The Development of the Anglo-Muhammadan Law in India

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Abstract

The Anglo-Muhammadan Law represents a peculiarity within the current context of comparative law, owing to its threefold nature of Muslim personal law, influenced by the Common Law, and belonging to the broader Indian legal system. Nonetheless, despite its singularity, it represents a field of study which is frequently overlooked. The present essay attempts, at least to some extent, to shed light upon it. In the first place, the article provides an historical overview of the development of the Anglo-Muhammadan Law, focusing on the main transformations and innovations introduced by the British and their unavoidable legal, social and religious consequences. This essay, however, illustrates, in addition, that, despite a powerful drive towards uniformity fostered by the prevailing system, the Anglo-Muhammadan Law preserves the distinctive features of the community it governs, for identity reason. Hence, the peculiar outcomes of the evolution of this branch of law could serve as a model to other national legislators facing similar issues within multicultural and multiethnic contexts.

I. INTRODUCTION

The present essay deals with the articulate issue of the Anglo-Muhammadan Law, namely the body of laws based on Islamic Law but reshaped by British jurists which was initially applied to Indian Muslims in colonial courts and which, notwithstanding India's independence in 1947, is still in force, though partly amended, owing to the necessity for it to be tailored to the historical and social evolution of the Country.

After a short introduction of the subject matter, the first part of the essay focuses on Islam, its legal tenets and sources of law, an unavoidable premise in order to grasp the extent of the Anglo-Muhammadan Law; while, the second part describes its historical development, providing the British administrators' point of view, and its fundamentals together with its consequences on traditional Islamic Law and India's legal system.

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II. THE ANGLO-MUHAMMADAN LAW – DEFINITION

Though the term Anglo-Muhammadan Law sounds, to some extent, self-explanatory, it is necessary, as a matter of clarity, to briefly define it so as to outline, with precision, the scope of such Law.[1]

The name "Anglo-Muhammadan Law" or "Muhammadan Law" was "given to this branch of law by the Anglo-Indian courts"[2] during British rule in India, for they used to call Islamic Law as "the Law of Muhammad which was however a wrong definition",[3] for Muhammad is the Prophet and Islam recognizes God as the only legislator, although Muhammad can be regarded as the law-giver in relation to the Sunnah. Hence, the Anglo-Muhammadan Law refers to the "branch of personal law" that British administrators applied "to those who belonged to Muslim religion in accordance with the principles of their own school or sub-school".[4] As a personal law, the Muhammandan Law belongs to private law, and deals with and regulates individuals' personal matters, namely those issues which directly concern their personality,[5] arising from their family and the environment in which they have been raised; therefore they can also be called Family Laws.[6]

Family matters in India[7] are rooted in religion, hence, depending on one's faith, different personal laws are then applied,[8] which entails that since several religious communities are present, different personal law systems are likewise in force (Muslim personal law, Hindu personal law, Christian personal law, etc.).[9] Due to their religious base and unlike secular laws which apply to all citizens of a State, personal laws govern

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1 This term has been coined to define the body of laws created by British-inspired Muslim courts, which merged Islamic legal principles with common law principles so as "to provide a system of legal redress for Muslims living in British India", A. M. Emon, "Conceiving Islamic Law In A Pluralist Society: History, Politics And Multicultural Jurisprudence", *Singapore Journal of Legal Studies*, December 2006, p. 340.

2 R. K. Sinha, *The Muslim Law - Muslim Law as applied in India*, 6th ed., Central Law Agency, 2006, p 11.

3 *Id.*

4 N. H. Jhabvala, *Principles of Muhammadan Law*, 1977, Jamnadas and Co., p. 11. The difference among schools and sub-schools mentioned here refers to the two main Muslim groups: the Sunnis and the Shias. "The [original] divergence between the two groups of sects was chiefly *political* and *dynastic*. Doctrinal and legal differences began to grow only in the course of time." See *id.*, p. 23. Such distinction led to the development of the Sunni and the Shia schools of thought, each of which gave birth to various sub-schools. The most important Sunni school is the Hanafi School, to which the majority of Sunnis in India belongs, while the most important Shia school is the Ithna-Asharis, to which the majority of Shias in India belongs. Different laws and rules of construction must be applied according to the belonging group. *Id.*, pp. 24-25.

5 Issues such as marriage, inheritance, divorce etc. See R. K. Sinha, *supra* note 2, p 1.

6 *Id.*

7 Unlike the Indian legal system, the French one is based on the principle of the secularity of the State which is also shared by Italy, although an exception is made within the field of family matters for the legally binding religious marriage (*matrimonio concordatario*).

8 In particular, as regards marriage, in 1872 two Acts were passed: the Christian Marriage Act, regulating the lawful celebration of a marriage in which at least one party was Christian, and the Special Marriage Act, whose provisions concerned civil marriage among those individuals which declared themselves as neither Jews, Muslims, Hindus nor Christians. See A. Gledhill, "The Influence Of Common Law And Equity On Hindu Law Since 1800"*, The International and Comparative Law Quarterly* , 1954, Vol. 3, p. 589.

9 R. K. Sinha, *supra* note 2, p. 1.

only those individuals "who answer a given description";[10] Muslims by birth or by conversion[11] are subjected to Muslim Personal Law.

Moreover, personal laws, unlike general laws, are not territorial laws, therefore their application is not constrained by state boundaries but "within certain limits, [they move] with the person".[12]

III. ISLAM AND ISLAMIC LAW: ORIGIN, DEVELOPMENT AND SOURCES OF LAW

The British judges appointed to adjudicate cases in Indian colonial courts assumed they were correctly interpreting and, consequently, applying Islamic Law to Muslims. However, they had little or no knowledge of Islam and its legal theory since they had been educated according to the British judicial and legal systems (Common Law). They imposed their bias as well as their disrespectful attitude on Indian Muslims, who as Islamic believers also felt deprived "of their sense of identity [. . .] [by such a] hybrid legal system".[13] It is, therefore, appropriate to briefly linger on the fundamentals of Islam and Islamic Law, before addressing more specifically the issues related to the Anglo-Muhammadan law, so as to clearly understand the differences as well as the influence[14] between the two systems.

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10 N. H. Jhabvala, *supra* note 4, p. 11.

11 "On conversion to Islam, the convert is deemed to have completely renounced his former religion and status." See N. H. Jhabvala, *supra* note 4, p. 21. However, for the conversion to Islam to be considered lawful, and allow for the application of Muslim law in personal matters, the converted Muslim has to "prove that his intention in adopting Islam was *bona fide*", see R. K. Sinha, *supra* note 2, p. 4 and for further details on the conversion methods, see *id.*, pp. 2-3.

12 R. K. Sinha, *supra* note 2, p. 1. See the judgment of the Supreme Court (India), , *The Controller of Estate Duty, Mysore, Bangalore Vs. Haji Abdul Sattar Sait & ors.*, [1973] 1 S.C.R. 231, concerning the issue of conversion to another faith and, in particular, the conversion of an entire community, such as the Khojas and Cutchi Memos cases. The Court held that "[a]ccording to Mohamedan Law a person converting to Mohamedanism changes not only his religion but also his personal law" (though this rule applies only to individual conversions) confirming in this way the personal nature of the Anglo-Muhammadan Law.

13 S. K. Rashid, "Islamization of 'Muhammadan Law' in India", *American Journal of Islamic Social Science*, 1988, Vol. 5, p. 136.

14 It is worth introducing here the concept of legal transplant, so as to explain the interrelations among the British legal system and Muslim Law. The notion of legal transplant was first formulated by Alan Watson. See A. Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed., The University of Georgia Press, 1993 and, furthermore, A. Watson, "Comparative Law and Legal Change", *Cambridge L. J.*, 1978, p. 313 and A. Watson, *The Evolution of Law*, The J. Hopkins Univ. Press,1989. The author lists nine relevant factors for the accomplishment of a legal transplant: pressure force, opposition force, transplant bias, discretion factor, generality factor, societal inertia, felt-needs, source of law and law-shaping lawyers. See A. Watson, "Comparative Law and Legal Change", *Cambridge L.J.*, 1978, p. 322. The concept of legal transplant represents a partial reception in a different legal system of one or more parts of the Law of a third State. This type of reception, deriving from the transplant of the law, results directly from the phenomenon of the circulation of legal models (circulation and reception can be joint together in the single notion of legal flow. See M. Lupoi, *Sistemi giuridici comparati. Traccia di un corso*, Ed. Scientifiche Italiane, 2001. The justification of legal transplants is based on the objective homogeneity of the market, which increases especially in case of technical or neutral laws. (G. Ajani, *Sistemi Giuridici Comparati*, G. Giappichelli, 2006, 37). So, on the basis of internal and external factors, legal products are analyzed and compared in order to determine the best

The cradle of Islam lies in the Arabian Peninsula, where Muhammad was born (in Mecca, in the 6th century A.D.) and received the message from God, which he, His Prophet, then spread among people.[15] Islam is therefore the last revealed religion and the word "Islam" in Arabic means "submission",[16] namely "the complete submission to the One Almighty God".[17] Each Muslim believes "in only one God and Muhammad is His Prophet";[18] from this basic statement, it is possible to derive two fundamental features of this religion: i) unlike Paganism, which was the prevalent faith in South Arabia at the time, Islam is monotheistic and ii) Muhammad was a man, chosen by God (Allah) as His Prophet, to accomplish to propagate His message among people; so, his actions were inspired and guided by God.

In Islam, law and religion are deeply intertwined. The *Quran* is Muslims' Divine Book, it contains God's words as they were revealed to Muhammad through the angel Gabriel and were then recorded by the Prophet's companions while he recited them under Divine inspiration and afterwards they were written down by his followers and collected to form the *Quran*.[19]

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rules and laws to regulate specific legal cases. The economic analysis of law, though trying to legitimize this phenomenon, provides a solution which, as usual, relates to the notion of efficiency (Watson instead referred to the concept of "prestige", *i.e.* the most prestigious model is the one which is then reproduced). The comparative efficiency, as duly explained G. Aiani, *supra,* p. 31, occurs when examining a law it may appear imperfect if compared with an ideal and abstract situation, but it will however be the best solution ever with regard to the institutional framework and from a historical perspective concerning the functioning of the aforesaid Law (path dependency theory). Cf. J.L. Halpérin, "Western Legal Transplants and India", *Jindal Global L. R.*, 2010, Vol. 2, p. 1, the author addresses the specific issue of legal transplants in India, maintaining that

> India can appear as an extraordinary laboratory for studying legal transplants, if one considers the presence of Portuguese and French legal transplants in corresponding constituencies, the development of Anglo-Hindu Law and Anglo-Mohammedan Law, the borrowing of techniques from the civil law tradition by the writers of the Indian Penal Code and the Indian Contract Law, and of course the maintenance of these laws, and many others from the colonial period, in the contemporary Indian legal order.

