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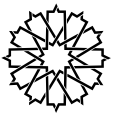

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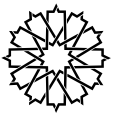


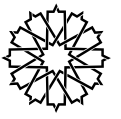
Preface

This book is an English translation of *Šerijatski sudovi u Jugoslaviji 1918-1941* (Sarajevo: Vrhovno islamsko starješinstvo, 1986). That book was based upon the text of my MA thesis of the same title, which was defended at the Faculty of Law of the University of Belgrade on 22 July 1985.

This book remains the only comprehensive study of how Islamic law was applied in interwar Yugoslavia written in Bosnian/Serbian/Croatian. It was written in socialist Yugoslavia and reflects the legal and historical scholarship of the time. The book has been translated without any major changes.

The issues discussed in the book are important for the history of Islamic law in a minority context as well as for the study of modern Islamic legal reform. In that sense, the English translation of this book hopes to bring the historical experience of the Muslims in the Western Balkans closer to the contemporary reader interested in Islam, law and minorities. In addition, this book shows that some of the issues debated at present about Muslims in Europe were being addressed in interwar Yugoslavia a century ago.

Fikret Karčić
September 2019



Introduction

For Muslims living in the 1918-1941 Yugoslav state, issues of personal status, family and inheritance rights, and any business related to endowments or trust funds (*waqf*) were dealt with under Shari'a law. Special Shari'a courts were established as separate government bodies for precisely this purpose.

It is rare in the history of modern liberal-democratic states to find legal regulations applied differentially based on aspects of personal identity, in this case religious affiliation, or for there to be separate departments within the court system for such purposes. Liberal-democratic states are generally founded on principles of nationality and the territorial validity and enforceability of their legal systems. The existence of Shari'a law and Shari'a courts in Yugoslavia between the two world wars is consequently a phenomenon of clear interest to legal history, as any similar phenomena in a country with Muslim minorities would be. As such, it is a matter of interest to both the legal history of the southern Slavic peoples and the general history of Shari'a law, a system which continues to flourish across a large part of the world today.

The Shari'a courts that existed in 1918-1941 Yugoslavia represent a final stage in the official application of Shari'a law in the region. Over the centuries that divide the initial appearance of Islam in the southern Slavic area and the first decades of the 20th century, the Shari'a courts experienced great institutional changes. These changes could be seen in the national, constitutional, and legal frameworks and the cultural and civilisational contexts under which they operated, in how they were organised, their jurisdiction, the law they applied, and in the social functions they served. In our analysis of their final historical phase in the southern Slavic lands, we shall

encounter elements of continuity and of change, of old and new, and see the interplay of many different social, legal, and ideological factors.

This is the first academic monograph to treat the Shari'a courts in the Yugoslav lands. Previous studies, discussions and articles on the Ottoman-period constitutional and legal history of the southern Slavic peoples naturally contain valuable information on the Shari'a courts and the application of Shari'a law. There are noteworthy works by Avdo Sućeska, Mehmed Begović, Mehmed Handžić, Hamid Hadžibegić, and Ahmed S. Aličić amongst others. A few authors (Šaćir Sikirić, Mihajlo Zobkow, Adalbert Shek) have dealt specifically with the Shari'a courts in Bosnia and Herzegovina under Austro-Hungarian rule. All of this has made it possible to gather the information required to trace and understand the history of the Shari'a courts between 1918 and 1941.

Any serious review of the literature on Shari'a courts in inter-war Yugoslavia must include Mehmed Begović's doctoral thesis, *La Evolution du Droit Musulman en Yougoslavie* (Algiers, 1930) which is still the most complete exposition of the problem. A full third of the book is dedicated to the question of the Shari'a courts and deals with the general problem of the evolution of Shari'a law in Yugoslavia. It gives an historical overview of the development of the Shari'a court system and periodises the process. This is followed by a contemporary's view on how the Shari'a courts in Yugoslavia were organised during the 1930s, their areas of jurisdiction, and the procedures they applied. The dissertation was composed and printed very soon after the introduction of new legislation by the authorities to regulate the Shari'a courts. This meant that, except for his historical introduction, the author limited himself to presenting their status in law and refrained from analysing the social, political, and legal circumstances that had led to Shari'a law being mandatory for Muslims. He also did not analyse the establishment of government Shari'a courts or their status. Objective factors prevented the author from dealing with issues arising from implementation of the 1929 *Law on the organisation of the Shari'a courts and on Shari'a justices*. He was also unable to analyse judicial practices and other similar issues.

The next most important literature on the Shari'a courts belongs to a set of articles that present the history and structure of these institutions in the Yugoslav regions, particularly in Bosnia and Herzegovina. These papers were produced in response to current issues affecting the Shari'a court system and its regulation. They had practical as well as academic goals and express a

range of views on the character of the courts in different parts of the country along with the status they should be given under pan-Yugoslav legislation. Examples of such works from the *Arhiv za pravne i društvene nauke (*henceforth *Arhiv)* include Hafiz Abdulah Bušatlić, "O ustrojstvu i nadležnosti šeriatskih sudova u Bosni i Hercegovini" (*Arhiv* no. 2/1923, 116-124), Mihajlo Zobkow, "Šerijatski sudovi" (*Arhiv*, no. 1/ 1924, 49-59), Ali Riza Prohić, "Bosna ve Herzek šeriat mehakimi – Šerijatski sudovi u Bosni i Hercegovini" (*Pravda – kalendar za godinu* 1920, 39-41). Berthold Eisner's "Šerijatsko pravo i naš jedinstveni građanski zakonik" (*Pravosuđe*, no. 6/1936, 1-16) is the most comprehensive of these presentations of Shari'a and its application in liberal-democratic Yugoslavia. By the time it was written, the reorganisation of the Shari'a courts had taken root and most outstanding issues had been resolved in practice. Considering Shari'a law in the light of the ongoing homogenisation of the civil code, it broaches a series of theoretical legal issues, including the significance and character of Shari'a law, the guarantees for its application, the need for a Serbo-Croatian codification, etc. Another good example is Milan Bartoš' "Obaveznost šerijatskog prava" (*Arhiv*, no. 6/1936, 499-503). This is a rare example from the interwar Yugoslav literature of a work dedicated to teasing out the implications of the international guarantees for Shari'a law's continued application in Yugoslavia. Mehmed Begović also focused on the Shari'a courts in his "Organizacija Islamske verske zajednice u Kraljevini Jugoslaviji" (*Arhiv*, no. 5/1933, 375-387).

While these articles contain considerable valuable data on the establishment, organisation, operation, and character of the Shari'a courts, their limitation to specific issues or periods in the history of the courts' activity is a major shortcoming.

There are also numerous works that offer a more general narrative exposition of the Shari'a courts. These are mostly systematic presentations of the material and procedural aspects of Shari'a law or of branches of the Yugoslav legal system.

The first subset of this kind includes works like Bušatlić's *Šerijatsko-sudski postupnik s formularima* (Sarajevo, 1927) and his *Porodično i nasljedno pravo Muslimana* (Sarajevo, 1926), Begović's *Šerijatsko bračno pravo s kratkim uvodom u izučavanje šerijatskog prava* (Belgrade, 1936), and Abdulah Škaljić's *Šerijatsko nasljedno pravo* (Sarajevo, 1941). In presenting Shari'a law institutions, the authors discuss the Shari'a courts' jurisdiction over various issues, Shari'a legal practice in Yugoslavia, and attempts to reform Shari'a regulations through practice.

The second subset includes systematic presentations of branches (or problems) of the Yugoslav legal system in such works as Dragutin Tomac's *Ustav i bračno pravo* (Zagreb, 1925), Srećko Culje's *Građansko procesno pravo Kraljevine Jugoslavije I-II* (Belgrade 1936-1938) and Slobodan Jovanović's *Ustavno pravo Kraljevine Srba, Hrvata, i Slovenaca* (Belgrade, 1924). This is perhaps an appropriate place to mention the work of D. Tomac. His treatment of Shari'a's mandatory force and the character of the Shari'a courts contains an historical interpretation of article 109 of the St. Vitus' Day Constitution, making him, to our knowledge, the first writer in the pre-WWII Yugoslav literature to draw attention to the political context and legal consequences of the constitutional guarantee for Shari'a courts.

In fourth place, the literature on the Shari'a courts comprises shorter articles on specific and important but contested issues that fell within their jurisdiction or practice. The works of A. Bušatlić, Mehmed Ali Ćerimović, Kasim Hadžić and Abdullah Škaljić are examples of this class of works.

Finally, there are journalistic or popular writings on the Shari'a courts that appeared in daily and periodical presses that offered sound introductions to the real problems that the Shari'a courts and the court system more generally faced.

This monograph explores how Shari'a law was applied by the state Shari'a courts in the interwar Yugoslav state. It offers a more complete overview and explanation of the phenomenon drawing from prior academic work, while also viewing things with historical distance in order to provide a greater level of objectivity.

Several issues need our attention. First, there is the question of Shari'a law's mandatory force for most Muslims in Yugoslavia in the areas of family and inheritance law and of *waqf* affairs. It is well known that Yugoslav citizens of other religious affiliations also dealt with certain types of marital issues before ecclesiastical or spiritual courts in accordance with their respective religious bodies of law. Shari'a law, however, had a considerably wider scope of application than ecclesiastical law, not least because it was statewide and through government courts. We must ask: why this was so? More precisely, how did Shari'a law come to be mandatory for Muslims in practice in Yugoslavia between 1918 and 1941 through government Shari'a courts?

Next, we will have to familiarise ourselves with the Shari'a courts' structure and operations. How were they organised and what was their place in the judicial system of the Yugoslav state? How were they related

to the Islamic Religious Community and what features did they share with the spiritual courts of the other religious communities? Who were the Shari'a justices, and what was their professional, social, and political standing? How were their activities regulated and what were their shortcomings in practice?

The Shari'a courts cannot be treated in isolation from the rights they administered and the law they applied. The sources of law they based their decisions on must be established and due consideration must be given to the impact of their practices, if any, on modifying the traditional viewpoint of Shari'a law. There is also the question of how Shari'a law's status was affected by some of its regulations enjoying the executive sanction of the Yugoslav state.

Finally, we should make clear the social and legal implications of applying Shari'a law through government Shari'a courts. How did the application of such a special body of law impact the Muslim population, attempt to harmonise Yugoslav civil law, and facilitate in the process of forming a common legal consciousness?

The following exposition of the normative legal aspects of the Shari'a courts and their institutions is based on published materials, official publications, and the daily and periodical press, while the legal-theoretical, historical, and sociological analysis are based upon the relevant literature.

The documentation for the Shari'a courts in Bosnia and Herzegovina is in the Archives of BiH and had not been sorted at the time of writing, thus rendering it inaccessible for academic use. The same is true of the documentation of the *Supreme Islamic Council* in Sarajevo and the *Council of the Islamic Community for Bosnia and Herzegovina*, *Croatia and Slovenia*.

The problems caused by this are somewhat mitigated by the fact that some of the Supreme Shari'a Court in Sarajevo's rulings issued between 1919 and 1944 have been published. Moreover, major decisions of the Shari'a courts, and particularly the higher courts, were regularly promulgated in the daily and periodical press, which makes these publications a first-rate source in our case.

We have followed a dual method in presenting the materials: chronological presentation (in discussing the problem of enacting and implementing legislation on the Shari'a courts) and a problem-based methodology (in dealing with the structure and operations of the courts, the sources of Shari'a law, and the consequences of its application, et cetera).

CHAPTER I

General Remarks on Shari'a Law and its Application in the Southern Slavic Lands Before 1918

The existence and activity of Shari'a courts in the Yugoslav state between 1918 and 1941 is just one, albeit the final, phase in the history of Shari'a law and its application in these regions. The Shari'a court system during that period cannot be studied in isolation. One must consider its prior history, beneath the surface of which we may discern the initial stirrings of many ideas and solutions that would only bear fruit later. An historical review of Shari'a law's earlier application in the southern Slavic lands is thus a necessary introduction to any consideration of the Shari'a court system in the period between the two world wars. This will allow us to establish the general and the particular and any elements of continuity and of change in the structure of this historical phenomenon. The fact that Shari'a court institutions have existed in various forms in other countries with Muslim minorities help contextualise their presence in Yugoslavia. However, before embarking on our review of how Shari'a law was applied, it is important to consider some general propositions on this form of law and the court system that applied it.

1. General Propositions on Shari'a Law and the Shari'a Judiciary

Joseph Schacht's research on Shari'a law is perhaps the most important of any contemporary scholar on Orientalist studies and Muslim legal studies.

In his view, "one of the most important legacies bequeathed by Islam to world civilization is its system of religious law – the Shari'a."[1] It is often said that law is for Islam what theology is to Christianity – the most typical manifestation of its teachings. For Muslims, law is not just an aspect of Islamic teaching overall; it is its functional expression.

In fact, Islamic teaching does not recognise any concept of law as a system of norms sanctioned by state coercion.[2] The Islamic term, *Shari'a*, usually translated as *code* or *law,* in fact means *the entirety of human duties*. Originally, it signified *a path to water*, but in the Islamic context it took on the meaning of the path Muslims must follow to attain salvation. Given this understanding and role, Shari'a unsurprisingly comprises religious, legal and moral elements. These elements include principles of personal behaviour, hygiene, and so forth.

The agglomeration of norms referred to as Shari'a includes various elements. Adherence to some of these is not a matter of purely individual preference. It is the state's concern to ensure enforcement that distinguishes these rules qualitatively from other norms, violations of which are sanctioned only by our personal sense of guilt or public shame. Norms enforced by state sanction may be considered to have become law in the modern sense and could represent the basis for constructing a positive legal system based on the teachings of Islam.

No such exclusive legal system has yet been constructed, however. Muslim legal experts have always been aware that many of the regulations they interpret are a matter for the individual rather than for the public authorities, who cannot readily exercise any real control over them. They have, nonetheless, continued to include them within the discipline that deals with Shari'a. For them, life in all its forms is a single whole and so must be the norms that regulate it. They judge every human act from the perspective of the Islamic system of values. They thus retain the close connection with religion characteristic of a particular phase in the historical development of many legal systems. The thesis that religion should regulate the field of law remains unchallenged in Islamic teachings. This understanding has had a vital influence on the general concept, development, and sphere of validity of what is generally considered "law" within Islam.

In the Islamic view, Shari'a is known essentially through revelation. The main sources of Shari'a norms and their content were "given" by authority.

1 Joseph Schacht, "Islamic Religious Law", in *The Legacy of Islam*, Oxford, 1979, 392.
2 Cf. S. G. Vesey Fitzgerald, "Nature and Sources of the Shari'a", in *Law in the Middle East, I* ed. M. Khadduri and H. Liebesny, Washington, 1955, 85ff.

They are the Qur'an, the sacred text of Islam, and the Sunnah, the normative practice of Islam's messenger, Muhammad, a.s. These two categories, which differ from each other in qualitative ways, make up what the history of law terms the *ius divinum*.

The belief that these bases of Islamic teaching are unchanging logically entails seeing interpretation as the means for rendering general principles and regulations concrete. The method is dogmatic. Given that Islam rejects any concept of a priesthood as a special category or of a church as the form of religious organisation, interpretation of the fundamental texts passed under the authority of the *Ulamâ*, learned experts in Arabic and Islamic teachings generally and scholars who devoted considerable attention to those parts of the Qur'an and the Sunnah that contain the regulations (*ahkâm*).

The interpretation and development of these texts gave norms the content required to regulate issues of daily life. Taken together, these interpretations comprise "construal." The Islamic term for this is *fiqh*, which literally means "understanding," but is normally translated as "jurisprudence" or "legal science." *Fiqh* is entirely consistent with the definition of jurisprudence from Roman law as "the knowledge of divine and human affairs" (*rerum divinarum atque humanarum notitia*). Whether in the form of individual opinion (*ijtihâd*) or of the consensus of the learned (*ijmâ', communis opinio doctorum*), *Fiqh* is thus a second source of content for Shari'a norms. It also includes rulings by the "rightly-guided *Caliph*s," the first four rulers of the Muslim state, which are accorded the character of precedent. Drawing conclusions by analogy (*qiyâs*), which traditional Shari'a theory allows as a source of law, is also essentially a method for interpreting and formulating norms. Similarly, respect for the general benefit (*maslaha, utilitas publica*) and equity (*istihsân*) are not independent sources, but goals by which the interpreter of the law is guided.

The third source for Shari'a norms is custom (*'urf*) so long as it is in accordance with the general principles of Islam. This category may also include institutions of foreign law, given that their reception has never been recognised as an independent source in Shari'a legal theory.[3]

It is important to note that only the learned had the right to interpret fundamental Islamic texts; the government had no authority in this area. In Islamic teaching, the government's only function was to ensure the implementation and enforcement of the regulations or provisions formulated by the legal sciences. In Muslim states, the scholars who laid the foundations of

3 On the sources of Shari'a law, see Amin Ahsan Islahi, *Islamic Law – Concept and Codification*, Lahore, 1979, 27-51, Fazlur Rahman, *Duh islama*, Belgrade, 1983, 105-125, 147-166.

Islamic jurisprudence often found themselves in conflict with ruling circles as a result.

Given that the state, at least in theory, was limited to sanctioning norms formulated by the legal sciences, the law in Islam has been considered a marked example of "jurists' law."[4]

The same conception that determined how law was construed in Islam also had an impact on the traditional understanding of its structure*; ius* and *fas* made a whole. Islamic jurisprudence considered its entire sphere of action to be a single whole with two parts. There was the area of the relations of the human and the divine (*'ibâdât*) and that of purely human relations (*mu'âmalât*). There was no sharp dividing line between these two areas. One must always have this in mind when studying legal history because this classification of Islamic jurisprudence does not correspond to that of the modern legal understanding. What is relevant is the conceptual apparatus that actually governed life in the past rather than our ideas about the place of law in Islam.

The division into *'ibâdât* and *mu'âmalât* is significant for another reason. According to Islamic teachings, human reason has no jurisdiction over the former. The texts of the Qur'an and the Sunnah have exclusive authority for those who believe that they are of divine origin and inspiration. However, there is room for human initiative in the latter, *mu'âmalât*. General principles may be developed and general norms stipulated through the efforts of scholars who are, nonetheless, subject to the limitations of their time and social circumstances. Accordingly, such interpretations can be changed, when the circumstances in which they were made change. This would prove very important for attempts at reforming Shari'a law, especially in the territory of Yugoslavia.

The process of interpreting the Shari'a law unfolded over four centuries (the seventh to the eleventh centuries of the new era), after which Muslim scholars tended to agree in principle on the generally complete and finished status of the legal edifice of Islam. They were mainly concerned with the ideational fragmentation of the Islamic world.

Not all areas of Islamic legal science had been equally developed by this time any more than they had all been given equal treatment in the sources of Islamic teaching. The areas of family and inheritance law were covered in some detail in the Qur'an and in the Sunnah so that all that was required of legal science was systematisation and the limited use of analogy. By contrast,

4 Joseph Schacht, op. cit. 400.

criminal, property, and obligational law were covered only by provisions of a general character. Therefore, jurisprudence and custom had a major role to play here, particularly in property and obligational law. For the areas of national and international law, there were only general principles. It would be up to the legal sciences to build entire new branches of law on them. In practice, Islamic jurisprudence carried out these tasks in a many different ways.

The field of *'ibâdât*, literally religious ritual, is the most solid redoubt of regulations grounded in the sources of Islamic teaching itself. Government authorities still intervened in exceptional cases though the courts and other organs. Outside of religious administration, however, this normally had to do with cases of violating religious commandments (failing to fast, blasphemy, etc.), and the legal provisions applied normally belonged to criminal law (*'uqūbât*).

In the field of *mu'âmalât*, the sphere of family relations, inheritance and *waqf* affairs fell almost exclusively within the domain of Shari'a. The Qur'an and the Sunnah dealth with first two areas in detail, giving the provisions in this area an unchanging character thus raising conformity with them to the level of religious obligations. In practice, the application of Shari'a law in this area, referred to as *al-ahwâl al-shakhsiyya* (personal status), came to represent a final mechanism for preserving the Islamic identity of the individual and family when political regimes changed and Islamic norms ceased to dominate the public sphere.[5] *Waqf* or endowment law had a somewhat different role. The making of endowments or trusts came to be subsumed under the rubric of pious endeavours whose goal was closeness to Allah, but whose function was to provide a material basis for religious, educational, and cultural institutions amongst many others. This very closely connected *waqf* law with the public aspect of Islam as a religion.

For Muslims, these three branches came to represent their freedom and the equal status of their Islamic faith. Demands for Shari'a to remain valid saw it as a condition of Muslim survival in areas where the writ of the Muslim state had ceased to exist, as happened in the Balkans once Ottoman rule ceased.

This insistence on personal status and its importance was a result of the characteristic course taken by the development of Islamic legal science under the historical conditions of Muslim society. This viewpoint may be considered a consequence and a corrective factor of the thesis of Shari'a's all-encompassing validity within Muslim society.

5 Seyyed Hossein Nasr, "The Question of Changes in Muslim Personal Law," in *Islamic Studies*, Beirut, 1967, 29-30.

There are several reasons for Shari'a's relatively feeble impact on areas of national, criminal, and financial law. First is the fact that the monarchy established thirty years after Prophet Muhammad's death could not accept independent sources of public legal regulation, viz. legal science. The sources of Islamic teaching contained general principles or provisions on these matters. Unstable political circumstances discouraged legal experts from working to develop them further, as it would have entailed criticising the violent behaviour of rulers and dynasties, a personal risk most legal experts were hesitant to take. In the end, the state's role in organising how Shari'a was to be applied allowed government to transform itself into a *de facto* legislature.

For these reasons, regulations governing government bureaucracy are a theoretical reflex of the Islamic community's early practices and of procedures adopted by respected rulers. Under the name *al-siyâsa al-shar'iyya* (administration in accordance with Shari'a), these norms form a special unity and are not included under *Fiqh*.

The underdevelopment of the criminal law principles contained in the sources of Islamic teaching afforded government significant freedom to apply its own provisions in this area based upon precedent and custom. These regulations took on the character of national law and eventually were applied to the general population.

The field of financial law was influenced by Islamic institutions such as *zakâ*t, donating property to benefit the poor or for public use, and *faj',* war booty, but also by the provisions of Byzantine and Sassanid law and the general economic and social structure of the mediaeval Muslim states.

This overview of how the various branches of the legal system in Islam developed over history is intended to help us understand the different approaches open to a Muslim population regarding the law of the land. If we use "Shari'a law" to refer only to that part of Islamic legal science that received state sanction, then we may conclude that the Muslim population has a very strong religious motivation to respect such provisions.

While Shari'a legal experts have not generally used state sanction as a tool in defining Shari'a law, it seems, from the perspective of the present and our investigation into state Shari'a law, not just possible but inevitable that we do so here. It is, however, also important that we maintain the distinction between the legal and the religious elements. While religious ritual has traditionally been subsumed under Islamic legal structures, it has not generally received been possible to give such norms much real legal protection. This was certainly the case for the later legal and governmental development of the Ottoman empire.

By the second half of the 19th century, Shari'a court jurisdiction rarely extended to extra-legal issues. Even when it did, it generally was only applied to matters of religious administration. At the same time, European law spread to areas previously subject to Muslim governance stopping the violation of purely religious norms being punished by law. The Shari'a courts in Bosnia and Herzegovina were warned, under *Provincial Government order no. 2050 of May 2nd*, 1881, that they could no longer decree criminal punishment (prison or fines) in the sense of the *Hatt-ı Hümâyun of 1856* for the transgression of religious norms.[6]

This is a particularly important fact for Shari'a law in the Southern Slav lands. Its religious character would henceforth be manifest largely through the Muslim population's understanding of Shari'a's origin and nature, its mandatory character, and whom it applied to. This separation of legal from religious regulation was accompanied by a similar separation in the scope of the organs responsible for applying these disparate aspects of Islamic teaching (viz. between the government Shari'a courts and the Islamic Religious Community). From that point on, Shari'a law came to be increasingly accepted as a special civil code applied to Muslims with only some of its institutions recalling the former unity of religion, morality, and law.

The general idea of a Shari'a judiciary derives from the specific concept of an Islamic state characterised by the unity of its religious and secular functions.[7] The judiciary in an Islamic state falls under the authority of the national sovereign (the imam or *Caliph*), a mandate that includes leading group prayers, interpreting the Shari'a, declaring and conducting war, and the supervision of public life. The *Caliph* delegates his powers to government officials. Thus, the *Qâdî* acts as the representative and authorised agent of the *Caliph* himself. Although the *qâdî*'s authority lacks independent foundation, in actual adjudication he is bound only by the law. The principles of delegation and representation led to the judicial function being exercised directly by the judge individually. In Islamic law, the legal maxim *juge unique, juge inique* (a sole judge is an unjust judge) has no purchase. Advisory bodies did exist in the Islamic judiciary at earlier points in its history, but they bear no comparison with the collegiate judicial bodies introduced during the 19th and 20th centuries.

This idea of the delegation of judicial authority was theoretically modified over time into the thesis that the *qâdî* was the representative of Muslim society as a whole rather than of the *Caliph*. In either form, it is interesting to

6 *Zbornik zakona i naredaba za BiH*, 1881, 342.

7 Cf. Emile Tyan, "*Judicial Organization", in Law in the Middle East*, I, 237-278.

consider how this idea could be considered to retain any validity about Shari'a justices in non-Muslim countries, and we will do so in our chapter on the organisation and character of the Shari'a courts in Yugoslavia.

The classical Islamic courts did not recognise levels or instances of jurisdiction. Such different ranks of judicial institution as they existed in Muslim countries were not built upon a principle of degree or instances but simply proceeded from each other with judges of higher rank carrying out largely administrative functions. Under such circumstances, judicial errors were corrected through the institution of "reviewing sentences after judgement" and appeals to special bodies established within the relevant bureaucracy (*al-mazâlim*).

Given the idea of representation and delegation, the *qâdî*'s real jurisdiction could be limited by decree of the political authorities. Taking this as their starting point, classical Muslim legal experts distinguished between the *qâdî*'s general and special jurisdiction. Al-Mawardî (d. 1057), the author of a well-known work on Islamic national law, held that the *qâdî*'s general authority extended to hearing disputes and passing judgement, protecting the rights of individuals, exercising guardianship and pupillary authority, oversight over endowments or trusts (*waqf)*, executing wills, contracting marriage on behalf of individuals in wardship, executing criminal punishments, supervision of public life, establishing the *bona fides* of witnesses, and ensuring equity and equality at trial.[8] *Qâdî*s had jurisdiction over all legal disputes involving Muslims. Non-Muslims could submit themselves, on request, to the jurisdiction of the *qâdî* and the Shari'a law.

All Muslim legal experts saw the proper exercise of the judicial function as a religious act. They went so far as to consider the delivery of justice "one of the most honourable acts of piety" (*Sarâhsî*) and "one of the most important duties, after belief itself" (*Kasânî*). Further testimony to the religious character of the judicial function comes from the *qâdî*'s authority in matters like the protection of mosques, oversight over *waqf*, leading group prayers, confirming the visibility of the new moon and the beginning of the Hijra month, conversions to Islam, etc.

The breadth of their powers meant that the *qâdî* did not just represent the judicial authority but was also protector of the faith in the public sphere, which gave him a key position in the structure of the Muslim state. The religious character of the law they applied and the theoretical subordination of the state authorities to Shari'a allowed *qâdî*s, depending on their personal

8 'Ali b. Muhammad b. Habîb al-Basrî al-Mawardî, *Al-ahkâm al-sultâ*niya fi al-wil*â*ya al-*d*înyya, Cairo, no date, 78-79.

moral fibre, to play the role of protector of the law and defender of the weak.

Over time, this classical concept of the Shari'a judiciary underwent modification, first in Muslim countries and then in countries where authorities whose legitimacy was based on the holy law of Islam had ceased to rule.

2. The Shari'a Courts in the Southern Slavic Lands under Ottoman Rule

Shari'a courts were established in the southern Slavic lands during the the times of the Ottoman conquest as Islam spread. During this time, Ottoman governmental and legal institutions were introduced. The Ottoman Empire was centralised and unified; its courts were organised after a common pattern. As a result, the principles and solutions generally applied by the Ottomans spread to these regions. The form taken by the Shari'a courts in the southern Slavic lands was the result of applying classical Islamic legal science and tradition under the concrete conditions of Ottoman rule. Any changes affecting the Shari'a courts in the Ottoman state were thus directly reflected in their organisation in the southern Slavic lands and necessarily played a significant role in determining their destiny.

In the literature on the history of law, the Ottoman Empire is considered the most successful attempt to create an Islamic state after the fall of the Abbasid *Caliphate*. Details from the founding of the Ottoman state were suggestive of the role Shari'a law came to play in the future Empire. In a statement to the Ghazi Emir Osman, founder of the dynasty, the Seljuk leader Allauddin made it a condition for recognising the new state that the law continue to be applied by the existing judges. Shari'a thus received the status of national law.[9]

One result of this was that the office of *qâdî* was taken over, along with its entire theoretical foundation, from a Muslim governmental and legal tradition that was prior to the Ottoman Empire. Thanks to the office's authority as applying God-inspired law, the *qâdî*s retained much of the charisma of the Golden Age of Islam in the minds of Muslims. A modern expert on Ottoman law of the classical period, has deployed Max Weber's terminology to argue that all three forms of "legitimate authority" – charismatic, traditional, and rational bureaucratic – were united in the

9 Ebul'ul*â* Mardin, "Development of the Shari'a Under the Ottoman Empire," in *Law in the Middle East*, 1, 280.

typical judicial office of the Ottoman Empire.[10] The elements of charisma and tradition seem to have dominated, however, and the office seems to been something of an exception within the Ottoman type of rationalised bureaucracy, where the authority of government officials depended on the Sultan as the source of power.

The combination of judicial independence in decision-making and the political authorities' lack of legal grounds for exploiting the opportunities offered in principle by Shari'a-legal norm-building helped give the judicial function a special place within Ottoman society and the state. However, this did not undermine the role the courts play in every state. So long as social institutions remained stable and prosperous (up to the end of the 17th century), the courts of the Ottoman Empire, for all their insistence on legality and the protection of rights, could do no more than mitigate existing contradictions and delay the development of social crisis.

In addition to their judicial duties, *qâdî*s also carried out tasks of general administration since the Ottoman Empire lacked specialised organs for that. Their application of the Shari'a law contained in their legal statutes depended on personal status (i.e. only over Muslims), while that of state law – the *qânūn* – was applied over territory (i.e. the entire population). The *qâdî*s, referred to in the sources as *hâkim-i-shar'i* (Shari'a justices), and their courts, referred to as *majlis-i-shar'i* (Shari'a councils), were the basic judicial institutions of the Ottoman Empire during the classical period. European observers of the 16th and 17th centuries who compared these courts with those in their own countries were impressed by their efficiency, speed, and fairness.[11]

During the 18th century and beyond, as the Empire was increasingly affected by general social and economic crises, and the *qâdî*s steadily fell more and more under the influence of local grandees – the *ayâns*. Riddled with corruption and inefficiency, the service lost its former reputation and became not just a symptom, but a major factor in the decline of the governmental and legal system. This is why Selim III (1789-1807) initiated his reforms, one of the first of which was an order to the Shaikh al-islâm to root out irregularities in the courts.[12] Measures taken against the judiciary during this period aimed at reviving an ideal from the past, when "the laws of God and state were respected."

10 R. C. Jennings, "Kadi, Court and Legal Procedure in 17th C. Ottoman Kayseri," *Studia Islamica* (Paris) XLVIII/1978, 137ff.

11 Mustafa Imamović, "Glose uz jednu novu studiju o osmanskom krivičnom pravu," *Anali Pravnog fakulteta u Beogradu*, *nos. 5-6*/1974, 646.

12 Ahmed S. Aličić, *Uređenje Bosanskog ejaleta od 1789. Do 1878.*, Sarajevo, 1983, 13.

Major changes came to the Ottoman legal and judicial system in the middle of 19th century. The reforms known in the Ottoman Empire as the *Tanzîmât* were announced in the *Hatt-ı Sharif of Gülhâne* or Rose Garden decree, issued on November 3, 1839, by Sultan Abdul Majeed (1823-1861).[13] This proclamation, with its guarantees of natural and human rights, equality and freedom of worship, and equality of taxation, provided a basis for introducing new legal regulations and creating new institutions to meet the needs of the state. The ideas expressed in the new law were confirmed and expanded in the *Hatt-ı Hümâyun* of February 18, 1856, particularly those offering greater freedoms for Christians, including their participation in government bodies and the civil courts which were to be organised as independent institutions.

Starting with the *Tanzîmât*, the once unitary legal system of the Ottoman Empire would be divided into two separate wholes built on two entirely different bases: Shari'a and European law. The latter was to be introduced into areas that Islamic legal doctrine did not deal with (corporate law, modern trade law, finance, et cetera) or where *fiqh* solutions had become obsolete (criminal law, executive court procedure).[14]

These changes to the legal system were necessarily reflected in the court system. Traditionally trained judges were not capable of applying the new European law, while the non-Muslim population could not be represented in courts based on Shari'a principles alone. The first step towards reforming the courts was to create special commercial courts (*mahâ*kim-i tijâriyya) with jurisdiction over commercial disputes between Ottoman subjects. This was based on French law. The next step was the *Decree on vilayet organisation* of November 7, 1864 (the 7th of Jumâdâ al-Ahira, a. h. 1281), which introduced special bodies referred to as courts regular (*mahâkim-i nizâ*miyya) to deal with civil disputes or delicts under the national law code.[15]

The courts presided over by the *qâdî*s had been fundamental and universal institutions but now found themselves limited, as Shari'a courts (*mahâkim-i shar'iyya*), to dealing with questions related to the personal status of Muslims (marriage, family, and inheritance) and *waqf* affairs. Their jurisdiction had already been clarified under the *Decree on the organisation of the Shari'a courts* of the 16th of Safar, a. h. 1276, (September

13 Cf. Aličić, op. cit. 54-56, 76.

14 The Shari'a legal expert A. Bušatlić characterized the Islamic legal doctrine of the time as a state "of awful inertia, stagnation, and treading water," A. Bušatlić, *Šerijatski sudovi*, *Gajret* (Sarajevo) 1928, 155.

15 A. S. Aličić, op. cit. 140.

15, 1859).[16] The Shari'a courts thus became specialised institutions, both in what and who fell under their jurisdiction.

The creation of regular civil courts in the Ottoman Empire and the mitigation of the Shari'a courts were particularly important for the legal history of the Muslim world. It was, according to Schacht, the first case in the history of Islamic governance that secular courts applying secular law were established on the same basis as *qâdî* courts.[17] This alone entailed relegation of the thesis of Shari'a's all-encompassing real-life validity in Muslim states from the practical legal sphere to the theological and metaphysical. This was not affected in any way by the historical co-existence of the Shari'a and regular courts or their overlapping in practice. The *qâdî*s, for example, also served as presidents of the judicial bench of the regular courts, for the simple reason that during this period they were the only trained jurists in the Ottoman Empire.

Shari'a courts were reorganised in all the countries under Ottoman sovereignty, in line with these legal and judicial reforms of the 1870s. In the Southern Slav lands, this meant in Bosnia and Herzegovina, in the southern territories of Serbia (in Niš, Kosovo and the Sanjak), Macedonia, and part of what is now Montenegro. This would play a major role in determining the context of and scope for the continued application of Shari'a law in the region.

3. The Application of Shari'a Law in the Southern Slavic Lands from the End of Ottoman Rule to 1918.

The issue of the validity of Shari'a law and how it was to be applied received different solutions in the various Southern Slavic lands during this period. The determining factor here were the circumstances governing a given national government's international standing, its internal legal and governmental structures, and the status of the Islamic religion. The history of the Southern Slavic peoples and lands after the end of Ottoman rule provides interesting data in this regard on the different destinies a single legal system could experience in a single geographical region.

16 *Dustur*, I, Istanbul, a. h. 1289/1872, 301-314. *Dustur* was the legal compendium of the Ottoman Empire.

17 J. Schacht, "Islamic Law in Contemporary States," *The American Journal of Comparative law*, no. 2/1959, 134-135.

a. Bosnia and Herzegovina

Austria-Hungary did not explicitly take on any obligations under international law as to the form of administration it would establish when it received its mandate to occupy Bosnia and Herzegovina under the Treaty of Berlin of 1878. Under the general rules of international law, however, occupation normally presupposed retaining the existing legal situation in occupied territories. Moreover, the Austro-Hungarian representative at the Congress of Berlin gave a written undertaking noting that "there will be no infringements upon the sovereign rights of his Imperial Majesty the Sultan in the provinces of Bosnia and Herzegovina…"[18]). The established practice of the Dual Monarchy was in any case to respect the political and legal traditions of the historical states and provinces it comprised, which favoured maintaining the legal *status quo*, including the application of Shari'a law through separate state courts. One of the first decrees of the occupying authorities on Muslim institutions was to confirm the *Law on Shari'a courts* of the 16th of Safar, a. h. 1276.[19] The nomination of Shari'a justices was left up to the national government.

The example of the Shari'a courts illustrates how the Austro-Hungarian administration approached different aspects of Muslim social life in different ways. While, on the one hand, the right of the Islamic religious authorities (*Mashîkha*) in Istanbul to appoint religious officials in Bosnia and Herzegovina from the ranks of the domestic pool of candidates was recognised, this was not the case with *qâdî*s. Clearly, the Austro-Hungarian authorities were already beginning to reduce the Sultan's "inviolate sovereignty" to matters of religion. Attempts by the Porte to secure its influence over the nomination of *qâdî*s met with little success, because of both energetic opposition of the occupying authorities to any form of recognition of Ottoman national sovereignty and opportunistic behaviour by Muslim religious leaders.[20]

The Shari'a courts in Bosnia and Herzegovina thus became, for the first time in their centuries-long existence in the land, part of the court system of a Christian state. It was that state which determined their jurisdiction and composition. It was that state which appointed, transfered, and replaced judges and committed its authority to ensure that Shari'a law decisions were executed. There was no opposition to this from Mus-

18 Mustafa Imamović, *Pravni položaj i unutrašnje-politički razvitak BiH od 1878-1914*, Sarajevo, 1976, 15.

19 "Gesetz über den Wirkungkreis der Scheriatsgerichte," *Sammlung*, II, 476-481.

20 Cf. Nusret Šehić, *Autonomni pokret Muslimana za vrijeme austrougarske uprave u BiH*, Sarajevo, 1980, 21-24.

lim circles for a variety of reasons. The principal one was that many legal experts of the *Hanafî* school, to which the Muslims in the Balkans belong, considered the nomination of *qâdî*s by non-Muslim rulers valid. Secondly, being backed by the authority of the state, even a Christian one, lent the Shari'a courts greater weight and authority than they would have had as just organs of a religious community. Third, by recognising the Shari'a courts as state judicial organs, Austria-Hungary took on the responsibility for financing and staffing them adequately.

Shortly after reaffirming the Ottoman *Law on Shari'a courts*, the occupation authorities embarked on a programme of standardisation. Through no fewer than 387 orders and rulings issued between 1878 and 1900 and many more subsequently, Austria-Hungary left its mark on the institution of the Shari'a courts in Bosnia and Herzegovina, as well as contributing significantly to their survival.[21]

The central legal document issued by the Austro-Hungarian authorities in Bosnia and Herzegovina on the courts' organisation was the *Order on the organisation and activities of the Shari'a courts*, affirmed by *Imperial decree* on August 29, 1883, and published by the *Provincial Government for Bosnia and Herzegovina* on October 30, 1883, under serial number 7220/III.[22] This order established in law the changes made to the Shari'a courts during the first five years of Austro-Hungarian rule and stipulated with greater precision the distinctions between their areas of jurisdiction and those of the administration's own political organs and the regular civil courts.

Following the occupation, the Shari'a courts continued alongside the regular courts and thanks to their expertise in domestic law were called upon to consider cases where the civil judges lacked knowledge of the applicable legal regime. These included marital, family, and probate matters for non-Muslims, when required by the public interest or expressly requested by the parties.[23] Under the 1883 Order (article 10), the Shari'a courts were made responsible for dealing with a list of issues in so far as they affected Muslims (or 'Mohammedans,' as they were termed). These included any and all matters related to marital law where both husband and wife were of the Muslim faith, regardless of whether they also involved property relations, matters related to the rights and duties of Muslim parents and their children, probate hearings and handling the estates of deceased Muslims where they involved *mulk* property

21 Cf. Eugen Sladović, *Priručnik zakona i naredaba za upravnu službu u BiH*, Sarajevo, 1915, 329-333.

22 *Zbornik zakona i naredaba za BiH*, 1883, 538-542.

