Definitions: state, ulama, secularists and Islamists

In the previous chapter, we discussed the processes by which the law was modernized, as well as the cultural and other forces that underlay these transformations. Notable Westernizing trends began in India at the end of the eighteenth century, and in the Middle East at the beginning of the nineteenth, culminating in the 1940s and 1950s. The changes, as we saw, were massive, involving the structural dismantling of the Shari’a legal system, and leaving behind a distorted and gradually diminishing veneer of Islamic law of personal status.

At one point, it seemed that Islam as a religion of legal norms was out of favor, having once and for all lost to the modernists and their new states. But the 1970s and early 1980s saw powerful events that appeared to halt the collapse of this religious force. The questions that confront us then are as follows. What were the sources of the re-Islamization trends that appeared during and after the 1970s? How far back do the origins of these sources extend? Are they a reenactment of pre-modern Islamic tendencies or are they, strictly speaking, the results of the modern project? What have they managed to accomplish in terms of converting the secularist legal changes, the engineered law of the state, into an Islamicized narrative? What methods and means have they pursued in order to accomplish this end, and where and when have they been successful?

To produce a manageable account of legal developments since the 1970s, a number of assumptions have been made about the “actors” involved. I take it as a reasonably valid proposition that there are four major actors on the legal scene who are not always neatly distinguished from one another, namely, the state, the “secular” modernists, the ulama and the Islamists.

Throughout the two previous chapters, we have pointed out several features that have necessarily made the nation-state in the Islamic world a modern entity. This is to say that governance in Islamic lands had to acquire modernist structures by force of necessity in order for the
nationalist elite not only to challenge direct and indirect Western colonialism but also, while attempting to accomplish this task, to rule their own populations efficiently. But this project involved an absurdity: to resist Western political and military hegemony, the state had to adopt modern technology, modern culture and modern institutions – in short, modernity in as mature and complete a form as could be imported or assimilated, according to need.

Yet, the modernization process, forced to depend for all its major features on a capitalist economy and/or technology, led to economic and other forms of dependency on one Western country or another (and in the 1950s and 1960s on the Soviet Union as well). Thus, to free themselves of the clutches of colonialism (a quintessential phenomenon in, and inherent to, modernity), Muslim states adopted modern institutions and cultures that led them to don new colonialist trappings. The state – the most overpowering project of modernity – has therefore come to the Muslim world to stay, in effect creating this most fundamental dilemma for Muslims around the world: if Islamic law governed society and state for over twelve centuries, and if the rule of law had a significance beyond and above the modern state’s concept of such rule, then how is that sacred law accommodated by the irretrievable fact of the state, in effect the maker of all laws? This is the question that permeates the fabric of all the discourse and practice of politics and law in today’s Muslim world.

The second actor is the camp commonly described as secularist-modernist, a significant camp during the 1940s and 1950s, though it slowly declined over the next three decades, becoming something of a minority after the early 1990s. Whatever strength it could garner since the 1990s appears to have stemmed from its association with the state, whose tendencies, generally speaking, have all along been on secular lines (with the obvious exception of such countries as Saudi Arabia and, later, Iran).

Marginally stronger than the secularists (at least until recently) are the ulama who, as a rule, survive as pockets in various Muslim countries, but not by any means in all of them. South East Asia, Pakistan, Iran and Egypt represent more prominent sites of ulama strength, Iran especially, where they have been commanding the state since 1979. In Saudi Arabia they constitute a powerful actor in domestic politics and especially in the legal system. Yet, thus far, in no Sunni country has the Iranian experiment of almost exclusive ulama rule been replicated. In Egypt and Pakistan, as we shall see presently, the ulama play a not inconsiderable role versus the state, at times standing in tension with it, at others in accommodation.

The latest but by far the most significant actor is the Islamist camp, distinguishing itself from the ulama in two critical ways, among others of lesser significance: the first is that the ulama, strictly speaking, continue to
uphold their “traditional” methods of interpretation or a semblance thereof, which is to say that they generally espouse the authority of their legal sources, treatises, legal schools, leading jurists and ways of instruction (although none of these spheres is an exact replica of its historical antecedents). A second important difference is the ulama’s professional loyalty to their area of specialization: they have continued to dedicate themselves to religious knowledge, either by acquiring it as students or by imparting it as teachers, professors, muftis or preachers. Although their functions are now nearly exclusively educational (i.e., not legal in the sense that obtained before the nineteenth century), they remain largely dissociated from other technical professions. (But this is not to say that such religious universities as Azhar do not offer extensive programs of study in the sciences.)

By contrast, the Islamists since the 1980s have come to represent an influential and pervasive camp, stretching across the entire Muslim world, and spanning the whole gamut of the social and economic orders. Generally speaking, they are not trained in traditional disciplines, nor (in part as a consequence) do they read the classical sources with the same perspective as the ulama. They are trained in a wide variety of modern technical disciplines, ranging from engineering and medicine to accounting, business and teaching in “secular” schools. Those of the Islamists who discourse on matters religious and legal seem willing to employ any modern interpretive amalgam. The interpretive methods they employ – what they say, how they say it and why – are of complex hybridity. They are not bound by an established or a given reading of the Quran and the Prophetic Sunna, as the ulama generally are. Their interpretive techniques with respect to these sources can invoke a wide range of principles ranging from the social to the natural sciences. In other words, having shed the mantle of traditional juristic and hermeneutical authority, the Islamists do not feel bound by the cultural and epistemic systems developed throughout Islamic intellectual and legal history. The recent proliferation of fatwas on the Internet, in print media and in video-recordings attests to a multifarious production of “religious knowledge” that has consistently lacked any axis of authority. Aside from Pakistan’s Mawdudi and Egypt’s Sayyid Qutb, whose writings have attracted significant numbers of Muslim readers around the world, and apart from a few other secondary writers, the Islamists, in terms of religious–legal authority, have thus far not unified their ranks under any clearly identified banner or ideology, which is to say that their camp – if the term is at all apt – is highly diverse.