The British adopted two policies concerning legal transplants, namely straight transplants from English Law and indirect transplants, and by means of the latter, they reshaped Hindu and Muslim personal laws, see J.L. Halpérin, *supra*, p. 6. These transplants, which are concretely represented by the various Acts promulgated in India during the last period of colonial power, shared some specific features, namely they were "produced by British authorities with the help of British lawyers who wanted to simplify, stylize and rationalize English Law". J.L. Halpérin, *supra*, p. 12. However, it ought to be noted that when Western laws were transplanted into colonies' legal systems, this was meant to protect Western interests and prevent the application of such local laws to Western adventurers. See W. Mensky, *Comparative Law in a Global Context - The Legal Systems of Asia and Africa*, 2nd ed., Cambridge University Press, 2006, p. 37. Moreover, legal transplants have also to be considered from the point of view of the transformation, evolution they have been subject to within the legal system which has received them, indeed "foreign inputs in the Indian legal order have produced many noteworthy outcomes, especially in constitutional and international law", cf. J.L. Halpérin, *supra*, p. 3.

15 N. H. Jhabvala, *supra* note 4, p. 2.

16 Nevertheless, the term submission does not entail any passive stance, but it rather implies that each Muslim "strive[s] to realize actively God's will in space-time, i.e. in history", J. L. Esposito, "Perspectives on Islamic Law Reform: the Case of Pakistan", *N.Y.U. Int'l L. & Pol.*, 1980-1981, Vol. 13, p. 218.

17 N. H. Jhabvala, *supra* note 4, p. 4.

18 *Id.*, p. 11.

19 *Id.*, p. 4 and p. 27.

Although part of the verses of the *Quran*[20] deal with legal principles, Muslims never regarded it as a code of law, therefore it "[was] never directly applied as [a] source of legal precept[s]",[21] as opposed to the practice followed by British jurists in India.[22] The *Quran* has a wide scope and illustrated a large number of general rules and principles which were meant to regulate all aspects of human life: however, not all situations were, and could possibly be, delineated.[23] Besides, in some cases, the meaning of the Holy Book is rather vague and invites various interpretations from classical Muslim scholars.[24] As a result, other, more precise, sources of guidance were necessary, and this led to the creation of the *Shari'ah*, which grew out of the attempts made by early Muslims, as they confronted immediate social and political problems, to devise a legal system in keeping with the code of behavior called for by the Holy Qur'an and the hadith.[25]

Hence, Muslims recognise and follow the *Shari'ah* as their Law, which is "based on the[se] Divine commandments and Prophetic guidance of Muhammad",[26] inspired by Allah and then collected in the *Quran* (*Al-Kitab*). So, Muslim Law regulates a man's relationship both with God and with his peers, encompassing criminal and civil matters as well.

The Islamic notion of Law, as opposed to the one developed within the Western tradition (Civil and Common Laws alike), lies in its source of validity. In fact, in the latter, the legislator or the judge (in traditional Common Law systems) are the supreme lawmakers; whereas, the *Shari'ah* is the 'Right Way of Religion'. Islam is grounded on

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20 The precise number of such verses is however hard to calculate, as, given the authors' dissenting opinions, they may range from a minimum of 80 to a maximum of 600, though only a tiny part of them is deemed to concern legal issues in a strict sense. See A. M. Emon, *supra* note 1, p. 334.

21 M. R. Anderson, "Islamic Law and the Colonial Encounter in British India", *WLUML Occasional Paper n. 7*, 1996, p. 11.

22 Different schools of law (*madhahib*) have developed over centuries and their interpretations of Islamic Law are all considered equally orthodox. Therefore, in order to determine the rule of Muslim Law applying to a specific region or Country, it is advisable "to start with a text of substantive law, rather than the *Qur'an* or traditions of the Prophet", A. M. Emon, *supra* note 1, p. 336. For comprehensive overview of the different Islamic schools, see F. Castro, *Il modello Islamico*, (edited by G.M. Piccinelli), 2nd ed., G. Giappichelli, 2007.

23 Legal injunctions in the *Quran* are scattered in its various chapters and they constitute just a small portion of its total 6,235 verses. The injunctions deal with issues related to family law, inheritance, and criminal punishments. The explanations of such injunctions offered by the *Quran* provide guidance for their broad understanding. However, while some of them are definitive in their application and cannot, therefore, be subject to further interpretation, others are somehow open to multiple understandings. The multiplicity of meanings is mainly due to the *Quran*'s variation in the grammatical use of language. In order to resolve such ambiguity, assistance from other Quranic verses and, then, from the Prophetic traditions is required. See A. A. Ibrahim, "The Rise of Customary Businesses in International Financial Markets: An Introduction to Islamic Finance and the Challenges of International Integration", *AM. U. INT'L L. REV.*, 2008, Vol.23, p. 677.

24 H. A. Hamoudi, "The Muezzin's Call and the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law", *Am. J. Comp. L.*, 2008, Vol. 53, p. 435. The author affirms that the *Shari'ah* was initially developed mainly through casuistic means by jurists from different schools of thought who interpreted the religious texts according to their personal views as well as through interpretative techniques, e.g. *qiyas.*

25 M. K. Lewis, M. L. Algaoud, *Islamic Banking*, Edward Elgar, 2001, pp. 20-21.

26 S. K. Rashid, *supra* note 13, p. 137.

the unique sovereignty of God as the only law-giver, so the entire legislation must comply with His will and, as it derives from Him, it ought to be considered as immutable as God.

Allah's directions, which are also mirrored and expanded upon in the Prophet's teachings, assumptions and actions (*hadith*) that form the *Sunna* (namely the Islamic tradition of correct behaviour), concern all human spiritual, moral and temporal conducts.[27] Such Divine directions, together with the *hadith*, form the essential foundation of the *Shari'ah*, whose meaning in Arabic is, in fact, "the path leading to a watering place",[28] that is the path to be followed in order "to achieve success in this world and the hereafter".[29] Muslims who comply with the precepts of the *Shari'ah* will then obtain religious and temporal benefits. As the *Shari'ah* contains "directions [that] are obligatory, [and] some [that] are only desirable",[30] it shall be considered the Muslim code of conduct, rather than a body of laws as usually conceived in a Western perspective.[31]

According to Islamic tradition, Muslim Law was not offered to men ready-made, but it rather had to be "built", by relying on its acknowledged sources, namely the *Quran* and the *sunna*. In fact, Islamic jurisprudence arose from the interpretation of these two texts made by learned people, the 'scholars' (*ulama*), who derived rules suitable to regulate people's life from them. One of the strongest accusations made against British rulers was that they misinterpreted the *Shari'ah*, owing to their disregard for the traditional *ijtihad*; this is the science of interpretation applied to Muslim holy texts and based on the principle that custom and interpretation may complement God's laws, provided the consistency of the former with the latter, and as long as in the *Quran* or in the *sunna* no provisions exist regarding the matter at issue.[32]

It follows that the two aforementioned texts constitute the primary written sources of the *Shari'ah*. For clarity, it is worth adding that, though the *sunna* and the *hadith* are mentioned here as a single source, a distinction between them exists. The *hadith*,[33] namely

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27 R. K. Sinha, *supra* note 2, p. 9.

28 S. K. Rashid, *supra* note 13, p. 136.

29 *Id.*

30 R. K. Sinha, *supra* note 2, p. 9.

31 The following example clearly outlines the different nature of the *Shari'ah* as opposed to the other legal systems. According to the doctrine of servitude, which is typical of Islam, "a thing or an action may be either Good, (*husn*), i.e. morally beautiful, or Evil (*kubh*), i.e. morally ugly" (*Id.*), and people "cannot understand what good and evil are, *unless* [they] are guided in the matter by a divinely inspired Prophet" (see N. H. Jhabvala, *supra* note 4, p. 7). Therefore, the commandments of Allah are divided into five categories [i.e. *wdgib* (obligation), *mandfib* (recommended), *mubah* (permitted), *makrih* (disapproved/disliked) and *haram* (forbidden/prohibited)] and each human action is assigned a Divine value, "so that everyone can himself judge the worth of his action, its beauty [. . .] or its ugliness". This fivefold classification of the commandments of Allah is the framework on which the *Shari'ah* rests in order to govern the conduct of Muslims, although it does not technically establish any lawfully binding provisions.

32 Konrad Zweigert & Hein Kötz, *Introduzione al diritto comparato*, Giuffrè Editore, 1992, Vol.1, p. 378.

33 Actually, some scholars disagree on the value of *hadith* as reliable source of law due to its oral origin (A. M. Emon, *supra* note 1, p. 334); to cite few examples, Joseph Schacht maintains that the traditions of the Prophet are forgeries, consequently, one cannot rely upon them [J. Schacht, *The Origins of Muhammadan Jurisprudence*, Oxford, 1967], whereas Fazlur Rahman argues that they represent the Muslim collective memory about the Prophet, though some historical and theological contradictions emerge from them [F. Rahman, *Islamic Methodologies in History*, Central Institute for Islamic Research,1965].

the traditions of the Prophet, are the "records of his actions and sayings",[34] while the *sunnah* is "the precept of the Prophet".[35] The difference between these two lies in the fact that "the *hadith* is the story of a particular saying or occurrence; [whereas] *sunnah* is the rule of law deduced from the Prophet's behaviour."[36] In addition to them, the *Shari'ah* is based on two other sources, namely *ijmaa* and *qiyas*. *Ijmaa* is the "consensus of the founders of the law, or of the community as expressed by the most learned",[37] hence, it consists in the agreement of the learned (Muslim jurists) on a specific legal issue.[38] And *qiyas* are "a collection of rules or principles deducible, by the methods of analogy and interpretation, from the first three sources".[39] This last source has been established at a later stage and is a complement to the previous three,[40] made necessary by the wide range of new needs engendered by the territorial spread of Islam throughout the centuries.[41]

As above stated, Islamic Law, though being Divine in nature, is the result of man's commitment to its interpretation so as to widen the scope of God's directions in order to cover also the regulation of such circumstances which had not been addressed neither in Allah's commandments nor in traditions of the Prophet. For this purpose, Islamic jurists have shaped the science of *fiqh* on the basis of the *Shari'ah* sources, so as to establish what is lawful and what is not, what is actually permitted and what is forbidden.[42] Which means that the *fiqh* is deemed part of the secular law, namely it represents the law enforced by legal authorities.[43]

IV. THE ANGLO-MUHAMMADAN LAW: DEVELOPMENT AND GROUNDS

The current Indian legal system is the result of the presence of various personal law traditions, each belonging to one of the country's diverse groups,[44] along with the

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34 N. H. Jhabvala, *supra* note 4, p. 7.

35 *Id.*, p. 27.

36 *Id.*, p. 28. The author says that "one of the greatest differences between the Sunnis and the Shias is that the Shias do not give credence to a *hadith, unless* it emanates from the household of the Prophet".

37 *Id.*

38 According to the classical view, the community in its entirety cannot err, as opposed to the individual. See *Id.*

39 *Id.*, p. 29.

40 *Id.*

41 The four sources of the *Shari'ah* (i.e. *Quran*, *sunnah* and *hadith*, *ijmaa* and *qiyas*) are the four roots of the Islamic Law, whose doctrine was formulated by As-Safi, a famous Muslim jurist, in order to provide a reliable and fixed method to determine the rules applicable to Muslims (see K. Zweigert & H. Kötz, *supra* note 32, pp. 378-379). Such doctrine, which was highly welcomed and implemented by Islamic jurists, was meant to tackle the problem of the presence of different, and to some extent contradictory, opinions within the Islamic jurisprudence, derived from the application of the *fiqh* the means through which the *Shari'ah* regulates concrete and factual circumstances.

