COURSE GUIDE

ISL 837
ISLAM AND SHARĪ‘AH IN NIGERIA

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CONTENTS **PAGE**

INTRODUCTION

ISL 837- ***Islam and Shar 'ah in Nigeria*** is a three-unit credit course available in the first semester of the 800 level of the Degree of Islamic Studies programme. The course gives you a clear picture of what the *Sharī'ah* in the Modern Times is all about. It gives you insight into the meaning and sources of *Sharī'ah* as well as its development at various stages. You will also be exposed to the application of Islamic Law in the 19^{th} and 20^{th} centuries. The course gives you insight into the controversy surrounding the alleged closure of the gate of *Ijtihād*. It also gives you insight into the circumstances leading to the limitation of al-Kali Courts to the law of personal status. The course introduces to you specific consideration of modern trends in the application of Islamic Law in some countries in the Middle East, North Africa, Turkey, India, Pakistan and Nigeria.

WHAT YOU WILL LEARN IN THIS COURSE

The general aim of this course is to provide for you a survey of the application of Islamic Law in the 19^{th} and 20^{th} centuries. It begins by giving you the definition of Islamic Law to serve as the background to the study. It goes on to trace the historical development of the Islamic Law into various stages that it covers. This is followed by appraising the sources of Islamic Law and the four schools of Law under the *Sharī'ah*. The concept of *Ijtihād* and its usage during the periods of the Prophet and the companions are thereafter presented. Your attention shall also be drawn to how *Ijtihād* affects Islamic Law and the controversy generated by the alleged closure of its gate. You shall also be familiarised with issues of the Western influence on *Sharī'ah*, different approaches to revival of Islamic law and consequent reforms leading to limitation of al-Kali Courts to the law of personal status. Moreover, the modern trends in the application of Islamic Law in the Middle East, North Africa, Turkey, India, Pakistan and Nigeria shall form part of what you shall learn in this course.

COURSE AIMS

There are sixteen units in the course and each unit has its objectives. You should read the objectives of each unit and bear them in mind as you go through the unit. In addition to the objectives of each unit, the overall aims of this course include:

1. to acquaint you with the meaning and historical development of Islamic Law otherwise known as *Sharī'ah*.
2. familiarise you with the challenges faced by Islamic Law leading to various reforms that subsequently brought about its limitation to the law of personal status.
3. describe to you the modern trends in the application of Islamic Law in some countries in the 19^{th} and 20^{th} centuries.

COURSE OBJECTIVES

Based on the general aims of this course, some objectives of the course as a whole are set out. These are the things you should be able to do by the time you complete the course. If you are able to meet the objectives, you would have achieved the aims of the course. Therefore, on your successful completion of this course, you should be able to:

- define and explain what Islamic Law is as well as trace its origin and development from the time of the Prophet to the modern time
- state the sources of Islamic Law with a view to explaining the role of each in sustaining the judicial system of Islam
- define *Ijtihād* and explain its role in the Islamic Law as well as discuss the controversy surrounding the closure of its gate.
- appraise the different approaches to the revival of Islamic Law and consequent reforms that led to limitation of al-Kali courts to the law of personal status
- discuss the modern trends in the application of Islamic Law in some countries with particular reference to Nigeria.

WORKING THROUGH THIS COURSE

You have to work through the study units in the course. There are sixteen units in all.

COURSE MATERIALS

Major components of the course are:

1. Course Guide
2. Study Units
3. Textbooks and References
4. Assignment File
5. Presentation Schedule

STUDY UNITS

There are 16 units (of four modules) in this course. They are listed below:

Module 1 *Al-Ijtihād*

Unit 1 The Meaning of *Al-Ijtihād*
Unit 2 *Al-Ijtihād* during the time of the Prophet and the Companions
Unit 3 The Divisibility and Procedure of *Ijtihād*
Unit 4 Controversy over the Alleged Closure of the Gate of *Al-Ijtihād*

Module 2 Law Reforms and *Sharīʻah*

Unit 1 The Impact of Western Influence on *Sharīʻah*
Unit 2 Reforms to Islamic Law
Unit 3 Different Approaches to Revival of Islamic Law
Unit 4 Limitation of Al-Kali Courts to the Law of Personal Status

Module 3 Modern Trends in the Application of Islamic Law in some Countries

Unit 1 Application of Islamic Law in the Middle East
Unit 2 Application of Islamic Law in Turkey, India and Pakistan
Unit 3 Application of Islamic Law in North Africa
Unit 4 Application of Islamic Law in Nigeria

REFERENCES AND TEXTBOOKS

Every unit contains a list of references for further reading which are meant to deepen your knowledge of the course. We hereby provide a list containing some of them. Try to get as many as possible of those textbooks and materials.

Muslehuddin, M. (1986). *Philosophy of Islamic Law and the Orientalists*. Delhi: Taj Company.

Kamali, M. H. (2003). *Principles of Islamic Jurisprudence*. Cambridge: The Islamic Texts Society.

Qadr, A. A. (1997). *Islamic Jurisprudence in the Modern World*. Delhi: Taj Company.

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Nasr, S. H. (2000). *Ideals and Realities of Islam*. Chicago: ABC International Group.

Elsiddig, A. A. M. (1993). "An Examination of the Problems of

Islamisation of Laws: Issues in Contemporary Islamic Legal Theory". Ph.D. Dissertation, the Temple University.

Makinde, A. K. (2007). "The Institution of *Sharī'ah* in Oyo and Osun States, Nigeria. 1890 – 2005". Ph.D. Thesis, University of Ibadan, Ibadan.

ASSIGNMENT FILE

In this file, you will find all the details of the work you must submit to your tutor for making. The marks you obtain from these assignments will count towards the final mark you obtain for this course. Further information on assignment will be found in the Assignment File itself and later in this *Course Guide* in the section on assessment.

ASSESSMENT

Your assessment will be based on tutor-marked assignments (TMAs)

and a final examination which you will write at the end of the course.

TUTOR–MARKED ASSIGNMENTS (TMAS)

Every unit contains at least one or two assignments. You are advised to work through all the assignments and submit them for assessment. Your tutor will assess the assignments and select four, which will constitute the 30% of your final grade. The tutor-marked assignments may be presented to you in a separate file. Just know that for every unit, there are some TMAs for you. It is important you do them and submit for assessment.

FINAL EXAMINATION AND GRADING

At the end of the course, you will write a final examination, which will constitute 70% of your final grade. In the examination, which shall last for three hours, you will be requested to answer three questions out of at least five questions.

COURSE MARKING SCHEME

This table shows how the actual course marking is broken down

Assessment	Marks
Assignments	Three assignments of 10% each count for 30% of course marks
Final Examination	70% of overall course marks
Total	100% of course marks

PRESENTATION SCHEDULE

The presentation Schedule included in your course materials gives you the important dates for the completion of tutor-marked assignments and attending tutorials. Remember, you are required to submit all your assignments by the due date. You should guard against falling behind in your work.

COURSE OVERVIEW

Unit	Title of Work	Weeks Activity	
Module 1: Definition, Development, Source and Schools of Islamic Law			
Unit 1	Definition and Philosophy of Islamic	Week 1	Assignment 1
Unit 2	Historical Development of *Sharī'ah*	Week 2	Assignment 2
Unit 3	The Sources of *Sharī'ah*	Week 3	Assignment 3
Unit 4	The Schools of Islamic Law	Week 4	Assignment 4
Module 2: *Al-Ijtihād*			
Unit 1	The Meaning of *Al-Ijtihād*	Week 5	Assignment 1
Unit 2	*Al-Ijtihād* During the Time of the Prophet and the companions	Week 6	Assignment 2
Unit 3	The Divisibility and Procedure of *Ijtihād*	Week 7	Assignment 3
Unit 4	Controversy over the Alleged Closure of the Gate of *Al-Ijtihād*	Week 8	Assignment 4
Module 3: Law Reforms and *Sharī'ah*			
Unit 1	The Impact of Western Influence on	Week 9	Assignment 1
Unit 2	Reforms to Islamic Law	Week 10	Assignment 2
Unit 3	Different Approaches to Revival of	Week 11	Assignment 3
Unit 4	Limitation of Al-Kali Courts to the	Week 12	Assignment 4
MODULE 4: Modern Trends in the Application of Islamic Law in			
Unit 1	Application of Islamic Law in the Middle East	Week 13	Assignment 1
Unit 2	Application of Islamic Law in Turkey, India and Pakistan	Week 14	Assignment 2
Unit 3	Application of Islamic Law in North	Week 15	Assignment 3
Unit 4	Application of Islamic Law in Nigeria	Week 16	Assignment 4
Revision			
Examination			
Total			

HOW TO GET THE MOST FROM THIS COURSE

In distance learning, the study units replace the conventional university lecturers. This is one of its great advantages. You can read and work through specially designed study materials at your own pace, and at a time and place that suits you best. Think of it as reading the lecture instead of listening to the lecturer. In the same way a lecturer might give you some reading to do, the study units tell you when to read, and which are your text materials or set books. You are provided exercises to do at appropriate points, just as a lecturer might give you an in-class exercise. Each of the study units follows a common format.

The first item is an introduction to the subject matter of the unit, and how a particular unit is integrated with the other units and the course as a whole. Next to this is a set of learning objectives. These objectives let you know what you should be able to do by the time you have completed the unit. These learning objectives are meant to guide your study. The moment a unit is finished, you must go back and check whether you have achieved the objectives. If this is made a habit, then you will significantly improve your chances of passing the course.

The main body of the unit guides you through the required reading from other sources. This will usually be either from your set books or from a reading section. The following is a practical strategy for working through the course. If you run into any trouble, telephone your tutor. Remember that your tutor's job is to help you. When you need assistance, do not hesitate to call and ask your tutor to provide it.

1. Read this Course Guide thoroughly, it is your first assignment.
2. Organise a Study Schedule. Design a 'Course Overview' to guide you through the Course. Note the time you are expected to spend on each unit and how the assignments relate to the units. Important information, e. g. details of your tutorials, and the date of the first day of the Semester is available from the study centre. You need to gather all the information into one place, such as your diary or a wall calendar. Whatever method you choose to use, you should decide on and write in your own dates and schedule of work for each unit.
3. Once you have created your own study schedule, do everything to stay faithful to it. The major reason that students fail is that they get behind with their course work. If you get into difficulties with your schedule, please, let your tutor know before it is too late for help.
4. Turn to unit 1, and read the introduction and the objectives for the unit. Aims and Objectives and what learners will gain working

through the course materials and its study units are stated clearly at the onset. We have also provided you a list of textbooks and references for your further reading. As an inference in the Guide, to develop an active interest in the course is a prerequisite for its successful completion. Assess yourself through the Self- Assessment Exercises (SAEs). You will equally be assessed for grading purposes through the TMAs. Thus, to do well in the course, you must get yourself organised and try to conform to the presentation schedule.

We wish you success in this course.

MAIN COURSE

CONTENTS **PAGE**

MODULE 1 *AL-IJTIHĀD*

UNIT 1 THE MEANING OF *AL-IJTIHĀD*

CONTENTS

1.0 INTRODUCTION

Al-Ijtihād is an important instrument explored for the interpretation of the evidences from the sources of Islamic law which are Qur'an and *Sunnah*. While *Ijtihād* is a continuous process of development of Islamic law, the divine revelation and prophetic legislation discontinued after the demise of the Prophet. It is as a result of this that *Ijtihād* is important in the study of Islamic law. Although there is a debate as to whether the gate of *Ijtihād* is closed or not, its relevance in the contemporary period cannot be under estimated. Therefore, *Ijtihād* continues to be seen as the main instrument of interpreting the divine message and relating it to the changing conditions of the Muslim community in its aspirations to attain justice, salvation and truth.

In view of the above, it becomes necessary to discuss *Ijtihād* by looking at its meaning and its basis with a view to determining its significance under the *Sharī'ah*. It also requires examining its usage during the time of the Prophet and his companions; and particularly to look at what brings about the argument of the closure of its gate thereafter. These are what you are going to come across in this Module

for your reading and digestion.

2.0 OBJECTIVES

By the end of this unit, you will be able to:

- give the meaning of *Ijtihād*
- state the basis of *Ijtihād*
- discuss the controversy surrounding the closure of the gate of *Ijtihād*

3.0 MAIN CONTENT

3.1 The Meaning of *al-Ijtihād*

In the linguistic sense, the word "*Ijtihād*" conveys exertion of effort and exhaustion of power to do a thing. It is derived from the Arabic word "*ijtahada*" which means "to exert oneself" but in the language of the law, it is taken to mean the exertion of effort in arriving at rules from the *Sharī'ah* evidences of the *Qur'ān*, the *Sunnah*, the *Ijmā'* and the *Qiyās*. *Ijtihād* is therefore defined as "the putting forth of every effort in order to determine with a degree of probability a question of the *Sharī'ah*. Allah has endowed men with reason by which they can distinguish between differing viewpoints, and He guides them to the truth either by explicit texts or by indications on the strength of which they exercise *Ijtihād*.

In a nutshell, *Ijtihād* means the use of human reason in the elaboration and explanation of the *Sharī'ah* Law. It covers a variety of mental processes, ranging from the interpretation of texts of the *Qur'ān* and the assessment of the authentic of *a hadith*. *Qiyās*or analogical reasoning, then, is a particular form of *Ijtihād*, the method by which the principles established by the *Qur'ān*, *Sunnah*, and *Ijmā'* are to be extended and applied to the solution of new problems not expressly regulated before.

Al-ijtihād, therefore, is an exercise of one's reasoning to arrive at a logical conclusion on a legal issue done by the Jurists to deduce a conclusion as to the effectiveness of a legal precept in Islam. It is an act of studying the *Sharī'ah* evidences with a view to finding the truth as a way of solution to legal problem. It is significant in building up the society for promotion and progress of the law and for that reason; it should be performed thoroughly and earnestly. The person exercising *Ijtihād* is called a *Mujtahid* and the question being considered is called *mujtahidfīh*.

SELF-ASSESSMENT EXERCISE

1. What is *Al-ijtihād*?
2. State the variety of mental processes which *al-ijtihād* covers.

3.2 Basis of *Al-Ijtihād*

In view of the fact that the *Sharī'ah* is Divine and is derived from well-established evidences fundamentally handed down by the precepts of the*Qur'ān* to be explained by the traditions of the Prophet, and developed to suit circumstances of necessity by *Ijmā'* and *Qiyās*, or juristic construction, etc., *Ijtihād* has served as the medium for the deduction of rules from these sources and the means by which transactions and social needs were provided the necessary flexibility. Thus, *Ijtihād* or interpretation is an essential element in the growth of the *Sharī'ah* law.

There are numerous provisions in the *Qur'ān*, the *Sunnah*, the *Ijmā'* of the Companions of the Prophet and the founders of the schools which authorise it as a duty binding upon a competent person to serve the cause of the sacred principles. The foundation of the doctrine and the technique of *Ijtihād* lie in many verses of the *Qur'ān*. The Glorious Book declares: "So learn a lesson, O ye who have minds" (Q.59:2). The *Qur'ān* shows the method by the following verse explaining: "Those to whom we have sent the Book study it as it should be studied..."
(Q.2.121).

The study is to be performed under a condition of earnestness. (See Q.47:24) and under the path provided by the *Qur'ān* itself: "O ye who believe, obey Allah, and obey the Apostle and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and His Apostle, if ye do believe in Allah and the Last Day: that is best and most suitable for final determination" (Q.4:59).

SELF- ASSESSMENT EXERCISE

i. Explain the basis for *Ijtihād.*
ii. Mention relevant portions of the Glorious *Qur'ān* supporting *Ijtihād.*

3.3 Conditions and Qualifications of a *Mujtahid*

There are certain conditions and qualifications that a person must meet before he is considered to be a *Mujtahid.* A *Mujtahid* must know many sciences and have the following qualifications or attainments:

1. The knowledge of the *Qur'ān* and all that is related to it, that is to say, a complete knowledge of Arabic literature, a profound acquaintance with the orders of the *Qur'ān* and all their subdivisions, their relationship to each other and their connection with the orders of the *Sunnah*. He should know when and why each verse of the *Qur'ān* was revealed; he should have a perfect acquaintance with the literal meanings of the words, the speciality or generality of each clause, the abrogating and abrogated sentences. He should be able to make clear the meaning of the "obscure" passages or *mutashābihāt*, to discriminate between the literal and the allegorical, the universal and the particular.

i. He must know the *Qur'ān* by heart with all the traditions of explanations.
ii. He must have perfect knowledge of the traditions or at least 3000 of them; must know their source, history, object and their connection with the laws of the *Qur'ān* and even know by heart the most important traditions.
iii. He must lead a pious and austere life.
iv. He must possess profound knowledge of all sciences of law and, later, a complete knowledge of the schools.