But this diffusion of authority is also endemic, though to a lesser extent, among the ulama as well as the so-called secular modernists. The latter
cannot be classified in any uniform terms, for they may range from atheists and Gnostics (who are relatively few) to believers in God who do not wish to see religion play any role in the state, its politics or the public sphere. On the other hand, some ulama have effectively, though not formally, joined the Islamist camp, as is the case with certain members of the lower echelons of Egypt’s famous Azhar. Their Islamist affiliation is attested not only by the political positions they adopt, but also by their hybridized interpretive mechanisms which are no longer loyal to the Azharite juristic methods of interpretation. Arguably, the reverse is also true, namely, that the Islamists have penetrated Azhar’s lower ranks, and continue to do so. The boundaries are never neat, not even on the level of state involvement.

In the following pages, we will discuss the main contours of juridico-political developments in five key Muslim countries, where trends have been set and where tensions and accommodations between and among these camps have had noticeable but varied effects.

**Egypt**

We begin with Egypt, as it offers, after British India (whose relevance for us is now limited to Pakistan), the longest experiment in legal modernization and, simultaneously, perhaps one of the fiercest tendencies to contest secularization of the law in the name of one Islamic ideology or another. Since Muhammad ʿAli, Egypt has enjoyed a relatively strong state, and from the middle of the nineteenth century it began to develop upper social classes imbued with vehemently secularist tendencies. But at no point was Egypt devoid of influential Islamic groups. The Azhar and its ulama were still forces to be reckoned with even after the exhausting effects of the nineteenth-century reforms. In fact, despite the chipping effects of Nasser’s institutional and administrative engineering around the middle of the twentieth century, Azhar grew phenomenally in size, increasing the number of its institutes from 212 in 1963 to 3,161 in 1993. Its student population increased from about 65,000 to almost a million during the same period. But even more phenomenal growth occurred in another religious movement that was to become far more popular and pervasive. In 1928, Egypt witnessed the birth of the Muslim Brothers, an association created by the Arabic language teacher Hasan al-Banna (1906–49). Spreading in the 1950s to Jordan, Syria, Sudan, Iran, Pakistan, Malaysia and Indonesia, the movement has continued to gain momentous strength, in Egypt as well as outside it, partly by virtue of an influential ideologue in the figure of Sayyid Qutb, later considered a martyr after being executed by Nasser’s regime in 1966.
These two Islamic camps, represented by Azhar and the Brotherhood, have advocated different visions of the Shari‘a, but view its implementation in the social order as a matter of principle, a desideratum. Regarding themselves as custodians of the traditional religious law and its methods, the Azharis, generally speaking, advocate a conventional version of the Shari‘a, largely derived from the legal doctrine expounded by the legal schools.

The Muslim Brothers, on the other hand, have a wider view of juridical possibilities, allowing for an Islamic law that can be modified to reflect the changing realities of the world, in ways comparatively far more open to interpretive possibilities. But the change is not to be of the sort dictated by the Western colonizer, for that form of change is precisely what has to be resisted and overcome. The colonizer’s change has been as detrimental to Muslim spiritual and social life as the conservatism of the Azhar ulama, whom the Muslim Brothers vehemently oppose. Modernity, which in the Brothers’ discourse appears distinct from Westernization, does not however pose any particular problem, that is, if we can assume that modernity qua modernity consciously posed itself as an intellectual subject in the thought of – at least – Banna and Qutb. But this perhaps is too much to assume, for it seems that the effects of science, technology and industry are not, according to the thought of these two men, appreciated in the social and moral realms. Although the Muslim Brothers, including Banna and Qutb, have never explained exactly what form of Shari‘a might be adopted in the new, avant-garde Muslim society, it is clear that religious morality is expected to lie at the center of the social order.

Morality represents the fundamental basis of any project of rebuilding a new Muslim society, and as such the Shari‘a, to be implemented, would have to rest on a moral social order. Living a moral life appears even as a predicate to the introduction of any Shari‘a order and explains at least in part the formation, in the 1980s, of local grass-roots Islamist communities throughout Egypt. Somewhat similar to the pre-modern neighborhoods, these mostly urban, lower-middle-class communities fashioned themselves into cohesive neighborhoods with their own systems that encompassed schools, hospitals, mosques, preachers, “banking” operations for mutual financial support, and other social-communal services. (Similar phenomena have also emerged in Gaza and Southern Lebanon, Hamas’s and Hizbullah’s networks being, respectively, prime examples.) Most of these Egyptian neighborhoods are populated by Islamists (who are by no means political activists in the majority of cases), although lower-ranking, techno-Azharites have also come to share these habitats. Indeed, the growth of this religious movement would ultimately bring unprecedented pressure upon the government to take seriously the
popular request to implement the Shari’a. But how did the state finally deal with these pressures?

The fundamentals of the politics of law that we have discussed in chapter 6 continued to be, in their bare essentials, largely operative on the Egyptian scene during the twentieth century. The regime needed Azhar to legitimize its nationalist and socialist projects, which were intended, as elsewhere, to reengineer the social order in the image of the ideal nation which is materially and culturally productive, just, successful and, most importantly, independent and free. On the other hand, Azhar, having become subordinated more than ever to the state and its apparatus, could not but oblige. Nasser’s regime brought Azhar to heel, first by nationalizing much of the waqf property in 1952, then by excluding its personnel from the national courts in 1955. But it was the 1961 reform that had the most drastic effect on Azhar, in both more and less predictable ways. The first major change was the introduction of scientific subjects into the curriculum, such as engineering and medicine, which, on the one hand, predictably liberalized Azhar but, on the other, created a class of techno-Azharites who – unpredictably – came in the 1970s to share and indeed strengthen the ranks of the Islamists. Nasser also subjected Azhar’s entire administration to the state, and made the appointment and dismissal of its head (Shaykh al-Azhar) a direct responsibility of the President’s office. Having mercilessly suppressed the Muslim Brothers and outlawed their political formations, and having systemically and systematically subordinated the Azhar to the state, Nasser and his regime could easily afford to ignore all religious sentiments that voiced a concern about the implementation of the Shari’a.

These concerns might have continued to fall on deaf ears had the Arab regimes been more successful in their projects, including their conflicts with Israel. The crushing defeat of 1967 ultimately brought Nasser himself to his knees, and the Muslim Brothers sprang back – from imprisonment, torture and deprivation – with a great deal of resentment. Azhar dramatically transformed its discourse, now invoking notions of repentance, and casting the so-called Setback (of 1967) as a lesson from God and exhorting Muslims to reconsider their erroneous ways, not least of these being Nasser’s socialism. Even Nasser himself spoke of the Setback as a divine intimation, a call for purification.

