Table 3 Labour-force participation

| Country | Women's share of adult labour force | |
|---|---|---|
| | 1970 % | 1995 % |
| Brunei | 18 | 34 |
| Bahrain | 5 | 19 |
| United Arab Emirates | 4 | 13 |
| Kuwait | 8 | 31 |
| Qatar | 4 | 13 |
| Malaysia | 30 | 37 |
| Libya | 16 | 21 |
| Lebanon | 18 | 28 |
| Saudi Arabia | 5 | 13 |
| Oman | 6 | 14 |
| Iran | 18 | 24 |
| Syria | 21 | 25 |
| Algeria | 19 | 24 |
| Tunisia | 24 | 30 |
| Jordan | 14 | 21 |
| Indonesia | 30 | 40 |
| Egypt | 24 | 29 |
| Morocco | 29 | 34 |
| Iraq | 16 | 18 |
| Pakistan | 21 | 26 |
| Bangladesh | 40 | 42 |
| Mauritania | 46 | 44 |
| Yemen | 25 | 27 |
| Sudan | 26 | 28 |

(UNDP, *Human Development Report*, 164—5)
Figures for Afghanistan and Djibouti not available.

# Is Having a Personal Law System a Solution? Towards a Supramodern Law

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## Introduction

The notion 'local' is more complex than earlier sharp distinctions between, for instance, the concept of 'great' and 'little' (or 'folk') traditions as a means of describing large-scale civilizations such as Islam.[1] However, it must be emphasized that the notion carries the misleading implication of something provincial, or an inferior and imperfect realization of a 'genuine' or 'high' culture of religious belief and practice. Although this misconceptualization is sometimes the case, it cannot be generalized, since the term 'local' refers to the concepts of culture, religion and law, which are not under the auspices of the state or the leading elite whether 'genuine', 'high' and 'perfect' or not. Local Muslim laws exist in England as well. It is now evident that there is a phenomenon of Muslim 'legal pluralism'[2] stemming from the existence of unofficial local Muslim laws operating in England. Expectations of assimilation have not become a reality and Muslims have not jettisoned their local religious laws.

[1] Dale F. Eickelman, 'The Study of Islam in Local Contexts', in Richard C. Martin (ed.), *Islam in Local Contexts* (Leiden: E. J. Brill, 1982), 1-16, at 2.

[2] Legal pluralism is an attribute of a social field and not of 'law' or of a 'legal system'. It is the presence in a social field of more than one legal order: John Griffiths, 'What is Legal Pluralism?' *Journal of Legal Pluralism*, 5, 24, 1986, 1-56, at 1-2, 8. The whole picture of law as it operates in society is composed of three levels: official law, unofficial laws and legal postulates (Masaji Chiba, *Legal Pluralism: Toward a General Theory through Japanese Legal Culture* (Tokyo: Tokai University Press,

*Journal for Islamic Studies*, Vol.20, 2000, pp. 99-124

In this article we endeavour to analyse the existence of unofficial Muslim family laws in England and demands for the application of Muslim personal law. As is known, some Muslim groups in England have been campaigning to establish a personal law system in order to regulate their family issues autonomously according to Muslim law.[3] We discuss the feasibility and probability of such a project by making reference to the socio-legal scholarship.

The experience of the Pakistani personal law system is discussed in order to understand how and whether a system of personal law ultimately solves the problems arising from the socio-legal reality of Muslim legal pluralism. The Pakistani experience shows that even if there is a personal law system, the persistent reality of Muslim legal pluralism will not disappear. Finally, after discussing the feasibility of a personal law system we try to develop the idea of supramodern legality.

This study endeavours to take a picture of the socio-legal sphere regarding the existence of unofficial Muslim legal pluralism without

1989) since law must be understood as a cultural construct and as enduring ideas, structures, processes and practices (written and unwritten, formal and informal, legalistic and less legalistic, local and national): June Starr, *Law as Metaphor: From Islamic Courts to the Palace of Justice* (New York: State University of New York Press, 1992), 174. Law exists at every level of society, sometimes as state law, sometimes as norms or rules of conduct, and is always infused with cultural and historical meanings: ibid., xix. Law is a process and is shaped by rules and a cultural logic which is labelled as legal postulate: see Masaji Chiba (ed.), *Asian Indigenous Law in Interaction with Received Law* (London and New York: Kegan Paul International, 1986). In the condition of legal pluralism, unofficial and official laws continuously and dynamically interact, the socio-legal sphere is not a normative vacuum and the operation of law is under the influence of legal postulates that always exist in the socio-legal sphere.

[3] The same debate is an issue in Canada as well: see Janet McLellan and Anthony H. Richmond, 'Multiculturalism in Crisis: A Postmodern Perspective on Canada', *Ethnic and Racial Studies*, 17, 4, 1994, 662-83. In Turkey, too, there is a vivid debate lingering on regarding the application of a Muslim family law: see in detail Ihsan Yilmaz, 'Dynamic Legal Pluralism and the Reconstruction of Unofficial Muslim Laws in England, Turkey and Pakistan' (Ph.D. thesis, SOAS, 1999), chap. 6.



entering into normative discussions from the point of view of Islamic jurisprudence and *fiqh*, as this falls within the ambit of another study. Determining whether such a project is desirable or necessary from an Islamic point of view is not the aim of this paper. What we do here is discuss the feasibility and possibility of the application of a Muslim personal law in England with special reference to socio-legal realities. In order to achieve this, we first give some background information on legal modernity in England. Then we discuss the challenge of legal pluralism to legal modernity with special emphasis on unofficial Muslim local laws.

## Legal modernity versus legal pluralism in England

Modernity is related to every dimension and aspect of life, and has substantial implications in the legal field as well. With the advent of the modern nation state, the development of a uniform legal system within national boundaries became the ultimate goal in the modern era. The theoretical foundations of this centralist and uniformist approach have roots in legal positivism, which is a theme of legal modernity. In legal modernity, the territorial nation state, rather than mankind, is adopted as the new point of reference for law. Laws are applied over wider spatial, ethnic, religious and class areas; personal law is no longer an issue at stake, territorial law replaces personal laws, special laws are replaced by general ones, customary ones by statute laws. Individual rights and responsibilities have taken the place of corporate rights and responsibilities. Secular motives and techniques have superseded religious sanctions and inspiration. Law making and application have become a professional area that operates in the name of central national power. This central national power tolerates no rivals by means of law to its sovereignty.