2. It should however be noted that a combination of all the above qualities is needed for the person who intends to be a full *Mujtahid*. And in addition to the above, among the moral qualities he must possess are:

i. He must be a good Muslim. That is, he must not be a nominal Muslim; rather, he must be a practicing one.
ii. He must be God-conscious and law-abiding to all the injunctions of the Glorious *Qur'ān*.
iii. He must not be influenced by heretical influences.
iv. He must be just, reliable trustworthy and pure from iniquitous practices.

SELF- ASSESSMENT EXERCISE

i. Mention the qualifications of a *Mujtahid*.
ii. State the moral qualities required of a good *Mujtahid*.

4.0 CONCLUSION

From what has been discussed so far, it is established that *al-Ijtihād* is a process of exercise of one's reasoning to arrive at a logical conclusion on a legal issue done by the Jurists to deduce a conclusion as to the effectiveness of a legal precept in Islam. This is done with a view to

ensuring that contemporary issues which are not directly mentioned in the Qur'an and *Sunnah* are discussed based on the interpretation of the texts of these sources. It therefore serves as an essential element in the growth and development of the *Sharī'ah* law. For a person to be qualified to carry out *Ijtihād*, he must fulfill certain conditions and possess certain qualifications. He must not also be found wanting morally; hence certain moral characteristics are required of a *Mujtahid*.

5.0 SUMMARY

This unit endeavours to give the definition of *Ijtihād*. Both literal and technical meanings of the word *Ijtihād* are mentioned. The unit further goes on to state the basis for *Ijtihād* under the *Sharī'ah* law and discusses it stands for. It appraises the conditions for carrying out *Ijtihād* and states the qualifications of a *Mujtahid*.It states the significant of *Ijtihād*on issues affecting the Muslim community and for building up the society for the promotion and progress of the law; hence it should be seen as an instrument very necessary for the development of Islamic law.

6.0 TUTOR-MARKED ASSIGNMENT

1. Define the word *Ijtihād*.
2. Discuss the basis for *Ijtihād* with references to the *Qur'ān.*
3. State the conditions and qualifications of a *Mujtahid.*

7.0 REFERENCES/FURTHER READING

Ajijola, A. D. (n.d.).*What is Shariah?* Kaduna: Straight Path Publishers.
Amin, S. H. (1985). *Islamic Law in the Contemporary World*. Glasgow: Royston Limited.

Doi, A. R. I. (1984). *Sharī'ah*: *The Islamic Law*. London: Ta Ha Publishers.

Muslehuddin, M. (1986).*Philosophy of Islamic Law.* Delhi: TAJ Comp.
Ramadan, S. (1970).*Islamic Law: Its Scope and Equity*. (n.t.)(n.p.).

The Encyclopaedia of Islam (1934). London: E. J. Brill Ltd. Publishers and Printers.

UNIT 2 AL-*IJTIHĀD* DURING THE TIME OF THE PROPHET AND THE COMPANIONS

CONTENTS

1.0 INTRODUCTION

The first time *Ijtihād* was used with a direct legal import was during the time of the Prophet. Although, there is a controversy as to whether all the rulings of the Prophet should be regarded as having been divinely inspired or whether they also partake of *Ijtihād*, the *'ulamā'* are generally in agreement that the Prophet practised*Ijtihād* on some affairs or some circumstances. There are also evidences that the Prophet approved the practice of *Ijtihād* to his companions; hence, *Ijtihād* was used by them when he was alive and after his death. It is on the basis of this that it is necessary to look at the application of *Ijtihād* by the Prophet and his companionsIn view of the above, you are going to be taking through the application of *Ijtihād* during the time of the Prophet and his companions in this unit.

2.0 OBJECTIVES

By the end of this unit, you will be able to:

- discuss how *Ijtihad* was applied by the prophet
- State how the prophet approved the use of *Ijtihad* for companions
- Evaluate how companions applied *Ijtihad*

3.0 MAIN CONTENT

3.1 Al-Ijtihād during the Time of the Prophet

The importance of *Ijtihād* or interpretation in constructing up a society and promoting the progress of law becomes evident when it is found that the Prophet himself exercised *Ijtihād* in spite of the fact that his source

of knowledge or *wa y* was available to him. In many cases where there was no revelation, the Prophet used to give his own opinion, which the early Muslim society used to take from the beginning as binding.

The majority of *'ulamā'* have held that the Prophet in fact practised *Ijtihād* just as he was allowed to do so. This, it is said, is borne out by the numerous *āyāt* of the *Qur'ān* where the Prophet is invited, along with the rest of the believers, to meditate on the *Qur'ān*.

Moreover, the majority view that the Prophet resorted to *Ijtihād* finds further support in the *Sunnah*. Thus, according to one *adīth*, the Prophet is reported to have said, 'When I do not receive a revelation (*wa y*), I adjudicate among you on the basis of my opinion.'

It is also a fact that the companions did, on numerous occasions, practise*Ijtihād* both in the presence of the Prophet and in his absence. The *adīth* of Mu'ādh Ibn Jabal is quoted as a clear authority that the Prophet authorised Mu'ādh to resort to *Ijtihād* in his absence when he was sent to Yemen. "What will you do if a matter is referred to you for judgment?" asked the Prophet. "I will judge according to the Book of Allah," Mu'ādh answered. The Prophet asked, "What if you find no solution in the Book of Allah?" Mu'ādh said, "Then I will judge according to the *Sunnah* of the Prophet." The Prophet asked, "And if you do not find (it) in the *Sunnah* of the Prophet?" Mu'ādh said, "Then I will make *Ijtihād* as best as I can and formulate my own judgment." The Prophet touched Mu'ādh's chest and said, "Praise be to Allah who has guided the messenger of His Messenger to that which pleases Him (Allah) and His Messenger."

Numerous other names are quoted, including those of AbūBakr, Sa'dIbn. Mu'ādh, AmrIbn. al-' and AbūMūsā al-Ash'arī, who delivered *Ijtihād* in the absence of the Prophet. It is also reported in a *adīth* that when the Prophet authorised 'AmrIbn. al-' to adjudicate in some disputes, he asked the Prophet, 'Shall I render *Ijtihād* while you are present? To this the Prophet replied, 'Yes. If you are right in your judgment, you earn two rewards, but if you err, only one.' It is similarly reported that Sa'd Ibn Mu'ādh rendered a judgment concerning the Jews and Banū Quray ah in the presence of the Prophet, and that he approved of it.

The Prophet was always desirous that his companions should develop insight (*fiqh)* and clear understanding of religion as a way of life (*dīn*). As a result of this, he said, 'when Allah desires (something) good for someone, He gives him good understanding of all that concerns *dīn*.'

SELF-ASSESSMENT EXERCISE

i. Discuss how *Ijtihād* was used by the Prophet.
ii. State how the Prophet approved the use of *Ijtihād* for his companions in his presence or absence.

3.2 *Al-Ijtihād* during the Period of the Companions

As the Prophet approved the application of *Ijtihād* for his companions either in his presence or absence when he was alive, its application did not stop after his death. The companions of the Prophet continued to develop the concepts of law by the exercise of *Ijtihād*. AbūBakr said: "I decided the question of *kalālah* (a deceased leaving no parent or child to inherit) according to my opinion; if it is correct, then it is an inspiration from Allah; if it is wrong, then the error is mine and the Satan's; Allah and His Prophet are innocent of such error." 'Umar said: "I do not know whether I have attained the truth but I spare no effort in striving to do so." 'Ali, Zayd b. Thābit, 'Abdullah b. 'Abbās, ' ishah, the mother of the Faithful, and others, were great jurists followed by great founders of the Sunni schools. They built up their schools by the exercise of *Ijtihād*.

The companions of the Prophet understood what is called *Ijtihād* as understanding (*fiqh*) as explained in the advice that 'Umar gave to his judge AbūMūsā al-Ash'arī. To him 'Umar proclaimed, "Judgment is to be passed according to express Qur'anic imperatives or established *Sunnah* practices… Make sure that you understand clearly every case that is brought to you for which there is no applicable text of the *Qur'ān* and the *Sunnah*. You, then, through comparison and analogy, distinguish similarities and sort out the odds in order to reach a judgment that seems next to justice and best in the sight of Allah."

Relying on the above quoted statement of 'Umar, Imam Shafi'i took *Ijtihād* to mean reasoning by analogy (*qiyās*). For him, *Ijtihād* and *qiyās* are "two names for the same thing." This conception of individual opinion or interpretation was a clear aspect of the intellectual life of the companions of the Prophet in the earliest Muslim society. In another occasion, 'Umar asked a litigant after his case had been judged by 'Ali and Zayd, who had both been companions of the Prophet: "How was the judgment?" The man told him. 'Umar then said: "Had I been the judge, I would have decided differently." The man asked him: "Why, then, don't you enforce your decision, you being the Caliph?" 'Umar answered: "If it were a decision based upon a specific ordinance of the Book or the *Sunnah*, I should have done that, but this is a matter of opinion, and thus we are all the same."

SELF-ASSESSMENT EXERCISE

i. Explain the position of Abū Bakron *Ijtihād.*
ii. Mention the instances for which ‘Umar encouraged *Ijtihād.*

4.0 CONCLUSION

There is no gainsaying the fact that the application of *Ijtihād* for determining issues of law started during the period of the Prophet. The Prophet himself was seen to have applied it on some affairs in some circumstances. He also encouraged his companions to apply it whether in his presence or absence. He sent some of them on assignments and approved the use of *Ijtihād* for them. It is as a result of this that the companions continued with the use of *Ijtihād* after the death of the Prophet. Hence, the generations after the companions too also made use of *Ijtihād*.

5.0 SUMMARY

This unit tries to explain how the Prophet made use of *Ijtihād*. It states that although the Prophet’s actions were divinely inspired, there were instances when he applied *Ijtihād* to determine some issues. It also mentions that the Prophet approved the use of *Ijtihād* for his companions either in his presence or absence. The unit appraises the conditions for which the companions engaged in the use of *Ijtihād* on some cases handled by them. They, however, did that on the condition that they were not issues based on specific ordinances in the Book or *Sunnah*.

6.0 TUTOR-MARKED ASSIGNMENT

1. Discuss the role of the Prophet in the application of *Ijtihād.*
2. How were the companions involved in the use of *Ijtihād*?
3. State the contribution of ‘Umar in encouraging the use of *Ijtihād.*

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UNIT 3 THE DIVISIBILITY AND PROCEDURE OF *IJTIHĀD*

CONTENTS

1.0 INTRODUCTION

There is the question as to whether a person is who is learned on a particular subject is qualified to practice *Ijtihād*in that area, or whether he is required to qualify as a full *Mujtahid*first in order to be able to carry out *Ijtihād*at all. Islamic Jurists have discussed this question under divisibility of *Ijtihād*. More so, *Ijtihād* occurs in a variety of forms, hence, there is no uniform procedure for *Ijtihād*. It therefore becomes imperative for us to discuss the divisibility and procedure for *Ijtihād*in this unit.

In this unit, you will be made to understand the arguments of the Islamic jurists on the divisibility of *Ijtihād*. It discusses the issue of whether the intellectual ability and competence of a *Mujtahid*can be divided into components or not. The unit also endeavours to explain to you the procedure of *Ijtihād*. It discusses what a person must first look at in carrying out *Ijtihād*.

2.0 OBJECTIVES

By the end of this unit, you will be able to:

- determine the divisibility or otherwise of *Ijtihād*
- state the procedure of *Ijtihād.*

3.0 MAIN CONTENT

3.1 The Divisibility of *Ijtihād*

The question as to whether a person who is learned on a particular subject is qualified to practise *Ijtihād* in that area, or

whether he is required to qualify as a full *Mujtahid* first in order to be able to carry it out at all has been a matter of discussion amongst Islamic jurists. The majority of *'ulamā'* are of the view that once a person has fulfilled the necessary conditions of *Ijtihād*, he is qualified to practice it in all areas of the *Sharī'ah*. According to this view, the intellectual ability and competence of a *Mujtahid* cannot be divided into compartment. *Ijtihād*, in other words, is indivisible, and we cannot say that a person is a *Mujtahid* in the area of matrimonial law and an imitator (*muqallid*) in regard to devotional matters (*ibādāt*) or vice-versa. To say this would be tantamount to a contradiction in terms, as *Ijtihād* and *taqlīd* cannot be combined in one and the same person. The majority view is based on the analysis that *Ijtihād*, for the most part, consists of formulating an opinion concerning a rule of the *Sharī'ah*. An opinion of this type occurs only to a fully qualified *Mujtahid* who has attained the necessary level of intellectual competence. It is further argued that all the branches of the *Sharī'ah* are interrelated, and ignorance in one may lead to an error of misjudgment in another. The majority view is further supported by the argument that once a person has attained the rank of *Mujtahid*, he is no longer permitted to follow others in matters where he can exercise *Ijtihād* himself.

However, among the majority, there are some jurists who have allowed an exception to the indivisibility of *Ijtihād*. This is in the area of inheritance (*mīrāth*), which is considered to be self-contained as a discipline of *Sharī'ah* law and independent of the knowledge of the other branches. Hence, a jurist who is only knowledgeable in this field may practice *Ijtihād* in isolation from the other branches of *fiqh*.

Contrary to the above, some Mālikī, anbalī and āhirī jurists have, however, held the view that *Ijtihād* is divisible. To them therefore, when a person is learned in a particular area of the *Sharī'ah*, he may practice *Ijtihād* in that area only. This will in no way violate any of the accepted principles of *Ijtihād*. There is similarly no objection, according to this view, to the possibility of a person being both *Mujtahid and muqallid* at the same time. Thus, a *Mujtahid* may confine the scope of his *Ijtihād* to the area of his specialisation. This has, in fact, been the case with many of the prominent Imams, who have, on occasions, admitted their lack of knowledge in regard to particular issues. Imam Mālik is said to have admitted in regard to thirty-six issues at least that he did not know the right answer. In spite of this, there is no doubt concerning Mālik's competence as a fully-fledged *Mujtahid*.

The view that *Ijtihād* is divisible is supported by a number of prominent jurists, including Abu'l- usaynal-Ba rī, al-Ghazāliī, Ibn al-Humām, IbnTaymiyyah, his disciple Ibn al-Qayyim and al-Shawkāni. According to the proponents of this view, if knowledge of all the disciplines of

Sharī'ah were to be requirement, most jurists would fail to meet it and it would impose a heavy restriction on *Ijtihād*. Al-Shawkānī, Badrān and al-Kassāb have all observed that this is the preferable of the two views. It may be added that in modern times, in view of the sheer bulk of information and the more rapid pace of its growth, specialisation in any major area of knowledge would seem to hold the key to originality and creative *Ijtihād*. The divisibility of *Ijtihād* would thus seem to be in greater harmony with the conditions of research in modern times.

SELF-ASSESSMENT EXERCISE

i. What is divisibility of *Ijtihād*?
ii. What are the arguments for and against divisibility of *Ijtihād*?

