

BOOK REVIEWS

RECENT BOOKS ON ISLAMIC LAW

There has been a crop of books on Islamic law lately and the purpose of this note is to review these books particularly with reference to the law and practice and the study of Islamic law in Malaysia.

Professor N.J. Coulson is the Professor of Oriental Laws in the University of London and his earlier books and articles have shown that he is a sympathetic though critical scholar of the Muslim Law. His latest book *Succession in the Muslim Family* is to be welcomed especially as it is claimed to be the first comprehensive treatise on succession in the Muslim family in English and to be important for all those directly concerned with the legal affairs of the five hundred million Muslims of the Near and Middle East, India, Pakistan and West Africa, particularly in those countries where English is the language of the law. Significantly enough no mention is made of Indonesia or Malaysia or the Far East. Professor Coulson himself says that he has endeavoured throughout to deal with the subject as a living aspect of contemporary jurisprudence and in a manner which will be intelligible to the modern student of law. It is difficult however to decide for whom the book is meant. The practitioner will find that there are very few authorities cited in the book and the student might find that he is presumed to know quite a lot. There are many statements of the law for which no authority is cited. Thus at pages 14-15 it is stated that "a series of recent judicial decisions in India and Malaya had ratified marriages contracted by Shafii girls without their guardian's consent on the broad ground that it was admissible to apply the more liberal Hanafi doctrine in these cases". The decision in Malaya referred to is presumably the Singapore case of *Salmah v. Soolong* (1878) 1 Ky. 421 in which however the facts were that the girl renounced the tenets of the Shafii school and embraced those of the Hanafi school. At page 28 reference is made to the fact that the presumption of legitimacy in favour of a child born during the continuance of a valid marriage under the Evidence Act has replaced the six months' rule of traditional Shariah law in India and Pakistan. No reference is made to the position in Malaysia but more serious perhaps is the failure to refer to the Pakistan case of *In Abdul Ghani* P.L.D. (1962) Lah. 531 where it was held that the question of legitimacy should be decided with reference to Islamic law instead of the Evidence Act. Thus a practitioner or student will not find all that he needs in

¹Cambridge University Press, 1971.

this book. It is disappointing to find a statement as at page 258 that "Syria has merely adopted the rule for which there is some Sunni authority, that a testator may validly apportion particular items of his estate to his heirs, provided these items do not exceed in value the heir's share of the inheritance." Where is the practitioner or the student to go to for the Sunni authority? The book too unfortunately shows that the Muslim law in Indonesia, Malaysia, Singapore, Thailand and the Philippines is largely ignored by British and American scholars. Indonesia does not figure at all in the Index of countries and Malaya is indexed at two places at one of which the reference is in fact to Malaysia. There are references to the Shafii law at various places in the books (these are not however indexed) but no reference is made to customary law, which is so important in practice in the Shafii countries of Indonesia and Malaysia.

Mr. Anwar A. Qadri's *Islamic Jurisprudence in the Modern World*² is a revised edition of his earlier work published in 1963. This book is better written than the first edition although there are still many loose and inelegant expressions. For some reason the author has left out the references to a number of books and articles on Islamic law in English in the bibliography, which was a useful feature of the first edition. The author states in his preface that he has used the most authentic materials on the subject and the bibliography contains an imposing list of authorities in Arabic. For the most part however the author appears to have drawn from secondary sources such as Abdul Rahim's *Principles of Jurisprudence in Islam* and Aghnides' *Mohammedan Theories of Finance*. There is no specific reference to the Islamic law in Indonesia and at page 134 of the book the author merely states that the followers of the Shafii school are still found in many Muslim lands. There are references to the law in Malaysia and Singapore and these appear to be taken largely from the reviewer's book on Islamic law in Malaya. Although the book was published in 1973 the author did not appear to have access to any Malaysian or Singapore enactment after 1962 and therefore the very significant changes made in Perak, Perlis and Singapore after that date are not dealt with. One serious error occurs in the author's treatment of *talak-i-taliq* or *chera'i ta'alik* in Malaysia. At page 390 the author states, "A delegated divorce is a good illustration in all systems; the conditional divorce is best in the Sunni school and the Ibadi law, though not necessarily in the Shafii law. The latter is the common method in the Shafii law and the former in the Hanafi and the Maliki systems". Then at page 401 the author deals with the practice in Malaysia and for some reason confuses the "talaq" and the "taaliq". "The form of the talaq", he says, varies in the States and he then

²N.M. Tripathi Pte. 1.td., Bombay, 1972.

proceeds to give examples of the *ta'alik* in Trengganu and Singapore.

