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THE RULE OF LAW IN THE ARAB MIDDLE EAST

by

Richard H. NOLTE

Trevelyan in his **History of England** sums up the celebrated stand of Sir Edward Coke against James I in these words :

In essence, the quarrel was this : James and Charles held, with the students of Roman Law, that the will of the Prince was the source of law, and that the Judges were 'lions under the throne,' bound to speak as he directed them. Coke, on the other hand, in the spirit of the English Common Law, conceived of law as having an independent existence of its own, set above the King as well as above his subjects, and bound to judge impartially between them....

The doctrine of the supremacy of law has been called the outstanding contribution of English civilization, transcending even Parliamentary democracy, Shakespearean poetry, and the industrial revolution; and for present purposes, I take this to be the meaning of "the rule of law." Events in recent years suggest that the question of the rule of law in the Islamic countries of the Middle East is of more than academic interest. Coups d'état, suspensions of constitutions, "treason trials," the establishment of authoritarian régimes, and the easy disregard of civil rights gives rise to doubt as to whether there is a rule of law in our sense in this area.

It can be shown, I think, that during the millenium of classical Islam and right down until recent decades there was a rule of law in the Middle Eastern area, albeit an imperfect one; and that the net effect of the importation of western concepts and methods (the "impact of the West") has been a negative one. To borrow Trevelyan's metaphor, the ruler in classical Islam had lions under the throne in the form of his

Islamic law judges, but he could not command them. He could leash them and unleash them, but they listened to the command of the Sacred Law which was beyond his control. Now, however, the ruler has equipped himself with powerful new lions borrowed from the West who are fully subservient to his command, and has also asserted his control over the Sacred Law itself. As a result, law in the Islamic countries of the Middle East has pretty much become the unchecked instrument of the state.

The Sacred Law of Classical Islam

In Islamic theory, the **Shari'a**, the Sacred Law, claims to regulate all the actions of men, public and private, social and individual. In theory, it makes no concession to Caesar, and asserts its authority over political man in all his acts of government as well as over private man in his prayers. This idea is summed up in the maxim. **Islam din wa daula** : "Islam is religion and state."

Much more than a legal system properly speaking, the **Shari'a** is the comprehensive catalogue of Allah's commands and recommendations laid down for the guidance of men. How and what to eat, when to wash, what to wear, how and when to pray and fast — these and similar matters are treated on the same basis and with just as much meticulous concern as matters more strictly legal such as marriage and divorce, or commercial transactions, or crime. Governing the whole range of man's relations with Allah and society, and in the absence of any organized Muslim church hierarchy, the **Shari'a** is incomparably the central institution of Islam.

To emphasize the wider conception of law manifested by the **Shari'a**, it may be useful to resort to analogy. In American baseball, for example, the "rules of the game" such as "three strikes is out" and "three outs retires the side" might be compared to law in the western conception. But in a Muslim conception, the "rules of the game" would include not only the foregoing, but would also govern the entire behavior of

all the players toward each other, toward the spectators, and indeed would govern the behavior of the spectators as well.

What the pitcher should do or not do when making a pitch, how to greet a scoring run, when it is or is not permissible to roll up sleeves, how to recover from a fall- -all these might be included in a Muslim conception of "rules of the game." The Sacred Law of Islam, backed by the threat of a painful doom in the Hereafter, claims to regulate all human action.

If wider in scope than law in the western conception, Muslim law is also more complicated in its judgments. In western law, an act is either lawful or not lawful. Whether or not such an act is also decent, good, pious, ethical, moral or, in good taste is beside the point. Not so in Muslim law. The **Shari'a** considers a given act -depending on circumstances- to be mandatory (**fard** or **wajib**), commendable or recommended (**sunna**), permissible (**halal** or **ja'iz**), reprehensible (**makruh**), or forbidden (**haram**).

