ISLAMISATION AND MODERNISATION WITHIN THE UAE PENAL LAW: SHARI'À IN THE MODERN ERA*

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INTRODUCTION

In so far as the fabric of the Muslim world and its society remained essentially the same for over a millennium, the Shari'À, by following the precepts of "Taqlid", was more than able to accommodate itself to any sort of development that the passage of time might produce. However, since the middle of the nineteenth century, the social and political conditions of the Muslim world have been dramatically changing because of the increasing influence of Western civilisation and its secular concepts of state and society, both considered incompatible with the tradition of Islam.

The adoption of the concept of the modern nation-state and its consideration as the sole source of legal authority together testify to the profound impact of Western civilisation on Muslim perceptions of state and legal authority. Indeed, contrary to orthodox Islamic doctrine, most Muslims have come to think of the law as something produced by state agencies.

Consequently, when modernisation of the Muslim legal system was deemed necessary due to the irreconcilable conflict between on the one hand the needs of Muslim society inspired by Western values, and traditional Shari'À law on the other, the Shari'À was replaced by governmental enactments in the form of codes and statues based on Western laws. Even in personal status law, where modernisation took the form of adapting Shari'À to fit modern requirements, Muslims did not refrain from tampering with Shari'À doctrine so as to promulgate its rules through governmental enactments; such a course of action effectively constitutes the secularisation of traditional Shari'À law.

Thus, within the process of modernising the Muslim legal system two distinct approaches were followed: one concerned "Westernisation" and the idea of adopting Western laws. The other involved adapting Shari'À to modern

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conditions. The term "the Westernisation of law" will be used in this article and others to refer to the former approach. The latter will be referred to as "the adaptation of Shari'a".

The impact of Western civilisation on the Muslim people's concept of state and authority is evidence even today in the so-called "Islamic resurgence" and in the Islamisation programmes of law (see as a rejection of the trend towards Westernisation in the legal sphere); for instance, Muslims supporting Islamisation policies consider Islamic law to be a product of the state, rather than of the traditional institutions of Muslim jurisprudence.

It should be noted here that "the Islamisation of law" is an English phrase in use in some Muslim countries; it refers to the official programme of replacing laws of Western origin with laws based on Islamic rules and norms or with laws compatible with Shari'a requirements. The term will be used in this and following articles to refer to various agenda of reform that have been officially adopted in the process of making laws more Islamic.

This article studies the evolution of Shari'a in modern life. The aim is to give a general background to the tension between Shari'a and Western law and the impact of this tension on the Muslim legal systems. The article is divided into three parts. The first deals with the process of abandoning Shari'a and the replacement of its rules with laws of Western origin. The second part concerns the process of adapting the Shari'a personal status law to fit modern requirements. The third part focuses on the Islamisation of law programmes in the Muslim world.

The abandonment of Shari'a and the Westernisation of the law

The changes in the legal system which started around the middle of the last century and affected the legal system of most Middle Eastern Muslim countries were indeed revolutionary. Shari'a was abandoned and its rules in most legal areas were replaced by laws of Western origin. The underlying cause of such a radical change was suggested by Anderson when he said:

But, whatever the arguments, the fact remains that almost completely to exclude the Shari'a from so many spheres of life, and to replace it by codes of an alien inspiration, might well seem the most drastic expedient to which a Moslem government could possibly resort. Until recently, however, most Moslems appear to have taken a somewhat different view, for it seemed preferable to them to keep the Shari'a intact and inviolate, as the perfect law which had, they believed, been applied in the glorious past and would be applied again, no doubt, in the golden Age to come - even if this meant that it must today be quietly displaced in practice by another law more suited to the exigencies of modern life - rather than to allow any profane meddling with its immutable provisions.¹