42 S. K. Rashid, *supra* note 13, p. 138. The *fiqh* is "the product of reasonings [sic] and deductions" (*id.*) on the grounds of the knowledge derived from the *Shari'ah* sources. It is the means through which the *Shari'ah* regulates concrete and factual circumstances, so it can be considered the case law of Islamic jurists. The distinctive features between the *Shari'ah* and the *fiqh* can be summarized as follows: the former has a wider scope than the latter, as the latter deals only with secular rights and obligations, moreover, the former is divine in nature, while the latter is made by man.

43 R. K. Sinha, *supra* note 2, p. 9.

44 In India, the Hindu community is by far the widest, and is followed by the Islamic one. See A. Gambaro & R. Sacco, *Trattato di Diritto Comparato - Sistemi Giuridici Comparati*, UTET, 1998, p. 485.

influences arising from the many foreign dominations.[45] Hence, a brief overview of Indian history ought to be provided so as to outline the social and legal context in which the British intervened.

In the 2nd millennium B.C., the territory of India was occupied by an Indo-European population, whose mother tongue was Sanskrit, and which laid the foundation of what would later become Hinduism. After this first long period of Hindu rule, India suffered alternate dominations. Back in the 8th century Islam started to spread through the sub-continent. However, it was not until the beginning of the 1st millennium A.D. that a Muslim sultan, Aibek, reigned in Delhi. Thereafter, the Muslim power reached its height in the 16th century with the Mughal Emperor, Akbar, and his descendants. As this empire grew, Islam gained further ground throughout India, and particularly in some regions (such as the Punjab and Kashmir) until the arrival of British colonists.[46]

The British rule in India started in the 18th century. The main goal of the early colonization period was to obtain the maximum possible revenue from the colony with the minimum expenditure of their own political and military resources.[47] This was in line with the initial British presence in the sub-continent, as it started under the authority of the East India Company, [48] whose purpose was indeed the exploitation of the local resources (land revenues) and trading activities. In order to achieve these goals the Company needed to adapt and tolerate many aspects of the pre-colonial Indian society, as well as relying upon the cooperation of native intermediaries and indigenous police forces, so as to maintain the effective control over the country without resorting to a wide use of military force.[49] Therefore, the first British administrators decided to "exercise power by adapting themselves to the contours of the pre-colonial political system, including law."[50] The preceding political system was, as stated above, the Mughal Empire, whose emperors were Muslims, belonging to the Hanafi school (the major Sunni school). For that reason "the Hanafi law was [then] administered till the establishment of British rule".[51] Accordingly, the application of the *Shari'ah* was initially tolerated by the British for the

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45 The policy of retention of local personal law systems was applied throughout the British Empire, giving rise to many hybrid systems, along with the Anglo-Muhammadan Law, such as the "Anglo-customary law systems in Africa, [. . .] Anglo-Hindu Law systems in India, Anglo-Buddhist law in Burma", see V.V. Palmer, "Mixed Legal Systems…and the Myth of Pure Laws", *Louisiana L. R.*, 2007, Vol. 67, p. 1216.

46 A. Gambaro & R. Sacco, *supra* note 44, pp. 493-494. In addition, for a more thorough comparative analysis see the following treaties: *id.*, K. Zweigert & H. Kötz, *supra* note 32, and R. David & C. Jauffret-Spinosi, *I Grandi Sistemi Giuridici Contemporanei*, 5th ed, Cedam, 2004.

47 This attitude was perfectly in line with the idea of Western conquerors that "in Asia, contrary to the American situation, it would not be possible to convert to Christianity the numerous populations they wanted to rule for high profits but with limited expenditures. The costs of implementing common law for indigenous people, they realized, was too heavy for uncertain interests". See J.L. Halpérin, *supra* note 14, p. 2.

48 The East India Company ruled directly over the *muffassal* territories (from the late 18th century till mid 19th century), which were those areas outside the Presidency Towns, i.e. Madras, Calcutta and Bombay, where the Company shared its sovereignty with the British Crown. see A. Gledhill, *supra* note 8, p.576.

49 M. R. Anderson, *supra* note 21, p. 4.

50 *Id.*, pp. 4-5.

51 N. H. Jhabvala, *supra* note 4, p.10.

sake of the broader interests at stake. However, over time, this policy changed,[52] owing to the gradual consolidation of the British power in India.[53]

Nevertheless, though early on the British colonization in India was rather tolerant and partially maintained the previous indigenous structures, innovations and changes were later introduced. In fact, new institutions were created which incorporated the old native mechanisms.[54] Among them, according to the Hastings Plan of 1772,[55] a new colonial law court system was established. Such plan set "a hierarchy of civil and criminal courts [. . .] charged with the task of applying indigenous legal norms"[56] in matters such as marriage, inheritance, caste and other religious usages.[57] These courts had to apply the two different systems of personal laws, namely Muslim and Hindu,[58] with respect to cases regarding the abovementioned family matters.[59] As a result, the population was divided into two main categories: Muslims and Hindu, regardless of the differences within each religious group. However, it is worth noting that, initially, the impact of this new colonial court system on Indian society was limited. In fact, on the one hand, only the local and regional gentry and Indian élite[60] relied upon this system, considering it a convenient method to settle their disputes, while the poor or the individuals belonging to lower tiers of society continued to trust those "local bodies which had acquired privileges of autonomy under the Mughal rule that persisted during the colonial period".[61] On the other hand, such new institutions were often exploited by the wealthy natives to their

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52 The reforms implemented by the British concerned above all the three traditional categories of personal matters, i.e. marriage, divorce and inheritance. See J.L Esposito, *supra* note 16, pp. 221-222.

53 S. K. Rashid, *supra* note 13, pp. 139-140.

54 M. R. Anderson, *supra* note 21, p. 5.

55 Warren Hasting was appointed Governor of Bengal and as the indigenous administration of justice was almost on the verge of collapsing, he was authorized by the East India company to make major changes in the administration of justice. Hence, he formulated the Judicial Plan of 1772, which consisted of 37 regulations dealing with civil and criminal laws. Such plan aimed at correcting the defects of the judiciary system without destroying the traditions of the indigenous systems. Sucheta Mehra, *Development of Adalat System during the time of Warren Hastings*: http://www.legalservicesindia.com/article/article/development-of-adalat-system-during-the-time-of-warren-hastings-252-1.html. Site accessed on 11.02.2014.

56 M. R. Anderson, *supra* note 21, p. 5. In 1773 *muffassal* courts were established in those territories governed by the East India Company. These courts were manned by the Company's servants, while those in Presidency tows were staffed by British lawyers appointed by royal charter; these two judicial systems were merged only in 1861. Notwithstanding the presence of such distinct local systems, there was only one last court of appeal, the Privy Council, whose decisions were binding on all Indian courts. see A. Gledhill, *supra* note 8, pp. 578-579.

57 N. H. Jhabvala, *supra* note 4, p. 11. In particular, as regards Hindu Law, this was applied "in matters of succession, inheritance, the joint family, partition, maintenance, gifts, wills and religious usage and institution" (A. Gledhill, *supra* note 8, p. 580).

58 "The system developed from 1773 imposed a degree of rigidity and uniformity upon the Hindu Law which it had not known earlier", A. Gledhill, *supra* note 8, p. 578.

59 R. K. Sinha, *supra* note 2, pp. 4-5.

60 In general, the local élite of the Muslim countries, or regions, ruled by the British allowed for the substitution of several parts of the Islamic Law with Western rules or codes, with the exclusion of family matters, which, on the other hand, were not "replaced by Western law, but [. . .] reformed through a process of reinterpretation" J. L. Esposito, *supra* note 16, p. 217.

61 M. R. Anderson, *supra* note 21, p. 6.

own advantage, as through them they could preserve and strengthen their autonomy and predominance within their community group.[62]

So, when the British arrived in India, they found a multiethnic society, characterized by the coexistence of several religious groups and by a strong political and legal fragmentation. Frequently, even within the same community many different practices prevailed and many different local authorities were followed. In such circumstances British rulers were faced with a serious control issue, worsened by their early attitude towards the administration of the colony, i.e. their attempt to rule it with the minimum effort and involvement, while, at the same time, try to gain the most profit from it. Therefore, British administrators had to conceive an effective solution to tackle such problem, which substantially lay in obtaining "simple, reliable, and reasonably accurate understandings of indigenous social life without sacrificing great labour and capital".[63] Following from this, the implementation of such solution gave rise to the Anglo-Muhammadan jurisprudence,[64] which was essentially based on "legal assumptions as well as law officers, translations, textbooks, codifications, and new legal technologies".[65]

A. The Genesis Of The Anglo-Muhammadan Law

British rulers founded the creation of the Anglo-Muhammadan law on some basic assumptions which were, however, misleading and which mirrored their deep lack of knowledge of the indigenous society. According to the aforementioned Hastings Plan, native laws could be incorporated into "the British-based legal institutions without significantly compromising the integrity of either".[66] Starting from this erroneous assumption, British administrators investigated the native legal systems, and, with regard to Indian Muslims, the authority of the *Shari'ah*. Nevertheless, due to the complexity of this system of laws and to the British need for a simple and one-size-fits-all legal approach, they reduced the *Shari'ah* to "a set of more or less homogenous legal rules";[67] an operation which resulted in the fact that "every aspect [thereof] was ridiculed, belittled or truncated".[68] The presumption that a single and fixed set of rules could apply to all Muslims was both against Islamic doctrine, and inadequate to respect the legal peculiarities of life of the different Muslim groups.[69]

Moreover, on the basis of such presumption, British rulers made a further mistake: namely, they chose to rely upon certain traditional and orthodox Islamic texts, treating

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62 *Id.*, pp. 6-7

63 *Id.*, p. 10.

64 The creation of the framework of the Anglo-Muhammadan Law took place in the first century of the British colonial power. *Id.*

65 *Id.*, p. 10.

66 *Id.*

67 *Id.*, p. 11.

68 S. K. Rashid, *supra* note 13, p. 135. The author affirms that
> the British colonialists deprived the Muslims of their sense of identity by substituting a good part of the Shari'ah with the English law and systematically mutilated the rest of it into a hybrid legal system [the] 'Muhammadan Law'.

69 M. R. Anderson, *supra* note 21, p. 11. This simplification of the *Shari'ah* did not distinguish either between Sunnis and Shias.

them as legally binding, and applying them more widely and rigorously than it was ever done in the pre-colonial era.[70] Hence, they directly applied the *Quran* as well as the other legal texts (such as the *al-Hidaya*[71]), which, on the contrary, were normally interpreted and translated into legal provisions and practice by the authority of the *qady*.[72] In fact, British administrators asserted the supremacy of the text over its interpretation, based on the assumption that only ancient legal texts could offer a reliable knowledge of the Indian legal framework. However, they lacked the proper understanding of the social environment to which the laws should have been tailored, and this, eventually, resulted in their disrespectful application.[73]

Returning to the colonial court system, the Hastings Plan established that it ought to have been based on the British model as regards procedure and adjudication, but ought to also have entailed the presence of native law officers, "*maulavis* and *pandit"*,[74] in an advisory function.

