

## Modern Trends in Islamic Law: Notes on J.N.D. Anderson's Life and Thought

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### ملخص

كثير ما يقال بأن "الإسلام هو دين أحكام"، وبالانطلاق من هذه الحقيقة، نفهم أهمية الأحكام والتي أصبحت من أحد اهتمامات الدين الإسلامي، إذا لم نقل أهمها، وتعتبر سمة مهمة في تعاليم الإسلام، لم يبالغ جارلس. جي. ادامس عندما قال "لا يوجد هناك موضوع مهم لدى دارس الدين الإسلامي أهم من موضوع "الأحكام" الإسلامية". ولهذا السبب، فدراسة الأحكام الإسلامية أخذت موقعا مهما لدى الثقافات الغربية حول الإسلام.

إن تطور الأحكام الإسلامية في رأى عدد من المثقفين الغربيين مر بثلاث مراحل (فترات) رئيسية: فترة التطور/التقليدية والفترة المتوسطة والفترة الحديثة (المعاصرة). كثير من المثقفين المذكورين أعلاه عاصروا تطور الأحكام الإسلامية في الفترتين الأوليتين. ونذكر بعض الأسماء على سبيل المثال لا الحصر Ignaz Goldziher, Christiaan Snouck Hurgronje, Joseph Schacht, dan Noel James Coulson، ونرى دونهم J.N.D.Anderson. ولو أن بعض المثقفين المذكورين أعلاه عاصروا الأحكام الإسلامية في الفترة الحديثة، إلا أن Anderson ركز اهتمامه بصورة خاصة على الأحكام الإسلامية في الفترة الحديثة. وبالاعتماد على الكتابات التي نشرها، Anderson توضح هذه المقالة تاريخ تطور الأحكام الإسلامية في الفترة الحديثة. وبصورة أدق، هذه المقالة تهدف إلى دراسة الصفات (السمات) الأساسية للتجديد الإسلامي ولذلك فإنها تشمل على عرض لخلفية الموضوع والطرق والنتائج وقضايا أخرى وتوقعات التجديد المذكور في المرحلة القادمة.

## Abstrak

Sering dikatakan bahwa "Islam adalah agama hukum"<sup>1</sup> Dengan adanya fakta ini, bisa dipahami betapa hukum juga menjadi perhatian dalam agama Islam, bahkan hal yang utama. Hukum merupakan aspek penting dalam ajaran Islam. Charles J. Adams tidak berlebihan saat menyatakan: "Tidak ada subyek yang lebih penting bagi pelajar Islam selain dari apa yang biasa disebut "hukum" Islam."<sup>2</sup> Maka dari itu, studi mengenai hukum Islam menempati posisi yang sangat penting di dalam ilmu pengetahuan Barat tentang Islam.

Beberapa sarjana Barat berpendapat bahwa perkembangan hukum Islam secara historis terbagi dalam tiga periode utama: periode klasik, periode pertengahan, dan periode modern.<sup>3</sup> Banyak dari sarjana-sarjana tersebut telah membahas hukum Islam pada dua periode pertama. Nama-nama seperti Ignaz Goldzieser, Christian Snouck Hurgronje, Joseph Schacht, dan Noel James Coulson, untuk menyebut beberapa nama, adalah yang paling terkenal. Hal ini berbeda dengan J.N.D. Anderson. Meskipun beberapa di antara mereka yang telah disebut di atas telah membahas hukum Islam pada periode modern, Anderson membatasi perhatiannya secara khusus terhadap hukum Islam selama periode modern. Dengan mendasarkan diri utamanya atas hasil kerja Anderson, makalah ini ditujukan agar bisa memahami perkembangan historis hukum Islam pada periode modern. Konkritnya, makalah ini bertujuan untuk menelaah sifat dasar reformasi hukum Islam dan karenanya mencakup pembahasan mengenai latar belakang, metode, akibat-akibat, dan permasalahan-permasalahan serta prospek reformasi tersebut.

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<sup>1</sup>G.H. Bousquet and Joseph Schacht, eds. *Selected Works of C. Snouck Hurgronje* (Leiden: E.J. Brill, 1957), 48. See also Charles J. Adams, "The Islamic Religious Tradition," in *Religion and Man: An Introduction*, ed. W. Richard Comstock (New York: Harper & Row Publishers, 1971), 577.

<sup>2</sup>Charles J. Adams, ed. *A Reader's Guide to the Great Religions* (New York: The Free Press, 1965), 316.

<sup>3</sup>See, for example, Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1990), 5-7. See also Bassan Tibi, *Islam and the Cultural Accommodation of Social Change*, tran. Clare Krojzl (Oxford: Westview Press, 1991), 64-5.

### A. J.N.D. Anderson and His Works

James Norman Dalrymple Anderson was born in Aldeburgh, Suffolk, England on 29 September 1908.<sup>4</sup> He had his early education at Lawrence College, Ransgate, and continued his study at the Trinity College, Cambridge, from where he obtained his B.A. in 1930 and LLB. in 1931. He finished his M.A. in 1934, MBE. in 1943, OBL (mil) in 1945, and LLD. in 1955. He received an honorary FBA. in 1970, DD. St Andrews in 1974, and DC. in 1974.<sup>5</sup>

Anderson has devoted his career to the study of Islamic law. He was a lecturer in Islamic law in the School of oriental and African Studies, and for three years, 1951–1953, reader in Oriental laws in the University of London. From 1953 to 1971 he was head of the Department of law of the School of Oriental and African Studies, University of London. He was also the chairman of U.K. National Committee on Comparative Law in 1957–1959 and the dean of Faculty of Law, University of London 1965–1969. In 1968–1969, he was the President of Social and Public Teachers of Law. In addition, Anderson was a visiting professor in many Universities, including Princeton University and New York University Law School in 1958, and Harvard Law School in 1966.<sup>6</sup> In March 1978, he gave an honorary lecture in Liberty, Law and Justice at the University of Bristol.<sup>7</sup>

Given Anderson's life long devotion to the study of Islamic law, it is quite understandable that he has universally been acclaimed as "one of the leading English-speaking authorities on Islamic law."<sup>8</sup> Anderson himself has simply said: "It is Islamic law which has been the subject of my own

<sup>4</sup>His name is some time written as Norman Anderson or Sir Norman Anderson (see Anderson, *Law Reform in the Muslim World*, London: The Athlone Press, 1976; idem "Islamic Law in Africa," *Journal of African Law* 21, 1977: 137, 168); Farhat J. Ziadeh, review of *Law Reform in the Muslim World*, by J.N.D. Anderson, *The Muslim World* 69 (1979): 210.

<sup>5</sup>Ann Evory, ed. *Contemporary Author IV* (Michigan: Gale Research Company), 24. See also *Who's Who* 1982 (London: A&C Black, 1992), 36.

<sup>6</sup>*Who's Who* 1992, 36. See also Hilda Kuper and Leo Kuper, eds. *African Law: Adaptation and Development* (Berkeley: University of California Press, 1965), viii.

<sup>7</sup>J.N.D. Anderson, *Liberty, Law and Justice* (London: Steven & Son, 1978), 18.

<sup>8</sup>Russell D. Niles, Foreword to *Islamic Law in the Modern World*, by J.N.D. Anderson (New York: New York University Press, 1959), v. See also Maulana Syed Hamid Ali, "Changes in Muslim Personal Law: Scope and Procedure," *Islamic Thought* 14 (1970): 1.

specialist study.”<sup>9</sup>

Anderson’s interest took him to several Muslim countries, particularly in Africa. In 1950-1951, he visited Tanganyika, Nyasaland, Zanzibar, Kenya, Uganda, British Somaliland, the Colony and Protectorate of Aden, Nigeria, the Gold Coast (Ghana), Gambia, and Sierra Leone.<sup>10</sup> Other areas visited by Anderson include Egypt, Syria, Tunisia, India, and Pakistan.

Anderson’s writings in the field of Islamic law are quite numerous. These discuss various aspects of the development of Islamic law in the modern period. While his scholarly contributions are all important in their own right,<sup>11</sup> Anderson’s major thesis is best expressed in his two monumental works, *Islamic law in the Modern World* and *Law Reform in the Muslim World*. Of the two, the latter seems to be a summary of all his previous works. Broadly speaking, it could be said that Anderson’s work may be divided into two categories: first, it deals with the development of Islamic law in the modern period in a general fashion; second, it concerns the development of Islamic law in some of its more specific aspects, such as personal status, inheritance, law and custom, law of marriage, law of divorce, or in specific areas such as Africa, India, Egypt, Iran, Iraq, and Pakistan.

Moreover, it should be noted here that Anderson is more concerned with the practical aspect of Islamic law than with jurisprudence, or the theoretical aspect.<sup>12</sup> Anderson has confidently affirmed that the development of Islamic law during the modern period is of importance for several reasons: first, it shows Islamic law to be a living system of law, capable of at least partial adaptation to modern society. Secondly, it constitutes a mirror of the course of social change in the independent Arab and Muslim countries. Thirdly, it provides “a most valuable side-light on the progress of modernism in Islam ....”<sup>13</sup> The general purpose of his study on Islamic law is an

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<sup>9</sup> J.N.D. Anderson, “The Role of Personal Status in Social Development in Islamic Countries,” *Comparative Studies in Society and History* 13 (1971): 16.