To use the baseball analogy again, it might be mandatory to accept the decisions of the umpire without argument, or forbidden to strike a member of the opposing team. It might also be commendable to cheer the losing team or to applaud a good hit - not mandatory but recommended as a way to build up a credit in Heaven. Similarly, it might be reprehensible to use foul language or to throw down the bat in anger, actions not bad enough to guarantee a painful doom but sufficient to incur a drain on the player's heavenly account.

The foregoing will have given an idea of the highly normative character of the **Shari'a**, a fact of the greatest importance in the history of Islam. For in setting up an eternal, unchanging, divinely sanctioned standard of human conduct, the **Shari'a** was the decisive factor over the centuries in creating a stable, unified, orderly and law abiding Muslim community out of widely diverse peoples, and a social fabric that was proof for over a thousand years against invasions, revolts, civil wars, famines, and all other calamities and political vicissitudes. The **Shari'a** may truly be called the backbone of Muslim society.

The normative quality of Muslim law is not accidental. It is a product of the process by which the law came into being. Immediately after the death of the Prophet in 632 A. D., the Arabs exploded out of their inhospitable peninsula and began the sweeping conquests which in less than a century carried them to dominion over an area stretching westward through North Africa and Spain to the Pyrenees, and eastward through Persia and far into central Asia. During this period, generally speaking, there was no such thing as Muslim law. The religion itself was only commencing to be elaborated beyond its primitive beginnings; and if the Arab conquerors were Muslims, they were so at a time when the term hardly meant anything more than Arab.

But there was law, of course. The new empire had to be administered; and in the process, a body of administrative practice was built up which together with customary practice was to constitute the main raw material of the **Shari'a**. By and large, the Arab rulers of the first century and their governors followed a policy of empiricism in solving the host of new administrative problems. Where precedents arising out of then background of Arab customary law (e. g., the arbitral method of settling disputes) or introduced by Prophetic innovation (e. g., punishments for certain delicts; a modified law of divorce, marriage, and inheritance) seemed appropriate, they were followed. Administrative and legal habits, institutions and concepts which the conquerors found in the civilized organized areas of Byzantine Egypt and Syria and Sassanid Iraq and Persia were taken over in wholesale lots (e. g., tax methods, and the institutions of market inspector and complaints tribunal). Talmudic law and the canon law of eastern Christian churches made their contributions; and beyond doubt, there was in addition a good deal of improvisation.

Generally speaking, the Arab administrators of the first century of Islam were successful in evolving a corpus of administrative practice out of these kaleidoscopic origins which, if not entirely integrated and coherent, was nonetheless equal to the demands of governing a vast and turbulent empire and of

securing the revenues from the subject cities and provinces necessary to support a large military organization and to prosecute almost continuous war.

In a natural delegation of authority, Arab governors began early to put the business of deciding disputes and assigning penalties into the hands of secretaries for legal affairs, or **qadis**, whose role was initially similar to that of the magistrates in the recently displaced Byzantine administration. The "jurisprudence" of these early **qadis** contributed much to the formation of the recognized body of administrative and legal habit which had developed by the end of the first century of Arab rule.

The **Shari'a**, the Sacred Law of Islam, began as a protest against the customs and habits of Arab society including this body of administrative practice.

During the initial century, it is possible to identify two main tendencies. The one, already touched upon, involved the organization and administration of a new empire, and the imposing on it of an Arab stamp. The other tendency was an Islamic one; and toward the end of the first century it became dominant. In the vanguard of the Islamicizing tendency were groups of pious scholars in various cities of the empire who had begun to examine and criticize Omeyyad administrative practice and the customary practices of the people at large, using as criteria the precepts of the new religion. No doubt motivations of piety were re-inforced by political and other considerations; in any case, the objective was reform. They began by criticizing popular and administrative practice piecemeal, and gradually went on to elaborate in more and more detail a system of things as they ought to be as compared with what they were in fact. In this way, Muslim law acquired its decisively normative character.