With particular regard to *maulavis*, their function consisted in answering the courts' questions (which were usually formulated in an abstract manner, without any relevant details of the actual case) as regards specific Islamic law matters by means of a *fatwa*, or a legal interpretation, which was then rigidly applied by British judges to settle the related case. In other words, the legal principle drawn by the *maulavis* from the circumstances of the case at hand was theoretical so that it could be implemented on judges' choice (and discretion) to adjudicate also later cases. Nonetheless, the *maulavis* would often disagree on a particular legal issue, owing to the judicial discretion in applying the *Shari'ah* principles which the Islamic legal theory had ever allowed for. Such diversity of opinions with regard to legal matters was unacceptable to British judges as it did not fit their

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70 *Id.*, p. 3.

71 "*Al-Hidaya*, a twelth century text of Central Asia origin that primarily relied upon [. . .] the two pupils of Abu-Hanifa", *Id.*, p. 9.

72 The *qadis* were legal scholars who, during the Mughal Empire and well after it into the colonial period, were appointed as functionaries in charge of the administration of justice applying the *Shari'ah*. The decision of the British administrators to abolish the office of *qadis* (Kazi Act of 1864) and to replace them with English judges, was strongly contested by Muslims, and it is considered one of the leading factors of the changes in the Muslim Law. See S.K. Rashid, *supra* note 13, pp. 140-141. In other colonies, such as British Nigeria and French Algeria, the *Shari'ah* underwent a similar evolution, though in these Countries, "even after the colonial domination, *Qadis* continued to administer the *Shari'ah*", as opposed to British India, were any request to reintroduce their office was rejected by the colonial power (S.K. Rashid, *supra* note 13, p. 140).

73 *Id.*, p. 11. By relying only upon texts, the British reduced Muslims and Islamic Law to a fixed image, in which any deviation from their content was considered an hazard which could prejudice the truth of Islam. Consequently, in so doing, the colonialists "contributed to the view that Islamic law is an unchanging, inflexible religious code", A. M. Emon, *supra* note 1, p. 340. This attitude can be regarded as an advantageous stratagem used by British rulers to preserve the *status quo* in their colonies; in fact, an unchangeable legal system results also in unchangeable rights, institutions and laws which do not allow for any transformation in the subjugated population.

74 M. R. Anderson, *supra* note 21, p. 5. They were respectively experts of Muslim and Hindu Law. *Pandits* were Hindu Law officers of the courts who ought to give their opinion to British judges on the basis of *sastras*. The Sanskrit texts contained however an "ideal law, never susceptible of complete and identical application, but subject to modification by custom", which varied greatly owning to various circumstances such as time, space, family and caste. Nevertheless, British judges relied upon *sastras* as they would have done with English laws. See A. Gledhill, *supra* note 8, pp. 576-577.

judicial framework and their rigid textual approach; therefore, *maulavis*, together with *pandits*, became more and more mistrusted and eventually excluded from colonial courts.

The Common Law principle of binding precedent was adopted instead.[75] In 1864, the Act XI officially excluded them from the colonial courts, which entailed that the Anglo-Muhammadan Law was to be entirely administered by British judges.[76] This enactment produced unhealthy effects on the *Shari'ah*.[77]

Afterwards, as in the late 19th century the colonial power consolidated its authority and increased its ability to effectively handle indigenous resistance, British influence on the Indian legal system was no longer restricted to the adoption of Common Law tenets (such as the doctrine of binding precedent and the principle of equity), but rather resulted in the substitution of laws of British origin for large portions of the Anglo-Muhammadan Law.[78] In fact, the alteration of the *Shari'ah* in favor of the British laws can be specifically traced back to the constitution of the third Law Commission in 1861, which passed six enactments,[79] which "generally superseded the principles of the *Shari'ah* in their respective fields".[80]

Subsequent to the exclusion of native officers from the courts, and, given the supremacy accorded to the textual approach, the next measure adopted by the British administrators consisted in translating indigenous laws and legal sources into English so as to enable British judges to autonomously interpret and apply them. The first translations were completed in the 18th century and concerned the *al-Hidaya*[81] (translated from Arabic into Persian, and then into English in 1791)[82] and the *al-Sirajiyya*, a treatise on inheritance (translated into English in 1792). However, at that time, British judges still relied upon the advisory function of the native officers; therefore, the actual effect that those translations produced was to establish an "essentialist, static Islam incapable of change from within".[83] Nevertheless, in the 19th century, British judges resorted more consistently to such translations, that were considered reliable sources, though they

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75 The Anglo-Indian court system adopted along with the doctrine of *stare decisis*, or binding precedent, also the Common Law principle of *communis error facit jus*, whose application led judges to definitely abandon the use of Sanskrit texts and replace them with court decisions. A. Gledhill, *supra* note 8, p. 578.

76 *Id.*, p. 12.

77 S. K. Rashid, *supra* note 13, pp. 141-142.

78 M. R. Anderson, *supra* note 21, p. 7. Such trend could be spotted already in the doctrine of the Hastings Plan, which provided for the application of the principle of justice, equity and good conscience in cases where the indigenous laws provided no rule.

79 Namely, the Indian Succession Act, the Indian Contract Act, the Negotiable Instruments Act, the Indian Evidence Act, the Transfer of Property Act, and the Criminal Procedure Act. See S. K. Rashid, *supra* note 13, p.140.

80 *Id.*

81 In order to understand the Sunni tradition, the British entrusted the English translation of *al-hidaya*, although this text represents only "a short manual of Hanafi law that does not consistently provide the underlying logic or reasoning for the rules of the school", and they did not take into accout a more comprehensive work, i.e. *Sharh al-Hidaya*, which is "a multivolume commentary on [*al-hidaya*] and provides greater jurisprudential insight into the tradition" (A.M. Emon, *supra* note 1, pp. 340-341).

82 The text was firstly translated from Arabic into Persian by three Muslims clerics, and then it was translated into English by Charles Hamilton, whose initial work comprised four volumes, which was however edited and shortened, providing judges and practitioners with an even more reductive overview of Muslim Law. *Id.*, pp. 341-342.

83 M. R. Anderson, *supra* note 21, p. 13.

have never been revised. Another translation was then produced, namely the one of an abridged version of the fatwa *Almagiri*,[84] together with a part of an *Itna 'Ashariya* text (belonging to the Shia school). These three translations accounted for the entire English textual base of the Anglo-Muhammadan law: it is however clear that, given the variety and wide scope of Islamic Law, the limited number of translations resulted in an inadequate and completely insufficient picture of the Muslim personal law.[85]

Further on, influenced by Bentham, who advocated in favour of codification, in 1835 the British established the first Indian Law Commission tasked with formulating an extensive body of rules[86] inspired by the British model, although they limited their involvement to those fields they were particularly interested in, such as justice and commercial activities.[87] As far as personal matters were concerned, however, the British preferred to apply to the various local communities their respective traditional law. As a result, to facilitate the judges' knowledge of such rules the colonial administration also promoted the creation of textbooks, which were "compilations of materials ordered in a thematic way".[88] The first textbook, published in 1825, was a collection of *fatwa* by W. H. MacNaghten, which also contained his generalizations regarding the various legal issues emerging from those legal interpretations. MacNaghten's textbook served as a model for the production of the subsequent colonial textbooks: they offered a simplistic organization of knowledge, where doctrinal differences were minimized and a single rule or solution was proposed for multifaceted issues. Consequently, the *Shari'ah*, as it emerged from such texts, was far from its traditional idea: rather it became "a fixed body of immutable rules beyond the realm of interpretation and judicial discretion"[89], or as defined by S. K. Rashid, "[the] travesty of the *Shari'ah* and its fossilization into 'Muhammadan law'".[90]

B. British Rulers' Main Innovations

In the mid-19th century, British administrators decided to widen the range of sources of the Anglo-Muhammadan Law, and started to focus their attention on custom. Nonetheless, although custom is considered a secondary source of Islamic Law, it is subject to certain restrictions, namely only customs complying with the Shari'ah principles are deemed to have the validity of law. However, the British, in keeping with their policy of simplification and generalization, expected to record[91] customary practices among natives, considering them something commonly acknowledged, of ancient origin and rooted in society, i.e.

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84 This famous *fatwa* consists in a collection of legal opinions in the *fiqh* tradition, see *id.*, p. 9.

85 *Id.*, pp. 13-14.

86 "The Indian codification was something unique, a kind of intermediary model of codification between the continental one in Europe and a few examples of developed statute laws in England", J.L. Halpérin, *supra* 14, p. 13. It could be affirmed that the Anglo-Indian Law was so extensively codified that it exceeded the stage of codification reached by the British law at the time.

87 See *Id.*, and A. Gambaro & R. Sacco, *supra* note 44, p. 500.

88 M. R. Anderson, *supra* note 21, p. 14.

89 *Id.*

90 S. K. Rashid, *supra* note 13, p.142.

91 Revenue collectors conducted surveys in each village of the Punjab region in order to ascertain the customary practices. See. M. R. Anderson, *supra* note 21, p. 15.

something that could be codified and then generally applied.[92] As already mentioned, this had the unintended consequence of distorting the very nature of such practices. Furthermore, this approach did not take into account the differences among the various indigenous groups and the need for interpreting those usages in a way consistent with that adopted by the community within which they had been recorded. Nevertheless, the British administrators used them as guidelines for the formulation of policies,[93] even though they lacked two constituent features that each standard ought to possess, namely fixity and stability space and time wise.

Along with the aforementioned changes brought about by British administrators to the pre-colonial legal system, the development of the Anglo-Muhammadan Law was also combined with the introduction of new legal technologies, such as bureaucratic procedures and methods of inquiry.[94] The colonial edifice needed information regarding natives' social life, happenings, practices, etc.; therefore, standardized methods of data collection were implemented: data were categorized and systematized to ease their circulation throughout the colony as well as in England. In addition, other administrative tools were introduced, i.e. regular reports and the use of printed forms for the district administration. Those innovations were unavoidable in order to successfully rule over such a huge and diverse country, but they did not affect common people.

However, some changes did affect common people; one of these, introduced in the field of legal procedure and which proved to be revolutionary, was "the use of documentation in matters of law and evidence".[95] In fact, under *Shari'ah* legal doctrine, "only the spoken testimony of a morally reliable witness [was considered] admissible

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[92] Nonetheless, the British made a selection aimed at excluding the indigenous practices which could interfere with the development of colonial policies and interests.

[93] M. R. Anderson, *supra* note 21, p.15, such codification distorted social life by way of selecting and interpreting material from an external view point.

[94] *Id.*, p. 17. Although procedural law transplants were commonly faced with a strong resistance on the local side, as they clashed with the proceedings traditionally accepted and applied, the Malaysian Islamic case stands for an exception thereto. In fact,

> the secular English models of civil and criminal procedure, of evidence, of trial and appellate structure, and of common law adjudication were, with some modifications, imported across the boundary on a wholesale basis.