<sup>10</sup> Anderson, *Islamic Law*, xix.

<sup>11</sup> He wrote no less than 49 articles in various journals and in various books edited by either himself or other scholars, and wrote no less than 10 books.

<sup>12</sup> Anderson, *Islamic Law*, xix.

<sup>13</sup> J.N.D. Anderson, “Recent Developments in Shari’ah Law” (I), *The Muslim World* 40 (1950): 224.

Herbert J. Leibesny points out that “Law has ... become in most Islamic countries a conscious instrument of modernization” (see his “Stability and Change in Islamic Law,” *Middle East Journal* 21, 1967: 34).

effort to trace "the attempts which had been made during the last century or so to bring the law more into line with the facts of modern life, and...the fascinating problem of how a theocratically immutable law can in fact be amended in practice."<sup>14</sup>

## B. Conception of Law in Islam

Like some other Western scholars, Anderson makes a clear distinction between the concept of law as commonly understood in Western society and that in Islam.<sup>15</sup> Anderson shares this same view with those who maintain that law in any society plays a decisive role. Law is "the distilled essence of the civilization of people and ...it reflects that people's soul more clearly than any other organism."<sup>16</sup> The primary purpose of any law is to make social life possible. In addition, law, "is merely as an idea in human minds."<sup>17</sup> Accordingly, law "derives its authority from the reason and will of man, and his moral nature."<sup>18</sup> More than this, law reflects the values current in a society at any given time. Society has its starting point in the formulation of a legal code for its acts and activities. Opinions regarding legal or illegal acts and activities change, sometimes diametrically, as values change. When this situation takes place law is altered accordingly.<sup>19</sup>

The Muslim conception of law,<sup>20</sup> according to Anderson, is quite different. It has frequently been said that Islamic law is basically and essentially divine.<sup>21</sup> Accordingly, Allah is the only source of Islamic law, and hu-

<sup>14</sup> Anderson, *Islamic Law*, 16

<sup>15</sup> Anderson, *Islamic Law*, 2, 4, 51. See also J.N.D. Anderson and N.J. Coulson, "The Muslim Ruler and Contractual Obligation," *New York University Law Review* 33 (1958): 928-9.

<sup>16</sup> Anderson, *Islamic Law*, 17.

<sup>17</sup> Ibid., 8-9.

<sup>18</sup> D. de Santillana, "Law and Society," in *The Legacy of Islam*, First edition, eds. Sir Thomas Arnold and Alfred Guillaume (Oxford: Clarendon Press, 1931), 288.

<sup>19</sup> Anderson, *Islamic Law*, 2-3. See also M. Mustafa Azami, *On Schacht's Origins of Muhammadan Jurisprudence* (Saudi Arabia: King Saud University Press, 1985), 5; Santillana, "Law and Society," 306-7.

<sup>20</sup> There are many terms used to describe law in Islam, some of them being: Islamic law, Muhammadan law, Muslim law, Divine law, Sacred law, Islamic religious law, Religious law, Shari'ah.

<sup>21</sup> J.N.D. Anderson, "Law as a Social Force in Islamic Culture and History," *Bulletin of the School of Oriental and African Studies* 20 (1957): 15. See also idem, "The Adaptation of Muslim Law in Sub-Sahara Africa," In *African Law: Adaptation and Development*, 149.

man authority has no power to legislate.<sup>22</sup> Islamic law is the will of Allah, revealed of the Qur'an to humankind through His Messenger, Muhammad, and it is regarded as a divinely ordained system which controls the Muslim society and not vice-versa.<sup>23</sup> Therefore, the doctrine that Allah possesses all legislative power and that His law is to have supreme control over all aspects of human life is clearly established.<sup>24</sup>

It should be clear then that law in Islam is different from that understood in Western society. It has often been pointed out that Western law "is essentially secular, whereas Islamic law is essentially religious."<sup>25</sup> In addition, Islamic law covers not only what is considered law according to Western concept but also all aspects of human life,<sup>26</sup> which are classified into five categories of commanded, recommended, left legally indifferent, reprehensible, or forbidden by Allah himself.<sup>27</sup> Given this fact, it is reasonable, according to Anderson, that the position of Islamic law in Islamic teachings has great importance. Its important position has been regarded as without parallel in Islam, for the Islamic civilization was "unequally based on reli-

<sup>22</sup>J.N.D. Anderson, "The Significance of Islamic Law in the World Today," *The American Journal of Comparative Law* 9 (1960): 188. See also idem, *Law Reform*, 38; idem, "Shari'ah Today," *Journal of Comparative Legislation and International Law* 31 (1949): 17; idem, "Role of Personal Status," 17; S.V. Fitzgerald, "The Alleged Debt of Islamic to Roman Law," *Law Quarterly Review* 67 (1951): 82; Gustave E. von Grunebaum, *Medieval Islam: A Study in Cultural Orientation* (Chicago: The University of Chicago Press, 1947), 144; Mohamed Al-Nowaihi, "Religion and Modernization: The General Problem and Islamic Responses," in *Modernization: The Humanist Response to Its Promise and Problems*, ed. Richard L. Rubenstein (Washington: Paragon House, 1982), 321.

<sup>23</sup>J.N.D. Anderson and N.J. Coulson, "Modernization: Islamic Law," in *Northern Africa: Islam and Modernization*, ed. M. Brett (London: Frank Cass, 1973), 73-4. See also idem, "Muslim Ruler," 928; idem, "Shari'ah Today," 31; N.J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1990), 1-2; idem, "The Concept of Progress and Islamic Law," in *Religion and Progress in Modern Asia*, ed. Robert N. Bellah (New York: The Free Press, 1965), 75; Majid Khadduri, "Nature and Sources of Islamic Law," *The George Washington Law Review* 22 (1953-4): 6; Ali, "Muslim Personal Law," 2-3.

<sup>24</sup>Anderson, *Islamic Law*, 5-7. See also idem, "Law as Social Force," 17; idem, "Role of Personal Status," 17; Coulson, *History*, 20; idem, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: The University of Chicago Press, 1969), 1-20.

<sup>25</sup>Anderson, *Islamic Law*, 2. See also Ali, "Muslim Personal Law," 3.

<sup>26</sup>J.N.D. Anderson, "Modern Trends in Islam: Legal Reform and Modernization in the Middle East," *International and Comparative Law Quarterly* 20 (1971): 5. See also idem, "Law as Social Force," 13-4; idem, *Islamic Law*, ix, 5, 17, 38; idem "Law Reform in the Middle East," *International Affairs* 32 (1956): 43; idem, "Shari'ah Today," 18; Ali, "Muslim Personal Law," 2.

<sup>27</sup>Anderson, "Law as Social Force," 14. See also idem, *Islamic Law*, 3.

gion, and the religion of Islam has always accorded a pre-eminent place to law.<sup>28</sup> As Anderson emphasizes elsewhere: "It is, indeed, impossible to understand the Muslim mind, Muslim society, Muslim ideals, politics, and reactions, without some knowledge of that of law which, in theory at least, still molds and pervades them all."<sup>29</sup> Law in Islam, says Anderson, always goes hand in hand with theology as the twin sciences since the early history of Islam.<sup>30</sup> Theology deals with that which a Muslim must believe, and law prescribes what a Muslim should or should not do.<sup>31</sup> Anderson also emphasizes that "law has normally taken precedence over theology."<sup>32</sup> One important reason for this is that "it is for more profitable and seemly to concentrate on the study of what may be known or deduced of God's commands regarding how man should behave than to speculate on the essentially inscrutable mystery of His nature and attributes."<sup>33</sup> Consequently, the law "has constituted the basic science of Islam."<sup>34</sup>

Anderson has also discussed the early historical development of Islamic Law,<sup>35</sup> thought very briefly and clearly on the basis of the works of previous scholars, particularly those of Joseph Schacht.<sup>36</sup> This discussion seems to be intended to give a general picture of the early history of Islamic

<sup>28</sup> Anderson, "Law as a Social Force," 13; See also idem, *Law Reform*, 1; Liebesny, "Stability and Change," 16.

<sup>29</sup> Anderson, "The Significance of Islamic Law," 187. See also idem, "Modern Trends," 1. In a different sentence but has a same meaning, see H.A.R. Gibb, *Mohammedanism*, second edition (New York: Oxford University Press, 1962), 106; Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1986), 1.

<sup>30</sup> Anderson, "Modern Trends," 1. See also idem, *Islamic Law*, 19; idem "Reform in the Middle East," 43; idem, "The Significance of Islamic Law," 187; idem, "Recent Development" (I), 244.

<sup>31</sup> Anderson, *Islamic Law*, 19. See also idem, "Reform in the Middle East," 43; idem, "Recent Development" (II), 34; idem, "The Significance of Islamic Law," 187; idem, *Law Reform*, 2-3.

<sup>32</sup> Anderson, "Law as a Social Force," 1. See also idem, "Modern Trends," 1; idem, "The Significance of Islamic Law," 187.

<sup>33</sup> Anderson, "Law as a Social Force," 13. See also idem, *Modern Trends*, 1.

