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English Common Law and Islamic Law in the Middle East and South Asia: Religious Influences and Secularization

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ENGLISH COMMON LAW AND ISLAMIC LAW IN THE MIDDLE EAST AND SOUTH ASIA: RELIGIOUS INFLUENCES AND SECULARIZATION

HERBERT LIEBESNY*

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I. THE ROYAL PREROGATIVE AND COMMON LAW

In England, during the first half of the seventeenth century a serious conflict having both legal and political implications arose concerning the Royal Prerogative. Its main protagonists were King James I and Sir Edward Coke, an outstanding jurist. The King had insisted upon the Royal Prerogative, which placed the King above the law and gave him absolute power. This position had its origin in Roman law.¹ Coke, on his part, argues that the common law was above the King's Prerogative. This led to a violent clash between Coke and the King in November 1608 when, in a meeting between common law judges and ecclesiastics with the King, the King declared that he would always protect the common law. Coke replied, much to the King's indignation, that the common law protected the King. He also prayed the King to consider that ecclesiastical jurisdiction was foreign to England. A general discussion of the further development of common law and of the decisive role of Parliament is beyond the framework of this Article.

One aspect, however, needs to be stressed—namely the development of

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¹ The Roman jurist Ulpian in Justinian's *Digest* states that the ruler is not bound by the laws (*princeps legibus solutus est*). DIG. JUST. 1.3.31.

precedent. In publishing his famous reports of cases, Coke stated that his objective was twofold; first, to provide a permanent record of cases which he regarded as illustrations of different branches of the law; second, to furnish a model of accurate and learned reporting.

The English doctrine of precedent (*stare decisis*) is strongly coercive in nature due to the fact that English law is largely based on case law. In subsequent cases, judges must regard earlier decisions. A judge's decision in a particular case constitutes a "precedent." In a later case a judge may have different kinds of precedent to consider and an earlier decision may be merely part of the material on which he will base his own decision. If he feels obliged to decide the case before him in the same way as the previous case was decided, the precedent is considered binding. If a precedent is merely an important part of the later decision it is regarded as persuasive.²

The idea of precedent is totally foreign to Islam and had been introduced in the subcontinent by British judges. In fact, the *qāḍī* had power to review his order and also the judgment of his predecessor.³ Both civil and criminal judgments could be reviewed.

II. ISLAMIC LAW IN MUGHAL INDIA

Under the Mughal emperors, Islamic law of the Hanafite school was the law of the land. Under the Mughals, the judicial courts were either secular or ecclesiastic. The principal courts for the settlement of disputes were presided over by the King, the governors, or other executive officers. The law was generally ascertained from the *ʿulama*. The governors followed the same procedure in the provinces.⁴

Apart from the secular courts mentioned, the *qāḍī*, as in most Islamic countries, functioned as judge and was assisted by a *mufti* who usually performed only an advisory role.

Although the Hindus were regarded as *dhimmi*s (a tolerated community) and could bring their cases before the *qāḍī*, they generally preferred to use their own five-men village council (*panchayat*) for the settlement of their legal differences.

III. LEGAL DEVELOPMENTS IN BRITISH INDIA

The British did not recognize the Mughal claim that Islamic law was the law of the land. They abolished the *qāḍīs* and substituted secular courts which followed the principle of the personality of the law and based this principle, as Islam had done, upon the religion of the litigants in-

² R. CROSS, *PRECEDENT IN ENGLISH LAW* 4-5 (2d ed. 1968).

³ M. AHMAD, *THE ADMINISTRATION OF JUSTICE IN MEDIEVAL INDIA* 51 (1951).

⁴ S. IKRAM, *HISTORY OF MUSLIM CIVILIZATION IN INDIA AND PAKISTAN* 434 (1961). On the judicial system under the Mughal emperors see M. AHMAD, *supra* note 3, at 133.

volved. This meant that in cases concerning only Muslims, Islamic law was applied, and in cases involving only Hindus, Hindu law was used. If one party was Muslim and the other was Hindu, the law of the defendant was followed.