In countries, such as Malaysia, in which dual systems coexist, the borrowing of legal procedures between them is eased by the familiarity with the foreign system. Nevertheless, dual systems tend to undergo transformations in the course of time, which may lead to the restoration of the previous (pre-colonial) system, or simply to the end of dualism by choosing to rely upon only one of the two systems. Malaysia represents a peculiar case also in this regard, as, given the discomfort arising from the coexistence of dual systems, in the effort to tackle it, "the dissonance between the rules and institutions of the two is reduced and their content actually converges". Obviously, the systems do not entirely converge, nevertheless, the differences between Malaysian secular law and Islamic law do not derive from a revival of an ancient Islamic law, but rather from the borrowings from current Islamic systems which are deemed similar to the domestic one, such as Pakistan, Singapore and India. D. L. Horowitz, "The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change", *Am. J. Comp. L.*, 1994, Vol. 42, pp. 574-576.

[95] M. R. Anderson, *supra* note 21, p. 17. The moral norms contained in the *Shari'ah* were translated into enforceable rules through the institutional framework of adjudication according to which jurists had to construe the applicable rule by taking into account the actual circumstances of the case at hand, hence "the law was not simply created in an academic vacuum devoid of real world implications", which implied that "the resolution

as evidence before the court".[96] As a matter of fact, in the pre-colonial system the use of documents was allowed but did not hold any validity in terms of legal evidence before the courts. The British introduced the practice of transcribing the witness's deposition into the deponent's language and then formulating summaries in English; even though the legal validity of the oral testimony was initially maintained, as time went by, and in consonance with the mainstream trend of textual supremacy within the Anglo-Muhammadan Law, deposition texts became the only legally binding evidence.[97] It is worth noting that the extensive reliance on written legal texts also fulfilled a subtler purpose: the need for documentary evidence on the one hand, and, on the other, the widespread use of standardized forms in district administration and business transactions, coupled with the very widespread illiteracy among the local population, were geared towards making legal institutions inaccessible to the most part of the natives, as well as denying them the possibility of improving their economic or social condition within the legal framework provided by the colonial power.[98]

The last very important difference between the *Shari'ah* and the Anglo-Muhammadan Law, which ought to be stressed, lies in the sources of law. While the major sources of the former are the *Quran*, the *sunnah* and the *hadith*, the *ijmaa* and the *qiyas*, the latter recognizes, in addition to those, the following four sources: i) the customs and usages, ii) the judicial decisions, iii) the legislation and iv) the principle of justice, equity and good conscience.[99]

Customary laws are considered valid (in so far as they are not in contrast with Anglo-Muhammadan Law) on the basis of the principle that the community in its entirety cannot be mistaken (the same tenet underlying *ijmaa*); and, although they were not acknowledged by the traditional Islamic legal theory, the assumption of validity of the customs and usages, dating back to the Prophet's time, rests upon His silence about them, which has then been identified as their tacit recognition.[100]

As regards judicial decisions, these cannot be truly considered sources of law, however, as they played an important role throughout the development of the Anglo-Muhammadan law, they are regarded as reliable and authoritative legal opinions in

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of a controversy may not have been dependent upon some doctrinal, substantive determination of the law", regardless of the essential role played by adjudication institutions. See A. M. Emon, *supra* note 1, p. 338. Subsequent to the introduction of the Common Law model of judicial procedure, Anglo-Indian proceedings started to entail "the interpretation of documents, the use and avoidance of precedent, the resort to alternative holdings, the invocation of burden of proof", D. L. Horowitz, supra note 95, p. 555. An example of procedural innovation based on the British model, and still present in the current judicial system, is the *muta'ah* litigation in Malaysia. The *muta'ah* obligation deals with wives who have been unjustly divorced and who, therefore, are entitled to receive a compensation calculated on the basis of the means of their former husbands. The problem which lawyers constantly face in this regard consists in proving the assets truly held by the husband as *Shari'ah* courts are not accustomed to extended discovery. So, in order to accomplish their task, lawyers tend resort to civil rules applicable to secular courts, which rely upon Western procedural model. D. L. Horowitz, *supra* note 95, p. 565.

96 M. R. Anderson, *supra* note 21, p. 17.

97 *Id.*, p. 18.

98 *Id.*

99 N. H. Jhabvala, *supra* note 4, pp. 27-31.

100 *Id.*, p. 29.

the adjudication of cases. Moreover, the case law resulting from the transplant within the Anglo-Muhammadan Law of the doctrine of binding precedent, is still widely acknowledged in India.[101]

Legislation, instead, comprises those parts of the Anglo-Muhammadan Law which have been regulated through acts of legislature, such as the Shariat Act.[102]

Finally, the principle of justice, equity and good conscience is the one upon which the courts may rely: i) in the event of a conflict of opinion or the lack of any specific rule, and/or ii) when the rigid application of an established rule or its analogical deduction may cause hardship to an individual or will not be suitable for his current needs.[103]

C. The Shariat Act

British rule in India ended formally in 1947, but its legacy as regards legal and judicial matters lived on. In 1937 the various enactments regulating the application of Anglo-Muhammadan Law to Muslims in the different States of India, were replaced by a single act, the Muslim Personal Law Act, or Shariat Act, enacted by the Central Legislature, whose purpose, as stated in the Act itself, was "to make provisions for the application of the Muslim Personal Law (Shariat) to Muslims in India".[104]

The passing of the Shariat Act represented the statutory recognition that Muslim personal Law must be applied to Muslims. Under Section 2 of the Act, courts are bound to apply this law[105] when, "notwithstanding any customs or usage to the contrary" and "save questions relating to agricultural land", a dispute arises among Muslims concerning any of the following matters:

> intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of P.L., marriage, dissolution of marriage, including *talaq,ila,zihar, han, khula* and *Mubara'at*,[106] maintenance, dower, guardianship, gift, trust and trust properties and *wakfs* (other than charities and charitable institutions and charitable and religious endowments).[107]

Obviously, in matters other than these, Indian general laws apply.

It is worth providing some examples regarding the concrete provisions of this Act. Under the Shariat Act, marriage is considered a civil contract, whose rights and obligations arise immediately after its creation,[108] and which can be dissolved by divorce.

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101 A. Gambaro & R. Sacco, *supra* note 44, p. 501.

102 Muslim family laws were generally excluded from a direct reformation both by foreign rulers and by domestic governments. In fact, "Muslim nations have enacted reform laws which have merely modified or restricted traditional practices", except for two few Countries, Turkey and Tunisia. J. L. Esposito, *supra* note 16, p. 220.

103 N. H. Jhabvala, *supra* note 4, pp. 30-31.

104 *Id.*, p. 13.

105 In this context, the word Shariat is used to refer to Muhammadan Personal Law and "the use of the word is not thought to import any variations" (S. D. Fardunji Mulla, *Principles of Mahomedan Law*, 20th ed., Lexis Nexis, 2013, p. 4.

106 These are among the traditional forms of divorce recognized by Muslim Law.

107 See also R. K. Sinha, *supra* note 2, pp. 4-5.

108 B. L. Verma, *Development of Indian Legal System*, Deep&Deep Publ., 1987, p. 328.

The following are the various traditional forms of divorce[109] mentioned in the Act. "When divorce proceeds from husband at his will it is known as *talaq*";[110] for a *talaq* to be valid, the husband must have clearly communicated his intention of dissolving the nuptial tie and there must have been a prior attempt at reconciliation between the parties. Divorce by *ila* occurs when a man vows to abstain from sexual intercourse with his wife for a period of time longer than four months and observes this oath. *Zihar* "is a form of inchoate divorce",[111] whereby if the husband compares his wife to one of the female relations he cannot marry, the wife then becomes prohibited unless he performs expiation.[112] *Kuhla* and *Mubara'at* are forms of divorce by mutual consent; the difference is that the former is initiated at the instance of the wife, whereas the offer of divorce in the case of the latter may proceed from either the husband or the wife.[113] With respect to inheritance,[114] a heir is entitled to receive an interest in his ancestors' property only upon their death. Moreover, no distinction is made between movable and immovable property, nor between ancestral or self-obtained property.[115] Furthermore, concerning guardianship, boys, once independent from their mothers' care, are in custody of their natural "guardians", namely their fathers, the executors appointed by their fathers, their grandfathers and the executors appointed by them, or, in case these are absent, by a

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[109] In this regard see the judgment of the Supreme Court (India), *Moh. Ahmed Khan v. Shah Bano Begun and ors.* [1985] 3 S.C.R. 844. This is the most famous case in Indian judicial system concerning the concept of divorce in Muslim personal Law and the liability of Muslim husbands to provide for the maintenance of their divorced wives. The judges held that the clauses regarding maintenance were applicable regardless of the personal law governing the parties, as the "wife" is defined as such "irrespective of the religion professed by her or by her husband". The final part of the sentence includes an appeal to the Muslim community made by Dr. Tahir Mahmood who invites Muslims to contribute to the creation of a uniform Indian civil code, rather than striving for securing "an 'immunity' for their traditional personal law from the state legislative jurisdiction". It is also worth noting that this judgment provides an example of harmonization between Muslim and Common Law notions, as it states "[n]ature of Mahr or dower-Whether Mehr is maintenance". Owning to the revolutionary nature of the *Moh. Ahmed Khan Vs. Shah Bano Begun and ors.* adjudication, a petition was made which challenged the constitutional validity of the *Muslim Women (Protection of Rights and Divorce) Act* of 1986. Nevertheless the Supreme Court upheld the validity of the Act. See the judgment of the Supreme Court (India), 28 September 2001.

[110] P. Kusum, *Kumud Desai's Indian Law of Marriage&Divorce*, 8th ed., Lexis Nexis Butterworths Wadhwa Nagpur, 2011, p. 341.

[111] S. D. Fardunji Mulla, *supra* note 106, p. 402.

[112] P. Kusum, *supra* note 111, p. 347.

[113] Under Hanafi law, Muslim women were granted only three reasons to lawfully divorce: namely, i) the husband's impotence, ii) the adultery and iii) the exercise of the option of puberty. Besides, a Muslim woman could not unilaterally repudiate the marriage. In order to clarify and improve Muslim women's status in this regard, the Dissolution of Muslim Marriage Act was passed in 1939. This Act drew upon Malikiki law and provided in Section 2(ix) as further grounds of divorce "any other ground which is recognized as valid under Muslim Law" (such as *li'han*, i.e. the husband's wrongful allegation that his wife committed adultery). Further on, the major reform achieved through this Act concerned the use of apostasy as an undisputed means to claim divorce under Hanafi law; that is Muslim women were often driven to renounce their faith or convert to another one so as to be granted divorce. The aforementioned Act established that if a Muslim woman could provide any ground for divorce among those recognized by law, then "her renounciation of her faith or conversion to another religion would not by itself dissolve the marriage", J.L. Esposito, *supra* note 16, pp. 229-231.