Legal modernity assumes the social space between legislator and subject implicitly to be a normative vacuum. It assumes that the legislator is more or less autonomous from the social context in which the law is to have its effects, that the subject of the rule is an atomistic individual, and that the legislator's command is uninfluenced by the

social medium. This conceptualization of law perceives it as a distinct, uniform, coherent, autonomous, exclusive and systematic hierarchical ordering of normative propositions.[4]

Assimilationist assumptions of development and modernity underlie such conceptualizations: until the heterogeneous structures have been melted into a homogeneous population which modern states are likely to enjoy, allowances can be made while unification remains the primary goal. Positivist and centralist understandings of legal modernity allow for no other forms of normative ordering with a hope for state-centred homogeneity. Legal modernity, in this sense, resembles "a machinery for the relentless imposition of prevailing central rules and procedures over all that is local and parochial and deviant".[5]

Coupled with legal centralist understanding, the uniformist idea of a legal system is a core part of the modern English legal system. The English legal system is the one and only official legal system, and other systems of law have *prima facie* no place in it except to the extent that the official legal system may recognize some of their rules. Yet, in contrast to purported uniformity and expected assimilation of the legal system, the challenge of postmodern legality is a fact and the diversity of laws is a reality in today's England. Socio-legal studies have shown that, in praxis, claims of legal modernity do not work fully and state law also has its limits.[6] Social engineering through law is a contentious matter. In multicultural situations, there are alternative normative orderings in society, and

[4] The hermeneutic approach has challenged the idea of coherence; see for instance the following by Clifford Geertz: *Islam Observed* (New Haven, CT: Yale University Press, 1968); *Interpretation of Cultures* (New York: Basic Books, 1973); *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983).

[5] Marc Galanter, 'The Modernization of Law', in Myron Weiner (ed.), *Modernization* (New York and London: Basic Books, 1966), 153-65, at 157.

[6] Concerning the limits of law, Allott's work provides a comprehensive and detailed analysis: Antony Allott, *The Limits of Law* (London: Butterworth, 1980).



resistance to official law is always an issue. As one writer strongly states, "the 'reach' of state power and state law is subject to specific conditions and always falls short of its ideological pretensions".[7] No law can, ultimately, compel action. All the law can do is "try to induce someone, by order or by persuasion or by suggestion, to a certain course of action".[8]

A body of research shows the limits to the capacity of law to transform social life.[9] For instance, Moore's semi-autonomous model tries to explain why new laws to direct change do not necessarily produce the anticipated consequences.[10] To her, the social space between legislator and subject is not a normative vacuum. Although the state has the power to use physical force, it does not mean that there are no other agencies and modes of inducing compliance.[11] Even though the formal legal institutions enjoy a kind of monopoly in terms of the legitimate use of power there are some other forms of effective coercion or effective inducement. Between the individual and the body politic there are various interposed social fields to which the individual belongs. These social fields have their own rules and the means of coercing or inducing compliance. Literature on legal pluralism suggests that in all communities a number of modes of normative ordering coexist with the official law. Local law, custom, ethnic minority laws and customs can be cited as some major factors that influence and impede the effectiveness of law in modern societies. These factors are the sources of multiple interpretations, incoherence, multiple

[7] Alan Hunt, 'Law and the Condensation of Power', *Law and Social Inquiry*, 17, 1, 1992, 57-62, at 59.

[8] Allott, *Limits of Law*, 45-6.

[9] See for example, Allott, *Limits of Law*.

[10] Sally Falk Moore, 'Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study', *Law and Society Review*, 7, 4, 1973, 719-46.

[11] Ibid., 723.

legal authorities, local interests and local concerns. These factors may also affect the degree of respect for the official lawmaker, other than being a source of justification for popular resistance. In short, official laws are not always absolutely effective and they alone cannot deal with social problems since they have a limited capacity. There are limits and resistance to legal modernity in the socio-legal sphere where the sovereignty of state law is not absolute and legal pluralism is a fact. The existence of unofficial Muslim laws and legal pluralism in England is a remarkable example of this reality.

## Postmodern Muslim legality in England

Islam is now the second-largest religion in Britain. Estimates of the number of British Muslims range between one million and two million.[12] Despite the diversity perceptions of Islam, it remains a common-identity symbol for those who wish to differentiate themselves from the dominant society.[13] Muslims in Britain have constructed an Islamic identity, which is facilitated by and expressed in particular patterns. Especially in family issues, Muslims have found an area in which to assert their autonomy in order to reconstruct their Islamic and customary identities and implement

[12] Farzana Shaikh, *Islam and Islamic Groups* (London: Longman Current Affairs, 1992), 261; Roger Ballard and V. Singh Kalra, *The Ethnic Dimension of the 1991 Census: A Preliminary Report* (Manchester: Census Microdata Unit, University of Manchester, 1993), 2; Ceri Peach and Gunther Glebe, 'Muslim Minorities in Western Europe', *Ethnic and Racial Studies*, 18, 1, 1995, 26-45, at 35; Philip Lewis, *Islamic Britain: Religion, Politics and Identity among Muslims* (London: I. B. Tauris, 1994), 14; Muhammed Ibrahim Qureshi, *World Muslim Minorities* (Islamabad: World Muslim Congress, 1993), 342.

[13] W. A. Shadid and P. S. van Koningsveld, 'Blaming the System or Blaming the Victim? Structural Barriers Facing Muslims in Western Europe', in W. A. Shadid and P. S. van Koningsveld (eds.), *The Integration of Islam and Hinduism in Western Europe* (Kampen: Kok Pharos Publishing, 1991), 2-21, at 17.



their family law in the diaspora.[14] They have not simply abandoned their family law as many expected them to do.[15] A survey conducted in 1989 showed that in the event of conflict between Muslim law and English law, 66 per cent of Muslims would follow the former.[16]

Since British Muslims are not evenly distributed across the country, the dilution of the social, religious and cultural characteristics of the community is far from possible.[17] The Muslim community in Britain has set up an internal regulatory framework to settle disputes. They have tended to avoid officialdom, and usually keep their family matters out of the hands of the courts. There are many understandable reasons for this situation if we look at the issue from the Muslim perspective. First, many areas of Muslim law have traditionally and purposely been left to extra-judicial regulation. Second, in the eyes of many Muslims, "the secular authority of western law may lack legitimacy and moral standing to deal with any intricate matter of obligations that may arise in the context of a personal law system".[18] Third, because of concerns of *ʿizzat* (honour), they do not want to wash their dirty linen in public. The fourth reason is the lack of response and recognition from the official legal system. The state's hesitation to recognize their Muslim

[14] Iqbal Wahhab, *Muslims in Britain. Profile of a Community* (London: Runnymede Trust, 1989) 7; Roger Ballard, 'Introduction: The Emergence of Desh Pardesh', in Roger Ballard (ed.), *Desh Pardesh: The South Asian Experience in Britain* (London: Hurst and Co., 1994), 1-34, at 15.