3.2 The Procedure of *Ijtihād*

Since *Ijtihād* occurs in a variety of forms, such as *qiyās isti sān ma la ahmursalah*, and so on, each of these is regulated by its own rules. There is, in other words, no uniform procedure for *Ijtihād* as such. The jurists have nevertheless suggested that in practising*Ijtihād*, the jurist must first of all look at the *nu* of the *Qur'ān* and the *adīth*, which must be given priority over all other evidences. Should there be no *na* on the matter, then he may resort to the manifest text (*āhirī*) of the *Qur'ān* and *adīth* and interpret it while applying the rules pertaining to the general (*'āmm*) and specific (*khā*), the absolute and the qualified, and so forth, as the case may be. Should there be no manifest text of the subject in the *Qur'ān* and the verbal *Sunnah*, the *Mujtahid* may resort to the actual (*fi'lī*) and tacitly approved (*taqrīrī*) *Sunnah*. Failing this, he must find out if there is a ruling of *ijmā'* or*qiyās*available on the problem in the works of the renowned jurists. In the absence of any guidance in these works, he may attempt an original *Ijtihād* along the lines of *qiyās*. This would entail a recourse to the *Qur'ān*, the *adīth* or *ijmā* for a precedent that has an '*illah* identical to that of the *far'(*i.e. the case for which a solution is required). When this is identified, he is to apply the principles of *qiyās*in order to deduce the necessary ruling. In the absence of a textual basis on which an analogy can be founded, the *Mujtahid* may resort to any of the recognised methods of *Ijtihād* such as *isti sān ma la ahmursalah*, *isti āb*, etc., and derive a solution while applying the rules that ensure the proper implementation of these doctrines.

The foregoing procedure has essentially been formulated by al-Shāfi'i. When the procedure is followed by a *Mujtahid*, the ruling so arrived at may be that the matter is obligatory (*wājib*), forbidden (*arām*), reprehensible (*makr h*) or recommended (*mand b*).

From the view point of its procedure, *Ijtihād* may occur in any of the following four varieties. Firstly, there is the form of a juridical analogy (*qiyās*) which is founded on an effective cause (*'illah*). The second variety of *Ijtihād* consists of probability (*ann*) without the presence of any *'illah* such as practising *Ijtihād* in regard to ascertaining the time of *alā*tor the direction of the *qiblah*. The third type of *Ijtihād* consists of the interpretation of the source materials and the deduction of *a kām* from existing evidence. This type of *Ijtihād* is called *Ijtihādbayānī*, or 'explanatory *Ijtihād*', which takes priority over 'analogical *Ijtihād*', or *Ijtihādqiyās*. The fourth variety of *Ijtihād*, referred to as *Ijtihādisti lā ī*, is based on *mu la ah* and seeks to deduce the *a kām*in pursuance of the spirit and purpose of the *Sharī'ah*, which may take the form of *isti lāh*, juristic preference (*isti sān*), the obstruction of means (*sadd al- dharā'i'*), or some other technique. Imam Shāfi'ī accepts only the first type, namely analogical *Ijtihād*, but for the majority of *'ulamā'*, *Ijtihād* is not confined to *qiyās*and may take the form of any of the foregoing varieties.

SELF-ASSESSMENT EXERCISE

i. State the procedure of *Ijtihād.*
ii. Mention the four varieties of *Ijtihād.*

4.0 CONCLUSION

From the foregoing, it is established that there are arguments on the divisibility of *Ijtihād*. While some jurists are of the view that the divisibility of *Ijtihād*is impossible, some are of the view that it is possible. This latter position seems to be in greater harmony with the contemporary period. In view of the sheer bulk of information and more rapid pace of growth, specialisation in any major area of knowledge would be of more valuable assistance to the concept of *Ijtihād*. In respect of the procedure of *Ijtihād* however, it is explained that in practising *ijtihād,* there is a laid down procedure to be followed before a ruling can be arrived at. From such a procedure therefore, four varieties of *Ijtihād* occurred.

5.0 SUMMARY

This unit examines the divisibility and procedure of *Ijtihād*. It explains how the jurists engage in polemics of the divisibility or otherwise the compartmentalisation of *ijtihād*. It mentions the views of the jurists for and against divisibility of *ijtihād* and concludes that its divisibility is desirable in the modern time. The unit also discusses the procedure of *ijtihād*. It states the method a *Mujtahid* will follow in exercising *Ijtihād* before he arrives at a ruling. It mentions the four varieties of *ijtihād* that

may occur when the procedure is followed.

6.0 TUTOR-MARKED ASSIGNMENT

1. Explain what divisibility of Ijtihād is.
2. What are the arguments for and against divisibility of *ijtihād?*
3. State and explain the four varieties of *ijtihād*.

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UNIT 4 CONTROVERSY OVER THE ALLEGED CLOSURE OF THE GATE OF *IJTIHĀD*

CONTENTS

1.0 INTRODUCTION

At a particular period in the history of the development of Islamic Law, questions as to who was a qualified person to exercise *Ijtihād* were asked by scholars. Consequently, consensus established itself that from that time onwards, no one might be deemed qualified to have the necessary qualifications for independent reasoning in law (*Ijtihād*); hence all future activity would have to be confined to the application and interpretation of the *Ijtihād* of some already established scholars. This implies that the door of *Ijtihād* was closed. This action brought about serious controversy among scholars. While some believed that the closure of the gate is normal, some others saw it as un-called for and stated that the gate of *Ijtihād* can never be closed.

This unit is therefore meant to discuss with you the reasons for the alleged closure of the gate of *Ijtihād* and the controversy that surrounded the alleged closure. It also discusses the call of some scholars for the revival of *Ijtihād*.

2.0 OBJECTIVES

By the end of this unit, you will be able to:

- state the reasons advanced for the closure of the gate of *Ijtihād*
- examine the controversy over the closure of the gate of *Ijtihād*
- discuss the call of some scholars for the revival of *Ijtihād*.

3.0 MAIN CONTENT

3.1 Alleged Closure of the Gate of *Ijtihād*

During the formative period of the Islamic Law, the questions as to who was a qualified scholar and who had the right to independent exercise of his own opinion had not arisen. It was open to anyone sufficiently interested to embark upon this kind of speculation on religious law. However, this freedom to exercise one's own judgment independently was progressively restricted by several factors, such as the achievement of a local, and later of a general, consensus, the formation of groups of circles within the ancient schools of law, the subjection of unfettered opinion to the increasingly strict discipline of systematic reasoning, and last but not least the appearance of numerous traditions from the Prophet, traditions which embodied in authoritative form of what had originally been nothing more than private opinions. Thus, the field of individual decision was continually narrowed down.

By the beginning of the fourth century of the Hijrah (about 900 C.E.), the point had been reached when scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards, no one might be deemed to have the necessary qualifications for independent reasoning in law (*al-Ijtihād*), and that all future activity would have to be confined to the explanation, applications, and at the most, interpretation of the doctrine as it had been laid down once and for all. This 'Closing of the door of *Ijtihād*', as it was called amounted to the demand of *taqlīd*, a term which had originally denoted the kind of reference to companions of the Prophet that had been customary in the ancient schools of law, and which now came to mean the unquestioning acceptance of the doctrines of established schools and authorities.

However, the rule of *taqlīd* did not impose itself without opposition. In later generations, there were scholars who held that there would always be a *Mujtahid* in existence, or who were inclined to claim for themselves that they fulfilled the incredibly high demands which the theory had, by then, laid down as a qualification for *Ijtihād*.

SELF-ASSESSMENT EXERCISE

i. What are the factors responsible for progressive restriction of independent reasoning?
ii. Discuss the alleged reason for the closure of the gate of *Ijtihād.*

3.2 Controversy on the Closure of the Gate of *Ijtihād*

In view of the alleged closure of the gate of *Ijtihād,* the question arises whether it is still open or has come to an end with the so called closure. With the exception of anbalis, who maintain that *Ijtihād* in all of its forms remains open, the *'ulamā'* of other three schools have on the whole acceded to the view that independent *Ijtihād* has discontinued. Another related question by the *'ulamā'* is whether the idea of the total extinction of *mujtahid n*at any given period or generation is at all acceptable from the view point of doctrine. Could the *Sharī'ah* entertain such a possibility and maintain its continuation, both at the same time. The majority of the *'ulamā'* of *us l*, including al- midī, Ibnal- ājib, Ibn al-Humān, Ibn al-Subki and Zakariyaal-An ārī have answered this question in the affirmative, whereas anbalīs have held otherwise. The anbalīs have argued that *Ijtihād* is an obligatory duty of the Muslim community, whose total abandonment would amount to an agreement of deviation error which is precluded by the adīth which states that "My community shall never agree on an error". To say that *Ijtihād*is a *wājib*(obligatory) whether *'aynī*or *kafā'i* takes it for granted that it may never be discontinued. This is also the implication of another adīth which provides that "a section of any *Ummah* will continue to be on the right path; they will be the dominant force and they will not be vanquished till the Day of Resurrection".

Since the successful pursuit of truth is not possible without knowledge, the survival of *mujtahid n*in any given age is therefore sustained by this adīth. Furthermore, according to some *'ulamā'*, the duty to perform *Ijtihād* is not fulfilled by means of limited *Ijtihād*or by practicing the delivery of *fatwa* alone. According to the anbalīs, the claim that *Ijtihād* has discontinued is to be utterly rejected. *Ijtihād*is not only open, but no period may be without a *mujtahid*. The Shi'ah *Immamiyyah* have held the same view. And finally, it may be said that the notion of the discontinuation of *Ijtihād* would appear to be in conflict with some of the important doctrines of *Sharī'ah*. The theory of *ijmā'* for example, and the elaborate procedure relating to *qiyās*, all proceed on the assumption that they are the living proofs of the law and presume the existence of *mujahid n*in every age.

SELF-ASSESSMENT EXERCISE

Discuss the argument for and against the closure of the gate of *Ijtihād.*

3.3 Call for Revival of *Ijtihād*

In view of the alleged closure of the gate of *Ijtihād* and the controversy

surrounding the closure, some scholars have called for the revival of *Ijtihād*. An early influence in the direction of a return to original *Ijtihād* was the anbalī jurist-theologian, IbnTaymiyyah and his disciples, who inspired the renewed call for the practice of *Ijtihād*, especially on the part of Wahhabi and the Salafiyyah movements in the ijāz. Authors throughout the Muslim world have begun to criticise *taqlīd* and advocate the continued validity of *Ijtihād* as a divinely prescribed legal principle.

A number of most prominent *'ulamā'* including ShāhWalī Allah, Muhammad Ibn Ismaā'ilal- an'āni, Muhammad Ibn 'Ali al-Shawkāni and Ibn. 'Ali al-Sanūsi led the call for the revival of *Ijtihād*. The 19th century Salafiyyah movement in the ijāz advocated the renovation of Islam in the light of modern condition and the total rejection of *taqlīd*.

Al-Shawkāni (d.1839 C.E.) vehemently denies the claim that independent *mujtahid n* have become extinct, a claim that smacks of 'crass ignorance and is utterly to be rejected'. The same author goes on to name a number of prominent scholar who have achieved the highest rank of erudition in *Sharī'ah*. Among the Shāfi'i's, for example, at least six such scholars can be named who have fulfilled, in an uninterrupted chain of scholarship, all requirement of *Ijtihād*. These are 'Īzz al-DīnIbn 'Abd as-Salām and his disciple, IbnDaqīq al-'Īd, then the latter's disciple, Zayn al-Dīn al-Irāqi, his disciple IbnHajar al-'Asqalānī, and his disciple, Jalāl al-Dīn al-Suyūtī. That they were all full *mujtahid n*is attested by the calibre of their works and the significance contributions they have made to the *Sharī'ah*.

In view of the above, Iqbal Lahori considers the alleged closure of the gate of *Ijtihād* to be 'a pure friction' suggested partly by the crystallisation of legal thought in Islam and partly by that intellectual laziness that, especially in periods of spiritual decay, turns great thinkers into idols. Iqbal continues: "If some of the later doctors have upheld this friction, modern Islam is not bound by this voluntary surrender of intellectual independence".

Abu Zahrah is equally critical of the alleged closure of the door of *Ijtihād*. How would anyone be right in closing the door that Allah has opened for the exertion of human intellect? Anyone who has advanced this claim could surely have no convincing argument to prove it. Abu Zahrah continues: "the fact that *Ijtihād* has not been actively pursued has had the chilling effect of moving the people further away from the sources of *Sharī'ah*".

SELF-ASSESSMENT EXERCISE

1. .Discuss the arguments of Ibn Taymiyyah and his disciples in calling for the revival of *Ijtihād*.
2. State the erudite scholars that are mentioned as qualified *mujtahid n*.

4.0 CONCLUSION

The discussion above shows that, although there was an alleged closure of the gate of *Ijtihād* by earlier scholars, some of the later scholars did not take this position. This, therefore, generated controversy among the scholars. While the scholars of other schools of law saw nothing wrong in the closure, the scholars of the anbalī School of law as well as Shi'ah Imams did not support the closure. They are of the opinion that independent reasoning is an instrument given by Allah to every generation to pursue the truth; hence no period may be without a *mujtahid*. It is on the basis of this that arguments for the revival of *Ijtihād* were put up by some scholars.

5.0 SUMMARY

This unit examines the alleged closure of the gate of *Ijtihād*. It explains the reason advanced by the early scholars for the closure of the gate. It discusses the controversy that the alleged closure generated among the scholars of various schools of Islamic law. The unit also discusses the call for the revival of *Ijtihād* by some scholars. It states the arguments advanced by these scholars in calling for the revival of *Ijtihād*.

6.0 TUTOR-MARKED ASSIGNMENT

1. Mention and discuss the reason given for the closure of the gate of *Ijtihād.*
2. Discuss the controversy generated by the alleged closure of *Ijtihād.*
3. What are the arguments of the scholars calling for the revival of *Ijtihād*?

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MODULE 2 LAW REFORMS AND *SHARĪ'AH*

UNIT 1 THE IMPACT OF WESTERN INFLUENCE ON *SHARĪ'AH*

CONTENTS

1.0 INTRODUCTION

The contact of the Muslim countries with the West brought about a lot of changes in almost all aspects of their life including the legal system. Prior to the arrival of imperialism in the Muslim lands, the legal system guiding them in all aspects of public, private and international dealings was the *Sharī'ah*. With the arrival of the imperialists however, the Muslim societies witnessed Western influence on their legal system – the *Sharī'ah*, particularly on the penal aspect.

As a result, looking at the Western influence on *Sharī'ah* becomes very important. It is significant because it has a lot of effects on the *Sharī'ah* throughout the Muslim world. It requires that you are informed about this development in the history of *Sharī'ah* in the Muslim world. This unit will therefore take a critical examination of the Western influence in the Muslim countries and discuss its impact on the *Sharī'ah*. These are what you are going to come across in this unit for your reading and digestion.

2.0 OBJECTIVES

By the end of this unit, you will be able to:

- state the effect of the Western influence in the Muslim countries
- discuss the impact of the Western influence on the *Sharī'ah.*

3.0 MAIN CONTENT

3.1 Western Influence in the Muslim Countries

The influence of the Western world was first felt in the Muslim countries with the coming of imperialism in the early 19th century. Prior to the arrival of the imperialists in the Muslim societies, the legal system that was prevalent in their lands was the *Sharī'ah*. However, with the arrival of the imperialists, the Muslim countries were influenced by the Western legal system known as Common Law or the Continental Law. This influence continued even after the independence of these states from foreign domination, as they continued to follow Western methodology in legislation. It effected a large scale transformation in the social, cultural and political life of these countries leading to their modernisation, development and prosperity. But this development and progress, which cannot be denied, also kept them away from their history, religion and heritage and endangered their future progress. Their legislature adopted the Western principle of supremacy of the parliament; criminal statutory legislations were enacted by these parliaments or other legislative authorities. Punishments were devoid of their ethical elements such as expiation, self satisfaction and deterrence. Offenders were often only fined or imprisoned and their spiritual needs were neglected. Trials and appointment of judges followed Western patterns, as did sentencing and penal procedures.

Apart from these direct effects of Western domination on Muslim societies in the area of legal system, other factors have also played a significant role in this respect. Attracted by Western educational system and social and cultural trends, many individuals started to advocate secularist views in Muslim countries. Scientific and technological advancement witnessed in the West after the Industrial Revolution was interpreted as a defeat of religion and faith; this led to a general weakening of religious values and morals.

The result was a miserable failure of criminal policy in these countries, a continued upsurge of the crime rate and the abandonment of moral values and spiritual teachings which had always helped to prevent crime

and conditioned social behaviour. Some of the adverse impacts were the disintegration of society and the break-up of family and social ties in general. Muslim countries were also influenced by the materialistic trends which emanated from the West.