[114] In this regard, see the judgment of the Supreme Court (India), *Mahdu Kishwar & ors. v State of Bihar & ors.* [1996] 5 S.C.C. 125, concerning the issue of inheritance and specifically the discriminatory nature of certain provisions of the *Chota Nagpur Tenancy Act* of 1908 "which go to provide in favour of the male, succession to property in the male line", being therefore unfair against women. The sentence provides references to the legislation on the matter of inheritance, and among them it mentions the Shariat Law stating that "whereunder the female heir has an unequal share in the inheritance, by and large half of what a male gets."

[115] B. L. Verma, *supra* note 109, p. 328.

court.[116] The provisions relating to gifts regulate the transfer of property from a donor to a recipient; three elements are required: i) a declaration made by the donor, ii) its acceptance made by the recipient and iii) the delivery of the possession of the property in question.[117] The most contradictory issue addressed in the Shariat Act concerned the *waqf*,[118] which consisted in the settlement of properties for charitable purposes or in the transfer thereof to the descendants of a family, while protecting them from statutory interference. Under the Anglo-Muhammadan Law, the transfers of property made first for the benefits of a family and then for charitable purposes were no longer considered valid *waqf* unlike what had occurred during the pre-colonial era.[119]

Moreover, this Act brought about two major changes: namely, it abrogated "the customs and usages which [were] contrary to the rules of Muhammadan law",[120] and established that when no provisions concerning a specific legal point were present, Indian courts would "apply the principles of equity, justice and good conscience".[121] The Shariat Act is still in force today, though with some amendments.[122]

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116 *Id.*, pp. 331-332.

117 *Id.*, p. 332. Cf. the sentence of the Supreme Court (India), *Abdul Rahim & ors. v Sk. Abdul Zabar & ors.*[2009] concerning a case of gift under Muslim Law, stating in par. 10 therein that "under Mohammadan Law [gift] is a contract which takes effect through offer and acceptance" and thereafter listing "the conditions to make a valid and complete gift under the Mohammadan Law".

118 Under Section 2 of the *Mussalman Validating Act* 1913 "wakf means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable". This definition has been slightly modified by the *Wakf Ac*t 1995, whose Section 3(r) states that "wakf means the permanent dedication by a person professing Islam, of any movable or immovable property for any purpose recognized by the Muslim law as pious, religious or charitable" (S. D. Fardunji Mulla, *supra* note 106, p. 196). The *Mussalman Validiting Act* was passed in response to the large scale protests which took place after the Privy Council decision denying the validity of *wakfs-alal-aulad*, despite its recognition under Muslim law. The issue of *waqf* has given rise to controversies also in current India, for an example see the judgment of the Supreme Court (India), *Trustees of Sahebzadi Oalis Kulsum Trust v The Controller of Estate Duty, A.P.*[1998] in which the court held that a trust deed executed in favour of a grand-daughter but "ultimately for the maintenance of a holy shrine" was a "trust [. . .] in the nature of wakf-alal-Aulad. In fact, the recital in the trust deed is to the same effect".

119 B. L. Verma, *supra* note 109, pp. 333-334.

120 N. H. Jhabvala, *supra* note 4, p. 16.

121 R. K. Sinha, *supra* note 2, p. 7. The judgment of the Supreme Court (India), *Ahmedabad Women Action Group (AWAG) & ors. v Union of India* [1997] concerns a Public Interest Litigation challenging the constitutional validity of some Muslim personal Law provisions (such as polygamy, male unilateral *talaq*, Sunni and Shias inheritance laws discriminating against women, etc.). The court dismissed the petitions, and, among the precedent sentences which it mentions in support of its decision, one is particularly interesting, namely the judgment of the case *State of Bombay v. Narasu Appa Mali* [1952] A.I.R. 84, wherein the Judge Gajendragadkar "expressed his opinion on the question whether Part III of the Constitution applies to personal laws" and held that "the personal law do not fail within Article 13 (i) at all." As regards this issue, the Supreme Court, in adjudicating a similar case, though of Hindu law matters, held that

> in our opinion [. . .] Part III of the Constitution does not touch upon personal laws of the parties. In applying the personal laws of the parties, he could not introduce his own concepts of modern times but should have enforces the law as derived from recognized and authoritative sources of Hindu law, i.e., Smritis and commentaries referred to, as interpreted in the judgments of various High Courts, except where such law is altered by any usage or custom or is modifies or abrogated by statute.

See Supreme Court (India), *Sri Krishna Singh v Mathura Ahir and ors.* [1980] 2 S.C.R. 660.

122 With respect to the transitional period of the Shariat Act, see the judgment of the Supreme Court (India), *C. Mohammed Yunus v Syed Unissa and ors.*[1962] 1 S.C.R. 67, which, in fact, states

V. THE CONSEQUENCES OF THE ANGLO-MUHAMMADAN LAW

The previous sections of the present essay have focused on the analysis and the description of the development of both the Anglo-Muhammadan and the Islamic laws, openly highlighting the differences between the two systems and briefly mentioning the alterations brought about by the former on the latter. This section aims at explaining more substantially how the application of British legal and judicial principles as well as colonial methodical procedures historically impacted (and still do) on the Indian legal system.

It is worth remembering that, although in the late 19th century British administrators decided to replace parts of Muslim Law with British rules, the policy of applying personal laws to family matters was never completely abolished, as it represented a useful administrative technique to maintain a better control over the indigenous population.[123] Nevertheless, personal laws underwent substantial alterations owing to their "integration" in the colonial system, and these, with respect to the *Shari'ah*, can be summarized in five major setbacks: i) the adoption of the theory of *stare decisis*, which deprived it of its dynamism, ii) the application of English law, iii) the appointment of non-Muslim judges adjuticating cases involving Muslim legal matters, iv) the judicial misinterpretation of the *Shari'ah* and other Islam classical legal texts, and v) the problems related to Islamic education in today's India.[124]

First, the principle of *stare decisis*[125] belongs to the Common Law system and was obviously alien to the *Shari'ah*, but as the Indian colonial courts "were staffed by British or British-trained judges", "this became the unquestioned principle of the administration of justice".[126] And worse, owing to the gradual exclusion from the judicial system of native officers and the abolition of the office of *qadis*, many judgments of that time were wrongful and contrary to the *Shari'ah*. In addition to the principle of *stare decisis*, British judges, as already stated, relied upon the traditional Islamic texts and rigidly applied them, without accepting any innovative theories adopted by contemporary jurists. This attitude resulted in a strong rigidity and conservatism of the Anglo-Muhammadan law, two

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that on the enactment of the Shariat Act 26 of the 1937, as amended by the Madras Act r8 of 1949, the Muslim Personal Law applies in all cases relating to the matters specified notwithstanding any customer usage to the contrary even at the stage of appeals, if other conditions prescribed under the Act are fulfilled.

123 M. R. Anderson, *supra* note 21, p. 8.

124 S. K. Rashid, *supra* note 13, p. 142.

125 The doctrine of *stare decisis* or binding precedent represents the main distinction between Common Law and Civil Law. According to this doctrine a lower court is bound by the prior decisions of a superior one, and, though this part has been abolished in England in 1966, superior courts are also bound by their own precedents. On the basis of such tenet, it follows that the courts have to rely upon a precedent, even though it is an isolated one, regardless of its age, and regardless of whether the principle underlying the precedent decision sounds inadequate to the current circumstances, owing to historical, social and legal changes or further grounds. The rigid application of this doctrine has been somehow reduced as a result of the introduction of the possibility for judges to "distinguish a precedent", when it is deemed inadequate. Nevertheless, judges are still bound to a precedent if its *ratio decidendi* also covers the dispute at hand. See K. Zweigert & H. Kötz, *supra* note 32, pp. 311-314. The application of this principle gives rise then to the development of case law, which is also what the Anglo-Muhammadan Law and the Anglo-Hindu Law have eventually become. See *Id.*, p. 381 and p. 390.

126 S. K. Rashid, *supra* note 13, p. 143.

characteristics which are incompatible with the typical dynamism of the *Shari'ah*.[127] It is worth adding that the constraining approach adopted by the British towards the Islamic Law was also employed with regard to the Hindu Law, which was characterized by the same flexibility and dynamism.[128]

Second, the so called anglicization of the *Shari'ah*[129] began with the Hastings Plan of 1772 which introduced the principle of justice, equity and good conscience.[130] Afterwards, in the late 19th century, this principle led to the generalized application of British laws, in case of conflicting opinions within the Islamic community. As the time went by and British power in India increased, British administrators started replacing part of the *Shari'ah* with British laws and introducing new codes, based on British models. British judges used to apply the principles and concepts[131] of the Common Law, while directly introducing some parts of their own laws so as to regulate particular legal fields;[132] in particular, in the field of property law, starting from 1872, various acts[133] were passed which merely codified the Common Law.[134] As a result, the Anglo-Muhammadan Law can be considered

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127 Consequently, "the Shari'ah ceased to be a growing organism responsive to progressive forces and changing needs" and the resulting Anglo-Muhammadan Law was so peculiar in itself that it "cannot be used as a guide to the rules of Islamic Law as applied in countries which have been outside this system, such as, Saudi Arabia, Egypt, Syria, Iran, Nigeria" S. K. Rashid, *supra* note 13, p. 144.

128 Hindu traditional Law underwent many changes during the British rule, which in part mirror those that affected the *Shari'ah*, though its transformation could be deemed even more intense, as the notion of a Hindu Law that could fit British standards did not exist, so it was almost invented by altering the Hindu tradition. See J.L. Halpérin, *supra* note 14, p. 15. Just to add some examples, British laws replaced parts of Hindu Law, for instance, property rights were directly replaced by Common Law rules, while other traditional laws were repealed (such as the prohibition on widows to remarry). Further on, the principle of equity, justice and good conscience was applied by judges to determine the rules of law to be followed in adjudicating a case, while the principle of *stare decisis* started to be applied, after the abolition of *pandits* in 1864, when British judges took to relying upon their previous decisions not only as persuasive arguments but rather as binding precedents; such method, however was against Hindu legal tradition, according to which, on the contrary, no court decision could be deemed binding, as the judge ought to try to reach the most equitable solution in relation to the specific circumstances of the case at hand. Besides, also with respect to Hindu legal literature, British judges decided to only rely upon the faulty English translation of few of the very numerous "dharmasutras" and "dharmashastras". See K. Zweigert & H. Kötz, *supra* note 32, pp. 389-390.

129 S. K. Rashid, *supra* note 13, p. 145.

130 This principle originally excluded from its sphere of application inheritance and family matters.

131 In particular, the most important ones consisted in the application of the doctrine of the binding precedent, the principle of justice, equity and good conscience, and the principle of due process by which a court would regard a decision as righteous, if it was the result of just and loyal proceedings. Moreover, in certain cases where the British Law was deemed unsuitable, British judges resorted to non-British models (Scottish, French) and tailored the British framework to fit in with the Indian needs. See A. Gambaro & R. Sacco, *supra* note 44, p. 501.

132 Those codes concerning specific legal fields were: the Penal Code (1860), the Civil Procedure Code (1859), the Contract Act (1872), the Transfer of Property Act (1882), the Trusts Act (1882), the Specific Relief Act (1872), the Negotiable Instruments Act (1881) and, subsequently, the Succession Act (1865); K. Zweigert & H. Kötz, *supra* note 32, p. 277.