[15] See now in detail David Pearl and Werner F. Menski, *Muslim Family Law*, 3rd edn (London: Sweet and Maxwell, 1998); Yilmaz, 'Dynamic Legal Pluralism'.

[16] Dilip Hiro, *Black British, White British: A History of Race Relations in Britain* (London: Grafton Books, 1991), 192; Sebastian M. Poulter, *Ethnicity, Law and Human Rights: The English Experience* (Oxford: Oxford University Press, 1998), 203.

[17] See Ballard, 'Introduction: The Emergence of Desh Pardesh', 15.

[18] Werner F. Menski, 'Asians in Britain and the Question of Adaptation to a New Legal Order: Asian Laws in Britain', in Milton Israel and Narendra Wagle (eds.), *Ethnicity, Identity, Migration: The South Asian Context* (Toronto: University of Toronto, 1993), 238-68, at 255.

identities in terms of law has led to poor communication between the community and the legal system. This has not only increased the number of problems the community encounters but also has engendered some negative feelings towards the legal system. These factors have paved the way for the reconstruction of unofficial Muslim laws in the country.

## Differential legal treatment: feelings of resentment and discrimination[19]

Due to the purported separation between state and religion in England there cannot be a question of Islam or any other religious community being recognized as a 'religion' in a legal sense. Religious affiliations are not registered at all and are not even the subject of inquiry during a census.[20] The Home Office refuses to consider introducing a law on religious discrimination.[21] Indeed, the official message is that religion does not matter for the law. However, this approach has caused many cultures to feel threatened, so they do all they can to prevent their members drifting away.[22] Muslim law as a religious law can have the status of moral but not legal rules, in civil as well as in public law. Muslims are therefore subject to the same rules as all other inhabitants of the country.

A major feature of the English legal system pertaining to the recognition of ethnic minority laws and customs is its piecemeal and *ad hoc* character. It does not have a uniform, systematic, coherent and objective system of recognition. For instance, it has not found it necessary to define 'customary law' as an abstract

[19] See now in detail Ihsan Yilmaz, 'Muslim Law in Britain: Reflections in the Socio-legal Sphere and Differential Legal Treatment', *Journal of Muslim Minority Affairs*, 20, 2, 2000, 343-50.

[20] The state responded to the criticism and now, in the forthcoming 2001 census, the government is considering including a question regarding religious affiliation.

[21] See, for instance, several issues of *Q-News*.

[22] Andrew Bainham, 'Family Law in a Pluralistic Society', *Journal of Law and Society*, 22, 2, 1995, 234-47, at 242.



concept. Instead, it has reacted haphazardly to a wide range of customary values. This might easily cause differential treatment of the various ethnic minorities, which could undermine the respect for the lawmaker.

The state is willing to accept social, but not legal, pluralism. Thus, its desire for the maintenance or achievement of uniform legal standards is diametrically opposed to the religious and cultural diversity of the people. Obviously, this has put the burden of assimilation on Muslims and other minorities.

The view from within the minority Muslim community is therefore that the law and its personnel are biased and that the criteria for making exceptions and distinctions are not maturely reflected.[23] "The official approach", according to one observer, "is to tell 'the other' to put up with inferiority and differential treatment in the name of uniformity of law and equal treatment guarantees."[24] Muslims are told to adapt to British conditions instead of asking for recognition of Muslim law, and are reminded that their own law also allowed for "discrimination against certain people".[25] As a result, a long-standing dissatisfaction among members of the Muslim community is a reality. They feel "that the structures of white British society are, at best, blind to the existence of a Muslim community in the country".[26] Muslims argue that they "are among the very worst-off group, and yet, unlike religious groups like Sikhs and Jews, they are not deemed to be an ethnic group and so are outside

[23] An examination of a few issues of, say, *Q-News* would easily reveal that resentment. See, for example, *Q-News*, June 1997, 1ŏ20 November 1997.

[24] Werner F. Menski, 'Law, Religion and South Asians' (London: SOAS, 1996 (unpublished paper)), 1-33, at 16.

[25] Werner F. Menski, 'Ethnicity, Discrimination and Human Rights' (London: SOAS, 1997 (unpublished paper)), 1-10, at 6; The Runnymede Trust, *Islamaphobia* (London: Runnymede Trust, 1997). See also the *Daily Telegraph*, 30 July 1997, 1.

[26] Jorgen S. Nielsen, 'Muslims in Britain: Searching for an Identity', *New Community*, 13, 3, 1985, 384-94, at 384.

the terms of existing anti-discrimination legislation".[27] Muslim writers frequently compare their position to the legal position of Jews and Sikhs.[28] The Runnymede Trust published a detailed research report that gave impetus to the relatively new term 'Islamaphobia'.[29] In this study, the Commission on British Muslims and Islamaphobia states that it is a serious anomaly, in view of case law to the effect that Jews and Sikhs are fully protected under the Race Relations Act but that no such protection exists for members of other faiths.[30]

Sebastian Poulter, a leading scholar in the field, observed that "whereas in the 18th century the privileges accorded to Jews and Quakers reflected religious toleration, in our age they symbolise religious discrimination".[31] To him, there can surely be no justification for preserving what has now become a rather embarrassing historical anomaly. There is no good reason why some religious minorities should be exempt from the normal legal requirements, but not others. It is noteworthy in this argument that although he correctly diagnoses the problem of discrimination at the expense of Muslims, his recommendation is not the extension

[27] Tariq Modood, *Racial Equality. Colour, Culture and Justice* (London: Institute for Public Policy Research, 1994), 14; United Kingdom Action Committee of Islamic Affairs (UKACIA), *Muslims and the Law in Multi-faith Britain: Need for Reform. Memorandum Submitted by the UKACIA* (London: UKACIA, 1993); Jan Rath et al., 'The Recognition and Institutionalization of Islam in Belgium, Great Britain and the Netherlands', *New Community*, 18, 1, 1991, 101-14, at 106. For a number of Muslim responses, see Tariq Modood, 'Muslim Views on Religious Identity and Racial Equality', *New Community*, 13, 3, 1993, 513-19. See also *Q-News*, June 1997.