23 Šaćir Sikirić, "Naši šerijatski sudovi," *Spomenica Šeriatske sudačke škole*, Sarajevo, 1937, 14.

(unhindered personal private ownership), hearings in any legal action or case taken with regard to inheritance or legacies of the aforementioned type, and certificates and other forms of provision in the case of death. The Shari'a courts also participated in the division of *arâdî miri* (heritable usufruct over nominally state-owned land, normally for rent) in Muslim hands, wardship or guardianship matters (particularly administering the property of orphans), conveyancing or contracts based upon *tapija* or title deeds and grants of usufruct that predated the establishment of the land registry, and *waqf* administration (article 11).

Under subsequent decisions of the national government, this authority was extended to investigating the validity of proxy authorities or powers of attorney, that is the legality of the signatures on such proxy powers for Muslim individuals, as well as to the participation of Shari'a justices in the governance structures of *waqfs*, hearing civil disputes regarding *waqfs* where the *waqf*-related aspect of the matter was not itself in question, Muslim inheritance of *miri* properties, etc.[24]

The Austro-Hungarian authorities introduced certain novelties into how the Shari'a courts were organised and their business conducted. The most important was the creation of a second level (instance) within the court system. At the first level, Shari'a justices (*qâdî*) registered with the district administration (articles 1-2) carried out Shari'a jurisdiction. From 1906, the Shari'a courts became an integrated part of the district courts.[25] The second and final instance was the Supreme Court in Sarajevo in its role as Supreme Shari'a Court (article 2). According to article 15 of the regulation, the Supreme Shari'a Court comprised four judges, two of whom were Shari'a justices, with the chief justice of the Supreme Court serving as president.[26] Under a law promulgated on February 17, 1913, (article 15, it. 1), the Supreme Shari'a Court was envisaged as a second-degree instance whose rulings were generated by a committee of three members of the Supreme Shari'a Court, the most senior of whom would preside. These sessions were attended by a non-voting member of the Supreme Court, in an essentially advisory role, largely restricted to questions of general, inter-religious, and international law.[27] In this way, the Supreme Shari'a Court became an institution composed of Shari'a justices that carried out the tasks

24 Ibid., 18-19.
25 Ibid., 20.
26 The Supreme Shari'a Court was a bench with five judges at this point. Cf. Adalbert Schek, *Ustrojstvo i nadležnost šerijatskih sudova* (lectures given at the Shari'a Judicial College), lithograph, August, 1905, 1.
27 *Glasnik zakona i naredaba za BiH*, 1913, 69.

within their areas of competence independently. From an administrative point of view, however, it continued to be part of the Supreme Court.

Another matter related to the introduction of a second-tier in the Shari'a court system involved granting parties the right to appeal to the Supreme Shari'a Court against decisions of the first instance Shari'a court (article 16). This was a significant modification of Shari'a procedural law.

The question now arises as to what led the Austro-Hungarian administration to introduce a second-tier into the Shari'a court system and a mechanism of appeal as a regular legal recourse. First one should note that Austria-Hungary accorded the Shari'a courts importance as institutions because of both Muslim sentiment and their role dealing with significant legal matters. Consequently, throughout its existence, the Austro-Hungarian administration was anxious to regulate both how the courts were organised and their jurisdiction in some detail. It was, moreover, unthinkable under the Austro-Hungarian understanding of a *Rechtsstatt* for any form of judicial decision-making to be limited to first-instance rulings only. In the noteworthy view of Eduard Eichler, a leading expert of the day on political and legal conditions in Bosnia and Herzegovina, it was a guiding light of government policy in the region to affect a gradual adjustment of existing legal and regulatory frameworks to Western European principles.[28]

One should view the introduction of appeals into Shari'a jurisprudence in Bosnia and Herzegovina as part of the more general process of modernising these courts through the second half of the 19th century under the influence of European ideas in almost all countries were Shari'a law was applied.[29] The establishment of a second-tier or instance was often accompanied by the introduction of the principle of collegiality on the bench. We have already seen this principle at work on the Supreme Shari'a Court in Bosnia and Herzegovina. The question of how the second-tier courts were to be set up was approached on principles common to most of the countries experiencing the modernisation of their Shari'a jurisprudence. Here we are thinking primarily of the role of judges on the regular civil courts in the operations of the second-tier Shari'a law courts. In Bosnia and Herzegovina, at one point the civil judges on the Supreme Court had the casting vote in the Supreme Shari'a Court. In Algiers, the *qâdî* courts only acted as courts of first instance, while the regular civil courts had jurisdiction over appeals. In so-called British India, Shari'a law was administered by the regular civil courts, the final instance for appeal

28 Š. Sikirić, op. cit. 15.

29 N. J. Coulson, *A History of Islamic Law*, Edinburgh, 1978, 163.

being the legal committee of the Imperial Privy Council. This introduction of the principle of a second-tier and allowing civil judges from the regular courts to exercise influence over the implementation and application of Shari'a law was intended to ensure a higher degree of legal certainty and of control over the Shari'a courts by the government authorities.

At this point, the question arises as to how experts in Shari'a law theory and the Muslim religious leadership viewed these measures to modernise the Shari'a courts in Bosnia and Herzegovina by the Austro-Hungarian authorities.

The unalterable sources of Shari'a themselves contained only general principles for the organisation of the courts and procedural law. In the interpretation of legal experts, the state had the right to stipulate how the Shari'a law was to be applied, because the courts functioned as representatives of the supreme government authorities.

One could not even theoretically deny the Austro-Hungarian state, which had brought the Shari'a courts under its own government structures, the right to organise them in line with its own regulations. A further fillip towards accepting the principle of a second tier and collegiality within the Shari'a court system came from practice in the Ottoman empire, which had introduced these principles into its own civil court system during the period of the *Tanẓîmât*, allowing the possibility for and ensuring the legitimacy of similar reforms in the Shari'a courts.

The introduction of civil judges from the regular courts into second-tier Shari'a courts was not acceptable from the perspective of Shari'a law itself, but it was nonetheless implemented in practice for the simple reason that it was the will of the government authorities. Shari'a legal experts and the Muslim religious leadership did, however, take measures to reduce these judges' role on the Supreme Shari'a Court from that of deciding factor (casting vote) to an advisory one on questions of general law.

Austria-Hungary retained the Shari'a courts in Bosnia and Herzegovina as government institutions, even though Islam was no longer the state religion. In addition to the undeniable benefits it offered in the application of Shari'a law, this status allowed the government authorities to exercise political control over the institutions. Article 6 of the 1883 Order stipulates that the district administration (an organ of the political authorities) was to secure a report on each candidate for Shari'a judge, covering "the personal relations, as well as the moral and political conduct of the applicant party" and forward it to the provincial government.

With implementation of Shari'a law under the jurisdiction of state courts, Islamic ritual, religious and educational, and to some degree *waqf* affairs were now handed over to the jurisdiction of the Muslim religious structures. These were reformed on the hierarchical principle common to modern religious communities. The Shari'a courts had only an indirect relationship to the Islamic Religious Community through the requirement that candidates for *qâdî* pass a technical exam before the *Ulamâ Majlis* or Council of the Ulam*â*, under the chairmanship of the *Grand Muftî* (article 7 of the Order from 1883). Candidates also sat annual exams before the *Grand Muftî* at the Shari'a Judicial College (article 9 of the *Statute establishing a Shari'a Judicial College in Sarajevo*).[30] Moreover, the Supreme Shari'a court had the right to seek the opinion of the *Majlis of the Ulamâ* before any decision (article 20 of the 1883 order). The basis for nominating Shari'a justices was the government regulations for appointing officials (article 4 of the 1883 Order). It was only after the struggle for Islamic religious and educational autonomy had been resolved that the *Grand Muftî* was able to exercise greater influence on appointing Shari'a justices through the issuing of *murâ*sala – a religious *imprimatur* that a given person was fit to apply Shari'a law (article 140 of the *Statute for the autonomous administration of Islamic religious, waqf and maârif affairs*).[31]

The fact that Shari'a law would continue to be applied through governmental Shari'a courts was never questioned at any point during Austro-Hungarian rule in Bosnia and Herzegovina. The Provincial Constitution (*Statute*) of February 17, 1910, included a provision in article 10 that stated "it is guaranteed that Shari'a law will continue to be applied amongst Muslims for family matters and marriage, as well as the inheritance of *mulk*."[32] When the regular judiciary in Bosnia and Herzegovina was being put on a proper legal footing through legislation, a general readiness was expressed to do the same for the institutions of the Shari'a courts. The *Law on constitution of the courts* of December 23, 1913, stipulated in article 63 that "the structure of the state legal services and the Shari'a courts shall be dealt with under special laws, as shall the nomination and official conditions of officers within the state legal services and the Shari'a court system."[33] The start of the First World War and the dissolution of the Monarchy prevented the enactment of the law.

30 This statute was promulgated under order no. 23 972/I of the National Government for BiH on May 14, 1887. (*Zbornik zakona i naredaba za BiH*, 1887, 48ff.

31 *Glasnik zakona i naredaba za BiH*, 1909, 419-454. *Maârif* refers to the administration of educational institutions, like madrasahs.

32 *Glasnik zakona i naredaba za BiH*, 1910/II, 21ff.

33 *Glasnik zakona i naredaba za BiH*, 1913, 405-411.

b. Serbia

The question of legal regulation of how Shari'a law was applied in Serbia only arose after the Balkan wars. It simply had not arisen as an independent legal issue before that or had been dealt with in terms of the situation on the ground.

According to the *hatt-ı sharîf* of the 1st of Rabī' al-Ākhir, 1245/30th of September 1829 and that of the 1st of Rajab, 1249/7th of November, 1833, the non-military Muslim population in the autonomous Serbian state was required to leave within a period that was initially one but later extended to five years. The mass exodus finally took place after the conference at Kanlica in 1862. In the meantime, Shari'a law had continued to be valid for Muslims and applied by *qâdî*s.

After successful wars against Turkey from 1876 to 1878, Serbia's sovereignty was extended to areas whose population were predominantly Muslim. The law dealing with the liberated areas, dated January 3, 1878, accorded Islam the status of recognised religion (article 77).[34] The provisions of the *Berlin Peace Treaty* that dealt with Muslims and their property in Serbia did not cover Shari'a law.[35] It seems to have been assumed that the legal guarantee of freedom of religion and legal recognition of a religion entailed the right to apply at least certain provisions of religious law. The application of religious law to marital relations followed from there being no civil marriage in Serbia at that time. Since marital regulations in the *Serbian Civil Code* of 1844 were based upon the teachings of the Orthodox Church, Christians who did not belong to that confessional community and non-Christians (Muslims and Jews) contracted marriage under their own religious law. Regulation number VN: 2444, dated December 7, 1861, was issued to cover Serbian subjects of Catholic or Protestant affiliation, stipulating that their marriages should be officiated by the first-tier courts, applying the regulations of whatever church the spouses belonged to.[36] There were no explicit regulations for Muslims or Jews. Živojin Perić took the view that the provision also covered non-Christians.[37] This would have meant that the application of Shari'a law lay within the jurisdiction of the regular

34 *Zbornik zakona i naredaba izdanih u Knjaževstvu Srbiji od 5. avgusta 1877. do 12. juna 1878*, vol. 32. Belgrade 1878, 266.

35 Cf. Vladimir Đuro Degan, "Međunarodnopravno uređenje položaja Muslimana s osvrtom na uređenje položaja drugih vjerskih i narodnosnih skupina na području Jugoslavije," *Prilozi Instituta za istoriju radničkog pokreta u Sarajevu*, 8 (1972), 63-64.

36 A. Andrijević, *Naš brak i reforma njegova*, Veliki Bečkerak, 1919, 50.

37 Živojin Perić, *Lično bračno pravo po srpskom GZ*, Belgrade, 1934, 28, fn. 24.

civil courts. However, that did not happen in practice. One reason for this most certainly was due to the civil judges' ignorance of Shari'a.

Most of the Muslim inhabitants of Serbia lived in the region of Niš. The Muftî of Niš was their religious leader and exercised jurisdiction over their marital affairs in his role as a religious judge. He was no doubt also responsible for issues of inheritance law (though this is not specifically mentioned in the literature). We base this assumption on the primarily on the fact that, from a religious point of view, marital and inheritance law have the same significance from Muslims, which is why this area was reserved in non-Muslim countries for the application of Shari'a. The second reason we make this assumption is because in the Yugoslav state of 1918 to 1941, the Muftî presided over matters of inheritance as justice of choice at the request of the parties. We cannot suppose his jurisdiction was any more restricted in the period immediately following the end of Ottoman rule.

One particular point of interest relates to the judicial practice of the Muftî of Niš. Should either party appeal his decisions, he would send them directly to the Sheikh ul-islam in Istanbul for review, even though this infringed upon the national sovereignty of Serbia.[38] In this case, therefore, an organ of a foreign state was acting as second-tier instance. This practice was not based on any legal act or decision of Serbia and simply represented the behaviour on the ground of a religious elder or leader, deferring to his own supreme religious leader. Judicial decision-making was based on the *Multaqâ* compendium, which one Serbian author has described as "a clerical Handbook… which contains the regulations on Muslim marital law, based upon the principles of the Qur'an."[39]

After the Balkan War of 1912, Ottoman rule came to an end in the Novi Pazar Sanjak, Kosovo and what today is known as North Macedonia. The liberated areas were annexed to Serbia and Montenegro. A significant proportion of the population was Muslim, raising the question of how to regulate their status in religious and civil law.

These questions were incorporated into the peace treaty signed between Serbia and Turkey in Istanbul on March 14, 1914. The Istanbul Agreement envisaged establishing an umbrella religious organisation for all the Muslims in Serbia (see article VIII).

There were muftîs in every district, elected by Muslim voters that served as religious, educational, and judicial authorities. The King would nominate a supreme Muftî from amongst three candidates chosen by all

38 A. Andrijević, op. cit. 54.
39 Ibid., 50.

the muftîs in special session. The Serbian government would then notify the *Shaikh al-Islam* through its mission in Istanbul of the nominee for supreme muftî, who would then be provided with all the required authorities (*manshūra* and *murâsala*), enabling him to delegate the rights to exercise Shari'a jurisdiction and to issue *fatwas* to other muftîs in Serbia. It was envisaged that the muftîs would have the same rights and duties as all other public officers in Serbia.

The most important provisions of the Istanbul treaty for the application of Shari'a law in Serbia were items 10 through 13 of article 8, given here in full:

> (Item 10) In addition to jurisdiction over purely religious affairs and a supervisory capacity regarding *waqf* property, the muftîs will exercise jurisdiction amongst Muslims in matters of marriage, divorce, the assignment of alimony and child support, wardship, guardianship, attainment of majority, Islamic wills, and the inheritance of the duties of *mutawallî* (*tawlît*).
> (Item 11) Regarding inheritance, interested Muslim parties may, under the preceding agreement, have recourse to the supreme muftî in his role as arbiter. All normal legal forms of recourse through the courts will be available against such arbitration decisions, unless stipulated to the contrary by special clause.
> (Item 12) Any *hujjat* or rulings handed down by the muftîs will be subject to scrutiny by the supreme muftî, who will confirm them if they are found to be in accordance with the regulations of Shari'a law.
> (Item 13) Rulings by muftîs will be enforced by the appropriate responsible organs of Serbia.[40]

The Istanbul peace treaty may be considered the international legal instrument that governs in most detail the standing of the Muslim populations and the implementation of Shari'a law in the Southern Slav countries after the end of Ottoman rule. This makes the irony all the greater that it was never actually applied. The agreement was ratified but never made law in Serbia because Turkey joined the Central Powers in World War One that broke out so soon afterwards. The Serbian government nullified the agreement because of the existence of a state of war between the two countries. Moreover, the ideas given expression in the Istanbul treaty had an impact on the internal legislation of the Serbian state governing the question of the implementation of Shari'a law. Here we are thinking particularly of the linkage between the religious and the Shari'a-legal functions retained in the person of the muftî.

40 See Đuro Degan, op. cit., 80-81.

Under the *Order on the organisation of the courts and on judicial process in the annexed territories of Old Serbia*, dated June 7, 1914, the following were placed under the jurisdiction of the muftîs: marital disputes between Muslim spouses, disputes over maintenance, guardianship and wardship issues, trust funds for minors, and their emancipation or coming of age (article 52).[41] During the First World War, the Muftî of Niš was appointed as acting supreme muftî of Serbia via a decree of the Council of Ministers.[42] The establishment of this office not only ensured unified administration of Muslim religious affairs in Serbia, but also allowed oversight and review of muftîs' decisions in their application of Shari'a. In cases of appeal by dissatisfied parties, the supreme muftî could, on examination of the details of the case, issue an authoritative opinion (*fatwâ*) instructing the responsible muftî to alter his ruling.

In the newly liberated territories then being incorporated into the fabric of the Serbian state, application of Shari'a was entrusted to the muftîs who under Ottoman tradition had carried out religious, educational, and advisory functions. The scope of application of Shari'a law was now restricted. Any attempt to explain why muftîates were now being established in place of the Shari'a courts that had existed before must consider the following circumstances. First, the institution of muftîate already existed in Serbia before the Balkan wars and had both religious and Shari'a judicial spheres of action, so that existing administrative arrangements could simply be extended to the newly liberated and annexed territories. Muftîates with a similar sphere of action had been envisaged under the never-implemented Istanbul peace treaty. Secondly, Orthodoxy was the state religion in Serbia, with other religions like Islam recognised but not of equal status. For this reason, it would probably have been impossible to establish institutions like state Shari'a courts, applying Shari'a to Muslims on a compulsory principle. Third, the status of the muftîates corresponded, as simultaneously religious and judicial bodies to the situation in the Orthodox Church where officials of a certain rank carried out the joint function of priest and judge.[43] In this way, the institution of the muftîate was very close to religious institutions that already existed in the state of Serbia and had jurisdiction over some marital affairs.

This was the situation regarding the implementation of Shari'a law when the Muslim-populated areas under Serbia's national sovereignty came to be incorporated into the first common state of the Yugoslav peoples.

41 Srpske novine, no. 126 of June 10, 1914.

42 Hasan Rebac, "Islam u Kraljevini Srba, Hrvata i Slovenaca," *Jubilarni zbornik života i rada SHS 1 XII 1918-1928, II*, Belgrade, 1929, 658.

43 Mehmed Begović pointed out this similarity in his dissertation, *De l'Evolution du Droit Musulman en Yougoslavie* (Algiers, 1930, 111).

c. Montenegro

The issue of the legal regulation of the religious and civil status of the Muslim population in Montenegro first arose after the 1876-1878 wars when five Ottoman *qâdîluks* were incorporated within its national and legal framework. In the absence of any other legislation-making instance in the country, the decrees and legal acts of Prince Nikola were the only legal basis for the application of Shari'a law for a long time. Some years after the annexation of the liberated areas, the Prince appointed Hajji Salih-efendi Huli of Ulcinj to be muftî of Montenegro, giving him the authority to judge Muslims under Shari'a law, "just as it was during the Ottoman time."[44] At the Muftî's suggestion, Prince Nikola appointed *qâdî*s in Ulcinj, Bar, and Podgorica. Of the five *qâdîships* from the Ottoman period, Kolašin and Nikšić did not receive *qâdî*s, due to emigration of the Muslim population from these areas.[45]

The resultant situation was confirmed in the Montenegrin Constitution of December 6, 1905, in the concise provision contained in article 129, "the internal administration of the Mohammedan confession falls to the Montenegrin muftî." What this provision entailed is clear from parts of the royal address from the throne, held before the assembly on St Nicholas' Day, when the king said "to our Muslim countrymen, who do not fall short of their Christian fellow citizens in good conduct, work, or obedience, I confirm them the Shari'a law on marriage, dissolution, and inheritance, and make them equal in freedoms and rights with their Christian brothers in the state, so that they are in no wise hindered in the spiritual connections which have always linked them with their great *Caliph*."[46] The jurisdiction of the Shari'a courts was rendered in more detail by later rulings of the Minister of Justice. It included establishing guardianship over custodial accounts and trust funds for Muslim minors, the property of widows, and the division of the so-called minor dowry (which appears to have corresponded to the category of *mulk* property in Bosnia and Herzegovina), while the pastures, meadows, and woods that comprised the "great dowry" (*arâdî miri* in other areas) fell under the national courts. In Montenegro, like in our other areas, different forms of inheritance regulation were applied depending on the legal nature of the legacy. The regular courts enforced the decisions of the Shari'a courts.

44 M. Karađuzović, "Crnogorski i bosansko-hercegovački muslimani i nadležnost šerijatskih sudova," *Glas Crnogorca* (Cetinje), no. 4, January 31, 1912.

45 For more on the problem of the Muslim population in Montenegro after the 1876-8 wars, see Novak Ražnatović, *Crna Gora i Berlinski kongres*, Cetinje, 1979, Žarko Bulajić, *Agrarni odnosi u Crnoj Gori (1878-1912),* Titograd, 1959.

46 M. Karađuzović, op. cit.

The *qâdî*s had the status of government officials, appointed by the Minister for Education and Ecclesiastical Affairs, at the suggestion of the Muftî, with the prior approval of the King. The Montenegrin muftî, whose office was referred to as the Shari'a Administration, acted as a second-tier instance in the application of Shari'a law. Dissatisfied parties had the right to appeal the *qâdî*s' rulings within 15 days of promulgation.[47]

A certain degree of confusion regarding the jurisdiction of the Shari'a courts in Montenegro was introduced by the *Introductory provision regarding the Law on judicial process in civil cases*, dated November 1, 1905, article 4 of which stipulated that the spiritual judicial authorities and Shari'a courts would in future exercise judicial authority in marital disputes, so long as such disputes did not relate to property rights.[48] A lack of jurisdiction over marital property disputes was also the case for Christian spiritual courts. The Shari'a courts had, however, always had jurisdiction over the resolution of marital property issues (the dower or *mahr*, the maintenance of divorced women or *nafaqa*, et cetera). If article 4 of the introductory provision was actually implemented, it would make Montenegro an exception in this regard, which we doubt, as the Shari'a courts here were in any case responsible for property issues (inheritance, custodial accounts, et cetera).

Students of these circumstances have generally judged the condition of the Shari'a courts in Montenegro quite negatively. They have noted that proceedings were conducted primarily orally and in Ottoman and that the custodial accounts (*aytâm sandūk*) were kept without order or oversight. Due to the absence of legal regulation of the area, many issues were left to the personal preferences of the muftî and the alertness of the state organs.[49]

After the First Balkan War, the Muslim religious administration was unified across the entire national territory of Montenegro. A Central Shari'a Administration was formed, with its seat in Stari Bar, later moved to Podgorica, but changes were only made to the Shari'a court system after unification in 1918.

d. Croatia and Slavonia, Slovenia and Dalmatia

The administrative and legal regulation of the status of Islam and Muslims came relatively late in the Austro-Hungarian-ruled southern Slavic lands

47 M. Karađuzović, *Glas Crnogoraca*, no. 5, February 4, 1912.
48 Ibid.
49 Dža-m, "Organizacija šerijatskih sudova u bivšoj Crnoj Goroj," *Novo vrijeme (Sarajevo)*, no. 34, September 5, 1931.

(other than Bosnia and Herzegovina) probably because of the negligible Muslim population. All these countries share a common absence of the application of Shari'a law. It was on 27 May, 1916, that Islam received the status of legally recognised religion in these areas, under the *Law on recognising the Islamic religion in the kingdoms of Croatia and Slavonia*.[50] The Islamic Religious Community and the doctrines, provisions, and customs of Islam received legal protection, so long as they did not infringe upon the existing legal order. Under article 7 of the law, the regulations of the second chapter of the first part of the *General Civil Law Code (OGZ)* were to apply to Muslim marriages, until such time as their marital rights were not otherwise dealt with under a special law. The relevant provisions of the civil code applied to questions of marital disputes, consanguinity, and divorce. The functions and roles given the clergy under the civil code were to be carried out by the political authorities for Muslims.[51] Islamic institutions that were considered contrary to current opinion were not given legal protection. For example, polygamy was not merely left without legal protection, but was considered a criminal act.

Muslims could not regulate their marital affairs under Shari'a law in Slovenia or Dalmatia either. Civil law governed these issues and the civil courts had jurisdiction. This situation was a result of article 7 of the Austrian *Law on the recognition of the followers of Islam under the Hanafî rite as a religious association*, dated July 15, 1912.[52]

It is striking that, except in Bosnia and Herzegovina, Muslim marital relations were regulated in the Austro-Hungarian-ruled southern Slavic lands so as to subject the entire area to the general civil code. Family and inheritance relations simply were not mentioned. This is understandable for *waqfs* which basically did not exist in these areas. In our view, the absence of any mention of Muslim family and inheritance affairs in government regulations can be explained by the following circumstances: the Austro-Hungarian monarchy regulated the legal position of Islam and Muslims in line with its policy towards other religious communities. These communities had their own spiritual courts, responsible for the non-property-based marital affairs of their adherents. In family and inheritance matters, however, their adherents were subject to the general civil code. On the same principle, Muslims were subject to that same body

50 *Zbornik zakona i naredaba valjanih za Kraljevine Hrvatsku i Slavoniju*, X/1916, 149-151.
51 E. Sladović, Ženitbeno pravo, Zagreb, 1925, 94-95.
52 *List državnih zakona za Kraljevinu i zemlje zastupane u Carevinskom vijeću*, LXVI/1912, 875ff.

of law. It was, however, only for Muslims that the regular civil courts had jurisdiction in non-property-related marital affairs, while the spiritual courts were responsible in the case of other religious communities. This was because of the small number of Muslims, the absence of an Islamic religious hierarchy in these areas, and the consequent irrationality of establishing a separate Shari'a court system.

The matter of the validity of Shari'a law in these areas would change under the new Yugoslav state.

CHAPTER II

The Mandatory Character of Shari'a Law and the Institution of State Shari'a Courts in Yugoslavia from 1918 to 1941

The establishment of the first joint state of the South Yugoslav peoples did not interrupt the application of Shari'a law. In fact, this system of law took on a mandatory validity for Muslims across the whole territory of the state. At the same time, a consistent uniform system was introduced applying it through national or state Shari'a courts. In this way, the Muslim population in interwar Yugoslavia retained its own separate system of law and separate courts for dealing with family, inheritance, and endowment or *waqf*-related issues. Islamic law was thus more widely applied than other systems of religious law in the first Yugoslavia and had validity in civil, and not just confessional law. These phenomena should be of particular interest to legal historians.

We will now look more closely at these two aspects of the application of Shari'a law in Yugoslavia – its mandatory character and the institution of state Shari'a courts. A more complete explanation will require investigating the legal sources and reasons behind the mandatory application of Shari'a. We then need to elucidate why and how the institution of national Shari'a court was accepted for the application of Shari'a legal regulations. What were the reasons, and what was the significance of accepting such a solution which did not arise even indirectly from the principle of Shari'a's mandatory character? Finally, we will look at the way Yugoslavia dealt with the question of applying Shari'a law and compare it with how this matter was dealt with in other European countries with Muslim religious and ethnic minorities.

1. Legal Sources and Reasons for the Mandatory Application of Shari'a Law

For a variety of different reasons, the question of Shari'a law's validity for the Muslim population found a place in one of the new Yugoslav state's most important international instruments and so in the fundamental law of the country. In both cases, the question was treated as integral to the problem of the general status of Muslims. The legal guarantees and how to realise them were largely overdetermined by Yugoslavia's socio-political, constitutional, legal, and cultural status as a liberal democratic polity.

a. The guarantee in international law for the application of Shari'a

During the First World War, under the influence of European public opinion, a new consensus emerged regarding the importance of protecting ethnic, religious, and linguistic minorities.[1] The legal means for realising this goal were found in the international legal institution of the protection of minorities. This represented a corrective to the formation of new states on the national principle. The remit was the protection of any citizens in a state who differed from the majority population by race, creed, or language. The new European states were thus bound under international conventions and peace treaties to protect minorities residing within their national territory.

For the Kingdom of the Serbs, Croats, and Slovenes, this obligation was contained in the peace treaty concluded by the main Allied and Associated Powers with Austria at Saint Germain on September 10, 1919. Article 51 of the treaty required the State of the Serbs, Croats, and Slovenes to accept in advance and unreservedly any and all provisions the major powers should consider necessary for the protection of minorities. These provisions were to be contained in a separate agreement annexed to article 51. Signing such a blank cheque was in clear contravention of the very idea of national sovereignty, and the Yugoslav delegation at Saint Germain refused to sign the agreement. Under international pressure and with additional interpretation to the effect that the Kingdom's obligations under article 51 were exhausted by the agreement on the protection minorities, the Yugoslav state acceded to the by declaration on December 5, 1919.

1 Cf. Ilija Pržić, *Zaštita manjina*, Belgrade, 1933, 77ff.

In addition to the general provisions on the protection of minorities, the agreement annexed to article 51 also contained specific provisions on Muslims, contained in article 10. The Kingdom accepted a number of obligations, e.g. on regulating the family and personal status of Muslims, nomination of the *Raîs al-Ulamâ* or *Grand Muftî*, the protection of mosques, graveyards and other religious institutions and establishments, and the granting of all the necessary forms of relief to Islamic endowments and other charitable institutions.

Under this agreement, the entire Muslim population in Yugoslavia (Muslims in an ethnic sense, the members of either the Albanian or Turkish ethnic minorities, Roma, etc.) was treated homogeneously as a religious minority. Because of this form of treatment, the agreement on the protection of minorities only included the kingdom's obligations regarding Muslim religious life and certain other matters derived from specific aspects of the faith. It belongs to the series of such international instruments drawn up and agreed upon after the First World War to protect the religious rights, not just of individuals, but of entire groups. The provisions of these agreements had to be incorporated into the internal legislation of the states bound by them and legal protection of the rights contained in them provided.[2] Putting things in terms of a religious rather than a national Muslim question was in fact close how most Muslim religious and political representatives viewed things as they busied themselves in the first years of the new Yugoslav state pursuing the idea of a unified religious organisation for Muslims across the territory of the state. They accepted the treaty on the protection of minorities as an important resource in their internal political battles.

A rare exception amongst Muslim politicians in his approach to the Treaty was Šukrija Kurtović, who spoke against article 10 at the 125th regular session of the Provisional National Assembly of the Kingdom of Serbs, Croats and Slovenes.[3] He argued against treating Muslims as a minority. He was also against introducing provisions for the protection of the Muslim population into the peace treaty with Austria, because he believed that Muslims would ultimately find themselves worse off under the new state. He further stated that "everything article 10 speaks of already exists for Muslims in our state." Naturally, this was not entirely correct nor was it ever fully achieved during the history of the liberal democratic Yugoslav state.

2 Sergei Troicki, "Međunarodna zaštita religiskih prava," *Arhiv*, no. 2/1926 (vol. XII/XXIX), 104-105.

3 *Stenografske beleške Privremenog narodnog prestavništva Kraljevine Srba, Hrvata, i Slovenaca, V,* Zagreb, 1921, 463.

The peace treaty with Austria and the declaration signed at Saint Germain were entered into record at the 127th regular session of the provisional National Assembly, on September 28, 1920.[4] The treaty was passed provisionally into law on May 10, 1920 and as statute on June 18, 1922.[5]

There have been attempts in the literature to clarify the origin and reasons for the special article on Muslims in the treaty on the protection of minorities. According to one version, the idea for article 10 was first formulated by the journalist and Yugoslav Muslim Organisation (JMO) activist Sakib Korkut. He had been approached by a pair of Frenchmen, one of whom was the military attaché, with a suggestion that he put the demands of the Bosnian and Herzegovinian Muslims into writing.[6] This visit had followed the appearance of an article by a French journalist, Charles Rivet, in *Le Temps* (April 1, 1919), in which he had published details of the difficult circumstances Muslims found themselves in under the new state, accompanied by an appeal from *Grand Muftî* Džemaluddin Čaušević that called upon France to ensure that the Muslim population was afforded protection of both their persons and property. The plausibility of this explanation is largely based upon the fact that several obligations under article 10 (nomination of a *Grand Muftî* and the protection of graveyards and mosques) have no sources in earlier international legal instruments that deal with the position of Muslims nor any particular similarity to the obligations put on other Balkan countries regarding their Muslim populations.

What impact the demands of the Muslim element in Bosnia and Herzegovina really had on the introduction and formulation of a special article on Muslims in the treaty is difficult to judge. Yugoslav authors who have dealt with this issue (I. Pržić, A. Purivatra, and V. Degan) have based their views on generally available information on the drafting of the agreement at the peace conference and on statements made by individuals. It might be possible to source a reliable account of the origin and formulation of article 10 from the minutes of the Committee for New States which was responsible for drafting the treaty. These documents were not published during the interwar period, however, and the problem does not appear to have attracted any special attention from lawyers or historians since.[7]

4 Ibid., 491.

5 *Službene Novine, no. 133-A,* June 19, 1920, and *no. 224-XXX* from 1920.

6 Atif Purivatra, *Jugoslavenska muslimanska organizacija u političkom životu Kraljevine Srba, Hrvata, i Slovenaca*, 66, fn 14. This explanation is based upon private documents in the possession of M. Hadžijahić (Sarajevo).

7 Even a recent book on the peace conference fails to dedicate any particular attention to the question of a special article on the Muslims of Yugoslavia. See Andrej Mitrović, *Jugoslavia na konferenciji mira 1919-1920.* Belgrade, 1969.

What is certain regarding the treaty is that the major Western powers (the USA, France, and England) did exert pressure on the Kingdom of the Serbs, Croats, and Slovenes to sign it. It is also true that governing circles in the kingdom did their best to avoid doing so because it contained international guarantees for Macedonia, rather than because of the special article on Muslims.

Secondly, the international guarantees of freedom of religion and civil equality for Muslims with all other citizens were, as we have seen, in line with existing international relations and international legal instruments in Europe starting from the very first establishment of nation states in South-Eastern Europe as it liberated itself from Ottoman rule. The Yugoslav state's obligation to apply Shari'a law therefore was not novel in this context.

It is only the obligation to nominate a Muslim religious leader for the state as a whole that one might see as coming from Muslim circles within the Kingdom of the Serbs, Croats and Slovenes. This may well have been presented to the French emissaries or equally well communicated to the representatives of the great powers in some other way.

As to the question of the obligatory nature of Shari'a law, the contents of provision 1 of article 10 are significant. They go as follows:

> The state of the Serbs, Croats, and Slovenes agrees with regard to the Muslims, insofar as their family and personal status concerned, to introduce provisions which will allow these issues to be regulated in accordance with Muslim custom.[8]

So, even though the demands for the mandatory application of Shari'a law in Yugoslavia rested upon the treaty for the protection of minorities, the text of the instrument itself did not, as Milan Bartoš has shown, actually give Shari'a regulations the character of mandatory law, any more than it excluded recourse to general civil law for Muslims.[9]

What is striking here is that there is no mention of Shari'a law itself in article 10; rather all that is discussed is "Muslim custom." It is not at all clear that these two terms refer to the same thing. While Shari'a did determine Muslim customs to a very large degree, popular tradition and foreign influences also played a significant role in shaping them. In Yugoslavia, Muslims at times defended traditional forms of behaviour with more enthusiasm than they did Shari'a legal regulations. When the international obligations

8 The text follows the translation of I. Pržić (*Zaštita manjina*, 223).

9 See Milan Bartoš, "Obaveznost šerijatskog prava," *Arhiv, no. 6*/1933 (vol. XXVI/XLIII), 499-503.

were integrated into internal legislation, the expression "Muslim customs" was interpreted as "Shari'a law" because of the insistence of the Muslim religious and political representatives on retaining the institution of national Shari'a courts. One of the rare authors to draw attention to the possible consequences of the expression "Muslim customs" was Hamid Hadžiefendić.[10] Discussing the problem of reforming Shari'a law in Yugoslavia, he expressed his view, based on his interpretation of the treaty, that the state legislature had no jurisdiction over changing Shari'a law regulations, but that Muslims themselves could do so by changing their customs. In this way, there would be no infringement of the international treaty. The only unresolved issue would therefore be which Muslim forum would have the authority to initiate and decide upon a change in customs. As was generally the case with attempts by Muslim modernising intellectuals to reform Muslim cultural and social life, his position had little practical impact.

Secondly, article 10 of the treaty required the Kingdom to allow the family and personal status of Muslims to be regulated in accordance with their customs. As styled in this provision, Shari'a law did not have to take on obligatory validity for Muslims. The international treaty would not have been violated in any way had the Yugoslav state acted similiarly to France in Algeria or to Bulgaria, where Muslims had recourse to Shari'a law, but could also eschew it voluntarily and submit themselves to the general civil law. In short, the international obligation under Saint Germain did not have to result in making Shari'a obligatory or even retaining the institution of national Shari'a courts. It was reasons of an internal political and legal nature that produced this situation.

b. The constitutional guarantee of the application of Shari'a law

The issue of applying Shari'a law and the survival of the state Shari'a courts in Bosnia and Herzegovina was raised on the internal political stage during the very initial stages of revived political life in the new state. Religious demands, including the continued validity of Shari'a, were placed front and foremost in the programmes of groups working on creating a common Muslim political organisation. Some groups insisted on them more, others less, but none rejected them. This is understandable given the religious and political isolation of the Muslim masses, their

10 H. H. Efendić, "*Šerijatsko bračno pravo*," *Reforma* (Sarajevo), no. 2, March 30, 1928.

sense of vulnerability, and the circumstance that the major social and indeed the politically decisive factor for the Muslim population at the time was their sense of religious solidarity.[11]

The Muslim Organisation, a political group from Sarajevo gathered around the *Vrijeme* newspaper (the first issue of which came out on January 8, 1919), argued in its programme for a constitutional guarantee for the institution of the Shari'a courts, "as state authorities responsible for passing judgement in accordance with Shari'a regulations," retaining the same sphere of action, or, in certain areas, an expanded one.[12]

In its *Fundamental programme for a common organisation of Muslims within the Yugoslav state*, the Tuzla Action Committee, grouped around muftî Ibrahim Maglajlić, was particularly vocal in its demands for the unhindered application of the Islamic religious regulations of the *Hanafî madhab* and a guarantee of the independence of the Shari'a justices with an extension of their jurisdiction over all Muslim family affairs and recognition of their executive authority.[13]

The Muslim Community, a group formed in Banja Luka in January 1919 around a programme put forward by the publicist, Sulejman el-Syrri Abdagić, sought "freedom of confession and a state guarantee of the equality of Islam with all other public confessions. Moreover, everything implied by the following words, *Shari'a, Waqf, Caliphate*, and so forth, including the necessary institutions."[14]

Yugoslav Muslim Democracy, a group formed in December 1918 in Sarajevo, in spite of not dealing with a number of important religious issues, nonetheless found it impossible not to broach in its programme (*Jednakost*, January 8, 1919) the retention of the Shari'a courts as vital institutions, as well as the extension of their sphere of activity to all other parts of Yugoslavia where there were Muslims living.[15] It is true, however, that there was no insistence in any of this upon an extension of the actual authorities of the Shari'a courts.

The JMO, founded on February 16, 1919, adopted in its programme the orientation of the Muslim Organisation, whose leading members had been the author Edhem Mulabdić and the journalist and theologian Sakib Korkut. It is worth noting that, according to a clarification issued by the party's Central Committee, the reasons for setting up independently had

11 Cf. Veselin Masleša, *Muslimansko pitanje*, Dela, II, Sarajevo, 1954, 1954.
12 A. Purivatra, op. cit., 414.
13 Ibid., 416.
14 Ibid., 417.
15 Ibid., 416.

included the government's unwillingness to address the question of Muslim religious and educational autonomy, the relationship with the *Caliphate*, and the institution of the Shari'a courts, as well as questions of reparations for serf resettlement, relief of debts on village smallholdings, and the looting of Muslim property during the period of unification.[16]

The JMO's demands regarding the application of Shari'a law were set out in section 2 of it programme that stated:

> We demand a constitutional guarantee that the institutions of the Shari'a courts will remain unaltered with their current scope of action as government authorities for issuing judgement in accordance with Shari'a regulations. This scope of action is to be extended in the following regard, viz. that the Shari'a courts be given jurisdiction over all Muslim family affairs and responsibility over the conduct of Muslim wardship affairs and for keeping the registers of Muslim births and deaths, as well as for contracting and dissolving Muslim marriages, giving the registers the status of public records. We also demand that the Shari'a courts have judicial authority in all *waqf* matters requiring *hukmi shar'i* [Shari'a court decisions]. We request that these courts be given executive authority in all their decisions and rulings, while Shari'a justices should be given the right of direct disciplinary authority over any parties, with a view to ensuring the authority of the bench.[17]

As is evident, applying Shari'a law and retaining state Shari'a courts were inextricably connected for the Muslim citizens and their religious representatives in Bosnia and Herzegovina. There was no inkling of the possibility of any other form of solution. In fact, they were calling for an increase in the *qâdî*s' judicial authority and an expansion of their existing authorities. Special emphasis was placed on providing a constitutional guarantee for the existence of Shari'a courts as government authorities entrusted with adjudicating in accordance with Shari'a law. For Muslim representatives, incorporating such provisions into the fundamental law of the land was a way to guarantee the permanence and sanctity of the institution. Due to their position, the question of applying Shari'a law through national Shari'a courts took on special importance for the JMO during preparations for adopting the first constitution of the new Yugoslav state.