With regard to Islamic law, the English officials and judges continued to use Al-Marghīnānī's *Hedāya*, a twelfth century work which had also been used under the Mughals, and the *Fatāwā al-ʿAlimḡiriyya*. The latter work was the result of the endeavors of the Emperor Awrangzīb ʿAlamḡir (1658-1707) to restore the orthodoxy of Islamic law which had been neglected by his predecessors. The *Fatāwā al-ʿAlimḡiriyya* is not merely a collection of *fatwas*, as the title would suggest, it also contains excerpts from authoritative works of the Hanafite school. A partial translation into English from the original Arabic of the *Fatāwā al-ʿAlimḡiriyya* was published by Neil B.E. Bailliee in *A Digest of Moohumudan Law* and in his *Moohumudan Law of Sale*.

For the use of British officials, the *Hedāya* was translated into English in 1795 by Charles Hamilton and published in four volumes. The translation was not from the original Arabic, but from a Persian translation and contained numerous errors. A second edition of the *Hedāya*, omitting the obsolete material, was published in one volume by Grove Grady in 1870. This edition was reprinted in Lahore in 1963.

Upon request by the East India Company, a charter was issued by George I in 1726 which established royal courts in the three Presidency Towns of Calcutta, Bombay, and Madras.⁵ These courts consisted of the mayor and at least two aldermen. The application of English law had already been prescribed by an earlier Royal Charter (1661) and the Company impressed upon the courts that they must administer English law. The members of the mayor's courts were primarily agents of the Company with no training in law. Only in London did the Company have lawyers who scrutinized the decisions in the field after the cases had been decided.

While the mayor's courts dealt with civil matters, criminal jurisdiction in each Presidency Town was exercised by the Governor and five members of his council. Each of these officials acted as justices of the peace with the same powers as justices of the peace in England. The jurisdiction of both the civil and criminal courts was restricted to the Presidency Town and the "factories"⁶ subordinate to it. The exercise of judicial functions by non-lawyers, employed for the most part by the Company, was due to the Company's distrust of professional lawyers whom it felt it could not control. For various reasons this system of dispensing justice did not flourish and the administration of justice became chaotic.

⁵ The term "Presidency" refers to the main political subdivision of British India. The names of the principal cities, Calcutta, Madras, and Bombay were used to denote the "Presidency" and the cities themselves were called "Presidency Towns."

⁶ The term "factory" as used by the British in India refers to factors or agents in a foreign country.

Notably, the provisions of the Charter of 1726 applied primarily to Europeans. Muslims and Hindus, having their own laws and customs, were free to dispose of their cases themselves. If, however, both native parties wanted to have their case decided by the mayor's court, English law was applied.

A development of great significance for British India was the Act of the Long Parliament in 1833 which deprived the Privy Council of all jurisdiction over English bills or petitions. The Council, however, retained jurisdiction over appeals from places outside the ordinary jurisdiction of the courts of law and equity. As English possessions increased during the eighteenth century and the British Indian Empire came into being, George III decreed that a supreme court should be established in Calcutta and that appeals from that court should lie with the Judicial Committee of the Privy Council. The Archbishop of Canterbury along with other archbishops and bishops were members of the Judicial Committee until 1876. Since that time, however, the Committee has been a purely lay body. Of special importance for India was that Parliament authorized the Crown in 1871 to appoint four paid members from among the judges of the superior courts of India to the Privy Council. These Indian members were not always Europeans: Outstanding Indian judges, such as Ameer Ali, were also appointed. The decisions of the Privy Council were of great importance and even though the Council's jurisdiction no longer extends to India, Pakistan, and Bangladesh, these decisions still have persuasive value in the courts of these countries.

In the early nineteenth century, Jeremy Bentham, one of the greatest English law reformers, advocated codification of the law and expressed interest in applying his ideas to the Indian legal system. Although Bentham never had an opportunity to participate in preparing codes for India, the work was promoted vigorously by a British lawyer, politician and writer, Thomas Babington Macaulay who stated in a famous speech in Parliament:

What is administered [in India] is not law, but a kind of crude and capricious equity We do not mean that all people of India should live under the same law, far from it. . . . We know how desirable that object is; but we also know that it is unattainable. Our principle is simply this: uniformity where you can have it, diversity where you must have, but in all cases certainty. . . . I believe that India stands more in need of a code than any country in the world. . . . This seems to me precisely that point in 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, an enlightened and paternal despotism.⁷

⁷ T. MACAULAY, *PROSE AND POETRY* 714-16 (G. Young ed. 1967).