<sup>34</sup> Anderson, "Law as a Social Force," 20.

<sup>35</sup> Anderson, *Law Reform*, 3-10. See also idem, "Law as a Social Force," 15-21; idem, *Islamic Law*, 10-6; idem, "Recent Development" (I), 245-54, idem, "Recent Development in Shari'ah Law in Sudan," *Sudan Notes and Records* 31 (1950): 82-3; idem, "Reform in the Middle East," 43-4; idem, "Shari'ah Today," 18-9.<sup>1</sup>

<sup>36</sup> Anderson refers to the following works of Schacht: *An Introduction to Islamic Law*, *The Origins of Muhammadan Jurisprudence*, "Pre-Islamic Background and Early Development of Jurisprudence," "The School of Law and Later Development of Jurispru

law in order to present a more clear understanding of the development of Islamic law in the modern period. For, according to Anderson, the classical theory of Islamic law still "underlies to historical thinking of modern Muslim."<sup>37</sup> One may also argue that the discussion of Islamic law in the modern period cannot be divorced from the study of earlier developments. For example, there is no doubt that one should look at, among others, the history of the school of the Maliki, Hanafi, Shafi'i, and Hambali, in order to understand the diverse and divergent opinions on various legal matters in contemporary Muslim society.

### C. The Historical Background of the Reform

As has generally been pointed out, the historical development of Islamic law is divided into three main periods. The first period was, as historians call it, the formative period, during which Islamic law was very flexible and adapted itself easily to the existing law and custom of societies. This period has been seen as the great creative period of Islamic law.<sup>38</sup> The second period dates from the beginning of the third/ninth (some say fourth/tenth) century, and was the period during which Islamic law was supposedly finalized by the orthodox school of law.<sup>39</sup> This situation has said to have led to inflexibility, and Islamic law "became increasingly rigid and ststic,"<sup>40</sup> which, in the long run, had the undesired result known as the *insidad bab al-ijtihad*,

dence," in *Law in the Middle East: Origin and Development of Islamic Law*, eds. Majid Khadduri and Hebert J. Liebesny.

<sup>37</sup> Anderson, "Law as a Socisal Force," 17.

<sup>38</sup> Herbert J. Liebesny, "Religious Law and Westernization in Moslem Near East," *The American Journal of Comparative Law* 2 (1953): 202.

<sup>39</sup> Anderson, "Modernization," 73. See also idem, "Reform in Middle East," 44; idem "Shari'ah Today," 19; Liebesny, "Religious Law and Westernization," 495; Al-Nowaihi, "Islamic Responses," 322-3.

<sup>40</sup> Anderson, "Law as a Social Force," 16. See also Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1959), 137; idem, "The School of Law and Later Development of Jurisprudence," in *Law in the Middle East: Origins and Development of Islamic Law*, eds. Majid Khadduri and Herbert J. Liebesny (Washington, D.C.: The Middle East Institute, 1955): 76-7; idem, "The Law," in *Unity and Variety in Muslim Civilization*, ed. G.E. Gustave von Grunebaum (Chicago: University of Chicago Press, 1955), 77; Majid Khadduri, "From Religious to National Law," in *Mid-East: World Centre, Yesterday, Today, and Tomorrow*, ed. Ruth Nanda Anshem (New York: Harper and Brothers Publisher, 1956), 224; idem, "Nature and Sources of Islamic Law," *The George Washington Law Review* 22 (1953-4): 19; Herbert J. Liebesny, "Judical System in the Near and Middle East: Evolutionary Development and Islamic Revival," *Middle East Journal* 37 (1983): 202-3.

the closing of the gate of *ijtihad*.<sup>41</sup> This era ended supposedly at the close of the thirteenth/nineteenth century, when the Islamic nation-state began to emerge, along with a growing consciousness of the need for law reform.<sup>42</sup> This, the third stage of development, has come about because modern Muslim countries have felt themselves unable to deal with new legal problems with the aids of classical Islamic law alone.<sup>43</sup> Because of historical conditions, the classical legal doctrines "are no longer true in modern times and are therefore obviously no longer appropriate to new legal requirements."<sup>44</sup> Anderson could be correct when he said that during the last century various provisions of Islamic law, even in the sphere of family law, have been modified, and it has been brought more into line with modern conditions and conceptions.<sup>45</sup>

Moreover, one has to take into account that the third period emerged when the influence of the Western civilization on the East began to grow considerably, especially after the French Revolution.<sup>46</sup> As a result, many as-

<sup>41</sup> Anderson, "Modern Trends" 14. See also idem, "Law as a Social Force," 16; idem, "Shari'ah Today," 19; idem, "Role of Personal Status," 21; Schacht, *Introduction*, 70-1; idem, "Theology and Law in Islam," in *Theology and Law in Islam*, ed. G.E. von Grunebaum (Weisbaden: Otto Harrassowitz, 1971), 20-1; idem, "School of Law," 73-4; idem, "Law and Justice," in *The Cambridge History of Islam*, vol. 2, eds. P.M. Holt, Ann K.S. Lambton, and Bernard Lewis (Cambridge: Cambridge University Press, 1970), 563; idem, "The Law," 77-8; Liebesny, "Religious Law and Westernization," 495; idem, "Comparative Legal History: Its Role in the Analysis of Islamic and Modern Near Eastern Legal Institutions," *The American Journal of Comparative Law* 20 (1972): 38-52; idem, "Stability and Change," 18-9; Khadduri, "Religious to National Law," 224; idem "Nature and Sources," 19. According to Subhi Mahmassani, the reason for the backwardness of Islamic law are: 1. Closing of the door of *ijtihad* in Islamic jurisprudence and neglect of education. 2. Adherence to doubtful texts. 3. Adherence to formalism and accessories. 4. Sectarianism. 5. Neglect into the effective cause of laws. 6. Association of religion with ways of daily life (see his "Muslim: Decadence and Renaissance, Adaptation of Islamic Jurisprudence to Modern Social Needs," *The Muslim World* 44, 1954: 187; and his "Adaptation of Islamic Jurisprudence to Modern Social Needs," in *Islam in Transition: Muslim Perspectives*, eds. John J. Donohue and John L. Esposito, Oxford: Oxford University Press, 1982: 181-7).

<sup>42</sup> Anderson, *Law Reform*, 14. See also idem, "Role of Personal Status," 21.

<sup>43</sup> Anderson, *Islamic Law*, 23-4. See also Tibi, *Islam*, 65.

<sup>44</sup> Tibi, *Islam*, 65.

<sup>45</sup> Anderson, "Reform in the Middle East," 43. See also idem, "Modern Trends," 1.

<sup>46</sup> Anderson, *Law Reform*, 15. See also idem, "The Eclipse of the Patriarchal Family in Contemporary Islamic Law," in *Family Law in Asia and Africa*, ed. J.N.D. Anderson (London: George Allen and Unwin, 1969), 233; James L. Barton, "The Impact and Influence of Western Civilization on the Islamic World," in *The Moslem World of Today*, ed.

pects of the Islamic teaching came to be questioned. One of the most serious questions that was, and continues to be, addressed was that of the role of Islamic law,<sup>47</sup> including such areas as family law—the law of marriage and the status of women, to mention just a couple.<sup>48</sup> Anderson firmly believes that the impetus and the inspiration of the reform movement came from outside of Muslim society, particularly “from Christian mission, and from the general impact of Western life and standards.”<sup>49</sup> This period has not yet come to an end.<sup>50</sup>

It goes without saying that the Ottoman Empire has been seen as the first Muslim polity which tried to modernize its society through (for the most part) adopting Western ideas, including the Western legal system.<sup>51</sup> This tendency was emphasized by, among others, Reed: “it was a group of Turkish intellectuals, fired by the French Revolution, who in the 19<sup>th</sup> century, sought to Westernize their lands while clinging passionately, if not too logically, to Islam.”<sup>52</sup> This policy, it was hoped by many Turks, would create a strong Turkey,<sup>53</sup> and help to reserve the decline of the Empire which had started

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John R. Mott (London: Islamic Council of Europe, 1975), 217-41; Ali, “Muslim Personal Law,” 7; David Bonderman, “Modernization and Changing Perceptions of Islamic Law,” *Harvard Law Review* 81 (1968): 1170-1, 1177.

<sup>47</sup> Anderson, “Contemporary Islamic Law,” 233. See also Khadduri, “Religious to National Law,” 220; idem, “Secularization and Islamic Law,” in *The Principles of Law Making*, ed. Nazar Ali Shah (Lahore: Meezan Printing Press, 1961), 37; A. Rahman I. Doi, *Shari’ah in the 1500 Century of Hijra: Problems and Prospects* (London: Ta-Ha Publisher, 1981), 8.

<sup>48</sup> After discussing the status of women according to Qur’an, Alfred Guillaume, for example, comes to the conclusion that woman are inferior to men in Islam, and “...the status of women lies the greatest difference between the Muslim and the Christian world” (see his *Islam*, England: Penguin Books, 1954, 71-2).