Article 65 of the Draft Constitution presented by the Yugoslav Muslim club to the constitutional committee of the Constitutional Assembly was dedicated to the establishment of Shari'a courts. For the most part, it re-

16 Ibid., 56.
17 Ibid., 418-419.

produced the party's programmatic preferences in a somewhat abbreviated version:

> The national Shari'a courts shall rule over family, marital, and inheritance issues for Muslims. It shall have independent governance over Muslim pupillage or wardship matters and shall administer birth and death registers for Muslims and record their marriages. These books and records shall have the status of public records.[18]

It may be noted that this formulation lacks any reference to Shari'a court jurisdiction over *waqf*-related issues requiring Shari'a-judicial decision, as stipulated in the JMO programme. This is almost certainly a matter of imprecise expression, rather than of any intention to exclude *waqf* affairs from the authority of the Shari'a courts.

The draft constitution offered by the Yugoslav Muslim club was one of eight draft constitutions put forward and was not itself accepted as the basis for further work by the Constitutional Assembly. The ideas expressed in it, however, guided JMO deputies in the debate on the draft constitution. For example, during discussion over the principles of the draft constitution at the 10th session of the constitutional committee, judge Fehim Kurbegović declared:

> … Another very important issue for us is that of the Shari'a courts. These courts count today with us as government courts and we insist they remain such. For the most part, their remit is to deal with family issues, keeping the registers and records, and inheritance rights.

They are an integral part of Shari'a law and we cannot give that up. We cannot make any concessions that go against Shari'a law, in this regard, as we would be acting against our own institutions. We therefore require that these institutions remain governmental and that their authority and jurisdiction remain within the same boundaries as proposed in our draft…[19]

The next step in the struggle for a constitutional guarantee for the Shari'a courts was made during discussion on the details of the draft constitution. In discussing the constitutional provision for the judiciary (article 70), Mehmedalija Mahmutović, the Muftî from the Sanjak, proposed an amendment to the article, which stated:

18 Ibid., 83, fn7.

19 *Stenografske beleške, Rad Ustavnog odbora Ustavotvorne skupštine Kraljevine SHS, I,* Belgrade, 1921, 124. Henceforth *SB. RUO.*

> …the government Shari'a spiritual courts shall rule on family, marital, and inheritance matters for the Muslims, in accordance with the regulations of the *Hanafî madhab.* They shall manage independently all matters of wardship (custodial accounts) for Muslims and administer the registers of Muslim births and deaths as well as the contracting and dissolution of Muslim marriages. The registers and records shall have the status of public records.[20]

The Muftî explained his proposal in terms of the need to establish Shari'a courts in both the Sanjak and Macedonia of the sort that already existed in Bosnia and Herzegovina. It is particularly interesting that the proposal for a constitutional guarantee of the Shari'a courts and Shari'a law came from a non-JMO deputy. Even though JMO deputies and Muslim representatives from the southern regions took quite different positions on important issues, in this case deputy Kurbegović felt able to state categorically that Muftî Mahmutović's proposal was entirely in accord with the JMO's draft constitution's position on state Shari'a courts.[21]

The actual formulation of the annex to article 30 proposed by the Muftî from the Sanjak contained certain peculiarities. First, it used the strange phrase "state Shari'a spiritual courts," within which the designators "state" and "spiritual" are mutually exclusive. Insofar as the Muftî was following the model of the Shari'a courts in Bosnia and Herzegovina, the epithet "spiritual" was clearly out of place. Second, it stipulated that the Shari'a courts would rule in accordance with the regulations of the *Hanafî madhab*. There is no mention of this in the JMO draft of the constitution. This is probably because the Shari'a-judicial and religious authorities had authority over issues of material Shari'a law, so there was no need for the state to affirm this. As to the position on jurisdiction in the execution of wardship (custodial accounts) matters and the registers, Muftî Mahmutović's proposal was identical to that of the JMO and represented a call for a broadening of the courts' jurisdiction in comparison to Bosnia and Herzegovina.

Voices were raised at the same session of the constitutional committee against a constitutional guarantee for the Shari'a courts. Milosav Rajčević, a former Montenegrin justice minister, argued for religious affairs remaining within the remit of the Shari'a courts, just as Orthodox and Catholic courts dealt with the religious affairs of their flocks, however he argued against the Shari'a courts ruling on matters of property. He asked:

20 Ibid., III, 4-5.
21 Ibid., III, 6.

"why should the property affairs of Mohamedans be separate and dealt with in one way, while those of the Orthodox and Catholics are dealt with in a quite other one?"[22]

Deputy Vojislav Marinković considered it generally superfluous to include provisions on Shari'a courts in the constitution. "The Shari'a courts are regular courts," he claimed, "and the establishment and organisation of regular courts and their jurisdiction is stipulated in law." He pointed out that the Shari'a courts would remain wherever they had already been established until the situation was changed in law.[23]

The JMO deputy Sakib Korkut responded to these objections in principle. He strongly opposed any reduction of the Shari'a courts to merely religious (spiritual) ones: "Everything that lies within the jurisdiction of the Shari'a courts today is already contained in Shari'a and our demand that the institution of Shari'a courts be guaranteed in the constitution itself is a logical consequence of the principle of respect for religion…."[24] Korkut further elucidated the demand for the application of Shari'a law at a session of the constitutional committee by offering an argument that would continue to be used regularly on any occasion the issue was raised; if Islam is a recognised religion, then its system of law must also be recognised, i.e. Shari'a. To the objection that a national constitution was no place for a provision on a particular form of court, Korkut was clear: "Well, our issue regarding the Shari'a courts can be tackled in either the paragraph on religions or in the paragraph on courts, but we are looking for a guarantee that will make it impossible to accept in law the viewpoint advocated here among us moments ago by the former justice minister of Montenegro."[25]

Given the approach taken by the civilian Muslim representatives in the constitutional committee, a statement made by Nikola Pašić at the Corfu conference proved particularly prophetic. Advocating the view that all religions, including the Muslim one, should be on an equal footing, he said, "Their religion is also their civil law. This may cause difficulties. But from the governmental point of view, it should not be a problem."[26]

Marko Trifković, the Minister for preparations for the constitutional assembly, also declared on the proposed addition to article 70. In his view,

22 Ibid., III, 9.
23 Ibid.
24 Ibid., 11.
25 Ibid.
26 Dragoslav Janković, *Jugoslovensko pitanje i Krfska deklaracija 1917. godine,* Belgrade, 1967, 275.

the Shari'a courts should be considered national courts and Muslims should be given a constitutional guarantee, but it could not take effect immediately since there would have to be consultations within government.[27]

As the JMO deputies to the Constitutional Assembly were in opposition at that time, the constitutional guarantee for the Shari'a courts and their other proposals faced a highly uncertain destiny. Anxious to secure the necessary majority to pass the Constitution, the Radical-Democratic coalition entered negotiations with the JMO parliamentary party. During these negotiations, the JMO deputies set two types of conditions: one for integration within the Constitution itself, the other for execution by the government.[28] Provisions on religions in the spirit of the JMO draft of the constitution, provisions on the compulsory teaching of religious education in primary and secondary schools, the institution of the Shari'a courts, the suppression of alcoholism, the protection of property, and a law on proportional representation were introduced into the Constitution. After a certain degree of compromise on both sides, agreement was reached on March 15, 1921. The Pašić government was committed to, amongst other things, introducing a provision on Shari'a courts into the Constitution.

As early as April 1, 1921, the Minister for the Constituent Assembly told a session of the Constitutional Committee that the question had been resolved after the proposal by the Muslims on the constitutional provision on Shari'a courts and that there was now agreement between the select committee and the Muslims to introduce a provision into the Constitution that read "state Shari'a judges will rule on family and inheritance matters for Muslims."[29]

This formulation differs from both the provision in the Draft Constitution proposed by the Yugoslav Muslim Caucus and that of Muftî Mahmutović. As well as leaving out the part about conducting wardship duties and the registers, it also uses "state Shari'a judges" instead of "state Shari'a (spiritual) courts." According to the members of the Constitutional Committee, his change in styling was intended to emphasise that this was not an independent, separate court, but rather that is a section of the civil courts in which Shari'a judges exercised Shari'a jurisdiction (J. Radončić, F. Kurbegović).[30]

In the discussion following Minister Trifković's proposal, entirely new positions were expressed. Most speakers opposed giving the Shari'a courts jurisdiction over matters of property. Deputy Pavle Čubrović sug-

27 *SB. RUO*, III, 10.
28 Cf. A. Purivatra, *op. cit.*, 86.
29 *SB. RUO*, IV, 5.
30 *SB. RUO*, IV, 7.

gested a new wording for the amendment to article 70: "The Shari'a courts remain the responsible instance for religious questions only, while in all other matters jurisdiction passes to the civil courts."[31]

Removing questions of property from the Shari'a courts' remit would have made them very similar to the spiritual courts of the other recognised confessions, which would have been more acceptable to some at least of the deputies on the Constitutional Committee. Amongst those who voiced support for such a solution were Jovan Jovanović, Jovan Đonović, and Živko Jovanović.[32] It was also feared that the special courts that the proposed constitutional provision would produce would separate the Muslims from the rest of the Yugoslav population (J. Đonović), or even put them in a privileged position (Miloš Moskovljević). The socialist Etbin Kristan spoke against the constitutional guarantee for the Shari'a courts, warning the delegates that by accepting the annex to article 70 they were betraying the national ideal they were invoking since it would be impossible to accept that there should be different rights and systems of law in a unified state.[33]

On the other hand, some deputies from outside the JMO did support the constitutional guarantee for Shari'a courts. Jovan Radonjić stated that it was self-evident that the matter of marital disputes and inheritance was a matter for a Muslim religious judiciary and was an integral part of the Muslim religion. To deny these rights to Muslims was to be intolerant. Deputy Radonjić even said that: "If we were to oppose the proposal for there to be Shari'a courts, we would be being more intolerant than the Ottoman empire in the 16th and 17th centuries," as the Serb Orthodox Patriarchate had then been not just the largest spiritual centre, but also the major place of judgement.[34] Milorad Vujičić explained the retention of Shari'a courts on the grounds that it could be viewed as the Muslims agreeing that the Shari'a courts should hear inheritance cases as preferential courts, and that as such the proposal should be accepted.[35] Ljuba Jovanović offered additional arguments for accepting the constitutional provisions on Shari'a courts. He said that the state was not giving up its sovereignty by recognising a particular right or form of law, nor was it denying national and governmental unity by recognising differences that really did exist. It was clear that Shari'a law had a special significance for Muslims and that this should be taken into account. He pointed out that,

31 *SB. RUO*, IV, 5.
32 *SB. RUO*, IV, 6-7.
33 *SB. RUO*, III, 7.
34 Ibid.
35 Ibid.

up until 1912-3, Muslims lacked the right to apply Shari'a law under the Kingdom of Serbia and that this had been a major, if not the only reason for them emigrating. To avoid that happening in 1912 and 1913, a decree had been issued accepting Shari'a family and inheritance law and leaving it up to the muftîs to deal with legal issues accordingly. Since the population of the Kingdom of SHS had lived under different influences that had given rise to differences between them, such provisions could not just be done away with the stroke of a pen. He proposed accepting the provision on Shari'a courts with the hope of promoting peace in the country and respect for the Muslims.[36]

The amendment on Shari'a courts was passed by a majority of votes at the April 1, 1921, session of the Constitutional Committee.

Members of the Constitutional Assembly addressed the issue subsequently on two occasions; once during the preliminary discussion on the Draft Constitution during the second half of April 1921, and once during the special session on the section on the judiciary on June 14, 1921.

The first occasion saw not just legal objections in principle made against the constitutional guarantee for Shari'a courts, but also attempts to lay bare the political circumstances that led to such provisions being included in the Constitution. Etbin Kristan called it political horsetrading, out of a conviction that the result would have been quite different even a few months earlier, before the Muslims joined the government.[37] Deputy Vojislav Lazić accused the government of failing to take into account even a single objection from his party regarding the courts and of only including the provision on Shari'a courts "because there are Muslims in the government today."[38] Rista Đokić, a deputy for the Agricultural Workers' Party from BiH, proposed that if there did have to be Shari'a courts then the costs of their existence and operations should be borne by Muslims only.[39]

By the time of the special hearing on the section on the judiciary, it was clear that the provision on Shari'a courts, formulated as item 3, article 109, would pass in the form accepted by the Constitutional Committee (with replacement of the phrase "Shari'a judges" by "Shari'a justices", so that it now read: "state Shari'a justices shall rule on family and inheritance matters for Muslims.") The socialist deputy Milan Korun called the introduction of the provision a form of medieval currency used to pay for the purchase of Mus-

36 *SB. RUO*, IV, 8.
37 *Stenografske beleške Ustavotvorne skupštine Kraljevine SHS* (henceforth SBUS), I Belgrade, 1921, no. 7, 14-15.
38 SBUS, I, no. 8, 23.
39 SBUS, I, no. 13, 6.

lim votes for the Constitution, noting ironically that given the concessions made to the Muslims, the state should now be called the "Kingdom of Muslims, Serbs, Croats, and Slovenians."[40] Todor Lazarević pointed out that introducing a provision into the constitution which properly belonged in the Law on the organisation of the courts and on the establishment of judicial authorities created an exception, for "reasons known to the Assembly," and that it was moreover out of place as a constitutional provision because it would hinder any reorganisation or closure of the Shari'a courts.[41] The government position was put by the Justice Minister, Marko Đuričić, who said "Gentlemen, I cannot claim to be thrilled with the Shari'a courts. But this must stand." He pointed out that just as there had been reasons for retaining certain types of Shari'a court in Macedonia in 1912 and 1913, so it was even more urgent now, when Bosnia had joined the newly united state and that the Shari'a courts would just have to be allowed to evolve.[42] Article 109 was passed, with minority dissent, that same day.

The history of the constitutional guarantee for the Shari'a courts allows us a considerably greater degree of insight into the reasons Shari'a law was made part of the state legal system in Yugoslavia at a time when a process had already begun in the protector-country of Islam that would lead to secularisation of both state and law. We have already seen that the obligations under St. Germain did not have to lead to mandatory application of Shari'a law on the Muslim population, and certainly not through national Shari'a courts or justices. As mentioned, it was internal political and legal reasons that produced this outcome.

From the very beginning, Shari'a law had represented part of the new state's legal and political reality. On the one hand, there were existing Shari'a courts in BiH with forty years of tradition behind them within the framework of a typical Christian state, just as there had been Shari'a courts in Montenegro and muftîates on the territory of the former Kingdom of Serbia. The new state made retaining the existing legal situation and institutions a matter of principle, particularly in the sphere of private law. The unbroken existence of national Shari'a courts in BiH and the application of Shari'a law in other areas took on a certain significance in this context. Resting on purely legal considerations, one could retain the national Shari'a courts wherever they already existed until they were reorganised by law to render them equivalent to the spiritual courts or were

40 SBUS, I, no. 44, 3.
41 SBUS, I, no. 44, 5.
42 SBUS, I, no. 44, 8.

abolished. Legal reasons were, therefore, not sufficient in themselves to require making Shari'a law mandatory throughout the state, while the practical scope of their validity would have been uncertain.

On the other hand, there was the social and political reality of 1.3 million Muslims for whom the strongest call imaginable to political action was the watchword "the faith is under attack."[43] To have neglected Shari'a law or abolished the Shari'a courts where they already existed and were an "established right" would have been an alarming sign of warning of extreme danger for the faith. The risk of the uncertain consequences this could produce was not something the government structures could accept, counting as they were on binding the Muslims to them and being able to rely on their votes.[44]

Expressing the mood of the majority of the Muslim population, the JMO deputies formulated and expressed the demand for a constitutional guarantee for the Shari'a courts. This demand allowed them to avoid a separate debate on the mandatory character of Shari'a law and on how it was to be implemented.

The constitutional provision on the Shari'a courts was worded to give Shari'a law the character of an imperative norm in Muslim family and inheritance matters.

Here one should note that the bourgeois Muslim politicians demanding a constitutional guarantee for the Shari'a courts at the Constitutional Assembly where intimately convinced that this was an actual requirement for the Muslim part of the Yugoslav population. This is clear from S. Korkut's statement to the general debate on the Draft Constitution in the Constituent Assembly on April 21, 1921, when he said,

> When we know this too, that we are going to get Shari'a courts as a government authority, given expanded powers, this is a great plus for us, one which counts with us for more than the three hundred million to deal with agrarian reform in Bosnia, about which Mr. Risto Đokić has spoken at such length. We appreciate this and if there are those amongst you who do not, we appreciate that too and consider it a great success and hold it to be a major concession.[45]

43 According to the official census in 1922, there were 1,337,687 Muslims living in Yugoslavia. (E. Sladović, *Ženidbeno pravo*, 96).

44 Krsta Marić, a judge from Bosnia, would later write that the passage on Shari'a justices was introduced into the Constitution to "render the state more acceptable to the Muslims and stop them playing the Turkish card once and for all," while "allowing Shari'a courts was a concession to the Muslims with a view to reconciling them to the state and returning them to Serbdom." (*Novi Život*, Belgrade, December 22, 1923).

45 SBUS, I, no. 13, 27-28.

Many authors have accorded the JMO the major role in gaining the constitutional guarantee for the Shari'a courts. Milan Bartoš wrote that the JMO's discipline during voting on the St. Vitus' Day Constitution was what led to the incorporation of item 3 in article 109, which is what made the application of Shari'a law mandatory for all Muslims.[46] Čedomil Marković was of the same opinion, viz. that the Muslim representatives helped the government to pass the constitution and their service was rewarded by introduction of the provision on Shari'a courts. According to this author, whether intentionally or not, this placed an obstacle in the way of introducing a general and mandatory form of civil marriage and so the separation of law and religion in matters of marriage and inheritance that it would only be possible to remedy by constitutional amendment or revision.[47] The position of the publicist Mustafa Mulalić is of interest here, as he argued against the JMO and matters being organised on a religious basis, writing,

> The religious approach taken by the Muslim caucus saved, in their view, the Shari'a law and the Shari'a courts. The constitutional provision recognising Islam as an equal religion recognised consistently both Islamic inheritance and marital law, which was a major success for preservation of Islamic religious traditions.[48]

Against this, certain other Muslim authors made no mention of the political factor in securing the constitutional guarantee for the Shari'a courts. A. Bušatlić claimed that it was the result of the public legal recognition of the Islamic religion.[49] According to this Shari'a law expert, the application of Shari'a law was the result of "a social need on the part of one section of our people."[50]

The state Shari'a courts and the mandatory character of Shari'a law were obviously not an immediate consequence of the public legal recognition of Islam. Not merely had the Christian religions had such recognition, but they had, in the case of Orthodoxy, even been favoured. They had not received the right to apply their religious law via state courts, however, certainly not in anything like the same degree as was allowed to Shari'a law.[51] If the implementation of Shari'a law did express a social need on the

46 M. Bartoš, *Obaveznost šerijatskog prava*, 500.
47 Čed. Marković, *Političko pravno pitanje religije*, Belgrade, 1924, 13-15.
48 Mustafa Mulalić, *Orijent na Zapadu*, Belgrade, 1936, 185.
49 "In so far as the state recognise the Islamic faith and its full existence, then the Shari'a courts must be tolerated as the external sign of that toleration." A. Bušatlić, Šerijatski sudovi, *Gajret*, 1928, 156.
50 A. Bušatlić, "Šeriatski sudovi i šeriatske sudije (malo razjašnjenja)," *Novi Život 26*, I, 1924, 4.
51 E. Kristan drew attention to this in the Constitutional Assembly, saying "… I know that there are many institutions in the New and Old Testaments, in the Talmud, which, if they were still in practice, would change our current circumstances greatly. But you only make an exception in cases when it the Muslim gentlemen who require it." (SBUS, I, no. 7, 14).

part of Muslims, it had had to find political expression first and meeting it had required a political fight. We should look for the reason some Muslim authors preferred not to emphasise the political moment in their writings as an intention to defend the state Shari'a courts as institution using arguments drawn from international and national law rather than from transitory political compromise.

2. The Legal Consequences of Establishing State Shari'a Courts

While implementing the international obligation to allow the use of Shari'a law, the government of the Kingdom of SHS decided retain the institution of the state Shari'a courts as they existed in BiH for obvious reasons. It had two other options: to hand over all matters relating to Muslim personal status and family law to the regular courts, which would then rule on the basis of Shari'a, or to leave it all in the hands of the muftîs, as had been done in the old Kingdom of Serbia.[52] The first was unacceptable because the regular courts had no expertise in Shari'a. The second would have been quite like the institution of the spiritual courts of the recognised religions and would have been a more economical option, as the muftîs would have been religious officials and justices at the same time. It was not accepted, however, because of the position held by the civil political representatives of the Muslims.

According to interpretation no. 9324/922 of the General Session of the Court of Cassation in Belgrade, dated January 1, 1923, item 3 article 109 envisages a departure from the regular remit of the courts of first-instance, justices of uncontested actions, or judges in chancery; it envisages special courts to judge Muslims.[53]

The application of a special body of law based on the teachings of Islam and the existence of special courts for Muslims represented remnants of the concept of Islam as a model of society. The presence of religiously inspired law in the civil legal sphere of social relations hindered the process of reducing Islam to a purely religious phenomenon, limiting it to the private life of the individual.

52 Cf. M. Begovitch, *De l'Evolution du Droit Musulman en Yougoslavie*, 111-112.

53 "Tumačenje tač. v. g. i d čl. 5 Izmena I dopuna u zak. o ustrojstvu sudova," *Arhiv*, no. 3/1923 (vol. VI/XXIII), 235.

Under the interpretation and implementation of item 3, article 109, Muslims were supposed to deal with issues of personal status, family and inheritance law, and endowments under Shari'a law.[54] In practice, the question of whether a Muslim of liberal views could reject the application of Shari'a and the authority of the Shari'a courts had received a negative answer.[55] In exceptional cases, such persons could contract civil marriages where such an institution was available (Vojvodina) or where they were allowed to in cases of necessity (Slovenia and Dalmatia). In other cases, the only way for a Muslim to avoid subordination to the authority of the Shari'a courts was to leave Islam.

The St. Vitus' Day Constitution, which S. Troicki saw as part of the process of secularising the Orthodox world in the third decade of the 20th century (the overthrow of the Russian monarchy as the "fall of the Third Rome", the abolition of the secular powers of the Istanbul patriarchate, the abolition of the system of state religion in the Kingdom of SHS, etc.), had, through its adoption of a mandatory religious oath to the king and his ministers and the guarantee for Shari'a courts, limited its own stated principle of freedom of religion and conscience and the rule that civil and political rights were to be enjoyed independently of religious confession.[56]

The constitutional provision on the Shari'a courts was the legal basis for having them throughout the state. Any pre-existing regulations in conflict with it were suspended once the constitution entered into force. The significance of the constitutional guarantee is not affected by the fact that it took eight years to pass a law on the principle contained in article 109. The situation that prevailed was considered temporary.

History rewarded the hope of the bourgeois Muslim politicians; the constitutional guarantee would ensure the institutional continuity of the Shari'a courts. For the entire lifespan of the liberal democratic Yugoslav state, item 3, article 109 acted as a breakwater to any attempts to abolish the mandatory character of Shari'a.

One result of the Shari'a courts governmental character was the exclusive jurisdiction of the state over their legal regulation, *de facto* establishment, and maintenance. In this way, the state never gave up its imperium over this important area of social life. Moreover, the possibility of exercising political control over the Shari'a courts gave the state immediate

54 M. Begović, *Šerijatsko bračno pravo s kratkim uvodom u izučavanje šerijatskog prava*, Belgrade, 1936, 2.
55 M. Bartoš, *Obaveznost šerijatskog prava*, 502.
56 Čed. Marković, *Političko pravno pitanje religije*, 12-13.

influence in the area of the interpretation and application of legal regulations that was three times greater than that of the religious community. This objectively squeezed the autonomy of the Islamic Religious Community at a time when the same forces were fighting for it as it had won the constitutional guarantee for Shari'a courts.

3. A Comparative Review of the Validity of Shari'a Law in Yugoslavia and Other Balkan Countries

The validity of Shari'a law for Muslims in Yugoslavia was not an isolated issue. Shari'a law was also applied to a limited degree in other Balkan countries with Muslim minorities. There were, of course, certain differences in terms of how compulsory it was and how it was applied.[57]

First, one may note that after the First World War the application of Shari'a law was guaranteed in Balkan countries by means of international legal instruments for the protection of minorities. Before that, it had been secured by bilateral or multilateral peace treaties with the Ottoman empire made by either the great powers or the Balkan states. The role of the Ottoman empire in this was only natural as the problem of the legal status of Muslim populations in the Balkans and Southeast Europe only arose with the Ottoman loss of territories in the region. The Muslim population, whose religion and customs had previously been protected by the the Ottoman empire found themselves in the position of religious minorities in liberated, newly established Christian-majority Balkan states. Moreover, as *Caliph* of the Muslim World, the Ottoman sovereign claimed a right to act as religious protector of Muslims living under the sovereignty of non-Islamic states. The prevalent view of the time was that the application of Shari'a law in areas affecting the personal status of Muslims was a sign of religious freedom. This is why from the mid-19th century on treaty provisions governing the legal status of the Muslim population in Southeast Europe always included clauses on the application of Shari'a law.

57 In illustrating this problem with regard to a few issues, we shall keep to the data provided by Mehmed Begović. See M. Begović, Die Anwendung des Scheriatrechtes in den Balkanstaaten, *Moslemische Revue* (Berlin), no. 3-4/1935, 54-60.
More recently, Hans-Jürgen Kornrumpf has dealt with the application of Shari'a in Balkan countries in his "Scheriat und christlicher Staat: Die Muslime in Bosnien und in den europäischen nachfolgestaaten des Osmanischen Reiches," *Saeculum* (Freiburg/Munich), XXXV, h. 1 (1984), 17-30.

The Anglo-Ottoman agreement of June 4, 1878 obliged England to protect the Muslims of Cyprus. Article 1 of the annex to the agreement dated July 1, 1878 stipulates that Muslim religious courts will continue to exist on the island with exclusive jurisdiction over the religious affairs of the Muslim population.[58] A nearly identical provision can be found in article 8 of the agreement between the great powers and the Ottoman state of May 24, 1881 which treats the status of Muslims in areas ceded by the Sublime Porte to Greece. The application of Shari'a law is also guaranteed in the Bulgarian-Ottoman peace treaty of September 29, 1913 and the Greco-Ottoman treaty of September 14, 1913.[59]

After the First World War, the international community paid special attention to the protection of religious, national, and linguistic minorities through the instrumentarium of international law. A special institution was created that called for the protection of minorities. This was important because it placed international legal protections on minorities above the internal legislation of any given state. This guaranteed the continuance of whatever was found to be the state of affairs in relation to the status of a given minority and facilitated in preserving that group's special characteristics. The situation guaranteed under the international instruments for the protection of minorities was not subject to change at the will of a state under whose sovereignty a given minority lived.

The winners of the First World War required many smaller countries to accept the obligations regarding the protection of minorities regardless of their involvement in the war or whether or not they were a previously existing or newly-created state.[60] This was done either through peace treaties, special treaties, or even via unilateral declarations on the part of certain states.

The Kingdom of Serbs, Croats, Slovenes and Greece both explicitly accepted obligations under international law regarding the application of Shari'a law during this period in the form of special treaties on the protection of minorities signed together with the main Allied and Associated Forces. Albania did the same through a unilateral declaration issued when it joined the League of Nations. The declaration had the same binding force as treaty provisions.

The clause that Greece agreed to in Sevres on August 10, 1920 that allowed for the application of Shari'a law (article 14) is identical to the

58 Ilija Pržić, *Zaštita manjina*, 71; H. Kornrumpf, op. cit., 20.
59 I. Pržić, op. cit., 72.
60 Budislav Vukas, "Bilješka o sudbini ugovornih odredaba o zaštiti manjina iz vremena Lige naroda," *Zbornik Pravnog Fakulteta u Zagrebu*, no. 4/1978, 273ff.

provision contained in article 10 of the treaty on the protection of minorities accepted by the Kingdom of Serbs, Croats and Slovenes. The application of Shari'a law was primarily related to the issues of personal status and was fo, the most part, respected during the interwar period unlike other obligations with regard to the Muslim population.[61]

Albania issued its declaration on the protection of minorities on October 2, 1921, when it joined the League of Nations. Item 3 of article 2 reads as follows: "Appropriate measures will be taken to regulate the family and personal status of Muslims, in line with Muslim customs."[62]

It somewhat strange that in its declaration of the protection of minorities Albania it cites its obligation towards its Muslim population, including the application of Shari'a law, even though it is common knowledge that Muslims represent a majority of the population of the country.[63] This was most likely due to the efforts of a newly-created state to join the international community with all the legal obligations normally required of other newly-formed states.

Albania introduced international obligations regarding the application of Shari'a law into its national legal system via the constitution of October 2, 1921. Following the secularization policy of Turkey, the Albanian government abrogated the validity of Shari'a law and of the legal systems of the other religious communities in the civil sphere when it adopted its Civil Code on April 1, 1928.[64]

In the period between the two world wars, Shari'a law was also applied in both Bulgaria and Romania.

Its validity for the Muslim population of Bulgaria was based on article 5 of the Treaty of Berlin, the Bulgarian-Ottoman peace Treaty of September 29, 1913, and the provisions of articles 49-57 of the Treaty of Neuilly-sur-Seine of November 27, 1919. The Bulgarian Procedure for Civil Suits of December 15, 1891, (articles 1222 and 1223) and the Law on Inheritance of December 17, 1889 (article 344) implemented these obligations

61 The equality of Muslims under civil law with citizens of other religious confessions was infringed by legal regulation 1366/1938, which denied them the right to ownership of property or even to manage older houses. The autonomy of the *waqf* administration system was desiccated by legal regulation 2345/1930. (See "Muslims in Greece, the forgotten 'alien elements,'" *Arabia* (London), no. 35 (July 1984), 75-76.

62 The translation follows the text given by Vladimir Đuro Degan (op. cit. 91).

63 According to the 1930 census, Muslims then made up 69% of the total population of Albania. See the *Encyclopaedia Britannica*, volume 1 (1965), 512.

64 For more on this, see G. H. Bousquet, "Note sur les réformes de l'Islam Albanais," *Revue des Etudes Islamique* (Paris), IX (1936), 399-410; idem, "Un exemple de laïcisation du droit musulman – Le code civile albanais, " in *Introduction a l'étude du droit comparé*, Paris, 1938, III – IV, 643 – 646.

by recognising Muslims' right to have their marital and inheritance affairs conducted under Shari'a law. Any hearings on issues in these areas fell within the remit of the Muftî. Shari'a law in the area of inheritance was not binding in nature; any adult Muslim could request that his case be dealt with under civil law in front of a regular court.

The situation was practically identical in the Kingdom of Serbia. International obligations and the absence of a civil form of marriage resulted in the Islamic religious authorities (muftîs) having authority in matters of marital law. When it came to inheritance, one could choose the Muftî and Shari'a law or the regular courts and general civil law.

The Muftîs were government officials. The *Grand Muftî*'s seat was in Sofia, and he acted as a Shari'a court of second instance. The remit of his office included the supervision of *waqfs*. The Muftîs applied the Shari'a law of the *Hanafî madhab* in its traditional form. They showed none of the reforming tendencies that were evident in the Shari'a judiciary in Yugoslavia. The French orientalist G. H. Bousquet visited Yugoslavia, Albania, and Bulgaria in 1936. He noted that the only significant change made to Shari'a law in Bulgaria was a decision by a committee of muftîs after the First World War that raised the minimum age for Muslims getting married to 18 for the groom and 17 for the bride.[65]

The application of Shari'a law to the Muslim population Romania was based upon article 44 of the Berlin peace treaty, which required the state to protect religious and national minorities on its territory. The responsibility for applying Shari'a was governed by laws of March 30, 1886, and July 26, 1921. The Shari'a justices were appointed by the state and were responsible for hearing Muslim family disputes. This remained the case until April 3, 1935 when changes were made to the existing *Law on the organisation of the courts*. This did away with the special Shari'a jurisdiction transforming *qâdî*s into advisers of the regular civil justices. Religious administration and the traditional interpretation of Islamic religious regulations remained the responsibility of the Muftîate, based in Constance since 1878.[66]

One may conclude that the international obligations to allow the application of Shari'a law were not in themselves enough of a guarantee to attain the goal which was to preserve the personal autonomy of Muslims in the Balkan countries in the period between World War One and World War Two. The destiny of these obligations largely depended upon how

65 G. H. Bousquet, "Islam in the Balkans," *The Muslim world*, XXVIII (1937), 69.
66 H. J. Kornrumpf, op. cit., 28.

numerous the Muslim community in a given state was, its degree of political organisation and commitment, and the actual course of internal political events in the state involved. Moreover, following the collapse of the Ottoman Empire and the secularisation of Turkey that followed, there was no longer a significant Muslim state or institution with an interest in ensuring that the obligations were actually being respected.[67] While legal circles in Europe were interested in the issue, in the Balkan states, many wondered what the point of maintaining Shari'a law was at all if the most important Muslim state itself had abandoned it.

The second conclusion to be drawn from this comparative review relates to the fact that the application of Shari'a law in the Balkan states was entrusted to different bodies: Shari'a justices (*qâdî*s) and religious officials (*muftîs*). Under the authentic Islamic concept, the Muftîs could play the role of legal advisers to private individuals and even to government authorities. The application of Shari'a law, however, was an exclusive responsibility of Shari'a justices. In Islamically organised states, Muslims did not have any special religious organisations because state and religious bodies were interconnected. It was only after the end of Ottoman rule in Southeast Europe that Muslim groups began to organise as religious communities. Accordingly, the role of the Muftî took on new content; he became responsible for applying the Shari'a law on behalf of the Muslim population and acting as the highest religious-administrative (i.e. ecclesiastical) authority in a given area "not unlike a bishop in Episcopalian churches."

The application of Shari'a law through state Shari'a courts represented a form of continuity in the application of this law by judicial bodies that reached back to the period of Islamically organised states. The state Shari'a courts emphasised the civil-legal and not the religious function of Shari'a, and they offered greater legal guarantees of the rule-based application of both material and procedural law.

67 The Congress of European Moslems held in Geneva from August 12 to September 5, 1935, discussed the possibility, some 15 years after agreement of the Treaty on the protection of minorities, that this instrument of international law might also be used for the protection of Muslim minorities. It bore no practical fruit, in contrast to the cases of other religious and national minorities.

CHAPTER III

The Structure and Functioning Operations of the Shari'a Courts

The constitutional provision on Shari'a courts implementationtook place under heightened political circumstances. The legal order of the new state was built on the foundations of several different legal traditions from the various regions that comprised it.

In just over two decades, attempts were made to organise the Shari'a courts under the law, provide them with expert staff, and make of them institutions of unquestionable legitimacy *vis-à-vis* both the personal legal affairs of Muslims and the legal order of the state. Many different obstacles loomed over the implementation of the provisions arising from article 109 of the Constitution. These obstacles included: frequent changes of government; different positions taken by civilian Muslim political representatives regarding political life in the state; the consequent different attitudes taken by ruling circles towards the Muslim population and its institutions; the objective condition of Shari'a law itself; and the shortcomings of the Shari'a judiciary.

Any investigation of the structure and operations of the Shari'a courts necessarily raises questions. How did the organisation of these institutions progress and what were the major factors affecting the form they ultimately took? What was the place of the Shari'a courts in the judicial system of the Yugoslav state? Who were the Shari'a justices, how were they educated, and what was their professional, social and political status? How did the Shari'a courts operate and what did it really mean to be subject to their jurisdiction?

1. Establishing the Shari'a Courts

Two phases can be discerned in the process of determining in law the organisational norms and jurisdiction of the Shari'a courts in Yugoslavia: the first one was from 1918 to 1929 and the second one lasted from 1929 to 1941. The turning point in this process was passage of the *Law on establishing the Shari'a courts and on Shari'a justices* on March 21, 1929.

a) The 1918-1929 period

The major global characteristics of this time period were its retention of the status quo in applying Shari'a law and the attempts made to bring the organisation of the Shari'a courts under a single law for the entire territory of the state. We will now look in more detail at both these characteristics.

Legal regulation of the Shari'a courts

Once the St. Vitus' day Constitution had been adopted, the issue of an enabling act for article 109 naturally arose.

At an annual assembly held on October 23, 1921, the Association of Shari'a justices in Bosnia and Herzegovina elected a committee to draft a *Law on Shari'a courts* for presentation to the relevant government authorities. The committee members included justices of the Supreme Shari'a Court in Sarajevo (Jusuf-Zija Midžić, Salih Mutapčić, and Ali-Riza Prohić), as well as judges from the district Shari'a courts (Hilmi Hatibović, Abdulah Bušatlić, Hasan Kadić, Salih Udović, and court clerk Muharem Kulenović). It produced a draft law in 24 points which it presented to Fehim Kurbegović, the JMO deputy tasked with working on a draft *Law on Shari'a courts*.[1]

The JMO had in fact declared passage of a *Law on Shari'a courts* "a cardinal point in our programme."[2] The party did not, however, enjoy close cooperation with Nikola Pašić's administration following passage of the St. Vitus' day Constitution. The government put off meeting its obligations under the agreement reached with the JMO before voting on the Constitution. During the government crisis of December 1921, JMO deputies made continued support for the government conditional on those ob-

1 Abdulah Škaljič, "Osvrt na rad staleške organizacije šeriatskih sudaca od osnutka do današnjih dana," *El-Hidaje (Sarajevo), no. 10-11*/1943, 313.

2 *Pravda*, June 14, 1923.

ligations being met. One of those obligations was the "passage of a *Law on Shari'a courts* for the kingdom as a whole." The JMO newspaper rejected objections of blackmailing the king's government, pointing out that demanding the passage of one law that was fully in agreement with the national constitution and therefore could hardly be considered blackmail.[3]

The Pašić administration accepted this condition under item 2 of the *Protocol to the Agreement on extension of the coalition* and committed to passing it in the current session:

> A *Law on Shari'a courts* consistent with art. 109, section 3, of the Constitution to be presented simultaneously with a procedural law on organisation of the courts. Until such point as this law is passed, the provisional law governing the courts in the southern regions will be extended, with an annex to the effect that the present muftîs will carry out the tasks of the Shari'a courts within the scope of the jurisdiction envisaged under the constitution. Appeals against their judgements will be heard by a Supreme Shari'a Court to be established under the court of first instance in Skopje, after the model of the Supreme Shari'a Court in Sarajevo.[4]

As with the JMO's other conditions, this one was only partially met.

