 1985 SC. 945.

[36]Mahmood, Tahir, "Shah Bano Judgement: Supreme Court Interprets the Quran", Islamic C.L.Q. (1405 AH/1985 AC) Vol. V No. 2, p. 112.

[37]See, for example: Rashid, S.K. & Masood Arshad, "Judicial Reform of Muslim Personal Law: The Thin Edge of the Wedge", 6 *Aligarh L.J.* (1398 AH/1978 AC), pp. 1-27; a slightly different version of the same article under the title: "Muslim Personal Law in *India*: An Analysis of Judicial Reform", *Journal Institute of Muslim Minority Affairs* (Jeddah) Vol. 3 No. 1, pp. 72-88; See also *Supra n. 7* and; Rashid, S.K., "The Impact of British Colonialism on *Shar'ah*: The Indian Experience", *Degel,* (University of Sokoto) 1404 AH/1984 AC, pp. 125-135; also *Radiance*, 15-22 Dhu al Hijjah 1406 AH/29 Sep.–5 Oct. 1985 AC, pp. 6-7.

here. The discussion brings out clearly two things: A libertarian trend among some judges in interpreting Islamic law, and their less than adequate knowledge of the *Sharī'ah*. Marginal erosion of the *Sharī'ah*, on the other hand continued through legislation even in post–1367 AH/1947 AC India. This compelled *Mawlānā* Abul Hasan Ali Nadawi , President, All-India Muslim Personal Law Board, to send a memorandum to the Prime Minister Rajiv Gandhi in which he wrote:[38]

> . . . any change in the *Sharī'ah*, direct or indirect, through legislation or judicial interpretation, would amount to *mudakhalah fi al dīn* (interference in religion) in violation of the freedom of religion guaranteed by the Constitution of India under Articles 25 and 26.

E) *Apathy towards Islamic Legal Education:*

Before the advent of the British, Indian Muslims were governed by the *Sharī'ah*. The laws of English origin were thrust upon them against their will. Indians were encouraged to study English law courses offered within the country or in England. These new converts to English law became its champions. The indigenous legal systems were either not taught at all or only very cursorily.

'Abd al Q'adir 'Awdah, the Egyptian thinker and reformer, graphically describes the neglect of Islamic legal education in the wake of colonialism:

> Consequent to the introduction of European law to Muslim countries special courts were established. The judges of these courts were appointed from among Europeans or indigenous scholars who had never studied Islamic jurisprudence. Besides, educational authorities had established special schools to teach the new philosophies of law. Naturally, such schools gave full attention to the study of the European codes, neglecting Islamic jurisprudence except in the instance of a few matters such as *waqf*. This attitude led to a lamentable end, inasmuch as nearly all the jurists, who were among the elite of the educated, were kept ignorant of the principles of Islamic law. It is lamentable because this ignorance is equivalent to their ignorance of the jurisdiction and rules of their religion. . .

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[38] *Muslim India*, Sept. 1984, p. 418.

> Among the European-educated Muslim elites are those who believe that Islamic jurisprudence is primarily the product of juristic innovations. If one submits to them an Islamic theory of jurisprudence that was unknown to man made jurisprudence till date, they would express their astonishment at the Muslim jurists who could reach levels of judicial competence in the seventh and eight centuries that other jurists could not reach or conceive of until the nineteenth or twentieth centuries![39]

In India, Islamic legal education in the Universities is either totally neglected or given minimal attention by teaching a few topics of "Muhammadan law" relating to personal status. Even those universities such as Aligarh, which claim to be of Muslim character, or those located in Muslim environments, such as Calicut, are guilty of this. The "Anglo-Muhammadan law" appears to be in complete command of the syllabus of every school of law.

And hold fast, all together, by the Rope
Which God stretches out for you,
And be not divided among yourselves . . .

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[39]Coulson, N.J., *A History of Islamic Law*, (Edinburgh, 1971), pp. 149-150, cited in Doi, A.R.I., *Shari'ah The Islamic Law*, (London, 1984), p. 450, 451.