The British actually had little experience in drafting comprehensive codes since English law was primarily case law. Therefore, in drafting the Penal Code, the drafters, led by Macaulay, turned for guidance to the French Penal Code of 1810 and, to a lesser degree, to the Code of Louisiana.

As is customary in British and American statutes, certain definitions and principles are contained in an introductory section; this method is not used to any significant extent in French codifications. The most important code drafted was the Indian Penal Code of 1860. Like the other codes, it was enacted only after the government of India had been assumed by the Crown in 1858. The Code is still applied in Pakistan and with various amendments, the most significant changes being made when President Zia-ul-Haq revived the Qur'anic *hadd* punishments in 1979.⁸ The Penal Code has been regarded as an outstanding piece of work, and it has been applied in British India and its successor states as well as in other British possessions such as the then Colony of Aden. The Code was composed by English jurists who had served in India although its form and content primarily reflect an English code. The Penal Code was supplemented in 1898 by the Criminal Procedure Code.

The sections of these two codes are usually brief and general (more so in the Penal Code). In a very detailed three-volume edition by Shaukat Mahmood, each article is followed by a synopsis discussion covering court decisions applying the Code provisions. For example, fights between two groups, often over trivial matters, are common. How then should article 96 of the Penal Code, which simply states that "Nothing is an offense which is done in the exercise of private defense [in American terms, self defense]", be interpreted? Mahmood's synopsis gives the gist of numerous cases to show when private defense is justified and when it is not.

Section 300 is important in that it stipulates that as a general rule, culpable homicide is murder if the act which causes the death is done with the intention of causing death, or if the act is intended to cause such bodily injury as the offender knows is likely to cause death to the person who has been harmed, without the offender having any excuse for risking such a dangerous act.

There are, however, several exceptions to this general rule. An important exception is that culpable homicide is not murder if the offender, while deprived of the power of self-control by grave and sudden provocation, causes the death of the person who provoked him. This provision has been invoked to give lighter sentences to men who committed homicide in defense of the family honor, as defense of the family honor is generally regarded as an excuse for homicide. This position is clearly expressed in the Lebanese Penal Code of 1949, wherein it states that a man

⁸ See *infra* text at Section V.

having surprised his wife, his female ascendant, or decendant or his sister in the act of committing adultery or having illicit sexual relations with a third person and having committed non-premeditated homicide or injury on one or the other of the persons involved shall benefit from a defense which wholly excuses him.⁹

In the Indian Penal Code, article 304 deals with culpable homicide and its punishment. In cases under this provision sentences have been imposed upon men who killed in defense of family honor. While the sentences were lighter than in other cases of culpable homicide, a man who murdered a female relative and/or her lover still might draw a sentence of ten years imprisonment, even in Pakistan, although courts have sometimes imposed sentences of only a few months. The sentences of the courts thus appear to vary widely. There apparently is no provision for an acquittal of the offender, unless he is pardoned by the President. A conflict thus remains between the sentiment of the rural and tribal people and the practice of the courts. Even after the Islamic revival of 1979, the language of the courts has remained English, probably by necessity in a multilingual country. The use of an English code, however, excludes defendants as well as plaintiffs from being able to understand the proceedings in which they are involved.

A. *Retaliation and Blood Money (Diva)*

Retaliation and the payment of blood money are sanctioned by *Sura II*, verse 178. Payment of blood money for accidental killing is also prescribed in *Sura IV*, verse 92. Payment of blood money for homicide and bodily injuries is still imposed by the *qāḍi* courts in Saudi Arabia, in which the amount of blood money is expressed in camels. According to a legal opinion of the Mufti of Saudi Arabia in 1955, 100 camels were due for intentional killing, while the same number but of lesser quality were to be given in case of accidental homicide. Blood money for the loss of a limb, parts of a limb or the eyes is awarded according to a fixed scale. The Mufti decrees the equivalence of camels prescribed to be handed over in Saudi *riyals*.