On January 30, 1922, the *Law on the organisation of the courts* was amended with provisional injunctions (article 5, items v, g, and d) dealing with the application of Shari'a law in so-called southern Serbia (the Sanjak, Kosovo, and Macedonia).[5]

Under these injunctions in article 5, the government did what was realistically possible in the short term thus giving a legal footing to the situation established under the *Provision for the organisation of the courts and on procedure in the southern regions*. No Supreme Shari'a Court for appeals of the sort envisaged in the Protocol was established in Skopje. In the end, jurisdiction was given to the Supreme Muftîate in Belgrade. The provisional system for applying Shari'a law through the muftîs was thus shored up; instead of moving towards the establishment of national Shari'a courts in line with the constitutional guarantee, a process of building new structures for which establishing a Supreme Shari'a Court in Skopje could have represented a first step. Hasan Rebac, department head of the Muslim office in the Ministry of Religions, played a key role in ensuring passage of this arrangement. He was generally responsible for ensur-

3 A. Purivatra, op. cit., 102.
4 Ibid., 421.
5 *Službene Novine*, no. 37—Va, February 18, 1922. (The signatories for the Council of Ministers include Mehmed Spaho, the Minister for Trade and Industry).

ing that Islamic Religious Community affairs in the southern regions were organised to allow state bodies to exercise full and direct influence over the management of *waqf* property and the conduct of the various forms of religious life.[6]

There were grounds for expecting work on drafting a *Law on Shari'a courts* to be accelerated, particularly as it was considered "a non-political issue." On February 1 and 2, 1922, however, the ministers from the JMO ranks (M. Spaho and H. Karamehmedović) had already resigned over government delays in meeting its obligations on taxation policy and the agriculture budget for Bosnia and Herzegovina.[7] The issue of continued cooperation with the government split the JMO deputies and led to a new party being formed, the Yugoslav Muslim People's organisation, with a separate Yugoslav Muslim People's Caucus. Two of its members were nominated to replace the dismissed JMO ministers.

The JMO's national congress was held on June 15, 1922 and supported Dr. Spaho's faction thus confirming the party's transition to opposition. In the contest with the pro-government faction for support amongst the Muslim electorate, JMO agitators listed among their reasons for leaving the government coalition the different levels of taxation in different provinces, the condition of Muslims in the Sanjak, and the government dragging its feet on introducing Shari'a courts for Muslims in the southern regions.[8]

As a result of all this, the pro-government group ("the right-wingers") failed to win even a single seat in the March 18, 1923 elections. No matter how much these results strengthened the JMO, they could do very little from the opposition benches as its deputies' proposals "were regularly rejected and questions or interventions put to individual ministers for the most part ignored."[9]

The issue of a *Law on Shari'a courts* had remained tabled. As it took on increasing significance for the Muslim public, it became an integral part of their political calculations for both the government and civilian Muslim politicians, regardless of their own tactical and political attitudes.

A survey on drafting a *Law on Shari'a courts* was conducted in August 1923 at the court department of the Bosnian and Herzegovinian regional administration. Participants included B. Eisner, the president of the Sarajevo Supreme Court's Council, Osman Nuri Hadžić, Department Chief in

6 Cf. M. Hj. (Muhamed Hadžijahić), "Hasan Rebac i muslimanska vjerska autonomija," *Hrvatski dnevnik* (Sarajevo) no. 1686 (1941).
7 *Pravda*, February 2, 1922.
8 A. Purivatra, op. cit., 122.
9 Ibid., 158.

the Ministry of Internal Affairs, Fehim Kurbegović, a judge, and Ibrahim Sarić, a Shari'a justice. Kenan Zija, a deputy of the *Džemijjet*, was also selected for inclusion in the survey but did not in fact take part.[10]

The survey team interviewed the Secretary of the Association of Shari'a justices, A. Bušatlić, who presented them with a draft of the law prepared under the auspices of the Association. According to an article by him published at the time, any *Law on Shari'a courts* would have had to cover: 1) the establishment and organisation of the Shari'a courts, 2) their jurisdiction, and 3) related practical matters.[11]

Under this proposal, the Shari'a courts would have been government bodies operating simultaneously under Shari'a regulations and national laws/provisions, so long as the latter were not in conflict with the fundamental principles of the Islamic faith. The Shari'a court system would have had two levels and been independent but fallen generally under the purview of Justice Ministry. Judges would have received a licence or *murâsala* from the *Grand Muftî* who would in turn have been provisioned with a *manshūra* or delegation of authority from the *Caliph*. The existing Shari'a courts in Bosnia and Herzegovina were to be retained and rolled out across the state. Their jurisdiction was to be expanded to include the keeping of registry records and administration of the property of wards of the court. The Shari'a courts would have had disciplinary authority over petitioning parties (including the authority to pass prison sentences and issue fines), while their rulings, once they had entered into force, would be implemented automatically on the basis of an incorporated executive clause without any need for further confirmation. Shari'a family, probate, and *waqf* law would remain unalterable and sacrosanct.

The survey team did its work quickly. The next step came from a group of civilian Muslim politicians who were close to the government at the time.

Deputies of the *Džemijjet* who had refused a couple of years earlier to cooperate with the JMO deputies on the grounds that the latter were "clericals," themselves made any support to the government beyond December 1923 conditional on passage of a *Law on Shari'a courts*, the autonomy of endowments (*waqf*), the opening of religious schools, resolution of the agrarian question in the southern regions, guarantees of public safety, and so forth.[12]

10 *Pravda*, August 12, 1923.
11 A. Bušatlić, "O ustrojstvu i nadležnosti šerijatskih sudova u Bosni i Hercegovini," *Arhiv*, no. 2/1923. (vol. VII/XXIV), 116-124.
12 A. Purivatra, op. cit., 162, fn. 138.

At the 13th regular session of the National Assembly held on January 23, 1924, the Justice Minister put forward a proposal for a law to extend the *Provision on the organisation and scope of the Shari'a courts in Bosnia and Herzegovina* of October 30, 1883 to the territory of the entire state. The surprise was that, instead of a draft for a new law, the provision from 1883 was being put forward despite its having been amended multiple times already. It also had received extensive criticism of its shortcomings in expert circles. It was almost as though, under the pressure of demands to regulate the Shari'a courts, the government in the end had more confidence in tried and tested arrangements than in new steps.

The proposal emphasised that the district Shari'a courts would exercise first-instance Shari'a jurisdiction, while supreme Shari'a courts would comprise the second and ultimate instance. Reorganisation would require Shari'a courts to be formed in every district with at least 4000 Muslim inhabitants. There would be supreme Shari'a courts in Sarajevo and Skopje. Shari'a justices' rank and salaries would follow the *Law on officials and other government employees in the civil service*.

The full text of the 1883 provision was attached to the Minister's proposal.[13]

This legislative proposal to extend legislation from one part of the country to the rest, was forwarded under parliamentary procedure for consideration by the legislative committee.[14]

At a plenary session of the legislative committee on January 28, 1924, a subcommittee was selected to examine the legal proposal on the Shari'a courts, the JMO member being Halid-bey Hrasnica.[15] It seemed as though a law might be voted through in a matter of days.

Crises and political life, however, or as a journalist with *Pravda* put it, "wrangling by the parties over other matters of state," prevented voting on the *Law on Shari'a courts*.[16] Although there was a draft law on organising the regular courts before the assembly at the time, the fact that the draft *Law on Shari'a courts* was not taken into consideration in parallel provided the JMO with an opportunity to direct sharp criticism at the government.

The Pašić government's crisis of the first half of 1924 culminated in the suppression of parliamentarianism. On 27 May, the National Assembly adjourned and regular sessions were not held again until October. Ljubo

13 *Pravda*, January 24, 1924.
14 *Stenografske beleške Narodne skupštine Kraljevine Srba, Hrvata i Slovenaca (SB NS), redovan sazlv za 1923-1924, I,* Belgrade 1924, 272.
15 *Pravda*, January 29, 1924.
16 *Pravda*, May 17, 1925.

Davidović formed his administration on 27 July with Democrats, dissident Radicals, members of the Slovenian People's Party, and members of the JMO. This administration's short lifespan (dismissed on October 15, 1924) prevented serious work on a *Law on Shari'a courts*.

The JMO joined the government of Veljo Vukičević in April 1927. This period corresponds with the issuing of an order by the Justice Minister to B. Eisner to carry out a final revision of a draft *Law on Shari'a courts*.[17] In our view, Eisner's activities played a key role in the shift to drawing up a new *Law on Shari'a courts*, rather than just extending the 1883 decree.

During this period, the Association of Shari'a Justices in Bosnia and Herzegovina, the *Grand Muftî*, the Supreme Muftî of Serbia, and JMO deputies and ministers all made representations with the Justice Minister for passage of the law.

In September 1928, the Justice Minister in the Anton Korošec administration announced that a *Law on Shari'a courts* would soon be presented to the Assembly. In Sarajevo, *Pravda* greeted this with an opinion piece, "Beyond Review," expressing considerable satisfaction at the prospect of Shari'a courts in the southern regions.[18]

The Korošec administration was very short lived. The King put in place the organisational and personal preconditions for resolving chronic political crisis by introducing personal rule.

The regime was established after dictatorship was declared on January 6, 1929, and took measures to secure the loyalty of its Muslim subjects while at the same time undermine JMO influence on the masses. The standard-bearer of this policy was a leading Radical from BiH, Milan Srškić, but its executors were leading Serb-oriented Muslim politicians, Muftî and later *Grand Muftî*, Ibrahim Maglajlić, Hamdija Karamehmedović, Avdo Hasanbegović, and others.[19] Srškić served as Justice Minister in General Peter Živković's first administration. He attempted to exert influence on the Muslims through organisational subordination of the Islamic Religious Community to his ministry and packing its administration with loyal individuals. This was consonant with his view that their previous leadership had imposed a "Turkish" mentality on the Muslims.

One of his first steps was to propose the King promulgate a law on organising the Shari'a courts and Shari'a justices. The king ratified the law on March 21, 1929, and it was promulgated seven days later.[20]

17 A. Škaljić, *Osvrt na rad staleške organizacije šeriatskih sudaca*, 315.
18 *Pravda*, September 12, 1928.
19 Cf. Mustafa Imamović, *Pravni položaj verskih zajednica u vreme šestojanuarske diktature*, neobjavljeni magistarski rad, Belgrade 1967, 90, A, Purivatra, op. cit., 300-301.
20 *Službene Novine,* no. 23 — XXIX, 28. III 1929.

There were several reasons for how the law came to be passed a mere two and a half months after the declaration of dictatorship.

First, preparations for introducing the law were already close to finalisation in any case. Unanimity had by then been achieved of Muslim civil and political opinion regarding the need for the law. By enacting this already prepared draft, the January 6th regime could thus demonstrate its good will toward the Muslim masses, while at the same time offering its own supporters additional arguments.[21]

The draft *Law on organising Shari'a courts and on Shari'a justices* (henceforth the *Law on SCSJ*) envisaged a single common form of organisation for Shari'a courts throughout the state in areas that were inhabited by significant Muslim populations. This approach fit well with the standardising politics of the January 6 regime, which embarked in a spirit of centralisation and unitarism upon a legislative programme intended to reform legal life throughout Yugoslavia after a single, homogenous model. The King's personal rule thus also left its mark on the *Law on Shari'a courts*. A new provision for verdicts to be issued in the name of the King (article 5) ensured these courts were more closely incorporated into the governmental and legal system than at any time since the end of Ottoman rule.

The law's passage however did not secure the regime's immediate policy goals regarding the Muslim population; the state did not reserve these new authorities for itself. In fact, it had previously had much broader powers over muftîs outside of Bosnia and Herzegovina. Later organisational changes within the Islamic Religious Community, which was stripped of its autonomy in 1930, and the infiltration of Shari'a justices into its administrative bodies, from district committees all the way up to the forum for electing the *Grand Muftî*, would later offer the state more scope for exercising influence over the religious life of Muslims.

Separate regulation of the Shari'a courts

An amendment to the *Law on the organisation of the courts* of January 30, 1922, had changed the provisions governing the application of Shari'a law in so-called 'southern Serbia.' It made no real changes in substance but meant that the scope and method for applying Shari'a law was henceforth regulated by an instrument with greater legal force. The temporary character of this arrangement was explicitly stressed.

21 The Serbian Supreme Muftî Mehmed Zeki-ef. Činara used an interview in 1929 to praise the January 6 regime for "the success it has shown in passing a number of useful new laws." (*Novo vrijeme*, December 21, 1929)

Article 5 of the law contains the following provisions related to the application of Shari'a law:

"pt. v. – As regards marital disputes between Muslims, or disputes over maintenance, matters of guardianship and wardship, and the emancipation and majority of minors, insofar as these affect Muslims, jurisdiction shall lie with the muftîs, within the scope of their local responsibilities.

pt. g. – The provisions of the civil code on inheritance are to be applied and enforced. For inheritance under the law, the court may base its decisions on customary law, insofar as it is established without doubt that this is rooted and sanctioned in long-standing general practice.

pt. d. – Serbian Muslim subjects may make their testamentary wills according to the provisions of Islamic law. The validity of such a testament will be determined by the muftî.

Similarly, Muslims may have recourse, by prior agreement, to the muftî as to their judge of choice in questions of inheritance. Legal recourse against the rulings of the muftî, as the judge of choice, shall be via the regular courts, unless otherwise explicitly agreed.

Provisions pts. v and d shall remain in force up until such time as a *Law on Shari'a courts and their jurisdiction* is enacted."

The Court of Cassation in Belgrade gave its interpretation of this legal text in general session on January 1st, 1923 in decision no. 9324/922.[22]

In its opinion, the Court of Cassation at one point designated the muftîs as "representatives of the Islamic faith" but at another as "government personnel." In their first capacity, as members of the Islamic religious hierarchy, they exercised oversight over Islamic religious life and subordinate religious officials (*imams*) and were *ex officio* representatives on regional *waqf* committees. In their second capacity, they carried out judicial functions. Depending on the tasks entrusted to them, they served as first-instance judges ruling in accordance with Shari'a law, as judges in chancery, judges in non-contested matters, and elective judges [i.e. judges chosen by the parties].

In marital cases involving Muslims and in cases regarding maintenance, the muftîs acted as representatives of the Islamic faith. As well as ruling on the religious validity of marriages, they heard questions of maintenance. Under article 100 of the Serbian Civil Code, the (Christian) spiritual courts could only issue non-binding rulings in principle on the right to maintenance in Christian marital disputes. The muftîs, by contrast,

22 "Tumačenje tač. v, g i d čl. 5 Izmena i dopuna u zak. o ustrojstvu sudova," *Arhiv, no. 3*/1923 (vol. VI/XXIII), 234-239.

could decide on the level of maintenance, a matter reserved under the Serbian Civil Code for the regular civil courts. As rulings on these issues were made in accordance to Shari'a law, in the absence of Shari'a courts, the muftîs' decisions were subject to review by higher-level Muslim religious authorities – in this case, the Supreme Muftî for Serbia.

In the opinion of the Court of Cassation, the muftîs were required to cut their cloth to the same laws as the regular chancery judges responsible for individuals of other religious confessions. Examples included issues such as guardianship and trust funds or custodial accounts for minors, estates in chancery of deceased Muslims, and the emancipation or majority of minors, in the absence of specific regulations. Their decisions on such matters were subject to review by the regular appeal courts.

For Muslims in 'southern Serbia,' the regulations governing inheritance and probate were generally those of the Serbian Civil Code, except that, under article 5, item d, where interested Muslim parties agreed in advance, it was possible to transfer probate from the regular civil courts to the muftî as judge of choice. His ruling, like that of any judge of choice, would be subject to review by the court of first instance assuming the parties had not waived their right of appeal. Whenever a muftî served as judge of choice, he was required to submit his ruling and any legal basis for it to the relevant court of first instance. In their review, the first instance courts were to be guided by the general regulations of civil judicial procedure governing the work of judges of choice.

When making wills, Muslims had the right to choose between having a chancery judge draw up a testament under the civil code or a muftî who could do so under Shari'a regulations. In the latter case, the muftî was standing in for the judge, and the appeals court was responsible for assessing his rulings.

The interpretations of the Court of Cassation to one side, it was possible for disputes over the nature of the muftî's role to arise in practice. This was because an individual whose basic role was religious was appearing as the executor of tasks that normally fell under government jurisdiction and were only delegated to him by the will of the state. It was consequently important to know in each case in what capacity the muftî was serving so as to determine which authority was responsible for exercising oversight over his legal actions.[23]

23 For how cases were resolved in judicial practice, see T. I., "Za rešenje pitanja o izuzeću muftije pri donošenju odluka po muslimanskim masama, nadležan je prvostepeni sud na čijoj teritoriji se nalazi muftîjstvo," *Branič* (Belgrade), *no. 12*/1928, 239.

Muftîs therefore differed from the Shari'a and the spiritual courts both in terms of the law they applied and the nature of their functions. One similarity they shared with the spiritual courts was that, although individuals occupying positions in the hierarchy of a religious community, they were nonetheless carrying out judicial functions and applying the law on grounds of religious confession. On the other hand, for some of the issues within their scope, the muftîs ruled based on general civil law, and their decisions were subject to review by the regular civil courts. Moreover, they were responsible for ruling on property issues over which the spiritual courts had no authority.

The Shari'a courts in Bosnia and Herzegovina were departments of the regular civil courts so that Shari'a justices had at best a weak connection to the Islamic Religious Community. The first instance Shari'a courts' rulings were subject to review by second or higher instance Shari'a courts. The Shari'a courts in Bosnia and Herzegovina enjoyed mandatory jurisdiction over Muslims on a range of issues, while the muftîs only had jurisdiction over issues related to personal status and marital law; their authority over inheritance was dependent on the consent of the parties. The application of Shari'a law in Bosnia and Herzegovina through government Shari'a courts was thus both more comprehensive and qualitatively different from the situation in the southern regions of Yugoslavia where there were muftîates.

Article 5 of the amended *Law on the organisation of the courts* was intended as a temporary measure, however, for a full seven years it remained the only legal source for the application of Shari'a law in the southern regions that according to the 1922 census some 720,078 Muslims lived.[24] Given their content, the provisions of the article were not really an adequate tool for breathing life into article 109 of the Constitution in any consistent fashion.

For example, as we have seen, muftîs could only serve as judges of choice in matters of inheritance. In practice, it was very difficult to get all the heirs to agree to hand a probate hearing over to a muftî. It was not unknown for estates to be passed down, without probate hearings, over several generations. This caused legal and property rights/relations to become increasingly complicated over time. There was no legal clarity as to how muftîs' decisions should be formally executed. This provided the parties with at best very weak procedural guarantees which only further contributed to the disfunctional situation.[25]

24 E. Sladović, *Ženidbeno pravo*, 96.

25 "Uspostavljanje šerijatskih sudova u Vardarskoj i Zetskoj banovini," *Novo vrijeme*, November 16, 1929.

These legislative and administrative shortcomings were exacerbated by the unsatisfactory material condition of muftîate services in the region.[26] In most cases, their levels of education were also unsatisfactory. For the most part, they were graduates of Islamic religious schools – madrasas – with *ijâza* diplomas. At best, most had only a rudimentary mastery of official language or the legal regulations governing wardship and other matters for which they were now responsible. They often wrote their rulings in Ottoman which meant the parties had to have them officially translated into Serbo-Croatian in order to use them with any official bodies. In some cases, the muftîs' secretaries were not Muslims and had no knowledge of Shari'a law or Shari'a court practice. As a result, what were called "Islamic baptismal certificate" began to appear in the practice of southern muftîs along with forms of documentation that were unfamiliar to Shari'a practices.

Because of this situation, proposals were made to hand over Muslim inheritance affairs to the regular courts in practice. The muftîs could provide an outline for the purposes of probate on the basis of which the court would then consider all other outstanding issues at the request of parties wishing for their probate to be dealt with according to Shari'a law.[27] While such cases happened in practice, the situation established under the legal regulations from 1922 remained in force right up to implementation of the *Law on the Shari'a courts*.

The *Provision on the management of waqf trust-endowments in the Kingdom of the Serbs, Croats and Slovenes* of September 12, 1919 was replaced on February 28, 1922 by the *Law on the management of trust-endowments in the Kingdom of Serbs, Croats, and Slovenes except for Bosnia and Herzegovina*. This brought a formal end to the Supreme Shari'a Administration in Montenegro and the position of Supreme or Chief Muftî there as the religious leader of the 22,856 Muslims in living in the area.[28] The *qâdî*s received the title of Muftî, as in Serbia, and their superior religious authority was now the Supreme Muftî in Belgrade.[29]

It is important to note that the amended *Law on the organisation of the courts* of January 30, 1922 and the Belgrade Court of Cassation's interpretation of it did not apply in Montenegro.[30] As to the question of the application of Shari'a law, the *status quo ante* was maintained.

26 CF. Rad. Gagić, "Primena t. v, g i d čl. 5 zakona o izmenama i dopunama u zakonu o ustrojstvu sudova od 30. I 1922." *Arhiv, no. 5-6*/1925 (vol. X/XXVII), 435-438, H., "Podmladak za šerijatske sudije," *Pravda*, May 19, 1921.
27 Rad. Gagić, n. artic. 438.
28 E. Sladović, *Ženidbeno pravo*, 96.
29 H. Rebac, *Islam u Kraljevini SHS*, 656.
30 Cf. Podogorica High Court ruling no. 417 dated May 16, 1925.

There were some 2,495 Muslims living in Croatia and Slavonia according to the 1922 national census.[31] As we have seen, under the *Law on recognition of the Islamic faith*, Muslims living in these areas had no right to apply Shari'a. After the St. Vitus' Day Constitution was passed, the question of Shari'a law's application in this area too was immediately raised insofar as Islam had been recognised by the highest level legal instrument in the country. This meant the Shari'a courts were guaranteed without limitations throughout territory of the state.

However, no Shari'a courts were created in this area until passage of the 1929 law. According to E. Sladović, even after adoption of the Constitution, Muslim marital issues still fell under the jurisdiction of the regular civil courts which had been tasked with ruling in accordance with Shari'a until Shari'a courts were established.[32] In practice, a different solution was adopted. The Imam of Zagreb was empowered by a decision of the *Grand Muftî* of December 25, 1919 to conduct Muslim weddings in accordance with Shari'a regulations. In 1922, the Imam was raised to the rank of Muftî and his office was renamed the Office of the Muftî. Under a November 18, 1922 resolution of the Ministry of Religions, the Muftî of Zagreb was authorised to contract marriages between Muslim men and non-Muslim females. In this way, the application of Shari'a law was entrusted to a religious functionary on this territory as well, no matter how limited the scope (i.e., only marital issues).

There were very few Muslims living in Slovenia (650 total) and Dalmatia (652 total) according to the 1922 census.[33] There also was no Islamic religious hierarchy or any religious officials in a position to apply Shari'a law in marital matters. Moreover, the opinion was held, as advanced by Rade Kusej, that the Austrian *Law on the recognition of Islam*, which envisaged the application of the Austrian Civil Code (OGZ) to Muslims in family matters and inheritance, remained in force on the territory of Slovenia and Dalmatia. As a result, Shari'a law did not extend to these regions.[34] In our view, the main reasons Shari'a law was not in force here before passage of the 1929 law was due to the small number of Muslims and the absence of any religious structures in these areas.

The passage of the St. Vitus' Day Constitution offered the Shari'a courts in Bosnia and Herzegovina not just a guarantee of continued survival, but also the prospect of decisive influence in shaping these institutions in the first common state of the southern Slavic peoples.

31 E. Sladović, *Ženidbeno pravo*, 96.
32 Ibid.
33 Ibid., 97.
34 Rade Kušej, "Ob reformi in izenačenju bračnoga prava," *Spomenica*. Mauroviću, II, 7.

The period between the constitutional guarantee and the actual passage of the Yugoslav *Law on Shari'a courts* saw no change in the organisation and jurisdiction of the Shari'a judiciary in Bosnia and Herzegovina. The St. Vitus' Day Constitution had no bearing upon the provisions of the 1883 decree in Bosnia and Herzegovina, and in the opinion of B. Eisner, it was possible to consider that decree a vehicle for implementing article 109.[35]

In 1918, there were 85 Shari'a justices and 30 trainees on the territory of the Supreme Shari'a Court in Sarajevo.[36] According to supreme Shari'a court justice Ali Riza Prohić, the actual condition of the Shari'a court system was at best unsatisfactory.[37] The causes he cited as having led to this situation included the poor quality of the judicial personnel being produced by the Shari'a Judicial School in Sarajevo, the poor material provision made for Shari'a justices, the inappropriate manner in which trainees progressed through their practical training, the lack of secretarial and support staff, the absence of supervision over the Shari'a justices themselves, and the deficient regulations particularly in the area of procedural law.

These were all issues to which attention would be paid in efforts to give a more thorough legal grounding to the Shari'a judiciary in the new state and to raise it to the level of a modern, reformed branch of the national judicial system.

b) The 1929-1941 period.

This period began with passage of the *Law on organising the Shari'a courts and on Shari'a justices* on March 21, 1929 and lasted until the collapse of the interwar Yugoslav state. Significant features of this period included the homogeneous and unified organisation of the Shari'a judiciary throughout the territory of Yugoslavia and efforts to apply legal regulations and provisions thoroughly and consistently.

35 B. Eisner, "Nadležnost u porodičnim i nasljednim stvarima muslimana i primjena šerijatskog prava," *Arhiv*, no. 2/1922 (vol. V/XXII), 147, fn. 3.

36 A. Škaljič, "Osvrt na rad staleške organizacije šeriatskih sudaca," *El-Hidaje*, no. 12/1943, 353.

37 A. R. (Ali-Riza) "Naši šeriatski sudovi," *Pravda*, 11. IX 1919, 16. IX 1919, 18. IX 1919, 20. IX 1919. 7. X 1919.

A common system for the regulation of the Shari'a courts

The *Law on the Shari'a courts* comprises 49 articles, divided into four sections: the Shari'a courts (1-27), Shari'a justices (28-37), Shari'a judicial assistants (38-40), and transitional and final provisions (41-49).

The first section dealt with the organisation and jurisdiction of the Shari'a courts. According to the text of the law, the first instance Shari'a judicial authority was exercised by special departments of the district courts, referred to as district Shari'a courts, while the second and final instance was in the hands of special sections of the appeal courts referred to as the Supreme Shari'a Court (article 1).

District Shari'a courts were established within every district court in which at least 5,000 Muslims resided. The Justice Minister was responsible for determining to which district Shari'a court any districts with fewer than the legally stipulated number of Muslims would be allocated.

The judicial authority in a given district Shari'a court was exercised by an individual justice (article 8). The number of Shari'a justices and clerks was to be determined by the Justice Minister, while the senior members of the district court would determine the administrative and support staff for the Shari'a court (article 7). The Shari'a judge, or the most senior in rank where there were more than one, would determine the terms of reference of the Shari'a court staff and be responsible for correspondence on matters that fell within Shari'a judicial jurisdiction (article 10). Oversight over the overall workings and staff of the Shari'a court and the administrative side, including record-keeping, was entrusted to the senior members of the district court (article 10).

Supreme Shari'a courts were to be set up as special departments of the appeal courts in Sarajevo and Skopje (article 3). Each of these courts was to have a minimum of three supreme Shari'a court justices along with the necessary number of Shari'a court officers. Administrative and support staff were to be appointed for the Supreme Shari'a Court by the president of the appeal court from amongst the staff of that court (article 11). The administration of the Supreme Shari'a Court belonged by rank/*ex officio* to the most senior Shari'a judge and the president of the appeal court (article 12).

The Supreme Shari'a Courts were responsible for considering and dealing with appeals lodged to the second and final instance against judgements and other rulings of the district Shari'a courts (article 13). Similarly, they were responsible for periodic review of the district Shari'a courts' operations and issuing corrective guidance to the Shari'a district

courts on any mistakes in their work (article 26, in relation to article 100 of the *Law on justices of the regular courts*). These courts made their rulings in closed sessions based on files from the first instance proceedings and, where necessary, with supplementation provided through the Shari'a district courts.

The *Law on the Shari'a courts* introduced certain novelties into the organisation of these institutions within Bosnia and Herzegovina.

Before passage of this law, there were Shari'a courts in every district court in Bosnia and Herzegovina regardless of the number of Muslims living in the district. Accepting the new legal condition for establishing Shari'a district courts (a minimum of 5,000 Muslims) led to a reduction in the number of Shari'a courts (within Bosnia and Herzegovina) and of mufti-ships (outside of Bosnia and Herzegovina).

Under the *Law on the organisation of the Shari'a courts*, two supreme Shari'a courts were set up which operated as courts of appeal or cassation for their respective areas. In this way, the many years of effort to establish a Supreme Shari'a Court in Skopje were brought to an end within the framework of the unified common organisation of Shari'a courts throughout the state.

Generally, the Shari'a courts were responsible for and had jurisdiction over Muslim family matters and inheritance and matters pertaining to Islamic trust-endowments or *waqfs* (article 1). They also had special jurisdiction over certain materials and persons. They had jurisdiction for discussing and ruling on precisely determined matters, but only in cases where those matters affected precisely determined individuals (i.e., Muslims). In exceptional cases, where a Christian or Jewish woman entered into marriage with a Muslim man, she became subject to Shari'a law in relation to the contracting of marriage and adjudication of matters consequent upon marriage without any change in her religious affiliation.

The issues over which the Shari'a courts' jurisdiction extended are listed in article 2 of the law. Disputes that arose in practice were resolved by opinions issued by the Court of Cassation in Belgrade or by decisions of the Justice Ministry.[38]

38 The Justice Ministry, wanting to promote precise adherence to the regulations in the Law on Shari'a Courts and to ensure homogeneity of judicial practice, sent rescript no. 14,531, dated December 11, 1931, which relates to the conduct of the Shari'a justices in the area of the Skopje Appeals Court and the Podgorica High Court, areas where such institutions had not previously existed. For the text of the rescript, see A. Bušatlić, Šerijatsko-sudski postupak u porodičnim, nasljednim i valkufskirn stvarima muslimana, second revised and enlarged edition, in manuscript at the VIS library in Sarajevo. Sarajevo 1933, VIII—XIII.

According to the text of the law, the jurisdiction of the Shari'a courts extended over the following issues.

1. Questions of marital law where the husband and wife were both of the Islamic faith or where the marriage was contracted in front of a Shari'a court or an individual authorised by a Shari'a court without distinction as to whether the dispute related to property rights or to other issues arising from the marital relation (article 2.1).

According to the interpretation of the legal text, all issues arising from marital relations were to be adjudicated according to Shari'a law so long as the marriage had been contracted in front of a Shari'a judge or person authorised by a Shari'a judge even if both parties were not themselves of the Islamic faith. Shari'a justices had previously been authorised to contract marriages between Muslim men and non-Muslim women of the Christian or Jewish faiths (by order of the National Government for Bosnia and Herzegovina, number 3558, of August 1, 1919). It is on this fact that the jurisdiction of the Shari'a courts for dissolving such marriages and mediating all disputes arising therefrom was based.[39]

The Shari'a courts were also responsible for mediating all issues arising from the marital relationship where both sides were of the Islamic faith, even if the marriage itself had not been contracted as an Islamic one (but as a Catholic, Orthodox, or civil one).[40] This interpretation of article 2.1 of the *Law on the Shari'a courts* limited the jurisdiction of the Shari'a courts in comparison to the traditional Shari'a law concept or approach, according to which the Shari'a courts also had jurisdiction over mediation of marital issues in cases where one of the spouses of a non-Islamic marriage converted to Islam. According to the *Law on Shari'a courts*, it was now necessary for both parties to convert for the Shari'a courts to enjoy jurisdiction. This interpretation put an end to conversions to Islam motivated primarily by a desire for a one-sided dissolution of a marriage that had been contracted under the regulations of a different religion which made dissolution difficult or impossible. Muslim religious circles opposed this interpretation of the *Law on the Shari'a courts*. The *Grand Mufti*'s full council resolved on December 22, 1938 to seek an amendment to article 2 allowing women who converted to Islam to dissolve marriages contracted under non-Islamic regulations and ceremonies in front of a Shari'a court.

39 Cf., SSCS circular no. 430, dated August 20, 1921, *Glasnik VIS*, no. 1-3/1945, 14-15.

40 B. Eisner, "Šerijatsko pravo i naš jedinstveni građanski zakonik," *Pravosuđe* (Belgrade), no. 6/1936, 4-5, Ivan D. Petković, "Za razvod ranijeg hrišćanskog braka kad jedan od supružnika pređe u islam nije nadležan šerijatski sudija," *Arhiv*, no. 1-2/1932 (vol. XXV/XIII) 124-127.

This request was not accepted since it was materially at variance with existing inter-religious regulations.

Amongst the matters of marital law dealt with and resolved by the Shari'a courts, one may single out the following: the contract of marriage and the adjudication of consequences arising from it, the dissolution of marriage, the allocation of maintenance or alimony to divorcees, disputes regarding interpersonal relations between spouses (the wedding debt or brideprice – *mahr*, the woman's dowry or trousseau – *jihâz*), the duration and consequences of the post-marital waiting period ('*idda*, *tempus lugandi*), and so forth.[41]

The *Law on the Shari'a courts* allowed for the possibility of Islamic marriages to be contracted in front of individuals authorised by the Shari'a courts. These would generally have been Islamic religious officials, imams, who conducted Shari'a marriages for Muslims in their area based on individual or special authorisations called *izunname*. This practice was suspended in Bosnia and Herzegovina because of the difficulties that arose related to monitoring and controlling marriages contracted in this way due to the resultant lack of legal certainty. This was done by a decision no. 101 of the Supreme Shari'a Court in Sarajevo, dated February 20, 1919, issued in agreement with the Ulam*â* Council and with the approval of the Provincial Government for Bosnia and Herzegovina.[42] The Shari'a courts were declared to have the exclusive authority to contract Islamic marriages and they were also enjoined upon to record and register newlywed couples.

The passage of the *Law on the Shari'a courts in Bosnia and Herzegovina* abolished many courts due to the fact that the districts they were situated in had fewer than the legally required number of Muslim residents. In order to ensure that marriages continued to be carried out in accordance with Shari'a law regulations in remote villages and spare the population the high costs of travel, the Supreme Shari'a Court determined, in circular no. 385, dated August 29, 1930, that Shari'a courts whose areas of jurisdiction covered a broader territory could, in places where such institutions had been abolished, authorise a head imam as registrar for conducting Muslim marriages (except for mixed marriages).[43]

2. Matters relating to the rights and duties of parents and children, regardless of whether they were related to property rights or other issues

41 A. Bušatlič, *Porodično i nasljedno pravo muslimana*, Sarajevo 1926, 30-35, 40-47.

42 Husein Jahić, "Treba li dozvoliti imamima matičarima da obavljaju vjenčanja," *Hikjmet* (Tuzla) no. 54. December 17, 1933, 184-186.

43 Hasib Muradbegović, *Tumač šeriatskih propisa Hanafijskog mezheba o ženidbi, obitelji i nasljedstvu,* Zagreb 1944, 31.

arising from the parental or familial relationship, including disputes over legitimacy (article 2, item 2).

The prior determination of a marriage as Islamic is what counted for jurisdiction over these matters. According to the collections of Shari'a law, Shari'a courts heard cases on parental responsibilities for the upbringing and education of children, the children's right to education, maintenance of the children, children's obligations for maintenance of their parents, assistance from close kin, etc.[44]

The Shari'a courts were also responsible for hearing disputes over whether a child was born in wedlock. Insofar as Shari'a law does not recognise the institution of paternity testing, a child born out of wedlock was legally connected exclusively with the mother. Its relations to the unmarried Muslim father were adjudicated under the provisions of the general civil code that fell within the jurisdiction of the regular civil courts.[45] The Shari'a courts were responsible for appointing guardians for illegitimate children born to Muslim mothers with the remaining procedure falling within the remit of the regular courts of chancery.[46]

3. Questions of inheritance law, and particularly hearings over and the allocation of any legacies left by Muslims and any associated suits insofar as they concern questions of the rights of inheritance and the validity of provisions made in case of death (article 2, items 3 and 4).

During probate hearings, the Shari'a courts carried out a range of actions aimed at determining and preserving the estate and its orderly transfer to its rightful heirs. These duties included idneitfying of the estate, liquidating outstanding debts, probation of the will, dividing and allocating the estate, and settling any disputes over inheritance up to the point of handing over the estate to the heirs. The Shari'a courts had no remit to compel the division of inherited real property or consider suits to recover elements of the estate held by third parties on special legal grounds or suits by creditors against the estate whose claims were not recognised by the heirs.[47]

4. Matters of guardianship and the establishment of guardianship over Muslim minors and the placing of adult Muslims in relations of wardship, as well as the removal of wardship and the declaration of most Muslim minors (article 2, item 5).

44 A. Bušatlić, *Porodično i nasljedno pravo muslimana,* 87-99.

45 B. Eisner, "Nadležnost u porodičnim i nasljednim stvarima muslimana," *Arhiv*, no. 2/1922. (vol. V/XXII), 145-149.

46 Provincial Government Order no. 34739/III-7, dated April 26, 1917, *Glasnik VIS*, no. 10-12/1944, 194-195.

47 A. Bušatlić, *Šerijatsko-sudski postupnik s formularima*, Sarajevo, 1927, 20.

The Shari'a courts were responsible for carrying out all the functions of guardianship both during and after probate proceedings in matters concerning the personal rights of minors or persons placed under guardianship.[48]

5. Certifying the deaths of Muslims (article 2, item 6). The traditional Shari'a law institution of "death certification" (*ithbâtu al-mawt*) as practised by the Shari'a courts in Bosnia and Herzegovina had already been modified during the Austro-Hungarian period and brought more or less up-to-date with modern legal practices related to "declaring a missing person dead."[49] The *Law on Shari'a courts* explicitly entrusted this procedure for Muslims to the Shari'a courts.

6. Verification of the signatures of Muslim persons (article 2, item 7.2). According to the *Law on the Shari'a courts*, the courts were authorised to verify the signatures of all Muslim individuals, but they did not enjoy an exclusive remit. The regular civil courts could also carry out such tasks. In practice, there was some dispute as to whether the Shari'a courts were responsible for verifying the content of various forms of document in addition to the signatures including the content of bonds and powers of attorney related to bonds and promissory notes. This was the view taken by A Bušatlić, with reference to prior legal regulation of the Shari'a courts in Bosnia and Herzegovina.[50] Ivo Lesić, a senior member of the district court in Sarajevo, took the opposite view that there was no legal basis for such a practice and that Shari'a justices lacked the necessary expertise for such tasks.[51] The dispute was resolved by the Justice Ministry in decision no. 5943 of January 30, 1931 which took the view that Shari'a courts were authorised only to authenticate signatures of Muslims; they were not responsible to guarantee the contents of documents.[52] This position was reaffirmed by the Court of Cassation in Belgrade in decision no. 13,000 of December 9, 1931. This opinion of the Court of Cassation was binding on the Shari'a courts on the territory of the Supreme Shari'a Court in Skopje, but not in Sarajevo where the earlier practice continued.

7. Matters related to Islamic *waqfs* and all disputes arising in regard to such rights and responsibilities based on a property being part of a

48 Ibid., 97.
49 A. R. Proho, "Proglašivanje mrtvim," *Pravda*, 24. VI 1919.
50 A. Bušatlić, "Nadležnost sreskih šerijatskih sudova na području Vrhovnog suda u Sarajevu za ovjeravanje potpisa (rukoznaka) muslimana na ispravama," *Pravosuđe*, no. 9/1932, 527-528.
51 Ivo Lesić, "O postupku overavanja na području Vrhovnog suda u Sarajevu," *Pravosuđe*, no. 3/1932, 163-166.
52 "Zbirka raspisa i rešenja Ministarstva pravde za 1931," *Prilog »Pravosuđa« za 1931*, 2.

waqf where this designation was not itself disputed, as well as disputes over whether a *waqf* had been established under Shari'a law regulations by injunction of a final will or by legal action taken by the living (article 2, item 7.1).

All acts related to founding a *waqf* that required involvement of a court under Shari'a law fell under the remit of the Shari'a courts, e.g. putting together an endowment charter (*waqfiya*), disputes over administrative rights over an endowment (*tawliya*), disputes between the endowment and the administrator over the form of endowed property, disputes over rights to the income from an endowed asset on the basis of the endower's will (*shart al-wâqif*), etc.

The condition for the Shari'a courts to have jurisdiction over endowment-related disputes was that the endowment status of the matter was not in dispute. Shari'a lawyers were particularly critical of this provision which was taken over from the Austro-Hungarian period legislation in Bosnia and Herzegovina. It was considered illogical, insofar as such endowments were created under the regulations of Shari'a law, that civil courts, unfamiliar with Shari'a, were now responsible for discussing the question of the very existence and validity of endowments.[53]

Responsibility for the administrative aspect of an endowment lay with its own administrative bodies, while disputes between the endowment as a legal entity and other private legal entities fell within the jurisdiction of the regular civil courts.

8. Matters of religious administration. This was to apply under both the *Law on the Shari'a courts* and of other regulations which the law did not supersede or which were promulgated after it had come into force. The Shari'a courts were also responsible for a number of religious issues.