SELF-ASSESSMENT EXERCISE

i. How would you assess Western influence in the Muslim countries?
ii. Mention other areas affected aside the legal system.
iii. What are the effects of the Western influence on the Muslim societies?

3.2 The Impact of Western Influence on the *Sharī'ah*

Since the 18th and 19th centuries, there has been continuous growth in contacts between Islamic and Western civilisations. Muslim societies had constantly been exposed to new ideas, institutions, legal procedures, and situations posing a threat to Islamic tradition and law. Moreover, this period witnessed the conquest of the larger part of Muslim lands by the European imperial powers, British, French and Dutch. Therefore, the laws of Europe were thrust upon the countries occupied by the British, French or Dutch imperialists against the will of the people and the laments of the *'ulamā'*.

More so, Muslims were gradually trained under the European rulers. They were then influenced by them and were even given the opportunity to proceed for higher studies in European countries. Thus, the imperialists found their supporters from the distant land occupied by them, and those indigenes, in turn, influenced the masses and to some extent the *'ulamā'*. It was a long and arduous process of change but ultimately the colonialists succeeded. The *'ulamā'* were quietened and a compromise was struck which resulted into the Anglo-Mohammedan or Franco-Mohammedan law.

The first influence of the Common Law or European legal system on the Muslim society was found in the fields of public law including constitutional and criminal law as well as the civil and commercial transactions. The European rulers were clever enough not to bring about the changes in the personal law of the Muslims at once.

The Ottoman Empire, the then seat of the Islamic Caliphate was the first to be influenced by the European legal system in the 19th century through the capitulations which the Western powers introduced in respect of their citizens who were residing in the Middle East as the civil

servants and traders. In countries in South and South-East Asia and East and West Africa, the colonialists had made them in-roads as traders. Here the European system of commercial law was applied under the capitulatory system.

The Ottoman Empire introduced its first so called 'reforms' which are well known as the *Tanzimat* between 1839 and 1876. By 1850 they fully introduced commercial law based on French commercial code. As if this was not enough, in 1858 they adopted French penal code which replaced the *hadd* punishments of the *Sharī'ah*. The Ottoman Empire, the strongest Muslim power, was followed by Egypt where, in 1875, they adopted the French penal law replacing the *Sharī'ah* and French commercial law. While doing so, they tried to strike a compromise between the colonial legal system and the Islamic legal system. Later, the Italian and German influences also crept into the Muslim countries. Towards the end of the 19th century that is by 1875 and 1883, three quarters of the legal system in Muslim lands was derived from the European legal system.

In India, the *Sharī'ah* system which was practised during the centuries of Moghul rule was replaced by Indian penal code in 1862. By 1899, Sudan also became a victim. The last to be affected by the European legal systems were the countries of Maghreb, Morocco and Tunisia and Nigeria in West Africa. The colonial rule was established in Tunisia by France in 1891 and in Morocco in 1912. The Northern Nigeria was taken over by 1912. Lord Macaulay declared in India that the Islamic legal system was out-model and did not provide any justice whatsoever while Lord Lugard in Nigeria declared that the *Sharī'ah* system was "repugnant to natural justice and humanity."

In view of the above, whatever little of the *Sharī'ah* that continued in force in the Muslim countries was found only in the area of family law but there too certain so-called 'reforms' were introduced. In all the Muslim countries, with the exception of Saudi Arabia, the hybrid system of law which was neither *Sharī'ah* nor purely European law is the practice till today. It was only in the late seventies that efforts were being made by certain Muslim nations to re-introduce *Sharī'ah*.

Moreover, in recent decades, many Muslim countries have attempted to revive the *Sharī'ah* on a selective basis and in varying degrees. Only Iran has adopted it generally. Measures have also been taken in Middle Eastern countries, Pakistan, Sudan, Egypt, and elsewhere to confirm that their constitutions and laws of court procedure, property, and evidence are acceptable to the *Sharī'ah*. The latest development in Malaysia was the government's announcement in early 1997 that they would raise the

status of the *Sharī'ah* courts, to bring them up to that of the civil courts. Islamic laws of transactions have also seen a concerted revivalist effort in the wake of successful experiments in Islamic banking.

SELF- ASSESSMENT EXERCISE

i. How did the European imperialists penetrate the Muslim lands?
ii. Influenced by the European legal system?
iii. State the impact of European legal system on Ottoman Empire and other Muslim countries.

4.0 CONCLUSION

From the foregoing, it will be seen that the westernisation of the legal systems of Muslim countries began with the impact of European imperialism on Muslim societies in the eighteenth and nineteenth centuries. The legal systems of Muslim societies subjected to direct colonial rule underwent distinctive transformations in relation to the legal culture of the colonising power. The Ottoman Empire, the strongest Muslim Empire was affected by the influence of the imperialists. Moreover, there developed in Muslim parts of India under British rule a peculiar blend of common law and elements of the *Sharī'ah* that became known as Anglo-Mohammedan law. This unique, hybrid law was progressively reformed to eliminate what were regarded as the more archaic features of the *Sharī'ah* elements, and it remained influential in the legal systems of India and Pakistan after they achieved independence in 1947. Algeria was part of France from 1830 until independence in 1962, and as a French colony, it also developed a hybrid legal system, known as le *droit musulman algérien*, which incorporated many French features. Some countries in North Africa and Nigeria in West Africa were also affected.

5.0 SUMMARY

This unit has tried to examine the impact of western influence on the *Sharī'ah* Law. It begins by discussing the Western influence on the Muslim countries. It states that the penetration of the European imperialists into the Muslim lands influenced many of their systems of life including the legal system. The unit further discusses how the European legal system greatly made impact on the *Sharī'ah* legal system which resulted to what is called Anglo-Mohammedan or Franco- Mohammed law. It goes on to explain that the *Sharī'ah* legal system was so affected by the westernisation to the extent that whatever little of the legal system that continued in force in the Muslim countries was found only in the area of family law but there too

certain so-called 'reforms' were introduced.

6.0 TUTOR-MARKED ASSIGNMENT

1. Discuss the influence of the Westernisation on the Muslim countries.
2. How would you explain the penetration of the European legal system into the *Sharī'ah* legal system?
3. Examine the impact of Western influence on the *Sharī'ah* Law of the Ottoman Empire and other Muslim societies.

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UNIT 2 REFORMS TO ISLAMIC LAW

CONTENTS

1.0 INTRODUCTION

The Western influence on *Sharī'ah* legal system not only affected the penal code but also affected the law of personal status in some Muslim countries through the so-called 'law reforms'. It is noted that while some Muslim societies were influenced by the European imperialism to the extent of dropping *Sharī'ah* Law completely for the Western system of law, some only dropped the aspect of the penal code and left the aspect of personal status unchanged while others dropped the penal aspect and also allowed changes to the aspect of their *Sharī'ah* law of personal status through the so-called 'law reforms.'

This unit sets out to discuss the changes made to the Islamic Law in some of the Muslim countries. It starts by examining various changes made to the *Sharī'ah* law which brought about different ways of applying the law. This unit particular examines the so-called 'law reforms' and discusses the aspects of the *Sharī'ah* law affected by the law reforms. These are what you are going to be exposed to in this unit for your reading and digestion.

2.0 OBJECTIVES

By the end of this unit, you will be able to:

- discuss the various changes effected on *Sharī'ah* law
- explain what is meant by law reforms to *Sharī'ah*
- state the aspects of the Islamic law of personal status affected by the reforms.

3.0 MAIN CONTENT

3.1 Various Changes to the Status of *Sharī'ah* Law

After the independence of many Muslim countries, they adopted legal concepts of the imperialists without regard to their suitability for the Islamic social milieu and the basic spirit of the religion of Islam. Since Anglo-Mohammedan and Franco-Mohammedan legal systems have operated side by side with whatever was left of the *Sharī'ah* during the pre-independence period in the Muslim world, conflicts have often arisen. The *Sharī'ah* and the Western Common Law cannot be fused together completely nor will it be allowed by the *'ulamā'* of Islam and well meaning Muslims. This is the reason why the mixed law has not been able to command the respect of Muslims.

The post independence legal experience of some Muslim countries showed that some new Muslim states declared Islamic law as their source of legislation while some invited Muslim and non-Muslim scholars to advise them on their legal matters. Dr. Abd al-Razzaq al-Sanhuri and Professor Anderson were invited to advise them in the process. Dr. Sanhuri drafted civil codes particularly as regards the law of contract and property for Egypt, Syria, Iraq and Libya. Professor Anderson was invited by Habib Bourgiba of Tunisia and Sir Ahmadu Bello of Nigeria to advice on Islamic legal system.

In their march towards modernisation and secularisation, Egypt and Tunisia, in 1955 and 1956 respectively, abolished the *Sharī'ah* courts entirely. The law of personal status which was still based on *Sharī'ah* in now administered by a unified system of national courts along with the civil and criminal law.

In Algeria, the French legal system influenced the country so much that the courts of the *Qādis* act as courts of the first instance and the appeals are to be made to judges who are sitting in the ordinary civil courts. In India, the remnant of the *Sharī'ah* law has been put in the hands of ordinary civil courts and the final appeal was only to be made to the Judicial Committee of the Privy Council. In the craze for modernisation, the entire *Sharī'ah* was entrusted to be administered in the hands of incompetent lawyers who were solely versed in Common Law but certainly were not competent to administer the *Sharī'ah*. The fusion of the two systems resulted into confusion which will take a long time to be removed from the minds of the Muslims elites. Many of the laws based on the Qur'anic injunctions and the *Sunnah* of the Prophet were deliberately "reformed". Since the judges did not possess sound knowledge of the *Sharī'ah*, they tried to formulate novel principles by way of supplement to the traditional Islamic law in the name of so-

called justice and equity. They considered *Sharī'ah* as rigid, harsh and inequitable under modern conditions and hence they thought it was necessary for them to temper with the divine law. As a result of this, some changes were made by them to the *Sharī'ah* in the name of reform.

Going by the above development, Muslim countries affected by influence of the westernisation to effect changes in respect to the operation of *Sharī'ah* can be categorised into three categories. These are:

i. Countries where *Sharī'ah* law has been abandoned and replaced by the modern law applicable to all people irrespective of their religious inclination. These are Turkey and Albania where most of the laws both civil and criminal are secularised following the influence of the European legal system. Once the Ottoman Empire came to an end, these countries abandoned *Sharī'ah* totally.

ii. The countries which have retained the practice of *Sharī'ah* unchanged and un-codified as far as the *Sharī'ah* family or personal law is concerned. These countries only allowed western influence in the aspect of criminal law but retained the civil aspect of the *Sharī'ah*. These countries include Nigeria, Niger, Senegal, Mauritania, Mali, Guinea, Chad and Gambia.

iii. The countries where the *Sharī'ah* has been changed through modern legislative process, thus subjecting the Islamic legal institution to regulatory measures. Many Muslim and non-Muslim scholars call these changes "Law Reforms". The countries involved include Algeria, Egypt, India, Indonesia, Iran, Iraq, Jordan, Lebanon, Malaysia, Morocco, Pakistan, Sudan, Syria and Tunisia.

SELF-ASSESSMENT EXERCISE

i. Discuss the changes made to *Sharī'ah* in some Muslim countries
ii. State the major categories into which the Muslim counties are divided in view of the changes effected on *Sharī'ah*.
iii. Mention the names of the countries that completely abandoned *Sharī'ah*.

3.2 Law Reforms and Islamic Law

In many of the Muslim countries, the Islamic Family Law has been tampered with, or as the modernists put it, it has been 'reformed' under what they called 'law reforms'. Law reform is defined as "the process of

examining existing laws, and advocating and implementing changes in a legal system, usually with the aim of enhancing justice or efficiency". It is to be noted at this juncture that the few countries which have retained *Sharī'ah* either in all spheres of their legal system or in personal status alone had to face great challenges to defend the cause of *Sharī'ah*. However, there is a category of countries where the so-called reforms are introduced in the *Sharī'ah* Family Law. In such a situation, great damage was done since the modernists have attempted to change the *Sharī'ah* to suit their imaginations. In the process, they have rejected or twisted the legal injunctions of the *Qur'ān* and the guidance from the *Sunnah* of the Prophet.

Islamic Family law in Muslim countries has undergone tremendous change over the past century. This change has been considered one of "reform," defined loosely as the adoption of national laws to modify the rules of Islamic law that had been applicable and predominant in the particular country in an effort to improve the rights of women and children. Reform efforts have largely focused on placing restrictions on a husband's right to enter into a polygamous marriage; limiting a husband's right to unilaterally declare his wife divorced; extending a mother's right to child custody and to be compensated for it by her ex-husband; raising the minimum age of marriage; expanding a wife's ability to get a divorce at her initiative; requiring a husband to compensate his wife if he arbitrarily divorces her; and limiting a wife's duty of obedience towards her husband.

In the debate concerning family law in Egypt, both during the process of modernisation that took hold during the independence era as well as in current times, feminists pushed for legal reform of Islamic family rules that, to them, established inequality in the family. Their demands included a prohibition of polygamy, equal access to divorce for women and men, an increase in the financial rights of women, elimination of child marriage, and the end to the legal institution of obedience within marriage.

It was not until 1915 that the reformers ventured into extending principle of law reforms to the Islamic family law. The reform started during the Ottoman Empire when the miserable plight of Muslim wives governed by the dominant opinion in the Hanafi School forced the Sultan to take action and later the Ottoman Law of Family Rights was promulgated in 1917. The vanguard of reform next centred on Egypt where in 1920, the first reform of the substantive *Sharī'ah* law as applied by the Egyptian courts was put on the statute book. It was soon followed by a single, but important, enactment in 1923, a series of articles concerned with family law (similar to Law No, 25 of 1920, but more daring) in 1929, and three fairly comprehensive codes (of intestate succession, *waqf* endowments

and bequests) in 1943 and 1946.

By this time the impetus for reform had become widespread and manifested itself in a rapid succession of codes of family law or personal status – some more, and some less, comprehensive in their provisions. In 1951 the Jordanian Law of Family Rights was promulgated to displace the Ottoman Low of the same name – as was also the Syrian Law of Personal Status in 1953. The Syrian Law is the most comprehensive of all these enactments and was, at the time of its promulgation, the most progressive; but it was soon replaced, in so far as boldness of innovation is concerned, by the Tunisian Code of Personal Status 1956 (with an important appendix in 1959). This was followed by the Moroccan Code of Personal Status in 1958 and the Iraqi Law of Personal Status in 1959 (with an important amendment in 1963). There was a reform to the Islamic family law in Pakistan known as Muslim Family Laws Ordinance 1961. Piecemeal reforms along the same lines have also been introduced in what used to be the Eastern and Western Aden Protectorates. More so, an exceedingly interesting reform has been affected in Iran too by means of the Family Protection Act 1967.

In most Muslim-majority contexts, however, the rules of *fiqh* remain particularly (and in some jurisdictions uniquely) relevant in the area of family law, and the reform process is usually presented as taking place internally to Islamic law rather than something external to it. In early reform efforts, three main strategies were used to achieve substantive results namely: the strategies of exercising preference (*tahayyur*), patching (*talfiq*), and jurisdiction stripping.

SELF-ASSESSMENT EXERCISE

i. State the areas focused in the reform efforts.
ii. Discuss the various reform activities in the
iii. Muslim countries.
iv. Mention the main strategies employed in the early reform efforts.

3.3 Aspects of Islamic Law Affected by the Law Reforms

The reform efforts carried out in many of the Muslim countries show that many modifications have been introduced to the *Sharī'ah* family or personal law. The aspects where the modifications and manipulations are affected need to be mentioned for the purpose of clarification and understanding of the so-called 'reforms' to Islamic law of personal status. Some of these aspects are discussed here.