Tahir Mahmood's *Family Law Reform in the Muslim World*³ gives a valuable summary of the changes in the Muslim law in various Muslim countries. The author has included translations of the Arabic and Persian enactments and these provide useful source material. It may be unfair to judge the book from the chapters on the law in Indonesia and Malaysia but one wonders how up to date the material in the book is. Perhaps it is unfortunate for the author that there have been significant changes in the law in Indonesia, Singapore and Malaysia in recent years. In Indonesia there has been new comprehensive legislation, the Marriage Law of 1974, but this was enacted after the book was published. In Singapore the Muslims Ordinance of 1957 has been replaced by the Administration of Muslim Law Act, 1966 and in Malaysia there have been new enactments in Perak (1965), Kelantan (1966) and Sabah (1971). In the summary of the Malay - Islamic law there is a doubtful proposition of law at page 200, "The law of Islam does not regard an engagement or promise to marry as a binding agreement. Accordingly the laws in Malaysia do not provide the remedy of specific performance for such agreements." As the author rightly points out damages may be awarded for breach of such an agreement. The *chera'i ta'alik* is treated as a *talaq al-tafwid*, which is not exactly correct and there is no adequate treatment of the provisions relating to *kbul'*. The enactments given in the appendix to the Chapter are the Brunei and Singapore enactments. Perhaps the more recent Perak enactment might have been a better example. The author seems to be concerned mainly with legislative changes and there are no references to any case law in the Chapter on Malaysia and very few in the Chapters dealing with India, Pakistan and Ceylon.

The Muslim Law of Divorce by K.N. Ahmed⁴ is a comprehensive compilation of the Muslim law on the dissolution of marriage. In his preface the author states that he has confined himself to discussing the Hanafi law at length and to giving the laws of the other sects where they differed from the Hanafi laws. At various places in his book the author refers to the Shafii law but it is unfortunate that in most of these references he has not given the Shafii sources as his authorities. One exception occurs where the author deals with the husband's failure to perform marital obligations and explains what happens if a Shafii wife complains to the Qadi that her husband is of irritable temperament or that he ill-treats her without a cause. The procedure for reference to hakam is dealt with and the reference given is Al-Ramli's *Nihayat al-Muhtaj*. One wishes for more of such authoritative statements. Like most other books

³ Islamic Research Institute, Islamabad, Pakistan, 1972.

⁴ University of California Press, Berkeley, U.S.A. 1972.

on the Muslim law from India and Pakistan, this book also does not deal adequately with the type of dissolution of marriage known in Malaysia as "cherai ta'alik". The subject of "conditional divorce" is dealt with at pages 79-82 of the book but only the Hanafi law is given; nor is cherai taalik a delegated divorce or tafwid, as dealt with in Chapter 11 of the book. Perhaps it may be useful to quote what has been written by Juynboll about the *ta'aliq*. He says --

"Husband and wife according to the Shafiites can make no change in their mutual rights and duties as established in common law. Any agreement of the nature which they may make in the marriage contract has no binding effect. Nevertheless, it is usual in some Muslim lands, even among the Shafiites, for the husband to undertake certain exceptional obligations with regard to the wife, to which he is not bound by the law. He promises for example not to take a second wife, though he has the right to do so. In order to give a binding force to such promises the bridegroom immediately after the conclusion of the marriage contract, 'If I take a second wife (or if I neglect my wife and give her no *nafaqah*, etc.) then she is repudiated by me.' This custom is called *ta'aliq* (lit. to hang up the divorce to a condition).

By this *taaliq* various rights may be guaranteed to the wife which the law does not give her, and she may gain in this way a much better position. If she is ill-treated or neglected by her husband or if he acts in other respects contrary to his promises, the marriage is *ipso facto* dissolved and the wife may, if she wishes, marry another husband."

The author has rightly pointed out the differences between the Hanafi law and the Shafii law on the subject of the need for an express declaration for the revocation of an incomplete divorce (pages 128 and 132), the effect of a divorce under compulsion or threats (page 55) and the maintenance of a wife who has been irrevocably divorced (page 850). At pages 741 and 745 of the book the author puts the Shafii law too widely when he says that "under the Shafii law a marriage can be dissolved if the husband cannot or does not maintain his wife"; and "The Shafii, Maliki and Hambali laws provide for the dissolution of marriage when the husband is so poor as to be unable to maintain his wife or when he is capable of maintaining the wife but fails or refuses to do so." In discussing "iddah" the author does not deal with the difference between the Hanafi and the Shafii schools as to the duration of the *iddah* after divorce. The author does not deal with the payment of compensation on divorce (*mata'ab* under the law in Malaysia) and while there is a chapter on paternity, there is also no treatment of the right to custody of the children. One general criticism of the book is that it deals only with the Muslim law of divorce in India and Pakistan. No account is taken of the law and practice in the Arab countries and still less of the position in

Indonesia and Malaysia. On the contrary the author at times refers at length to the law in England and the United States of America and also deals with the requirements for complete satisfaction in the sexual act. Perhaps these parts of the book might be deleted or shortened, so that space might be found to deal with the law of divorce in other Muslim countries.