It was Sadat’s liberalizing policies that ushered in a new stage in the rise of the Islamist movement. Alleviating the oppression against the Muslim Brothers and releasing the groups’ members from prisons, Sadat began his rule with a policy of appeasement – promising, furthermore, to consider ways to implement the Shari’a. Article 2 of the 1971 Constitution stipulated that Islamic law is “a principal source” of legislation. (In 1969,
a Supreme Court had been created and in 1971 it was renamed as the Supreme Constitutional Court [SCC], whose function was to curb infringements by the legislative and executive branches.) Although a legislative parliamentary committee was to prepare laws in line with Article 2, and although Azhar was supposed to, and did, provide direction and assistance in drafting these laws, nothing came of what was, with the benefit of hindsight, little more than an act of lip service on the part of the regime. With a judiciary and a Parliament staffed by a liberal and secularized majority, Article 2 appeared to be no more than a rhetorical ploy.

In the meantime, the Islamist movement gained strength, and the ruling elite needed Azhar more than ever to combat the increasing pressure coming from the Islamists. The more Azhar was needed and the more it offered its support to the regime, the more assertive it became, and the more it called for the implementation of the Shari‘a. And to avert the political sting of the Islamists, the regime was willing to make concessions on the less innocuous legal front, concessions that happened to favor its ally, Azhar. And so in 1980 the Constitution was amended, and Article 2 changed to stipulate that the Shari‘a “is the principal source of legislation.”

But not much happened. No Islamic laws were passed, and no new cases were to constitute any step in that direction. Frustrated by the government’s lack of legislative action, the Islamists mounted challenges to the SCC, bringing cases regarding laws they alleged (often rightly so) to be in contradiction to the Shari‘a, and requesting that the SCC declare them, by virtue of Article 2, unconstitutional. This challenge also included Law No. 44 of 1979, the so-called Jihan’s Law (which extended the duration of child custody for divorced mothers, and, even more importantly here, made a husband’s marriage to a second wife an element automatically constituting harm to the first wife and therefore giving rise to divorce by operation of the law). But this Law and the other cases reviewed were dismissed without reference to their (in)compatibility with Article 2, which was one way for the SCC to avoid defining, once and for all (it was thought), what is exactly meant by the term “Shari‘a” mentioned in Article 2. Jihan’s Law was struck down on the grounds that it was passed through unconstitutional means, and the cases were dismissed on grounds of non-retroactivity. The Shari‘a of Article 2 was left undefined.

It was not until 1993 that the SCC delivered a definition of what the Shari‘a, in its opinion, meant. Under overwhelming pressure from the Islamists, it pronounced that the Shari‘a in effect amounts to the broad legal principles laid down in the Quran, as defined by the consensus of
jurists over the centuries. These were defined as fundamental principles, not specific rules, and as general and universal principles they are applicable to any society in any age. A case in point is the principle that law should not be harmful to Muslims. Accordingly, any law that does not violate any of these principles is one that does not stand in contradiction to the Shariʿa. But who is to make a determination of these general principles, and how? How is the actual power, or mere potential, of laws to harm or to benefit to be determined?

In answer to these questions, the SCC took the bold position that any judge presiding in the national courts can be a valid interpreter of these general Shariʿa principles; which, in effect, amounted to the proposition that these principles are so general that any person having basic knowledge of “Islamic law” – but who is sufficiently trained in modern law – can derive such principles from the Quran and the consensual practices of the jurists over the preceding twelve or thirteen centuries.

The SCC’s answer became the new bone of contention between the state and the Islamists. The challenge put forth by the latter was as much legal as political. The Islamists insisted – as their ideologue Qutb had done half a century earlier – that such exercises in interpretation are nothing short of human legislation producing a system where men rule over each other. The secular training of the national-court judges equipped them, even with the best of intentions, to extract nothing more than the most general of principles. Their well-nigh ignorance of Shariʿa’s rules, of Quranic exegesis, of hadith (which the SCC largely ignored), and even of basic skills in classical legal Arabic, largely barred them from any genuine understanding of what Shariʿa’s rules signified or even technically meant.

It is common knowledge – for anyone familiar with the modern Arab legal profession – that this profession as a rule considers the Shariʿa’s discourse as culturally remote, juristically complex and a judicially obscure system of rules. For those members who have little sympathy for the Islamists, Shariʿa’s system of rules is downright primeval, ultra-conservative and anti-modern. Nevertheless, the Islamists pushing the SCC to adopt a more sensitive position toward a “genuine” Shariʿa have insisted – and rightly so – that deriving such inordinately broad principles not only leads the court to indulge in utilitarian reasoning about law and society, but also lodges it in an arbitrary world where judges who know next to nothing about the religious and legal texts will be able to pronounce on God’s law. Indeed, a close analysis of some of the cases that the SCC has decided shows this much. Thus far, in the Egyptian experiment at least, a definition of Shariʿa that can garner popular and majoritarian legitimacy continues to be elusive.
Pakistan

Another country witnessing a significant push toward Islamization of laws, Pakistan emerged from the ruins of British India with a distinct Islamic identity, articulated by the anti-colonial nationalists as justification for their independence. It was emphasized that its reason for coming into existence was neither geographical nor ethnic, but rather religious. God was declared in the March 1949 Objectives Resolution as the sole sovereign of the Universe, a sovereign whose authority was “delegated to the State of Pakistan.” This assertion, from the very dawn of independence, betrayed the tension between the sovereignty of God and that of the state, for the legal history of Pakistan has been characterized by a potent tension implicit in the claims of “delegated” sovereignty. The political ruling elite, including Muhammad Ali Jinnah, was modernist and Westernizing, promoting the political, administrative and bureaucratic interests of what, in every way, was a nation-state. Yet, the Objectives Resolution, while insisting on purely Western concepts of governance, promised that “Muslims shall be enabled to order their lives … according to the teachings and requirements of Islam as set out in the Holy Quran and the sunna.”