As time went on and the Islamicizing tendency gained more and more the ascendancy in the Arab empire, the pious scholars began to progress from criticism of the existing state of affairs to the systematization and logical elaboration of their

earlier efforts; legal thought for its own sake became a motivation; and gradually the main outlines of the **Shari'a** took form. As it gained in definition and prestige, it began to have an influence on the practice of the governors and their **qadis**. But the decisive step in this direction remained to be taken by the Abbasids.

In 750 A. D., a little more than a century after the beginning of the Arab conquests, the Persian-based Abbasid dynasty, promising to establish the reign of Allah upon earth and riding the egalitarian appeal of Islam to the non-Arab masses of the empire, overthrew the Arab hegemony of the Omeyyads. Under the Abbasids, Muslim law came as close as it was ever to come, except for a time many centuries later under the Ottoman Turks, to establishing itself in fact as well as in theory over administrative and legal practice. The great innovation of the Abbasids was to centralize the appointment of the **qadis**, and to select them from the ranks of the pious legal scholars. Except insofar as the **qadis** had hitherto applied in practice certain Qur'anic rules about inheritance, divorce, and the like, this departure established for the first time a direct nexus between the Sacred Law and everyday practice: a substantial part of the practice was put into the hands of specialists who were required to make decisions in accordance with the **Shari'a**.

On the face of it, the **Shari'a** had captured, so to speak, the chief legal officers of the empire. A bridge had been thrown across the growing gulf between theory and fact, and foothold secured in administrative practice. But to complete its victory, the **Shari'a** would have had to go on to establish its practical authority over the other administrative officers of the empire including the ruler himself; and this, in spite of the theory and in spite of continuing efforts to do so, it was never able to accomplish. Although comparatively complete in matters of worship, family law, and even commercial transactions and private affairs in general, the **Shari'a** was sketchy indeed when it came to public law; and this very fact is a measure of its failure to bring conduct of state under its sway. The **Shari'a** did supply some guidance in matters relating to

the holy war (jihad), and to the collection and disbursement of certain taxes. It specified punishments for certain crimes, and it set out in general terms the public duties incumbent on the ruling authority such as defense of the frontiers and maintenance of the religion. But for the men who had to administer the Muslim empire, the **Shari'a** could not in its incompleteness and rigidity establish itself in practice as an all-sufficient law.

The wide gaps left by the **Shari'a** in its attempt to regulate the conduct of state continued to be filled by the administrative initiative of Muslim rulers and their lieutenants who were faced with the day-to-day necessities of government. A large and developing body of secular administrative practice thus remained outside the precincts of the Sacred Law and often in direct contradiction to it; and it was a practice which included, in fact if not in theory, all the functions of government, legislative, judicial, and executive.

Well aware of all this, Islamic legal theory sought to maintain the **Shari'a** claim to omnicompetence by bringing the ruler's administrative practice into the fold of Islam. But to do so, it had to make all the concessions. It was forced to recognize the wide discretionary authority (*siyasa*) the ruler already had, and to regularize it in the name of "common sense" (*istihsan*), or "consideration of the public good" (*istislah* or *masalih mursala*), or simply "necessity" (*darura*). In return, the ruler was exhorted to keep his administrative practice "sound," "religious," and "just" - within the bounds of the Law (*siyasa shar'iya*).

If the **Shari'a** failed to "capture" the ruler and his other administrative officials and was forced to recognize their practical autonomy even its new monopoly over the **qadis** was an incomplete one. For although the law they were thenceforth supposed to apply was the **Shari'a** which was held to be divinely established, eternal, and independent of the ruler's control and which was vested in legal handbooks and interpreted by a corps of jurists (*ulema'*) and jurisconsults (*muftis*) equally

beyond the ruler's control, the **qadis** continued to rely upon the ruler for execution of their judgments. Moreover, the **qadis** themselves continued to be appointed, paid, and dismissed by the ruler; and the latter retained his power to limit the competence of the **qadis'** jurisdiction in time, place, and subject matter. Despite their Islamic propaganda, the Abbasid rulers were not long content to suffer the existence of so important an institution independent of their authority; and they used the various powers confirmed to them by the **Shari'a** to cut down the role of the **qadi**. If they could not control the Law, they could at least fence in its judges.