[28] See for example Modood, 'Muslim Views', 516, for a comparison between Asian Muslims and Hindus and Sikhs; see Jean Ellis, 'Local Government and Community Needs: A Case Study of Muslims in Coventry', *New Community*, 17, 3, 1991, 359-76.

[29] Runnymede Trust, *Islamaphobia.*

[30] Cited in *Q-News*, June 1997.

[31] Poulter, *Ethnicity*, 205.



of these exemptions to the new minorities, but rather that all exemptions be abrogated.

As a result of such unequal application of legal principles, there has been widespread alienation from the state among members of ethnic minorities in Britain. Muslims in particular, but also others, feel strongly "that the human rights of non-white Britons are somehow less valued than those of whites".[32] They seem to be "disappointed about such obvious discrimination by the law itself".[33] In this context, the demand for the incorporation of Muslim personal law into the English legal system is one of the responses of the British Muslim community to counterbalance this discrimination.

## Demands for the incorporation of Muslim personal law into English law

Muslims do not only wish to be regulated by the principles of Islamic law when they are living in a non-Muslim state, they also seek to formalize such an arrangement within the state's own legal system. Although even in the Islamic world the principles of Muslim law are not always applied in total, Muslim family law usually prevails, in one form or another. In most Muslim countries the state has regulated the public or general law, but family law has remained almost untouched. During colonial periods, colonial Western powers more or less followed the same strategy.[34] Thus, to them, it is natural to "expect the application of Muslim family law, even from a non-Muslim government".[35] Muslims view and argue the issue principally in terms of religious freedom, and expect Islam's past

[32] Menski, 'Ethnicity', 7.

[33] Ibid., 6.

[34] P. S. van Koningsveld, 'Islamic Policies of the Western Colonial Powers: Their Relevance in the European Union in the Post-colonial Era', Centre for South Asian Studies annual lecture, 6 November 1996 (London: SOAS, 1996).

[35] Johannes J. G. Jansen, 'Islam and Civil Rights in the Netherlands', in Bernard Lewis and Dominique Schnapper (eds.), *Muslims in Europe* (London and New York: Pinter, 1994), 39-53, at 42.

respect for Jewish and Christian minorities in Muslim lands to be reciprocated in the West.

During the 1970s, the Union of Muslim Organizations of the UK and Eire held a number of meetings which culminated in a formal resolution to seek official recognition of a separate system of Muslim family law, which would automatically be applicable to British Muslims.[36] A proposal along these lines was subsequently submitted to various government ministers, with a view to having it placed before parliament for enactment. The demand was repeated in a meeting with Home Office ministers in 1989[37] and reiterated publicly in 1996.[38]

The claim to a separate Muslim family law arises mainly from five different causes. First, family values among Muslims as in many oriental cultures are held in very high esteem. This is most likely to be so when religious belief, legal principle and family relations are closely intertwined, as they are in Muslim culture. Second, other aspects of Muslim law have given way to Western-inspired laws in many Muslim-majority countries so Muslim family law has come to be seen as even more precious. Third, Muslims are familiar with the *millet* system, which is of pluralistic nature and permits different

[36] See also Modood, 'Muslim Views', 515; in 1984, a Muslim charter was produced which demanded that the *sharīʿa* should be given a place in personal law: see Daniḍle Joly, *Britannia's Crescent: Making a Place for Muslims in British Society* (Aldershot: Avebury, 1995), 15. In Canada, Syed Mumtaz Ali and Enab Whitehouse ('The Reconstruction of the Constitution and the Case for Muslim Personal Law in Canada', *Journal of the Institute of Muslim Minority Affairs*, 13, 1, 1992, 156-72) made a proposal for a Muslim personal law system, presenting Muslim law as a codified whole, rather than several sometimes conflicting systems. See also Patricia Kelly, 'Muslim Canadians, Immigration Policy and Community Development in the 1991 Census', *Islam and Christian-Muslim Relations*, 9, 1, 1998, 83-102, at 91.

[37] Hiro, *Black British, White British*, 192.

[38] Poulter, *Ethnicity*, 202. See *British Muslims Monthly Survey*, December 1996 (Birmingham: CSIS-MR), 15-16.



family laws to operate within an overall political jurisdiction.[39] Fourth, many Muslims perceive the issue in terms of religious freedom and claim religious toleration towards other monotheistic faiths. Fifth, finding themselves surrounded by teenage love affairs and pregnancies, easy abortion, prostitution, pornography, child abuse, marital breakdowns, extra-marital cohabitation and affairs, children born outside wedlock etc., many Muslims have come to believe that a sensible method of avoiding 'contamination' would be to operate within a system of Muslim personal law. However,

[39] The *millet* system is a kind of weak legal pluralism 'where the sub-cultures or subsystems have equal status or legitimacy' (L. M. Friedman, *Law and Society: An Introduction* (Englewood Cliffs: Prentice Hall, 1977), 71). In history, it is possible to find some examples of this legal pluralism. It was an ancient, premodern system in the Indian subcontinent (Werner F. Menski, 'Angrezi Sharia: Plural Arrangements in Family Law by Muslims in Britain' (London: SOAS, 1993 (unpublished paper), 1-10, 12)). It was applied by the Ottomans for almost 600 years until 1922. Here, since *sharīʿa* was the Muslim religious law, it was not applied to non-Muslims except in cases where non-Muslims came into litigation with Muslims or agreed to be judged by *sharīʿa* when their own religious laws were insufficient. It was therefore left to the non-Muslims to use their own laws and institutions to regulate behaviour and conflicts under the leaders of their religion. Division of society into communities along religious lines formed the *millet* (nation) system. Different denominations dealt with the ruling power through their *millet* leaders. The division of subjects along religious lines was not unique to the Ottomans. This system was also customary among the Romans, the medieval imperial states of Europe and the Middle East (Stanford Shaw, *History of the Ottoman Empire and Modern Turkey*, vol. I, *Empire of the Gazis: The Rise and Decline* (Cambridge: Cambridge University Press, 1976), 151). The Ottomans institutionalized and regulated it, making it a part of the structure of state as well as society. It was the Muslim religious law that determined the primary basis by which the subjects of the sulṭān were divided and organized to carry out their social functions. In this system, it was left to the non-Muslims to use their own laws and institutions to regulate behaviour and conflicts under leaders of religion (Friedman, *Law and Society*, 71). Later, this system came into prominence in India as an officially recognized way of dealing with diversity, first under Muslim rule, then under the British. It has been argued that such mixed legal systems take explicit account of minorities (Werner F. Menski, 'Uniformity of Laws in India and England', *Journal of Law and Society* (Peshawar), 7, 11, 1988, 11-26). Pakistan, as a result, has that type of legal system which is now called a personal law system.

