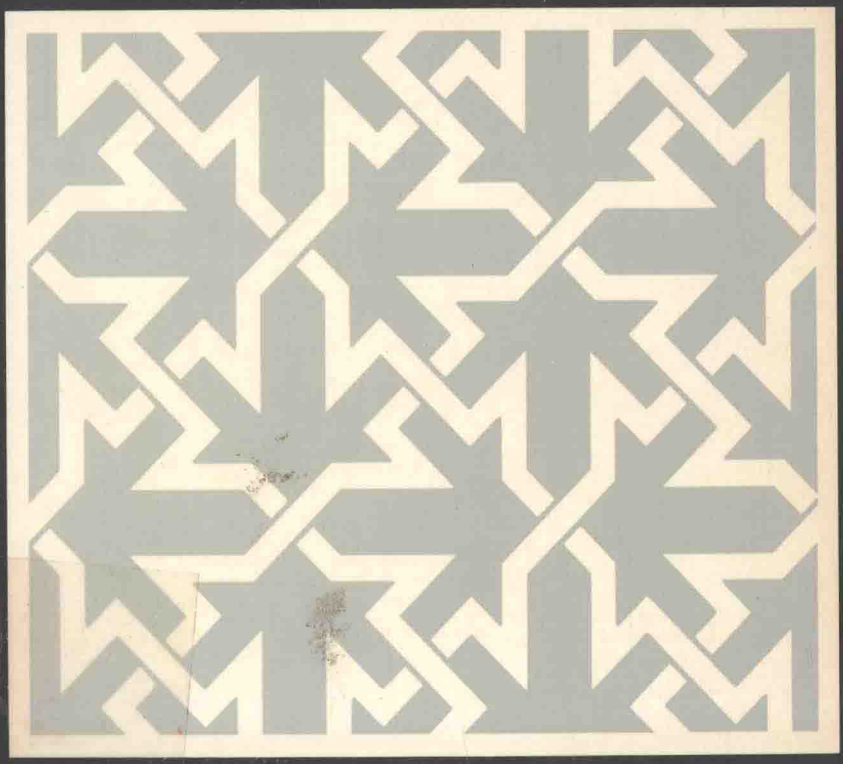
A TEXTBOOK ON MUSLIM PERSONAL LAW

2nd Edition



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CROOM HELM
London • Sydney • Wolfeboro, New Hampshire

Croom Helm Ltd, Provident House, Burrell Row,
Beckenham, Kent, BR3 1AT

Croom Helm Australia, 44-50 Waterloo Road,
North Ryde, 2113, New South Wales

British Library Cataloguing in Publication Data

Pearl, David
A textbook on Muslim personal law. —
2nd ed.
1. Persons (Islamic law)
I. Title II. A textbook on Muslim Law
342.61 [LAW]

ISBN 0-7099-4089-0

Croom Helm, 27 South Main Street,
Wolfeboro, New Hampshire 03894-2069, USA

Library of Congress Cataloging-in-Publication Data

Pearl, David.
A textbook on Muslim personal law.

Rev. ed. of: A textbook on Muslim law. 1979.
Bibliography: p.
Includes index.
1. Domestic relations (Islamic law) I. Pearl, David.
Textbook on Muslim law. II. Title.
LAW 340.5'9 86-24039
ISBN 0-7099-4089-0

Printed and bound in Great Britain by Mackays of Chatham Ltd, Kent

Preface

The second edition of this book is published some seven years after the appearance of the first edition in 1979. The first edition was written as an attempt to provide the English reader with a simple and short guide to the major aspects of Islamic law. The emphasis was placed on domestic relations and inheritance law in India, Pakistan and Bangladesh. The emphasis remains the same for this second edition. It is in the family law area that Islamic law plays a major role and it is in South Asia where the bulk of the Muslim community who have settled in the UK have their roots.

I am grateful to those who reviewed the first edition and I have taken account of all these comments when preparing this new edition. As before, it is hoped that these pages will be of some value to those who wish to know about the background to the laws of Islam: whether it be as students, as lawyers with cases to argue before the courts, or as laymen and laywomen who are simply interested in increasing their knowledge. I have decided to leave out of this edition the collection of legislative documents which appeared in the first edition. This decision was prompted by considerations of space, but in any event there is an excellent collection of material edited by Professor Tahir Mahmood, and there is also the book written by Keith Hodkinson which provides the source material for South Asia (See Appendix III).