The restrictions imposed upon the **Shari'a** in action, however, were not solely due to the despotic tendencies of the Abbasid rulers or of their successors since then. In some ways, the **Shari'a** was self limiting. It bound the **qadi** in terms of procedure as well as of law, with the result that **qadi** justice became more cumbersome and was deprived of all initiative. One quick result of the latter fact was that competence in matters of crime was mostly taken away from the **qadi** and given to the police (**shurta**), another arm of the administration. Similarly, utilizing the earlier Sassanid institution the Abbasid caliphs re-established administrative tribunals. Complaints (**mazalim**) about miscarriages of **qadi** justice and the oppressions of powerful men. Very soon, this "King's justice" was competing with the **qadi** courts, notably in matters of property right; and they thus constituted a further limitation of the **qadi's** function.

Nevertheless, it remains true that the **qadi** institution is one of the most vigorous ever developed by Muslim society. Although in most Muslim countries the **qadi's** jurisdiction and power has progressively been narrowed to the point that only matters of family law remain in his hands, the **qadi** courts are still an important part of their legal systems. In Saudi Arabia, the **Shari'a** is still the only official law and the **qadi** courts are still the only official courts, although it is interesting to note the recent formation in that country of a board of complaints reminiscent of the Abbasid prototype. In Turkey on the other

hand, and recently in Egypt, the **qadi** courts have been abolished.

The Classical Theory

Meanwhile, to go back to the Ponnatine period of Islam, the bands of pious scholars at work in the various cities of the empire had become schools of law, each with a body of tradition representing the particular synthesis of Islamic precept and local practice established by the consensus of the local scholars, each school differing somewhat from its neighbors but in touch with them and influenced by them, each continuing to elaborate its doctrines in the context of early Abbasid society.

In this process, the more or less anonymous "living tradition" of the local schools came more and more to be vested in bodies of doctrine and opinion recorded and extended by "masters" of the schools and their disciples; and the schools thus gradually lost their geographical identity and became distinct in terms of doctrine instead, each school under the name of an early master. In this way the schools of lower Iraq bit by bit developed into the Hanafi school, after the legal scholar Abu Hanafi (d. 150/767); and the schools of the Hejaz became the Maliki school after their eminent jurist, Malik ibn Anas (d. 179/795). Of several such schools, only these two together with the Shafi'i and Hanbali schools, all equally orthodox, have survived into modern times.

By the end of the second century of Islam, about the time of Harun al-Rashid and Charlemagne, this process of "personalization" was well begun. The **Shari'a** itself had been developed in general outline and fixed in a body of jurisprudence; and it had so to speak, become self-conscious. It had begun to seek an explanation of itself.

The formal theory of the origins of the **Shari'a** as elaborated during the third century of Islam has not much connection with historical reality. It is rather an explanation of the law and its sources developed long after the law itself had come into being, and it was the work of scholars mostly ignorant

of that historical process. It was essentially a **post factum** attempt to find a solid Islamic explanation and basis for the body of Islamic law already in existence.

According to the classical theory, there are four sources (**usul**) of Sacred Law: the **Qur'an**, or Muslim Bible, which purports to be the literal word of Allah as related by the angel Gabriel to the Prophet Muhammed; the **Sunna**, or the example set for Muslims in word and deed by the Prophet; **Ijma'**, or the consensus of the legal scholars on points of law; and **Qiyas**, or analogy, a logical method of extending known law to new situations.

Of some 6000-odd verses in the **Qur'an**, only about 600 supply rulings which fall within the circle of law--law in its wide Muslim sense. These verses deal chiefly with exhortations and rules about warfare and the taking of booty, about marriage, divorce, and inheritance. They prescribe a **lex talionis**, and lay down penalties for certain delicts such as theft, fornication and slander. They urge decent treatment of orphans, the honoring of contracts, and fairness towards one's wives--typical of the normative reformative character of the **Qur'an** and of Muslim law itself.