the list does not end here. One can add some other causes, such as the fact that many Muslims see no reason why the *millet* system was not given statutory force by the British parliament, especially as this was the case during colonial times in the Indian subcontinent.[40] Last but not least is the feeling that there is discrimination towards Muslims.

Although such demands have been made intermittently, they have been strongly rejected. They were "perceived as threatening an established order and a well-functioning system of legal regulation, have led to an essentially defensive, reactionary response".[41] We shall now elaborate on the response of the legal system and socio-legal scholarship on this issue. Then we will draw some comparisons from the Pakistani experience of personal law system.

## The response of official law and legal scholarship

The official legal system presents some justification in rejecting the incorporation of Muslim family law into the official legal system.[42] First of all, the incorporation of a personal law into existing law would go against the very notion of a uniform legal system. It is widely believed that it would be impossible in Britain because the law covers everyone, even nationals of other states, in all areas. However, this uniformity claim is not wholly accurate. Thus this would seem not to be an adequate reason by itself when one takes into account the privileges and exemptions granted to other minorities.[43]

[40] Van Koningsveld ('Islamic Policies') raised the same argument in a well-received lecture at SOAS in November 1996.

[41] Menski, 'Asians in Britain', 256.

[42] Sebastian M. Poulter, 'The Claim to a Separate Islamic System of Personal Law for British Muslims', in Chibli Mallat and Jane Connors (eds.), *Islamic Family Law* (London, Dordrecht and Boston: Graham - Trotman, 1990), 147-66, at 158.

[43] See in detail Sebastian M. Poulter, *English Law and Ethnic Minority Customs* (London: Butterworth, 1986); Carolyn Hamilton, *Family, Law and Religion* (London: Sweet and Maxwell, 1995).



A second reason might be the practical difficulty in applying Muslim family law since there are variations in Muslim family laws based on a diversity of interpretations. It is not clear which Muslim law would be applied. Third is the question of interpretation. Who will interpret Muslim law? If it is an English court, how can an English judge correctly interpret Muslim law? If a Muslim court fulfils this task, would the different groups of Muslims in Britain agree about the interpretation of Muslim law? Would cases be decided by the existing civil courts or by a specially established religious court staffed exclusively by Muslims? Poulter asserts that civil courts would hardly be legitimate in the eyes of Muslims, and the plurality of Muslim views as well as their non-uniform structure would prevent the latter option. According to Poulter, the fourth difficulty stems from the human rights dimension: Muslim family law is seen as contradictory to fundamental human rights. In short, to Poulter there is no justification for acceding to the claim for a separate system of Muslim personal law. However, statesĭ non-recognition or non-awareness of the unofficial Muslim law perpetuates some situations to the disadvantage of those whom states are supposed to protect, a predicament confounded by failure to realize the law in praxis, as in the case of 'limping' marriages.[44]

[44] Zaki Badawi succinctly summarizes the problem of 'limping' marriages among Muslims. The scenario is as follows. A woman seeks and obtains a divorce in the courts. She therefore becomes eligible for remarriage in accordance with civil law. But if her husband has not given her a *talaq* (repudiation), which is the prerogative of the husband within an ordinary Muslim contract of marriage, then one has the anomaly that the woman becomes unmarried according to the civil law, but still remains married according to the *sharīʿa*. The man could remarry according to both the civil law and *sharīʿa*, since it is open to him to have a polygamous marriage: Zaki Badawi, 'Muslim Justice in a Secular State', in Michael King (ed.), *God's Law Versus State Law: The Construction of Islamic Identity in Western Europe* (London: Grey Seal, 1955), 73-80. The same problem also occurs among Jews (see in detail Bernard Berkovits, 'Get and Talaq in English Law: Reflections on Law and Policy', in Mallat and Connors (eds.), *Islamic Family Law*, 119-46; Alan Reed, 'Extra-judicial Divorces since Berkovits', *Family Law*, 26, 1996, 100-3.

Another scholar, Anthony Bradney, argues that in the area of personal law individual autonomy and complete freedom of religion are incompatible.[45] Although in such instances the superiority of individual autonomy can justify religious discrimination, in other cases legal rules can facilitate the wishes of individuals whose religious demands do not involve disturbing the autonomy of others. Thus, for example, if believers can elect a personal law system then it is entirely compatible with the demands of personal autonomy. Yet Bradney stresses that personal law systems raise many practical questions, such as: when does one decide to opt into a particular system? Is that definition final? Should the personal law system be totally unconstrained by the state?[46]

Some other legal scholars also suggest that a separate law is not necessary. They emphasize that the *millet* system is not without problems, as many cases in India have shown.[47] It has also been argued that a unified system of law has in the past helped to create a more cohesive society.[48] In this context we will briefly analyse the socio-legal reality in Pakistan regarding the application of the *millet* or personal law system and its problems.

## Lessons from Pakistan

Pakistan is one of the laboratories for the contemporary application of Islamic laws, containing many examples of the interaction of religious and local customary traditions, and is extremely instructive about the role of the modern state *vis-a-vis* the scope and problems of Islamic legal reform. Islam is the foundation of state legitimacy in Pakistan and the state law is used as an instrument to ensure that

[45] Anthony Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993), 52.

[46] Ibid., 58.

[47] Hamilton, *Family, Law and Religion*, 91.