The 1949 Objectives Resolution was regarded as a Preamble to the Constitution, which was not to be promulgated until 1956. In the interim, the ulama maintained an organized and sustained pressure on the government toward implementing the promises made in the Resolution. One of the specific proposals on which they insisted was that the government should review Pakistani legislation with a view to expunging any law that stood in contravention of the Shari’a. The prevalent idea appears to have been that the Shari’a is constituted of the traditional set of rules adopted by the historical schools, not the sort of general principles later advocated by the Egyptian SCC. When the Constitution was finally promulgated in 1956, Article 198 stipulated that “no law shall be enacted that is repugnant to the Injunctions of Islam as laid down in the Holy Quran and the Sunna.”

However, the potential effects of this Article were restricted by clauses 2 and 3. In their aggregate, these two clauses required that a temporary advisory committee submit a proposal to the National Assembly seeking to rectify any law contrary to the Shari’a, but they effectively precluded the courts from hearing any cases that bore on Article 198.

The 1958 crisis that led to the abolition of the Constitution prevented the appointment of any committee and thus the National Assembly never carried out the provisions of Article 198. By the end of that year, Ayyub Khan had seized power and embarked on implementing a policy of modernization. One such far-reaching legislation was the Muslim Family Laws Ordinance of 1961, a law that was at the time typical in the Middle East but that ran against the wishes of a relatively strong Pakistani ulama constituency. One indicator of the legal tensions in Pakistan was the inheritance problem, which we have already discussed in regard to the children of a predeceased son. The 1961 Ordinance, acknowledging the principle of representation, decreed that the child of a predeceased child had the right to inherit what his or her parent would have inherited had he or she been alive. The next year saw the enactment of a new Constitution that was modernist in tenor, omitting not only any mention of Pakistan as an “Islamic Republic” (as in the 1956 Constitution) but also the entirety of the repugnancy clause. However, public discontent and pressure forced Ayyub Khan to restore both provisions, although these alterations remained superficial and were no more than a form of appeasement.

The repugnancy provision was in effect left dormant, and the law of Pakistan continued to preserve, until the late 1970s, its Anglo-Muhammadan form, whereby the courts continued to apply the law according to the common law case method. The civil war of 1971, the political changes occurring as a result and the new 1973 Constitution brought no change, although the repugnancy clause was included, again to no effect, in this Constitution.

But the Middle East and the Islamic world had changed by the 1970s. As mentioned earlier, the 1967 Arab defeat had caused a major self-reassessment, accompanied by a rediscovery of Islam as a political force. A gradual yet potent increase in Islamic consciousness spilled over beyond the Arab world, augmenting the local and nation-specific problems of each country. The 1979 Iranian Revolution was not the spark that ignited this consciousness, but was rather a powerful symptom of the currents sweeping the region, as well as the Islamic world at large, since 1967. The 1970s may well be called the decade of Islamic incubation. In 1979, Zia al-Haqq seized power and it was clear that his growing religious constituency could no longer be ignored or silenced through legislative lip service. As in Sadat’s Egypt, the political legitimacy of the regime rested squarely on satisfying this constituency. Zia al-Haqq immediately made it clear that his regime would pursue a program of Islamization, and he followed up on his promise by enacting a number of Islamic laws which closely followed traditional Shari’a rules.
Receiving by this point no concrete constitutional status, the Objectives Resolution of 1949 was formally incorporated as the Preamble to the Constitution, and the statutory language pertaining to repugnancy issues was strengthened. Furthermore, each High Court was supposed to have a Shariat Bench, but this was streamlined into a single Federal Shariat Court (FSC) in 1980. The latter was to decide on which laws contravened the Shari’a, and once a law was found by it to be repugnant, it would cease to have any effect. Yet, the FSC’s power was constrained by structural and other limitations. First, appeals to the Supreme Court could reverse the FSC’s decisions. Second, the FSC could not adjudicate the full range of the law: the Constitution, fiscal law, procedural law and law of personal status were entirely excluded from its jurisdictional purview. Third, in its early period, the five judges who staffed the FSC all came from the national courts, which is to say that none of them was a member of the ulama class. It was not surprising then that the FSC’s decisions were not always consistent with the Shariat ordinances promulgated by General Zia, nor were they in conformity with the traditional Shari’a rules.

In due course, however, the FSC’s bench began to be populated by members of the ulama class, and General Zia renewed his commitment to Islam as part of his bargain for political legitimacy. The price of the bargain was the 1988 Enforcement of Shariat Ordinance which decreed that the Shari’a was the “supreme source of the law in Pakistan and the Grundnorm for guidance of policy-making by the state.” But the earlier substantive exclusions from the purview of this court as well as appeals of its decisions to the Supreme Court remained in place, showing, at the end of the day, where true legal power lay.

The aforementioned exclusions were challenged in 1981 by the Peshawar Shariat Bench, which interpreted the exclusions as bearing on the Shari’a itself, not the state’s legislative pronouncements on personal status. Accordingly, it ruled that the inheritance rights prescribed by section 4 of the 1961 Muslim Family Law Ordinance were repugnant to Shari’a and that the orphaned grandchild was not entitled to his or her parent’s share had the parent been alive. The decision was appealed by the Government, and the higher court overturned it on jurisdictional grounds, stating that the Peshawar Bench was not empowered to make such a determination, and that this matter fell to the competence of the legislature alone (including its advisory Council of Islamic Ideology).

The persistence of the 1961 Ordinance is a marker of the modest extent to which substantive Islamization took place in Pakistan. No less is it a marker of the political uses the founding fathers and subsequent politicians made of the Shari’a. But the few changes that have occurred in this sphere during the last several years are indicative of a larger trend, as we
shall see shortly. The FSC declared that as of March 2000, section 4 allowing orphaned grandchildren to be represented in inheritance would no longer have effect, and delegated to the legislature the task of finding a solution for those grandchildren who, with this decision, were left to fend for themselves.

