

Islamic Property Law

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Islamic Property Law

*Cases and Materials
for Comparative Analysis
with the Common Law*

John Makdisi

ST. THOMAS UNIVERSITY SCHOOL OF LAW
MIAMI, FLORIDA

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Dedicated to

Junička

For her patience, love and support
that made this work possible

&

For our four children whose presence in this world
has taught me the true meaning of life

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Preface

ISLAMIC PROPERTY LAW is the first casebook of its kind to offer training in Islamic law to American law students in the comparative case-method style of learning. The several areas of law covered under the umbrella of Property are developed through translations of classical Islamic law texts in conjunction with English and American cases on the same subjects. The materials are sufficiently detailed to provide the type of sophisticated analysis with which law professors and students are familiar. Although the focus is on Islamic property law, the course also covers areas in torts, contracts, criminal law, wills and trusts, constitutional law, and jurisprudence, insofar as these areas touch on property. In this way the book also satisfies the tradition of comparative law casebooks that are comprehensive in coverage.

The two books that have come closest to providing the type of cases and materials that this book offers are HERBERT J. LIEBESNY, *THE LAW OF THE NEAR & MIDDLE EAST: READINGS, CASES, & MATERIALS* (SUNY Press Albany 1975), and JOHN H. BARTON, JAMES LOWELL GIBBS, JR., VICTOR HAO LI, & JOHN HENRY MERRYMAN, *LAW IN RADICALLY DIFFERENT CULTURES* (West 1983). Liebesny's book is written in the grand style of a survey. It does not permit the close analytical reasoning to which students are introduced in law school and which depends on materials that explore the law in greater depth. The Barton, Gibbs, Li and Merryman book was the first to introduce a modern Islamic legal system to American law students in a casebook format. In that book Egypt was one of four legal systems whose laws of succession, embezzlement, contracts and population planning were explored in sufficient detail to provide for the sophisticated analysis required of law students. Yet Egypt is an Islamic law system in much the same way that Italy is a Roman law system. While Islamic law principles and methodology influenced the creation of the Egyptian legal system, other influences, such as the civil law system, played a large role in changing its nature and characteristics. It is not truly a casebook on Islamic law.

Students should emerge from the course on Islamic Property Law with a sound understanding of property law in classical Islam and an enhanced understanding of property law in the United States. Since classical Islamic law is the precursor and inspiration for the legal systems of most Islamic law countries, this understanding should help practitioners as well as academics. The course can be taught as a 2-credit class or a 3-credit class. Assignments may range from 15 to 25 pages a class depending on the length of the class, and there is sufficient flexibility to add supplementary materials, if desired.

Common law cases are presented in reading materials and analyzed in class to determine the precise meaning of their legal norms, the extent to which these norms are applicable in related cases, the extent to which they are desirable in a modern society and economy, and the problems they leave unsolved.

Answers to such questions, if they exist, are developed from an examination of the decisions in other cases as well as the value judgments of the students themselves, but other cases in turn provide the basis for further questions. A favorite problem raised by law teachers is the apparent conflict of two cases over the application of a legal norm. In the interest of preserving the unity of the legal norm, a justification must be sought for distinguishing the two cases. As hypotheses are tossed around in class, an idea begins to form as to the limits within which the legal norm functions.

In Islamic law the questions would focus on the legal opinions (*fatawa*) of the mufti. Although the judge's role is minimal in the development of the law before the nineteenth century, the role of the mufti is preeminent and his opinions are decisions of cases which pose actual or hypothetical legal problems. The treatises which contain general legal principles include the recognized decisions of these *fatawa* to aid in defining the range and scope of application of the legal principles.

Beyond this general approach, however, the methodology used in deriving answers does differ from that used in the common law because of the differences in legal reasoning used in each system. Value judgments based on notions of equity or policy are often demanded of a student of the common law because such judgments are made by lawyers and judges in deciding the law for certain cases or evaluating it in others. For the mufti, value judgments are based on the Koran and the sunna. Although different notions of equity or policy may be ultimately responsible for a mufti's reliance on different verses from the Koran or traditions from the sunna to support a particular legal theory, the argument for expanding or narrowing a legal concept or principle must be constructed on these latter two sources. The student of Islamic law must therefore learn to draw his value judgments in this framework.