[48] Poulter, 'The Claim', 158; G. Speelman (ed.), *Religion and State in Europe: Two Seminar Reports*, CSIC Papers no. 4. (Birmingham: CSIC-MR, 1991), 7.



the purposes of the modern Muslim nation-state ideology are served. Modern Pakistani law, despite its constitutionally anchored commitment to observe the injunctions of Islam, operates on the basis that the state law is the only legal authority. In other words, it follows the Western model of political ideology which is characterized by the paradigm of legal modernity in the normative realm but tries to match this model with Islamic concepts.[49]

The state law claims superior control, while acknowledging the presence of religious laws. In matters relating to marriage, divorce, dowry, inheritance, succession and family relationships, the system of personal law is applied in Pakistan. Muslim, Christian, Hindu, Sikh, Buddhist and Parsi family laws are also applied in the country.[50]

Legal reforms to the personal laws in South Asia have always focused on the laws of the majority, while minority laws have been almost totally ignored, although for different reasons.[51] For instance, unlimited polygamy under Hindu law is still allowed in Pakistan, although it is forbidden in India.[52] Conversely, Indian Muslims may marry up to four wives in accordance with Muslim law, while Pakistani law, in section 6 of the Muslim Family Law Ordinance (MFLO) of 1961, made attempts to provide some legal controls.

In the Pakistani case, although there is a quest for modernity, traditional Muslim law has not been completely abandoned. Rather, there has been an attempt by the state to reform, limit, regulate and

[49] Speelman, *Religion and State*, 20.

[50] The personal law system in the country is a natural continuation of South Asian personal laws, akin to the *millet* system which has been applied in Muslim countries for centuries.

[51] Approximately 97 per cent of the population of Pakistan are Muslims. Most of them (over 80 per cent) are Sunnī: Munir D. Ahmed, 'Pakistan: The Dream of an Islamic State', in Carlo Caldarola (ed.), *Religion and Societies: Asia and the Middle East* (Berlin: Mouton, 1982), 261-88, at 274.

[52] In the same vein, Muslim polygamy is not restricted by statute in India, whereas the state has tried to restrict and control it in Pakistan.

restrict Muslim law. Regarding this issue, there has been a crucial ongoing debate between traditionalists and modernists.[53] According to the traditionalists, these reforms militate against the basic tenets of Islam.[54] This has led to a conflict between official and unofficial laws in the daily lives of Muslims. Recent research confirms that these reform attempts by the state have led to intense clashes between two types of Muslim personal law, the local Muslim law rules and the state-sponsored codified Muslim personal law.[55]

The official law is always perceived as being different from the immutable religious law and is not accepted as the just law.[56] Muslims feel that the state legal system has co-opted them, but does not truly include them.[57] This in turn has led to ineffectiveness in the official law and a gap between state law and popular practice. Patterns of diversified and plural practices have persisted and remain active.[58]

Thus, the reforms of the MFLO have failed to a certain extent. There are several reasons for this. First, some scholars list the failure

[53] John J. Donohue and John L. Esposito (eds.), *Islam in Transition. Muslim Perspectives* (New York and Oxford: Oxford University Press, 1982), 200; Rubya Mehdi, *The Islamization of the Law in Pakistan* (Richmond: Curzon Press, 1994), 157; for a Ph.D. thesis on this see Rehana Firdous, 'Discussions of Polygamy and Divorce by Muslim Modernists in South Asia, with Special Reference to their Treatment of Qur'ān and Sunna' (SOAS, 1990).

[54] See for instance Tanzilur Rahman, *Muslim Family Laws Ordinance: Islamic and Social Survey* (Karachi: Royal Book Company, 1997).

[55] Pearl and Menski, *Muslim Family Law*, 48.

[56] To that effect see remarkably S. Abul A'la Maududi, *The Islamic Law and Constitution*, 2nd edn, trans. Khurshid Ahmad (Lahore: Islamic Publications, 1960), 100. See now in detail Ihsan Yilmaz, 'Another "Limits of Law" Phenomenon: Reform in Muslim Family Law and Civil Disobedience in Pakistan', *Die Welt des Islams* (forthcoming).

[57] Gregory C. Kozlowski, 'Islamic Law in Contemporary South Asia', *Current Affairs*, 41, 1998, 68-88, at 87.

[58] Mehdi, *Islamization*, 8.



of democracy in the country.[59] Second, although some acts are conceived as illegal they are neither void nor invalid.[60] Third, the *ad hoc* nature of the reforms and lack of systematic Islamic rationale create serious problems.[61] Fourth, the apparent discontinuity of the reforms within traditional Muslim law subjects the law to heavy fire from the traditionalists.[62] Thus, ordinary people tend to be very sceptical about 'Islamization' although they are not sceptical about Islam itself, which continues to be the source of legitimization. They view themselves as Muslim but in terms different to those held by the state. In that sense, non-observance also stems from the lack of awareness of illiterate rural people, who constitute the overwhelming majority of the population. Rural women are the most disadvantaged.[63]

[59] See for instance Rashida Patel, *Women and Law in Pakistan* (Karachi: Faiza Publishers, 1979), 92; Mehdi, *Islamization*, 198.

[60] Mehdi, *Islamization*, 198; David Pearl, 'The Impact of the Muslim Family Laws Ordinance (1961) in Quetta (Baluchistan) Pakistan', *Journal of the Indian Law Institute*, 13, 1971, 561-9, at 567-8.

[61] John L. Esposito, 'Perspectives on Islamic Law Reform: The Case of Pakistan', *New York University Journal of International Law and Politics*, 13, 2, 1980, 217-45, at 238; see now also Kozlowski, 'Islamic Law'.

[62] Esposito, 'Perspectives', 238; Tanzilur Rahman, *Muslim Family Laws*, 295.