<sup>49</sup> Anderson, “Contemporary Islamic Law,” 233. Anderson has also pointed out that in the present time there is an indication that Islamic law has to some extent influenced other systems of law such as the Commonwealth legal system in India sub-continent, Zanzibar, and Northern Nigeria (see his “The Impact of Islamic Law on Commonwealth Legal System,” in *International and Comparative Law of the Commonwealth*, ed. Robert R. Wilson, Durham: Duke University Press, 1968: 63-80).

<sup>50</sup> Liebesny, “Stability and Change,” 16.

<sup>51</sup> Anderson, “The Significance of Islamic Law,” 188. See also idem, “Shari’ah Today,” 19; idem, “Adaptation of Muslim Law,” 141; idem, “Recent Development” (II), 34; Liebesny, “Impact of Western law,” 141; idem, “Religious Law and Westernization,” 496; idem, “Stability and Change,” 20-1; Bonderman, “Changing Perception,” 1177.

<sup>52</sup> Howard A. Reed, “Revival of Islam in Secular Turkey,” *Middle East Journal* 8 (1954): 268.

<sup>53</sup> Khadduri, “Religious to National Law,” 228.

already in 1683.<sup>54</sup> The period of the *Tanzimat*, marked by the Decrees *Hatti Sherif of Gulhane* of 1839 and *Hatti Humayun* of 1856, was the era of Ottoman reform,<sup>55</sup> in which the most important efforts of reform "were those effected in the area of law and justice."<sup>56</sup> The first reform of law was effected in the sphere of private law: the Penal Code enacted in 1858, followed in 1861 by the Code of Commercial Procedure, and in 1863 by the Code of Maritime Commerce.<sup>57</sup> It is certainly true, says Anderson, that the impulse of reform in the Ottoman Empire come not from any popular demand but from above, in the interests of administrative efficiency and indifference to foreign opinion.<sup>58</sup> He emphasizes elsewhere: "It was not that ordinary Muslims.... were dissatisfied with the law to which they were subject and began to demand its reform, but that these reforms were imposed on them by the Government."<sup>59</sup>

Besides the case of the Ottoman Empire, Anderson has also discussed the historical background of the reform in some other Muslim countries such as India, Malaysia, Sudan, and in Africa, South of the Sahara.<sup>60</sup> After discussing the major events in those Muslim countries, Anderson finally comes to the view that there are four major reasons that serve as the background for reform: economics, politics, legal, and social.<sup>61</sup>

<sup>54</sup> Geoffrey Lewis, *Turkey*, third edition (Washington: Frederick A. Praeger, 1965), 33.

<sup>55</sup> Anderson, "Law as a Social Force," 24. See also idem, "Modern Trends," 2; Liebesny, "Religious Law and Westernization," 496-7.

<sup>56</sup> Ehud R. Toledano, "The Legislative Process in Ottoman Empire in the Early Tanzimat Period: A Footnote," *International Journal of Turkish Studies* 1 (1979-80): 99. See also Roderick H. Davidson, *Turkey: A Short History*, second edition (Huntingdon: The Eothen Press, 1988), 78.

<sup>57</sup> Anderson, "Modern Trends," 2. See also idem, "Law as a Social Force," 24; idem, "Recent Development" (II), 34; idem, "Adaptation of Muslim Law," 151; idem, "Reform in the Middle East," 44; idem, "The Shari'ah and Civil Law (The Debt Owed by the New Civil Codes of Egypt and Syria to the Shari'ah)," *Islamic Quarterly* 1 (1954): 29; Liebesny, "Stability and Change," 21.

<sup>58</sup> Anderson, "The Significance of Islamic Law," 189. see also idem, "Shari'ah Today," 21; idem, *Law Reform*, 14; idem, "Modern Trends," 3; idem, "Role of Personal Status," 18, 27.

<sup>59</sup> Anderson, *Law Reform*, 15. See also idem, *Islamic Law*, 2.

<sup>60</sup> Anderson, *Law Reform*, 19-32.

<sup>61</sup> Anderson, "Modern Trends," 3-4. See also idem, *Law reform*, 32; idem, *Islamic Law*, 23; idem "Shari'ah Today," 21.

#### D. The Methods of Reform

Dealing with the methods of reform used by the Muslim reformers, Anderson classifies the subject-matter of Islamic law into two general categories: commercial and criminal on the one hand, family law on the other.<sup>62</sup> In the first stage of reform, says Anderson, the reformers addressed their reforms to the sphere of commercial and criminal law only. In this stage Muslim reformers virtually refused to interfere in any way with the provisions of Islamic law itself. Instead, for the most part, "they simply put it on one side in favor of legislation of quite different origin."<sup>63</sup> In the Ottoman Empire, for example, the enactment of the codes mentioned earlier, which were based on the Western particularly the French model, was said to be additional to Islamic law rather than contrary to it.<sup>64</sup> It is interesting to note here that the provisions of Islamic law, particularly in areas other than family law, were never applied in their purity and entirety.<sup>65</sup> During this period, or until about 1915, the reformers felt that no reforms were appropriate to the field of family law. The family law was considered the very heart of Islamic law, it had to be kept essentially Islamic;<sup>66</sup> indeed it was in this sphere that the provisions of Islamic law were most closely based on the Qur'an and the Sunnah of the Prophet.<sup>67</sup>

Since 1915, the situation has changed considerably, and Anderson calls this situation the second stage of the reform. Because of the changing situation, notes Anderson, the reformers felt that reform in the family law became unavoidable.<sup>68</sup> This reform, started by the two imperial Decrees of the Otto-

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<sup>62</sup> Anderson, "The Significance of Islamic Law," 191.

<sup>63</sup> Anderson, *Islamic Law*, 39. See also idem, *Law Reform*, 42, 82.

<sup>64</sup> Anderson, *Islamic Law*, 21. See also idem, "Shari'ah Today," 19; idem, "Role of the Personal Status," 18; idem, "Law as a Social Force," idem, "Modern Trends," 15.

<sup>65</sup> Anderson, *Islamic Law*, 82. See also idem, "Reform in the Middle East," 44; idem, "Law as a Social Force," 21; idem, "The Shari'ah and Civil Law," 29.

<sup>66</sup> Anderson, *Law Reform*, 82. See also idem, *Islamic Law*, 15, 25, 39, 82; idem, "Role of Personal Status," 18-9; idem, "Reform in the Middle East," 45; idem, "The Significance of Islamic Law," 190; Donohue, *Islam in Transition*, 200.

<sup>67</sup> Anderson, *Law Reform*, 38. See also idem, "Modern Trends," 5; idem, *Islamic Law*, 25 - 6, 91;

Liebesny, "Religious Law and Westernization," 492; Majid Khadduri, "Marriage in Islamic Law: The Modernist Viewpoints," *The American Journal of Comparative Law* 26 (1978): 215.

<sup>68</sup> Anderson, *Law Reform*, 82; idem, "Reform in the Middle East," 45. See also idem, "The Significance of Islamic Law," 190; idem, "Modern Trends," 5, 17; idem, "Recent Development" (II), 38; idem "Law as a Social Force," 27; idem, *Islamic Law*, 91.

man Empire enacted in 1915, granted relief to deserted wives, and provided for a dissolution of marriage in circumstances where the husband proved to have a disease which made having a family dangerous.<sup>69</sup> This decree was then followed in 1917 by a more comprehensive reform, the Ottoman law of Family Rights.<sup>70</sup> It should be remembered however that the reform in this second stage was different from that of the first one. Unlike the first stage, in which the reformers derived the reform from alien (Western) source, the reformers were confronted by the acute problem of "how reform could possibly be made in the sacred law itself."<sup>71</sup> In other words, the reformers attempted to base their reforms of the family law exclusively on "the rich soil of their own cultural heritage," particularly on principles drawn from Islamic law, instead of deriving them from alien (Western) sources.<sup>72</sup>

In this second stage, then, the reformers were compelled to search for methods in which Islamic law could be so interpreted, modified, and applied as to meet the needs of modern society. The following methods of reforms are, according to Anderson, widely used in contemporary Muslim societies.<sup>73</sup>

#### 1. The Procedural expedient.<sup>74</sup>

This method has given a much wider and more significant application to the principle of *takhsis al-qada'*, the right of the ruler to define and confine the jurisdiction of the courts.<sup>75</sup> Based on this principle, Muslim reformers

<sup>69</sup> Anderson, *Islamic Law*, 26. See also idem, "Modern Trends," 5; idem, "Contemporary Islamic Law," 224-5; idem, "Reform in the Middle East," 45; idem, "Role of Personal Status," 19; idem, "Law of Divorce," 42; idem, "The Significance of Islamic Law," 91.

<sup>70</sup> Anderson, *Islamic Law*, 26. See also idem, "Recent Development" (II), 38; idem, "Recent Development" (III), 116; idem, "Reform in the Law of Divorce in the Muslim World," *Studia Islamica* 31 (1970): 42; idem, "Modern Trends," 5; idem "Reform in the Middle East," 45; idem, "The Significance of Islamic Law," 190; Khadduri, "Marriage in Islamic Law," 214.

<sup>71</sup> Anderson, *Law Reform*, 43.

<sup>72</sup> Anderson, "Role of Personal Status," 18-9. See also idem, "Modern Trends," 12; idem, *Islamic Law*, 82; idem, *Law Reform*, 83.