The legal verses of the **Qur'an** are a hodgepodge of isolated fragments consisting of warnings against and appeals to change certain details of the unwritten customary law and practice of the primitive Arab community in which Muhammed lived. In no sense do they constitute a system or framework of a body of law, even in barest outline.

And yet the **Qur'an** claims to be a universal explanation of this world and the next. "Man is not left bewildered," it says. A solution of the apparent contradiction between the incomplete and haphazard rules of the **Qur'an** and its claim to universality was found in the repeated Qur'anic injunction to obey the Prophet. This injunction came to be interpreted to mean that the example of the Prophet (divinely guided as he was thought to be) carried the force of law.

The **Sunna**, or the practice of the Prophet, is embodied in thousands of stories and anecdotes about him. Each story or tradition (**handith**) comes equipped with an **isnad**, or a list of transmitters-- A said that B told him that C heard from D that E witnessed the Prophet doing this or saying that. The authenticity of these traditions was established by a formal examination of the chain of transmitters and not by application of historical criticism or even common sense to the content of the traditions. Modern western scholarship has established the fact that most of the traditions, while purporting to record legal precedents set by the Prophet, actually embody the ideas, habits, assumptions, aspirations, and vested interests of later generations. Later generations of scholars, as traditions from the Prophet became increasingly important as a source of law, tended to recreate the Prophet in their own image, so to speak, putting their own customs and practices under the aegis of an alleged Prophetic example in order to sanctify them with the authority of divine precedent.

This general retrojection was not, in the main, deliberate or done in bad faith; mostly, like Topsy, it "just grewed". But in this way, new legal raw material continued to find its way into the **Shari'a**; and the **Shari'a** was able to keep abreast of changing reality. By the middle of the third century of Islam, however, the scholars had arrived at a general agreement as to which traditions were valid and which not; and had recognized six collections of traditions as being authoritative. The traditions accepted by the scholars as sound became the second material source of Muslim law, explaining supplementing, and even correcting the first.

The agreement of the scholars upon a body of approved traditions is an example of the third source of Sacred Law: **Ijma'** the consensus of the scholars. **Ijma'** finds its basis as a source of law in the **Sunna** where the Prophet is recorded as saying, "My community will never agree on an error." Which interpretation of a Qur'anic ruling is correct, which traditions are authentic and binding, which analogical extensions are valid-- questions of this sort were decided by the gradual for-

mation of a consensus among the legal scholars. **Ijma'** therefore, is more a principle of selection and ratification than a material source of law.

But it is decisive. Because **Qur'an** and **Sunna**, legal principles and rules and analogical extensions- -all depend for their meaning upon what the Muslim scholars agreed was their meaning. The principle of consensus might have provided Muslim law- -as indeed it did for a time- -with a powerful means of growth and adaptation to changing circumstance. Instead, it became the great obstacle to adaptation and change, a principle of rigidity. A consensus once reached on a given point was considered to be forever binding beyond any chance of reconsideration- -a sort of canonical **stare decisis**. Muslim scholars of a later day did not have the power to reopen questions answered by their predecessors; and instead of a flexible instrument of progress, **Ijma'** became the mighty anchor of the status quo, the status quo of about tenth century A. D.

According to the theory, **Qiyas**, the extension of known law to new situations by analogy, is the fourth source of law. Not a material source like **Qur'an** and **Sunna**, it is rather a method. Like **Ijma'**, **Qiyas** derives its sanction from the **Sunna** in traditions to the effect that the Prophet enjoined the use of reason or personal judgment (**ra'i**). One tradition, for example, tells us that when the Prophet sent Abu Musa as his governor to Yemen, he said: "Judge by the book of Allah, and if you do not find in it what you need, by the practice of the Prophet. If you do not find guidance in this, use your own opinion (**ra'i**)."**Qiyas** came to be the disciplined use of personal opinion, the scholars agreeing that reasoned extensions of the Sacred Law must proceed to the new situation from known law by strict analogy based on a legally relevant common denominator or cause (**'illa**). For example, tradition records the Prophet as forbidding drinking from gold and silver vessels. **Qiyas** extends this prohibition to eating from gold and silver plates, the common legal denominator being feeding from gold and silver utensils. Analogical extensions of known law became binding when ratified by the consensus.