[63] The literature on the ignorance and illiteracy is vast: for some examples, see Samar Fatima Saifi, 'A Study of the Status of Women in Islamic Law and Society with Special Reference to Pakistan' (Ph.D. thesis, University of Durham, 1980); Kozlowski, 'Islamic Law', 83; Ahmed, 'Pakistan'; Ayesha Jalal, 'The Convenience of Subservience: Women and the State in Pakistan', in Deniz Kandiyoti (ed.), *Women, Islam and the State* (Basingstoke: Macmillan, 1991), 77-114, at 77; Rashida Patel, *Socio-economic Political Status and Women and Law in Pakistan* (Karachi: Faiza Publishers, 1991); S. Parvez Wakil, 'Marriage and the Family in Pakistan', in Man Singh Das (ed.), *The Family in the Muslim World* (New Delhi: M. D. Publications, 1991), 42-77; Ahmed Ali et al., 'Sociological Difficulties in the Implementation of Legislation Pertaining to Women in Pakistan', *Journal of Law and Society*, 9, 14, 1990, 9-31; Iqbal Alam and Mehtab S. Karim, 'Marriage Patterns, Marital Dissolution, and Remarriage', in Nasra M. Shah (ed.), *Pakistani Women. A Socio-economic and Demographic Profile* (Islamabad and Honolulu: Pakistan Institute of Development Economics and East-West Institute, 1986), 87-106; Mehdi, *Islamization*. For government publications admitting the reality, see Ministry of

The fifth problem in the system is the diversity of opinion concerning family law issues, which presents a fragmented structure of the legal system. A sixth point is that it is widely believed that the introduction of the official law is for the poor, and that the rich always escape from its application.[64] A seventh issue is that, due to the above-mentioned ignorance and low literacy level, women by and large are not aware of their rights, and even where they are they tend not to have the courage or the socio-economic position to fight legal battles with close relatives in a highly patriarchal society.[65]

In conclusion, state attempts to reform Muslim family law have been challenged by the local, unofficial Muslim law. Now, despite the state's attempts, there is still more than one type of legal norm governing Muslim family law issues in Pakistan, as has always been the case. The Pakistani case is instructive in the sense that it is irrelevant whether or not the state has a personal law system. It also shows most clearly that whether or not one introduces a personal law system, legal diversity and legal pluralism will not be overcome.

In short, as far as the application of Muslim personal law in England is concerned, it seems clear that for the above-mentioned reasons, and many others not explicitly expressed, a separate Muslim personal law cannot and will not be introduced in England. In short, it does not seem plausible in the foreseeable future that demanding the application of Muslim personal law in England would prove successful. Moreover, the Pakistani experience shows clearly that having a personal system will not ultimately solve the problems.

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Planning and Development Government of Pakistan, *Pakistan 2010. A Vision for Knowledge-led, Just, Tolerant, Enterprising and Prosperous Society* (Islamabad: MPDGP, 1998); Government of Pakistan Ministry of Education, *National Education Policy, 1998-2010* (Islamabad: GPME, 1998).

[64] Abdur Rashid, 'The Islamization of Law in Pakistan with Special Reference to the Status of Women' (Ph.D. thesis, SOAS, 1987), 314.

[65] Ali et al., 'Sociological Difficulties', 28.



In the view of Poulter, the wisest strategy would be to retain the present policy of adapting an essentially monistic structure on an *ad hoc* basis so that the reasonable religious and cultural needs of the ethnic minority communities are satisfied. He argues that the English legal provision is adequate for Muslims and their families.[66] Poulter also states that Muslims should hope that English law goes through regular updating procedures and that the underlying spirit of the fundamentals of the *sharīʿa* are increasingly embodied in its provisions.[67] In this regard Muslim organizations must be encouraged to become fully involved in the general legal reform process. They should avoid grandiose schemes and address more mundane local initiatives that have a greater potential for achieving practical results.[68] It is also recommended that legal professionals serving in family courts should receive training in the religions and cultures of the ethnic minorities of the country and that expert lay members should be included in the court hearings.[69] On the issue of the incorporation of Muslim family law into English law, Pearl and Menski state that the demand for an officially recognized Muslim personal law has not been fully supported by many Muslims.[70] In this they concur with Nielsen's earlier observation that "soundings among ordinary Muslims seem to suggest little active support for the idea".[71]

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[66] Poulter, *Ethnicity*, 204.

[67] Ibid., 233.

[68] Ibid., 233-4.

[69] Jorgen S. Nielsen, *Emerging Claims of Muslim Populations in Matters of Family Law in Europe*, CSIC Papers no. 10 (Birmingham: CSIC-MR, 1993), 8.

[70] Pearl and Menski, *Muslim Family Law*, 77.

[71] Jorgen S. Nielsen, *Muslims in Western Europe* (Edinburgh: Edinburgh University Press, 1992), 53.

## Concluding analysis: towards a supramodern law?

If the application of a personal law system is not the solution given the possibility of dynamic Muslim legal pluralism, what are the options for the future of legal systems and legal pluralism in postmodern conditions? The postmodern legal challenge entails the resurgence of local laws, dynamic legal pluralism, and the continuous construction of super-hybrid unofficial laws, all of which show the limits of modern state law. An escape from this socio-legal cul-de-sac requires a transcendence of the status quo and the challenges posed by postmodern legality. The new conceptualization of a legal system needs to be elastic, not rigid, in order to come to grips with reality, which is innovative and not anachronistic. It also needs to transcend internal fragmentation and the loss of autonomy. Otherwise, where the official law does not deal with reality, it would be unable to claim the loyalty of many Muslims. The overall effect of the official law's ostrich-like attitude towards 'the facts' on the ground would be to bring the secular law into contempt and will only strengthen unofficial laws.

Four different responses to the reality of postmodern legality are possible. First, states could continue to apply legal modernity in the form of a uniform legal system. Second, personal law systems could be adopted. Third, an ideal, utopian, postmodern legality could be advocated. Fourth, a paradigmatic shift in the understanding of legal systems could be envisaged. We now need to look at these alternatives in more detail.

First, the paradigm of legal modernity has some flaws and is far from meeting the demands of postmodern legality, which causes a number of problems, especially with regard to human rights, freedom of religion, women and children. As a second option, still in the legal modernity paradigm, the application of a personal law system, as discussed above, is not a perfect solution either. Even where one has a personal law system, there will always be problems and conflicts between different types of laws. Thus, having a personal law system is not a perfect response to the problems posed by postmodern legality. The key difficulties are still there.



Third, the ideal situation would be that the state deals with general policies, security and international politics, and leaves the private and family realm to its communities. The state and its law must be in the position of a referee between different types of laws in the socio-legal sphere, where skilful legal navigation is paramount to ensure the harmonious interaction of different laws. However, postmodern legality cannot be a viable basis for a sound legal system. It leads to nihilism and anarchy, because it is relativist. For the foreseeable future this option seems far from practical due to the heavy influences of modernity and the modern state paradigm. Having said all this, one should find a feasible and viable option, if not an ideal one, that would match the demands of postmodern reality and modern laws.