At the time of writing this preface, the UK Family Law Bill (1986) is still the subject of legislative discussion, having completed its stages in the House of Lords and gone through the formal first reading in the House of Commons. Part II of the Bill deals with the recognition of divorces, annulments and judicial separations obtained "overseas". The Bill repeals the Recognition of Foreign Divorces and Legal Separations Act 1971 and the Domicile and Matrimonial Proceedings Act 1973 in so far as it deals with this area of the law. In their place, is re-enacted the bases for the recognition of foreign divorces, including non-judicial divorces. A distinction, developed by case law, is now clearly made between the divorce obtained by proceedings (for example, the Pakistan talaq), and the divorce obtained otherwise than by means of proceedings (for example the talaq pronounced in India or Kashmir). In the former case, the talaq will be recognised in the UK if it is effective in Pakistan and at the relevant date either party was habitually resident, domiciled, or a national of that country. In the latter case, the so-called "bare" talaq from India or Kashmir will be recognised in the UK if it is effective by the law of the country where it was obtained (a new provision here) and if at the relevant date each party was domiciled in that country (or if only one is domiciled in that country, then the other is domiciled in another country where

the talaq is recognised). Recognition of a "bare" talaq is subject to the important proviso that no recognition will be afforded if one of the parties was habitually resident in the UK throughout the period of one year immediately preceeding the pronouncement. (Under the earlier legislation, both parties had to be resident here for one year to prevent recognition). Domicile is construed with reference either to the law in the UK where the issue arises or the law of the particular foreign country. There are discretionary grounds available to a judge to refuse recognition; the only new one being where there is no official document certifying that the divorce is effective under the law of the country where the divorce was obtained. In the case of "bare" talaq, lack of documentation may prove to be a major stumbling block to recognition. The law relating to the so-called transnational talaq will undoubtedly remain the same.

The cases discussed in this book have been taken from the major collections of Indian and Pakistan law reports; namely All India Reporter (AIR), Indian Law Reports (ILR), Pakistan Law Reports (PLD), and Law Reports Indian Appeals (LR IA). These Reports are available in Law Libraries in Oxford, Cambridge and London. Some of the less well known collections of cases, for example the Supreme Court Monthly Reports (SCMR) are not readily available outside the subcontinent, although Harvard Law School, as always, has a near perfect collection.

I have prepared this edition of the book on the University of Cambridge IBM Mainframe Computer (the Phoenix). I should like to thank the staff at the Computer Centre for helping me to grasp the complexities of the system. Even the Islamic laws of inheritance can appear as simplicity itself when set against the "logic" of the computer! Many bugs remained, and I must express a considerable debt to Yeshe Zangmo of the Research Centre for International Law who took over the final stages of the preparation, and who succeeded in extinguishing those bugs I had overlooked. My wife Gillian has been forced to live amongst piles of computer paper well beyond any call of duty. To her, I also say thank you.

The first edition of this book was dedicated to a decade of students who helped to create the book. This second edition is in turn dedicated to another group of students who have been no less patient.

DAVID PEARL.
Cambridge.

Contents

1. Historical Introduction

Joseph Schacht commenced his major work *An Introduction to Islamic Law* published in 1964 in the following manner: "The sacred law of Islam (Shari'a) is an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects." We can hardly improve on this statement. In the sacred law of Islam, the legal subject matter is but a part of the religious and ethical framework of life. This has been true from the very beginning of Islam; from the Qur'an itself. The essential feature of the Qur'an, the Holy Book of Islam revealed in the early seventh century to Mohammed, is that it is not a code of law. Only some eighty verses refer to legal topics and even in these verses there are both gaps as well as doubts as to whether the legal injunction is obligatory or permissive, as indeed whether it is subject to public or to private sanctions. Thus it is appropriate to describe Islamic law as consisting of the Qur'anic legislation which was subsequently interpreted by succeeding generations and which included much of the customary law of the Arabs. Indeed, the very nature of the Qur'an is such that it could not possibly be a comprehensive code of law. Legal precepts were revealed to Mohammed to meet certain contingencies of his experience as leader, in a pragmatic and empirical fashion. For instance, the fact that increasing numbers of Muslim males fell in battle acted as a catalyst to the verses which enjoined kindness to orphans and at the same time retained the practice of polygamy.[1] Another illustration is Sura XXXIII, verse 37, which abolished the pre-Islamic custom of adoption whereby an adopted child could be assimilated in law into another family. It may well be that the revelation of this verse was designed to settle the controversy which arose from the marriage of Mohammed to the divorced wife of his own adopted son, Zayd. A third illustration is Sura XXIV, verse 4, which lays down the penalty of 80 lashes for the offence of falsely accusing a woman of unchastity.[2] It is thought by some that this verse may well have been revealed after imputations of adultery against Mohammed's wife, 'A'isha.