Under the *Law on the Shari'a courts*, the Shari'a courts in the territory of so-called southern Serbia and of Montenegro were responsible for all other muftîate duties until such time as a *Law on the Islamic Religious Community* was passed and a constitution adopted for said religious community (article 45). This role was time-limited and primarily relevant to questions of endowment and religious administration.

A question of this sort that traditionally fell within the scope of the Shari'a courts was determining the new moon and the beginning of the lunar (*hijri*) months. This was related to determining when religious holidays should begin, particularly the month of fasting for Muslims.

53 A. Bušatlić, "Nadležnost šerijatskih sudova u BiH u *waqf*skim (zadužbinskim, zakladnim) pravnim poslovima," *Mjesečnik,* no. 4/1929, 171.

The *Law on the Shari'a courts* does not mention their remit in determining the new moon. Since this authority had been affirmed under Austro-Hungarian period regulations in Bosnia and Herzegovina and was never later restricted, Shari'a courts continued to carry out these tasks. This is clear from rescript no. 654 of the acting chief officer of the Islamic Religious Community (the first *nâ'ib*), dated August 2, 1937, reminding the members of the Ulam*â* Council that there was no need to send out a circular on the dates of oncoming religious holidays since the Shari'a courts were already doing that.[54]

The Shari'a courts determined the appearance of the new moon and so the beginning of the hijra months through a hypothetical scenario. A vignette was construed in which two individuals were debating when to return a debt. The deadline for repayment was the beginning of a hijra month. The plaintiff sought repayment on the grounds that the deadline had passed offering witnesses to that effect. In order to rule on repayment, the Shari'a judge had to resolve the prior question of when the hijra month in question began. He did this by questioning witnesses who had registered the phenomenon and then issued an announcement for the public.[55]

Shari'a justices also traditionally received the statements of non-Muslims on conversion to Islam. In the Yugoslav state, the Islamic Religious Community's bodies had sole responsibility for this, but individual Shari'a justices continued to carry out such tasks with reference to traditional collections of *fiqh*. This is why the *Grand Muftî*'s full council under act no. 2137/38.15 of December 22, 1938 forbid them from conducting conversions to Islam.[56]

Legal provisions on organisation of the Islamic Religious Community introduced after promulgation of the *Law on Shari'a courts* also concerned themselves with the role of Shari'a justices conducting religious administrative and endowment-related affairs.

The *qâdî*'s traditional authority to act as protector or guardian of *waqfs* was the basis for setting out in article 30 of the 1930 constitution of the Islamic Religious Community in the Kingdom of Yugoslavia. This article noted that Shari'a judges served *ex officio* on the *Commission on endowment and educational affairs* (Komisija za vakufsko-mearifske poslove) as chair. This arrangement was done away with under the 1935 constitution of the Islam-

54 *Glasnik VIS*, no. 3/1398, 133.
55 Mehmed Handžić, "U čiju nadležnost spada određivanje arapskih mjeseci." *El-Hidaje*, no. 9/1938, 137-138.
56 *Glasnik VIS*, no. 12/1939, 60.

ic Religious Community in the Kingdom of Yugoslavia which caused the Association of Islamic Religious Officials, *El-Hidaje*, to call at its annual assembly for Shari'a justices for it to be reintroduced to endowment administration.[57] The removal of the Shari'a justices was aimed at getting around the obligation for Shari'a judicial rulings before allowing property to be alienated or substituted for which was something Shari'a justices naturally tended to insist upon. It was also a way of ensuring the party loyalty of those appointed to the endowment administration.

The Islamic Religious Community constitution from 1936 also introduced certain limitations to the autonomy and elective nature of religious and endowment or educational bodies and gave the Shari'a courts responsibility for a number of tasks normally carried out under electoral procedure by the regular civil courts. These tasks included: checking voter lists for the *jamaat* councils and local endowment and educational commissions and assemblies (art. 102, 104, 105, 108, 109) and certification of candidate lists (art. 113 – 133, 136 – 137), et cetera.

Under the same constitution, the Shari'a courts were responsible for carrying out hearings of witnesses and other individuals and, where necessary, swearing them in at disciplinary investigations at the request of the religious and endowment authorities (article 13.3). They were also responsible for resolving conflicts between endowments or educational bodies (article 11).

The Shari'a courts' domain under the *Law on Shari'a courts* also included issues over which the relevant civil and spiritual courts had jurisdiction for Yugoslav citizens from other religious communities. The Shari'a courts' authorities had their roots in both the tradition of Islamic jurisprudence and the historical circumstances under which Yugoslav Muslims lived. The Islamic Religious Community's status and changes in its organisational structure tended to be reflected in the Shari'a courts' authorities and jurisdiction.

Implementation of the Law on organisation of Shari'a courts and on Shari'a justices

This law came into effect in Bosnia and Herzegovina on April 1, 1929 and across the rest of the country six months after publication in the *Official Gazette* (*Službene Novine*) which meant it was implemented on September 28,

57 *El-Hidaje*, no. 1/1940, 25.

1929. This reason for the extended waiting period (*vacatio legis*) for areas outside of Bosnia and Herzegovina was because these areas previously did not have state Shari'a courts and more time was required to set them up.

The Justice Ministry was responsible for creating the Shari'a courts and determining where they should be located. It had at its disposal the population of Muslims living in each area according to national statistical data.

Implementing the law reduced the number of Shari'a courts and justices in Bosnia and Herzegovina. There had been 85 Shari'a justices and 30 trainees in 1918. The calculation for 1931-1932 envisaged only 60 judges and 13 of these spots were not even filled.[58] This was partly remedied only after intervention by the *Grand Muftî* and the Endowment and Educational Council.

Establishing Shari'a courts where the legal conditions for them did exist and filling vacancies went forward slowly. It also did not follow the pattern of the Muslim population.

The first *naib* of the Supreme Religious Council of the Islamic Religious Community, Salih Savet Basic, requested on September 11, 1937 that the Justice Ministry reinstate a Shari'a court at Bileća since a report from the Endowment and Educational Commission noted that there were 5,600 Muslims resident residing there. The justice ministry did not approve the request since it considered the national statistics data from the population census as of March 31, 1931 to be the relevant figures. There had then been only 3,702 Muslims in Bileća at this time.[59]

The same senior member of the Islamic Religious Community requested on October 12, 1937 that an additional Shari'a judge be appointed at Bugojno since the one who was carrying out the function at that time could not handle the workload for an area with 18,000 Muslims on his own. The request however was rejected on budgetary grounds.[60]

Since financial considerations were a necessary precondition for establishing the institutions, several Muslim political representatives did attempt to make provision for new Shari'a courts when voting for the budget.

In some places such as in Velika Kladuša, Kozarac, and Tešanj, Shari'a courts were first established just before the interwar Yugoslav state expired by a July 19, 1940 decree by the Justice Minister.[61] Up to that point, those territories had been served by neighbouring Shari'a courts.

58 A. Škaljić, "Osvrt na rad staležke organizacije šerijatskih sudaca," *El-Hidaje,* no. 12/1943, 353-354.

59 "Pregled rada prvog naiba za Vrhovno vjersko starješinstvo IVZ, *Glasnik VIS*, no. 3/1938, 131.

60 Ibid.

61 *Službene Novine*, no. 166-LV, 23. VII 1940.

The implementation of the *Law on Shari'a courts* went forward somewhat differently outside Bosnia and Herzegovina.[62]

As there were no district courts for Shari'a courts to be sections of in some of the areas in Serbia and Montenegro at the time when the law came into force. It was stipulated that in those areas Shari'a courts should be established wherever the district muftîates were (article 43 of the *Law on Shari'a courts*).

The *Law on Shari'a courts* allowed the Justice Minister to appoint individuals with certifications of completed theological studies, which meant essentially the muftîs, as Shari'a justices in these areas for up to five years on condition that they pass the Shari'a judicial examination within three years. Muftîs with ten years effective service or who had passed the expert exam before the law came into effect were exempt from the requirement to pass the exam (article 44.1 of the *Law on Shari'a courts*).

This authority was widely used in appointing Shari'a justices, the key factor being the candidates' political orientation.

The Supreme Shari'a Court in Skopje was set up relatively quickly. In April 1930, a royal warrant appointed the following as judges of the court: Mehmed Zeki efendi, a former supreme muftî of Serbia, Mehmedalija Mahmutović, a former Shari'a judge from Novi Pazar, and Derviš Šećerkadić, a former district muftî from Plevlje.[63]

Most of the vacant positions on the district Shari'a courts in the southern regions were filled by graduates of the Shari'a Judicial School in Sarajevo.[64] In order to meet demands for Shari'a courts to be founded in these regions "wherever the legal conditions for it existed," the conference of pro-regime Muslim politicians and the Supreme Religious Council of the Islamic Religious Community concluded on February 24 and 25, 1933 that the Minister should be asked to appoint Shari'a trainees in those areas to judgeships as soon as they passed the exam.[65]

With the *Decree establishing district and circuit courts on part of the territory of the Skopje Appeals Court and the Podgorica High Court*,[66] courts

62 The press of the day wrote of how eagerly the Muslims living in the southern regions awaited the introduction of Shari'a courts. The newsletter of the Muslim supporters of the January 6 regime carried multiple articles about the introduction of the Shari'a courts, describing it as a success of the new order. (*Novo vrijeme*, March 1, 1930).

63 *Novo vrijeme*, May 3, 1930.

64 The following were nominated as Shari'a judges: Nedžib Fazlagić in Resno, Salih Lakić in Prijepolje, Hamza Čemalović in Podgorica, Sadik Čaršiimamović in Kavadaro, Abdulah Škaljić in Priština, Selim Serdarević in Kumanovo, Ibrahim Ridžanović in Novi Pazar, and Avdo Drnda as secretary of the Supreme Shari'a Court in Skopje (*Novo vrijeme*, March 16, 1930).

65 *Glasnik VIS*, no. 6/1934, 358.

66 *Službene Novine*, no. 230-LVII, October 5, 1934.

were finally established during the last part of interwar Yugoslavia where they had not previously existed.

A *Decree establishing the local jurisdiction of the district Shari'a courts on part of the territory of the Skopje Appeals court and the Podgorica High Court*[67] was introduced on November 10, 1934, as was a further *Decree on local jurisdiction of the Supreme Shari'a Court in Skopje* on August 20, 1935.[68]

Mistakes were sometimes made when determining the seat of the Shari'a courts which would be remedied only following intervention by religious or political actors. The Shari'a court whose seat should have been in Gusinje was located in Andrijevica, some 36 km away, where there were no actual Muslims thus making it practically impossible for the Gusinje Muslims to have recourse to it.[69] After reports about this situation in the civilian Muslim press, the seat of the Shari'a court was returned to Gusinje by official order.[70]

Not a single Shari'a court was established on the territory of Croatia and Slavonia before 1935. This caused problems in those areas for the contracting of Islamic marriages and conducting marital, probate, and other forms of hearing. It sometimes happened that imams carried out weddings without authorisation. Often those marriages were later declared invalid. The Islamic press and religious elements in Bosnia and Herzegovina sought the creation of Shari'a courts in these areas and for them to be subordinated under the authority of the Supreme Shari'a Court in Sarajevo similar as to how the Sarajevo Ulam*â* Council's spiritual jurisdiction had been extended to those areas under the Islamic Religious Community's constitution from 1930.[71]

A Shari'a court was finally established in Zagreb under article 56 of the *Law on budgetary twelfths* on August 1935.[72] Its jurisdiction covered the territories of all the district courts of appeal under Zagreb and Ljubljana under a *Decree on the territorial jurisdiction of the district Shari'a courts in Belgrade, Zagreb, Ljubljana, Split, and Novi Sad*, dated August 20, 1935.[73] This decree resolved the problem of Shari'a courts with local jurisdiction in areas where no such institutions had been established and there had been no extension of the jurisdiction of the nearest Shari'a court.[74] The

67 *Službene Novine*, no. 262-LXVIII, November 13, 1934.
68 *Službene Novine*, no. 198-XLVI, August 27, 1935.
69 *Islamski svijet* (Sarajevo), January 25, 1935.
70 *Službene Novine*, no. 69-XVI, March 22, 1935.
71 *Islamski svijet*, January 8, 1935.
72 *Službene Novine*, no. 174-XXXIX, June 30, 1935.
73 *Službene Novine*, no. 198-XLVI, March 27, 1935.
74 For suggested solutions to this problem, see Srećko Culja *Građansko procesno pravo Kraljevine Jugoslavije*, II, 646.

district Shari'a court in Trebinje thus became responsible for the territories of all the district courts of appeal in Split, as did the district Shari'a court in Belgrade for the territories of all district courts of appeal in Novi Sad and for individually identified courts in Serbia where the legal conditions did not exist to establish Shari'a courts. The district Shari'a court in Niš became responsible for the territory of individually identified district courts of the Niš region.

The district Shari'a court in Zagreb had the broadest territorial jurisdiction in the country stretching across the entire Sava and Drava banovinas. At the request of the Islamic Religious Community, the Shari'a court in Zagreb held sessions in other large towns where Muslims lived in order to make it easier for them to have recourse to the these courts.[75]

Following the Cvetković-Maček agreement and the establishment of the Croatian Banovina, a new legal and political dispute arose regarding the organisation of the Shari'a courts under this new administrative entity. The territorial framework of the Croatian Banovina included some 15 district Shari'a courts. The question now arose as to whether these Shari'a courts fell within the purview of the Banovina authorities or were still under the jurisdiction of the state. The answer depended on what the nature of the Shari'a court was taken to be. If the courts fell under religious affairs, then they remained in the sphere of common activities at the level of the state. If they fell under justice, then they were in the remit of the Banovina (article 2 of the *Decree on the Croatian Banovina*).

One side took the view that the Shari'a courts were of a secular and not a religious character. They were sections of the district courts and the district court of any regions associated with the Croatian Banovina fell within its jurisdiction. Since the district courts exercised the right of appeal within the framework of the Banovina, a Supreme Shari'a Court would have to be set up in Zagreb to supplement the Shari'a judiciary in the area and make of it an independent whole. Justice Hasib Muradbegović was a particularly strong public advocate of this idea.[76]

Circles around the leadership of the former JMO sharply opposed this view. *Pravda* wrote that "because of their concern for the general Islamic interest, the legal representatives of Muslims and representatives of the Shari'a law discipline in this state can in no way accept that the Shari'a

75 *Pravda*, January 15, 1937.

76 See Hasib Muradbegović, "Šeriatski sudovi u Hrvatskoj," *Savremenik* (Zagreb), no. 1/1940, 365-366; idem, "Još o šeriatskim sudovima u Banovini Hrvatskoj," *Savremenik*, no. 3-4/1940, 95-96.

judiciary be divided into two separate and unconnected systems."[77] *Grand Muftî* Fehim Efendi Spaho advocated the view that the Shari'a courts were religious in character and pushed for the courts in the Croatian Banovina to remain under the existing framework of the Supreme Shari'a Court in Sarajevo. He addressed the Justice Minister for clarifications in this regard. The Justice Ministry accepted his position and ruled the Shari'a courts to be "institutions grounded in religious affiliation and intended to operate on religious Shari'a legal regulations, so that, under the provisions in article 2, item 3.5, of the *Decree on the Croatian Banovina*, the state-level authorities retain their responsibility for the Shari'a courts on the territory of the Croatian Banovina."[78]

As to the Supreme Shari'a Court in Sarajevo's jurisdiction in the Croatian Banovina, the Justice Ministry explained that, in the absence of provisions in the *Decree on justice affairs*, dated September 27, 1939, changing the current situation regarding the Shari'a courts' jurisdiction, the only possible conclusion was that the jurisdiction of the existing Shari'a courts on the territory of the Sarajevo Court of Appeals and of the Supreme Shari'a Court in Sarajevo had not changed.[79]

The main reason for Muslim civil, political and religious representatives in Bosnia and Herzegovina taking this stance over the Shari'a courts in the Croatian Banovina was explained well by H. Muradbegović, one of the few Muslim opponents to it. He argued that the *Grand Muftî* (and some other groups of Muslims) feared that the Shari'a courts coming under the authority of the Ban's administration would have consequences for the autonomy of Bosnia and Herzegovina and might even create a new precedent.[80] The civil Muslim politicians' rejection of the very concept of forming an independent Shari'a judiciary in the Croatian Banovina was largely with a view to winning Bosnia and Herzegovina the status of autonomous unit, similar to that granted to Croatia. A contributory factor was that several Bosnian districts had been allocated to the Banovina under the name of "Bosnian Croatia." Government circles supported the civil Muslim politicians.

The issue of how Shari'a courts in the Croatian Banovina were to be organised was eventually resolved on political and not legal or theoretical grounds. The district courts in the Banovina were placed under the Ban's jurisdiction with some departments, viz. the Shari'a courts, remaining un-

77 After H. Muradbegović, "Još o šeriatskim sudovima u Banovini Hrvatskoj," 95.
78 After H. Muradbegović, "Šeriatski sudovi u Hrvatskoj," 365.
79 *Glasnik VIS*, no. 1/1940, 40.
80 H. Muradbegović, "Šeriatski sudovi u Hrvatskoj," 365.

der the Ministry of Justice.[81] The Shari'a courts' instance of appeal consequently remained outside the territory of the Banovina. This would remain the situation up until the collapse of the interwar Yugoslav state during World War II.[82]

2. The Character of the Shari'a Courts

Our presentation of the organisation and remit of the Shari'a courts has provided a certain picture of their character. We have noted that they carried out functions on behalf of the state authorities while at the same time retaining connections to the Islamic Religious Community. This raises the question of how this double character expressed itself on the normative and theoretical legal levels. How similar were the Shari'a courts to the spiritual courts of the other religious communities in Yugoslavia?

a) The relationship of the Shari'a courts to the state authorities

When looking at this problem from a normative and legal perspective, the first thing that needs to be made clear is that the national constitutions of June 28, 1921 and September 3, 1931 gave the title of state Shari'a judge to individuals ruling on family and inheritance issues for Muslims (article 109, item 3, article 100, item 4). The *Law on Shari'a courts* contains the same content (article 4).

The *Law on Shari'a courts* gave them the status of departments of the district or appeal courts (article 1), which entailed their integration into the system of national jurisprudence.

As already pointed out, when the constitutional guarantees for the application of Shari'a law were being made, the term "state Shari'a justice" was accepted in place of "state Shari'a courts" in order to emphasise these would not be independent separate courts. During implementation of the provision, the stipulation was rendered more precisely that one was dealing with both Shari'a courts and Shari'a justices. Because of the specific nature of the Shari'a material and the procedural law involved, individuals

81 *Glasnik VIS*, no. 2/1940, 84.

82 H. Muradbegović raised the matter of founding a Supreme Shari'a Court in Zagreb again, cf. *Obzor*, January 14, 1941.

nominated as Shari'a justices could not be integrated into the existing structure of the regular civil courts. Only a senior Shari'a justice could review and assess the rulings of a Shari'a justice. This led to the development of a specific institution: Shari'a courts of differing instances. These courts remained administratively part of the regular civil courts but were *de facto* an independent court system in implementation of the law.

The governmental character of the Shari'a courts was confirmed by other circumstances.

First, there was the provision in article 5 of the *Law on Shari'a courts* whereby Shari'a courts pronounced judgements in the name of the King. This provision was a novelty compared to the earlier history of Shari'a law in Yugoslav lands. Traditionally, the ruler's name had had no place in Shari'a court decisions even when the courts had operated as part of a system of government in a state led by a *Caliph*. All that Islamic custom required during a trial, as with any worthy activity, was expression of the formula "in the name of Allah, the Merciful, the Ever-merciful". The requirement that judgement be in the King's name derived from the general principle under which judicial authority is exercised in a monarchy.[83]

Shari'a court decisions were executed by the regular civil courts under the regulations governing executive procedure or by other government authorities, without review of the Shari'a courts' decisions, *per se* (article 20 of the *Law on Shari'a courts*).

Jurisdiction disputes between the Shari'a and the regular civil courts or the administrative authorities were dealt with by the Court of Cassation (article 25 of the *Law on Shari'a courts*).

The King appointed Shari'a justices on the advice of the Justice Minister. They took the same oath as judges in the regular courts (article 30 of the *Law on Shari'a courts*).[84]

The provisions of the *Law on organisation of the regular courts in the Kingdom of the Serbs, Croats, and Slovenes* of January 8, 1929 included: governing the extension of legal aid, judicial recess and absence for the purposes of recess, the administration of the courts, and the right of oversight all applied equally to the Shari'a courts, subject to minor changes specified in the

83 Art. 48 of the St. Vitus' Day Constitution states: "The courts exercise the judicial authority. Their sentences and rulings are declared and executed in the name of the King on the basis of the law."

84 Under art. 7 of the *Law on justices of the courts regular*, this oath reads as follows: "I N. N. swear to almighty God that I shall be loyal to the ruling King, that I shall carry out my duties exactly and conscientiously, and that I will consider only the law in passing judgement. So help me God."

Law on Shari'a courts (article 26). Similarly, the provisions related to judicial appointments, status and position, duties, the right of oversight and supervision, leave, and rank also applied (article 36 of the *Law on Shari'a courts*).

The interwar legal literature generally accepted the thesis of the governmental character of the Shari'a courts although there were doubts given that these courts applied law based on religious sources on the grounds of religious affiliation.

Writings that called into question the governmental character of the Shari'a courts tended to rely on theoretical legal and historical arguments rather than on the normative legal arrangements of the civil Yugoslav state.

An example of such criticism was that put forward by Mikhail Zobkow, associate professor at the University of Sarajevo and chair of the Council of the Supreme Court there.[85] Taking as his starting point the view that Islamic law was based on religious sources, he concluded that those to whom the preservation of such regulations was entrusted must be spiritual and religious personages. They were, in effect, clergy who were well-versed in the holy statutes to whom a judicial function had been entrusted. They remained spiritual personages, however, even when carrying out such a judicial function and therefore had no claim to the title of justice. Zobkow considered the Austro-Hungarian administration in Bosnia and Herzegovina responsible for having given the Shari'a justices governmental status and in so doing having resolved the issue of the Shari'a courts' jurisdiction "rather arbitrarily." He proposed that, before passing the *Law on Shari'a courts*, the Yugoslav legislature should act consistently with the historical development and fundamental task of the Shari'a courts and convert them into purely religious institutions with a remit for the religious aspects of marital and family law.

Zobkow interpreted the history of Shari'a jurisprudence through the prism of the European distinction between 'the secular' and 'the spiritual,' so that his ultimate conclusion could only be a call for "Europeanisation" of the Shari'a courts and treating them as ecclesiastical or spiritual courts. The history of Shari'a law and Shari'a courts offered him no arguments in support of this, however, as no such modification of Islamic jurisprudence had occurred anywhere else in the Islamic world. Given the absence or weakness of any real Muslim liberal intelligentsia in Yugoslavia, the state could have initiated and even implemented such a process but did not do so for political reasons.

85 M. Zobkow, "Šerijatski sudovi," *Arhiv*, no. 1/1924, (vol. VII/XXV), 49-59.

B. Eisner put forward a similar thesis arguing that at one point, even though designated state courts were associated with the regular courts as special departments, the Shari'a courts were nonetheless really just spiritual courts.[86]

By contrast, Dragutin Tomac insisted on the governmental character of the Shari'a courts. He advocated the thesis that the St. Vitus' Day Constitution had denied Muslims their right to confessional courts under the provision in article 109, item 3, insofar as it had entrusted their family and inheritance affairs exclusively to government judges. Tomac concluded that no other confessional group should be in a position to demand jurisdiction over the marital affairs of its flock since the constitution did not allow it to Muslims based on the principle of the equality of recognised religions.[87]

Because of their jurisdiction over property rights, he designated the Shari'a courts "a unique phenomenon in the entire state of the Serbs, Croats and Slovenes," given that, in every other area of law, the regular courts dealt with property rights on the basis of general civil law, while the Shari'a courts made their rulings based on a particular civil law imbued with Muslim principles.[88]

Slobodan Jovanović shared this understanding of the character of the Shari'a courts.[89] In his view they were a special division of the government courts and their members enjoyed the status of government judges, not religious officials, even if they made their rulings, as he put it, on the grounds of Muslim religious law, and not of state law. To prove his point about Shari'a courts as state authorities, Jovanović emphasised the circumstance that the *Convention on the protection of minorities* recognised no right on the part of Muslims to independent religious courts, rather they were only allowed to receive judgement in accordance with their religious law.

The well-known Orientalist J. Schacht also wrote at one point that during this period, Yugoslavia Islamic law was implemented through secular courts.[90] Schacht used the term to refer to modernised institutions for the implementation of Shari'a law as against traditional *qâdî* courts.

In his discussion of the legal system of the civil Yugoslav state, Ferdo Čulinović wrote that Shari'a law should be considered confessional even if

86 B. Eisner, *Međunarodno, međupokrajinsko (interlokalno) i međuvjersko bračno pravo Kraljevine Jugoslavije,* Zagreb 1935, 23.
87 D. Tomac, *Ustav i bračno pravo*, Zagreb 1925, 106-107.
88 Ibid., 20, 106.
89 Slobodan Jovanović, *Ustavno pravo Kraljevine Srba, Hrvata i Slovenaca*, Belgrade 1924, 462.
90 J. Schacht, *An Introduction to Islamic Law*, 93.

the Shari'a courts were themselves government and not ecclesiastical courts.[91]

Almost all writers on Shari'a law supported the understanding of the Shari'a courts as governmental judicial authorities. They expressed this viewpoint in their struggle for a constitutional guarantee for government Shari'a courts and in their later theoretical work.

A Bušatlić took as his starting point the traditional thesis that, given the types of affairs placed within their remit, the Shari'a courts were representatives of the state in the administration of justice. They were civil courts differing only in applying Muslim family law which has the character of religious law. The regular civil courts on the other hand applied civil law to all citizens, irrespective of religion. In this way, the functions of the Shari'a and the regular courts complemented each other.[92]

A.R. Prohić held the same view noting that the Shari'a courts were already "a government institution" in the early days of Islam. He concluded that the *qâdî*s in Yugoslavia were government judges because of the rulings they made under their remit for property rights.[93]

One specific problem facing these legal experts was the need to offer a Shari'a law clarification of the legitimacy of the Shari'a courts as judicial authorities of a non-Islamic state. They did so not merely on the legal-theoretical level, but also by initiating the adoption of appropriate legal and political arrangements.

Under Islamic law, the faculty of judgement falls within the remit of the *Caliph*. There may not always be a rightly appointed *Caliph*, but having courts to make rulings in accordance with Shari'a is a non-negotiable requirement for any Islamic community. The question therefore arises as to the legitimacy of Shari'a courts in areas outside of an Islamic state or in the absence of a legitimate *Caliph*.[94] *Hanafî* legal experts regarded as valid the appointment of judges by any Muslim authority including usurpers and rebels. They did question, however, whether the appointment of Shari'a justices by a non-Muslim ruler was valid. The well-regarded legal work, *Al-fatâwâ al-Tatarhâniya*, took the view that it was not a condition for a judge's appointment to be valid that the ruler be of the Islamic faith. Similarly, the lawyer Ibni Abidin held that the appointment of a Shari'a

91 F. Čulinović, *Državno-pravna historija jugoslovenskih zemalja 19. i 20. vijeka,* II. Zagreb 1958, 311.

92 H. A. Bušatlić, "Šerijatski sudovi," *Gajret*, 1928, 155-157.

93 A. R. Prohić, "Problem šerijatskog prava," *Gajret*, 1923, 154.

94 See further, M. Handžič, Šeriatsko javno pravo (skripta za Višu islamsku šeriatsko-teološku školu u Sarajevu), II.

judge by a non-Muslim ruler was valid, so long as Muslims themselves were happy with it.

In the view of a number of other *Hanafî* legal experts, in the absence of an Islamic authority, Muslims should elect their own *qâdî*, and so, as the *Fath al-qadîr* put it, choose a single individual as their chief to appoint *qâdî*s, imams, and khatibs (preachers).

The Shari'a legal experts in Yugoslavia accepted a combination of these views. None of them really questioned the nomination of Shari'a justices by non-Islamic rulers. Referring to the state's right to legislate for the jurisdiction of Shari'a courts, Bušatlić explicitly stated that a Shari'a judge is a representative of the ruler (*wakîl*) in the tailoring of justice and may therefore never exceed the authority entrusted to him. The judicial function (*Niyâba*) is the same as the representative one (*wakâla*), from which it follows that the Shari'a justices in Yugoslavia had to keep strictly to state laws and other regulations relevant to their sphere of action.[95]

This opinion reflected the politically realist position of the Shari'a legal theoreticians that the important thing for Muslim communities in non-Islamic countries was the implementation of Shari'a law and not the establishment of Islamic state institutions, which would be illusory. This was why the application of Shari'a law by the organs of a non-Islamic state could be considered legitimate.

This approach did not eliminate all links with a religious concept of the judiciary or the thesis that judicial authority was a form of authority delegated by the *Caliph*. Shari'a justices were expected not just to be nominated by the ruler but also to have an authorisation from the religious head of the Muslims. In our case, this was achieved by a series of delegations of religious authorisation.

The religious chiefs of the Yugoslav Muslims (the *Grand Muftî* in Bosnia and Herzegovina and the supreme muftîs in Serbia and Montenegro up until 1930) received their authorisation (*manshūra*) from the *Shaikh al-Islam* in Istanbul to carry out the administration of religious and Shari'a legal business on behalf of Muslims. The *Grand Muftî* in Bosnia and Herzegovina then passed on part of his authorities, insofar as they related to Shari'a jurisprudence, to *qâdî*s nominated by the government. This was done by an act referred to as the "mur*â*sala," which could be rescinded for serious Shari'a legal reasons (article 140 of the *Statute for the autonomous administration of Islamic religious and endowment-educational affairs in*

95 A. Bušatlić, "Nešto o nadležnosti za sklapanje braka pomuslimanjenih lica," *Mjesečnik*, no. 1/1923, 24.

Bosnia and Herzegovina). The religious head of the Muslims thus exercised a certain influence over the nomination of Shari'a justices.

With the abolition of the *Caliphate* and the institution of the *Shaikh al-Islam* in Turkey in 1924, the problem of how to ensure the legitimacy of Islamic religious and Shari'a judicial officials came up. As attempts to select a new *Caliph* fell through, the Muslims of Yugoslavia accepted the only realistic solution grounded in Shari'a law. A special advisory council comprising prominent members of the Islamic Religious Community would give the *menšura* to the *Grand Muftî* authorising him to conduct Islamic affairs in Yugoslavia including issuing *murâsala* to Shari'a justices (the *Constitution of the Islamic Religious Community*, July 9, 1930, article 64, which refers to article 4 of the *Law on the Islamic Religious Community*, January 31, 1930). In this way, Yugoslavia followed the legal opinion contained in the *Fath al-qadîr* collection on the legitimate nomination of Shari'a justices by non-Islamic rulers.

To close our discussion on the relationship between Shari'a courts and the state authorities, we ourselves assent to S. Culja's view that the Shari'a courts were a hybrid of governmental and religious authority.[96] This author deployed the following arguments: Shari'a justices were appointed and paid by the state and exercised judicial authority in the name of the King but were authorised to exercise that authority by the religious chief, frequently carrying out their judicial role under his instructions.

Culja thus offered an explanation as to the type of courts Shari'a courts belonged to. It was usual to designate them as special courts, but Culja demonstrated that all courts except the district, circuit, commercial, appeal, and cassation courts which were referred to as regular ordinary courts in the *Law on the organisation of the courts*, were more logically designated as extraordinary courts, because "extraordinary" is the antonym of "ordinary." Since the St. Vitus' Day Constitution forbade the institutionalisation of extraordinary courts, in the sense of institutions with limited recourse to legal remedies, any courts which might logically have been designated extraordinary, including the Shari'a ones, had to be called 'special courts.'[97]

b) The relationship of the Shari'a courts to the Islamic Religious Community

The relationship of the Shari'a courts to the Islamic Religious Community was regulated by the *Law on Shari'a courts* and the laws governing the

96 S. Culja, *Građansko procesno pravo Kraljevine Jugoslavije*, i, Belgrade 1936, 162.
97 Ibid., 66-67.

Islamic Religious Community, or rather its constitutions. Some issues were regulated in more detail by relevant decrees or orders.

The *Law on Shari'a courts* allowed the Islamic Religious Community two modes of influence over the Shari'a court system: the first was by issuing *murâsala* to Shari'a justices and by issuing opinions to the Shari'a courts on important religious questions. This first authority of the Islamic Religious Community, or rather its supreme chief, related to the induction of Shari'a justices into their duties, while the second related to matters of principle in the application of Shari'a law.

According to the *Law on Shari'a courts*, Shari'a justices were appointed by the King on the advice of the Justice Minister. However, they could only validly carry out their remit if they had a licence (*murâsala*) from the responsible supreme religious leader (article 4). By this provision, the Yugoslav *Law on Shari'a courts* carried over the solution of the Austro-Hungarian administration in Bosnia and Herzegovina as expressed in the so-called autonomous statute. Unlike that act, however, which envisaged that the *Grand Muftî* would issue a licence detailing all the authorities to be carried out in the name of the Rijaset (the Supreme Religious Council) when nominating or transferring Shari'a justices (and that the issuing of a licence on transfer could be denied only for important Shari'a legal reasons), the *Law on Shari'a courts* explicitly stated that receiving a licence was a precondition for the valid exercise of Shari'a legal authority.

According to the constitution of the Islamic Religious Community in the Kingdom of Yugoslavia of July 9, 1930,[98] the Supreme Religious Council, headed by the *Grand Muftî*, was responsible for issuing and revoking licences to Shari'a justices under the provisions of an order to be issued by the Ministry in cooperation with the Supreme Council (article 67.8).

The *manshūra* from which a newly elected *Grand Muftî* derived his Shari'a law legitimacy emphasised the issuing of licences to Shari'a justices amongst the authorities given to him by the Islamic Religious Community.[99]

98 *Službene Novine*, no. 167—LXIII, July 25, 1930.

99 At this point, the menšura issued to *Grand Muftî* Ibrahim Maglajlić, appointed to the office by the January 6 government at a time of centralisation of the Islamic Religious Community and abolition of its autonomy states: "We specifically authorise you... to note in the *murâs*ala*/licences* you issue to qadis all the religious functions you are entrusting to them for them to receive the legal authority to exercise judgement for Muslims on their family, marital, inheritance, and *waqf* affairs, keeping in all things to the recognised Shari'a law authorities, all to be done in accordance with the *Law on Shari'a Justices and Courts* and the *Constitution of the Islamic Religious Community*, so that in all Shari'a legal issues that arise over time, you, together with the members of the Ulamâ Medžlis may issue principled rulings based on the rules set out in the principles of Islamic jurisprudence (*usūlî fiqh*), on the foundation of the sources of the sublime Shari'a and the fundamental works of Shari'a law, as set out in art. 68 of the aforementioned Constitution."(*Glasnik VIS*, no. 11/1933, 46-47).

An *Order on the murâsala for Shari'a justices* was issued on March 10, 1931.[100] The Supreme Religious Council of the Islamic Religious Community played an important role in shaping it. The institution developed the preliminary draft while one of its representatives, supreme Shari'a court justice, Osman Vilović, attended discussions on the draft at the Justice Ministry. The Supreme Council then presented a final text for adoption by the Justice Ministry.[101]

The *Order on the murâsala* stipulated that Shari'a justices could not carry out their duties until they had received the regulatory licence, nor could their term of office be extended, if their licences were revoked (article 1). The *Grand Muftî* both issued and revoked licences (article 3). Before issuing an instruction of appointment, the justice ministry had to seek advice from the Supreme Council as to any justified reasons for not issuing a licence to a given individual (article 4). The licence could be revoked if either the work or behaviour of a Shari'a judge was found to be contrary to the rules of Islam or if a Shari'a judge grossly neglected his duties on the district Endowment and Educational Commission. Before revoking a licence, the Council had to issue a warning to the Shari'a judge via the Supreme Shari'a Court (article 7). There was no right of appeal against a decision to revoke the licence (article 8). The licence contains the following text:

> I authorise you to conduct as part of your official judicial duties all and any marital, family, inheritance, and *waqf*-related matters as envisaged in articles one and two of the *Law on organisation of the Shari'a courts and on Shari'a justices* of March 21, 1929, holding in all things to the recognised Shari'a legal authorities (*muftâ bih qawl*), to any conclusions made in the sense of articles 62 and 68 of the constitution of the Islamic Religious Community and to any orders and rescripts issued with the proper authority.
>
> In giving you this license, I expect of you that you will follow your calling in all things, in both your public and private life, and that you will in all external matters conform to the accepted customs of tradition, so that you may in every regard prove worthy of this honourable position and may serve as an example to Muslims, and that you will carry out your duties conscientiously and with commitment, in the spirit of the provisions of the sublime Shari'a, as well as with the provisions of the law, committing with all your might to work for the good and progress of Islam. May Almighty Allah direct you upon the proper path and assist you in your work for the well-being, good fortune, and majesty of the Islamic Religious Community. (Article 2 of the *Order on the murâsala*).

100 *Službene Novine*, no. 62—XVIII, March 19, 1931.
101 *Glasnik VIS*, no. 7/1934, 419.

Adoption of the Order was not just an expression of the January 6 regime's general policy on the legal definition (codification) of the status and activities of the religious communities and courts, but a real concession to the Muslim religious hierarchy given the Islamic Religious Community's many acts of submission to state authorities.

The Supreme Religious Council was required to issue licences without assessment of their suitability or qualifications to anybody already acting as Shari'a judge when the Order came into force. Several incompetent and even morally and religiously unacceptable individuals were consequently confirmed as Shari'a court justices, particularly in the territory of the Supreme Shari'a Court in Skopje.[102]

There were also cases of Shari'a justices being appointed without prior notification of the Supreme Religious Council by the Justice Ministry to check on reasons for not doing so.[103]

The Supreme Religious Council therefore released a statement that it could not issue a licence for the appointment of Ismail Hakija Eminović as Shari'a justice in Bar and was requesting the Justice Ministry to rescind its instruction of appointment. In other cases, it was decided that the licences would be issued with the caveat that in the future they would not be if the Justice Ministry continued to behave in violation of the Order.[104]

There were later cases in whch licenses were revoked primarily due to inappropriate behaviour. Warnings were issued to Shari'a justices over the neglect of their duties in *waqf* administration.[105]

The leadership of the Islamic Religious Community attempted to expand its influence over the Shari'a court system by seeking that the Order be supplemented by a provision requiring the issuing of a new licence whenever a Shari'a judge was promoted to the Supreme Shari'a Court. The government authorities did not accept this request.[106]

The second modality through which the Islamic Religious Community could influence the work of the Shari'a courts was set out in article 15 of the *Law on Shari'a courts* which states that "the Supreme Shari'a Court may seek the opinion of the responsible supreme religious leader on important matters of religion." Under the 1930 Constitution of the Islamic Religious Community, the responsibility for issuing such opinions passed to the Supreme Religious Council (article 67), but under the 1936 constitution, it

102 *Glasnik VIS*, no. 2/1934, 93.
103 Ibid.
104 *Glasnik VIS*, no. 6/1934, 347.
105 *Glasnik VIS*, no. 3/1934, 172.
106 *Glasnik VIS*, no. 2/1939, 59.

was given to the *Grand Muftî* and his Great Council (articles 96 and 98). The *Grand Muftî*'s Great Council had the authority to issue binding resolutions on any doubtful or disputed Shari'a-legal or religious issue. These resolutions also covered issues for which the Shari'a courts were responsible and so had an important impact on the application of Shari'a law in Yugoslavia.

Conclusion number 2111/38 of the *Grand Muftî*'s Great Council, issued December 21, 1938, offered an illustrative example of such a resolution.[107] In principle, it forbade marriages between Muslim men and non-Muslim, Christian, or Jewish women, even though they were allowed both by the letter of the Shari'a and in the interpretation of a significant portion of Islamic legal experts. As such, they had previously been contracted before Shari'a courts in Southern Slav lands. The *Grand Muftî*'s Great Council accepted thethe minority opinion within the *Hanafî* legal school which held that such marriages were forbidden.

Under the same conclusion, the position was taken that marriages contracted by Muslims in or outside of churches according to the ritual of other confessions could not be legalised by the Shari'a courts and that such persons should no longer be considered members of the Islamic Religious Community. The Shari'a courts acted in accordance with this decision.