The Court agreed with the proposal of the Council of Islamic Ideology that a requirement be placed upon the aunts and uncles of orphaned children to provide and care for them as members of their own families. But the social and moral conditions, the Court agreed, were not yet ready for such an obligation to be imposed. Although a moral community does not require external interference (one form of which is a legislative enactment), there must exist at least an elementary form of this community for such an enactment, first, to be accepted, and second, to have a constructive effect on the emergence and full formation of the moral community. In its decision, the Court wrote: “If the piety which is a prerequisite of an Islamic Social Order had been prevalent, it [viz., imposition of obligation upon uncles and aunts] could well have been a good solution but in the situation in which we are placed, we are of the view that the better solution would be the making of a Mandatory will in favor of the orphaned grandchildren.”

The Court’s imposition of a mandatory will, and not a duty of care upon relatives, appears to be grounded in the conviction that with the modernizing changes in society and the virtual non-existence of a moral community, a duty of care will end in failure, and will meet with stiff popular resistance. This view, echoing Sayyid Qutb’s ideas, rests on the assumption that the social order must first develop its moral character before it is ready for the implementation of Shari’a. Whether or not the Court articulated the moral–legal ramifications of the case in these terms, its decision certainly demonstrated that at least it arrived at an intuitive understanding of the functional and organic interdependence between and among the moral, communal and legal spheres within the Shari’a. But the tenacity of the 1961 Ordinance and the entanglement of Pakistan’s ruling elite in “modernizing” policies – in good part dictated by international hegemonic powers – have carried the day, effectively leaving the Court, the Islamists and the ulama, however differently they articulate Islam, in a minority position.

3 Lucy Carroll, “The Pakistan Federal Shariat Court, Section 4 of the Muslim Family Laws Ordinance, and the Orphaned Grandchild,” *Islamic Law and Society*, 9, 1 (2002): 75 f. In the mandatory scheme, the bequest must apportion to orphaned grandchildren what their deceased parent would have inherited had he or she been alive, with the proviso that such apportioning not exceed one-third of the grandfather’s total estate. Should the parent not make such a bequest, the court must assume that the grandparent did do so.
Iran

As noted in chapter 7, significant changes to the Shari‘a did not take place until Reza Shah Pahlavi assumed power in 1925. With the assistance of the British, and in a bid to centralize his rule, the Shah subdued the tribal chiefs (who nearly incapacitated the Qajars), and embarked on a project of weakening the ulama and their institutions. He confiscated their waqfs and placed their administration in the hands of the Ministry of Education. Any ulama retained as administrative or educational personnel were now paid by the government, depriving them of their traditional independence. This was a victory for the state that lagged behind its Ottoman counterpart by about three-quarters of a century.

Very much in line with changes the Ottomans had long since effected, the Pahlavi regime immediately introduced two new and important enactments: the Code of Judicial Organization and the Principles of Civil Procedure (both in 1927). A new state system of courts was thus established, with judges and prosecutors as civil servants. In 1931, the Act of Marriage was promulgated, implementing changes that reflected – as we saw in the previous chapter – the increased interest of the state in the reengineering of family life. This Act was the result of preparatory work conducted by a commission composed of ulama and European-trained lawyers. The rest of the legislation on family law, including inheritance and gifts, was enacted in 1935. The years 1967 and 1975 witnessed two further waves of changes to family law, the latter year having introduced the Family Protection Act, the hallmark of which was the abolishing of the husband’s right to unilateral divorce. Needless to say, the sphere of family law was the only reserve of the Shari‘a, however thin it had become. To all intents and purposes, the rest of the law and legal system were of entirely Western inspiration, the French influence manifestly dominating.

The monumental Iranian revolution of 1979 produced colossal political and conceptual ruptures, within Iran and outside it no less. Yet, interestingly, the sphere of law, the supposed hallmark of the Islamic Republic, experienced a relatively small, indeed nominal, measure of Islamization for years after the Revolution took place.

In chapter 7, we had occasion to speak of the distinctive Shi‘i theory which holds the Imam to be the lawgiver and the inspector of its application. But since the Imam is in hiding, and since law must continue in operation, several functions that the Imams would have fulfilled must now be dispensed – by proxy – by the Jurist-in-Charge. This delegation of duty has become known as Vilayat-i Faqih, the theoretical foundation of governance in the new Islamic Republic.
Building on three centuries’ worth of Twelver-Shi’i doctrine, but simultaneously charged with intense anti-colonialist sentiments, Ayatullah Khomeini (the charismatic leader and theorist of the Revolution) expanded on this theory and argued that, as long as the Imam remains in hiding, the Jurist-in-Charge, the MARJA’-TAQLID, must fulfill the role of political and religious ruler, representing the Imam’s functions in all worldly and spiritual affairs. This doctrine became formally enshrined in the 1979 Constitution of the new Republic, where Article 5 states that the Jurist – or a group of such Jurists – who has fulfilled the qualifications of *ijtihad* (mastery of the law) is entitled to exercise leadership, provided the Imam continues to be absent. The extension of the Jurist’s powers to the political, military and other secular realms was justified, in Khomeini’s discourse, by reasoning to the effect that, for an Islamic state to be run in genuine compliance with the Shari’a, it must be supervised and administered by the ultimate expert in the law, the Marja’-Taqlid.

Khomeini’s position, it must be noted, represented an expansion on the doctrine he elaborated during the decade or so before the Revolution. In that earlier version, the Marja’-Taqlid assumed a supervisory role – very much like that prescribed by the 1906 Constitution – whereby the Jurist or Jurists evaluate(s) all legislation in order to ensure that laws stand in conformity with the rules of the Shari’a. As we just saw, this position was revised shortly before 1979 so that governance, including the supreme exercise of political power, might rest exclusively in the hands of the Marja’-Taqlid. In both versions of the doctrine, the Marja’ is responsible for exercising *ijtihad* in those unprecedented cases that may befall the community and its state, but otherwise the Marja’ is to regard and treat the established law of the Shari’a, at least in its broad outlines and foundational principles, as unchangeable. This permanency of the law as structure and principles constituted the essence of the Islamic rule of law, a feature that continues to be advocated and cherished by the majority of Islamists today.