These three examples should not in any way be seen as a challenge to the divinity of the Qur'an. Indeed, the reverse is intended; for the Qur'an is a contemporary document which reflects the life and aspirations of Mohammed

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1 Qur'an, Sura (Chapter) IV, verse 3.

2 Qadhf.

and his followers in their efforts to create a new community from the desert wastes of Arabia. The legislation contained in the Qur'an, therefore, is piecemeal, superseding some, but certainly nothing near a majority, of the pre-Islamic customary laws of the Arabian communities.

It would be as well to outline in this general historical introduction the most important of the reforms introduced in the Qur'anic verses. First, and certainly of paramount importance, the Qur'an detailed fundamental changes in the laws of inheritance. By and large, the customary law in the pre-Islamic period was patrilineal. The right to inherit property belonged exclusively to the male agnatic relations of the deceased. All females were excluded from the scheme of succession, in part because they were non-combatants in the tribal disputes. The tribal unit was established so firmly that the nearest male agnate succeeded to the property to the exclusion of any other agnatic relation alive at the death of the deceased. Thus, the sons and their issue excluded the father; in the absence of lineal descendants, the father excluded the brothers and their issue; the brothers and their issue, so it is generally assumed, excluded the paternal grandfather; and finally the paternal grandfather excluded the uncles and the issue of the uncles.

The Muslim struggle against adversaries, which depleted the male members of the community leaving many scores of widows and orphans, inevitably interfered with the customary transfer of property on death. It was paramount to introduce generally a more extensive distributive system around the wider family circle, and, in particular, to involve female inheritance. Thus, the most far-reaching reform in the Qur'an in the legal field is contained in the verses which provided a series of fixed fractional inheritance rights to certain relatives of the deceased who, in the pre-Islamic customary law, may not have received any part of the estate.[3] The result of this revelationary material is to translate the old tribal bond of pre-Islamic Arabia into an extended-family bond of the Muslim community, politically allied by religion and legally allied by inheritance. However the new "sharers" did not supersede the old agnatic system; rather the Qur'an introduced the morality of Islam into the customary practices of the Arabs.

The second major reform of the Qur'an is in family law generally, and the status of women in particular. One of Mohammed's major aims was to alleviate the deprived role of the Arabian woman, and thus much of the legal material to be found in the Qur'anic verses concerns the very real attempt to enhance the legal position of the woman. In customary law, the woman was

[3] Qur'an, Sura IV, verses 7-14.

treated as an "object of sale"; she was fully exploited by her father, and she could be sold in marriage to the highest bidder. The husband was entitled to terminate the contract of marriage on any occasion and for any whim. Qur'anic legislation completely transformed this position. From an object of sale, the revelation directing the husband to pay a dower (mahr) to the wife, involved the wife as a contracting party in her own right.[4] The absolute right of repudiation (the talaq) is at least controlled by the introduction of the 'idda (waiting period) of three menstrual cycles during which time the husband is given the opportunity to reconsider his decision. The right of polygamy is restricted to four concurrent wives, and the husband is obliged to treat these wives equally.[5]