The *Law on Shari'a courts* did dissolve one link between the Islamic Religious Community and the Shari'a judiciary – the passing of an exam for Shari'a justices in front of a committee of the Ulam*â* Council for BIH. Under the law on Shari'a justices, this exam was to be passed at the Supreme Shari'a Court of the area in which the candidate had been practising (article 32).

Beyond these links between the Shari'a court system and the Islamic community, Shari'a justices participated in the bodies and activities of their religious community in other ways too. However, since this material is of no real relevance to the issue of the structure of the Shari'a courts, it will be dealt with later in our discussion about the status and activities of the Shari'a justices.

c) Comparison of the Shari'a and the spiritual courts

The different legal traditions, the religiously informed consciousness of most of the population, and obligations under international treaties, including concordats (with the Vatican), combined to prevent the laicisation of marriage in the Yugoslav state. This led to a certain unevenness in marital

107 *Glasnik VIS*, no. 2/1939, 54-55.

law; different fora had jurisdiction over marital issues. Both religious and civil marriage existed in the Yugoslav state in which both state and spiritual courts exercised jurisdiction over marital affairs.

While the St. Vitus' Day Constitution put marriage under the protection of the state (article 28) and proclaimed the principle that state courts exercised judicial authority (article 48), the logical conclusion regarding the exclusion of the spiritual courts in matters of marriage was not drawn in legislation in the way that certain legal writers demanded.[108] Because the creators of the Constitution had remained silent on spiritual courts, the thesis was accepted in practice that the legal situation from before the Constitution had been retained.[109]

This meant that the regular civil courts were exclusively responsible for marital affairs in Slovenia, Dalmatia, Istria, and the Vojvodina. In Croatia and Slavonia, spiritual courts were responsible for issues of the validity of marriage, separation, and divorce, for both Roman Catholics and the Orthodox, while the regular civil courts dealt with all other issues. In Serbia, the spiritual courts of the Orthodox and Catholic churches (following the Concordat of 1914) had jurisdiction in marital affairs, at least with regard to the validity and dissolution of marriage and certain matters of property related to marriage (spousal maintenance during the period of the court case, the right to maintenance afterwards, maintenance of any children, and compensation for breach of promise). In the same way, the spiritual courts of all recognised religious confessions exercised jurisdiction in marital affairs in Montenegro. In Bosnia and Herzegovina, jurisdiction was granted to the spiritual judicial authorities of the recognised religious confessions over their co-religionists in marital affairs so long as property rights were not affected.

The jurisdiction granted to the spiritual courts over marital affairs was considered a privilege granted to the religious communities that enjoyed a public legal status. For special reasons, the state delegated a part of its authorities to be exercised by religious bodies. Thereby, the rulings of these courts could be considered equal in standing to the rulings of the regular civil courts, insofar as they were made within the framework of legally recognised authorities and jurisdiction.[110]

The spiritual courts of the recognised religious communities, other than the Islamic, were purely ecclesiastical institutions, however. Their

108 D. Tomac, *Ustav i bračno pravo*, 107-108.

109 See further B. Eisner, *Međunarodno, međupokrajinsko (interlokalno) međuvjersko pravo*, 11-20, S. Culja, *Građansko procesno pravo Kraljevine Jugoslavije*, I, 291.

110 B. Eisner, *Međunarodno, međupokrajinsko i međuvjersko pravo*, 30.

establishment, organisation, and procedures were regulated by ecclesiastical law and regulations. This is the essential difference between these institutions and the Shari'a courts.

The Shari'a courts represented an emanation of government or state authority. Their jurisdiction was established under national law and their determinations pronounced in the name of the King were executed without review of the content under state law. The Shari'a justices had the status of government officials while being fully independent in their pronouncement of justice. The Shari'a courts were a part of government judicial structures. As such, parties were represented in front of them by lawyers under the appropriate legal regulations governing legal representation without regard for the religious affiliation of the representative.

The spiritual courts were primarily ecclesiastical fora even when the executing authorities delegated by the state and their judges were ecclesiastical dignitaries. The rulings of the spiritual courts of both the Catholic and the Orthodox churches were delivered in the name of God or the holy Trinity.[111] When it came to their execution or enforcement, there was a disagreement in theory as to whether the enforceable rulings of the spiritual courts enjoyed judicial execution or government assistance for execution. The latter opinion was advocated with strong argument to the effect that government assistance in execution was afforded after confirmation as to whether an enforceable decision had been delivered by the spiritual court within the bounds of its competence and whether it was in any form of contradiction with state law.[112]

The ecclesiastical authorities set out the procedures for the spiritual courts and they were promulgated as such: the procedure for the courts of the Serbian Orthodox Church of May 30 (June 12), 1933, the procedural rule book for marital disputes of the German Evangelical church of the Augsburg confession of February 18, 1931, and the *Codex iuris canonici* for Catholics in Croatia and Slavonia.

Parties appearing before the spiritual courts of these three religious communities were denied legal representation, or it was limited and contingent upon the religious affiliation of the representative.[113] A lawyer could only make written submissions to the Orthodox spiritual courts and had himself to be Orthodox or at the very least Christian, if there were no qualified Orthodox

111 Radoje Vukčević, "Državno i crkveno pravosuđe," *Branič* (Belgrade), no. 11/1936, 524.
112 B. Eisner, *Međunarodno, međupokrajinsko i međuvjersko pravo*, 31.
113 Matija Belić, "Advokatsko zastupanje pred duhovnim sudovima", *Branič*, no. 6/1935, 295-299.

individuals in the petitioner's place of residence. The evangelical spiritual courts disallowed any form of legal representation, but parties petitioning the spiritual courts of the Catholic Church could engage legal representation and sometimes had to, but the lawyer had to be Catholic or, when there was no alternative, had to be approved by the Bishop.

After 1929, the jurisdiction of the Shari'a courts extended across the state, but that of the spiritual courts over only certain parts of Yugoslavia.[114] In this regard, the number of spiritual courts were always less than that of the Shari'a courts. In 1924 there were four Orthodox and three Roman Catholic spiritual courts in Bosnia and Herzegovina where full confessionalism of marital law pertained. At the same time, there were Shari'a courts in every district in Bosnia and Herzegovina.[115]

3. The Shari'a Justices

Our consideration of the character of the Shari'a courts will now be supplemented by an introduction to the personal and technical requirements for exercising the function of Shari'a justice, the nature of their service, and their social status.

a) The personal and technical conditions required for appointment as a Shari'a justice

According to the *Law on Shari'a courts*, any male citizen of the Kingdom of Serbs, Croats, Slovenes, or later of Yugoslavia, could be a Shari'a justice, so long as he was of the Islamic religion and had a regular legal degree, had passed a course in Shari'a or had graduated from the Shari'a judicial school, and in either case had passed the Shari'a judicial exam, was at least 26 years of age, and met the general legal conditions for government service (article 28).

These conditions represented a mixture of Shari'a law requirements and Yugoslav government regulations. The requirement that Shari'a justices be male and belong to the Islamic religion had their origin in Shari'a law. In the Shari'a law compendia, one of the first things mentioned in the

114 S. Culja, *Građansko procesno pravo Kraljevine Jugoslavije,* I, 165.
115 M. Zobkow, "Šerijatski sudovi u BiH", 58.

conditions for carrying out the judicial function is male gender, followed by majority (in terms of age).[116] Even if *Hanafi* legal experts had allowed women to be judges in matters on which they could testify, in practice this rarely happened. Drawing upon the tradition of Shari'a law in southern Slavic lands, maleness was therefore introduced as a legal condition for carrying out the function of Shari'a justice. In fact, the Yugoslav *Law on justices of the regular courts* of January 8, 1929, (article 2) itself contained a provision on the ineligibility of female individuals for the judicial function.

The requirement that Shari'a justices be of the Islamic faith shared the same origin. The reason for this was the understanding that the judiciary was exercising a religious function and that, as a rule, non-Muslim testimony against Muslims was not given the same weight.[117] Introduction into the *Law on Shari'a courts* meant these conditions were incorporated into state legislation. Their validity, alongside other procedural rules, refutes the thesis that the Shari'a courts in Yugoslavia were purely secular institutions.

Other conditions show some signs of modification of traditional Islamic legal and doctrinal requirements by the state, as well as similarities with governmental for carrying out the judicial function.

According to the *Law on Shari'a courts*, Shari'a justices had to be at least 26 years old. In Shari'a law, the age census was lower – mere majority.[118]

Shari'a law requires that Shari'a justices be well acquainted with the bases and branches of Shari'a law.[119] The *Law on Shari'a courts* formalised this requirement by requiring candidates to hold law degrees, including a specific course in Shari'a, or have graduated from the Shari'a judicial school, and in either case to have passed the Shari'a judicial exam.

At the time the *Law on Shari'a courts* came into force, there were no Shari'a law courses at legal schools in Yugoslavia. The first one was only offered at the Belgrade Law School in 1931 when Mehmed Begović was appointed as Associate Professor in Shari'a Law after a three-year specialisation in Algiers and successfully defending his doctoral thesis.[120]

Up to that point, and to a large degree even after the establishment of the Shari'a course at Belgrade, candidates for Shari'a justiceships trained at the Shari'a Judicial School in Sarajevo.[121] The Austro-Hungarian authorities

116 Ali b. Muhamed b. Habib el-Basri el-Maverdi, *Al-ahkâm al-sultâniyya,* 72.
117 Ibid., 72-73.
118 Ibid., 73.
119 Ibid., 73-74.
120 *Gajret*, 1931, 481.
121 See further *Spomenica Šeriatske sudačke škole u Sarajevu izdana prilikom pedesetogodišnjice ovog zavoda (1887-1937)*, Sarajevo 1937, 109.

had founded the school in Bosnia and Herzegovina in 1887. Its statutes state that it was founded with a view to "the formation of appropriate candidates for service as Shari'a justices (*qâdîs*) in Bosnia and Herzegovina" (article 1), though the Austro-Hungarian authorities did have the covert intention of using the opening of such a school in Sarajevo to avoid the previous practice of judges and Muslim intellectuals training in Turkey, in line with the Monarchy's long-term policy in the Balkans.[122] The Provincial Government for Bosnia and Herzegovina was responsible for the financing, supervising, and oversight of this institution, while the *Grand Muftî* had a right of oversight over its general operations and the management of teaching in religious subjects. To enrol at the school, candidates had to have finished junior secondary school (*ruždija*) or junior gymnasium, along with a two-year course at the madrasah. Schooling lasted five years. The syllabus, which was changed several times during the existence of the school, included Serbo-Croatian, Oriental and European languages (by preference), Shari'a legal and Islamic traditional studies, civil law, history, geography, and some supplementary mathematics. Under the *Law on officials* of July 3, 1923, the school received the status of a "senior technical school, equivalent to a faculty."[123] Over its 50 years of existence, 370 graduates finished the Shari'a Judicial School, going on to carry out a number of other significant roles in religious, cultural, and political life in addition to serving as Shari'a justices, from service as government ministers to acting as local imams. In this regard, the school may be regarded as the first centre for the education of a modern Muslim intelligentsia in Bosnia and Herzegovina.

The issue of developing the Shari'a Judicial School into a Higher School for Shari'a Legal and Islamic Theological Studies was mooted several times amongst the Bosnian and Herzegovinian public. A preliminary step for such a reform was the foundation of the Shari'a Gymnasium by a decision of the National Council of Serbs, Croats and Slovenes for Bosnia and Herzegovina on November 25, 1918 as a classical gymnasium with additional Oriental and Islamic subjects. Amongst other things, the school was intended to provide a supply of students for the future Shari'a Academy or Islamic Theological Faculty. The idea of such a school however made little headway with Yugoslav authorities who tended to prefer the creation of Shari'a courses at the law faculties. Ulam*â* circles and the traditional Muslim elite were against integrating the education of Shari'a justices at the law faculty, as they felt that the number of semesters dedicated

122 Hajrudin Čurić, *Muslimansko školstvo u BiH do 1918,* Sarajevo, 1983, 259.
123 M. Zobkow, "Šerijatski sudovi u BiH," 55.

to studying Shari'a law would be insufficient. More particularly, they objected to locating the chair of Shari'a law in Belgrade. The thesis was promoted that "Shari'a can only succeed in an Islamic environment, and the conditions for that are most nearly met in Sarajevo."[124]

The study of Shari'a law at the law faculty served to underline the governmental character of the Shari'a courts and the state's role in training Shari'a justices. The choice of Belgrade as the seat of Shari'a legal studies should be viewed alongside the transfer of the seat of the Supreme Religious Council of the Islamic Religious Community from Sarajevo to the capital and in the context of the January 6 regime's centralising policy.

Somewhat later, around the time of the attempt to establish an independent Shari'a judiciary within the Croatian Banovina, moves were made to create a chair in Shari'a law at Zagreb University.[125] The candidate for the docentship or assistant professorship, Mehmed Alajbegović, was sent for specialist training in Algiers. Given the imminent collapse of the interwar Yugoslav state, this plan for a Zagreb chair in Shari'a law was never realised.

A high school that would prepare Shari'a justices was finally created when the Minister of Education issued a decree on the Higher Islamic Shari'a and Theological School in Sarajevo on March 30, 1937.[126] The school was created thanks to the participation of Muslim deputies in the Stojadinović – Korošec – Spaho coalition government of June 1935. The school thus represented the survival of the Shari'a Judicial School at a higher level.[127]

All branches of Shari'a law were studied, along with disciplines of secular law (encyclopaedia law, Roman law, civil law, constitutional and administrative law, the history of Slavic law) and canon law. The teaching staff included leading experts in Shari'a legal disciplines (Mehmed Handžić, Mehmed Ali Ćerimović, Muhamed Tufo, Alija Silajdžić) and secular law (Miloš Bajić, Hamdija Ćemerlija, Abdulselam Belagija, and others).

During the lifetime of the school (1935 – 1945) a total of 10 generations with 103 students were enrolled, and 38 of them received diplomas. In addition to working in the legal profession, its graduates played a significant role in Yugoslav Oriental studies.

The education of the Shari'a judiciary in the Yugoslav state was, clear-

124 Speech by JMO deputy A. Hadžikadić in the debate on the Ministry of Religions' budget on March 15, 1927, *Pravda*, March 29, 1927.

125 An idea supported by the then *Grand Muftî* Fehim-ef. Spaho. See *Glasnik VIS*, no. 2/1939, 62.

126 *Službene Novine*, no. 72 A, March 31, 1937.

127 For more on this school, see Kasim Hadžič, "Viša islamska šeriatsko-teološka škola u Sarajevu," *Takvim* (*godišnjak Udruženja isIamskih vjerskih službenika u SR BiH*), 1983, 139-159.

ly, somewhat variegated, placing an emphasis on general legal studies (at the Belgrade law faculty) or on Shari'a legal disciplines (in Sarajevo).

After finishing their schooling, graduates of the Shari'a Judicial School legal faculty served as Shari'a judicial trainees. The trainee phase lasted three years and was a period during which trainees gained the expertise and practical knowledge needed to serve as full Shari'a justices. Finishing their traineeship afforded candidates the right to sit the Shari'a judicial exams, administered by the Supreme Shari'a Court of the territory where the candidate had been in practice (art. 32 of the *Law on Shari'a courts*). The training period and sitting for the Shari'a judicial exams were governed by a rulebook of November 7, 1929.[128] Law faculty graduates who passed the exam were eligible for placement as a justice on the district Shari'a court after spending at least one year in a Shari'a court, while Shari'a judicial school graduates required two years (article 29 of the *Law on Shari'a courts*).

b) The professional and social status of Shari'a justices

The *Law on Shari'a courts* stipulated that the appointment of Shari'a justices, their status, and their rank were to be determined in accordance with the regulations of the *Law on justices of the regular court regular* (article 36).

Before passage of this law, there had been disagreement in the legal literature as to whether the permanency of judicial appointment also applied to Shari'a justices. Before 1929, Shari'a justices were often reassigned without their consent.[129] Even after passage of the *Law on Shari'a courts*, some legal authors argued that permanent appointments did not apply to Shari'a justices. In August 1937, the Shari'a justices directed a remonstrance to the Justice Ministry setting out their claim to equal status with the justices of the regular courts with regard to their level of schooling, following creation of the Higher Islamic Shari'a and Theological School, and that consequently their permanence of appointment should no longer be up for discussion.[130]

The Shari'a justices enjoyed judicial immunity, meaning that prior approval of the Justice Ministry was required to initiate an investigation against one or more of them, where there was reason to believe they

128 *Službene Novine*, no. 266—CVI, 13. XI 1929.
129 A. Bušatlić, *Šerijatsko-sudski postupnik s formularima*, 15.
130 *Pravda*, August 20, 1937.

might have committed a criminal act in the exercise of their official duties (article 21 of the *Law on justices of the regular courts*).

The Justice Minister was also responsible for ordering any investigation into disciplinary offences by Shari'a justices. In such cases, a judge of the Supreme Shari'a Court would sit on the disciplinary bench of the Appeal Court in the place of one of the appeal judges (article 36, *Law on Shari'a courts*).

The assessment of Shari'a justices was regulated by the *Decree on the assessment of justices of the regular courts and Shari'a justices* of June 23, 1932.[131] This decree was later amended. The procedure for assessing Shari'a justices was identical to that for justices of the regular courts. The district Shari'a court judges underwent assessment at the first instance by the personnel council of the district courts and then by the personnel council of the appeal courts in any second instance process. The main change was that the participating Shari'a district or Shari'a Supreme Court justice was the most senior rather than the most junior member of the council.

Shari'a justices were also on an equal footing with justices of the regular courts when it came to salaries and other forms of remuneration (Shari'a justices who had graduated from the Shari'a judicial school were initially placed in a lower status group than the justices of the regular courts because of their lower level of formal schooling).

Before passage of the *Law on Shari'a courts*, Shari'a justices and their assistants were poorly situated within the schedules of officials, and Shari'a trainee judges had to wait years after passing their professional exams for an appointment even if there were many vacant posts as Shari'a justice. Shari'a justices and trainee justices were also denied the right to the judicial allowance.[132] These forms of discrimination were rectified by political intervention on the part of ministers from the ranks of the JMO.[133] Once the *Law on Shari'a courts* passed, the problem was no longer dealt with on the basis of political happenstance, rather it now received systematic legal regulation.

After October 5, 1920, the Shari'a justices came together professionally to form the Association of Shari'a Justices and Practitioners, which later changed its name in 1931 to the Association of Shari'a Justices of the Kingdom of Yugoslavia. In addition to issues of status, the Association took an interest in the legal regulation of the Shari'a justice system and met with a certain degree of success.

131 *Službene Novine*, no. 191—LXXIX, August 20, 1932.
132 A. Škaljić, "Osvrt na rad staleške organizacije šeriatskih sudaca," *El-Hidaje,* 12/1943, 350.
133 The judicial addition to the Shari'a justices was approved in 1924, when Halid-bey Hrasnica was Justice Minister.

The link between the Shari'a courts and the Islamic Religious Community was reflected in the status of the Shari'a justices. The legal regulations governing the Islamic Religious Community did not consider Shari'a justices to be just government officials but also representatives of that community.

The 1930 *Law on the Islamic Religious Community* envisaged that the community would be represented before the state by the muftî or his deputy, or in their absence, by a Shari'a judge (article 7). Under the Islamic Religious Community constitution of that same year, district Shari'a justices presided on the district *waqf* commissions and were, as such, representatives of the religious community at the level of the district (article 12). According to Order no. 58,073 of the Minister of Justice, dated June 3, 1935, Shari'a justices were permitted to use the final hour of their working day for work for the *waqf* and *maârif* or endowment and educational administration.[134]

There were nonetheless significant differences, particularly in status, between the Shari'a justices and religious officials. Their status as government officials with quite solid incomes distinguished the Shari'a justices from most religious officials, who were modestly paid from *waqf* resources. This distinction went so far that some *qâdî*s began to sit with government representatives at the entrance to the mosque rather than in the rows for the faithful and the Ulam*â* during public prayers (*du'â; dova*) in the mosques on state holidays. Indeed, some Shari'a justices even caused scandal in religious circles and the general Muslim public through their disregard for Islamic norms of behaviour in private life.[135]

Nonetheless, Shari'a justices enjoyed a high degree of esteem amongst the Muslim population. Their service secured them all the advantages of representatives of traditional authority amongst the masses. At the same time, the degree of modern education they had attained during their schooling allowed them to present themselves as champions of cultural progress amongst Muslims. Their children regularly attended school thus helping to break down the suspicions that existed amongst the Muslim masses against modern education. The Shari'a justices also took an active role in cultural societies. The authorities took a particularly kind view towards their involvement in the Muslim cultural society, *Gajret*.

Their public service imposed certain forms of political activity expected of government officials. This related particularly to the expression of po-

134 *Glasnik VIS*, no. 7/1935, 351.
135 *Pravda*, May 26, 1923.

litical opinions and party affiliation. Due to all the potential consequences it might have in swaying Muslim voters, Shari'a judges who voted for an opposition party during elections was seen as scandalous in the eyes of the government authorities. Such justices normally faced political sanctions if they did this.[136] These realities led to them dissimulating their political opinions and sentiments or altering their views as circumstances changed.[137]

Political influence could not be entirely excluded from the appointment of Shari'a justices. It was particularly relevant during the January 6 dictatorship period. One sees this clearly from the nomination of Shari'a justices during this period. Appointments to the newly created Supreme Shari'a Court in Skopje included Mehmed Zeki Činara, a former Supreme Muftî of Serbia known for his sympathies with radical circles, Derviš Šećerkadić, a former district muftî from Plevlje, who had opposed the majority of the *Džemijjet* in 1924, declaring for cooperation with the Radicals, and Mehmedalija Mahmutović, a former Shari'a judge from Novi Pazar.[138]

In Bosnia and Herzegovina, the January 6 regime retired Salih Safvet Mutapčić and A. R. Prohić as justices of the Supreme Shari'a Court in Sarajevo. They were replaced by A. Bušatlić and Ibrahim Sarić.[139] As early as 1923, the last of these had, as a pro-regime figure, been appointed director of the Shari'a Judicial School, replacing Muhamed ef. Dizdar, who was accused of having preferred Roman to Cyrillic script in administration at the school.[140]

This ramping up of the influence of political factors on the Shari'a judiciary is confirmed by an official statement directed by the Supreme Religious Council of the Islamic Religious Community to the relevant government authorities, dated January 23, 1932. It requested that persons with neither the relevant qualifications nor the authority not be allowed to interfere in the appointment of Shari'a justices, "who are the only proper representatives of Shari'a legal jurisdiction and of the Islamic Religious Community."[141]

There was a sea change in the political orientation of the factors exercising influence over the Shari'a judiciary after 1935. Under the influence

136 Suljo Haznadarević, a Muftîate trainee in Peć was suspended over public expression of support for the Democratic Party — statement by former Shari'a justice Vejsil Kadić from Sarajevo made to the author on July 20, 1984.

137 A good example of this is a qadi from Čajniče, who was a Croat under the Austro-Hungarian regime in BiH, but a Serb under the Radicals. He ended up a member of SRNAO. (*Pravda*, June 21, 1924).

138 *Novo vrijeme*, May 3, 1930, *Pravda*, April 2, 1924.

139 *Novo vrijeme*, August 24, 1929.

140 *Pravda*, November 13, 1923.

141 *Glasnik VIS*, no. 3/1934, 174.

of the JMO, which had now joined the government, individuals who had been prominent as supporters of the earlier regime now began to be removed from the Shari'a courts.

There was no way for the Shari'a courts to be insulated from political influence since they were institutions born of political compromise themselves.

4. The Functioning of the Shari'a Courts

The Muslim population was subordinated to a specific material and procedural form of law since they were subject to the jurisdiction of the Shari'a courts. This determined, in its important aspects, how the Shari'a courts functioned. The general concept of civil Shari'a procedure and its peculiarities *vis-à-vis* modern judicial procedure as applied in the regular Yugoslav courts placed Muslims in a different position from other citizens when it came to realising and protecting their individual rights in marital, family, and inheritance matters. At the same time, these circumstances were the main factor distinguishing Shari'a from the regular civil courts as institutions entrusted by the state with the same role in private legal affairs.

Shari'a procedural law had been modernised in Bosnia and Herzegovina between 1878 and 1918 under the influence of Austrian legal theory, thus reducing the differences between how the Shari'a and the regular courts operated. Nonetheless, significant differences remained.

They appeared in the general principles underlying procedure in the Shari'a courts and the specific regulations that directed Muslims onto a different path for realising their rights than was offered to their fellow citizens of other religious confessions.

a) General characteristics and peculiarities of Shari'a court procedure

The basic principles of Shari'a court procedure can be boiled down as follows, according to Franjo Kruszelnicki and A. Bušatlić: the adversarial principle, offering a hearing to both parties, the discussive principle, the use of oral argument, and immediacy at courts of the first instance, publicity, formal truth, and the legal theory of evidence.[142]

142 A. Bušatlić, *Šerijatsko-sudski postupnik s formularima*, 31-32, F. Kruszelnicki, *Postupak pred šerijatskim sudovima u BiH*, Zagreb, 1917, 21-23.

This last principle could lead to unjust rulings in the presence of unscrupulous behaviour by either party or by the justices. According to it, the justice was obliged to consider a claim truthful if the legally prescribed evidentiary means were adduced and to rule favourably in this regard, regardless of his own personal belief, once the discussion had reached a point that was formally susceptible for such a ruling.

The regulations governing procedural law in Shari'a courts were contained in *the Majalla* and the provisions governing Shari'a courts in Bosnia and Herzegovina. For anything not adequately covered, reference was to be had to the procedural code for civil cases.[143] In spite of significant progress compared to traditional compendia of *fiqh*, *the Majalla*, as the basic source for procedural norms and standards, was not able to meet all the needs of modern legal commerce or ensure a satisfactory degree of protection for individual rights.

In 1919, the Shari'a lawyer, A.R. Prohić, described procedure at the Shari'a courts as defective and out of date.[144] In his view, the main defects include but were not limited to: a lack of regulations governing territorial jurisdiction, judicial assistance and recusal, hearings, objections, minutes or a court record for oral hearings, types of judicial decision, third parties in suits, service with court documents and records, the procedure for declaring death. Practically the entire procedural code for non-adversarial proceedings was also lacking.

The procedure on evidence was also viewed as entirely out of date. Giving evidence was considered a moral but not a legal duty. It was only valid if carried out in the presence of both parties which could lead to difficulties and major costs if a proposed witness lived in another district. The justice had no leeway in assessing witness statements. Only in cases where there was doubt about the credibility of a witness could the justice order an investigation into his or her moral character (*tazkiya al-šuhūd*). This is a classical institution of Shari'a procedural law. It is based on the idea that a statement is considered truthful if given by an individual whose probity is not in doubt. The moral character of a witness was tested by taking statements from neighbours and acquaintances. Given a positive result to such questioning, the court was obliged to accept the statement or statements of a witness.

The Supreme Shari'a Court rejected some traditional procedural institutions, considering them as obsolete. One such institution was the *šahâda*

143 See Chapter IV.

144 A. R. (Ali Riza), "Naši šeriatski sudovi," *Pravda*, September 20, 1919.

al-hisba. This had to do with qualified testimony which entailed legal consequences from the acts testified about regardless of the intention or will of the actor. Such acts had to belong to the category of *huqūk Allah* (divine law), which is approximately equivalent to the category of public law. For example, if a man declared before witnesses that he was leaving his wife (*talâq bâ'in*), and they passed this on to his wife, the Shari'a court would execute the procedure, whether at her request or as a matter of official duty. Once witnesses had confirmed their statements before the court, a decision to end the marriage would be made even in the absence of the husband or of his consent. This very strict procedure was intended to prevent frivolous, not-properly-considered endings to a marriage. The Supreme Shari'a Court in Sarajevo declared this institution obsolete in Ruling no. 185/30, referring to the more up-to-date regulations in *the Majalla*.[145]

Confronted with shortcomings like this, some Shari'a legal experts, like A. R. Prohić himself, suggested taking over the new Ottoman law for Shari'a courts. This, however, never happened.

The lack of qualified advocates was a problem for the Shari'a courts. According to both traditional Shari'a law teachings and *the Majalla*, the interests of parties before the court was to be protected by a general contract of representation (*wakâla*). The history of Shari'a judicial systems does not know a specific institution of advocacy. Under Yugoslav legal regulations, lawyers were authorised to represent parties in front of all public authorities, including Shari'a courts. No particular conditions were set for lawyers appearing before Shari'a courts, e.g. expertise in Shari'a law, which undermined protection of the interests of the parties. Keeping in mind that the parties themselves were not well versed in Shari'a law, one gets a clearer picture of the realities of legal protection at the Shari'a courts.

b) Material weaknesses of the Shari'a judicial system

Beyond these shortcomings and anachronisms in procedural regulations, weaknesses in how supervision was exercised over the courts of first instance also had a negative impact on their functioning. This contributed to delays in delivering judgement and even abuses of judicial powers.

In 1919, A. R. Prohić wrote that the Supreme Shari'a Court had not carried out even a single inspection of the courts of first instance in 25

145 The author possesses copies of the ruling.

years.[146] Unlike the Austro-Hungarian authorities, who did instruct regular court inspectors to conduct a review of the Shari'a courts towards the end of their period of rule, albeit one that could hardly have been particularly effective under the circumstances, the Yugoslav *Law on Shari'a courts* entrusted this function to the Supreme Shari'a Court (article 26 of the *Law on Shari'a courts*). Given how short the period for which the *Law on Shari'a courts* was in force, it was never realistic to establish efficient accountability structures during the lifetime of the first Yugoslav state (1918-1941).

Therefore, it remained possible for unresolved probate cases from 1906, 1910, 1912, and 1920 to be cited in the Prijedor Shari'a court in 1924.[147]

Academic studies of judicial practice had yet to begin when the Shari'a courts were still in existence. The disorganised condition of the Bosnian and Herzegovinian Shari'a court archives has moreover prevented us from engaging here in any analysis based on primary sources of how the Shari'a courts functioned. Coverage from the contemporary press does, at least, allow one to identify certain weaknesses in how these institutions operated. The principal emphasis tended to be on dilatoriness in dealing with probate and endowment (*waqf*) affairs and on abuses by individual Shari'a justices.[148] Some of these texts were intended to discredit individual Shari'a justices politically, as members of rival bourgeois political parties or groups. Leaving such personal factors to one side, one can nonetheless identify some common forms of abuse in the Shari'a judiciary.

Illegality and irregularity were apparently most likely to occur in the spheres of marital and family relations, particularly regarding the dissolution of marital relations by one-sided declarations from the husbands. Certain Shari'a justices were notorious for their very prompt declarations of dissolution and denying the wife legally mandated maintenance.[149] Before passage of the *Law on Shari'a courts*, muftîs in Serbia and Montenegro enjoyed considerably greater opportunities for abuse. Some of these illegalities even received their own names. One example was the so-called *jalan veraset hudžet* (false probate certificates) issued by some muftîs for stamp duty. There were also cases of allowing previously married women to remarry before the proper legal dissolution of their existing marriage had transpired. For example, poor administration often resulted in the embezzlement of Muslim minors' custodial funds (*aytâm sandūk*).[150] The

146 A. R. Prohić, "Naši šeriatski sudovi," *Pravda,* September 18, 1919.
147 *Pravda,* March 21, 1924.
148 *Pravda,* November 25, 1923.
149 *Pravda,* November 17, 1923.
150 *Pravda,* April 20, 1924.

language of business of the Shari'a courts represented a problem. As government courts, they were obliged under the constitution to record their rulings in the official national language ("Serbian-Croatian-Slovenian" in the terminology of the day – article 3 of the Constitution of June 28, 1921), but many muftîs wrote their decisions in Ottoman. The parties in Serbia and Montenegro did not generally use Ottoman as their native tongue and consequently had to procure court-certified translations of the decisions of courts in their own country.[151]

These material shortcomings of the Shari'a judicial system were not new characteristics emerging only under the framework of the Yugoslav state from 1918 to 1941. The moral prestige of the function of *qâdî* had been notoriously undermined during the last centuries of the Ottoman state. During the period of Austro-Hungarian rule in Bosnia and Herzegovina, the authorities had embarked upon a path of modernising the Shari'a courts and promoting a new enthusiasm for administration, efficiency, timeliness. Under the Yugoslav state, the immediate need was to deal in principle with the form in which the courts were to survive, how to unify their organisational structure across the entire territory of the state, how to put in place modern and well-trained judicial personnel, and so overcome existing weaknesses or shortcomings. Politicisation of the Shari'a court system, from various directions, prevented the determined the eradication of abuses, however. A period of more than two decades was simply not long enough for all that, and neither were the forces pushing for change within the framework of the Shari'a legal discipline and practice powerful enough.

151 Similar things happened at the Supreme Shari'a Court in Sarajevo, albeit to a lesser extent. Following a Justice Ministry warning, the court issued order no. 235 on April 19, 1926, instructing the district Shari'a courts to write their documents in Serbo-Croatian and in either Cyrillic or Latin script. Shari'a legal provisions or technical terms were to be given in Arabic in brackets (*Glasnik VIS, no. 1-3*/1945, 28).

CHAPTER IV

The Sources and Character of Shari'a Law in Yugoslavia

No presentation of the Shari'a courts in Yugoslavia would be complete without examining the sources on which they based their rulings and conducted their courtroom procedures. The following review will cast more light on our general account of how Shari'a law was implemented in government Shari'a courts. We shall also attempt to establish the form Shari'a law in Yugoslavia took in practice and its degree of orientation towards both the classical forms and contemporary attempts to update those forms of the sort already then underway in some Muslim countries. We will also investigate whether the reforms of Shari'a law came about under the influence of the Shari'a judiciary or were rather because of more general trends in the Yugoslav legal system. In the end, we shall attempt to determine the legal, theoretical and practical relationships that existed between Shari'a and the Yugoslav national legal system.

1. The Sources of Material Shari'a Law

Shari'a law existed in un-codified form well into the 19th century. Shari'a law is marked by the absence of any creation of general legal rules by national legislatures. The fact that this system of law is essentially based on religious sources has meant that only experts in religious disciplines could be considered authoritative interpreters. In the Islamic understanding, the state or national authority is subordinate to the law and the national leader's main duty

is to protect and implement Shari'a.[1] This way of looking at the state and its role is what lies behind the quite independent development of Islamic law in the history of Muslim states. Shari'a law developed within circles of religious teachers and was contained in legal works to which the state only provided its sanction. One may therefore properly say that the history of Islam has known great lawyers and legal scholars, but few law-giving rulers. When a Muslim state has issued its own laws, it has generally considered itself authorised to regulate only such administrative and public-legal issues as are not treated in detail by Shari'a law or to give its own sanction to one of the already existing and equally valid legal interpretations.

Since the middle of the 19th century, both private and official codifications have appeared in many Muslim countries under the influence of European legal systems as contained in civil codes and the resulting need to provide unified and representative collections of Shari'a law as well as for uniformity of judicial practice. Shari'a law thus appeared in a new form, contained in collections divided into chapters, institutes, and paragraphs.[2]

The Shari'a law applied in the Shari'a courts of Yugoslavia was a mix of all its forms, traditional and modern. It included the works of Muslim legal experts, Ottoman state laws and decrees, and private and official codifications and compilations.

a) The works of Muslim legal experts

The works of the Shari'a legal experts relied upon by the Shari'a courts in Yugoslavia took several forms. Some were original works presenting the regulations and provisions of Shari'a law generally after the interpretation of a given legal school. Others were commentaries on original works, in which the text of the original was often explicated through linguistic interpretation or examples, or in the form of collections of legal opinions (*fatwâs*) issued on real or hypothetical problems. We will now take a brief look at the works which enjoyed the greatest reputation in the Shari'a judicial system in Yugoslavia.

The work held in the greatest esteem in the Ottoman Empire and in those areas where Islam was spread by the Ottomans was a collection of Shari'a regulations composed under the literary title of *Multaqâ al-abhur*

1 Seid Ramadan, *Islamsko pravo – izvor i razvoj*, Sarajevo, 1984, 38-42, Mustafa Imamović, "Islamski koncept države," *Prilozi za orijentalnu filologiju* (Sarajevo), XXIV (1974), 165-177.

2 Mustafa Ahmad al-Zarqâ'î, *Al-madkhal al-fiqhiyy al-'âmm* (General introduction into Islamic legal doctrine), Damascus, 1952, II, chapter on "Islamic law in a new groove."

(The Confluence of the Seas) by Ibrahîm al-Halabî (d. 956/1549), a lawyer and religious official who flourished under Sultan Suleiman II (1520-1566). This work was based on what were then current sources of Islamic legal doctrine and is both comprehensive and truly representative. It became the handbook for judges in the Ottoman state, serving as the basis for their decision-making. It was also main textbook in Islamic schools (*madrasas*). Even after the end of Ottoman rule in the southern Slavic lands, for as long as the Shari'a courts continued to exist, *qâdî*s continued to be trained on the texts of the *Multaqâ* and cited it in judicial decisions. Generally speaking one can say that it was treated as canonical.[3]

In terms of the system it used in presenting its materials, the *Multaqâ* is an example of casuistics in the Islamic legal sciences. Religious and legal regulations are presented in 57 books. Ritual regulations ('*ibâda*) are discussed in nine books. The remainder deal with real, obligational, marital, family, inheritance, criminal, and procedural law.[4] Some 20 commentaries have been written on the work with the best known coming from the pen of Mula Abdurrahman Šejhi-zade Damad-efendi (d. 1078/1667). The title of his commentary is the *Majma' al-anhur* (The confluence of rivers) and it is usually cited as *Damad*. Because of its accessibility and the expansiveness of its explications, this commentary is cited even more frequently in Shari'a judicial practice than the original.[5]

The next work esteemed by the Shari'a courts[6] was a commentary on the *Tanwîr al-absâr* (The illumination of views) composed under the title of *Al-durr al-mukhtâr* (The chosen pearl) by Allaudin el-Haskefi (d. 1088/1677), a muftî from Syria. This work follows all other works of *fiqh* in terms of content and systematisation. This commentary was itself commented upon in *Radd al-mukhtâr* (The selected answer), which was cited in Shari'a judicial practice in Yugoslavia after its author, Ibni Abidin.[7]

Other works cited in the decisions of the Shari'a courts include the *Fath al-qadîr* (The mighty victory), *Durar al-hukkâm* (The pearls of the

3 Eugen Sladović, *Islamsko pravo u Bosni I Hercegovini*, 23; Cf. e.g. circular no 180 of the Supreme Shari'a Court in Sarajevo (henceforth SSCS), dated March 18, 1924, *Glasnik VIS*, no. 1-3/1945, 19-20. (When reference is made to the *Glasnik VIS*, while citing a circular of the SSCS, this refers to the Zbirka naredbi i okružnica za šerijatske sudove u BiH 1900-1944, edited by Abdulah Škaljić.)

4 E. Sladović, op. cit., 24.

5 Cf. SSCS circular no. 267, dated July 4, 1917, *Glasnik VIS*, no. 10-12/1944, 191-192, SSCS Order no. 813 šer., dated December 30, 1897, Zbirka naredaba za šer. Sudove, 254.

6 Cf. *SSCS circular no. 180*, dated March 18, 1924, *Glasnik VIS, no. 1-3*/1945, 19-20, *SSCS Order no. 813 šer.,* dated December 30, 1897, *Zbirka naredaba za šer. Sudove,* 254.

7 Cf. *SSCS ruling no. 170*, dated March 14, 1931, *SSCS circular no. 267*, dated July 4, 1917, *Glasnik VIS, no. 10-12*/1944, 191-192.

judges), *Muhît* (The Ocean), *Al-bahr al-râ'ik* (The deep sea), and *Fath al-mu'în* (The useful victory) among many others.[8]

The Shari'a courts also held in high esteem several collections of legal opinions, particularly the *Al-Fatâwâ al-Hindiyya* (Indian fatwas). In fact, this work was composed thanks to an initiative by the Moghul leader, Mohamed Eureng Zib Alemgir (d. 1118/1706) and represented an attempt to codify Shari'a law in the form of legal opinions. It enjoyed a great reputation throughout the Islamic world and consequently also in the Shari'a courts of Yugoslavia.[9]

Al-fatâwâ al-tatarhâniyya (the Tatarhan Fatwas) is a collection of legal opinions written by Alim bin 'Ala al-*Hanafî* (d. after 752/1351) made at the behest of the viziers of two of the Moghul rulers of Tatarhan.[10]

The *Fatâwâ al-ankarawî* (Fatwas of the Ankaran) was written by the Shaykh of Islam, Muhamad al-Ankarawî (d. 1098/ 1686). In this case, the fatwas were ordered according to the usual systematisation of works of *fiqh*.[11]

A number of other collections are also cited in the decisions of the Shari'a courts: *Bahja al-fatâwâ* (The splendour of legal opinions), whose author died in 1156/1743, *Al-fatâwâ qâdîhân* (The Kadi-han Fatwas), whose author died in 592/1196, *Al-fatâwâ al-Bazzâziyya* (The fatwas of Bazzaz), whose author died in 827/1424, *Al-fatâwâ al-Zayniyya* (The Fatwas of Zayn), whose author died in 970/1563, etc.