<sup>73</sup> For a discussion on this issue, see Anderson, "Law as a Social Force," 31; idem, "Modern Trends," 12-5; idem, *Law Reform*, 42-85.

<sup>74</sup> Anderson, *Law Reform*, 43-7, 58, 80. See also idem, "Shari'ah," 21-4; idem, "Role of Personal Status," 20-1; idem, "Contemporary Islamic Law," 224-5; idem, "Significance of Islamic Law," 192-4.

<sup>75</sup> Anderson, *Law Reform*, 43. See also idem, "Modernization," 74; idem, "Recent

introduced some legislation concerning the family law which was binding on Muslims.<sup>76</sup> In Egypt, for example, legislation has been introduced on the requirements which should be fulfilled by any Muslim relating to the claims of marriage or divorce has been introduced. Accordingly, any claim of marriage or divorce would have to be supported by documentary evidence "free from suspicion of forgery which indicate the truth of the claim."<sup>77</sup> Moreover, the Court "has the right to form its own opinion of the value and credibility of witness' testimony and to give judgment accordingly."<sup>78</sup> Legislation has also been introduced regarding the age of marriage for both parties. One important result of the legislation, at least in Egypt, is the discouragement of child marriage.<sup>79</sup>

## 2. The eclectic expedient.<sup>80</sup>

This principle is known in Arabic as *takhayyur*, that is, a suitable viewpoint is selected from amongst various juristic opinions in order to fulfill the needs for arising from new demands of the Muslim Society.<sup>81</sup> The most popular example of this expedient is the *Majallah al-Ahkam al-'Adliyyah* of the Ottoman Empire, which was issued in 1876,<sup>82</sup> and was the first codification of Islamic law which used a Western model.<sup>83</sup> The provisions of Islamic law in the *Majallah*, says Anderson, were not simply based on the dominant opin-

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Development" (II), 38-9; idem, "The Significance of Islamic Law," 192; Joseph Schacht, "Problems of Modern Legislation," *Studia Islamica* 12 (1960): 102.

<sup>76</sup> Anderson, "Modernization," 74. See also idem, "Shari'ah Today," 22; idem, *Islamic Law*, 93.

<sup>77</sup> Anderson, *Law Reform*, 45. See also idem, "Shari'ah Today," 22, "Recent Development" (II), 42; idem, "Recent Development" (III), 113

<sup>78</sup> Anderson, "Recent Development" (II), 44.

<sup>79</sup> Anderson, "Modern Trends," 13. See also idem, "Recent Development" (II), 47; idem, *Law Reform*, 46; idem, "Shari'ah Today," 20; idem, "The Significance of Islamic Law," 192-3.

<sup>80</sup> Anderson, "Recent Development" (I), 244-5. See also idem, "Contemporary Islamic Law," 225; idem, "Role of Personal Status," 20; idem, "Shari'ah Today," 22-3; idem, "The Significance of Islamic Law," 192-3

<sup>81</sup> Anderson, "Is the Shari'ah Doomed to Immutability," *The Muslim World* 56 (1966): 11.

<sup>82</sup> Anderson, *Law Reform*, 47-8. See also idem, "Recent Development" (II), 34, 36; idem, "The Shari'ah and Civil Law," 29; idem, "Shari'ah Today," 22-3.

<sup>83</sup> Anderson, *Islamic Law*, 24. See also idem, "Modern Trends," 2; idem, "Reform in the Middle East," 45; idem, "Reform in Islamic Law in Iran," *Iqbal Review* 12 (1971): 17; Liebesny, "Stability and Change," 22.

ions in the Hanafi school, but rather were a selection of those provisions seemed most appropriate to the contemporary world.<sup>84</sup>

The other eclectic method widely used in Muslim societies is the doctrine known in Arabic as *talfiq* (literally "patching").<sup>85</sup> This method is understood as "combining part of the doctrine of one school or jurist with part of the doctrine of another school or jurist."<sup>86</sup> The most obvious and radical application of this method can be found in, among others, the Egyptian law of (the provision of) the waqf, 1946.<sup>87</sup>

Moreover, it should be underlined here that the eclectic method used by the reformers is not limited to the opinions among the Sunni jurists only, but also extends to the opinions prevalent among the Shi'i.<sup>88</sup> However, as Anderson notes, Muslim reformers "seldom, if ever, expressly acknowledge this in regard to legislation promulgated in a predominantly Sunni Country."<sup>89</sup>

But Anderson also reminds us that, although the expedient of *talfiq* is very effective and has proved deeply beneficial in practice, it seems unsatisfactory in theory,<sup>90</sup> for the provisions of Islamic law which are derived from different jurists are often based on completely different juristic premises and arguments.<sup>91</sup>

### 3. The expedient of re-interpretation.<sup>92</sup>

This expedient has been used by the reformers to re-interpret the classical texts, in emphasizing the importance of practicing *ijtihad*. According to the reformers, it was wrong to think that the gate of *ijtihad* has been closed.

<sup>84</sup> Anderson, "Modern Trends," 2, 5. See also idem, *Islamic Law*, 24; idem, *Law Reform*, 48; idem, "Recent Development" (II), 38; idem, "The Shari'ah and Civil Law," 29; idem, "Law in Iran," 17.

<sup>85</sup> Anderson, "Modernization," 75. See also idem, *Law Reform*, 51.

<sup>86</sup> Anderson, "Modernization," 75. See also idem, *Law Reform*, 51.

<sup>87</sup> Anderson, *Law Reform*, 57-8.

<sup>88</sup> Anderson, "Modernization," 75. See also idem, "Recent Development" (I), 244; idem, "Role of Personal Status," 21; Al-Nowaihi, "Islamic Responses," 180-1.

<sup>89</sup> Anderson, *Law Reform*, 51, 54. See also idem, "Modern Trends," 13; idem, "Law as a Social Force," 31.

<sup>90</sup> Anderson, *Islamic Law*, 97.

<sup>91</sup> Anderson, *Islamic Law*, 97. See also idem, "Modernization," 75.

<sup>92</sup> Anderson, *Law Reform*, 58-65. See also idem, "The Significance of Islamic Law," 193-4; idem, "Shari'ah Today," 23-4; idem, "Contemporary Islamic Law," 225.

For without exercising *ijtihad*, Islamic law would inevitably stagnate, and would therefore not be unapplicable to the ever-changing circumstances of life.<sup>93</sup> It is also believed that "the agreement of the past can be abrogated by the agreement of the present and the future, and hope to use *ijma'* as an instrument of reform."<sup>94</sup>

The problem of divorce and polygamy are examples of this method of reform. The reformers have reinterpreted the classical texts concerning both divorce and polygamy, coming to the view that certain modifications should be made.<sup>95</sup> As a result, for example no divorce "would be effective except by consent of court."<sup>96</sup> In line with this, it is also stipulated that "a man who had already one wife should not be permitted to marry another woman without consent of court."<sup>97</sup>

#### 4. The expedient of administrative regulation.<sup>98</sup>

This expedient, according to Anderson, seems to be the basic for all previous expedients. Accordingly, this expedient is usually combined with one or another of the first three expedients.<sup>99</sup> The reform, in case of this expedient, does not directly interfere with the subject matter of Islamic law, but rather concerns a legislative enactment or a certain executive legislation,<sup>100</sup> which is regarded as beneficial and not contrary to Islamic law.<sup>101</sup> This expedient could not be found in the classical text.<sup>102</sup>

Examples of this kind of reform includes: first, the new structure of the courts including some procedural changes in them (the reformed courts came to be known as Mixed Court, Nizamiyyah Court, Shari'ah Court, and

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<sup>93</sup> Anderson, *Law Reform*, 58-9. See also idem, "Recent Development" (I), 254; idem, "Role of Personal Status," 21; idem, *Islamic Law*, 97; idem, "Modern Trends," 14; idem, "Modernization," 75; idem, "Shari'ah Today," 21, 23; Al-Nowaihi, "Islamic Responses," 324.

<sup>94</sup> Anderson, "Shari'ah Today," 23.

<sup>95</sup> Anderson, *Law Reform*, 59. See also idem, "Modernization," 75-6; idem, "Immutability," 10-1.

<sup>96</sup> Anderson, *Law Reform*, 60.

<sup>97</sup> Ibid., 62.

<sup>98</sup> Anderson, *Law Reform*, 65-77. See also idem, "The Significance of Islamic Law," 194; idem "Contemporary Islamic Law," 225.

<sup>99</sup> Anderson, "Modern Trends," 14.

<sup>100</sup> Anderson, *Law Reform*, 65.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid., 74.