In British India, there was no provision for the payment of blood money in the Code of Criminal Procedure; blood money is still not awarded. On the other hand, in Pakistan an amendment to the Code of Criminal Procedure provides:

[T]hat when any person is convicted of an offense involving death, hurt or injury to the victim, loss, destruction or theft of property, the Court while sentencing the accused shall, except for reasons to be recorded it otherwise directs, award compensation to the

⁹ 1949 LEBANON PEN. CODE art. 562.

heirs of the person killed, the person injured or a person whose property has been injured, lost or destroyed, as the case may be. The amount of compensation awarded by the Court under this section shall be regarded as a sentence of fine.¹⁰

An important fact is that the heirs of a person who has been killed are entitled to receive compensation, making this payment akin to blood money. As an example, the High Court of Lahore in *Fazel-ur-Rahman v. State*¹¹ dealt with the appeals of Fazal-ur-Rahman, his brother and his father who had been sentenced to death by the Sessions Court (the trial court). The high court reviewed the facts of the case in great detail and sentenced Fazal-ur-Rahman, who had only inflicted a minor wound on the deceased, to one month imprisonment. The other two appellants, however, mercilessly attacked the deceased with their weapons causing his death. They were each sentenced to ten years rigorous imprisonment. In addition, each of them had to pay 1500 rupees in blood money to the heirs of the deceased. In case of default of payment, the defaulter was to undergo another three years of rigorous imprisonment.¹²

In addition to the two codes dealing with penal matters, a Code of Civil Procedure was enacted in 1908 which, including amendments, is currently applicable in Pakistan. A Contract Act came into force in 1872.¹³ While the Pakistani courts and most of the law remained secular until the revival of Qur'anic law in 1979, a Muslim Personal Law Application Act was enacted by the British in 1937 and amended in 1943. This Act was designed to give uniformity to the application of Islamic law by the courts of British India.¹⁴

The 1937 British Act was repealed in what was formerly West Pakistan by the West Pakistan Muslim Personal Law Application Act of 1962.¹⁵ The most important provision of this Act was article 2, which stated:

[N]otwithstanding any custom or usage, in all questions regarding succession (whether testate or intestate), special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts, religious usages or institutions, including waqfs, trust and trust properties, the rules of decision, subject to the provisions of any enactment for the time being in force shall be

¹⁰ PAKISTAN CODE CRIM. PROC. art. 544A.

¹¹ [1971] All Pakistan Legal Decisions 883.

¹² *Id.* at 911.

¹³ For details on various aspects of commercial law as practiced in Pakistan, see A.G. CHAUDHARY, *MERCANTILE LAW IN PAKISTAN* (1966).

¹⁴ For the text of this Act see S. MAHMOOD, *PRINCIPLES AND DIGEST OF MUSLIM LAW* 348 (2d ed. 1967).

¹⁵ *Id.* at 378.

the Muslim Personal Law (*Shariat*) in cases where the parties are Muslims¹⁶

Interestingly, this Act mentions adoption, although adoption is not permitted by classical Islamic law. A Muslim Family Laws Ordinance was enacted in 1961 on the basis of the report of a special commission which claimed the right of *ijtihad*. Since only one commission member was a professional scholar of Islamic law, this report drew fire from the fundamentalist religious leaders. The legislation followed in several respects the Dissolution of Muslim Marriages Act of 1939 enacted by the British. That Act had established a number of reasons under which a wife could obtain a divorce from her husband. These reasons were similar to those enacted by Arab countries, such as Egypt.¹⁷

IV. PRESENCE OF STATUTORY RULES IN ARAB COUNTRIES: JUSTICE, EQUITY, AND GOOD CONSCIENCE IN INDIA

In countries having comprehensive code systems, such as the majority of European and Arab nations, the judge can usually turn to the provisions of a code or a major statute when deciding a case brought before him. If these sources offer no solution, the civil codes of several Arab countries provide guidance. Thus the Egyptian Civil Code of 1948 states:

[I]n the absence of a provision of law that is applicable, the judge will decide according to custom and in the absence of custom in accordance with the provisions of the Islamic *shari'a*. In the absence of such principles the judge will apply the principles of natural justice and the rules of equity.¹⁸

The corresponding provisions of the Syrian Civil Code of 1949 are identical to those of the Egyptian code, except that *shari'a* law is to be applied before the resort to custom.