Toward the end of his life, however, Khomeini modified his doctrine for the second time. Now he maintained that the Marja’ is not bound by the Shari’a and its laws, and can make his own determination of what the law is. The Marja’ can abrogate even the essential pillars of Islam – such as pilgrimage – and demolish mosques, among other things, if “the interests of the Islamic country” are threatened. Very much in the spirit of the modern state which sees itself – and acts – as a system whose function is to create and impose discipline with a view to correcting any deviation from the self-established norm, Khomeini fully absorbed this modernist perception of the law’s function. He adopted the view, unknown – in its modernist political connotations – to pre-modern Islamic jurists of any
strand, that: “Islam regards law as a tool, not as an end in itself. Law is a tool and an instrument for the establishment of justice in society, a means for man’s intellectual and moral reform and his purification.”

As one historian has argued, this doctrine grants the Marja’ absolute authority over and above the law, and it is precisely for this reason that the Sunni ulama shied away from it. For “in the guise of upholding Islam the state might make it subservient to its own goals and ultimately absorb it within itself.” It is this “guise,” representing no more than a thin veneer, that marks the superficial difference between a self-declared secular state and a self-declared Islamic state. The ulama as well as the Islamists – Sunni and Shi’i – have yet to discover that, in the final analysis, a state is a state, no matter what name one gives to it.

Be that as it may, very little in Khomeini’s doctrine was implemented immediately, for even the Marja’ himself, the Supreme Leader, could not overhaul the Pahlavi state with the speed he hoped for, and in fact he died before much of his legal ideology was implemented. Part of the reason may lie in the paradox of his conception that Islamic governance grounded in the Shari’a’s rule of law was gradually fading away in favor of a modernist perception of governance (a change that can be explained by the weight of his experience as a political leader of a modern state which, under the Shah, had cultivated a sophisticated system of surveillance and bureaucracy). Yet Khomeini’s paradox was that of the Islamic Republic as well, for the tension between the Islamic ideal, even in its modernized form, and the reality of the modern state was and remains dominating.

This tension is exemplified in several features of the Republic. Consider, for instance, the limitations in the 1979 Islamic Constitution. Article 4 requires that “All civil, penal, financial, economic, administrative, cultural, military, political laws and other laws or regulations must be based on Islamic principles … absolutely and generally.” Yet, the mechanism created to implement Islamization of laws was not programmed in absolute Islamic terms. The Constitution provides for a supervisory council (COUNCIL OF GUARDIANS) consisting of six Shari’a jurists and another six Western-trained lawyer-jurists whose task it is to ensure that all bills presented to the Parliament stand in conformity with Islamic law.

The juristic qualifications of the latter six members might well be questioned, at least on grounds of lack of scholarly expertise in Shari‘a’s traditional law and its interpretive system.

Furthermore, according to Article 167, the court judges are supposed to adjudicate each case on the basis of codified law, and in the absence of such a law their decisions must conform to a fatwa issued by a learned Shari‘a jurist. This article effectively preserves much of the Pahlavi legal system, since it was understood by all parties concerned that the transformation aspired to in the various Articles that require comprehensive Islamization cannot obtain except through a piecemeal process. And this is in fact what happened. As late as 2000, the Procedure of General and Revolutionary Courts replicated most of these stipulations, stating that if any law is inadequate or unclear or does not exist in regard to a case at issue, the court must make recourse to a fatwa based in Islamic legal principles or the judge himself must perform ijtihad. However, should the law be found by the judge to contradict the state’s enacted law, the case must be sent to another court for adjudication. The state, as we shall see further below, must reign supreme, a situation that hardly squares with Khomeini’s own assertion that “[Islamic] law alone … rules over society. Even the limited powers given to the Most Noble Messenger and those exercising rule after him have been conferred upon them by God … in obedience to divine law.”

In the first months of the Revolution, the symbols that touched on the sensitive images of the Shari‘a received the first attention, for this was the testing ground. How can an Islamic state, an Islamic revolution, continue to uphold the idolatrous laws of the sacrilegious Shah? So night clubs, alcohol shops, music (including videos and cassettes), dancing and the sale of pork were immediately outlawed. The Constitution shortly thereafter came to prohibit usury, mentioning it by name (Art. 43). And within four months of the new Republic’s birth, the Islamic penal laws were instated in lieu of the Shah’s criminal code, which was based on the 1816 French Penal Code. However, even this instatement of penal law was tenuous, requiring additional enactments in 1982, 1988, 1989, 1992 and 1996 to give it a concrete and more complete form.

Furthermore, in installing the so-called discretionary punishments (ta‘zir), the Republic faced a dilemma. In the Shari‘a, offenses ranged from the moral to the monetary and homicidal. Some of these (i.e., adultery/fornication, wrongful accusation of adultery/fornication, drinking alcohol, theft and highway robbery) were known as HUDUD, and

7 Khomeini, Islam and Revolution, 56–57.
happened to be regulated by the Quran and the Sunna. But there were other offenses whose punishments were to be determined by the judge in light of the particular facts and circumstances of each case. In no case can the punishments for these offenses exceed the *hudud* penalties, nor can these punishments be predetermined. Acting in the manner of a modern state, the Islamic Republic, however, fixed the penalties for such offenses, in effect taking away the most characteristic property of what makes *taʿzir* what it is, namely, the judge’s social, moral and legal evaluation of a particular and unique situation which every case represented. It was the ad hoc balance that the *qadi* struck among these three and other considerations which gave *taʿzir* its features and distinguished it from *hudud*. Failure to recognize that the conceptual foundations of *taʿzir* have always assumed that each case presents unique moral conditions was a reflection not only of the moral community’s undoing but also of the modern state’s inherent role in metamorphosing the otherwise independent Shari’a into a form of state law. The reasoning behind creating this uniformity – i.e., that different penalties were imposed by judges for the same crimes – bespeaks the inevitable discomfort that the modern state displays in the face of heterogeneity: the Subject must always be uniform.

The supremacy of the state was not merely a conceptual residue of modernist influences on Islamic modes of governance, but rather a conscious choice of how the Islamic Iranian experience, or at least the influential Khomeini and other Ayatollahs surrounding him, articulated its own concept of political modernity. In effect, Khomeini viewed Islamic law not merely as a tool by means of which certain social and moral goals can be accomplished, but one that is derivative of the state, the cardinal ordinance of God. “The state is the most important of God’s ordinances and has precedence over all other derived ordinances of God.” The state does not operate within the framework of the law; rather, it is the law that operates within the state. “If the powers of the state were [only] operational within the framework of God’s ordinances, the extent of God’s sovereignty and the absolute trusteeship given to the Prophet would be a meaningless phenomenon devoid of content.”