Beyond the prophetic revelation, Mohammed was concerned with the organisation of his religious community (the Umma). To adopt one phrase of Professor Coulson[6] he was the "judge-supreme" responsible for the interpretation of the revelations in the Qur'an to meet the particular problems as and when they arose. For instance, in one case which is known to us as Sa'ad's case, Mohammed worked out the exact relationship between the Qur'anic "sharers" and the pre-Islamic agnatic heirs. Sa'ad, so we are told, was one of the followers of Mohammed who fell in battle. On his death, Sa'ad's brother appropriated the whole of the estate. His widow sought assistance from Mohammed. The early commentators of the Qur'an tell us that Mohammed directed that Sa'ad's widow should take 1/8 from the estate (the sum which is prescribed in the Qur'an); the two daughters should take 2/3 (likewise as prescribed in the Qur'an) and then, that the residue, 5/24, should go to the brother as the agnate. This case, therefore, lays down the important rule that in a competition between the Qur'anic heirs and the "old" agnatic relations, the Qur'anic heirs have first claim on the estate. Other examples of this type of decision-making in the field of inheritance relate, first, to Mohammed's restriction of the power to make bequests to 1/3 of the estate, and, second, to his refusal to permit the making of a bequest in favour of any heir.

This type of synthesis of the Qur'anic revelations with the pre-Islamic custom is almost certainly as far as one can go in the description of the early historical developments of the law without entering into controversial territory. The major question, and perhaps one which requires some sort of explanation

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4 Qur'an, Sura IV, verse 19.

5 Qur'an, Sura IV, verse 3.

6 N.J.Coulson, *A History of Islamic Law* (Edinburgh, 1964) (paperback edition, 1978 at p. 28).

at the outset, but to which we shall return, is: how much of the law now in existence and which is called Islamic law (the Shari'a) can be historically attributed to the words and deeds of Mohammed. The classical formulation of the sources of Islam was worked out some two centuries after Mohammed's death and, as we shall describe, this formulation attributes to Mohammed himself the collection of what are referred to as authentic Hadith (traditions) which, after the Qur'an, is the second of the classical sources of law. The Hadith is seen to be the evidence of what is known as Sunna (practice of the community). Literally, Sunna means the "trodden path" and it is often used to express the customary law prevalent in Arabia before the advent of Islam. After the revelation, the "trodden path" continued to be the accepted law for the Muslim community; but only in so far as it had not been abrogated by Mohammed. The classical theory states that on the advent of Islam the concept of Sunna became, for the Muslim, the model or the normative behaviour of the Prophet. Thus, the Western orientalist Goldhizer refers to the classical concept of Sunna as "all that could be shown to have been the practices of the Prophet and his earliest followers". Hadith describe the "report" or evidence of the Prophet's behaviour. It is self-evident that, for the classical jurist as for the religious Muslim today, Sunna and Hadith are consubstantial in that they refer to the same substantive law. The Sunna is related by traditions known as Hadith. Orientalists do not see the picture exactly this way. The controversy surrounding the legal innovation of Mohammed can best be described by the following question: is it correct to refer to the Hadith as the second source of Islamic law, remembering that the Hadith were collected and compiled some two centuries after Mohammed's death, or rather are the collections an attempt to attribute to the Prophet either, first, the origin for the Sunna which had developed since his death or, second, to undermine the Sunna which had developed in order, for political reasons, to return to what was thought to be the "pristine purity" of the Qur'an? Western orientalists since Goldhizer have doubted the authenticity of large tracts of the Hadith material in their attribution to the Prophet. Particularly, J. Schacht in his seminal work, *Origins of Muhammedan Jurisprudence*, reaches the conclusion that the Sunna, by and large, is anterior to the Hadith rather than being either the reverse or consubstantial.

Be this as it may, Hadith material is in two parts – the text and the transmissional chain (isnad) which provides the names of the narrators supporting the text.[7] The classical theory is that the authenticity of the Hadith

[7] For a good intoduction to the material, see A.Rahman I.Doi *Introduction to the Hadith* (Sevenoaks, 1981).

is dependent upon the strength of the isnad. The text itself is not subject to critical analysis. It must be stressed, however, that even if one accepts as essentially valid the view of Schacht, this does not in any way at all contradict the ideal vision of an apostolic behaviour. As a source of law, this "behaviour" is second only to the Qur'an. Whether the mass of material reflects the seventh century of Mohammed or a later period of the jurists and administrators is, of course, at the essence of the controversy – but it is rather beside the point. No one doubts that the Hadith collections became the vital source for all decisions in the Muslim world.