In particular, an example of the different methods of legal reasoning used in the two legal systems lies in the means used to eviscerate an established legal principle without directly abolishing it. In the common law a legal principle is established by precedent, a decision in a judicial case which, under the doctrine of *stare decisis*, must be respected by the courts and applied in all future cases with analogous facts. A court may feel it has just cause not to apply the principle in a particular case but may be reluctant to disregard the doctrine of *stare decisis* and overrule the case constituting precedent. One solution to this problem which has been used by courts is to limit the applicability of the legal principle virtually to the facts of its case and, by so limiting the scope of analogy, to remove the case with similar facts from the domain of the precedent. This evasion of precedent falls within the permissible notion of distinguishing a case on its facts.

In Islamic law a legal principle is established through the general consensus of the legal scholars or directly in the Koran or the sunna. If a need is felt to avoid the result which the application of a principle in a particular case would produce, recourse may be had to a restrictive interpretation of the principle which respects its form but circumvents its spirit. Legal principles are often stated in the abstract in the Koran, the sunna and Islamic legal treatises. Although cases help define their range of applicability, these principles are not technically conceived as limited by the facts of the cases in which they are enunciated. They are an expression of the will of God either directly or indirectly, and the case follows the principle, not the principle the case. Therefore, an attempt to evade the import of a legal principle must distinguish it by its form rather than through the facts of the cases in which it appears.

The principles which are legal norms in specific cases may thus be analyzed through hypothetical cases presented in class in a learning-by-doing approach, which is similar

to the American case method approach in form but quite different in the methods of legal reasoning used to test the limits of these norms in terms of their durability, applicability and effectiveness in conflict resolution.

This approach is offered here not as an alternative to the descriptive process that often characterizes a comparative law course, but as a complement which will help convey a deeper understanding of the legal process by which a foreign legal system functions.

With the renewed interest in Islamic countries to restore the authority of Islamic law and the concurrent growth in intellectual curiosity about Islamic law in the West, it is appropriate at this time to consider its introduction to law school curricula at a stage beyond the introductory level. The teaching of Islamic law can and should meet the standards of quality, rigor and depth required in other law school courses if it is to offer any real benefit for comparative law study.

The four most frequently used sources in the casebook for translated Islamic law texts are BAILLIE, MINHAI, KHALIL and HEDAYA:

BAILLIE is a source of Hanafi law. The full title of the work is NEIL B. E. BAILLIE (translator), *THE MOOHUMMUDAN LAW OF SALE, ACCORDING TO THE HUNEEFEEA CODE: FROM THE FUTAWA ALUMGEEREE, A DIGEST OF THE WHOLE LAW, PREPARED BY COMMAND OF THE EMPEROR AURUNGZEBE ALUMGEER* (London 1850). The *Preliminary Remarks* at the beginning of the translation provide the following helpful information:

The *Futawa Alumgeeree*... was compiled in India by eminent lawyers assembled for the purpose by the Emperor Aurungzebe Alumgeer.... It was commenced in the eleventh year of the emperor's reign [about 1670 A.D.]....

The word *futawa* is the plural form of *futwa*, a term in common use in Moohummudan countries, to signify an exposition of law by a public officer called the *mooftee*, on a case submitted to him by the *kazee*, or judge. The offices of *kazee* and *mooftee* are usually quite distinct, though the *kazee* ought to be well acquainted with the law, as well as competent, from his experience of human affairs, to apply it, when duly expounded, to the various cases that come before him. The *Futawa Alumgeeree* is composed of extracts in Arabic from several collections of *futawa* of older date, and also from other legal treatises of a more abstract character, by writers of the Huneefee sect.... [T]he *Futawa Alumgeeree* may be adapted to the purpose of an elementary treatise on Mussulman law. As an useful repertory from which the judge may obtain authoritative precedents for his guidance, its value has never been disputed.