Mazalim Court, ect);<sup>103</sup> second, reform regarding the witnesses in the court; third reforms to regulate the certification of the decision made by the court.<sup>104</sup>

#### 5. The expedient of reform by juridical decision.

According to Anderson, this expedient has been widely used, particularly in those countries where the judicial precedents were very important as in India and Pakistan.<sup>105</sup> Through this expedient, the application of Islamic law is made by a series of judicial decisions.<sup>106</sup> The working of this expedient may be illustrated with the following example from India as reported by Anderson:

He Dhavan J. refused to grant a husband who had married a second wife a decree of restitution of conjugal rights against his first wife who had refused to live with him-on the ground that, under the social conditions of India today, the taking of the second wife must be regarded as an insult to the first wife which was likely to cause her mental suffering and affect her health. Since, therefore, a husband must be taken to intend the natural consequences of his action, the taking of the second wife, in the absence of a 'weighty and convincing' explanation, raised a presumption of cruelty to the first, so it would be inequitable for the court to compel her to continue to live with him.<sup>107</sup>

#### E. The Result of Reform

After discussing the background of the reform and the methods used by the reformers, Anderson proceeds to the results achieved by Muslim reformers in the countries concerned.<sup>108</sup>

In this discussion, Anderson divides the subject-matter of Islamic law into two general categories: family law, and subjects other than family law (comprising commercial, criminal, and civil law).<sup>109</sup> Anderson emphasizes

<sup>103</sup> Ibid., 66. See also idem, "Modern Trends," 2; idem, "Reform in the Middle East," 44; idem, "Shari'ah Today," 20; idem, "Return Visit to Nigeria: Judicial and Legal Development in the Northern Region," *International and Comparative Law Quarterly* 12 (1963): 282-94.

<sup>104</sup> Anderson, *Law Reform*, 72.

<sup>105</sup> Ibid., 77.

<sup>106</sup> Ibid., 80.

<sup>107</sup> Ibid., 81. See also idem, "Contemporary Islamic Law," 230

<sup>108</sup> Anderson, *Law Reform*, 87.

<sup>109</sup> Anderson, "Reform in the Middle East," 51

that the big difference between the two is that reform in the field of commercial, criminal, and civil law extensively drew upon the alien (Western) sources. This is not the case with the family law where the reform drew upon Islamic law itself, and was based on the classical works of Muslim jurists and the original culture of the Muslim societies. There is also another difference. While the reform in the commercial, criminal, and civil law was imposed from above (because of the interests of the government), the reform in family law came from below, from popular demand or social development.<sup>110</sup>

Nonetheless, certain features of reform in the field of commercial, criminal, and civil law is, says Anderson, interesting to be mentioned. The reformers themselves acknowledged that the reform in this field were largely derived from alien sources. In the later development, however, Muslim reformers seriously asked themselves:

If we can go back to the original source of our law and interpret them in the sphere of family law, why not in other spheres too? Why have a commercial law, or criminal law, which is almost entirely of foreign inspiration? Why should we not, instead, re-interpret our own law, or apply it in a new way?<sup>111</sup>

To put it differently, there is a tendency among the reformers to look for such general principles of Islamic law which can serve as a foundation for provisions derived, in fact, from Western sources. Consequently, certain provisions of the law in the field of commercial, criminal, and civil law have to some extent been claimed as Islamic.<sup>112</sup> To support this contention, Anderson provides quite a number of examples from the law codes of the countries formerly under the influence of the French and British law such as Tunisia, Sudan, India, Pakistan, Africa and especially Egypt.<sup>113</sup>

But it would be misleading, Anderson notes, to postulate that all the provisions of the commercial, criminal, and civil law have been Islamized. Certain provisions, even today, continue to contradict the provisions of Islamic law as interpreted by all the recognized schools. The examples of this

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<sup>110</sup> Anderson, "Role of the Personal Status," 27.

<sup>111</sup> Anderson, "Contemporary Islamic Law," 225.

<sup>112</sup> Anderson, "Law as a Social Force," 33. See also idem, "Moslem Ruler," 921; idem, "The Shari'ah and Civil Law," 45-6; idem, *Law Reform*, 89-92; idem, "Reform in the Middle East," 51; idem, "Role of Personal Status," 22, 30; Liebesny, "Religious Law and Westernization," 499; Khadduri, "Marriage in Islamic Law," 218; Bonderman, "Changing Perception," 1172.

<sup>113</sup> Anderson, *Law Reform*, 86-100.

area such matters "as loans or investments which carry fixed rates of interest, betting and gambling, life annuities and insurance."<sup>114</sup> Anderson has aptly remarked, however, that although several reforms apparently contradict the provisions of Islamic law, Muslim reformers are concerned nevertheless that reform of law be in conformity with the dictates of the revealed will of Allah, and that it should not contradict the fundamental Islamic ideology of the divine law.<sup>115</sup>

Other results of reform discussed by Anderson are concerned with family law. In Anderson's view, a discussion of family law in general and the law of marriage in particular is very important, and this for several reasons. In the first place, family law has been regarded as the very heart of Islamic law. Secondly, family law has been considered as the basis of an Islamic society. Thirdly, family law is still applied to some four hundred million Muslims particularly in the Arabic Peninsula. Fourthly, it is in family law, particularly marriage and divorce, that the battle is waged today between the forces of conservatism and modernism in contemporary Muslims society.<sup>116</sup> More than this, the reform in the family law, according to Anderson, has been a clear mirror of social change in Muslim society, and has also been the most outstanding example of how nominally immutable law can be modified and changed in practice.<sup>117</sup> Anderson discusses the results of reform in family law under various heads including marriage, married life and its termination, children, and family relationships, testate and intestate succession, waqf, and gifts.<sup>118</sup>

Anderson goes into great detail in discussing each of the above mentioned aspects. To illustrate the results given by Anderson, and to avoid a

<sup>114</sup> Ibid., 96.

<sup>115</sup> Anderson, "Modernization," 73.

<sup>116</sup> Anderson, *Islamic Law*, 39. See also Khadduri, "Marriage in Islam," 213.

<sup>117</sup> Ibid., 27. See also idem, "The Significance of Islamic Law," 191; idem, "Modern Trends," 12; idem, "Reform in the Middle East," 43.

<sup>118</sup> Anderson, *Islamic Law*, 26-37, 38-80. See also idem, *Law Reform*, 100-71; idem, "Recent Reforms in the Islamic Law of Inheritance," *International and Comparative Law Quarterly* 14 (1962): 349-65; idem, "The Religious Element in Waqf Endowments," *Journal of the Royal Central Asian Society* 38 (1951): 292-9; idem, "Reform in Family Law in Morocco," *Journal of African Law* 2 (1958): 146-59; idem, "Recent Development in Shari'ah Law in the Sudan," *Sudan Notes and Records* 31 (1950): 82-104; idem, "Waqfs in East Africa," *Journal of African Law* 3 (1959): 152-64; idem, "Islamic Law in Africa," 136-8; Fazlur Rahman, "A Survey of Modernization of Muslim Family Law," *International Journal of Middle East Studies* 2 (1980): 454-65.

lengthy discussion on the issues, this section will be confined to the results of reform in the field of marriage.

Anderson acknowledges that the advent of Islam introduced certain major innovations in the law of marriage. One of these was the restriction of the practice of polygamy to a maximum of four wives at a time. This rule has been well recorded by the classical Muslim jurists.<sup>119</sup>

In the modern period, however, the situation has changed considerably.<sup>120</sup> The most important reform in the field of marriage is the regulation that a contract of marriage should be properly registered. This regulation is of major importance, and has served the basis for any reform in contemporary Muslim society. For example, the registration method has been effectively used to limit, or even prohibit, the practice of polygamy.<sup>121</sup> By using one of the methods mentioned in the previous section, the reformers try to re-interpret the so-called "Verse of Polygamy." As a result, certain modifications have been introduced, ranging from the restriction to the prohibition of the practice of polygamy. The examples of this are as follows.

Turkey and Tunisia are the only Muslim countries at the present time which have abolished the practice of polygamy.<sup>122</sup> Other Muslim countries have not yet prohibited the practice of polygamy, but rather restrict its practice through stipulations in their codes. These countries include Morocco, Iraq, Iran, Pakistan, South Yemen, Somalia, Syria, and Singapore.<sup>123</sup>

It should be important here to quote some stipulations which reflect the restrictions of the practice of the polygamy. In Iraq, for example, it is clearly stated:

Article 4: "marriage with more than one wife is not allowed without permission of court, and such permission shall not be given unless the following two conditions are fulfilled: (a) that the husband has the financial

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<sup>119</sup> Anderson, *Law Reform*, 100-1. See also idem, *Islamic Law*, 41-2.

<sup>120</sup> Anderson, "Modernization," 76. In his "Contemporary Islamic Law," Anderson presents a rather detailed discussion on the change of the family law particularly the status of women in the family structure in contemporary Muslim society.

<sup>121</sup> Anderson, *Islamic Law*, 48-9. See also idem, *Law Reform*, 109.

<sup>122</sup> Anderson, "Contemporary Islamic Law," 229. See also idem, "Modernization," 78-9; idem *Law Reform*, 110; idem, *Islamic Law*, 49; idem, "Role of Personal Status," 28; Khadduri, "Marriage in Islamic Law," 215, 217; Schacht, "Islamic Legislation," 125.