The Iraqi Civil Code of 1951 has more extensive provisions, such as the following:

In the absence of an applicable legal provision the judge shall decide according to custom and in the absence of custom in accordance with those principles of the Islamic *shari'a* which are most in keeping with the provisions of this Code without being bound by any particular school of jurisprudence. In the absence of these principles the judge will apply the rules of equity.

¹⁶ See *id.*

¹⁷ For further details see H. LIEBESNY, *THE LAW OF THE NEAR AND MIDDLE EAST* 136-73 (1975).

¹⁸ 1948 EGYPT CIV. CODE art. 1.

In all this the Court shall seek guidance from decisions which are in accordance with judicial practice and from the legal principles (*fiqhs*) firstly in Iraq and then in foreign countries whose laws are similar to those of Iraq.¹⁹

These codes were drafted by an outstanding French-trained Egyptian jurist, Dr. °Abd al-Razzaq al-Sanhuri on the basis of his theory that a synthesis between Western and Islamic law could be achieved in new codifications.

In British India, the situation was quite different. Codes were not enacted until the middle of the nineteenth century. In the meantime, however, the judges needed guidance if a rule could not be deduced from statutes, the written sources of personal law, custom, or case law. In these instances, regulations enacted by the British occupants of India since 1781 provided for the application of justice, equity, and good conscience. According to J. Duncan M. Derrett, the author of a thorough historical study of this phrase, it originally embodies a concept of the Roman-canonical system.²⁰ In British India the phrase became firmly fixed as a residual source of law, the area of its operation narrowing progressively. Gaps, particularly in the personal law of Muslims and Hindus which lacked guidance through legislation or case law concerning conflicts between the personal laws of the two groups, could be filled in by reference to justice, equity, and good conscience. Although this formula was not initially conceived as implying the primary application of English law, Lord Hobhouse stated in a widely cited guardianship case, *Wagheila v. Sheikh Masludin*,²¹ that the matter had to be decided by equity and good conscience, "generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances."²² Derrett states that original intention was to apply an English rule, not because it was English, but because it happened to be an expression of justice, equity, and good conscience.²³ In the realm of guardianship, wills and trusts, the rules of the English Chancery were observed. In contract, tort and conflict of law cases, as well as constitutional questions, English law was consulted first, although in the last decades of the nineteenth century other systems of law also were considered. In this context English law meant not only common law, but also statutory law.²⁴

In applying Islamic law the British relied upon the opinion of classical jurists, thereby following the principle of *taqlid* which they equated with

¹⁹ 1951 IRAQ CIV. CODE art. 1(2).

²⁰ Derrett, *Justice, Equity and Good Conscience* in CHANGING LAW IN DEVELOPING COUNTRIES 114 (J.M.D. Anderson ed. 1963).

²¹ 14 I.A. 89 (1887).

²² *Id.* at 96.

²³ Derrett, *supra* note 20, at 142.

²⁴ *Id.* at 144.

stare decisis. This approach by the British courts in India and by the Privy Council has been regarded by the Pakistanis as too rigid, thus preventing the adjustment of Islamic law to the changing needs in British India. Nonetheless, the development of an amalgam of Islamic, customary, English common law, and statutory principles has led, mainly through court decisions, to the creation of a distinct body of law, the Anglo-Muhammadan Law. The right of appeal to the Privy Council was abolished in 1950 and the highest court in Pakistan now is the Supreme Court whose decision on questions of law are binding on the lower courts.²⁵ Like the Privy Council before it, the Pakistani Supreme Court is not bound by its own decisions and may deviate from them.

In cases where there are no applicable Supreme Court decisions, high court decisions are binding on the courts subordinate to the high court in question. Even before the large scale revival of Qur'anic law the Pakistani courts discussed the meaning of basic Islamic institutions in the modern world. A good example is *Khurshid Jan v. Fazal Dad*.²⁶ The case itself was rather simple. Khurshid Jan was given in marriage before puberty, that is before she was sixteen, and on attaining puberty petitioned the court for a declaration that she was repudiating the marriage. Before the declaration could be issued, however, she went to the house of her intended husband and cohabitated with him. The trial judge nevertheless maintained that the repudiation, having taken effect with the institution of the suit, remained valid. On appeal to the district judge this decision was reversed. Khurshid Jan then appealed to the high court, where both sides raised questions concerning the interpretation of Islamic law. Among these were three questions which were referred to the full high court bench of five judges: (1) What are the sources of Muslim law? (2) What are the rules of interpretation of Muslim law and can courts differ with the views of the *imams* and other jurisconsults of Muslim law on grounds of public policy, justice, equity, and good conscience? (3) How are the courts to be guided in case of conflict of views among the founders of the different schools of Muslim law and their disciples, other *imams* and *faqih*s (specialists in *fiqhs*)?