MINHAJ is a source of Shafi'i law. The full title of the work is E. C. HOWARD (translator), *MINHAJ ET TALIBIN: A MANUAL OF MUHAMMADAN LAW ACCORDING TO THE SCHOOL OF SHAFII BY MAHIUDIN ABU ZAKARIA YAHYA IBN SHARIF EN NAWAWI TRANSLATED INTO ENGLISH FROM THE FRENCH EDITION OF L.W.C. VAN DEN BERG* (London 1914). The *Prefatory Note* at the beginning of the translation states:

[T]he *Minhaj et Talibin*... "occupies the first rank for deciding legal cases." In the preface to his edition of this treatise, published in 1882..., Mr. Van den Berg explained that the French version, of which this book is a rendering into English, was not a mere literal translation of the concise Arabic text, which would have been unintelligible, but a paraphrase, based partly upon the *Moharrer* and the Commentary of Mehalli, and partly upon the two principal sixteenth-century commentaries on the *Minhaj et Talibin*—that is to say, the *Tohfah-d-Mohtaj*

and the *Nihayat el Mohtaj*. It is not always possible to decide a question by reference to the *Minhaj* alone; and in such a case a Muhammadan jurist—alim, fakih, mufti or kadi, as it may be—has recourse principally to the *Tohfa* and the *Nihaya*, which Dr. Th. Juynboll, in his *Handbuch des islamischen Gesetzes*, 1910, calls “the two standard works in the whole modern Fikh-literature of the School of Shafi’i.”

KHALIL is a source of Maliki law. The full title of the work is F.H. RUXTON (translator), **MĀLIKI LAW BEING A SUMMARY FROM FRENCH TRANSLATIONS OF THE MUKHTASAR OF SĪDĪ KHALĪL WITH NOTES AND BIBLIOGRAPHY** (London 1916; 1980 reprint). The *Preface* at the beginning of the translation includes the following:

Practically, with no exception, every Muhammadan in British West Africa belongs to the Māliki School, and it is that law which alone prevails. The texts most in use are the *Mukhtasar* of Sīdī Khalīl, the *Risālah* of Ibn Abū Zaid, and the *Tuhfat* of Ibn ‘Āsim, of which the first is the most important and the most complete, and it is on French translations of the *Mukhtasar* that the present work is based; translations of the *Risālah* and of the *Tuhfat* being used for purposes of annotation. A translation of the *Minhāj al-tālibin* of Nawawī, the Shāfi‘ī text most often met with in British East Africa and in Malaya, has also been occasionally used in the hope of making the present English version of assistance to administrators in those countries. Differences that exist between Māliki and Shāfi‘ī Law are but of small material importance.

The *Introduction*, written by one of the French translators seventeen years after the French took Algiers in 1830, is also included at the beginning of the translation and gives some insight into the Arabic work and its author:

Khalīl b. Ishak b. Yā ‘ūb, the author of the précis of jurisprudence which forms the subject matter of this book, is, in certain works, spoken of as Khalīl b. Ishak b. Shu‘aib. According to Ibn-Hadjar, his real name was Muhammad, and the name ‘Khalīl’ was merely a qualifying term signifying ‘friend.’

Khalīl, commonly known throughout North Africa as ‘Sīdī Khalīl,’ or ‘the Master,’ was surnamed ‘Dī‘-al-Dīn,’ or the ‘Renowned of the Religion and of the Religious Law.’ In Cairo he taught law, tradition, and grammar. Through his teaching, as also through his sound judgment and wisdom, of which he gave great proof in all questions of law, Khalīl acquired a great reputation and rose to the first rank among the ‘*Ulamā*’ of Egypt. His piety merited the veneration of all, whilst his profound and unceasing studies gave to his work paramount authority throughout four centuries; even to this day the respect attached to his name and to his knowledge is ever living and still the same. Throughout North Africa, the Arabs swear by two names only:—the celebrated al-Bukhārī, the collector and commentator of the traditional words received from the Prophet, and Sīdī Khalīl.

Khalīl was the author of several works. He composed six volumes of commentaries upon Ibn-al-Hājib, to whom we owe several works of law at one time classic. He wrote a further commentary upon Ibn-‘Abd-al-Salām; a guide for the proper observances of the pilgrimage; a biography of his professor, al-Manūfi, who died in A.H. 749; and a commentary upon a portion of the *Mudawwanah*. Khalīl is also the author of the *Taudi*, a work which has spread to both the west and the east, and which was, for a long time, the guide and inspiring influence of Māliki jurists.