1. **Divorce:** It is believed by the modernists and feminists that the Islamic law on divorce is discriminatory against women; hence, justice and equity have to come in this aspect. With the reform therefore, a wife can get a judicial divorce, in most Arab countries, for any of four reasons: because her husband is unable or unwilling to support her; because he subjects her to intolerable treatment; or because he goes away and leaves her for a specified period. But in Tunisia, Pakistan and Iran things have gone further than this. The Tunisia Code allows a wife to insist on divorce, whatever her reason may be, provided she is prepared to pay such financial compensation as the court may decree. In Pakistan judge-made law has opened the door to a wife demanding a divorce, where she alleges that her marriage has become intolerable, on condition that she pays back her dower and returns any gifts which she may have received in respect of the marriage. And in Iran she can apply for a divorce, after first obtaining a certificate of "impossibility of reconciliation" on a wide variety of grounds (in which virtual equality between husband and wife has been achieved).

2. **Marriage:** Attempts have been made in most Arab countries virtually to eliminate both child marriage and marriages compulsory imposed on adult wards by their guardians. The restrictions on child marriage are confined, in Egypt, to the procedural device. It is noteworthy, however, that the minimum age for bride and bridegroom differs greatly from country to country, and that most of the relevant legislation also prescribes an intermediate age at which marriage is permitted only if the court regards the parties as sufficiently mature and if their guardians approve.

3. **Polygamy:** In several of the countries concerned, polygamy has been restricted, whether more or less drastically; and in Tunisia it is totally forbidden. The first country to introduce any restriction in this matter was Syria, where a man who already has one wife is required, under the law of 1953, to get judicial permission before he marries another; and this permission should be withheld if the Court is not satisfied that he is financially competent to support his existing dependants and also take on new responsibilities. Restrictions of varying severity were also introduced in Morocco in 1958, in Pakistan in 1961 and in Iran in 1967; but it was only in Tunisia under President Bourguiba that plural marriages were absolutely prohibited, in the code of 1956, by criminal sanctions – on the dual ground that certain human institutions, such as slavery and polygamy, made sense at an earlier period in human development, but were

repugnant to the civilised conscience today, and that history has proved that no man other than a prophet is in fact capable of treating two or more wives with equal justice (so it is within the province of the State to forbid a union which would inevitably fail to fulfil the divine conditions). The Iraqi code of 1959, moreover, included a clause which made it clear that a polygamous marriage contracted without consent of court would not only be liable to criminal sanctions but would itself be regarded as null and void; but this lat provision – although not the criminal sanctions – was repealed in 1963.

4. **Bequest:** Several reforms have been introduced in the law of intestate succession in some of these countries, whether directly or sometime by calling in aid the law of testamentary dispositions. An example is going to be cited here. In the Islamic law of succession, orphaned grandchildren are totally excluded from any share in their grandparents' estate if a son of such grandparents also survives. This is in accordance with the basic principle of "the nearer in degree excludes the more remote". So the reformers in Pakistan introduced the principle of representation in such cases; but this, while it certainly protects the interests of orphaned grandchildren, makes havoc of the Islamic law of intestate succession in a number of different respects. The solution first introduced in Egypt in 1946 and subsequently adopted (with minor differences) in Tunisia – and also (in so far as the children of pre-deceased sons, but not daughters are concerned) in Syria and Morocco – was much more subtle. This took the form of requiring grandparents to make a bequest, in favour of such orphaned grandchildren as would otherwise be excluded from any share in their estate, of what their predeceased parent would have received had he survived, provided this does not exceed that third of the estate regarded as the maximum over which a testator has control; of instructing the courts, should the grandparent concerned have failed to fulfil his obligations, to act as though he had; and of giving these "obligatory bequests" priority over any voluntary ones. This device has the virtue of protecting the interests of orphaned grandchildren very adequately, in most cases at least, while leaving the structure of the Islamic law of intestate succession wholly unaffected.

5. ***Waqf*:** Regulations about the way in which *awqāf* are administered have, indeed, been promulgated in country after country; but much more stringent changes were introduced in Egypt in 1946 and in Lebanon in 1949. Under the Egyptian reforms only such *awqāf* as took the form of mosques or

cemeteries were to be irrevocable and perpetual; other "public' *awqāf* might be temporary or permanent at the discretion of the founder; and "private" or family *awqāf* must never be created to last more than 60 years, or form more than two series of beneficiaries, after the death of the founder. The same law also included many other provisions designed to ensure that the beneficiaries in a family *waqf* should have much more immediate and lasting control of their share in the property concerned. But in 1949 the Syrian Government totally abolished private or family *awqāf*; and this lead was followed in Egypt in 1952 and in Tunisia in 1956.

SELF-ASSESSMENT EXERCISE

1. Why is it that law reforms affected divorce?
2. State why polygamy is restricted or forbidden under the law reforms.

4.0 CONCLUSION

It will be seen from the foregoing that the so-called 'law reforms' affected the Islamic family law to a greater extent. While the westernisation of the legal systems of Muslim countries was not limited to the penal code, it was even extended the *Sharī'ah* law of personal status. The whole idea of reform began in 1915 during the period of the Ottoman Empire when by 1917 Ottoman Law of Family Rights was promulgated. Egypt followed suit in 1920 and other countries were not left out in promulgating theirs. This, therefore, brought about various modifications witnessed in some aspects of the Islamic law of these countries. Such aspects included divorce, marriage, polygamy, bequest, *waqf* etc.

5.0 SUMMARY

This unit has tried to discuss the modern reforms made to the *Sharī'ah* Law. It starts by examining the various efforts made in making changes to the status of Islamic law in some of these Muslim countries. It mentions that these changes brought about three categories of applying *Sharī'ah* law of personal status in some Muslim countries. The unit also examines the so-called 'law reforms' as they affect Islamic family law. It states what led to the reforms and mentions how it was carried out from one country to another. It finally explains the aspects of the *Sharī'ah* legal system or the Islamic family law so affected by the reforms.

6.0 TUTOR-MARKED ASSIGNMENT

1. Explain how various changes were made to the status of *Sharī'ah* Law
2. State how law reforms began leading to the promulgation of Family Law Rights in various countries
3. Discuss the aspects of Islamic family law affected by law reforms.

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UNIT 3 DIFFERENT APPROACHES TO THE REVIVAL OF ISLAMIC LAW

CONTENTS

1.0 INTRODUCTION

Since the seventies, the Muslim world has been witnessing signs of a widespread Islamic resurgence. All Muslim countries except, perhaps, Saudi Arabia, had been applying western laws during the long periods of foreign domination and most of them still continue to follow the western pattern, especially in matters related to crime. Muslim societies have suffered from the deterioration of social, legal, moral and cultural life, resulting from the influence of foreign criminal legislations which have contributed to the upsurge in crime rates and been ineffectual in combating crime. These societies have lately become aware of the necessity to return to their moral and religious heritage to remedy these problems. As a result, Muslim countries have witnessed vital changes or revivals in their legal policies.

This unit endeavours to examine the efforts of some Muslim countries to revive their *Sharī'ah* law to conform to the traditional *Sharī'ah* system. It begins by discussing what led to the clamour for reviving *Sharī'ah* law in some of these Muslim countries. It then proceeds to examine various approaches employed in reviving the Islamic law. These are what you are going to be exposed to in this unit for your reading and digestion.

2.0 OBJECTIVES

By the end of this unit, you will be able to:

- discuss what led to the idea of reviving the *Sharī'ah* law
- explain various approaches adopted in reviving the *Sharī'ah* law

3.0 MAIN CONTENTS

3.1 Revival of Islamic Law

In the 1970s the political influence of forces favouring the retention and/or renewal of the *Sharī'ah* began to make itself felt, and a process of abrogating westernising reforms and reinstating *Sharī'ah* law began in Libya, Iran, Pakistan, Egypt, Sudan, and Kuwait. Many of these countries attempted to revive the *Sharī'ah* on a selective basis and in varying degrees. Only Iran has adopted it generally. Measures were also taken in Middle Eastern countries, Pakistan, Sudan, Egypt, and elsewhere to confirm that their constitutions and laws of court procedure, property, and evidence are acceptable to the *Sharī'ah*. The latest development in Malaysia was the government's announcement in early 1997 that they would raise the status of the *Sharī'ah* courts, to bring them up to that of the civil courts. Islamic laws of transactions have also seen a concerted revivalist effort in the wake of successful experiments in Islamic banking.

The circumstances in which the replacement and reform of the *Sharī'ah* took place resulted in political tensions between the westernised elites and other, more traditional segments of Muslim societies. The masses remained attached to the idea of the supremacy of *Sharī'ah* law, anticipating that its reinstatement would cure endemic political, economic, and social ills. The *fuqahā'* continued to study and defend the *Sharī'ah* and were offended by their displacement by the new class of lawyers and judges trained in Western law; as traditional guardians of the *Sharī'ah* heritage, the *fuqahā'* also retained prestige and a popular following among the masses. Meanwhile the forces of what has come to be known as political Islam, in which Islam was converted to a populist political ideology, won support from disaffected urban dwellers for their proposals for Islamisation.

The regimes in the Muslim world have responded to the demonstrated popularity of Islamisation programmes by enacting selected principles of *Sharī'ah* law in statute form. Libya was the first country to undertake such initiatives in the 1970s, and its example was subsequently imitated in Pakistan and Sudan and to a lesser degree in some other countries. These measures did not mean that the governments were relinquishing control over the legal systems, which remained basically Western in character and structure. The major emphasis in such Islamising legislation tended to be on re-enactment of Qur'anic criminal laws.

Although in the West religion has been largely separated from law, in the Muslim world Islamic law, or *Sharī'ah*, is not confined to purely religious matters. *Sharī'ah* is applied to a wide variety of 'secular' legal

issues, ranging from inheritance, marriage, and divorce to contracts and criminal punishments. Moreover, after a brief (and mostly disastrous) flirtation with secularisation in the 1950s and 1960s, many Muslim-majority countries have now embarked upon conscious efforts to inject more religion into government.

An increasing number of Muslim-majority countries are inserting '*Sharī'ah* supremacy' clauses into their constitutions, making any legislation which contradicts the provisions of Islamic law unconstitutional. This trend is a continuation of one that began in 1979 in Pakistan with the passage of the *Hud d* Ordinance, and in Egypt with a 1980 amendment to the constitution stating that "the principles of the Islamic law are the chief source of legislation." More recently, the newly adopted Iraqi constitution included a clause stating that "no law can be passed that contradicts the undisputed laws of Islam."

Avowedly religious political parties are gaining support all across the Muslim world, from traditionally secular Turkey (where the Islamist Justice and Development Party has governed since 2002) to Egypt, Jordan, Morocco, and Palestine (where the Islamist parties of the Muslim Brotherhood, Islamic Action Front, Justice and Development, and Hamas, respectively, constitute the largest opposition groups in those countries). It is therefore shown that in most of these Muslim nations, Islamic law is now being used to reassert the Islamic identity in spheres of their life by striking back at the West and more precisely at Western interests and values.

SELF-ASSESSMENT EXERCISE

i. Discuss the circumstances leading to the clamour of reviving the *Sharī'ah*
ii. How did the Muslim nations go about the revival of the *Sharī'ah* law.

3.2 Different Approaches to the Revival of Islamic Law

In many of the Muslim countries, not only the national legislative authorities are actively engaged in debating and promulgating a new set of Islamic-based laws, but the national courts and tribunals also place an increasing emphasis on the Islamic principles in the course of interpretation of the existing (often Western type) legislation. Thus, the significance of the Islamic legal traditions for the further development in the contemporary legal systems in these countries is evident.

The on-going discussion is now centred upon the type of approach to Islamic law which should be adopted by modern Islamic legislators who are required to find solutions to the problems facing modern Muslim States by digging into the corpus of the classic works of the Islamic jurists of the medieval time. This is the greatest challenge which faces the advocates of law reform on the one hand and the campaigners for the purification and de-colonisation of law in Muslim countries on the other. They have to define their own relationship *vis a vis* the great masters of Islamic jurisprudence whose institutional writings have been accepted in respective schools of Islamic law without questioning for generations. In all, there are three distinct bodies of opinion within the Muslim world concerning the appropriate approach of modern Muslim jurists towards the classic Islamic law. First, the conservative school which considers the classical rules, worked out by old masters of Islamic law, as binding. These revivalists (or fundamentalists) claim that the task of a contemporary Muslim jurist is confined to find out the exact rules of the relevant Islamic legal principles as laid down in the classic and institutional works of the old masters, and to apply same rules. This view is based on the ideological and theological grounds which regard Islamic law as an integral part of the institution of Islamic faith, thus being infallible and eternal. This view is upheld by the "followers of tradition" (*Ahl as-Salaf*) in Kuwait. A handful of the supporters of this group gained access to the Kuwaiti National Assembly in the general election of 1981. They were responsible for introducing legislation which prohibits conferring Kuwaiti citizenship to non-Muslims resident in Kuwait. Their Iranian equivalents, called the Hojjatiyeh, dominate the Council of Guardians – a constitutional body set up under the Iranian Constitution of 1979 with a view to ensuring that the decisions of the Iranian National-Islamic Assembly (the Majlis) do not ignore Islamic precepts. The Hojjatiyeh movement is dedicated to purifying the observance of the religious formalities in Iran in the face of socialistic and radical attempts by the revolutionary Muslims led by Ayatollah Khomeini. The Hojjatiyeh for instance successfully opposed the nationalisation of foreign trade which had been enacted by the Majlis.

Secondly, there is a growing body of opinion which questions the binding character of traditional *Fatwas* of the old masters. The proponents of this view consider the modern Muslim legal scholar as being entitled to work out his own legal solutions for new, or even old, problems with reference to the primary sources of Islamic law but bypassing the traditional legal scholarship of the leading jurists of the past. This attitude opens the door to have a totally fresh approach towards Islamic law because the primary sources of *Sharī'ah* are open to quite different interpretations. In practice, more often than not the proponents of this approach have already made up their mind that a

particular legal solution is the most advantageous or best suited solution and only for the sake of justification of their own view they make reference to selective sources of traditional Islamic law. Much of the socialistic views upheld by many Muslims are being justified in this way.

Thirdly, there is a middle-of-the road approach which acknowledges due respect for the institutional writings of old masters, but at the same time recognises that if and when these old solutions conflict with public interests in the Muslim community, other legal solutions can be found under the doctrine of *istislah* or *masalih marsalah* i.e. public interest or public policy.

SELF-ASSESSMENT EXERCISE

Enumerate and discuss the approaches employed for the revival of *Sharī'ah*.

4.0 CONCLUSION

The practice of western laws in most of the Muslim countries for a long period of foreign domination created some problems in these countries. It was observed that their societies suffered from the deterioration of social, legal, moral and cultural life resulting from the influence of foreign legislations which cannot control social ills or combat crimes. In view of this, the necessity to return to their moral and religious heritage to remedy the situation was realised and efforts were made to follow it up. This brought about Islamic resurgence in these countries leading to the revival of Islamic law. However, three different approaches were used in carrying out the revivalist mission on the *Sharī'ah* law.

5.0 SUMMARY

This unit discusses the revitalisation of *Sharī'ah* law in the Muslim world. It starts by examining the various efforts made various countries in reviving Islamic law in their constitutions. It states that some of these countries inserted '*Sharī'ah* supremacy' clauses into their constitutions. The unit goes on to examine the different approaches adopted in reviving the *Sharī'ah* law. It mentions that the approaches include the conservative school; fresh school and middle-of-the road approaches.

6.0 TUTOR-MARKED ASSIGNMENT

1. What can you adduce as reasons leading to the agitation for revival of *Sharī'ah* law in some Muslim countries?
2. Discuss how the revivalist mission on *Sharī'ah* was carried

out.

3. Examine various approaches to the revival of *Sharī'ah*.

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UNIT 4 LIMITATION OF ALKALI COURTS TO THE LAW OF PERSONAL STATUS

CONTENTS

1.0 INTRODUCTION

Prior to the colonisation of Muslim societies by the European, *Sharī'ah* law was applied in both civil and criminal matters of their courts. These courts were either known as Alkali or Khadhi courts deriving from the name given to a judge in Arabic – *al-qādi*. The westernisation of their legal system after colonisation notwithstanding, the *Sharī'ah* law was still applied in many of these societies although with limitation.