In their answer, the majority of the judges differed considerably from the generally accepted view of classical Islamic law that there were four basic principles from which Islamic law was derived (*usul al-fiq*): the *Qur'an*, the Sunna of the Prophet, the consensus of the scholars (*ijma*) and reasoning by analogy (*qiyās*).²⁷ The judges in this case accepted only two primary sources, *Qur'an* and *Hadith*, while they regarded *ijma*, *qiyās* and *istidlal* (private reasoning, deduction) as secondary sources. If a court resorts to private reasoning it will undoubtedly be guided by the rules of

²⁵ Constitution art. 189 (Pakistan).

²⁶ [1965] Pakistan Law Reports (West Pakistan) 312.

²⁷ *Id.* at 360.

justice, equity, and good conscience, or in terms of the *fiqh*, by the doctrines of *istihsan* and *istislah*, both described by the judges as doctrines of equity. This reasoning reveals an attempt to find an Islamic equivalent of the English formula.²⁸

V. THE REVIVAL OF ISLAMIC LAW IN PAKISTAN

A decisive step toward the revival of Islamic law based on the *Qur'an* was taken by President Mohammad Zia-ul-Haq who presented to the nation *The Introduction of Islamic Laws* on February 10, 1979 (the birthday of the Prophet). This work included measures in the economic field, such as establishing *zakat* as a compulsory tax and introducing interest-free banking. It also revived *hadd* punishment, that is, a fixed punishment for certain offenses established by God in the *Qur'an*. Manufacture, importation or exportation of intoxicants, or their sale or possession are punishable by whipping, imprisonment or a fine. Drinking intoxicating beverages is subject to *hadd* punishment. Unless there is a confession, however, the act of drinking has to be witnessed by two pious and honorable men. Otherwise discretionary punishment (*ta'zir*) shall be applied. This pattern of determining punishment is similar to that for other *hadd* offenses. Theft, for example (aside from petty larceny) is punishable by the amputation of the right hand. Again, however, this *hadd* punishment is applicable only if the act was witnessed by two pious and honorable men. Otherwise, *ta'zir* punishment according to the Penal Code of 1860 shall be imposed.

Under *hadd* rules, adultery is punishable by stoning the offender to death. Fornication is punishable by whipping. Short of a confession, however, *hadd* punishment cannot be applied unless the sex act itself is witnessed by four honorable men; otherwise *ta'zir* punishment involving whipping, imprisonment or a fine will be imposed.

False accusation of adultery (*qadhf*) is also dealt with. Again, either a confession or a statement by two truthful, honorable men that they heard the accusation is needed. If *qadhf* is proven, the offender is subject to whipping. *Qadhf* that is not so proven is subject to *ta'zir* punishment. *Lian* is the oath by a husband that his wife, who is an honorable woman, has committed adultery. The wife counters with an oath that the accusation is false. In this case the marriage will be dissolved. Several other offenses, such as rape, kidnapping, and selling or buying a person for purposes of prostitution, were also regulated.

Procedurally, the pertinent provisions of the 1898 Code of Criminal Procedure continue to apply. Substantively, the requirement of several reliable men as witnesses to the criminal act makes proof of a *hadd*

²⁸ See also H. LIEBESNY, *supra* note 17, at 123-25.

offense very difficult, if not (as in the case of adultery) practically impossible. Thus, the applicability of *ta'zir* punishment is increased. In fact, thus far there have been few reports of the imposition of the *hadd* punishment of amputation on a person convicted of theft.