Generally, one may say that the Shari'a courts in Yugoslavia applied legal opinions found in the works of legal experts hailing from all parts of the Islamic world (from Arab countries, through Central Asia, to India). These works appeared at different times (from the 12th to the 18th centuries of the common era) and reflected both the concrete circumstances and conditions of their times.

The realities facing Yugoslav Muslims during the first half of the 20th century, especially during the ongoing process of transition from an oriental and Islamic culture to a Western European one, posed new demands in the area of Shari'a law too. For example news questions that Shari'a had to now accommodate included: whether to restrict the right of the husband to end the marriage unilaterally, whether to give the wife the right to appeal to

8 Cf. *SSCS circular no. 327*, dated September 24, 1923, *Glasnik VIS*, no. 1-3/1945, 16-18, B. (A. Bušatlić), "Razvod braka u slučajevima muževe neimaštine, siromaštva i nesposobnosti za uzdržavanaje svoje žene," *Gajret*, 1930, 38-39.

9 Cf. *SSCS circular no. 327*, dated September 24, 1923, *Glasnik VIS*, no. 1-3/1945, 16-18.

10 Cf. *SSCS judgement no. 528*, dated December 29, 1923, issued by H. A. B. in *Mjesečnik*, no. 2/1925, 313-316.

11 Cf. *SSCS circular no. 260*, dated June 24, 1918, *Glasnik VIS*, no. 10-12/1944, 196-197.

the court for divorce outside the cases treated in the classical legal texts, whether to continue to maintain the classical individualistic conception of religious endowments, whereby the endower has an exclusive right to determine the intended use of an endowed good, whether the will of the benefactor is to be respected regardless of changed circumstances, and whether to retain the principle of the inalienability of endowment property.

The classical works of the Muslim legal experts offered no solutions in such cases for the simple reason that these problems had not existed at the time when they wrote their works. On the other hand, the Shari'a justices could not in principle search for solutions outside of the Shari'a law. Any possible solution had to lie in renewing the legal thought of Islam. But the Islamic Religious Community and Yugoslavia did not feel itself called upon, within the context of the Islamic world, to initiate an independent reform of Shari'a law. For many different reasons, they preferred to selectively accept reforms already carried out in Ottoman Turkey and in Arab countries, primarily Egypt.

It was with this aim in mind that they carried out both an official and a practical reception of reformist Ottoman laws and decrees and codifications and compilations of Shari'a law, while legal opinions that reflected the line of the reform movement in Islamic legal studies were excerpted and incorporated into circulars and orders from the supreme Shari'a courts.

b) The reformist Ottoman laws and decrees

Ottoman state regulations characteristically took a variety of different approaches towards Shari'a law: some represented government sanction of specific Shari'a legal interpretations while others embodied greater or lesser deviations from Shari'a. Some even introduced entirely new content. The regulations of the state legislation in the Ottoman Empire applied equally to the whole population regardless of religious affiliation. Because of this, some of these regulations, if they had not been explicitly altered or rescinded in the meanwhile, in fact already applied to the entire population in Bosnia and Herzegovina even after the end of Ottoman rule. Over time, these regulations came to be applied only by certain specific bodies and depending on the religious affiliation of the affected citizens: Shari'a courts for Muslims and regular civil courts for non-Muslims.

The regulations of the reformist Ottoman laws and decrees dealt with matters of (real) property, the so-called *miri* system of inheritance, coming-of-age, the protection of minors and orphans, and so forth.

The Ottoman land law, known as the *Arâdî qânūn* or the *Law of the seventh of Ramadân, 1274*, was issued on April 21, 1857.[12] It contained an introduction with definitions of the various types of land, a first section on state land, on possession of this land, its transfer, inheritance, and reversion to the state, a second section on public land, its definition and the principles to be applied to uncultivated or waste land, and a third section on varia. The law recognised various categories of land: land in unrestricted personal ownership (*mulk*), land owned by the state, but where the right of use or benefit belonged to private individuals on the basis of a rental agreement (*arâdî miri*), land belonging to Islamic endowments (*arâdî mawqūfa*), land retained for public use and benefit (*arâdî matrâka*), and uncultivated or waste land (*arâdî mawât*).

Under a revision of the *Law of the 17th of Muharram, 1284* (May 21, 1867), the specific order of inheritance for *arâdî miri* was regulated.

Given their origin and character, both the *Arâdî qânūnâma* and the revision represented an initial approach to shaping the law in accordance with national feelings at a time when they were still largely unexplored in the Ottoman Empire. On the one hand, these regulations retained certain institutions and ideas from Shari'a law, while, on the other, they suppressed some Shari'a regulations through their legal constructions, replacing them with local Ottoman customs. In this way, while the roots of many of the institutions may no doubt be found in early Muslim history (*waqfs, arâdî miri*, etc), a new approach was being introduced to the inheritance (*intiqâl al-'âdî*) of *miri* properties that represented a radical departure from traditional Shari'a inheritance law (*farâid*).[13] Bearing in mind that *miri* property includes meadows, pastures, arable land, woodlands, etc. , one is fully justified in concluding that the revision of the *arâdî qânūnâma* exempted a major part of the cultivable land of the Ottoman Empire from the application of Shari'a inheritance law. Still, aside from giving a specific order of inheritance and certain other departures from Shari'a (e.g. forbidding the disposition of *miri* property by testament), the land law did stipulate that the principles and regulations of Shari'a inheritance law continued to apply with regard to defining the idea of inheritance, determining the point at which a right to inherit was attained, the call to probate hearings, and the right to inherit of children born posthumously or out of wedlock. The Ottoman land law thus retained the guiding idea of Ottoman legislative reform in its conceptual apparatus – the journey towards modernisation.

12 Ebul'ulâ Mardin, *Development of the Shari'a Under the Ottoman Empire*, 286-288.
13 Cf. A. Škaljić, *Šerijatsko nasljedno pravo*, Sarajevo 1941, 108-109.

During the period of Austro-Hungarian occupation in Bosnia and Herzegovina, article 1 of the *Law on the land registry* of September 1, 1884, entailed retention of the procedures for determining the legal nature of property and the order of inheritance set out in the laws of the 7th of Ramadan, 1274, and the 17th of Muharem, 1284. The same was true of the Yugoslav *Law on the internal organisation, establishment, and correction of land registry books* of May 18, 1930 (article 87).[14]

The situation was slightly different in other parts of Yugoslavia.[15] After the Balkan wars and the annexation of the newly liberated areas to Serbia and Montenegro, application of the Serbian civil code of 1844 was extended to them under a decree of February 17, 1914. Neither the Ottoman land law nor its revision were retained in force by any regulatory provision in so-called southern Serbia (the Sanjak, Kosovo, and Macedonia). One may therefore conclude that application of the *Arâdî qânūnâma* was tacitly suspended by the order of February 17, 1914. In practice, however, the result was a certain degree of havering. The muftîs, who were authorised to hold probate hearings for Muslims as judges of choice, continued to distinguish real property in terms of its legal character as *miri* or *mulk*, applying the *Arâdî qânūnâma* to the first and the provisions of Shari'a inheritance law to the second. This was the case up to February 12, 1921 when the Supreme Muftî for Serbia and Montenegro issued rescript no. 127 warning the district muftîs that the *Arâdî qânūnâma* was no longer in force and that they were to rule on the basis of the Shari'a legal compendium during probate hearings for Muslims.

The Supreme Muftî did not have the authority to suspend application of the Ottoman land law himself since this was under the jurisdiction of the national legislature. He was merely stating the situation on the ground after applicability of the Serbian civil code had been declared. In rescript no. 131 of March 14, 1931, the Supreme Shari'a Court in Skopje countered this view, strongly argued by Hamdija Azabagić in the literature, with the position that legally the *Arâdî qânūnâma* had remained valid for the territory of the court up to the Supreme Muftî's rescript of February 12, 1921, so that the Ottoman land law would continue to apply to any probate hearing on the estate of someone who had died before that date and the regulations of Shari'a inheritance law to the estate of anyone who died after it.[16]

14 Ibid., 105.
15 Hamdija M. Azabagić, "Primjena i važnost zakona 'Erazi kanunama' na području Vrhovnog šerijatskog suda u Skoplju," *Glasnik VIS, no. 12*/1935, 537-542.
16 Ibid., 541.

This meant that after 1921 the inheritance rights of Muslims were dealt with under one set of regulations in Serbia, Macedonia, and Montenegro, but under another in Bosnia and Herzegovina and the other areas. In the first case, everything entering into the estate of an individual of the Islamic confession was dealt with in accordance with Shari'a inheritance law, as contained in the classic compendia. However, in the second case, Shari'a inheritance law was only applied to things in absolute ownership, while property over which the deceased only had a right of use that were dealt with under the revised Ottoman land law.

The Ottoman law of the 16th of Dhu al-Hijja, 1286, (March 20, 1869) dealt with the question of the coming-of-age (majority) of citizens of the Ottoman Empire. It was based on the concepts of Shari'a law. This law distinguishes between physical and psychological maturity (*bulūg* and *rushd*). Whether a particular individual had reached maturity was determined by the facts on the ground. The interpreters of Shari'a law did not fully agree upon the temporal boundaries according to which one might properly consider a minor to have reached psychological maturity which manifested itself as the capability to manage property rationally. Given these circumstances, the Ottoman Empire had, under article 13 of the law of the 16th of Dhu al-Hijja, 1286, and drawing upon the recognised opinions of Shari'a legal experts, determined that the onset of maturity took place no later than the end of the 20th year of life (20th birthday).

This law applied to the entire population in Bosnia and Herzegovina until the adoption of the Yugoslav law on reaching majority in July 31, 1919. The question then arose as to whether the law of 16 Dhu al-Hijja still applied to Muslims, who would now attain majority a year earlier than the rest of the citizens of Yugoslavia (at 21 years of age).

In at least one concrete case, the Supreme Shari'a Court in Sarajevo issued a ruling (no. 407 of September 25, 1923) expressing the viewpoint that the law of 16th Dhu al-Hijja, 1286, continued to apply to Muslims. The explanation was that the Yugoslav law on reaching majority was valid in general for all citizens in the Kingdom of Serbs, Croats, and Slovenes in all cases where specific other laws did not determine otherwise. As the application of Shari'a law was guaranteed in questions of the personal status of Muslims, the question as to when and how a Muslim minor attained mental maturity was governed by Shari'a regulations, including the law of the 16th of Dhu al-Hijja.[17]

17 A. Bušatlić, "Da li je dosta 20 godina ili je potrebno 21 godina života za proglas punoljetnosti," *Arhiv* no. 1/1925 (vol. XI/XXVIII), 60-64.

The Ottoman decree on orphans, known as the *Aytâm nizâmnâma*, was adopted on the 5th of Dhu al-Hijja, 1268 (September 20, 1851). Along with the decree of the 7th Rabî' al-awwal, 1268 (December 31, 1851), it provided the main legal source for regulating the protection of orphan property via the so-called a*ytâm sandūk* (custodial accounts).[18] The Shari'a courts applied the provisions of these decrees when forming Muslim custodial accounts. Particular attention was paid to preserving the property in the same condition as it was left in at the time of death. Once any verified outstanding debts of the estate had been paid off, custodial accounts were formed, and the funds were invested at interest to benefit the orphans.

These decrees were not promulgated separately in Bosnia and Herzegovina. The Shari'a courts applied them in order to retain the existing legal situation. There is an order by the Provincial Government for Bosnia and Herzegovina, (no. 234 710/III-7 dated November 14, 1918) that refers to application of the provisions of the *Aytâm nizâmnâma* when declaring an individual of age.[19]

The muftîs on the territory of Serbia, Macedonia, and Montenegro observed the provisions of these decrees in practice up until 1929 when forming Muslim custodial accounts. The absence of Shari'a courts in these places entailed a lower level of security of property for minors in wardship than in Bosnia and Herzegovina. This situation changed after 1929 however with the establishment of the Shari'a courts.

Ottoman laws were also applied to the administration of *waqfs* or endowed trusts. The Constitution of the Islamic Religious Community of October 24, 1936 stipulated explicitly in article 219 that the provisions of the law of the 10th of Safar, 1290 (April 9, 1873) would continue to apply to any appointments to religious offices or positions in religious or educational endowments not furnished with a pension.[20]

c) Private and official codifications and compilations of Shari'a law

Attempts to codify individual areas of Shari'a law had begun to appear during the mid-19th century on in the Islamic world. Governments in certain Muslim countries as well as prominent Shari'a legal experts support-

18 Cf. Bora A. Milojković, "Itam sanduk," *Arhiv,* no. 2/1925 (vol. XI/XXVIII), 153-157.
19 *Glasnik VIS,* no. 10-12/1944, 199-200.
20 *Službene Novine,* no. 256-LXIV, dated November 5, 1936.

ed these efforts. Practically all these attempts at codification were present in the Shari'a legal theory and practice in Yugoslavia. Some of them found application through the continuity of the Shari'a judiciary from the Ottoman period, while others enjoyed either official or *de facto* reception.

The Majalla-i ahkâmi 'adliyya or *Majalla* is a civil law collection based upon the the *Hanafî* legal school of Islamic law.[21] It represents the work of the Ottoman reform movement of the mid-nineteenth century and contains provisions relating to property, contracts, compensation, adverse possession of other people's property, and judicial or courtroom procedure. Therefore, it may properly be termed a codex of property law. It contains 1851 articles, spread across 16 books, gradually published in the Official Gazette of the Ottoman Empire, *Dustūr*, between 1870 and 1877. *The Majalla* was adopted thanks in part to the influence of religious parties in the public life of the Empire which advocated for a civil code based on Islamic legal doctrine, against the efforts of secular Ottoman politicians who promoted adpoting the French *Code Civile*. Given its sources and the forces that stood behind it, *the Majalla* was one of the most important resources for preserving Islamic institutions at a time when the Ottoman Empire was quickly transforming from an oriental and Islamic social order to a Western European one.

While much praised, *the Majalla* came over time and particularly after the establishment of constitutional order in Turkey in 1900 to be increasingly exposed to a dual form of critique. Islamic legal circles objected to its limited sources since it was based exclusively on interpretations of the *Hanafî* legal school and suggested that incorporating opinions from other legal schools was a good idea so long as they adequately expressed the public interest under changing social circumstances. On the other hand, European-educated intellectuals took the view that a legal code based upon the unchangeable sources of Islam simply could not meet the needs of a society undergoing radical change.

The Ottoman government did not allow any changes to *the Majalla*, but the 1880 Law on civil judicial procedure and the Rescript of 1914, drafted using concepts from French law, suppressed many of its provisions governing procedure in the Ottoman civil courts. *The Majalla* remained in force in the Ottoman Empire up until 1926 when the government in Ankara decided to adopt the Swiss codification as its civil legal code.

21 S. S. Onar, "*The Majalla*," in *Law in the Middle East*, I, 292-308.

Outside of Turkey, *the Majalla* continued to be applied in the Arab countries that came under the administration of the European powers as mandates (Palestine, Trans-Jordania, Syria, Lebanon, and Iraq) after the disintegration of the Ottoman state as well as in Cyprus and in Yugoslavia. The case of *the Majalla*, which continues in force in some of these countries even today, confirms one of the few laws in political and legal history, that legal creations can take on a relatively independent existence and not infrequently outlive the states within which they came into being.[22]

The continued validity of *the Majalla* in Bosnia and Herzegovina was based upon an Imperial proclamation to the people of Bosnia and Herzegovina in 1878 which made clear "The old laws retain their validity, until new ones are promulgated."[23] Not long afterwards, the Austro-Hungarian administration gave its sanction to large parts of *the Majalla* in its own official *Compendium of laws and decrees for Bosnia and Herzegovina* (the *Sammlung der fur Bosnien und die Hercegovina erlassenen Gesetze, Verordnungen und Normalweisungen*).[24] The regular civil courts were required to apply *the Majalla* as the law of the land with regard to the entire population of Bosnia and Herzegovina. The inability of court officials to use *the Majalla* in the original, however, and the absence of an appropriate translation, as well as the tendency towards Europeanisation of the law in Bosnia and Herzegovina, resulted in it being crowded out of the regular civil court system and *de facto* reception of the Austrian general civil code (OGZ). This was vividly expressed by the notion that local courts in Bosnia and Herzegovina ruled on the basis of sound common sense, the district courts on the basis of the Austrian general civil code, and the Supreme Court on the basis of *The Majalla-i ahkâmi 'adliyya*.[25]

Even after the Austro-Hungarian occupation, the Shari'a courts in Bosnia and Herzegovina continued to apply *the Majalla*, both in matters of material and of formal law. With the extension of the Shari'a courts to the entire national territory of Yugoslavia, this application of *the Majalla* was systematised, though some muftîs on the territories of Serbia, Macedonia, and Montenegro had been using the codification even before that as the basis for their customary practice and personal judgement.[26]

22 Albert Vais, "Neke specifične zakonitosti u istorijskom razvoju prava," *Zbornik radova iz pravne ibid.rije posvećen Albertu Vajsu*, Belgrade, 1966, 14-15.

23 Mihajlo Zobkow, "Primjenjivanje austrijskog općeg građanskog zakonika u BiH," *Mjesečnik no. 8*/1921, 314.

24 M. Imamović, *Pravnik položaj i unutrašnjopolitički razvitak BiH od 1878-1914*, 39.

25 M. Zobkow, op. cit., 355.

26 Wanting to improve public understanding of Shari'a law, the Montenegrin Muftî Karađuzović translated major sections of *the Majalla* into Serbo-Croatian for publication in *Glas Crnogoraca* no. 6 (February 11, 1912) and no. 10 (March 10, 1912).

The application of *the Majalla* in the Shari'a courts was grounded in the customary practice of the Shari'a judiciary, the high reputation the collection enjoyed amongst Shari'a lawyers or legal experts, and the fact that the Supreme Shari'a Court in Sarajevo and later the one in Skopje regularly referred to the codex in their rulings and circulars.[27]

The Majalla-i ahkâmi 'adliyya was also used in drafting the first overviews of the various branches of Shari'a law in Serbo-Croatian.[28] It was one of the basic collections used for educating Shari'a justices at the Shari'a Judicial School and later the Higher Islamic Shari'a and Theological School in Sarajevo. The original text of the code in Ottoman was regularly used both in the courts and in teaching even when a translation into Serbo-Croatian did exist.[29]

"The Shari'a regulations on personal status" (*Al-ahkâm al-shar'iyya fî al-ahwâl al-shakhsiyya*) is a well-known legal work whose author, Muhamed Kadri-Pasha (1821-1886), was an Egyptian scholar and statesman. He is remembered in history for his attempts to codify Shari'a law. He wrote three works to this end: the above-mentioned "Shari'a regulations on personal status," a codification of civil and obligational law entitled "Guidelines for the bewildered to teach them about human situations " (*Murshid al-hayrân ilâ ma'rifa ahwâli al-insân*), which comprises 941 articles and was approved by the Egyptian government in 1890, and a compilation of Shari'a regulations on endowments, that was titled "Regulations on justice and equitable dealing in adjudicating disputes over endowments" (*Qânūnu al-'adlî wa al-insâfî li al-qadâ' 'alâ mushkilât al-awqâf*), and was comprised of 646 articles.[30]

Of these three works by Kadri-pasha, the Shari'a courts in Yugoslavia used only the first citing it in shorthand as the *Ahkâm shar'iyya* (Shari'a regulations). The work therefore served as an authoritative collection of Shari'a legal regulations in both Egypt and Yugoslavia, at the same time. It contains 476 articles and is divided into three parts. The first part contains regulations on marriage, its legal consequences, and how to terminate it; the second part deals with kin relations, parents and children, guardianship, testaments, gifts, and missing persons; the third part deals with Shari'a inheritance law.[31] Kadri-pasha did not introduce any material changes into

27 Cf. *SSCS circular no. 180*, dated March 18, 1924, *Glasnik VIS no. 1-3*/1945, 19-20.
28 Cf. M. A. Ćerimović, *O vakufuu (Šerijatsko vakufsko pravo)*, Sarajevo, 1935, A. Bušatljić, *Porodično i nasljedno pravo muslimana*, Sarajevo, 1926.
29 *Majalla ahkâmî shar'iyya (Ottoman Civil Code)*, Sarajevo, 1906.
30 Abbâs Husnî Muhammad, *(Islamic law: horizons and development)*, Mecca, 1402/1982, 237.
31 E. Sladović, op. cit., 25 fn. 105.

Shari'a law, simply presenting the existing material in the form of a modern European law code, though even here he was not quite consistent. (For example, he did not discuss testaments in the part dedicated to inheritance law, but along with other family law relations. He discussed gifts in the same place, while according to European systematisations this would belong under obligational law).

The *Ahkâm shar'iyya* collection was not officially recognised in Yugoslavia. It was introduced in *de facto* ways, as Shari'a magistrates made considerable use of it in dealing with marital and family disputes.[32] It was also used in theoretical treatment of Shari'a law and in teaching at the Higher Islamic Shari'a and Theological School.[33] One thing that was particularly interesting was the fact that the collection was taken over almost in its entirety into the compilation of Shari'a family and inheritance law prepared by Hasib Muradbegović under the name "The Interpreter of Shari'a Regulations," which we will discuss later.

The Ottoman family law (*hukūk-ı âile karârnâmesi*) is a codification of Shari'a marital and, in part, family law. It took the form of a legal order (*karârnâma*) of the 8th of Muharram, 1336 (May 17, 1917) and was approved by the Shaykh al-Islam and sanctioned by then Ottoman Sultan, Mehmed Reshad. This law was applied in Turkey up until Shari'a courts were abolished and even after that in Syria, Trans-Jordania, Palestine and the Lebanon. It is still in force for Muslims in Israel and the Sunni Muslim community in the Lebanon.[34]

The promulgation of the *Ottoman family law* represents the beginning of so-called modernising legislation in the history of Shari'a law, which is defined as "the attempt to adapt Islam to contemporary conditions, by updating those parts of the traditional *instrumentarium* that are considered mediaeval and consequently inapplicable in the modern age."[35] The redactors of this law did not limit themselves to dealing with the rulings of the official legal school of the Ottoman Empire. They also accepted the opinions of other legal schools if they considered them to fit the needs and spirit of the time better. It is worth noting that this law also contains regulations regarding marriages of (Orthodox) Christians and Jews that are in the spirit of their communities' (*millets*) own religious law. These

32 Cf. *SSCS judgement no. 528*, dated December 29, 1923, issued by A. Bušatlić in *Mjesečnik no. 7*/1925, 313-316; ruling no. 395 of the court in Kočani, dated March 31, 1933, in Alija Silajdžić, *Testament u šerijatskom pravu*, Sarajevo, 1941, 131.

33 This collection is often cited in M. Begović's , Belgrade, 1936.

34 J. Schacht, *An Introduction to Islamic Law*, Oxford, 1964, 103.

35 Ibid., 100.

provisions are left out of the translation into Serbo-Croatian which is understandable given that in Yugoslavia the law would only ever be applicable in front the Shari'a courts and for Muslims.

The law introduced certain novelties into the traditional practice of applied Shari'a law. It introduced marriage banns (advanced declaration of intent to contract marriage), settled that Muslim marriages could only be celebrated in Shari'a court rooms, that any extrajudicial dissolution of the marriage had to be recorded with the Shari'a court, deprived guardians of the right to contract marriages in the name of their underage wards, and introduced elective family courts to deal with disagreements between spouses.[36]

The Ottoman family law continued to be applied in Yugoslavia until 1929 on the territory of the Supreme Shari'a Court in Skopje. The codification was never officially accepted on the territory of the Supreme Shari'a Court in Sarajevo even though that court had recommended it to the Bosnian and Herzegovinian provincial government in 1918 under petition no. 277/18. The issue of official acceptance of the law was raised a number of times after that but without success.[37] The law was applied on the territory of the Supreme Muftîate in Belgrade and later the Supreme Shari'a Court in Skopje most probably because of the continued presence of Ottoman administrative traditions. The idea of accepting the *Ottoman family law* was not completely given up until the closing of the Shari'a courts in Yugoslavia as is clear from the fact that the law was printed in Serbo-Croatian in 1945.

Even if not officially recognised, the *Ottoman family law* certainly influenced practice in the Shari'a courts in Yugoslavia. Its legal rulings are present in the decisions of the Shari'a courts while the calls for reform of Shari'a law in Yugoslavia and the remit of the Shari'a courts aimed at solutions which the law had adopted and which marked the beginning of a significant period in the history of Shari'a law.

"Regulations on endowment funds" (*Ahkâm al-awqâf*) or to give it its full name "A gift to later generations on the regulations regarding endowment funds" (*Ittihâf al-akhlâf fî ahkâm al-awqâf*) Is a well-known collection of Shari'a regulations on trust funds and endowments. Written by Omer Hilmi-effendi, President of the appeal court in Istanbul and a recognised expert on endowment issues, the work was printed in Istanbul in 1307/1889. It contains 482 legal cases (*mas'ala*) that relate to endowments, their validity, establishment, type, administration, oversight, and

36 A. Škaljić, *Ženitbeni zakon 'Hukuki aile kararnamesi'*, Sarajevo, 1945, 4.
37 Ibid., 3.

so forth. This work illustrates particularly well the fundamental weakness of the codifications and compilations of Shari'a law from the 19th and early 20th centuries – their inability to free themselves from the casuistic system of the classical works on Islamic legal science.

The Shari'a courts adhered closely to this work in their dealings on *waqf* affairs.[38] "The regulations on endowment-funds" were also used in the systematic presentation of material endowment law and in hearings on contested issues affecting Islamic endowments.[39]

One should also mention the Austrian compilation of Shari'a law issued in Vienna in 1883 under the title *Eherecht, Familienrecht und Erbrecht der Mohamedaner nach dem Hanafitschen Ritus* (Marital, family, and inheritance law of the Mohammedans according to the *Hanafi* rite) as an attempt to set out the material of this area of law in a representative manner in the official language of the Monarchy. It was supposed to shelp establish more complete oversight over the Shari'a court system as a branch of the national or state judiciary thus contributing to the uniformity of adjudication. The collection was divided into three sections: marital law (articles 1 through 332), family law (articles 333 through 486), and inheritance law (articles 487 through 577).[40] Shari'a legal experts objected to the compilation stressing that a number of the provisions of Islamic law had not been validly reproduced. The Shari'a courts themselves essentially paid no attention to the compilation, never mentioning it in their rulings. They had no obligation to do so since the Austrian compendium of Shari'a law was never promulgated as law. It was, for the most part, of an informative character utilized generally by lawyers who didn't know Arabic or Ottoman.

"The interpreter of Shari'a regulations of the *Hanafi* madhab on marriage, family, and inheritance" is a compilation of Shari'a regulations put together by Hasib Muradbegović. The collection was printed in the final years of the Second World War and was, understandably, never finished. One of the rare copies of the book may be found in the Gazi Husref Bey library in Sarajevo under call number 1155 with the evident marks of galley proof corrections.[41] "The interpreter of Shari'a regulations" is divided into three books: I – Shari'a marital regulations; II – on legal relations between

38 A. Bušatlić, *Šerijatsko-sudski postupnik s formularima*, Sarajevo, 1927, 74.
39 M. A. Ćerimović, *O vakufu*.
40 E. Sladović, op. cit., 25-26.
41 Hasib Muradbegović, *Tumač šeriatskih propisa Hanafijskog mezheba o ženitbi, obitelji i nasljedstvu s važnijim okružnicama Vrhovnog šerijatskog suda, Ulamâ medžlisa I Šireg savjeta reis-ul-uleme i s osvrtom na građansku i kanonsku ženitbu I obiteljske odnose,* Zagreb 1944, Naklada Ministarstva pravosuđa i bogoštovlja, 561.

parents and children; III – Shari'a testamentary and inheritance law. A Serbo-Croatian translation of the Ottoman law of the 17th of Muharram, 1274 is printed in an annex along with the decrees of the Austro-Hungarian authorities in Bosnia and Herzegovina on the family and inheritance affairs of Muslims, the *Law on the form of the last will and testament of members of all faiths other than the Muslim* of January 11, 1912 and an alphabetical list of lesser-known words and a concordance of paragraphs from the Egyptian *Ahkâm shar'iyya* and this work.

"The Interpreter of Shari'a regulations" is largely based on the codification by Muhammed Kadri-pasha (the *Ahkâm shar'iyya*). The Shari'a regulations are given in the main text, while the commentary includes more extensive explication with reference to domestic Shari'a legal literature, comparisons of the Shari'a legal institutions with the Austrian civil code, canon law, and the practice of the Shari'a courts themselves. The author introduced certain novelties into the text of the compilation itself which were the result of the reforming activities of the Supreme Shari'a Court in Sarajevo. This distinguished this work from its Egyptian model.

"The Interpreter of Shari'a Regulations" was created as a result of knowing both Shari'a and general civil law and represents a belated attempt at a systematic presentation of Shari'a law in modern clothes in the southern Slavic lands. Since the work was compiled during the period of the so-called Independent State of Croatia, one does find in certain parts, alongside the presentation of purely Shari'a regulations and provisions, interpretations that involve the justification of fascist politics. For example, the author draws the conclusion that the Independent State of Croatia was an Islamic state from the fact that Shari'a courts existed under it which is absurd.[42]

In the absence of a single comprehensive and generally valid codification of material Shari'a law that could be applied in Yugoslavia, it was inevitable that similar matters would be ruled upon in a variety of different ways. The Shari'a justices referred to many legal works and collections of opinions. Different legal schools had very different opinions on individual questions, and the Shari'a justices did not study these problems systematically during their training. Moreover, they had almost unlimited freedom when choosing legal works and commentaries on legal regulations. These circumstances even led an Islamic theologian of the traditionalist orientation to describe the conditions in the Shari'a judiciary in Yugoslavia as such that "legal security is neither offered nor can it be."[43]

42 Ibid., 91.

43 A. L. Čokić, *O jurisdikciji šerijatskih sudova*, Tuzla, 1931, 2.

Hafiz A. Bušatlić, one of the most prominent Shari'a legal experts in Yugoslavia between the two world wars, advocated the preparation of a law on Muslim family and inheritance rights for use by the Shari'a courts "in step with the spirit of the times, but also within the framework of the foundations of Shari'a, regardless of *madhab* and the un-harmonised opinions of individuals, legal philosophers, and to include within it a similarly appropriate and contemporary approach to these rights and all of it in our language."[44] This writer set out in a few words the need for the codification of Shari'a family and inheritance law as follows: "it must be drafted and enacted to ensure that certain of the more modern legal provisions of the non-Hanafists (the other Islamic legal schools – op. F. K.) are enshrined in law for us Hanafists as well, so that we may strive after better results in delivering justice and so that uniformity of procedure wins out, but most of all so that everyone may be acquainted with his own personal rights and duties in relationships, and so that the state may keep a clean account of them."[45]

The prominent Yugoslav legal expert B. Eisner was well acquainted with the problems of the Shari'a judiciary. He also advocated for the codification of Shari'a family and inheritance law in Yugoslavia.[46] Like Bušatlić, he explained the need for the codification in terms of the state's right to oversee the Shari'a courts as a branch of the national judiciary. This would be in the interest of Muslims since they often were not fully aware of Shari'a law themselves and so prevented them of being deprived of their own rights and legal protections. Finally, there was a need to ensure uniformity and stability of judicial practice. Eisner thought this model could also facilitate in the codification of Shari'a law in both Egypt and Turkey.

Despite the convincing nature of all these arguments, there simply never was a single, comprehensive official codification of Shari'a law applied throughout the interwar Yugoslav state. This is the more surprising once one knows that both religious representatives and Shari'a and civil legal experts were calling for such a codification. Why was no authoritative collection of Shari'a law ever issued in Serbo-Croatian when this was the best and most efficient way for the state to establish control over the implementation of this form of law? It would appear we should seek the cause in a general hesitation in the interwar Yugoslav state to regulate the

44 A. Bušatlić, "Šerijatski sudovi," *Gajret*, 1928, 157.
45 Ibid.
46 B. Eisner, "Nadležnost u porodičnim i nasljednim stvarima muslimana i primjena šeriatskog prava," *Arhiv, no. 3*/1922 (vol. V/XXII), 235-236.

application of Shari'a law through legislation. One should bear in mind that it took eight years to get from the constitutional guarantee of a Shari'a judiciary to the *Law on the organisation of the Shari'a courts and Shari'a justices* despite the legislative side being prepared very quickly. Afterwards, the talk on one side was about the need to codify Shari'a law, while on the other it was about doing away with it altogether, particularly with a view towards unifying the civil law in Yugoslavia. One gets the impression that the mandatory implementation of Shari'a law was, both for governing circles and for a large part of the Yugoslav legal establishment, a necessary compromise and a political issue, so that how it was dealt with was always contingent upon the balance of forces at any given time (in this case, especially the position taken by the civil political representatives of the Muslims and by their religious representatives). For this reason, there was no commitment to longer term solutions when it came to applying Shari'a law. Codification certainly falls within this set of tools.

d) Circulars and orders of the supreme Shari'a courts.

In the absence of any official Yugoslav codification of Shari'a family, inheritance, and endowment law, different means were required to introduce material changes into Shari'a law and to attain stability and harmonisation of judicial practice. One solution was found in an institution that did not originally belong to the concept of Shari'a law. This was authorising the Supreme Court to issue opinions of principle that would be binding for the lower instances.

The introduction of a second instance into the Shari'a judicial system during the period of Austro-Hungarian rule in Bosnia and Herzegovina had given the supreme Shari'a courts the right to issue, in agreement with the government and legislative authorities, circulars to the courts of first instance on important matters.[47] These circulars had binding force with regard to the application of laws and decrees and to procedure. The *Law on organising the Shari'a courts and on Shari'a justices* does not explicitly mention this right of the supreme Shari'a courts to issue circulars, but they continued to do so calling on the practice of the Shari'a judicial system in Bosnia and Herzegovina.

The supreme Shari'a courts' circulars and orders covered both material and procedural law. At this point, we are particularly interested in the

47 A. Bušatlić, *Šerijatsko-sudski postupnik s formularima*, 8.

significance of these acts for Shari'a material law, as applied in the southern Slavic lands. Our study of the circulars and orders of the supreme Shari'a courts has been facilitated by the fact that there are two published collections of them: the *Zbirka naredaba za šerijatske sudove u BiH 1878-1900* (Lithographic, without editors' name, place, or date of publication) and the *Zbirka naredaba i okružnice za šerijatske sudove 1900-1944,* edited by Abdulah Škaljić (*Glasnik VIS* no. 8-9/1944, 165-172, no. 10-12/1944, 186-203; no. 1-3/1945, 9-26). In regard to Shari'a material law, the supreme Shari'a courts' circulars and orders contain binding interpretations of Shari'a regulations and so, to a certain extent, both reform the Shari'a law and harmonise the practice of the Shari'a courts.

The interpretations of the Shari'a regulations given by the supreme Shari'a courts were binding on the Shari'a courts of first instance.[48] On the other hand, the Shari'a legal regulations also bound the Islamic Religious Community so that the Supreme Religious Council issued binding interpretations of Shari'a for the religious community's bodies.[49] In this way the remit for interpreting Shari'a regulations was split. It was natural under the circumstances for the Supreme Religious Council of the Islamic Religious Community to interpret Shari'a regulations that related primarily to religious issues, narrowly understood, while the supreme Shari'a courts interpreted the Shari'a regulations that stressed legal aspects. There was no sharp line of differentiation, however. The supreme Shari'a courts could seek opinions from the Ulam*â* Majlis or Council, or later the *Grand Muftî*, for guidance on certain issues.[50] The Supreme Religious Council took positions in principle that affected the application and implementation of Shari'a law and were binding for the Shari'a courts. Thus, for example, the *Grand Muftî*'s Grand Council took the view, in item 1 of its conclusion of December 21, 1938 that mixed marriages between Muslim men and non-Muslim women were forbidden in principle in Yugoslavia.[51] Under the classical interpretation and practice of Shari'a, such marriages

48 E.g. Alimony does not cover any medical expenditures on a sick former spouse nor is a former husband required to pay for his divorced spouse's treatment – *SSCS ruling no. 1*, dated May 12, 1924 (*Mjesečnik, no. 2*/1925, 85-86). The father is required to pay child support in cash, rather than in kind, directly to their divorced and un-remarried mother as their care-giver – *SSCS ruling no. 528*, dated December 29, 1923 (*Mjesečnik, no. 7*/1925, 313-316).

49 The *Grand Muftî*'s Grand Council was responsible for settling contested matters of Shari'a law. Art. 98 of the Constitution of the Islamic Religious Community, dated November 5, 1936.

50 Art. 15 of the *Law on organization of the Shari'a courts and on Shari'a justices*.

51 *Glasnik VIS*, no. 2/1939, 54-55.

were allowed and had up until then been conducted in front of the Shari'a courts. This overlapping of jurisdictions when it came to interpreting Shari'a law is indicative of the position of the Shari'a courts as state bodies that nonetheless also had very close ties to the religious community.

Reforms of particular Shari'a legal regulations were gingerly approached by the supreme Shari'a courts and represented a departure from the thinking of the official legal school of the former Ottoman Empire the thinking of other Muslim legal schools and legal experts. In the study of Shari'a law, this method is called *takhayyur* (selection) and was widely used in other parts of the Islamic world at the time.[52]

Given the atmosphere of traditionalism that was characteristic of religious, cultural, social life for most of the Muslim population in interwar Yugoslavia, even the methods of reform allowed by Shari'a law were only approached by appealing to the practice of Muslim countries.

Initially, and up to the dissolution of the *Caliphate* in Turkey in 1924, the Supreme Shari'a Court in Sarajevo appealed to fatw*â*s of the Supreme Religious Council of all Muslims (the *Mashîkha*) as published in the *Jarîda 'Ilmiyya* Gazette when implementing a reform. For example, the interpretation that it was permissible to declare individuals who had gone missing on the battlefield after an engagement with the enemy deceased on the basis of witness by comrades was accepted in circular no. 267 of July 4, 1917. Prior to this, it had, in the view of many respected legal experts, only been possible to declare a missing person dead after the passage of 30, 60, 70, 80, or even 90 years from the day of disappearance. It should be clear how much easier and fairer the new solution made dealing with the question of inheritance and the maintenance of women and children after the end of the First World War.[53]

Referring to a decision of the *Mashîkha*, the Supreme Shari'a Court in Sarajevo instructed all Shari'a justices in Bosnia and Herzegovina in circular no. 327 of September 27, 1923 that in future they should apply the opinion of *Hanafî* Imam Muhammad ibn Hasan al-Shaybanî (749–805), which allowed women the right to seek a judicial dissolution of marriage as a result of the onset of madness or contagious skin diseases in their husbands.[54] Under the previously valid opinion of the leading legal expert Abū Hanîfa (d. 767) and his pupil Abū Yūsuf (d. 798), neither spouse had a right to request judicial dissolution of the marriage on account of any defect in the other spouse except for sexual dysfunction.

52 See further N. J. Coulson, *A History of Islamic Law*, 185ff.
53 *Glasnik VIS*, no. 10-12/1944, 191-192.
54 *Glasnik VIS*, no. 1-3/1945, 16-18.

Again referring to a decision of the *Mashîkha*, in circular no. 234 of January 27, 1917 the Supreme Shari'a Court in Sarajevo instructed all Shari'a courts in Bosnia and Herzegovin to follow the opinion of the Hanbalî legal school which recognised women's right to judicial dissolution of marriage where the husband was absent (*gâ'ib*) for more than 12 months and payment of maintenance could not be collected from his property.[55] Under the previously held *Hanafî* view, women did not have this right.