The definition of sources and the irrevocability of consensus gradually deprived the body of "positive" Islamic law (**fu-ru'** - "applications," or literally, "branches" as opposed to **usul**, "sources," or literally, "roots") of the possibility of further growth. For as the scholars progressed in their elaboration of the Law, the fact that they could not recognize new sources or turn back to reconsider points already agreed upon meant that before very long the logical possibilities of the legal system were exhausted - - indeed, spurn out to extremes every bit as absurd and empty as those reached by the scholastics of medieval Europe. But before losing themselves in sterile detail, the scholars had constructed an imposing and enormously prestigious edifice of law, and one that has stood the test of time. The **Shari'a** has endured essentially unchanged for a thousand years.

The gradual crystallization of the **Shari'a** found a later formulation in the phrase, "the closing of the gate of **ijtihad**." **Ijtihad** means the exercise of independent mental effort in the search for truth; but as the law became fixed, there was no more room for **ijtihad** and was gradually replaced by the doctrine of **taqlid**, the duty to accept without question the conclusions worked out in the past and ratified by the slow movement of consensus. And so during the fourth century, the "gate" closed. Henceforth the work of the scholars was limited to explanation, interpretation, and application.

In theory, the **Shari'a** is the all-sufficient regulator of the whole range of human action, including conduct of state. For ruler and subjects alike, it marks the "pathway" (which is the root meaning of **Shari'a**) to salvation. The ruler, or **imam**, according to the theory, derives his authority from Allah; and upon him as Allah's vicegerent lies the duty of guaranteeing observance of the Sacred Law in the Muslim community. Upon the community in turn lies the duty of obedience. The ruler represents the Law, but he does not embody it since the Law exists independently of him and he is himself subject to it. His transgressions of the Law in his acts of state as well as in his

private acts are sanctioned by the promise of retribution in the Hereafter.

It is here that a fundamental shortcoming becomes apparent. In theory, the **Shari'a** purports to impose a thoroughgoing rule of law binding on ruler and ruled alike. In practice, as we have seen, it failed to establish effective control over the ruler. And so far from imposing on the community the civic responsibility of restraining or removing a Law-violating ruler, the doctors of the Law (for historical reasons it is not necessary to go into) instead enjoined obedience on the grounds that civil disturbance was worse than "obedience in sin," and that "the tyrannous ruler is a thousand times better than chaos." Muslim society thus fatalistically disclaimed responsibility for government and failed to establish in the name of the **Shari'a** an airtight guarantee of individual and community rights against arbitrary authority. Instead of "rule of law", "oriental despotism" became the keynote of Islamic history.

If it is true that Muslim society as a whole was law-abiding, and also true that the **Shari'a** generally imposed a restraint upon the ruler through his own piety or through his political prudence during an era when the **qadis** and juriconsults wielded an enormous popular prestige; and if it is therefore possible to assert that there was a qualified rule of law during most of Islamic history, it nonetheless remains a fact that Muslim society bring little sense of responsibility for government to its present day problems, and no ingrained habit of forcing rulers to behave or bringing them to book for their wrongs.

The Impact of the West

With this background in mind, we may now glance at the changes produced during the past century or so by the so-called "impact of the West." The term has become a cliché, but it stand as an accurate description of the rising tide of goods, tools, techniques, social institutions, ideas, and values from the West that has inundated the Middle East along with other areas of the world. Faced with the evident inferiority -- often

emphasized by military force-- of its own cultural equipment in the face of this onslaught, Middle Eastern society has been quick to seize upon and utilize all these things in its effort to overcome its disadvantage and to acquire respectability in terms of the new western model. In a Tonybeeian sense, this is the Herodian response to the challenge of the West; and the great new reformist and reconstructive social force in the Middle East is nationalism, with the nationalists (whose basically constructive purposes become destructive and extremist when too long thwarted) as the "creative minority."