<sup>123</sup> Anderson, *Law Reform*, 111-4. See also idem, "Modernization," 78-9; idem, *Islamic Law*, 50-1; idem, "Law in Iran," 25-6; idem, "The Syrian Law of Personal Status," *Bulletin of the School of Oriental and African Studies* 17 (1955): 36; Rahman, "Muslim Family Law," 457-8; Khadduri, "Marriage in Islamic Law," 216-7.

competence to support more than one wife; and (b) that there should be some lawful benefit in this second marriage." Article 5: "Polygamy is not permitted if there is any fear that co-wives will not be treated with equal justice, and the decision in this matter shall be left to the Qadi." Article 6: "Anyone who makes a contract of marriage with more than one wife contrary to the provisions in article 4 and 5 shall be punished by imprisonment for not more than one year, or by a fine of not more than 100 dinars, or by both."<sup>124</sup>

Other result in the field of family law are: judicial divorce at the demand of the wife, restrictions on a husband's right of repudiation, restriction of child marriage, restriction of forced marriage, questions of 'idda, paternity, custody, and guardianship.<sup>125</sup>

#### F. Problems and Prospect.

The last aspect discussed by Anderson concerning law reform in the Muslim world is that of the problems and prospects Muslim reformers face in the contemporary world. Basing himself on the contemporary situation of certain Muslim countries, Anderson makes an attempt to outline "the pressures which still exist for changes in the law in many predominantly Muslim countries,"<sup>126</sup> and also discusses the "debates to which these pressures give rise and the problems which confront present, or future, reformers; and the way in which these problems might conceivably be resolved."<sup>127</sup>

Anderson then classifies the pressures for change in Islamic law under three main categories: pressures for a return to Islamic law, pressures for certain relaxations in the scope of Islamic law, and pressure for a more radical approach to Islamic law as a whole.<sup>128</sup>

The first type of pressure may be found in countries where the movement for reform has ushered in a system of law which is today largely secular. The most obvious examples of this phenomenon is to be found in Paki-

<sup>124</sup> Anderson, *Law Reform*, 111

<sup>125</sup> Anderson, "Law as a Social Force," 28-31. See also idem, "Modern Trends," 7-17; idem, "Role of Personal Status," 22-6.

<sup>126</sup> Anderson, *Law Reform*, 172.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid., 172-3. In his *Islamic Law* (p. 83), Anderson presents another classification of the Muslim countries into three groups: those that still regard Islamic law as the fundamental law and still apply it more or less in its entirety, those that have abandoned the Islamic law and have substituted a wholly secular law, and those that have reached some compromise between these two positions.

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It is well-known that under the Moguls, Islamic law received an important position in the society of the Indian sub-continent. Under British rule, however, the situation changed, and Islamic law came to be confined to the area of family law. After independence, the Muslims had a strong desire to have their daily life regulated by Islamic law; the establishment of Pakistan was a clear example of the effort to do so.<sup>129</sup> The constitution of 1953 clearly states that: "the Muslim of Pakistan should be enable, individually and collectively, to order their lives in accordance with the teaching and requirements of Islam as set out in the Holy Qur'an and Sunnah...."<sup>130</sup>

It has also been asserted repeatedly that any constitution should be brought into conformity with the provisions of Islamic law laid down in the Qur'an and the sunnah of the Prophet.<sup>131</sup> In practice, however, the meaning of this statement is not very clear. There were, for example, endless debates among Muslims themselves concerning the meaning of certain verses of the Qur'an or certain dicta of the prophetic tradition. They have always debated for example about: "what is the precise implication and application of the Qur'anic provision," and "what...does the prohibition of *riba* or 'usury' really mean?"<sup>132</sup> Along with this issue, another problem comes up as to what kind of state the Pakistan ought to be. Confronted by such issues, three general groups have emerged. The first was the group of *ulama* or traditional scholars, who strictly wanted the implementation of Islamic law as set out in the classical works and including the rules of criminal law.<sup>133</sup> The second consisted of some leading Pakistanis who wanted Pakistan to be secular state.<sup>134</sup> According to this group, Islam should primarily be considered a personal bond between the individual Muslim and his God, and as guide to his private life, "rather than a complex of commands and prohibitions, addressed to society as a whole, which must be enforced by the law-making

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<sup>129</sup> Anderson, *Law Reform*, 174

<sup>130</sup> Ibid., 175. Liebesny presents several codes of Pakistan as the result of reform in his "Stability and Change," 32-4.

<sup>131</sup> Anderson, *Law Reform*, 178. See also idem, "Law as a Social Force," 34; idem, *Islamic Law*, 99-100; idem "The Significance of Islamic Law," 197; idem "Moslem Ruler," 921.

<sup>132</sup> Anderson, *Law Reform*, 178

<sup>133</sup> Ibid., 180.

<sup>134</sup> Ibid., 181.

and law-enforcement agencies of the state.<sup>135</sup> The third group, says Anderson, can be placed between the two extremes and mostly consisted of educated Pakistanis. This group proposed to establish an Islamic state, but clearly rejected the implementation of classical Islamic law as the first group demanded. This third group was of the opinion that the provisions of Islamic law should be interpreted in line with the modern circumstances in order to meet the needs of modern society. Consequently, this group gave a good deal of thought to how, for example, "the requirement of insurance, banking etc., could be reconciled with the relevant Islamic injunctions, as they understand."<sup>136</sup>

The future of Islamic law in Pakistan depends therefore on whose interpretation of the verses of the Qur'an or of certain text of the Sunnah shall prevail.<sup>137</sup>

The second type of pressure for reform is the desire to make certain a relaxation in the classical provisions of Islamic law.<sup>138</sup> This type, says Anderson, can, for the most part, be found in Saudi Arabia. Unlike the case of Pakistan, the entire ruling elite acknowledges that Saudi Arabia is an Islamic state, and Islamic law is the only law of the state.<sup>139</sup> More than this, the provisions of Islamic law are strictly limited to the Hanbali school, and are based largely on the views of the famous Hanbali jurist Ibn Taymiyyah and his disciple Ibn Qoyyim.<sup>140</sup>

It is true that in 1977, the King Ibn Su'ud proposed a modification of Islamic law, suggesting that "a code of Islamic law should be drawn up which was based not only on the doctrine of the Hanbali school but that of whichever school seemed closest to the Qur'an and *sunna* on the particular point concerned."<sup>141</sup> This policy, however, was soon abandoned by the Hanbali 'ulama'.<sup>142</sup> Nonetheless, the pressure for reform, particularly in the sphere of commerce, has been unavoidable. Dealing with this issue, a number of administrative regulations promulgated by the government have been intro-

<sup>135</sup> Ibid., 182.

<sup>136</sup> Ibid., footnote 8.

<sup>137</sup> Anderson, "Law as a Social Force," 35.

<sup>138</sup> Anderson, *Law Reform*, 185. See also idem, "Islamic Law in Africa," 137.

<sup>139</sup> Anderson, *Islamic Law*, 83. See also idem, "The Significance of Islamic Law," 196.

<sup>140</sup> Anderson, *Law Reform*, 184. See also idem, *Islamic Law*, 83.

<sup>141</sup> Anderson, *Law Reform*, 184.

<sup>142</sup> Ibid.

duced. As a result, without touching the detailed regulations of the classical jurists, the government can effectively meet the needs arising from new social demands. Examples of this are a commission on loan (rather than interest), insurance for certain contacts, the imposition of the fines and terms of imprisonment.<sup>143</sup> These new provisions of law are usually named either *nizam* (regulation) or *marsum* (royal decree) rather than *qanun*, a technical term usually employed for legislation based on the views of the classical jurists.<sup>144</sup> It should be mentioned in this context that the policy of the government, although it seems to be different from the detailed rules of the classical jurists, is supposedly based on the general principle known as *mashlahah*, as reinterpreted by Ibn Qoyyim.<sup>145</sup> Based on this principle, says Anderson, the provisions of Islamic law are far removed from the rigid regulations contained in the classical texts of all the well-known schools of Islamic law.<sup>146</sup> More than this, "commands and prohibitions applicable to the Arabia of the first century of the *hijra* need not always be regarded as literally binding today."<sup>147</sup>

Other countries which could be placed in the same category as Saudi Arabia are, according to Anderson, Yemen, Oman, Afghanistan, and Somalia.<sup>148</sup>

The last type of the pressure for reform is what Anderson call "conflicting pressures" or "pressures in both directions at once." Those countries which are included in this category are divided into two further groups, which are briefly discussed in the following.

The first group consists of those countries in which majority of the population is Muslim such as Egypt, Iraq, and Tunisia. The most prominent of attitudes in these countries is that of a "more radical approach to the Shari'ah as a whole."<sup>149</sup> Egypt is the most obvious example which is easily analyst. The reason for this:

Derives partly from a natural reaction against codes of law which are predominantly alien inspiration in favour of their own cultural heritage; partly from an aspiration to take the lead in evolving distinctively Arab code

<sup>143</sup> Ibid., 185.

<sup>144</sup> Ibid.

<sup>145</sup> Anderson, "Shari'ah Today," 25. See also idem, *Law Reform*, 187; Mohamed Al-Nowaihi, "Problems of Modernization in Islam," *The Muslim World* 65 (1975): 179.

<sup>146</sup> Anderson, *Law Reform*, 187.

<sup>147</sup> Anderson, "Shari'ah Today," 25.