Last but not least, we envisage a supramodern legality as a partial, if not ideal, solution. History has shown that the very existence of states is almost inevitable. Human beings could not have found another viable option to preserve communal life. Thus, the problems of legal organization have to be discussed within the context of the state paradigm. However, that condition does not mean that one has to accept the presumptions of legal modernity. Dynamic legal pluralism as a postmodern phenomenon is here to stay. On the other hand, if the state is an apparatus of society, and the *raison d'etre* of the state is to serve society, then state law has to be realistic, taking cognizance of the fact of postmodern legal conditions. Only in this way would state law be able to sustain its credibility.

The state's move, whether national or multi-ethnic, multicultural or multi-national, should be focused on developing a new supramodern response. It cannot be a postmodern response, as a postmodern understanding does not involve the idea of a superior state law. I offer the term 'supramodern legality' to mean a legality of the supra-contemporary situation. Supramodernity does not have to be directly linked to modernity, which is an accidental result of

unique developments in the Western world. That perspective could be sustained in all eras - premodern, modern and postmodern. It is not a result of historical developments. From a higher point of view, that which is supramodern, the socio-legal sphere could still be seen as unified. But the perspective to be taken is very important. Differences could be seen as embroideries on a carpet or different colourful stones in a mosaic. Supramodern understanding is neither a full defence of modernity nor a complete acceptance of postmodernity, but a new approach that recognizes the significance of the points raised by the debates. It argues for an integrated theory that envisages the harmonious incorporation of different laws; the state law is open to such legal pluralism and continues to act as a referee in the process. To offer a standard and monolithic model of law to meet the challenges of social and cultural pluralism in a postmodern condition does not seem feasible for too long. Law is culture-specific and also situation-specific. Thus, its operation would differ from one context to another. All we can do here is to offer a new, if not concrete, understanding of a theoretical legal system for the future dynamic legally pluralistic context. Law is a very complicated process. Speculation about the future in the socio-legal realm is not an easy task. Thus, the state should constantly check the socio-legal sphere and adapt its law to the demands of reality. In other words, state law must behave like a chameleon, adapting itself to its changing surroundings.[72] This article has tried to argue that law is a socio-cultural construct. Not only would the specific conditions of the socio-legal situation change from country to country, but also a possible supramodern model would be different from one country to another. Put differently, supramodernity is a new socio-legal mentality not a concrete model and it is flexible

[72] Santos uses the phrase 'law as chameleon' to point out the ability of the law to adapt to changing milieu: Bonaventura de Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law', *Journal of Law and Society*, 14, 3, 1987, 279-302.



enough to adapt itself to changing locality. It is this flexibility that could make it 'universal'.

In this view, an umbrella law to prevent postmodern hyperfragmentation of the socio-legal sphere is needed. It does not matter whether the legal system is personal or not. It could be a uniform legal system but not homogeneous, in that it provides exceptions for local laws but still constantly monitors the living reality of dynamic legal pluralism, and makes proper adjustments. A supramodern legal system is still formally a uniform legal system within boundaries of a state. Thus it does not lead to anarchy or nihilism as in the postmodern theory, but recognizes diversity as part of the mosaic. 'Unity within diversity' is flagged in this understanding with themes of tolerance, multiculturalism and postmodernity.[73]

Supramodern legality admits postmodern legality and constantly adjusts itself to the living reality. Otherwise, legal pluralism, like legal modernity, could be repressive to women and children if the state purports to be unaware of factual situations in the socio-legal sphere. The most viable option is not to disregard dynamic legal pluralism but rather to recognize it and to act in accordance with this perpetual fact: otherwise, the vulnerable members of society will continue to suffer. The problem is not whether to have a personal law system, but to have a sensitive legal system that constantly monitors the socio-legal sphere and develops to protect the members of society.

[73] In fact, the English legal system is a candidate for this kind of supramodern legality with its tradition of flexibility, adjustment to changing conditions and tolerance of other cultures. Yet as we noted above, it is still not an example of the supramodern model as there is no mechanism to monitor the socio-legal sphere and certain objective criteria to take account of different local laws. Moreover, English law makes its adjustments in an *ad hoc* fashion with the hope of the demise of local laws and success of homogeneity. It is also relatively slow to respond to the challenges of socio-legal reality, as we have seen in the cases of Muslims' legal discrimination and limping marriages.

Supramodern mentality and mechanisms take into account the demands and necessities of people from all backgrounds, especially with regard to culture, religion and ethnicity. This method should not be enforced in an *ad hoc* character in the hope of the demise of all unofficial laws, but should try to strike a delicate balance between the demands of the socio-cultural legal sphere and the political stance of the state.

Acknowledgement:

I am grateful to Dr Shamil Jeppie, first for making me aware of the discussions in the South African context about Muslim family law as well as encouraging me to write this paper and for his comments and criticisms on an earlier draft.

# Documents / Notes

# Minorities in Islamic History: An Analytical Study of Four Documents

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The usage of the term "minority" as in Muslim minorities is of quite recent currency. *The Oxford English Dictionary* notes its usage in four senses: (1) The condition or fact of being smaller, inferior, or subordinate; (2) the state of being minor or under age; (3) the smaller number or part of something, opposed to "majority"; and (4) the number of votes cast for or by a smaller party, as opposed to the majority. Essentially, therefore, "minority" is a relative term, as opposed to "majority". Most probably the third usage is more appropriate for our context. Among the examples that the *Dictionary* gives, two are relevant to our discussion. Referring to his ideas at a certain point, Edmund Burke (1789) remarked: "We are a minority, but then we are a very large minority." In 1828, MaCaulay wrote, "Conspiracies and insurrections in which small minorities are engaged...".[1] In this usage, we can further note that the word "minority", in addition to meaning a smaller number, also denotes a sense of 'community'.

The above-mentioned semantic vagueness also pervades the legal usage of the term "minority". In international law, the term has not been clearly defined. Its various usages stress two semantic elements: smaller community and distinction from the dominant

[1] *The Oxford Compact English Dictionary* (Oxford: Oxford University Press, 1971), vol. I, 1805.