But the work at once the most widely circulated and the most revered, which has come from the pen of Khalil, is the *Mukhtasar*. Khalil devoted twenty-five years to its composition. ‘The *Mukhtasar*,’ says al-Râzi, ‘is a thing precious above all; it is a book which should be read with great assiduity, and one which has become to all men of learning the object of study; . . . it is unique in character, and no one has ever composed another to compare with it.’

When Khalil died the manuscript of the *Mukhtasar* was complete up to the chapter upon marriage, or about one third of the work. The remainder was found among his possessions, either on separate sheets, or in the form of unedited copy. His disciples added the remainder, thus recovered, to what had already been finally put together by him; and, in this manner, the book was finished.

HEDAYA is a source of Hanafi law. The full title of the work is CHARLES HAMILTON (translator), **THE HEDAYA, OR GUIDE: A COMMENTARY ON THE MUSSULMAN LAWS** (London 2d ed. 1870). The second edition omits certain passages in the **HEDAYA** from the translation. Where these passages are given in this book, they are from an older edition. The *Preliminary Discourse* (pp. xxvi–xxvii) at the beginning of the translation provides the following information:

AL **HEDAYA** literally signifies the guide. There are many Arabic works on philosophical and theological subjects which bear this name. The present, intitled **HEDAYA FIL FOROO**, or the guide in particular points, was composed by Sheikh **BURHAN-AD-DEEN ALEE**, who was born at Marghinan, a city of Maver-alne’r (the ancient Transoxania), about A.H. 530 (A.C. 1152), and died A.H. 591. As a lawyer, his reputation was beyond that of all his contemporaries. He produced several works upon jurisprudence, which are all considered as of unquestionable authority. — According to the account which he himself gives us in his exordium, the **HEDAYA** is a Sharh or exposition of a work previously composed by him, intitled the *Badayat al Moobtida*, an introduction to the study of the law, written for the use of his scholars, in a style exceedingly close and obscure, and which (it would appear) required an illustrative comment to enable them to comprehend it. — Of the *Badayat al Moobtida*, the translator has not been able to procure any copy. It is, indeed, most probably no longer extant, as the present more perspicuous paraphrase superseded the necessity of the text, and rendered it useless.

THE HEDAYA is an extract from a number of the most approved works of the early writers on jurisprudence, digested into something like the form of a regular treatise, although, in point of arrangement, it is rather desultory. It possesses the singular advantage of combining, with the authorities, the different opinions and explications of the principal commentators on all disputed points, together with the reasons for preferring any one adjudication in particular; by which means the principles of the law are fully disclosed, and we have not only the dictum, but also the most ample explanation of it.

There are two Arabic texts translated by this author in the casebook. The excerpt from **FATAWA ‘ALAMGIRI** at 265–67 was translated from the edition that was published by Bulaq Press in Egypt in 1892. The excerpt from **KASANI** at 271–72 was translated from the fifth volume of **‘ALA’ AD-DIN ABI BAKR IBN MAS‘UD AL-KASANI** (d. 587/1191), **KITAB BADA’IC AS-SANA’IC FI TARTIB ASH-SHARA’IC**, which was published by Bulaq Press in 1910.

Footnotes with few exceptions have been omitted from the cases and materials in this casebook without indication by ellipsis. Case cites within cases are generally omitted without indication by ellipsis, unless the case cite supports a quote in the text or is otherwise important for the student's understanding. When a case cite within a case is included, the information following the case name is sometimes omitted. An ellipsis is used to show the omission of text in a paragraph. If the text that is omitted starts within a paragraph and extends to include another paragraph or paragraphs, the ellipsis appears only in the paragraph where the omission begins. If the text that is omitted starts at the beginning of a paragraph and extends to include part of another paragraph, the ellipsis appears only in the paragraph where the omission ends. Dates are sometimes given according to the Islamic calendar, which started in the moon year in which the prophet Muhammad immigrated from Mecca to Medina. The Islamic dates are denoted by an H. When dates from both the Islamic and Gregorian calendars are used, they are separated by a slash.

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