Much the most important and most relevant book for the practice and study of Islamic law in Malaysia is Daniel S. Lev's *Islamic Courts in Indonesia*.⁵ The only pity is that at times the author goes out of his way to make uncomplimentary remarks about the Islamic law itself. The administration of Islamic law in Indonesia, as it is in Malaysia, has many defects and weaknesses but as Lev himself shows much of this is due to the neglect and indifference, if not hostility of the Colonial power and the poor status, poor qualifications and inadequate facilities of the judges of the Islamic courts. It is unfair to blame the Islamic law itself, for if the law has not adapted itself to the changing needs this is because those who are given the task of administering it are unqualified and ill-equipped to make the necessary adaptations. Much is being done in Indonesia to remedy this and perhaps the author has not given sufficient attention to the useful work that is being done by the various Institut Agama Islam Negeri (I.A.I.N.) and the private Islamic universities in Indonesia. In one respect the book is already out of date. Indonesia now has a new Marriage Law, 1974 which in many respects can bear comparison with the legislative enactments in the other Islamic countries. The most valuable part of the book is the part devoted to the function of the Islamic courts in divorce and inheritance cases. Much of the material has been obtained by observation in the courts themselves and this is a line of research which it is hoped will be carried on in Malaysia also. It is significant that the author states that the *ta'alik-talak* category accounts for the largest proportion of divorce actions and this section of the book can be read with profit by the experts on Islamic law in England, India and Pakistan. The author refers to *muta'ab* gifts and to *barang pencharian* in the chapter on Divorce but one would have wished for more details of the practice in Indonesia. In the Chapter on Inheritance, the author seems to be unaware of the rule that a Muslim can only make a valid will of up to one-third of his property; perhaps he was misled by relying on Fyzee's article on the *Fatimid Law of Inheritance*. The book is a pioneer in field and court research on Islamic law and it is hoped that more research on these lines will be done not only in Indonesia but also in Malaysia.

Ahmad Ibrahim.

⁵ University of California Press, Berkeley, U.S.A., 1972.

INTERNATIONAL LAW CASES FROM MALAYSIA AND SINGAPORE

by S. Jayakumar

[Singapore: Singapore University Press,
1974: XXIV and 458 pp. \$S40.00]

A casebook can serve two basic functions. It may be used as a teaching tool to provoke discussion and encourage analysis or it may be used as a convenient repository of basic primary materials. From either one of these perspectives, Jayakumar's *International Law Cases from Malaysia and Singapore* leaves much to be desired.

As a teaching tool its principal limitation is that it relies exclusively on cases to convey the role international law plays in the decision making process. In so doing it eschews the real world by excluding treaties, the work of intergovernmental organisations and representative state practice from Malaysia and Singapore. In the sections on jurisdiction and law of the sea, for example, it would have been useful to include Malaysian and Singaporean continental shelf legislation and model concession agreements relating geographical, jurisdictional and profit sharing arrangements. International law, as Jayakumar himself has ably demonstrated elsewhere, is not made by judicial tribunals, especially in newly independent states. To indicate even implicitly that it is, distorts the entire process and encourages the already wary undergraduate into thinking that the relationship between international law and reality is tenuous. This conviction can only be further fostered where no background, no sense of political history and no indication of alternative views are provided. In addition, fully 90% of the cases included are pre-*Merdeka* decisions delivered by English judges, whose views cannot be said to reflect a Malaysian or Singaporean perspective of the requirements of world public order. Jayakumar has included occasional questions and comments comparing the cases and encouraging the reader to search for a "truer" rule of law, but both questions and comments focus on internal consistency issues instead of inquiring into the external and frequently unarticulated policy reasons underlying the judgements. This absence is nowhere more striking than in *Government of the State of Kelantan v. The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* ([1963] M.L.J. 355), where the High Court dismissed a motion by the plaintiff challenging the constitutionality of the Malaysia Agreement and the Malaysia Act on the very eve of the new State's establishment.

It is as a convenient reference tool that Jayakumar apparently intended the book to be primarily used. Its ability to serve this purpose has been drastically impaired by its narrow scope and insular outlook. Almost no