This unit attempts to discuss the limitation of the *Sharī'ah* to the law of personal status in view of colonialism witnessed by the Muslim societies. It begins by examining meaning and history of Alkali courts. It later discusses how the *Sharī'ah* was limited to the law of personal statues in the Alkali courts. These are what you are going to be exposed to in this unit for your reading and digestion.

2.0 OBJECTIVES

By the end of this unit, you will be able to:

- discuss the meaning and history of Alkali courts
- explain how the *Sharī'ah* was limited to the law of personal status.

3.0 MAIN CONTENT

3.1 Meaning and History of Alkali

The word 'Alkali' is derived from the Arabic word *al-qādi* which means the judge. *Al-qādi* is the judge appointed by a Muslim ruler to judge in accordance with Islamic law in a court known as *Sharī'ah* Court. The

term "Alkali" later became the name attached to the *Sharī'ah* courts or courts of the judges who apply *Sharī'ah* law particularly in Nigeria. In some other parts of the world, the courts are sometimes called Kadi courts or Khadhi courts.

The term *qādi* was in use right from the time of the Prophet Muhammad, and remained the term used for judges throughout Islamic history and the period of the caliphates. While the muftis and *fuqahā'* played the role in elucidation of the principles of jurisprudence and the laws, the *qādi* remained the key person ensuring the establishment of justice on the basis of these very laws and rules. Thus, the *qādi* was chosen from amongst those who had mastered the sciences of jurisprudence and law. During the period of the Abbasid Caliphate, the office of the *qādi al-qudāt* (Chief Justice of the Highest Court) was established. Among the most famous of the early *qādi al-qudāt* was *Qādi* Abu Yusuf who was a disciple of the famous early jurist Abu Hanifa. The office of the *qādi* continued to be a very important one in every principality of the caliphates and sultanates of the Muslim empires over the centuries. The rulers appointed *qādis* in every region, town and village for judicial and administrative control and to establish peace and justice over the dominions they controlled.

In the history of the Muslim societies in the world, al-Kali courts had been in existence long before the arrival of the European colonialists. For example, Kadhi courts were in existence along the East Coast of Africa long before the coming of the British colonialists in the 19th century. The Kenyan coastal strip was then part of the territories controlled by the Sultan of Zanzibar. In 1895, the Sultan of Zanzibar authorised the British to administer the coastal strip as a protectorate, rather than a colony as distinct from the mainland, subject to certain conditions including the British agreeing to respect the judicial system then in existence in the said protectorate. The British agreed to these conditions and throughout their administration of the coastal strip this judicial system, which included the Kadhi courts, continued to exist.

In Nigeria, almost all towns and villages in the North established *Sharī'ah* courts popularly known as Alkali courts in their areas prior to the arrival of the British. Hence, the Alkali courts had to be primarily retained by the colonial rulers. There, Alkali courts concurred entirely with the Emir's *siyāsah* tribunal (palace courts). They were all regarded by the British colonialists as the Native Courts which had both civil and criminal jurisdiction.

Sooner or later, the British administration introduced gradual methods to ensure the juridical subjugation of Nigeria. This was accomplished through various judicial and legal policies that were formulated to

whittle down or exterminate the *Sharī'ah*. The British efforts in this direction included the attempt on legal harmony, the introduction of repugnancy clauses, British proclamations, ordinances and laws etc. The Native law and custom was virtually introduced to replace the *Sharī'ah* law whereas the Native Courts were set up with admixture of adherents of different religions as members. *Sharī'ah* courts or Alkali courts were then placed under Native courts. This step certainly had a far reaching effect on the application of *Sharī'ah* law in Northern Nigeria.

SELF-ASSESSMENT EXERCISE

i. What is Alkali? Briefly discuss its history in Islam
ii. What was the position of Alkali Courts before the arrival of the British colonialists?

3.2 Limitation of Alkali Courts to the law of Personal Status

It is a fact that almost all parts of the Muslim world have been under the European colonial over-lordship in one form or another at one period or the other. In some places, colonialism came by force of arms through conquests as in most parts of Africa and Asia. In other places, the colonial powers penetrated through their agents who acted as "advisers" to local rulers but the so-called advisers, in reality, controlled the countries. In yet other places, colonial powers had agents working for them right inside the officer corps of the armed forces of a country up to the high command and at an appropriate time, those agents enacted a *coup d'état* and delivered the country to colonial hegemony. There were also places where local potentates were procured to submit to a state of "freely consented domestication". In all these cases, colonialism acted in different styles. Thus, in Turkey, for example, the mission was to eradicate Islam completely – root and branch and, therefore, *Sharī'ah* was scrapped at a stroke. In French African colonies, *Sharī'ah* was allowed a very limited scope as part of tolerated local customs mainly in personal status and customary land matters, and it is applied only through assessors in French courts. In some British colonies, the *Sharī'ah* was allowed in "personal status" matters only, and it was administered by the English judiciary as a tolerated part of the local English legal system - as was the case in British India (and as remains the case in the whole of the Indian sub-continent to this day). In other colonies, as in the Sudan and Egypt under the British, the permitted part of the *Sharī'ah* (i.e. Muslim personal law) was allowed to be administered by *Sharī'ah* courts, including *Sharī'ah* Court of Appeal, and *Sharī'ah* judges. The case of British India affords a good example of the possible consequences of putting the *Sharī'ah* under the administration of non- *Sharī'ah* judges. In the time of Muslim rule in India under the Mughal emperors, the *Sharī'ah* applied in the Muslim

parts in its totality and this continued to apply even after the British penetration. The British, at first, continued with the full application of the *Sharī'ah* and the *Sharī'ah* applied in both civil and criminal matters, with few modifications. This continued until 1862 when they ousted the jurisdiction of the *Sharī'ah* from criminal law and procedure and replaced them with a Penal Code and Code of Criminal Procedure, and the *Sharī'ah* was eventually confined to personal status matters and it was administered by the British judges rather then, as was hitherto the case, by Muslim *Sharī'ah* judges. This application by the British judges led to what has become known as the "Anglo-Mohammedan Law" – a hybridisation that eventually produced neither fish nor fowl.

The above was the experience of many Muslim societies colonised by the British. In Nigeria, for example, the gradual methods introduced by British administration to ensure the juridical subjugation of Nigeria really affected the status of *Sharī'ah* in the North. The first British legislation to govern Native Courts in Northern Nigeria was Native Courts Proclamation No. 5 of 1900. It gave recognition to the existing Alkali courts prior to the subjugation of the area to British rule. It was amended by Native Courts Proclamation No. 11 of 1904. This was later repealed in 1906 and re-enacted by Native Courts Proclamation of No. 1 of 1906. However, the repeal and re-enactment gave up at various times. Later, the Native Courts were empowered to try some cases according to the dictates of the *Sharī'ah* on the one hand, and the British officials could apply English laws to review such cases on the other hand. This development reduced the jurisdiction of the Alkali courts in the North to law of personal status and these courts were allowed to function.

SELF-ASSESSMENT EXERCISE

1. What was the position of *Sharī'ah* in Muslim societies before the arrival of the European colonialists?
2. Discuss the different styles in which colonialism acted on *Sharī'ah* in the colonised Muslim societies

4.0 CONCLUSION

There is no doubting the fact that *Sharī'ah* practice in the Muslim world attracted both civil and criminal matters before the arrival of the European colonialists. Sooner or later, the Colonial administration introduced gradual methods to ensure the juridical subjugation of the Muslim societies. This was accomplished through various judicial and legal policies that were formulated to whittle down or exterminate the *Sharī'ah*. Therefore, the jurisdiction of Alkali courts which formerly covered both civil and criminal matters of the *Sharī'ah* law was reduced

to cover only the law of personal status.

5.0 SUMMARY

This unit discusses the limitation of Alkali courts to the law of personal status. It begins by looking at the meaning of Alkali and discusses its historical background. It goes on to examine the position of *Sharī'ah* in the Alkali courts of the Muslim world before the arrival of the European colonialists into these areas and the effect their judicial subjugation had on the *Sharī'ah*. The unit finally states how the jurisdiction of Alkali courts in the Muslim societies was reduced to the law of personal status.

6.0 TUTOR-MARKED ASSIGNMENT

1. Give the meaning and historical development of Alkali courts
2. What was the status of Alkali courts before the arrival of the European colonialists?
3. Discuss the different styles employed by the colonialists in reducing the jurisdiction of Alkali courts.

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MODULE 3 MODERN TRENDS IN THE APPLICATION OF ISLAMIC LAW IN SOME COUNTRIES

UNIT 1 APPLICATION OF ISLAMIC LAW IN THE MIDDLE EAST

CONTENTS

1.0 INTRODUCTION

The *Sharī'ah* was considered the core and the essence of Islamic civilisation in the Middle East or Arab countries in the pre-colonial period. However, their contact with western civilisation in the 18th and 19th centuries ended up with their weakness and the adoption of the Western law. With the adoption of the Western system of law, the application of Islamic Law became seriously affected.

This unit endeavours to discuss the effect of the Western civilisation on the application of Islamic Law in the Middle East. It commences by examining the legal system of the Middle East. It also looks at the application of Islamic Law in the Middle East with a view to showing the effects of Western system of law on the Islamic Law. These are what you are going to be exposed to in this unit for your reading and digestion.

2.0 OBJECTIVES

By the end of this unit, you will be able to:

- discuss the legal system of the Middle East
- give account of the application of Islamic Law in the Middle East.

3.0 MAIN CONTENT

3.1 Legal System in the Middle East

The first thing that needs to be mentioned about the legal system of the Middle East is that there is no single uniform Middle East or Arab law, nor is there one uniform legal system for all Arab countries, though most of the Arab countries have adopted the codified civil law system, based on the Egyptian Civil Code, as opposed to the English Common Law system.

During the Ottoman Empire before the First World War, the Ottoman government compiled the jurisprudence of the Hanafi School in a uniform Civil Code called "Majella", which was applied to Arab countries, which were parts of the Ottoman Empire. The Majella continued to be applied in most Arab countries after the fall of the Ottoman Empire, until each Arab country developed its own legal system and enacted a Civil Code.

With the partition of the Ottoman Empire, France and Britain took over different Arab countries. Under the rule of the Western colonial powers, the influence of Western laws particularly those of the French codified legal system and the French Civil Code grew in the Arab countries, and the legislative process of reconciling between the *Sharī'ah* and the Western laws gradually began. Consequently, the direct application of Islamic law continued to decrease.

The Egyptian Civil Code of 1948 was the first and a successful product of the aforesaid process. The author of the Egyptian Civil Code, Dr. Sanhuri, succeeded in reconciling and bringing together in harmony the principles of *Sharī'ah* and the provisions of European Civil Codes and in particular the French Civil Code.

In this modern period, all Arab countries except Saudi Arabia and Oman have modern Civil Codes based fully or partly on the Egyptian Civil Code. Thus, one of the common features between the laws of the Arab countries is the similarity or even uniformity of the provisions of the Civil Codes. Another major common feature is the application of

Islamic law in all Arab countries whether directly or indirectly. As understood from the foregoing introduction, there is no single or uniform Arab or Middle East law, but the laws of the Arab countries share together many common features and similarities, which render a comparative view of those laws a matter of interest to lawyers.

In addition to the application of *Sharī'ah*, the influence of the Majella and the uniformity of the source of Arab Civil Codes as mentioned before, there are other common factors such as interchanges of judges and jurists between Arab countries, common history and common language, which all together have created a common legal approach and jurisprudence between the Arab countries.

SELF-ASSESSMENT EXERCISE

i. What is the reason why there is no single uniform Middle East or Arab law?
ii. How would you explain why all Arab countries based fully or partly on the Egyptian Civil Code?

3.2 Application of Islamic Law in the Middle East

There is no single rule as to when and where *Sharī'ah* applies; its application varies from one country to another and depends on the religious and social structure of the society, the legal system, and the provisions of the constitution and the Civil Code of each Arab country. *Sharī'ah* may apply either directly as a common law of the country, where there is no fully developed codified legal system, or indirectly through the application of statute law based fully or partly on Islamic law, or as a source of law to fill legislative gaps when a particular statute lacks the necessary provisions.

In Saudi Arabia, where there is no Civil Code, *Sharī'ah* operates and applies directly as a common law of the country, both in commercial courts as well as in courts of personal matters. No other law is applicable, if contrary to *Sharī'ah*. For a businessman who concludes for example a contract with a Saudi company including provisions for interests, or for a group of banks which provide syndicated loans to a Saudi client, it is indeed advisable to see whether the terms of their contract are valid or enforceable under Islamic law. Parties should take the prohibition of interest under *Sharī'ah* into account when negotiating an agreement. Even excessive penalty clauses in a contract may be held unenforceable by the Saudi courts, based on the general principles of *Sharī'ah*. However, the direct application of *Sharī'ah* remains confined, in Saudi Arabia to areas of law, where no legislation

exists. Though, *Sharī'ah* is the common law of the country, Saudi Arabia has enacted a great number of legislations, the so called "Regulations" covering many fields of law including the Company Law, the Code of Commerce and the Tender Law.

In other Arab countries which adopted Civil Codes and civil legal system, *Sharī'ah* plays a lesser role and applies mainly in the field of the family laws such as, marriage and inheritance. In these countries, family laws were enacted based on one or more of the Islamic schools of law, while commercial and civil codes are based on European and to some extent on Islamic law.

In such countries, where a complete civil law legal system was founded, the *Sharī'ah* domination or application in matters, other than the family law, also varies depending on the provisions of the constitution and the Civil Code of the country. The constitutions of the most Arab countries including Egypt, Syria, Kuwait, Bahrain, Qatar, United Arab Emirate and Yemen refer to *Sharī'ah* either as a primary source of law or the source of law. Consequently, and in cases of legislative lacuna where the law lacks a provision, the *Sharī'ah* principles are to fill the gap either as the first source or as one of the sources of law. Where the constitution describes *Sharī'ah* as the "principal" source of legislation, the hierarchy implies that, all other laws and statues must comply with the principles of *Sharī'ah*.

SELF-ASSESSMENT EXERCISE

i. Explain how and where Islamic law is applied directly as a common law in the Middle East.
ii. Discuss how and where Islamic law is applied indirectly through the application of statute law in the Middle East.

4.0 CONCLUSION

The incursion of the Western legal system on the *Sharī'ah* system in the Middle East greatly affected the application of the latter. The application of Islamic law which was hitherto applied through a uniform Civil Code called "Majjela" was jettisoned and each Arab country developed its own legal system and enacted a Civil Code. Hence, all Arab countries except Saudi Arabia and Oman have modern Civil Codes based fully or partly on the Egyptian Civil Code. With this development therefore, the application of Islamic law in all Arab countries became whether directly or indirectly.

5.0 SUMMARY

This unit discusses the application of Islamic law in the Middle East or Arab countries. It starts by examining the legal system of the Middle East. It moves on to discuss the application of Islamic Law in the Middle East. It identifies the fact Islamic Law was hitherto applied under a uniform Civil Code called "Majjela" throughout the Middle East during the pre-colonial period. It further states that their contact with Western civilisation led each Arab country to the enactment of modern Civil Codes based fully or partly on the Egyptian Civil Code. The unit finally submits that the Islamic Law was reduced to direct or indirect application in the Middle East.

6.0 TUTOR-MARKED ASSIGNMENT

1. Discuss why all Arab countries based their Civil Codes fully or partly on the Egyptian Civil Code.
2. How would explain how Saudi Arabia directly apply Islamic Law?
3. Explain what is meant by direct and indirect applications of Islamic Law in the Middle East.

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UNIT 2 APPLICATION OF ISLAMIC LAW IN TURKEY, INDIA AND PAKISTAN

CONTENTS

1.0 INTRODUCTION

The *Sharī'ah* law was at one time or the other part of the legal system of some countries in the world including Turkey, India and Pakistan, particularly before the colonial period. However, their contact with western civilisation led to the secularisation or westernisation of their legal system which eventually weakened or eliminated the *Sharī'ah* system as the case may be in any of this countries.

This unit endeavours to take a look at the effect of the Western civilisation on the application of Islamic Law in these countries. It commences by discussing the *Sharī'ah* application in these countries before the colonial administration and in the modern times. It begins by examining Turkey before India and finally Pakistan. These are what you are going to be exposed to in this unit for your reading and digestion.