133 The most valuable example is the Indian Contract Act of 1872 which codified the rules of British Law regarding, for instance the conclusion of a contract, the vices of the will etc. Additional, though similar examples are the Specific Relief Act (1877) and the Transfer of Property Act (1882). See *Id.*

134 *Id.*, p. 381.

> the *Shari'ah* [. . .] as seen by English judges and interpreted by them with the help of English law, without fully grasping it and thereby aligning it with English principles of equitable justice.[135]

Consequently, what it is now left to Indian Muslims is a hybrid legal system, biased in favor of the Common Law.[136]

Third, the abolition of *qadis* violated the *Shari'ah* prescription, as "only a Muslim, possessing specific qualifications could be a *Qadi*, or judge, to decide cases under the *Shari'ah*".[137] Such specific qualities concerned the *qadi*'s knowledge and competence regarding Islamic faith in its entirety as well as his personal involvement in the decision of a case, for as a practicing Muslim he would be spiritually affected by the outcome of the dispute.[138]

Fourth, from the previous points there derives the subsequent judicial misinterpretation of the *Shari'ah* which took place throughout the colonial period and is, to some extent, still present today. In fact, British judges were involved in the so called "judicial adventurism":[139] they disregarded the given rules of interpretation of the *Shari'ah* as well as the importance of the advisory function of native officers and scholars, in spite of "their less than adequate knowledge of the *Shari'ah*",[140] an attitude which led to judicial misinterpretation.[141]

Fifth, the colonial court system relied not only upon British judges, but also upon Indians educated in British law. In fact, British administrators encouraged the Indian elite,

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135 *Id.*, p. 146.

136 British judges do not hesitate to modify "the dominant Islamic ruling when they felt that the Islamic tradition made little meaningful sense". And this attitude was clearly reflected in the decision of the famous *Baker Ali Khan* case, concerning the validity of a *waqf* created through a will. The Privy Council, in settling this case, was confronted with a precedent decision dealing with similar circumstances, i.e. the *Agha Ali Khan* case. Such controversy had been decided by a learned Muslim jurist, who established that, given the fact that the parties were Shi'as, Shi'ah law ought to be applied, which, as opposed to Sunni tradition, considered invalid such form of *waqf*. Regardless of the trustworthy analysis carried out on various Islamic legal sources by the Muslim jurist, the Privy Council attacked the precedent judgment, for they argued that it was based on unreliable ancient texts, and, ignoring the Shi'ah doctrine, decided that a Shi'a could create a *waqf* through a will. This decision not only led to an harmonization between the Sunni and the Shi'a law, but "reduce the scope of Islamic legal analysis." A. M. Emon, *supra* note 1, pp. 343-346.

137 S. K. Rashid, *supra* note 13, p. 146.

138 This entails that the necessary legal competence to settle Muslim legal issues could only be possessed by an individual belonging to the Islamic community and who would share in the same moral, social and political views and traditions, all the while acknowledging the expression of cultural norms within the law governing such community which obviously could not be understood by an individual alien to it. *Id.*, p.147. In 1942, an Amendment was proposed in the Central Legislative Council to be attached into the Dissolution of Muslim Marriage Act, "to the effect that only a Muslim judge could take cognizance of matters covered by the Act". Nevertheless, as the British opposed, the amendment was not passed, with the exception of the State of Kashmir where the plea was accepted and resulted in the Jammu and Kashmir Dissolution of Muslim Marriage Act of 1942. *Id.*, *supra* note 13, pp. 147-148.

139 *Id.*, p. 148.

140 *Id.*, p. 149.

141 "The courts, following the British practice, operated on a case law system of legally binding precedents." And "[t]his approach enabled [them] to assert a creative role in elaboration of Islamic Law", as "[t]hey went far beyond their traditional role which was restricted to simply applying the established law", J.L. Esposito, *supra* note 16, p. 221.

namely, those few, who could afford a high level education to attend English law courses in India or in England. Consequently, the indigenous legal systems lost their primacy and were replaced by the study of the European ones. As a result of this, not only the British but the learned Indians as well were sometimes ignorant of the Islamic jurisprudence, a trend which has allowed for the gradual alteration of the interpretation and the enforcement of the Islamic Law to the advantage of the Anglo-Muhammadan Law.[142]

Notwithstanding the serious consequences that the forced introduction of the Common Law in India has brought about, and, above all, its interference in the sphere of personal law, the issue of the Anglo-Muhammadan Law can also be analyzed from a neutral historical perspective, with the purpose of understanding the influence that such crossbreeding has exercised in the evolution of the current Indian State and society.

The effects of colonialism often outlast the actual period of colonial rule, as in many cases the ruled country, once independent, found itself reshaped and altered from within by the systematic changes made by the colonial power. This is exactly what happened in India after its formal independence in 1947. Through almost two centuries of colonial rule, British administrators had introduced and established an effective administrative and judicial system, which obviously served the colonial purpose of maintaining control, but which were eventually left as legacy to the newly-freed country as initial support and base for state administration.[143] The British had tried to categorize and simplify the diversity inherent in the Indian society and these changes did not merely remain an external source of influence, but they were somehow interiorized by Indians.

One of the most striking of developments brought about by this phenomenon is represented by "the rise of a new kind of scripturalist Islam"[144]. As already described above, British administrators chose to rely upon classical Islamic legal texts and follow them strictly regardless of whether they were considered binding sources of law.

However, in the meantime (namely toward the end of the 19th and the early 20th century) a similar scripturalist trend was growing within the worldwide Muslim community, as Islamic scholars committed themselves to reading once again the traditional sacred texts (*Quran* and *hadith*) in order to go back to the roots of their religion. This approach was grounded on the belief that Muslims needed to strictly adhere to textual sources, so as to derive from them the essential dogmas of the Islamic faith, which ought to be protected against the widespread secularization of thought and the subsequent diminishing importance of religion in society. Hence, such approach served the purpose of preserving the "authentic" Muslim identity, especially in those countries where Islam was

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[142] *Id.*, pp. 149-151. Such erosion of the *Shari'ah* continued well after India's independence insomuch as in 1984 the President of All India Muslim Personal Law Board was compelled to send a memorandum to Indian Prime Minister, maintaining that

> any change in the Shari'ah, direct or indirect, through legislation or judicial interpretation, would amount to *mudakhalah fi al din* (interference in religion) in violation of the freedom of religion guaranteed by the Constitution of India under Articles 25 and 26.

S. K. Rashid, *supra* note 13, p. 149.

[143] M. R. Anderson, *supra* note 21, p. 4.

[144] *Id.,* p. 20.

"endangered" by the presence of foreign powers, such as, for instance, India.[145] Besides, as a side effect of British policy, the adoption of scripturalism by Indian Muslims was facilitated by the concurrent British imposition of the orthodox Anglo-Muhammadan Law, based upon a rigid compliance with the strict rules of the Hanafi school, throughout the country.[146]

The great diversity within the Islamic community was also downplayed by the British who tried to impose standard rules to all Muslims. This caused many problems to the colonial courts, which were faced with the application of a fixed personal law system when settling disputes regarding parties, who were instead used to be governed by different personal arrangements. Despite those issues, such simplification provided, however, an important legal framework. In fact, the Indians, all be reluctantly, had to adapt to this new legal context in order to safeguard, as well as enhance, their economic, social and religious status within the colonial State. Owing to the constraints cause by this legal categorization, the only way for local communities to maintain a certain degree of autonomy or political privileges was to follow the new social framework introduced by the British. Indeed, "[t]he search for political allies [. . .] fostered the formation of new coalitions based upon, among other things, Muslim identity".[147]

Lastly, another unexpected development of the Anglo-Muhammadan Law and, one more subversive in nature, concerned the issue of Muslim identity. Indian Muslims could not accept that Muslim law was to be administered by non-Muslim judges as that was not only a violation of the *Shari'ah*, but it also implied changes in the traditional arrangements regarding their personal matters.[148] Therefore, a new vision of Islam developed in India during the last colonial period (late 20th century) around the idea of Muslim identity as opposed to the colonial rule; the same scripturalist and more orthodox approach fostered

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[145] See C. Geertz, *Islam Observed: Religious Development in Morocco and Indonesia*, 1971, pp. 104-105. Though the author addresses the cases of Indonesia and Morocco, he also takes into account the scripturalist approach with respect to Islam at large. Nevertheless, such scripturalist approach, which is based on the doctrine of *taqlid*, i.e. following the law found in the manuals of the schools, does not allow Muslim Law to meet the current needs of the modern society. Thus, to overcome this obstacle, Islamic sources of law ought to be reinterpreted and reformed by means of the right exercise of *ijtihad* (human reasoning), which will permit to maintain a continuity with the past, while "produc[ing] an Islamic legal system capable of meeting the needs and the exigencies of contemporary life." J. L. Esposito, *supra* note 16, p. 240. Furthermore, the same static idea of the *Shari'ah* promoted by British rulers and, partly inherited by Muslims themselves, it has recently proved to be the widespread conception of Islam Law both in Western as well in Eastern Countries (see A. M. Emon, *supra* note 1, pp. 332-333, the author provides the examples of the leadership of the Majlis Ugama Islam Singapura and the Canadian practitioners, who shared the common concept of the *Shari'ah* "as an inflexible code of religious rules, based on the Qur'an and the traditions of the Prophet Muhammad, and immune to change.").

[146] M. R. Anderson, *supra* note 21, p. 20. By reinterpreting Muslim Law, Islamic elite members were trying to resist to the colonial legal imposition and modernization of the *Shari'ah*; however, in so doing, the "multiplicity of opinions, different doctrinal schools, and competing theories of interpretative analysis" which characterized the medieval Islamic Law were set aside in favour of a more static and codified law. This attitude shall be considered Muslims' response to the issue of their political identity, for "the reductive, reified, and determinate concept of Shari'a provide[d] a foundation for defining identity through tradition", countering the widespread of Western values and culture, A. M. Emon, *supra* note 1, pp. 348-351.

[147] M. R. Anderson, *supra* note 21, p. 22.

[148] For example the law of *waqf*.

by the British towards Islamic texts and the prominence they gave to the oversimplification of the Muslim community, fostered the Muslim anti-colonialist struggle.[149]

VI. CONCLUSION

The Anglo-Muhammadan Law appears substantially different from the *Shari'ah*; and, even more so, it can be regarded as an independent system, "a hybrid law, heavily influenced by English principles of law, with rules borrowed from a number of foreign legal systems",[150] or in other words, a transformation of the Shari'ah so as to bring it in line with the colonial principles of law.

It follows, then, that the Anglo-Muhammadan Law may be labeled as a hybrid or mixed system,[151] defined as such by the "presence or interaction of two or more kinds of laws or legal traditions within each system".[152] Hence, those systems entail the presence of rules, techniques, legal procedures and laws derived from different systems, even though, one of them tends, eventually, to prevail.[153] The State of Louisiana and the Québec province represent two valid examples of crossbreeding and coexistence between a system of Civil Law and one of Common Law, which ought to be briefly discussed so as to provide a comparison with the Anglo-Muhammadan Law.