It is self-evident that it is necessary to keep firmly in one's mind the vital distinction between the "classical" formulation of the sources of Islamic law on the one hand, and the actual or "material" sources of the law on the other. The Hadith collections are the second of the classical sources after the Qur'an, although the Sunna of Mohammed – his decisions and his actions – represents the beginning of the "material" sources. This Sunna, in part a theoretical idealism, although it cannot be doubted that it includes actual practice, was continued by Mohammed's successors – the four Caliphs: namely Abu Bakr, 'Umar, 'Uthman and 'Ali. The Caliphs continued to solve in an *ad hoc* manner the cases which came before them. The solutions were based on interpretations of the Qur'an from where they drew their source. Two examples can be given.[8] Both examples appear in later Hadith collections, and thus it can be postulated that they both express a decision of a later age turned into a norm by the classical exposition of that other age. It would be consistent with the development of the law, however, to accept both decisions as examples of a gradual filling in of the gaps of the Qur'anic legislation.

The first example is known as the Himariyya or Donkey Case. In this case, a woman died leaving a husband, a mother, two uterine brothers and two full brothers. In the normal Qur'anic distribution, the husband would be entitled to 1/2 of the estate, the mother to 1/6 and the uterine brothers, as Qur'anic heirs, would take 1/3. The full brothers, the agnatic heirs, represented the old pre-Qur'anic inheritors. The Qur'anic heirs, in this situation, exhaust the estate. The full brothers appealed to 'Umar against this decision on the grounds that, as they had the same mother as the deceased – indeed as they possessed the very same quality of relationship which was the exclusive basis of the uterine brothers' right of inheritance, they should be entitled to participate in the inheritance. 'Umar accepted this argument and permitted the full brothers the right to share equally with the uterine brothers in 1/3 of the estate. As the full

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[8] cf. Coulson, op.cit. pp 24, 25.

brothers claimed to be entitled by virtue of their uterine relationship, this decision represented a victory for the Qur'anic sharers and a defeat for the old agnatic relationship. Indeed, the full brothers are reputed to have told 'Umar, "Assume that our father does not count, consider him a donkey" (a himar).

The second example of this process of decision-making is taken from the caliphate of 'Ali and is known as the Minbariyya (Pulpit Case). 'Ali was faced with the problem of the distribution of an estate between a wife, a father, a mother and two daughters. The Qur'anic distribution would have produced a situation where the estate was exhausted before all the heirs had been fully satisfied. The two daughters obtained 2/3, the father and the mother 1/6 each and the wife 1/8. In solving the difficulty, 'Ali adopted the principle of proportional abatement; thus the wife's share was reduced from 1/8 to 1/9 and the shares of the other relations were abated in proportion.

These two decisions exemplify the piecemeal character of the Caliphs' judgments. They were content to solve problems as and when they arose. In essence, they were filling in the gaps to the Qur'anic legislation. In doing this, the Caliphs were providing the clothes for the bare skin of the revelation. For instance, drinking of wine is prohibited in the Qur'an; but no penalty is laid down. Abu Bakr fixed the penalty at 40 lashes but 'Umar and later 'Ali extended this punishment to 80 lashes. This result was arrived at by analogy with the offence of false accusation of unchastity (qadhf)[9] where the Qur'an had fixed the penalty at 80 lashes. This filling in of gaps continued at least until the founding of the Umayyad dynasty in 661 AD, when it can be said that the formative period came to an end.

In the second period, that is from 661 AD until the end of the Umayyad dynasty in 750 AD, the essential factor contributing to the development of the law was undoubtedly the extension of Muslim rule to the non-Arab territories, and in particular the growth of trading contacts with Byzantium and Persia. Inevitably, Byzantine and Persian legal concepts infiltrated into the Muslim legal philosophy. A few well known examples will suffice for present purposes.

First, one can point to the development of the civil and political status of the non-Muslim communities.Certain non-Muslim citizens of the Muslim state are permitted to reside on Muslim soil in return for the payment of the jizya (the poll tax) and the kharaj (the land tax). They are known as the Dhimmi

9 Qur'an, Sura XXIV, verse 4.