2.0 OBJECTIVES

By the end of this unit, you will be able to:

- discuss the secularisation of Islamic law in Turkey
- give account of the application of Islamic law in India
- explain the application of Islamic law in Pakistan.

3.0 MAIN CONTENT

3.1 Application of Islamic Law in Turkey

Turkey was one of the very first Muslim countries that encountered the

Modern West and its civilisation and that attempted to respond to the challenges posed by Western power and civilisation. Earlier before the encounter with the West, Turkey had been under the control of the Ottoman Empire. The entire power and authority was collected in the hands of one man, the Sultan. The sultans ruled the Empire from its foundation until its fall under an absolute authority. During this period, the rules of Islam were the only legal order in the Empire. The *Sharī'ah* law was the legal system that regulated the life and behaviour of the individuals. This was the first feature of the Turkish legal system and the era was based entirely on religious law - *Sharī'ah* (1299 – 1839).

The secularisation and westernisation of law began in 1839 by the promulgation of *Tanzimat* (Reorganisation Charter) in the Ottoman Empire. Inspired by the 1789 French Revolution and its effects on legal and political systems, the western minded "viziers" persuaded the Sultan to proclaim the *Tanzimat*. With the Charter, the Ottoman rulers aimed at renewing the social and political life and structure of Turkey in line with western formats and some European codes of law were adopted. Particularly in the fields of criminal, commercial and procedural law some western tenets were adopted. The most important reform at this period was the enactment of the Civil Code in 1876 which was called "the Majella." This was the first Civil Code ever made in the Ottoman Empire. Refusing the proposal of the civil code from the West, only Islamic principles were adopted in the Majella. The Majella remained in force until the adoption of the Swiss Civil Code in 1926, 2 years after the promulgation of the Republic. This period was therefore known as the era of joint application of Islamic and secular laws.

However, after the promulgation of the Turkish Republic in 1926, an array of reformist movement began under the leadership of Kemal Ataturk. Ataturk indicated the future and the new destination of the Turkish nation as the West. The Sultanate and Caliphate were abrogated. The most important reform of the modern state was the adoption of the Civil Code and the Code of Obligations of the Switzerland in 1926. With the enactment of new Civil Code in 1926, the Madjella and all its Islamic extensions were abrogated and the equality of men and women was adopted. The year 1926 was a very prolific year for various types of codes. By the year 2000, a new Civil Code based on more liberal rules and an absolute equality of men and women was put into force. It is therefore noted that in the entire legal system of the contemporary Turkish society, there are no Islamic rules and tenets. On the contrary, the system is based on the classical Roman and Continental legal systems since the promulgation of Republic in 1926. This is the era of secular and westernised legal system.

It needs to be mentioned, however, that although the new Turkish Civil

Code became effective in 1926, it created an anomaly. Family law had been one of the last bastions of Islam, and the legal system the area most resistant to secularisation. Muslim family law officially became secular for the first time in history, while Islam continued to be the religion of the most Turkish citizens. Hence, the Turkish Muslims have not totally abandoned the Muslim law in favour of the transplanted 'secular' western law. These Turks Muslims have actively assimilated to the secular law but on their own terms unofficially apply the *Sharī'ah*, particularly in the family law. By combining the rules of two different normative orderings, they have pragmatically been successful to meet the demands of both secular law and the religious law. Therefore, the application of Islamic law in the secularised Turkey is in form of dynamic legal pluralism which is a social field of more than one legal order; official and unofficial. In a condition of dynamic legal pluralism, unofficial and official laws continuously and dynamically interact.

SELF- ASSESSMENT EXERCISE

i. How can you explain the era based on religious law in Turkey?
ii. Which period can be described as joint application of Islamic and secular laws in Turkey?
iii. What is the situation of Islamic law in the era of secular and westernised legal system of Turkey?

3.2 Application of Islamic Law in India

The application of Islamic law could be said to have begun in India in the 7^{th} century. At the second half of the 7^{th} century, the Islamic law was first witnessed in India subcontinent. It was practised by the Muslims who came to India for business. Muhammad b. Qasim conquered Sindh at the beginning of the 8^{th} century and he introduced Islamic law only to administer peace and justice. He did not interfere with the arena of the personal law of the native people.

The Umayyad regime ruled the subcontinent of India from 1206 to1526. They applied Islamic law only to the Muslims and allowed other communities to practise the law of their traditions. The Mogul emperors thereafter ruled over the subcontinent between 1526 and 1862. During this period, Islamic law was developed based on Hanafi School of Jurisprudence. This was therefore in practice in subcontinent of India until the colonisation of the area by the British in 1862. It was during the British rule of India which covered about 300 years that they westernised the law of India and formed a number of commissions to reform the existing laws.

The British administration then codified the following codes:

i. The India Penal Code,
ii. The Code of Civil Procedure iii. The India Evidence Act
iv. The India Contract Act
v. The *Sharī'ah* Application Act, 1937
vi. The Dissolution of Marriage Act, 1939.

From the different codes codified by the British administration as listed above, it is clear that *Sharī'ah* Application Act was one of the codes allowed. This is a clear indication that *Sharī'ah* law was in application in India and was recognised by the British administration. The *Sharī'ah* Application Act of 1937 came into existence when it was discovered that some Muslims used to practice the customary law of Hindu religion, especially the law of will and inheritance. They practised it against the existing law of *Sharī'ah*. In view of this, a Bill on *Sharī'ah* Application Act was presented to the Federal Legislative Assembly in 1937 and was passed into law.

In view of the fact that majority of Muslims in India were followers of School of Imam Abu Hanifa, the Hanafi Family Law was radically developed in India. This created a sort of hardship to people, especially the law relating to divorce. For instance, one of the features of the law is that a husband can divorce his wife without providing her any reason for it. Some Muslim women then found it difficult to cope with the hardship of Hanafi law; hence, this led to the Dissolution of Muslim Marriage Act of 1939. The Act was enacted according to the Maliki School of Law.

The application of *Sharī'ah* in India centres on Muslim family matters and the judiciary always plays secondary role in them. The people usually do not approach a Court of Law for adjudication on personal matters. Therefore, a court only takes litigation if a party files a suit in a court of law. What the people do usually is to approach the Imam or Mufti on the personal matters for him to give *fatwa* in accordance with *Sharī'ah* laws. Therefore, there are two important institutions in India which implement the *Sharī'ah* laws. These are the *Darul-Quda'* and the *Darul-Ifta*. *Fatawa* (Islamic verdicts) are usually issued by these institutions and their verdicts are given importance by the common Muslims because they believe that their verdicts are given on *Sharī'ah* basis.

SELF-ASSESSMENT EXERCISE

i. How was Islamic law practised before the British colonisation of

India?

ii. Mention the codes of law enacted India by British administration

iii. How is the status of the application of Islamic law in India after British colonisation?

3.3 Application of Islamic Law in Pakistan

Akistan was part of the subcontinent of India until 1944 when the subcontinent was divided between India and Pakistan. Therefore, Pakistan operated the same system with India until 1944 when it became an independent country. The *Sharī'ah* Application Act of 1937 and the Dissolution of Marriage Act of 1939 were in practice in Pakistan till 1961 when it enacted Muslim Family Law Ordinance. This came into existence in order to reform certain parts of the 1939 Act.

However, in most of the cases, the Ordinance was not put into practice. As much as the legal practitioners considered the Ordinance as appropriate legislation, the feminists and social activists thought that it creates a lot of domestic and social problems. They were therefore working for 'Uniform Family Code'. The religious experts too considered that the Ordinance was against the *Sharī'ah* particularly the laws relating to polygamy, divorce, intervening marriage and succession. They demanded for a law based on Hanafi jurisprudence. The differences among these groups continued for more than a half century without any effective initiatives taken to resolve the problem.

In view of the above, the situation in Pakistan is just like that of India. The common Muslims do not approach the court. What they do is to approach their Imams and Muftis when they have issues relating to Islamic family matters. Although there is what could be seen as application of *Sharī'ah* in Pakistan, the enactment of Muslim Family Law Ordinance of 1961 created a problem in the country when some Muslim scholars alleged that the some aspects of the Ordinance was contrary to the principles of *Sharī'ah*. This, therefore, made many people not to approach a Court of Law for adjudication on personal matters; rather they prefer approaching the Imams and Mufti.

The above situation notwithstanding, Pakistan went further in 1979 to expand the application of Islamic law to go beyond the family law of personal status. In this year, *Hud d* Ordinance was enacted. This has to do with criminal matters which included: *Zina* (adultery or extra-marital sex); *Qadhf* (defamation or false accusation of *zina*); *Sariqa* (theft or offence against property) and *Khamar* (intoxicant or prohibition of drinking of alcohol). By the year 2006, an amendment was carried out to 1979 *Hud d* Ordinance. It was President Pervez

Musharraf who proposed reform of the *Hud d* Ordinance. On November 15, 2006, the Women's Protection Bill was passed in the National Assembly. The Bill was ratified by the Senate on 23 November, 2006 and it became law in 1 December, 2006. The amendment included rape and fornication (voluntary sexual intercourse by an unmarried man and woman) into the *Hud d* Ordinance.

SELF- ASSESSMENT EXERCISE

1. How was Islamic law applied in Pakistan before 1961?
2. What was the situation of the application of Islamic law after the Ordinance of 1961?
3. What are the contents of the *Hud d* Ordinance of 1979 and its amendment of 2006?

4.0 CONCLUSION

Turkey was under the control of the Ottoman Empire before the coming of the West to the country and the *Sharī'ah* law was the legal system that regulated their life at that period. The arrival of West to Turkey led to the secularisation and westernisation of their law in 1839. Eventually Turkey became a secularised state and Islamic law became a private affair of the Muslims. However, the situation in India is a little different. While the application of Islamic law started long before the coming of the British colonial masters, their arrival did not completely phase out the application of Islamic law. It was only restricted to Muslim Family law through the enactment of various codes of law. The situation was similar in Pakistan since the country was part of the subcontinent of India until 1944. However, Pakistan went further to extend its Islamic application to cover criminal matters through *Hud d* Ordinance of 1979 and its amendment of 2006.

5.0 SUMMARY

This unit takes a look at the application of Islamic law in Turkey, India and Pakistan. It begins by discussing the legal system of Turkey before and after colonisation and how the legal system was eventually secularised and Islamic law was applied only at private level. It also discusses the application of Islamic law in India. It states that Islamic law was applied before the arrival of the British colonial administration and was also applied during the colonialists but only at the level of the law of personal status. The unit further examines the application of Islamic law in Pakistan. It submits that the application of Islamic law in Pakistan was initially at the level of what was in operation in India but was later expanded to cover criminal matters.

6.0 TUTOR- MARKED ASSIGNMENT

1. Discuss the historical origin of legal system of Turkey up to the time it was secularised.
2. How would you explain the situation of Islamic law in India?
3. The application of Islamic law in Pakistan is different from that of India. Elucidate.

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UNIT 3 APPLICATION OF ISLAMIC LAW IN NORTH AFRICA

CONTENTS

1.0 INTRODUCTION

North Africa, comprising Tunisia, Algeria and Morocco is known by the Arab as *Al- Maghrib Al-'Arabī* – the Arab West; it is indeed the island separated from the Africa of the black races. The population of *Maghrib* states or North Africa has largely adopted Arab civilisation. Therefore, there is no doubt that the countries in North Africa, like their counterparts in other Muslim world applied *Sharī'ah* law before they were colonised. However, their contact with western civilisation has influenced greatly the application of Islamic law in the countries. Therefore, the three *Maghrib*i states selected the French model, a choice that maximised the possibility of centralised state control over the legal system. In the area of personal status, state control was extended to areas that had previously been governed according to customary practices or private arrangements. In general, compliance with state-mandated bureaucratic procedures became required. Hence, since the Maghrib states became independent of France, they have modified their family law to accommodate modern ideas regarding women's rights and the nature of marriage. Tunisia, Algeria and Morocco share a common legacy of Islamic jurisprudence of the Maliki School and French legal culture.

This unit endeavours to take a look at the effect of the French civilisation on the application of Islamic Law in these countries. It discusses the *Sharī'ah* application in these countries in conjunction with the French Legal System. It looks at how French civilisation has influenced the application of Islamic law in these countries. These are what you are going to be exposed to in this unit for your reading and digestion.

2.0 OBJECTIVES

By the end of this unit, you will be able to:

- discuss the application of Islamic law in Tunisia
- give account of the application Islamic law in Algeria
- explain the application of Islamic law in Morocco.

3.0 MAIN CONTENT

3.1 Application of Islamic Law in Tunisia

Tunisia was an autonomous province of the Ottoman Empire from 1574. During this period, the legal system was based on both Hanafi and Maliki schools of law. Hanafi was influential but never disposed the position of the Maliki School. However, Tunisia became a French protectorate in 1881 and attained full independence in March 1956. Like the case of other Muslim countries which have been brought under the control of Western powers, there has been a gradual sublimation of Islam and Islamic law in Tunisia too. Therefore, Tunisia is one of the three *Maghrib* states that selected the French model, a choice that maximised the possibility of state control over the legal system.

In the area of personal status, state control was extended to areas that had previously been governed according to customary practices or private arrangements. In general, compliance with state-mandated bureaucratic procedures became required. Hence, the traditional Islamic model of separate, confessional based family laws was rejected leading to the adjustment of their personal status laws to enable them apply to non-Muslims, but the laws continued to be interpreted by reference to Islamic jurisprudence. Thus, although they have been systematically westernised in terms of their content, these personal status laws are not fully secular.

The Tunisian Code of Personal Status was enacted in 1956, only six months after independence. Since then it has been amended several times. The code introduced dramatic reforms and signalled unequivocally President Habib Bourguiba's determination to use Tunisian law as an instrument of modernisation. It is known as The Law of Personal Status (TLPS). It was inspired by unofficial draft codes of Maliki and Hanafi family law. The TLPS was extended to apply to all Tunisian citizens in 1957, thus ending the application of rabbinical law to Jewish personal status matters and the French Civil Code to personal status cases relating to non-Muslim Tunisians. Among the most controversial provisions of the TLPS were those banning polygamy and extra-judicial divorce. Tunisia's is by far the most modern of the

Maghribi codes. It is unique in the Arab world for having prohibited and criminalised polygeny. It established identical grounds for divorce for husband and wife and allowed both spouses to divorce without proof of fault.

SELF-ASSESSMENT EXERCISE

i. How can you trace the historical record of Tunisia legal system?
ii. What can you say about The Law of Personal Status (TLPS) in Tunisia?
iii. Why is Tunisian code the most modern of the Magbribi codes?

3.2 Application of Islamic Law in Algeria

The Algerian legal system is based on French and Islamic law. Algeria remained under French rule for 132 years, constituting the longest direct European colonisation of any region in North Africa. After a brutal eight-year struggle for independence, Algeria became a sovereign state in July 1962.

Under French rule, courts applied Maliki principles in matters relating to personal status and succession. Commentators note that the process of adjudication and interpretation in the Franco-Algerian courts led to distinctive developments in the area of family law. In 1916, a commission headed by the French jurist Marcel Morand was appointed to formulate a draft code of Muslim law. The draft code, *Avan-project de code du droit Musulman Algerien*, based mainly on Maliki principles but incorporating some non-Maliki (mainly Hanafi) provisions, was never formally passed into law although it did influence the application and administration of family law in Algeria. The government eventually issued a Marriage Ordinance in 1959, enacting some Maliki principles relating to family matters; the Ibadi minority was initially exempted from the Ordinance. The legislation may have been inspired by the codification of family law in Tunisia and Morocco in 1956 and 1958 under newly-independent national governments. Though the Marriage Ordinance did not introduce substantial changes to family law, there were some provisions based on Hanafi principles. The Ordinance established rules for solemnisation and registration of marriage, raised the minimum marriage ages for both parties, and established certain regulations relating to judicial dissolution and court orders for post- divorce reliefs; its application was specific to those who registered their option for state legislation.