The territory of Louisiana had been a French colony since the 17th century, (despite a short Spanish rule in the late 18th century) until it was sold by Napoleon to the United States in 1803, thereby becoming a member of the Union. Notwithstanding its inclusion in the United States, the Civil Code of Louisiana was drafted on the basis of the French Civil Code. However, over time, Louisiana has been influenced by the legal system of the other States and by federal law, both of which belong to the Common Law tradition; the lack of an independent civil law base in the Country and the distance (both in terms of space and language) from the current French system, coupled with that phenomenon, are likely to increase the Common Law influence.

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149 *Id.*, p. 24.

150 W. Mensky, *supra* note 14, p. 369.

151 The existence of mixed legal systems dates back to ancient times and was generated by the social, political and commercial contacts among peoples. In particular, the Roman Empire and, later on, the Ottoman Empire represent two main historical examples of supranational entities which gave rise to mixed legal systems. As regards the Romans, the creation of mixed systems arose, on the one hand, from the gradual enlargement of the Empire which brought several tribes under its rule, and, on the other hand, from the principle according to which foreign peoples under Roman rule would still be governed by their own personal laws. This approach was embraced also by the German tribes once the Roman Empire collapsed. Given the coexistence of different populations governed by diverse laws, the latter "could not be hermetically separated", so they interacted and influenced each other giving rise to mixed systems of personal laws. Since its foundation in 1299, the Ottoman Empire was a plural legal system which evolved by the 19th century into a mixed system. Like the Romans, the Ottoman rulers applied Muslim law to Muslim people, while allowing non-Muslims to be governed by their own laws, except for criminal law. V. V. Palmer, *supra* note 45, pp. 1212-1215.

152 *Id.*, p. 1205. The author argues that "the current conception of 'mixed system', wherein the sole requirement is only the presence or interaction of two or more kinds of laws or legal traditions within each system" is so broad that it could embrace most of African and Asian systems as well as the classical mixed systems, such as Scotland, Louisiana and Quebec. It follows that a strict application of this conception would result in regarding "the quasi-totality of the legal systems of the world [. . .] as 'mixed legal systems'" *id.*, p. 1206.

153 K. Zweigert & H. Kötz, *supra* note 32, p. 90.

Whereas, the Canadian province of Quebec, was a French colony until 1772, when the entire region became part of the British dominion of Canada. Nonetheless, under the Quebec Act 1774 the citizens of the region were granted the right to be ruled according to French Law. Today's Quebec Law is based on a Civil Code which was formulated in 1886, and, though widely inspired by the Code Napoléon, it also includes matters (such as commercial law) governed by Common Law, which applies to the rest of Canada.

In spite of the similarities between these two hybrid systems, the survival of Civil Law in Quebec seems to be more probable than in Louisiana, as the French tradition is not only present in legislation, but it is also part of the local culture, and, furthermore, within Quebec French is one of the official languages, just like English.[154] The examples of Louisiana and Quebec serve to demonstrate that in hybrid systems there is a tendency on the part of one of the underlying legal traditions to prevail over the other.

Returning to the Anglo-Muhammadan Law, this system can be regarded as a peculiar type of hybrid system, for it is not made up of two, or more, political components, but it is a mixed system that concerns specifically the subjective sphere of personal matters,[155] constituting only a part of the overall Indian legal system, which belongs to a third legal tradition, namely the Hindu Law.

In fact, today's India is a "special case of 'hybridisation' or 'bricolage' between different legal components and perhaps the best illustration of the complex indeterminacy of legal orders".[156] Many former colonies, after their independence, found themselves dealing with the heritage of hybrid legal systems left by foreign rulers;[157] and, frequently, this has led to highly disappointing results. This failure in effectively administering and applying those mixed systems derives directly from the blind introduction of alien legal elements and the enforcement of foreign laws in a third society, without taking into account the importance of the local social and cultural context.[158] In fact, as a general rule, "unifying attempts through statutory reforms will remain largely ineffective unless

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154 *Id.*, pp. 143-146.

155 The peculiarity of the Anglo-Muhammadan Law case lies in its subject matter, namely, Muslim family law. The latter, representing the major part of the *Shari'ah*, stands for the common heritage of the different Islamic nations, to which Muslims will eventually return in order to retrieve their own history and values and to enhance their sense of identity against Western hegemony. See J. L. Esposito, *supra* note 16, p. 245.

156 J.L. Halpérin, *supra* note 14, p. 6.

157 Among such former colonies it is worth mentioning Malaysia, where "the Shari'ah is double affected by the common law", D.L. Horowitz, *supra* note 95, p. 555. In fact, on the one hand, the body of British-derived secular principles which does not apply to Muslims "cover the same fields as those which apply to Muslims", such as, for instance, family law. And, on the other hand, since the start of the Islamic Law codification in the 1980s, statutory provisions were placed before Islamic courts for interpretations, "upgrading" their role in the Country judicial system, similarly to Common Law courts. *Id.*, p. 556.

158 Many post-colonial societies have witnessed the rise of nationalist movements which affirmed the necessity to go back to their authentic cultural roots and pre-colonial institutions. However, at least as regards the legal field, the influence of imported laws or procedure could not be completely wiped out. Nevertheless, the success of legal reforms, including colonial legal transplants, is never predictable, as it does not depend on their "isomorphism with preexisting legal norms or [their] compatibility with specific features of the culture" (D.L. Horowitz, *supra* note 95, p. 578) as shown by Malaysia. In fact, its legal reforms have partly incorporated local elements so as to avoid conflicts on a large scale, while, on the other hand, they have substantially modified other fundamental matters, such as taxation, divorce, *muta'ah*, and the role of quadis' courts, though "none of this seems to have stirred significant rejection", *id.*, p. 579. Thus, it could be assumed that for a legal reform

the community itself modifies its norms".[159] This statement, by W. Mensky, clearly summarizes the current Indian situation, as "many post-colonial Indian judgments reflect the need for gradually reorienting Indian legal system, finding suitable and sustainable local solutions as opposed to those left by the colonial influence".[160] Such a stance of the Indian legal society reflects the default of the positivistic and modernist approach introduced by the British, the so-called "rule of law", whose application after the Country's independence, especially during the 70s, lost credibility as it "favoured the rich and powerful, underwriting huge abuses of law by the elite and by the state itself".[161] Therefore, traditional laws have regained ground and are currently being reinvented so as to fit in the modern Indian system.

In conclusion, from a diachronic perspective, the main effects of English Law upon Muslim Law in India are still a process in progress, and its most ambitious outcome, *i.e.* a uniform legal system, is still incomplete. This process of subliminal uniformity involved in the first place the legal and judicial formants.

Starting from the early 19th century, British judges moved the *Shari'ah* closer to the British tradition, by means of general Common Law principles in order to adjudicate the cases at hand. Subsequently, the legislative format mitigated the great divergences within the Muslim community, by fully replacing parts of the *Shari'ah* principles and institutions with British rules. This attitude reached its height in 1937, with the Shariat Act.

After India's independence, this trend has been fostered by the Supreme Court, which, in consonance with its role as guarantor of the uniform interpretation of the law, has left "less room for conflicting decisions of High Courts",[162] owing to the application of the British doctrine of binding precedent.

Furthermore, such a thirst for uniformity is also evinced by one of the non-self-executing provisions of the Constitution, namely article 44, which reads "[t]he State shall endeavour to secure for all citizens a uniform civil code throughout the territory of India";[163] however, in spite of this exhortation and the position repeatedly adopted by

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to be successful it ought to "tap a powerful aspiration to modernity or find home in an unusually adaptable culture", such as Malaysia. The tolerance of legal contradictory elements within the same system enables the Country to avoid a dogmatic approach in favour of a more pragmatic one. *Id.* The author concludes by arguing that "legal pluralism is likely to endure in many countries", for it ought not be assumed that "what has become, after a lengthy quest, authentic and familiar, however eclectically it was created, can find easy and equivocal acceptance among people whose own search for authenticity may begin and end elsewhere." *Id.*, p. 580.

159 W. Mensky, *supra* note 14, p. 54.

160 *Id.*, p. 56.

161 *Id.*, p. 261.

162 A. Gledhill, *supra* note 8, p. 603.

163 See art. 44 of the Indian Constitution: http://lawmin.nic.in/olwing/coi/coi-english/coi-indexenglish.htm. Site accessed on 13.03.2014. However, it ought to be mentioned that a petition "to consider the question of enacting a common Civil Code for all citizens in India" has been made, though the Supreme Court dismissed it as it cannot legislate on the matter. See Supreme Court (India), *Maharshi Avadesh v Union of India* [1994] 1 S.C.C. 713. It is likewise evident that in a context so much characterized by religion, it could be argued that such uniformity might be seen as a violation of the fundamental rights to freedom and religion, and in the event such uniformity was reached, then it would be difficult to relegate religion to a specific and limited field.

the Supreme Court over the decades, the legislature has, so far, failed to pass a uniform civil code.[164]

It also bears mentioning that the Anglo-Muhammadan Law as a mixed (personal) system is necessarily entangled in the processes of transformation which the entire legal system is presently undergoing and whose final outcome will largely depend on the interaction among those social, cultural, legal and political factors. Granted, this is true for all legal systems, but it is even more so in India, because there the regulation of personal matters is inextricably linked to the personal law of the citizens which is religious in nature. This entails that the regulation of these matters has strong ties to a person's community and is, therefore, defended as an element of cultural identity from everything that is perceived as an attack from the outside.

This phenomenon affects, in particular, the Muslim minority – in spite of their number[165] –, for they fear that a hypothetical uniform civil code would "codify" the extinction of a part of their identity.[166]

Here is why these peculiarities of the Indian legal system cannot be overlooked if one wants to carry out an accurate comparative legal analysis of the Anglo-Muhammadan law and its historical development.[167]

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[164] Among many, see the judgment of the Supreme Court (India), *Smt. Sarla Mugdal, President, Kalyani & ors. v Union of India & ors.* [1995] 3 S.C.C. 635, which deals with the specific circumstances concerning a Hindu husband, who married under Hindu Law, but who has subsequently embraced the Muslim faith and seeks recognition for his second marriage. This case raised once again the issue of a uniform civil code, as "no matrimonial law of general application [exists] in India" and "[t]here is no general matrimonial law regarding mixed marriage other than the statute law" which, however, was not applicable under the circumstances. Hence, the judges argued that "the Governments – which have come and gone [since 1949] have so far failed to make any effort towards 'unified personal law for all Indians", and that if the Hindu Law was codified back in the 1950s so as to uniformly govern the most part of the Indian population, "there is no justification whatsoever to keep in abeyance, any more, the introduction of 'uniform civil code' for all citizens".

[165] According to the 2011 census, the Muslims number 138,188,240; however, they only account for 13.4% of the overall population. http://censusindia.gov.in/Census_And_You/religion.aspx. Site accessed on 19.03.2014.

[166] After all a legal system

> does not need merely to promote efficiency, or to align particular doctrines with particular opinions or social practices, or to follow developmental imperatives, or to suit the knowledge and interests of lawyers and reformers,

but it ought to be deemed morally appropriate for a specific context. D.L. Horowitz, *supra* note 95, p. 569.

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