The result has been a profound and accelerating social transformation in the Middle East, and nowhere have the changes been more drastic than in the field of law. Modern nation states with their separate constitutions and governments have risen from the remains of the Ottoman Empire. National sovereignty has replaced the multi-national religious doctrine of the Caliphate. Western-type codes, courts, and legislation have dispossessed the religious courts and all but deprived the **Shari'a** of social effect in Turkey and Egypt, and elsewhere have thrust them far into the background. Even in a isolated and "backward" country like Saudi Arabia, the new complaints boards and other administrative "committees" suggest that developments parallel to those in the other countries are to be expected there too before long.

On the face of it, the **Shari'a** has been a major victim of western legal concepts and methods; but this deserves a closer look. If one considers all the law actually applied in a modern Muslim state as a circle or pie chart, one can think of it as being divided into sectors. One sector would consist of secular municipal law, the positive law of the state (or **siyasa** in the terminology of Muslim law). A second sector would be that part of the **Shari'a** still applied in practice (dealing typically with matters properly religious or akin to the religious such as marriage, divorce, inheritance, pious endowments, etc.), leaving the rest of the circle to customary law. The size of the Muslim law sector has varied with time and place, impinged upon as we have seen by the police, complaints, or marketplace

jurisdictions set up by a given ruler; but in recent decades it has been far more drastically constricted by the expansion of the municipal law sector through executive decrees and legislated codes and statutes. For the first time, the **Shari'a** has been in competition with a rival system of law. The constricting tendency was carried to its logical conclusion in Turkey in the 1920's during the secular revolution under Ataturk, and also recently in Egypt: abolition of the religious law courts meant the banishment of the **Shari'a** in its entirety to the realm of religious ideal.

The ruling authority's power to do this, however, is conceded by the **Shari'a** itself through its acknowledgment of the ruler's right to limit the jurisdiction of the **qadi**; and while they may deplore it, the conservative scholars of the law (**ulema'**) undoubtedly prefer straightforward suspension, which leaves the Sacred Law intact as an ideal, to attempts to change the Law itself.

Others, however, both within and outside the ranks of the **ulema'** want to do precisely that. They want to establish (or as they say, reestablish) a thoroughgoing **Shari'a** rule of law. They begin with the premise that the Sacred Law is valid universally, for all time, and for all the activities of man. Nothing that the law seems no longer adequate to the needs of modern society, they conclude that its original and essential principles have been obscured by the later additions of the scholars. They therefore call for a return to the "true" principles of Islam, and assert the right to reopen the "gate of **ijtihad**." This implies a loosening of the principle of **Ijma'**, and appears to threaten the whole edifice of the **Shari'a**. Of this the conservative theologians are acutely aware, and they charge the modernizers with seeking to destroy the religion.

The modernizing approach until it was displaced by the more self-confident and forthright approach of President Nasser's government - is visible in recent Egyptian legislation. Instead of eliminating **Shari'a** jurisdiction by frontal assault, so to speak, and substituting a more desirable law, the **Shari'a**

jurisdiction was maintained but the **Shari'a** itself was infiltrated and made to conform more closely to modern need. The method used was to abrogate by legislative enactment the **qadi's** right to apply a given rule of the **Shari'a** and to require him to apply another more suitable rule resurrected from the past and representing an aberrant opinion long ago discarded by **Ijma'**. For example, Article 4 of Décret-Loi 25 of 1929 modified the Muslim law rule then in force that ambiguous expressions which may signify divorce do so signify. Ambiguity was to be resolved in favor of divorce. The amending Article 4 stated: "Expressions of ambiguous meaning which may at the same time signify divorce and something else do not signify divorce unless intent to divorce exists." The change was based on the view to this effect held by two early jurists; and upon their authority, the change was held to be a valid restatement of the **Shari'a**.