The first Constitution promulgated in 1964 declared Islam the state religion. The new regime also amended the Marriage Ordinance of 1959, repealing or amending certain provisions such as the exemption of Ibadi marital relations from the terms of the Ordinance and the minimum marriage-age. The second Constitution adopted in 1976 reaffirmed Islam as the state religion. Periodic demands for comprehensive codification of personal status and inheritance laws eventually led to a draft code being presented to the National Assembly in 1980. After several years of debate, discussion and protest, the Family Code was enacted in 1984.

The provisions of the Family Code 1984 are drawn from various schools of law, the Algerian draft code of Muslim law formulated by a commission headed by Marcel Morand in 1916, and parallel legislation from neighbouring countries (particularly Moroccan enactments). Article 222 of the Code specifies the *Sharī'ah* as the residuary source of law, thus allowing for selection of appropriate interpretations from any school of law or directly from the original sources of law (*Qur'ān* and *Sunnah*) or from secondary sources.

In view of the above, although the Algerian independence came in 1962, it was not until 1984 that Algerian Family Code was enacted. Many previous drafts had been put forward and rejected, provoking more controversy. Resembling the Moroccan *Mudawwana*, the 1984 Family Code represented a solid victory for Algerian conservatives.

SELF-ASSESSMENT EXERCISE

i. How would explain the fact that Algerian legal system is based on French and Islamic law?
ii. Discuss the Marriage Ordinance of the Algerian legal system.

3.3 Application of Islamic Law in Morocco

Spanish and Portuguese power in Morocco and the Western Sahara was in its ascendancy in the 15th century, with several coastal areas being the subject of rival claims. By the early 20th century, the British acknowledged Morocco as part of the French sphere of influence, with Morocco being divided between Spain and France in 1904. A French protectorate was established in 1912. Spanish Morocco faced fierce resistance and a revolt in 1920 nearly succeeded in driving the Spanish out, when a French and Spanish alliance re-established Spanish authority in 1926. Morocco gained independence from France in 1956 and Spain relinquished authority over most of its Moroccan holdings during the same period. The status of the Western Sahara remains

unresolved, with contesting claims on the part of the Moroccan state and the Polisario Front (Popular Front for the Liberation of the Saquia el-Hamra and Rio de Oro) which proclaimed a government in exile of the Sahrawi Arab Democratic Republic (SADR) in February 1976. The region was divided between Morocco and Mauritania in April of that year, with Morocco taking over the remaining one-third of the territory soon after Mauritania succumbed to pressure from Polisario in 1979 and abandoned its claims. Preparations for a long-delayed UN-sponsored referendum on the future of the territory continue.

Under French and Spanish rule, the colonial legal systems influenced local developments outside of the sphere of family law. *Sharī‘ah* courts continued to apply Maliki *fiqh* during the first half of the century (in addition to local tribunals applying customary law). Following independence in 1956, a Law Reform Commission was established in order to draft a code of personal status. A Code was passed into law within the next year, based on dominant Maliki doctrines as well as *takhayyur*, *maslaha*, and legislation from other Muslim countries (perhaps most importantly the Tunisian Code of Personal Status 1956). Article 82 of the Code directs that “with regard to anything not covered by this law, reference shall be made to the most appropriate or accepted opinion or prevailing practice of the school of Imam Malik.” Major amendments to the Code’s provisions relating to marriage guardianship, polygamy, *talāq* and *mut‘ah al-talaq* were made in 1993.

The Moroccan personal status code, known as the *Mudawwana*, came into force in 1958, two years after Morocco’s independence. The philosophy it embodied was diametrically opposed to that of the Tunisian code. The Moroccan state signalled its independence from France by reaffirming many rules taken from the treatises of Maliki jurists of centuries past. Reforms adopted in 1993 increased women’s rights, but did not bring Moroccan law to the level reached by the Tunisia law in 1956.

SELF- ASSESSMENT EXERCISE

i. What was the status of *Sharī‘ah* under French and Spanish rule in Morocco?
ii. Discuss the Law Reform as it affected *Sharī‘ah* after independence in 1956.

4.0 CONCLUSION

North Africa states comprising Tunisia, Algeria and Morocco like other parts of the Muslim world applied *Sharī‘ah* law before they were colonised. Their contact with western civilisation like other Muslim

countries made great impact on the application of Islamic law in these three countries too. The impact seems a little different from others in the sense that the three Maghribi states selected the French model, a choice that maximised the possibility of centralised state control over the legal system. Therefore, since the North African states became independence of France, they have modified their family law to accommodate modern ideas regarding women's rights and the nature of marriage. Hence, Tunisia, Algeria and Morocco share a common legacy of Islamic jurisprudence of the Maliki School and French legal culture.

5.0 SUMMARY

This unit discusses the application of Islamic law in North African states. It begins by examining the situation before independence giving the effect of the French civilisation on the application of Islamic Law in these countries. It discusses the *Sharī'ah* application in these countries in conjunction with the French Legal System. It looks at how French civilisation has influenced the application of Islamic law in these countries. It shows that the French civilisation has been incorporated into their legal system to the extent that women's rights were given prominence in their law of personal status.

6.0 TUTOR-MARKED ASSIGNMENT

1. Discuss The Law of Personal Status (TLPS) in Tunisia.
2. How would you explain that Algerian legal system is based on French and Islamic Laws?
3. Give an account of the application of Islamic Law in Morocco.

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UNIT 4 APPLICATION OF ISLAMIC LAW IN NIGERIA

CONTENTS

1.0 INTRODUCTION

As it was the case in many parts of the Muslim world, so was it in Nigeria when it comes to the issue of *Sharī'ah* application. Islamic law had been applied in the Northern Nigeria and some parts of South-western Nigeria long before the arrival of the colonialists. It is on record that the practice of *Sharī'ah* in Nigeria was as old as Islam itself. Islamic law was applied in both the civil and criminal aspects in the Northern Nigerian long before the arrival of the British colonial administrators. It was later that the Islamic criminal law ceased to be applied and was replaced with penal code. However, the Islamic law of personal status continued to be applied.

This unit endeavours to take a look at the application of Islamic Law in Nigeria. It discusses the *Sharī'ah* application in the country before the British colonisation. It also examines the application of Islamic law during the colonial administration. It goes on to look at the status of Islamic law in the country after the independence till the present time. These are what you are going to be exposed to in this unit for your reading and digestion.

2.0 OBJECTIVES

By the end of this unit, you will be able to:

- give account of the *Sharī'ah* application in Nigeria before the colonisation
- describe the situation of Islamic law during the colonial era
- discuss the status of Islamic law after independence to the present

time.

3.0 MAIN CONTENT

3.1 The Development of *Sharī'ah* in Nigeria

The development of *Sharī'ah* in Nigeria cannot be separated from the spread of Islam in the country. Therefore, *Sharī'ah* application in Nigeria began immediately after the emergence of Islam in the country through Kanem Bornu in 1085 C. E. during the reign of Mai Hume Jimi. Ibn Batuta confirmed that *Sharī'ah* was in some parts of the North as early as the 14th century and it was reinforced in the reign of Mai Idris Aluma. Shaykh Muhammad Al-Maghili who arrived in Katsina in 1483 was reported to have contributed immensely to the establishment of *Sharī'ah* in the Northern areas. After leaving, he settled in Kano during the reign of Muhammad Runfa (1463 – 1499). The first two functions which he was reported to have performed were the appointment of the Imam for Friday prayers and a Qādi of which two jurists, Ahmad and Abdullah were recommended by him to occupy respectively. Under the government of Muhammad Runfa, he also established *Sharī'ah* Courts, the development of at least one of which he supervised by himself.

Sharī'ah got the real booster after the establishment of Sokoto caliphate. With success of the Sokoto jihad, early in 19th century, a caliphate was established where *Sharī'ah*, in all its ramifications, was the law of the land. The application of *Sharī'ah* therefore took firm root in the areas covered by the caliphate. The empire reigned for a century before the advent of the colonial administration.

As *Sharī'ah* was practised in the Northern part of Nigeria before the arrival of the British colonialists, it was also applied in some parts of the South-western Nigeria. Although, there was the marked difference between the practice in the North and South which is attributable to the effect of Jihad more than any other factor, this is not to say that *Sharī'ah* was not practised in the South. *Sharī'ah* was applied in some areas in Yoruba land of Nigeria before the advent of the British rule particularly where the rulers were Muslims. This development showed that Islam cannot be divorced from *Sharī'ah* and vice versa. As a result, the practice of *Sharī'ah* was well established among some Yoruba Muslim communities, particularly in places like Ede, Epe, Iwo and Ikirun.

SELF-ASSESSMENT EXERCISE

i. How would you assess the development of *Sharī'ah* in Nigeria?
ii. What would you explain was the major distinctive factor between the application of *Sharī'ah* in the northern and southern Nigeria?

3.2 Application of Islamic Law (*Sharī'ah*) *under* the Colonial Rule

As earlier mentioned, the history of *Sharī'ah* in Nigeria dates back to the advent of Islam in the country. It has been applied in the country since the advent of Islam for more than one thousand years. It is stated to be an art of governance and administration of justice for more than two centuries before the appearance of British administration in Nigeria. However, its history has been a chequered one since the British colonial masters took control of political power. Admittedly, recognition was accorded to *Sharī'ah* as part of the Indirect Rule System, but its status was somewhat compromised through the axes of the Repugnancy Doctrine, resulting in its progressive subjugation. English Common Law as well as Statute Law was declared superior to *Sharī'ah*.

Before the arrival of the British colonialists to Nigeria, it was *Sharī'ah*, both civil and criminal, which applied to the Muslims in the Northern States. *Sharī'ah* Courts existed, with the Emir's Court serving as an appeal court in criminal cases. Even after the occupation of the Northern States by the Britain, they did not abolish the application of *Sharī'ah* in both criminal and civil cases until 1960 when Islamic criminal law ceased to be applied fully and was replaced with the Penal Code.

In view of the above, the *Sharī'ah* legal system was methodically displaced of criminal law and was confined to personal law. The introduction of the codes was accompanied by a reorganisation of the judiciary. The Muslim Court was scrapped and replaced with the *Sharī'ah* Court of Appeal, which was given appellate jurisdiction in matters of Muslim personal law.

Apart from Northern Nigeria, *Sharī'ah* was also applied in some areas in Yoruba land of the South-western Nigeria before the arrival of the British colonialists. Some Muslim Yoruba Obas did establish *Sharī'ah* Court for their Muslim citizens at one time or the one. For example, Oba Aliyu Oyewole (1795 – 1820) instituted *Sharī'ah* Court in Ikirun, Oba Momodu Lamuye (1858 – 1906) instituted it in Iwo, while Oba Abibu Olagunju (1855 – 1900) applied it fully in his domain in Ede. Even the British colonialists were said to have relocated the *Sharī'ah* court to an area called Agbongbe in Ede in 1914. However, the British later contrived and abolished *Sharī'ah* in Yoruba land.

SELF-ASSESSMENT EXERCISE

i. What was the status of *Sharī'ah* in Nigeria before the arrival of the British colonialists?
ii. Explain what the British rulers did to displace the *Sharī'ah* of criminal law.
iii. Mention the Yoruba Muslim Obas that instituted *Sharī'ah* Courts in their domains.

3.3 The *Sharī'ah* Application after Independence to the Contemporary Period

The Penal Code and the Criminal Procedure Code were introduced and they took effect as from 1st October, 1960. The introduction of the Codes was accompanied by a reorganisation of the judiciary. The Moslem Court of Appeal was scrapped and replaced by the *Sharī'ah* Court of Appeal, which was given appellate jurisdiction, its decision was final – unless there was an issue involving fundamental rights.

Although, criminal matters were removed from the *Sharī'ah* jurisdiction with the introduction of the Penal Code and the Criminal Procedure Code, yet civil matters between Muslims were left under the *Sharī'ah*. This was done in two ways: first, the Native Courts Law provided for the application in civil matters, either the native law and custom prevailing in the court's area of jurisdiction or "the law binding between the parties"; and secondly, even though appeals in civil matters other than matters of "personal law" do not go to the *Sharī'ah* Court of Appeal but to the High Court, the High Court was specially constituted to include a *Sharī'ah* Court of Appeal judge to hear all appeals from native courts. In civil appeals governed by the *Sharī'ah*, the *Sharī'ah* judge presided.

It is to be noted that on its way out, the British had in 1956 incorporated a single *Sharī'ah* court of Appeal for the Northern region. This court was operated in the first Republic (1960-65). In 1976, the Rotimi Williams-led Constitution Drafting Committee (CDC) proposed the establishment of *Sharī'ah* Courts of Appeal at state and federal levels. The tension generated during the proceedings of the 1977/78 Constituent Assembly (CA) resulted in the stalemate and walkout by Muslims in protest against the manner the issue was handled. Nevertheless, the Supreme Military Council (SMC), the highest ruling body of the military regime, then arrived at a compromise by retaining the provision for the establishment of the *Sharī'ah* court for any state, which required it. Similarly in 1988, on the floor of the Constituent Assembly convened by the Babangida Military Administration, much political heat was generated during the debate on

the application of *Sharī'ah* in the country, which threatened to melt the unity of the fragile Federation. As in 1978, wiser counsel prevailed and the burning issue was resolved through a compromise namely, that any State that requires a *Sharī'ah* Court of Appeal may establish one. Moreover, the 1999 constitutional provisions in respect of the *Sharī'ah* are identical with those of the 1979 Constitution. Therefore, establishment of *Sharī'ah* Court of Appeal is still optional in the 1999 Constitution since it could only be established by the state that requires it.

However, with the re-entrance of democracy in Nigeria in 1999, Islamic legal system found an established footing in an otherwise westernised and secularised national legal system to flourish. On October 27, 1999, Zamfara State in the North Western part of Nigeria heralded the implementation of "total *Sharī'ah*" through a highly publicised and well celebrated launching. The action of the Zamfara State brought about the extension of application of *Sharī'ah* to cover criminal aspect of *Sharī'ah* that had hitherto been removed by the British. The bandwagon effect of the Zamfara State initiative culminated into the adoption of the new *Sharī'ah* model in a number of states in the Northern Nigeria, particularly, Muslim dominated states. The effect was not restricted to North; it was also felt in the South-western Nigeria. It was based on the initiative of Zamfara State that some states in the South-West established Independent *Sharī'ah* Panels in their states to adjudicate on personal matters affecting Muslims on private basis. The States where these Panels are found for now are: Oyo, Lagos and Osun.

SELF-ASSESSMENT EXERCISE

i. Explain the two ways by which civil matters were left under the *Sharī'ah*.
ii. Briefly describe the constitutional history of *Sharī'ah* between 1976 and 1999.
iii. State the contemporary situation of *Sharī'ah* in Nigeria between 1999 till now.

4.0 CONCLUSION

Nigeria is, without doubt, a country where *Sharī'ah* (both civil and criminal) was practised before the arrival of the British colonialists. The practice was prominent in the North and there are pockets of evidence that it was also practised in some towns in Yoruba land. However, the arrival of the British brought about the introduction of the Penal Code and the Criminal Procedure Code which led to the removal of criminal matters from *Sharī'ah* jurisdiction in Northern Nigeria and *Sharī'ah* was totally scrapped in South-western part. This was the situation up till

1999 when Zamfara State re-introduced the criminal aspect of the *Sharī'ah* and this was followed by many states in the North. The impact was also felt in the South-West when some states used the Zamfara initiative to established what is called Independent *Sharī'ah* Panels to see to the adjudication of Muslim personal matters on private level.

5.0 SUMMARY

This unit examines the application of Islamic law in Nigeria. It starts by discussing the development of *Sharī'ah* in Nigeria. It traces the history of *Sharī'ah* in the country from the date Islam found its way to the country up to the time of the arrival of the British colonialists. It also discusses the application of *Sharī'ah* under the colonial rulers in the Northern Nigeria as well as in Yoruba land. It shows how *Sharī'ah* was dealt with by the colonial rulers in the country. It finally discusses what happened to *Sharī'ah* in Nigeria after independence up to the contemporary period.

6.0 TUTOR-MARKED ASSIGNMENT

1. Discuss the development of *Sharī'ah* in Nigeria.
2. Give an account of how *Sharī'ah* was applied during the colonial period in Nigeria
3. State the position of *Sharī'ah* in Nigeria from independence to the contemporary period.

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