This vision of the state entirely comports with Khomeini’s other pronouncements that, in the name of the state, the Marjaʿ could suspend with impunity Shari’a rules, major and minor, if the “country’s” interest required doing so. In this vision, institutionalized checks and balances, both Western and Islamic, are absent. In theory and in practice, the Marjaʿ and the Council of Guardians have arrogated to themselves the “stately”

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power to pronounce on what is and what is not Islamic. But this power of determining the law in the name of the state in no way reflects the tradition of the Shari’a, wherein the conjoined effects of the stability of the law and its supremacy guarantee, as they in fact did, that the “state” always operates under the rule of law.

In the meantime, little in the way of Islamization was accomplished. This was clear from the frustrations Khomeini himself expressed in a 1982 speech. After that speech, the Parliament began to push toward Islamic legislation in earnest, declaring that all laws in the Republic deemed by the government institution applying them to be un-Islamic must be submitted to the Council of Guardians for review. But the Council immediately countered by affirming that, as long as a law was not officially declared un-Islamic, it should be applied provisionally until further notice, which would be presumably after the Council of Guardians had reviewed its substance. As it turned out, this position of 1982 expressed the Republic’s gradual approach to Islamization over the next two and a half decades. It was an approach that adopted a pragmatic policy, where the accommodation of legal practice on the ground took precedence over any consideration of Islamization that might cause paralyzing or harmful ruptures to the political system.

The first manifestation of this pragmatic policy was the re-legalization of music on radio and television, trade in videos, chess and other forms of entertainment. The reasoning, embodied in a fatwa that Khomeini issued, resorted to the juristic distinction between harmful and beneficial forms of entertainment, and what was restored, it was said, was entertainment of the latter form. But the reality behind re-legalization of “permissible” entertainment was the ineffectiveness of the 1979 prohibition, which brought to the fore the inability of the government to ban popular practices. Although this was presented to the public not as a retreat but as a policy operating in favor of public interest, to the religious leadership it was, as their fatwas suggest, a mitigated concession in favor of modernity’s pernicious effects, for such legislation would at least allow Islamic television programs and classical Iranian music to compete with their Western counterparts. It was an act of opting for the lesser evil. Prohibition on all forms of music would have meant that only black market, and thus Western, music was being consumed.

This retreat had a parallel in the law of ta’zir whose penalties, as we noted, were fixed by the state. Faced with criticism by some of the Ayatullahs themselves (on the ground that the discretionary nature of ta’zir is of the essence), the government could neither abrogate them nor restore their discretionary features. So the law had perforce to stay, but – in order to vitiate the criticism of the mullahs – it was given the
designation “state regulations,” a nomenclature that amounts to a declaration of withdrawing these penalties from the sphere of Shari’a. Like all Shari’a elements that have come to symbolize and capture the modern essence of “Islamic law,” penal law was pursued with particular vigor, but, like much else, several modernizing adjustments to the traditional system had to be made. Other modern institutions within the judiciary had to be accommodated and given a Shari’a-like veneer. For instance, the jury, required in trials of “political and press offenses,” was claimed to have a Shari’a pedigree, represented – as we have seen – in the habitual attendance of jurists in pre-modern courts of law, an attendance whose intent and purpose was to ensure “due process” and fair trials, but not to pass judgments. (Apparently, the immeasurable gap between the legal knowledge of these sit-in jurists and that of the jury does not appear to have been taken as a relevant factor in the analogy.)

Similar adaptations were made to rationalize and justify the legal profession, lawyerly practices and related matters – all of which had been introduced to Iran from the West. In the final analysis, the great majority of laws adopted before and after the Revolution were Western in inspiration and content, and they remain so. International laws, international conventions and treaties continue to be ratified every year, the traditional law of jihad notwithstanding.

**Indonesia**

The vigorous Dutch push on behalf of adat since the end of the nineteenth century – which aimed to privilege these adat over the Shari’a – generated massive resentment, not least because the Dutch were seen to be tampering with legitimate authority in both legal spheres. What exacerbated the matter further was the Dutch decision to eliminate the Islamic courts during the last few years before their final departure in 1950. All in all, it can be safely said that these policies did nothing but strengthen the Indonesian popular resolve to persist in their commitment to their religion and its juridical institutions. (In fact, this phenomenon is attested in several other colonized regions, where Shari’a’s importance grew significantly as a response to colonialism and – for the first time in history – as a rigid marker of political identity.)

On the other hand, the structures of political and legal power bequeathed by the Dutch to the largely secular native elite were maintained after the country’s independence (gained practically in 1950). All commercial laws and laws of industrial property and patents were maintained, as were all adat laws applicable to Indonesians. The Shari’a in its restricted family spheres was initially kept as before, and Indonesian
Christians continued to be governed by their own Marriage Law. The laws that the Dutch had applied to the Europeans were now applied to the Chinese, though certain parts of these laws were generalized to all Indonesian nationals. The near absence of legal change in the Republic was given official sanction in Article 2 of the 1945 Constitution which stipulated that “All existing institutions and regulations of the state shall continue to function so long as new ones have not been set up in conformity with the Constitution.”

One result of the political compromise the Dutch had to make before their departure was the establishment in 1946, after the defeat of the Japanese occupation, of a Ministry of Religion. In part, this was also a competitive measure, calculated to match the efforts expended by the Japanese to promote Islam as a means of controlling the population. Many Islamic institutions were subsumed under the administration of this Ministry. The Directorate of Religious Justice became the Ministry’s division responsible for the administration of Muslim courts. In the long run, this Ministry came to play a significant role in the promotion of Islamic law, both in terms of spreading its courts and judicial practices, and in creating an educational system that was conducive to the development of an Indonesian religio-legal identity. This Ministry tended, then as now, to be staffed by persons who did not hail from the upper Westernized elite that the Dutch had bequeathed to the country, an important fact in light of the power dynamics that were to determine the extent to which the Shari’ā was to be accommodated.