In addition to deciding questions of *hadd* and *ta'zir*, the Constitution Amendment Order of 1979 conferred a new type of jurisdiction on the high courts; namely to decide upon petition whether, how far, and in what respect, the existing laws or any of their provisions were repugnant to the *Qur'an* and Sunna. This power of the courts effectively curtailed legislative power. The high courts, however, being overburdened, could not cope with the new duties. The result was the creation of a Federal Shariat Court in May 1980, which, since 1981, has consisted of three judges selected from the high courts, three *'ulama* and a chairman with the status of a Supreme Court Justice. All judgments, whether subject to *hadd* or *ta'zir* punishment, may be appealed to the Federal Shariat Court if the sentence of the trial court was at least two years imprisonment. The Shariat Court may, on its own motion, increase or decrease the sentence. A final appeal lies to the Shariat Bench of the Supreme Court.

The Federal Shariat Court also has the power to judicially review laws to ascertain that they are not repugnant to the *Qur'an* and the Sunna of the Prophet. Such a review can be initiated by the Court on its own motion.

The reforms of Zia-ul-Haq as President of Pakistan have been superimposed upon and interwoven with a legal system which was essentially based on codes prepared under British rule, and on precedents which deviated in many respects from the decisions of the Privy Council, although occasionally looking to Privy Council decisions for guidance. In the Federal Shariat Court, judges, many of whom have had little judicial experience before being appointed, were trained mainly in secular law but were sitting with *'ulama*, whose background was primarily in Islamic law. Arrangements, however, were made to give young lawyers a more extensive training in Islamic law at the Islamic University of Islamabad. In August 1984 a bill was discussed in a cabinet meeting concerning the establishment of *Qazis* courts and the draft of a law on evidence. The latter was designed to bring the law of evidence into conformity with the injunctions of the *Qur'an* and the Sunna. The cabinet approved in principle the draft ordinance on the establishment of *Qazis* courts in Pakistan. A government spokesman stated that the process of selecting persons qualified to act as *qazis* would be initiated immediately.²⁹ While the *qazis* courts have now been established, the high courts still function in certain types of cases.

²⁹ The form *qazi* is generally used in the subcontinent. On the process of establishing *qazis* courts and the pertinent cabinet discussion, see generally Pakistan Times, Overseas Weekly, Aug. 12, 1984.

VI. ISLAMIC LAW IN BANGLADESH

The partition of India in 1947 resulted in the establishment of Pakistan under the leadership of Muhammad Ali Jinnah, long an advocate of a separate Muslim state in the subcontinent. The new state consisted of two sections, West Pakistan and, separated from it by 1000 miles of Indian territory and cultural and linguistic differences more marked than those existing within West Pakistan, East Pakistan. The political power was concentrated in West Pakistan, but East Pakistan produced jute, Pakistan's leading cash crop. Apparently much of the processing of jute took place in West Pakistan, which also had superior port facilities. Also, at least some of the high officials administering in East Pakistan came from West Pakistan, with the army largely composed of West Pakistanis.

When Bangladesh, with Indian help, became independent in 1971 as a result of the Indo-Pakistani war, the government of Sheikh Mujibur Rahman enacted a Constitution in 1972 which proclaimed secularism as one of the founding principles of state policy. The Constitution disallowed state favor of any particular religion and explicitly proscribed political action by religious organizations. Islamic political parties were banned.³⁰

Mujibur Rahman's government was overthrown in 1975 by a military coup d'état; the role of Islamic fundamentalists in this coup is uncertain. Leaders of the coup proclaimed an Islamic Republic of Bangladesh on the radio, but the official title of the country has remained Republic of Bangladesh. The example of Bangladesh would seem to indicate that Jinnah's concept of a unified Islamic state in the subcontinent could not be realized.

VII. NATION STATES AND LINE BOUNDARIES IN THE MIDDLE EAST

The West, mainly through its colonial policy, introduced to the Islamic world the idea of the basically secular, territorial nation-state, which largely follows what is regarded as its own best interest. Neither the secular idea of Arab unity nor the religious idea of Islamic unity has had any lasting success in unifying the existing nation-states. A strong indication that the idea of the nation-state was unfamiliar, at least in the more remote parts of the Arab world, has been the use of the word *jins* (from the Latin *gens*) for state in Oman. This word appears in the treaty of 1833 between the United States and Muscat and is still used in the Omani citizenship law of 1983.