<sup>148</sup> Anderson, *Law Reform*, 188-93

<sup>149</sup> Ibid., 173.

of law which would forge a further link in the unification of 'the Arab Nation'; and partly from a genuine desire, among some elements in the population, that their way of life should become more distinctively and uncompromisingly Islamic.<sup>150</sup>

For these reasons, it is not surprising that law in Egypt has been marked by a greater reliance on Islamic law rather than Western legal system;<sup>151</sup> the abolition of the separate courts is case in point.<sup>152</sup> Anderson reminds us, however, that at the present time, this tendency has "little or no relevance in practice," and it is not as prominent as it was a few years ago.<sup>153</sup>

Anderson also notes the existence of other viewpoints in Egypt. Those opposed to the afore-mentioned position have attempted to provide a further liberalization of the provisions of Islamic law. They have argued that the progressive reforms on the basis of juristic expediency should be extended. They have also emphasized that a change of social circumstances needs the change in the law. This postulate however has received a very limited acceptance among Muslims.<sup>154</sup>

Another group discussed by Anderson comprises countries in which the Muslim population is a minority, as in India, Kenya, Tanzania, Ghana, and Uganda.<sup>155</sup> It is true that in these countries "Islamic and customary law have for long lived side by side, and some regions have interpenetrated each other."<sup>156</sup> In contemporary Africa, Islamic law exists side by side not only with customary law but also with colonial (English) law. All of these

<sup>150</sup> Ibid., 194. See also idem, "Law Reform in Egypt: 1850-1950," in *Political Change in Modern Egypt*, ed. P.M. Holt (London: Oxford University Press, 1968), 230; idem, "Moslem Ruler," 921; idem, "Modern Trends," 15; idem, "Law as a Social Force," 15; idem, "The Significance of Islamic Law," 195; idem, "Shari'ah Today," 23-4.

<sup>151</sup> Anderson, "Law as a Social Force," 33. See also idem, "Shari'ah Today," 23-4.

<sup>152</sup> Anderson, "Reform in the Middle East," 48. See also idem, "Role of Personal Status," 29. For a discussion on the result of reform in Egypt, see also Anderson "Law Reform in Egypt," 209-30, and idem, "The Problem of Divorce in the Shari'ah Law of Islam: Measures of Reform in Modern Egypt," *Journal of the Royal Central Asian Society* 37-8 (1950-1951): 169-85.

<sup>153</sup> Anderson, *Law Reform*, 194-5.

<sup>154</sup> Ibid., 195.

<sup>155</sup> Ibid. See also idem, "Muslim Personal Law in India," and "Islamic Law of Testate and Intestate Succession and the Administration of Deceased Person's Assets," in *Islamic Law in Modern India*, ed. Tahir Mahmood (Bombay: N.M. Tripathi Private, 1972), 34-49, 203-6.

<sup>156</sup> Anderson, *Law Reform*, 197. See also idem, "Modernization," footnote 4; idem, "Relationship between Islamic and Customary Law in Africa," *Journal of African Admin*

three laws have inevitably influenced each other,<sup>157</sup> and to some degree there is a conflict between them.<sup>158</sup> Moreover, the pressure for reform in these countries is confined to the field of family law, and such pressure mostly comes from the emotional national feeling to create a new system of law for all citizens.<sup>159</sup> As a result, the provisions of Islamic family law in these countries are not the same as described by the classical jurists. The following is a clear case in point.

The constitution in Uganda, enacted in 1965 clearly states:

- (1) Except for those who already had more than one wife (who might register all their existing marriages), no person was to be allowed to register more than one marriage, under penal sanction, unless the earlier marriage had been dissolved. (2) When a man and women had been 'living together or otherwise for a period of not less than twelve months as man and wife, 'it should not be lawful for either party to deny the subsistence of marriage between them.<sup>160</sup>

In general, it should be clear from the various developments discussed in this section that although the pressures for and the result of the reform vary from country to country, the strong tendency among Muslim to reform certain provisions on Islamic law and to base their daily life entirely on Islamic law is common in all cases considered. In Seeking reform, Muslim are attempting to create a new system of law which is based not only on the classical jurists' views but also on some of those principles of an alien inspiration which are in conformity with the principles underlying the divine teachings, and, it is hoped, can provided the needs of modern life.<sup>161</sup> Anderson remarks on the future of Islam in general and of Islamic law in particu-

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*istration* 11 (1959): 228-34; idem "Adaptation of Muslim Law," 152-6.

<sup>157</sup> Anderson, "Impact of Islamic Law on Commonwealth Legal System," 63.

<sup>158</sup> Anderson, "Colonial Law in Tropical Africa: the Conflict between English, Islamic and Customary Law," *Indiana Law Journal* 35 (1960): 87-98. See also idem, "Conflict of Laws in Northern Nigeria: A New Start," *International and Comparative Law Quarterly* 4 (1959): 442-56; idem, "Islamic Law in Africa: Problems of Today and Tomorrow," in *Changing Law in Developing Countries*, ed. J.N.D. Anderson (New York: Frederick A. Praeger, 1963), 170; idem, "Adaptation of Muslim Law," 156-8.

<sup>159</sup> Anderson, *Law Reform*, 193. See also idem, "Adaptation of Muslim Law," 164.

<sup>160</sup> Anderson, *Law Reform*, 210

<sup>161</sup> See generally his "Immutability."

lar: "It is, indeed, on a satisfactory resolution of the tensions inherent in the present desire to reconcile the doctrines and institutions of the sacred law with the realities and requirements of modern life that the whole future of Islam as a social and political system may be said to rest."<sup>162</sup>

### G. Concluding Remarks.

In conclusion, a few general remarks may be made.

As a legal historian, Anderson has made a contribution of the highest significance to our knowledge of the historical development of Islamic law in the modern period. As Farhat J. Ziadeh put it: "Anderson has crowned a distinguished career of scholarship in the field of Islamic law in general and the modern reform of that law in particular."<sup>163</sup>

It is beyond question that Anderson's works are of very considerable importance for any student of Islam who is interested in understanding the development Islamic law in present time. Nonetheless, we have to realize that what Anderson has given us is not a complete survey of the Islamic terrain, but useful guide to conduct further research in the subject.

In dealing his subject, Anderson mentions certain figures whose thought was deeply engaged with the processes of the reform of Islamic law. He frequently mentions, for example, names such as Muhammad Abduh, Abd Razzaq Sanhuri, Qasim Amin, Amir Ali, and Mawdudi. But it is quite questionable that Anderson does not make any reference to the name of Fazlur Rahman. This question is very important for several reasons. In the first place, if, as Anderson emphasizes, the Western educated Muslim plays a significant role in addressing the modern issues of Islamic law, there is no question that Rahman would have to be considered one of the leading figures in the modern period. Secondly, Rahman was a significant opponent of Mawdudi; Mawdudi is mentioned in many places by Anderson, but Rahman is not. Thirdly, the works of Rahman have been widely disseminated in both Eastern and Western countries and some have already been published before the appearance of Anderson's major work, *Law Reform in the Muslim World*.

Another problem also deserves to be noted here. Anderson has made

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<sup>162</sup> Anderson, "Law as a Social Force," 40.

<sup>163</sup> Ziadeh, review of the *Law Reform in the Muslim World*, 210.

an attempt to discuss the reform movement in extensive areas of Muslim society. For this reason, he has discussed the subject not only in Muslim countries where he had an opportunity to conduct research, but also in other areas where Muslim populations are very significant although he never visited those countries. Consequently, certain points he has made are not elaborated adequately, or are even questionable. The obvious example of this is the case of Indonesia. He confidently insists, for instance, that "here (Indonesia) the structure of society is largely matriarchal-especially in the Minangkabau region of Sumatra."<sup>164</sup> Even today, this statement is true in case of Minangkabau. But it should be noted that Minangkabau is not representative of the whole of Indonesia; it is just one of the regions comprising the very large and diversified state of Indonesia, a state where local cultures differ from region to region. It is well-known to anyone familiar with Indonesian society that Indonesia is divided into three general categories: matriarchal (e.g. Minangkabau), patriarchal (e.g. Tapanuli), and parental (e.g. Java).

Another of Anderson's statements about Indonesia is: "In Indonesia...the conflict between those who favor a secular nationalism and those who demand an Islamic state has taken the form of political parties and even of civil strife."<sup>165</sup> But merely to say this is to express the general phenomenon in a wholly inadequate way, and it stands in need of a measure of qualification. While it is true that there was a conflict between the two groups mentioned above, that is not the case since the "New Order." Most, if not all, Indonesian Muslims are of the opinion that Indonesia is neither a religious state (*Negara Agama*) nor a secular state (*Negara Sekuler*), but a "Pancasila State" (*Negara Pancasila*). The "Pancasila State" does not recognize an official religion, but religious teaching can be practiced freely therein; this has to some extent influenced the policy of the Indonesian government. The conflict then is not between the secularists and the religious (Muslims), but rather between the conservative group which wants to apply Islamic law according to classical and medieval thought and the modern group which wants to introduce certain modifications in Islamic law in order to meet the needs of contemporary Indonesia. This, of course, is a general picture of Indonesia, and further research on the subject is badly needed in order to provide a more clear picture of Islamic law reform in contemporary Indonesia.

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<sup>164</sup> Anderson, *Law Reform*, 11

<sup>165</sup> Anderson, "Law as a Social Force," 37.

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