Together with support from Islamist parties, the Ministry of Religion (later Ministry of Religious Affairs) pressed for the creation of Islamic courts on various Indonesian islands – this in defiance of the influential Ministry of Interior that was backed by the largely anti-Islamic, secularist nationalist elite. By 1957, Shari’ā courts (Mahkamah Syariah) were convened in Sumatra and Java, and appellate religious courts for the other islands were established in Java. But in all of these developments, the Dutch colonial legacy was considerable, for these courts amounted to very little not only in terms of their jurisdiction; the scope of this jurisdiction was at times very different from one place to the next. The Dutch judicial policies established for Java and Madura (and later Kalimantan) between 1882 and 1937 reduced the Shari’ā courts in these islands to the adjudication of cases pertaining to marriage, and more specifically to divorce; on the other hand, the newer courts of Sumatra and elsewhere adjudicated spheres as varied as waqf, public funds (including religious alms-tax), gifts, bequests and inheritance. The unification of the judicial system thus posed a great challenge to the independent state, as the Javanese courts wished to acquire wider jurisdiction, especially over inheritance,
while the other courts, especially in Sumatra, resisted giving up what they had already gained at high cost.

During the first years after formal independence, the Shari’a courts were affected by a number of factors. Internal administrative and procedural inconsistencies, coupled with inadequate funding for both administration of the courts and training their officers and magistrates, remained something of a debilitating problem for years. More importantly, however, these courts were only part of a wider ethnic, religious, legal and cultural diversity which the state was assiduously trying to homogenize. The elite’s knowledge that law is a powerful mechanism of social engineering led to the promulgation of the 1947 Law No. 7, which positioned the Supreme Court and Chief Public Prosecutor at the pinnacle of authority in the legal system. Law No. 23 of the same year abolished the customary courts of Java and Sumatra, areas that had locally governed themselves under the Dutch. It is significant that this law asserted, in defensive terms, the sovereignty of the new Republic, stating that the Republic was not “merely the successor of the Netherlands-Indies Administration.” The process of unification continued unabated. A year later, in 1948, Law No. 19 introduced a three-tiered court system (first instance, appeal and supreme court) but did not account in these provisions for the adat and Shari’a courts.

An attempt at organizing the Shari’a courts came in 1957, when the central government defined the functions of these courts and the procedures for appointing their officers. No principles or laws of the Shari’a were stated, and the courts, modeled after their civil counterparts, were collegiate – another Dutch legacy. The laws of evidence were those used in civil courts, not those of the Shari’a, and so were the description and reporting of court cases. Following the Dutch policy, the new nation-state adopted the principle that the Shari’a courts should not deal with property and financial matters, which were, as noted earlier, deputed to the civil courts. Needless to say, such a dichotomization of divorce and property jurisdiction is artificial, and proved to be problematic, since in land-owning rural communities the two spheres were inseparable.

The national debate during the 1950s was redolent of the discourse over the places of adat and Shari’a in the country’s legal system. The pluralism of adat ran against the wishes of the secular nationalists whose strategy was to depict the adat as backward and anti-modern. Likewise, the weaker voices in this secularist-nationalist camp made similar arguments against the Shari’a. The proponents of adat, though, were powerful

enough to gain some concessions in the 1960s, when the Basic Law of Agrarian Affairs declared that the adat law provides a source of law in the Republic, taking the place of colonial law. But this concession was sharply limited by the introduction of conditions to the effect that any use of such customary laws should not impede the construction of a just and prosperous society. In substance, therefore, colonial law persisted quietly under a nationalistic guise.

On the other hand, the Shari’a courts survived this debate more successfully, partly owing to the aura of legitimacy that Islam generated, and partly because the legal “code” by which they were regulated (mainly of Shafi’i pedigree) was, unlike the pluralist adat, consistent with the aims of the national unification project. It is also very likely that the government realized the relevance of these courts to the daily lives of the rural population. Whereas no secular courts could play the role of a mediator, the Shari’a courts fulfilled a major role in arbitrating and mediating disputes before reaching the level of formal adjudication. Thus, Law No. 14 of 1970 affirmed the judicial powers of Shari’a courts, thereby appeasing a majority of citizens to whom the legislation was not just a legal act, but also a symbolic and political one. On the one hand, the law in effect was curbed through the concomitant affirmation of the “silent” colonial principle that Shari’a court decisions, to be effective, required the ratification of the secular courts. The religious Marriage Law of 1974 was, in application, subject to these very limitations.

In time, however, these limitations were removed. Under the increasing pressures of Islamization and of the Islamists of Indonesia, as well as the emergence of strong civil Islamic movements, and despite the stiff opposition of the “secularist” and non-Muslim groups, Law No. 7 (1989) was passed, unifying the Shari’a courts throughout the islands and, significantly, reversing the principle of ratification, known as executoire verklaring. Henceforth, the Shari’a courts’ decisions were self-validating, needing no sanction from the secular courts. As of 1991, these courts began to base their decisions on the new Compilation of Islamic Law in Indonesia, which reflected a modernized version of Islamic law that was also intended to create more consistency and uniformity within the country. In this Compilation polygamy remained legal under certain conditions and inter-faith marriage continued to be banned.

After the collapse of the Suharto regime in 1998, the process of decentralization (known as Otonomi Daerah) took on a new dynamic that resulted in a number of developments, often contradictory, on both the federal and district levels. Laws No. 10 and 32 of 2004 recognized the relative autonomy of Indonesia’s districts, giving the federal government exclusive powers over national and international policies, but leaving the
domestic affairs of the districts to be decided largely by the districts themselves. Sixteen districts have since signed on to the Sharia District Regulation (Peraturan Daerah Sharia; abr. Perda Sharia), including Aceh, Padang, Banten, Cianjur, Tangerang, Jombang, Bulukumba and Sumbawa. The main content of the Regulation is the application of Shari‘a teachings, understood and expressed variably by different districts. Some have passed laws requiring the donning of Muslim dress, whereas others limited it to civil servants; other districts also criminalized prostitution and the sale and consumption of alcohol, and regulated the collection of religious tax. On the other hand, in 2004, and under pressure from international and local human rights groups, the Ministry of Religious Affairs proposed a draft law to replace the 1991 Compilation. The proposed law – in which polygamy was to be strictly outlawed, and inter-faith marriage unconditionally legalized – led to a protracted national debate that continues until this day.