The idea of line boundaries is another concept introduced in the Arabian Peninsula by the West. In a region which consists largely of featureless desert, line boundaries have had little meaning. At the

³⁰ See Bertocci, *Bangladesh: Composite Cultural Identity and Modernization in a Muslim Majority State* in CHANGE AND THE MUSLIM WORLD 75-85 (1981).

Conference of Uqair in 1922 between the British acting for Kuwait and the Saudis, which was held to establish line boundaries, Ibn Saud was more interested in which tribes would owe him allegiance than in lines drawn on a map. Only when oil exploration showed that geological features could make the difference between a well producing a great deal of high quality oil and a dry hole did the rulers of the Arabian Peninsula fully grasp the significance of line boundaries.³¹

VIII. CONCLUSION

The British first established an influential position in India through the East India Company which began to function as a trading company on the basis of a charter by Queen Elizabeth I. By wresting more and more power from the Mughal rulers, however, the Company gradually became dominant in the country. The judges in the early period were not professional lawyers, but employees of the Company who had the interest of the Company foremost in mind. The review of the judicial decisions by Company lawyers in London had little practical value since it did not change the decision made in the field.

In 1833, the legal situation was changed greatly when the Privy Council lost its jurisdictional powers in England, but retained jurisdiction over appeals from British possessions overseas. The Crown had assumed control over India in 1858 and, in 1871, Parliament authorized the Crown to appoint to the Privy Council four paid members from among the judges of the superior courts in India. Some of these Indian judges were outstanding Muslim lawyers, such as Ameer Ali and Syed Mahmood. Each of them wrote the Privy Council's opinion in a number of cases.

The use of precedent was foreign to classical Islamic law, as was the concept of *res judicata*. Under British rule, precedents began to play an important role. This has remained the case in Pakistan, where according to the Constitution of 1973, Supreme Court decisions are binding on the lower courts. The same is true for high court decisions in their area of jurisdiction, which bind the lower courts if there is no applicable Supreme Court decision. Like the Privy Council before it, the Supreme Court is not bound by its own decisions.

British-drafted codes were introduced in India in the second half of the nineteenth century, the most prominent among them being the Indian Penal Code of 1860. The provisions of the codes are frequently rather brief and general, although large amounts of case law has developed interpreting the code provisions to meet the needs of the actual situations encountered in practice. Codes, however, were not enacted until long after

³¹ See Liebesny, *Comment* in MIDDLE EAST FOCUS: THE PERSIAN GULF, TWENTIETH ANNUAL NEAR EAST CONFERENCE 92-94 (C. Young ed. 1968).

British judges had begun to replace the largely legally untrained employees of the East India Company. The judges therefore had to find guidance for their decisions if the parties' usual sources of law—statutes, precedents or written sources of the personal law—were silent. In these instances the concepts of justice, equity, and good conscience were used as a residual source of law; reliance on these concepts was widely interpreted as equating the application of English law. In recent years the Pakistani courts have gone beyond the use of English principles and have explored, in addition to Islamic law, other sources such as American writings and court decisions, particularly where constitutional questions were involved.

A major change in the legal system of Pakistan was brought about by the revival in 1979 of *hadd* punishment for various crimes as prescribed in the *Qur'an* and Sunna. The harshness of these punishments is greatly mitigated by the fact that in the absence of a confession by the accused, the offense itself must have been witnessed by two or, in the case of adultery, four honorable men. This requirement of witnesses to the offense usually raises practical difficulties and *ta'zir* punishment has to be applied. The Federal Shariat Court, consisting of three secular judges selected from the high courts, three *'ulama*, and a chairman with the status of a Supreme Court Justice, has very broad powers, including appellate jurisdiction in all cases where the trial judge imposed a sentence of at least two years imprisonment. The Federal Shariat Court may, on its own motion, either decrease or increase the sentence. Since this court can act on its own motion, the prosecution and the defense attorneys do not appear to play the important role they usually have in an adversarial procedure. The Federal Shariat Court can, again on its own motion, review laws to ascertain that they are not repugnant to the *Qur'an* or the Sunna of the Prophet.

Qazi courts have now been reestablished in important localities, including the capital, Islamabad. The secular courts, however, apparently continue to function, at least at the high court level.