Between the extremes of abrogation and infiltration, the nineteenth century Ottoman **Majalla**, or "Digest of Just Laws," and the codes of Qadry Pasha in Egypt form a sort of halfway house. The former was an approach to a civil code based on the Hanafi (which school enjoyed official favor in the Ottoman Empire) law of contracts, obligations, and civil procedure; and the latter were unofficial codifications of Hanafi family law and the laws of inheritance, property, and pious foundations. These codes were western in form and Muslim in content, and represent an initial response to contact with western legal ideas. The **Majalla**, promulgated during the years 1869 - 76, was never applied in Egypt (which already had its own legal system) and has since been superseded in Lebanon, Syria, and Iraq. In Jordan, however, parts of it are still applied.

These early codifications have present day successors in the form of the closely similar civil codes of Egypt, Syria, and Iraq. All are of recent adoption, and owe paternity to Egypt's eminent jurist, Dr. Sanhoury. They are based on western principles of legislation, and draw both on the "sound" provisions of the **Shari'a** and on non-**Shari'a** sources including the jurisprudence of the national courts and foreign law codes.

The Sanhoury compromise thus satisfies the needs of modern society and at the same time usefully preserves something of the substance of Muslim law.

All these approaches to the problem of ancient law and modern need reveal the profound shift in assumptions that the impact of the West has produced in Muslim society. In the past, the ruler and all of society were regarded as operating within the framework of the unchanging Sacred Law. Now, they have moved outside and have no doubt about their competence and title to write their own sovereign law to meet changing necessity. Nowhere is this change of viewpoint more strikingly evident than among precisely those modernizing theologians who call for the reimposition *in toto* of a reformed **Shari'a**. They no longer seek, as their ancient predecessors did, to learn the will of Allah as a guidance for man. In going back into the past in search of more suitable precepts, they already know what they are looking for. The needs of modern society is the platform on which they stand. The Law is to be redefined in terms of social welfare: "... the goal of the Law is only the welfare of men, and wheresoever lies the welfare of men, there is the Law of Allah," writes Sheikh Khallaf of al-Azhar in a recent treatise. In their reworking of the classical theory, public welfare (**maslaha**) becomes the great new source of law by giving Islamic approval to the positive law of the state (**siyasa**) by which it is served, insofar as the latter is **siyasa shariya** and does not violate any of the basic principles (as newly defined) of the religion.

Viewed in historical perspective, this may be taken as merely the latest phase in the long effort of Muslim theologians to find a satisfactory Islamic explanation for the changing realities of political rule and to cast the net of Islamic control, over the ruler. Through their attempt to sanctify **raison d'état**, as it were, they may now succeed. But it seems clear that in the process Islam and its Sacred Law will have been altered, secularized, and weakened even as an ideal.

By thrusting the **Shari'a** far into the background, the influence of secular conceptions from the West has mostly dis-

solved the qualified rule of law imposed during the centuries of classical Islam. Never fully controlled, the ruler now appears to be fully uncontrolled from a **Shari'a** point of view. It remains to ask whether the modern Islamic states of the Middle East by establishing constitutions and bills of rights based on western models have been able to establish in fact the substitute rule of law thus implied. Few western observers, and few politically conscious Middle Easterners would concede that they have, or that it is even possible to do so without educated population prepared to insist upon it.

One may note, however, the interesting attempt of the Egyptian Council of State under the presidency of Dr. Sanhoury to impose judicial review on the administrative acts of the State, and indeed upon the legislative acts of Parliament. The Revolution of 1952, however, and the suspension of constitutional rule intervened before any practical results could be observed.

It is not, in my view, necessary to take too pessimistic a view of the present lack of a rule of law in the Middle East. Education is being extended with very great rapidity in the area, and with it goes the penetration of modern ideas and aspirations. If constitutions and bills of rights so far amount only to a sort of lip service to a popular ideal, at least the ideal is newly there, and popular. Implementation may come in time.