After the end of the *Caliphate* in Turkey (and therefore in the absence of authoritative fatwas of the Mešihat), the supreme Shari'a courts made use of examples of reform of the Shari'a law in Egypt, Tunisia, and Algiers. Given that these attempts at reform did were not always met with approval in their countries of origin, however, the reform of Shari'a law in the traditionalist Muslim environment of Yugoslavia actually lagged behind reforms in these Arab countries.[56]

The main mechanisms of reform continued to be judicial practice and the circulars and orders of the supreme Shari'a courts. In circular no. 97 of January 1, 1930, the Supreme Shari'a Court in Skopje accepted the opinion that women had a right to divorce in cases of their husband's poverty. Polygamy was limited to cases where the first wife was either sick or sterile, with the further condition that the first wife had to consent to the taking of a second wife and the husband had to prove his ability to maintain and treat both wives equally. These views were expressed in the Skopje Shari'a Supreme Court's decisions no. 1141 of November 5, 1932, no. 326 of March 31, 1933, no. 192 of March 1, 1933, and no. 874 of November 17, 1932.[57]

By their very nature, the circulars and orders of the supreme Shari'a courts had a unifying effect on judicial practice. While codification would have been the most suitable means for this, during the period when they were discussing or even attempting to create a legal compendium of Shari'a regulations, the circulars of the supreme Shari'a courts served as an expression of the situation on the ground and what was realistic. Although limited in their subject matter, they did contribute to uniformity in judicial rulings, particularly in cases where the classical works of Shari'a legal science had no concrete or final solutions to offer.

If one views the attempts at modernisation of Shari'a law in Yugoslavia in the context of the wider reform process unfolding at the time in the

55 *Glasnik VIS*, no. 10-12/1944, 186-188.
56 M. Begović, "O reformama porodičnog prava muslimana u Egiptu," *Arhiv*, no. 6/1935, (vol. XXXI/XLVIII), 560.
57 Ibid.

Muslim world, one may conclude that the reform methods in Yugoslavia had similarities to the practice of the Shari'a courts in Sudan. Unlike other European countries, where modernisation of the Shari'a law was pursued through state legislation and codification, in the Sudan it was realised through circulars of the chief Shari'a justice. Most of the circulars were issued between 1916 and 1935 and they contained modifications of the traditional *Hanafî* interpretation of Shari'a.[58]

While it is obvious that there was no connection between the practice of the Shari'a courts in the Sudan and those in Yugoslavia, this fact is nonetheless significant as it indicates how similar answers can appear independently to similar problems. It is moreover certainly relevant that the Shari'a law was being applied in both the Sudan and in Yugoslavia under conditions of the conceptual encroachment of Western legal thought.

2. The Sources of Shari'a Procedural Law

The regulations for the procedural law applied by the Shari'a courts in Yugoslavia were not qualified. Here too they drew their legal norms from sources of different types: the works of the classical Muslim legal experts, Ottoman reforming legislation and its codification of Shari'a law, Austrian procedural law in Bosnia and Herzegovina, as received through the laws and decrees issued by the government authorities for the Shari'a courts and the circulars of the supreme Shari'a courts. Two works written in Serbo-Croatian had a particular practical significance for Shari'a judicial practice. Their authors were Franjo Kruszelnicki and the hafiz A. Bušatlić. During the lifetime of the 1918-1941 Yugoslav state, a number of different attempts were made to draft a codification of Shari'a procedural law, but ultimately without success.

a) The works of the classical Muslim legal experts

In the classical works of the Muslim legal experts, procedural law is generally set out together with material law. We find regulations on the court, its jurisdiction, and court cases together with the norms of civil, criminal,

58 Tenzilur Rahman, "Application of Shari'a in the Muslim World," *The Muslim World League Journal* (Mecca), December, 1983, 25.

and personal law.[59] Thus the compendia of Shari'a material law that the Shari'a courts in Yugoslavia used also served as sources of procedural norms. Here we have in mind such legal works as the *Multaqâ*, the *Damad*, *Durr al-mukhtâr*, *Al-ashbâh wa al-nazâ'ir*, or the collections of legal opinions known as the *Al-Fatâwâ al-Hâmidiyya, Fatâwâ 'Abdurrahîm*, *Al-Fatâwâ al-Hindiyya*, etc.

It is worth noting that the Shari'a legal literature does contain works which are almost entirely devoted to the judiciary and procedure. One of these works that is well-regarded in our region of study was the compendium *Mu'în al-hukkâm* (The judges' assistant) written by the Hanafî lawyer 'Allauddîn al-Tarablūsi (d. 884/1479). It has chapters on the role of the *qâdî*, the conditions a person must meet to exercise the function, procedure, suits and their classification, evidence, punishments, etc. A. Bušatlić refers to this work in his book on Shari'a judicial procedure.[60]

The Shari'a courts in Yugoslavia could make use of the classical Shari'a works on procedure when dealing with issues for which they were responsible under government regulations.

b) Ottoman reforming legislation and its codification of Shari'a law

The Shari'a courts kept to the procedural norms set out in the Ottoman reforming laws when dealing with many issues. The Shari'a courts' local jurisdiction over certain types of probate hearing was settled under article 23 of the law of the 16th of Safar, 1276 (September 15, 1859) to which the Austro-Hungarian authorities gave their sanction immediately after occupation.[61] The procedure to be applied in handing over *miri* property to the heirs was set out in the laws of the 7th of Ramadân, 1274, and the 17th of Muharram, 1284.[62] In proceedings related to the property of minors in wardship, the relevant regulations were those of the decision of the 16th of Dhu al-qa'da, 1286, and so on.[63]

The general approach and, to a large degree, the details of Shari'a litigation procedure are given in *the Majalla*. This is particularly true for the

59 Muhammad 'Abd al-Jawâd Muhammad, *Buhūth fî al-shari'a al-islâmiyya wa al-qânūn* (Studies in Shari'a and general civil law), Alexandria, 1977, 148.
60 A. Bušatlić, *Šerijatsko-sudski postupnik s formularima*, Sarajevo, 1927, 39.
61 "Gesetz über den Wirkungskreis der Scheriatsgerichte," *Sammlung*, II, 476-481.
62 A. Bušatlić, op. cit., 92-95.
63 Ibid., 99.

general principles of Shari'a litigation, capacity to litigate and the representation of parties, suits, and procedure before the court of first instance. These procedural institutions and actions were governed by the regulations contained in the last five books of *the Majalla*. These are: Book XII – on settlement (articles 1531 – 1571), Book XIII – on recognising the rights and requests of others (articles 1572 – 1612), Book XIV – on suits (article 1613 – 1675), Book XV – on evidence and oaths (articles 1676 – 1783), and Book XVI – on judges and judgements (articles 1784 – 1851).[64]

While the application of *the Majalla* in proceedings before the Shari'a courts was not supported by any explicit official regulations, the views of the Sarajevo Supreme Shari'a Court on it were clear. In circular no. 70 of February 6, 1919, the court explicitly stated, while calling a party to attend a civil suit or proceeding, "that the procedures contained in *the Majalla* are valid for cases heard before the Shari'a courts."[65] In another case, the Sarajevo Supreme Shari'a Court, while drawing the attention of the regional court to the many lapses in procedure in circular no. 228 of June 16, 1928, instructed that they were to keep to *the Majalla* and the *Ta'lîmât*, which were attached.[66] In cases where the provisions of *the Majalla* were not sufficient, Ottoman litigation procedure was also used.

In presenting *the Majalla* as a source of procedural norms for the Shari'a courts, one should point out the provision in the Disciplinary Rulebook for Jamâ'a imams on the territory of Serbia and southern Serbia from 1929 that the disciplinary courts of the Islamic Religious Community in those areas were to investigate and rule on the guilt of imams in accordance with the rules contained in books XIV, XV, and XVI of *the Majalla*.[67] Unlike the *Law on the organisation of the Shari'a courts and the Shari'a justices*, which has nothing to say about the source of procedural norms for Shari'a courts, the sub-legal regulations on the responsibility of religious officials is one of the few regulatory texts of the interwar Yugoslav state that deals at all with the procedural law applied by the muftîs or Shari'a justices.

c) The reception of Austrian procedural law

With the establishment in Bosnia and Herzegovina, during the period of Austro-Hungarian rule, of a two-tier Shari'a court system, the issue arose as to the

64 *Majalla al-ahkâm al-shar'iyya,* II.
65 *Glasnik VIS*, no. 10-12/1944, 202-203.
66 *Glasnik VIS*, no. 1-3/1945, 24-26.
67 *Službene novine*, no. 59-XXIV, dated March 12, 1929.

procedural norms for regulating proceedings in front of the second-tier Shari'a courts, as well as of legal remedies, et cetera. As *the Majalla* only recognises "the review of a suit after judgement" by the same judge (articles 1838, 1839), its provisions could at best serve as a jumping-off point for the construction of an appeals process. A way out was found by taking over the institutions and arrangements of the procedural law applied in the regular civil courts. The Provincial Government for Bosnia and Herzegovina ordered, under document no. 54 916/III of September 24, 1887 that the institutes of the Civil Code of Procedure (GPP) for Bosnia and Herzegovina from 1883 "be employed by analogy in the Shari'a courts as well."[68] This is how the broad reception of Austrian procedural law began. It was to have a significant impact on forming the procedure used at the Shari'a courts in Bosnia and Herzegovina and later across the rest of Yugoslavia.

The Provincial Government, the Supreme Court for Bosnia and Herzegovina and the Supreme Shari'a Court in Sarajevo issued a number of special laws and orders to modernise and round out Shari'a judicial procedure.[69] In addition to bringing order to second-tier procedures and legal resources, these special orders and analogous application of the GPP also helped shape non-litigious procedures, in particular probate.[70] The clerical tasks of the Shari'a courts and the form and style of the Shari'a judicial documents very closely reflect the approach of the Austrian judicial system.

The Shari'a legal experts were not generally against modification of the traditional judicial procedures. Introducing Austrian institutions and practices into the Shari'a court system brought order and increased efficiency. The process as it took place in the southern Slavic lands was not an isolated case in the modern history of Shari'a law. The procedures of the Shari'a courts on the Indian subcontinent were modified by the introduction of a system of precedents and other institutions from English law. In the lands of the Maghreb, Shari'a court procedure was modernised under the influence of French procedural law.[71] Noel J. Coulson, professor of Oriental law at the

68 *Zbirka naredaba za šer. Sudove u BiH 1878-1900*, 51.

69 See further Provincial Government order no. 3075, dated July 3, 1880 on interpreters; SSCS order no. 561 šer. dated September 6, 1895, on issuing court orders, etc. *Zbirka naredaba za šer. Sudove u BiH 1878-1900*. The Supreme Shari'a Court in Sarajevo, in agreement with the Provincial Government and the Ulamâ Medžlis, set out in circular no. 101, dated February 20, 1919, the "Procedure for weddings and divorces. " The purpose of this document was to ensure "correct and homogeneous procedure in such matters." This circular therefore represents a major step in standardising procedure at the Shari'a courts. See *Glasnik* no. 1-3/1945, 9-12.

70 A. Bušatlić, *Šerijatsko-sudski postupnik*, 77.

71 N. J. Coulson, *A History of Islamic Law*, 163-181.

London School of Oriental and African studies, has drawn attention to a circumstance that conceals within itself the explanation for this phenomenon. He says that, in contrast to what is the case with most legal systems, the material-legal regulations in Islamic law are not inseparably bound up with the structures and procedures of the courts applying them. Because of the peculiar circumstances under which it emerged and developed (religious sources and the interpretation of religious scholars), Islamic law has become practically independent of the mechanisms by which it is applied. This is how the modern reorganisation of the Shari'a courts and their procedures could be an entirely separate issue from the nature and content of the law being applied.[72] This also helps explain the phenomenon that the reforms of Shari'a material law in Yugoslavia were carried out for the most part using the methods of Islamic legal science, as one would otherwise have lost the Islamic character of the law, but that the modifications to procedure involved a significant degree of reception of foreign (Austrian) law.

d) The attempt to codify Shari'a procedural law

Attempts were made to codify the existing legal situation in the interwar Yugoslav state, building upon the degree of modernisation of procedure already achieved in the Shari'a courts.

The basic principles of procedural law were already given in the *Law on organising the Shari'a courts and on Shari'a justices*. The principle of public proceedings (article 8) was stipulated, as were the right to appeal against the decisions of the first instance courts to the Supreme Shari'a Court (article 14), which, however, dealt with appeals in closed session (article 15). This law authorised the Minister of Justice to stipulate detailed regulations on the order of work at the district and supreme Shari'a courts in a rulebook. Article 27 contained this authorisation and was the legal basis for later attempts by the Shari'a justices, the bodies of the Islamic Religious Community, and the civil representatives of the Muslim population to have a so-called Procedural Handbook for Shari'a courts adopted. Even though the *Law on organising the Shari'a courts and on Shari'a justices* gave a fairly low place in the hierarchy of legal acts to this collection of regulations (a rulebook issued by the Minister of Justice), it was accorded much greater significance in public and was talked about as a codification of procedural law.

72 Ibid. 164.

Abdulah Škaljić provided more information on the Procedural Handbook in a paper on the Association of Shari'a Justices.[73] He claimed that the Justice Minister had already received a draft of the Handbook in 1929, but that he delayed giving it his authorisation. The Association of Shari'a Justices became particularly engaged on this issue. It passed a resolution at an assembly held on October 20, 1932 about the need to adopt the Handbook. During both 1932 and 1935, representations were made to the Ministry of Justice with the same requests. Both supreme Shari'a courts came out in favour of the Draft Handbook, while Fehim-efendi Spaho, a deputy to the Supreme Islamic Council also called for its enshrinement in law in 1936. From then through 1940, a series of delegations of the Association of Shari'a Justices passed through the Ministry of justice, and there were interventions and promises by the authorities that redaction of the Handbook would soon come to an end and that it would be enacted. However, after the interwar Yugoslav state, it never happened.

Unlike the Yugoslav legal authors, who never offered up even a single academic text to the attempt to codify Shari'a procedural law, G. H. Bousquet dedicated an article to it under the title of "new views on certain reforms made in the Shari'a law in Yugoslavia."[74] The article was written on the basis of information provided to the author by M. Begović. Bousquet stated that the Draft Handbook for the Shari'a courts would not only change the rules of procedure in the narrow sense, but also the rules of Shari'a material law, particularly those related to marriage. The main reforms envisaged by the Draft Handbook were:

1. Judgements in absentia. Traditional Shari'a law did not recognise this institution. *The Majalla* envisaged issuing a new summons to the party being sued and the nomination of a court-appointed advocate in the case of continued lack of response (article 1834). In article 240 of the Draft Handbook, it accepted a procedure in absentia from the general legal code, with the explanation: "the justice must investigate the case and decide at the first hearing."
2. The delegation of inheritance disputes to the regular civil courts. The Shari'a courts had exclusive jurisdiction in dealing with and allocating inheritance, but the Draft Handbook envisaged under article 39 the possibility that the appeals court could, on the basis of a request

73 A. Škaljić, "Osvrt na rad staleške organizacije šeriatskih sudaca," *El-Hidaje* (Sarajevo), no. 10-11/1943, 315-316.

74 G. H. Bousquet, "Nouvelles observations sur quelques réformes apportées au droit Musulman en Yougoslavie (1)," *Revue Algérienne, Tunisienne, et Marocaine de legislation et de jurisprudence* (Paris), vol. XLVIII (1932), 202-204.

by one of the heirs, transfer the settlement and division of inheritance by Muslims to the regular civil courts, which would, in this case, make its ruling in the presence of at least one Shari'a justice.

3. Setting out the procedure for placing under wardship. Article 351 of the Draft Handbook lists the persons who have a right to initiate the procedure for placing a given individual under guardianship. The novelty this article introduces lies in the list including the natural father and the natural children, on condition that they live together. As is well-known, in the case of children born outside of wedlock, the Shari'a law does not recognise their relationship with their natural father; it only a relationship with the mother.
4. Changes to the practice of unilateral dissolution of marriage by the husband. Even though a unilateral statement by the husband dissolving the marriage already had to be made in front of a *qâdî* and registered for it to count in the Shari'a courts of Yugoslavia, the Draft Handbook went even further. Article 379 stipulated that any such statement had the status of a normal petition for divorce and that the justice should hear the case at a regular hearing and determine as he finds best.

Overall, G. H. Bousquet concluded, on the basis of his analysis of the Draft Handbook for Shari'a courts, that these novelties introduced into the Shari'a court system in Yugoslavia offered a considerably better approach than the introduction of the Swiss civil code had in Turkey.

We were not able to examine a copy of the text of the Draft Handbook during our research. We did, however, find a copy of the "Regulations on the order of work at the district Shari'a courts and the Supreme Shari'a Court" that was drafted at the time of the so-called Independent State of Croatia. It was intended for implementation beginning in January 1945 in the library of the Supreme Islamic Council in Sarajevo and in the Gazi Huzref-bey Library under call number 3495. A number of circumstances suggest that this may be the Procedural Handbook or "Rulebook for operations at the district Shari'a and supreme Shari'a courts" that was mentioned by Hafiz Abdulah Bušatlić.[75] The second variant was altered to suit the norms and linguistic policy of the so-called Independent State of Croatia. The attempt to enact these "Regulations" and the compilation of Shari'a material law by H. Muradbegović was an integral part of the efforts

75 A. Bušatlić, *Šerijatski sudski postupak u porodičnim, nasljednim, i vakufskim stvarima muslimana*, second revised and expanded edition, in manuscript, Sarajevo, 1933. VIS Library.

to change the legislative basis of the Islamic Religious Community during the course of the war of national liberation from 1941 to 1945. The main proponents of this were the same religious and political circles who "considered the Ustaša state a legal framework for settling the status of the Islamic Religious Community."

"The Regulations" can be used as a basis for reconstructing the Rulebook for operations of the district Shari'a and supreme Shari'a courts. The Rulebook was to have contained around 400 articles and, certain data suggest, that leading Yugoslav legal experts (B. Eisner and others) were to be involved in compiling it, along with representatives of the Shari'a court system. Both in terms of content and scope, it transcends the character of a mere Rulebook and really represents a law on judicial procedure at the Shari'a courts. The first section treats of the Shari'a courts and their order of work (articles 1-105), the second section on litigation and nonlitigious proceedings (articles 106-369), the third part on the keeping of the register and the conduct of court clerical work (articles hundred and 70-397), the fourth section on the archiving of files (articles 397-401), and the fifth section on transitional and final provisions (articles 403-406).

The Draft Rulebook represented a summary of the modernisation of Shari'a judicial procedures began during the first years of the Austro-Hungarian occupation in Bosnia and Herzegovina and completed during the final years of the interwar Yugoslav state. The traditional Shari'a judicial procedure had been changed so that it would then have been more correct to speak of procedure in front of the Shari'a courts. Many of the classical procedural institutions were undoubtedly retained, as witnessed by explicit references to *the Majalla* (article 140), and the (article 369). However, Austrian procedural law is what now gave the basic flavour to proceedings, as is clear from the overall flow of courtroom proceedings, the system of evidence, with its introduction of the free assessment of evidence, in place of the earlier formal theories (article 174), the system of legal resources, and the introduction of the institutions of recess and the suspension of proceedings. Article 403 explicitly stipulated that where there are no specific provisions governing a particular question, then the provisions of the GPP will be applied, so long as they are not contrary to the provisions of Shari'a law.

e) The works of the Yugoslav Shari'a legal experts

Since no official compendium of regulations governing the procedures of the Shari'a courts had been put together by the time the interwar Yugoslav state met its end, there was a need for a Handbook that would contain a review of the procedural norms to be found in the sources of the various different types and origins. This role was filled, in the spirit of the traditional Shari'a law by a work by one of the most learned of Yugoslavia's Shari'a legal experts, A. Bušatlić. He printed a samizdat *Handbook of Shari'a Judicial Procedure with Formularies* (239 pages). The work was composed primarily for the needs of the Shari'a justices in Yugoslavia, and this consideration largely determined how the material was presented. There are five sections treating in turn the organisation of the Shari'a courts, their jurisdiction, litigious and nonlitigious proceedings, and clerical tasks. A number of forms for the different types of document issued by Shari'a courts are appended. In his approach, the author follows closely the earlier work by F. Kruszelnicki, who had written *Procedure at the Shari'a courts in Bosnia and Herzegovina* (Zagreb, 1917, 79 pages) in cooperation with the Shari'a Chief Justice Salih-effendi Mutapčić.[76] Academics generally gave Bušatlić's work high marks pointing out its significance in acquainting the Yugoslav public with the procedural law of the Shari'a courts.[77] Another expert in Shari'a law, Abdulah Škaljić, called the work "a roadmap for the Shari'a justices and a major aid to lawyers and clients alike," the most used book at the Shari'a courts.[78]

The lack of a codification of Shari'a procedural law and the lack of uniformity in judicial practice prompted leading Yugoslav legal experts to make very critical statements regarding the Shari'a court system. A professor at the Belgrade legal faculty, S. Culja, was of the view that the inconsistent procedural provisions in the *Law on organisation of the Shari'a courts and on Shari'a justice* meant that the level of legal certainty in Shari'a judgements "could not be particularly high, even though these courts are ruling on the highest goods."[79]

In our presentation of the sources of Shari'a procedural law, we have seen that proceedings at these courts were regulated by a variety of regulations in addition to the *Law on organising the Shari'a courts and on*

76 Printed as an supplement to *Mjesečnik* no. 11 and 12 from 1916, and, nos. 1, 2, and 3 from 1917.
77 See the review of this work by B. Eisner in *Mjesečnik* no. 8-9/1928, 443-444.
78 A. Škaljić, "Zbirka naredaba i okružnica," *Glasnik VIS*, no. 8-9/1944, 166.
79 S. Culja, *Građanski parnični postupak*, I, 167.

Shari'a justices. Multiple efforts to bring legal order to these proceedings failed largely because of the position taken by the responsible government bodies, most probably for the same reasons that codification of Shari'a material law did not succeed either.

3. The Place of Shari'a in the Legal System of the Yugoslav State from 1918 to 1941

The issue of the presence of Shari'a law within the legal system of the Yugoslav state has to be considered from both normative legal and sociological perspectives. From the normative legal perspective, certain Shari'a law provisions in legally determined areas of legal life had state sanction. There were state courts there to apply them, which meant these provisions of Shari'a law had become a part of the legal system of the Yugoslav state.[80] The fact that Shari'a law belongs to the category of religious legal systems did not affect this in any way. It is religious in its sources and principle of application, but it is secular in terms of the areas it regulates. Given that the Shari'a regulations in interwar Yugoslavia governed the personal status, marriage, family, inheritance, and endowments and trust-funds of Muslims, it is fair to say that the relevant Shari'a regulations formed a part of Yugoslav civil law. To put it more precisely, we are dealing here with a particular civil law, because it applied only to a specific circle of people. This is the view argued by D. Tomac of the Zagreb faculty of law.[81]

As the claim is that certain Shari'a law provisions had by virtue of receiving government sanction and validity *pro foro civili* become part of the material law of the Yugoslav state, we must consider the question as to whether the Shari'a regulations had unlimited validity in certain legally determined spheres of life. It is, for example, well known that Shari'a law contained institutions which were contrary to the prevailing legal and moral views of Yugoslav society. This discrepancy was due to the presence of different cultural bases for these legal and moral views (Islam and Christianity).

80 The Catholic writer Ivan Pavlinac took this view, on the grounds that by recognising the jurisdiction of Shari'a courts over Muslims, the Yugoslav state had sanctioned Shari'a regulations as its own law for its Muslim citizens. See I. Pavlinac, "Šerijatski bračni propisi," *Vrhbosna* (Sarajevo), no. 5/1940, 199.

81 D. Tomac, *Ustav i bračno pravo*, 160-161.

Neither the constitution nor the law placed any form of material limitation to the application of Shari'a regulations in the given spheres. Opinion was divided in legal theory on this question. D. Tomac took the view that any religious regulations because of which an individual might find themselves denied the full enjoyment of their civil and political rights because of their religious affiliation should be considered abrogated by the Constitution of June 28, 1921, article 22 of which declared that the enjoyment of civil and political rights was independent of religious confession. Since the so-called private rights of the citizen fall under civil rights (contracting private legal contracts, marriage, et cetera), then, under D. Tomac's interpretation, the St. Vitus' Day Constitution would have abrogated any regulations of Shari'a law that allowed the vacation of marital responsibilities for religious reasons. This would include the following institutions: *irtidâd* – apostasy from Islam of one of the marital spouses, which *ipso iure* entails the dissolution of the marriage, for which the Shari'a justice issues a declarative confirmation; *ila'* – the husband's covenanting that he will not have relations with his wife, after which the marriage is considered dissolved, etc.).[82] In short, Tomac, starting from the position that Shari'a law is civil law, took the view that the state legislature had the authority to determine to what degree state Shari'a courts should apply the inherited regulations of Shari'a law and so to what extent these regulations should be altered or replaced by new ones.[83]

On the other hand, in a religious survey conducted in Belgrade in 1921, the Muslim representatives called for the unhindered application of Shari'a regulations in the legally determined spheres of life. This would have included civil law sanctions for quitting Islam (dissolution of the marital relationship, loss of the right to inherit, being stripped of parental and guardianship authorities over minors), a legal ban on Muslim women marrying non-Muslim men, a stipulation that the children of Muslim marriages must be Muslims and that they remain such even if their parents leave Islam, that no one can adopt a Muslim infant, because Islamic law does not recognise adoption, etc.[84]

It was obvious that most of these requests were unacceptable to the Yugoslav authorities because they clearly went against the constitutional provisions on freedom of religion. Moreover, on the neuralgic territory of interfaith relations in interwar Yugoslavia, whenever particular religious communities demanded unlimited application of their own religious regulations it produced absolute legal chaos.

82 Ibid., 72, 85.
83 Ibid., 163.
84 Rade Kušej, *Verska anketa u Beogradu 1921*, Ljubljana 1922, 28-29.

The Shari'a judicial system and its most important representatives took a compromise position on this issue. They applied the Shari'a regulations that were legal expressions of Islamic teachings, as the religious moment could hardly be expelled from Shari'a law and its application, but at the same time they did try to bring the application of these regulations into line with the principles of modern civil legislation.[85]

For example, only a limited number of polygamous marriages were contracted at the Shari'a courts. Articles 290, 291, and 399 of the Yugoslav criminal law of 1930 declared that entering into a new marriage where there was already an existing one was a criminal act. A problem now arose in both legal theory and practice: did these provisions of the criminal law apply equally to Muslims? Lazo Urošević, a judge on the Court of Cassation affirmed in his commentary on the criminal law that it had tacitly done away with bigamy and polygamy for Yugoslav citizens of the Islamic religion. Toma Živanović, a member of the committee to draft the law, claimed the opposite – that it was not a criminal act for Muslims to enter into a new marriage in addition to an existing one. According to the provision of article 23 of the criminal law, it was not a criminal act when the provisions of public or private law excluded the illegality of an act.[86] The provisions of Shari'a, as a particular form of private law valid for Muslims, here had priority over the provisions of the general private law.

One further case illustrates the position of the most important representatives of the Shari'a judiciary and of Shari'a academics to the application of Shari'a law. In practice, the question now arose as to whether a Shari'a court had jurisdiction over the registration of a marriage between a Muslim man and a woman who has converted to Islam but was also still in a previous marriage to a non-Muslim. Under pure Shari'a regulations, where a non-Muslim woman converts to Islam and calls on her non-Muslim husband to do the same, but he refuses, the Shari'a court is authorised to declare a dissolution of the existing non-Muslim marriage, at the request of the one, and may register a new Islamic marriage with an individual of the Islamic faith, chosen by the woman. Some Shari'a courts in Yugoslavia began to apply these regulations with the full support of certain bodies of the Islamic Religious Community (the Ulam*â* Majlis in Sarajevo). Most Shari'a courts recused themselves in such cases. A. Bušatlić explained this position,

85 E. Sladović, *Islamsko pravo u BiH*, 123.

86 See further A. Bušatlić, "Pitanje kažnjivosti ili nekažnjivosti u sklapanju braka," *Gajret*, 1930, 268; D. N. Stanković, "Da li propis čl. 290 Kriv. zak. ukida bigamiju i poligamiju naših građana muslimanke veroispovesti," *Arhiv* no. 4/1932 (vol. XXIV/XLI), 224-226.

saying "it is more important to maintain religious toleration between citizens, particularly in a state in which there are members of different confessions, like our state, than to allow particular individuals to create religious antagonism within the state with conversions from one faith to another, particularly in order to dissolve marriages and contract new ones, and so create religious hatred."[87]

If we are to consider the place of Shari'a law within the legal system of the Yugoslav state from the sociological perspective, we must pay some attention to the degree to which this law's norms were actually present within the behaviour and consciousness of a given section of Yugoslav society. For the Muslim population in interwar Yugoslavia, Shari'a was an integral part of their faith, and its application was a sign of their freedom to practice their Islamic religion. While a significant number of Muslims were not in a position to acquaint themselves directly with the contents of the Shari'a regulations set out in works of Islamic legal science written in Arabic or Ottoman Turkish, it was at least somewhat accessible through religious education, tradition, and customs. Moreover, the Muslim population sometimes held firmer to its own customs than to the explicit norms of Shari'a law. One author pointed out ironically that in Bosnia and Herzegovina they would request a fatwa on whether it was permissible to have schools for Muslim girls, but not on whether coffee houses could serve alcohol or not.[88] Under Islamic teachings, the education of both male and female children is an obligation (*fard*), while the consumption of alcoholic drinks is strongly forbidden (*harâm*).

The real presence of Shari'a law in Yugoslav society is testified to by the many institutions that have become customary for even the non-Muslim population.[89]

For some of these customs, certain Shari'a legal institutions have been taken over into the civil law codes of the Yugoslav Peoples (Serbian civil law (SGZ) and General civil law of Montenegro (OIZ)).[90]

87 A. Bušatlić, "Nešto o nadležnosti za sklapanje brakova pomuslimanjenih lica," *Mjesečnik*, no. 1/1923, 24.

88 Adem Bise, *Da li može musliman živjeti evropskim kulturnim životom i ostati dobar musliman-Kur'an u teoriji i praksi*, Tuzla, 1937, 8.

89 M. Begović, "Uticaj šerijatskog prava na jugoslovenske pravne običaje," *Godišnjak Pravnog fakulteta u Sarajevu*, 1974, 375-380.

90 See further M. Begović, "Sličnosti između Medžele I Opšteg imovinskog zakonika za Crnu Goru," POF, V (1955), 33-42. Konstantin H. Terzijev, "O zalozi (tragovi) turskog zakonodavstva u Srpskom građanskom zakoniku," *Arhiv*, no. 1-2/1932 (vol. XXV/XLII), 9, 750-59; idem, "Šefiluk (preče pravo kupovine) – tragovi turskog zakonodavstva u Srpskom građanskom zakoniku," Arhiv, 1930 (vol. XXI/XXXVIII), 89-100; Idem, "Prodaja iz čl. 669 Srpskog građanskog zakonika (tragovi turskog zakonodavstva u Srpskom građanskom zakoniku," Arhiv, no. 1/1931 (vol. XXII/XXXIX), 34-39.

It is interesting that the Shari'a legal institutions retained in the customs of the non-Muslim population generally relate to relations based upon barter or insufficiently monetised forms of exchange, such as were characteristic during most of the period of Ottoman rule in the southern Slavic lands.

One such case is agreement on compensation of livestock (*kesim*), whereby the shepherd is responsible for any losses to the flock, even those due to chance (SGZ, articles 693-699, OIZ, articles 322-327), the giving of land out to rent, where the rent is paid as part of the yield (OIZ, art. 309-319), and watering rights (*haqq al-shafa'*) and irrigation rights (*haqq al-shurb*), all of which have, along with other institutions regarding the use of water, been taken over into Montenegrin customary law, along with the relevant Arabic and Turkish terms.

Also derived from Shari'a law are the understanding of the right to priority of purchase (*haqq al-shuf'a*) referred to in articles 670-676 of the SGZ, preferential sale (*al-bay' bi shart al-khiyâr*), where the vendor sells a movable item to the purchaser, who contracts either to pay for the purchase in instalments before the end of an agreed period of time or in a single payment, under threat of reversion to the earlier state of affairs (SGZ, article 669), a particular form of bequest (*amâna*) with heightened terms of responsibility for the recipient/custodian, whose meaning has been preserved, along with the Arabic term, in the legislation (SGZ, article 575, OIZ, article 310, 378-387) and in the customs of Serbia, Montenegro, and Bosnia and Herzegovina. On the one hand, the decanting of Shari'a law into Muslim custom led to heightened respect for certain regulations, but on the other hand, it led to an excessive emphasis on certain traditional aspects. Some institutions, which had no purchase in southern Slavic custom, became more or less formalities (e.g. *mahr* or the dower given by the husband to the wife). During this process, the feeling for the legal aspect has been lost. During the interwar period, in some places in Bosnia and Herzegovina, the so-called *jacija* or *dova* (a religious ritual and prayer for a happy marriage, which accompanies the celebration) came to be considered more important during the act of contracting a marriage than the wedding act itself in its form as private legal contract, which is what Shari'a law requires.

Shari'a law certainly would have established itself more securely in the consciousness and behaviour of the Muslim population if its exponents had been present at an earlier stage in the vernacular of those to whom it was being applied (i.e. regional languages such as Serbo-Croatian, Albanian, etc.).

CHAPTER V

The Social and Legal Consequences of Applying Shari'a Law and the Existence of the Shari'a Courts

Shari'a law's mandatory force and application through state Shari'a courts marked a phase in the social and cultural development of Muslim populations in southern Slavic lands. Having a special body of law governing their family and inheritance relations was an historical expression of their specific cultural vision; a vision secured during that first phase of integration into the Yugoslav state by means of both the international and the internal legal orders. Applying Shari'a law also affected their transition from an oriental and Islamic to Western European society.

For the legal system of the Yugoslav state, Shari'a law was both an expression of and a factor in the particularism that dominated private law. In this regard, Shari'a law's mandatory force necessarily affected the formation of a shared legal consciousness and so any attempt at unifying Yugoslav civil law.

1. The Application of Shari'a and Muslim Social and Cultural Status

The Muslim population entered the Yugoslav legal and governmental framework from different positions, given the historical experience of the previous four decades, and from a number of different situations, regarding the status of their social, legal, and cultural institutions.

The application of Shari'a law took place under a range of circumstances as a result. At the time, the most important phenomenon within the social and cultural life of the Yugoslav Muslims was their transition from an Oriental and Islamic to Western European cultural sphere. Applying Shari'a law during this process necessarily affected how the process itself developed.

a) The application of Shari'a law and the Muslim transition from an Oriental and Islamic to a Western European cultural sphere

The German Slavic scholar, Maximilian Braun, argued that the Austro-Hungarian occupation meant the end of the Oriental period for the Muslims of Bosnia and Herzegovina. It was a break from "the comfortable unity of religion and social existence."[1] The new legal and governmental framework and the new forms of spiritual life posed a number of dilemmas for the Muslims. On the one hand, there was the economic and social necessity of accepting European forms of commerce, while on the other there was the traditional resistance to manifestations of European culture and lifestyle. The modern Muslim intelligentsia took so-called Muslim modernist positions that began to appear in all countries where Islamic social institutions were encountering European thought and power. According to this way of looking at things, European "technologies of power" had to be accepted, while also retaining an Islamic life-view.[2] Such an approach produced a strengthening of the liberal and civil element in public and economic life, while allowing Islamic tradition to be retained in private. This is the framework within which one should view the application of Shari'a law. Reduced to a framework for family and inheritance, it could no longer, as a body of law, hinder social trends towards the supremacy of bourgeois relations, while its hegemony in the area of personal status did not affect government interests. Only the Muslims were subject to two sets of regulations, which differed vary significantly both in origin and in their goals, one applying to the private sphere, the other to the public.

The situation was somewhat different in those parts of Yugoslavia that were liberated from Ottoman rule in 1912 and 1913. The Muslim

1 Mustafa Imamović, "Maximlian Braun o počecima evropeizacije u književnosti bosanskih Muslimana," *Naučni skup Književnost BiH u svjetlu dosadašnjih istraživanja, posebna izdanja ANU BiH*, vol. 5, Sarajevo, 1978, 105.

2 Ibid. 104.

population of these regions first encountered European culture and perspectives under the first Yugoslav state. Islamic traditions, tribal institutions and customs (amongst the Albanians), and forms of social commerce shaped over the long period of Ottoman rule retained a strong presence and remained practically untouched in certain areas.

One should remember that Shari'a law applied to issues of personal and family status, and thus acted to regulate relations within Muslim groups. The legal relations of Muslims to other groups of citizens outside this sphere were subject to the general civil code. There was therefore no legal hindrance to Muslims being included in the forms of legal commerce typical of a European liberal state. This is confirmed by the fact that the codification of Shari'a property law – *the Majalla* – served as the country-wide property law in Bosnia and Herzegovina and, right up to its suppression by the *de facto* introduction of the Austrian civil code, never represented an obstacle to the development of civil social and economic relations.

By its nature and goals, Shari'a law slowed down the penetration into the area of the legal regulation of family and inheritance affairs of European values and approaches, which were based upon traditions of Roman law and Christianity. In this regard, Shari'a law contributed to ensuring that Yugoslav Muslims would continue to be a *corpus separatum* with regard to the rest of the population. As Ahmed Muradbegović has pointed out, this status was already well-developed at the very start of the expansion of Islam, through the action of historical circumstances, social and family life, religion, and culture.[3]

Beyond these issues of personal status and family relations stood the institutions of the political system of the liberal Yugoslav state, its public law, and the prevailing norms of behaviour, which Muslims accepted and according to which they acted. Given the general confessionalisation of Yugoslav marital law, applying Shari'a law to Muslim marital affairs was an understandable solution. The secularisation of marital and family relations would have brought about the Europeanisation of this aspect of the Muslim life, without replacing Islamic values with Christian ones. This was sommething Muslims were very concerned about. The inter-war Yugoslav state lacked the capacity to take this step in any case, so even minimal respect for the confessional moment in addressing matters of marital law entailed applying Shari'a.

One further significant circumstance for the application Shari'a law was that both the international obligations and the constitutional guaran-

3 A. Muradbegović, "Problem jugoslovenske muslimanske izolacije," *Nova Evropa* (Zagreb), no. 4/1921, 108.

tee viewed Muslims as a religious group rather than as members of specific nations or national minorities (Muslims, Albanians, Turks, Roma, etc.). If the were considered as a religious collective, they could be treated as a religious minority whose identity was to be secured through special family and inheritance law and courts. The application of the law was tailored to this treatment of Muslims: the personal application of law goes hand in hand with religious identification, while an emphasis on territorial validity is typical where the national principle is dominant.

A number of key aspects should be stressed in considering the relations between the various strata of Muslim society and Shari'a law and the courts.

The close relationship between law and religion meant that a majority of the so-called common folk lacked much awareness of the legal character of some Shari'a regulations and institutions. Entrusting the conduct of weddings to imams gave rise to the impression that this was essentially a religious ceremony and not a marital contract based in private law.[4] This understanding was expressed in the view commonly held in Bosnian villages that it was more important to organise a wedding celebration than to conduct the marriage ceremony in front of the relevant authorities.[5] This is what made it possible for women whose husbands had gone missing, but where the Shari'a legal conditions to declare them dead and so the marital relationship to have ended had not been met, to simply approach the village Imam, who would then "recite a *dova*" (a public act of prayer for good fortune in marriage) over the new, prospective couple, allowing them to embark upon their new life together, fully convinced of the legality of the procedure.[6] It is of course important to note that the Shari'a courts' practice was concerned to raise awareness of the legal character of Shari'a regulations and institutions. An example was order no. 101 of the Supreme Shari'a Court in Sarajevo, promulgated on March 20, 1919 that Shari'a marriages were to be contracted exclusively in the Shari'a courts.[7]

The situation was a bit different with Shari'a inheritance law. While practically all of Muslim inheritance law is already contained, in detail, in

4 A. R. Prohić, *Šta hoće naša muslimanska inteligencija*, Sarajevo, 1931, 19-20.

5 M. Hadžijahić, *Bračne ustanove bosanskih Muslimana prije 1946*, POF, XXX/1982, 159.

6 M. A. Bušatlić, "U pravno nevaljanom braku rođena djece nasljeđuju svoga oca, a njegova žena (njihova majka) ne nasljeđuje ga," *Arhiv*, no. 1-2/1926 (vol. XIII/XXX), 129.

7 N. J. Coulson has noted that Muslims in Yugoslavia and Dutch Guiana up until 1937 had to register putting aside a wife with the qadi, in contrast to Muslim majority countries, where the practice was only introduced in the late 19th and early 20th centuries. (N. J. Coulson, *A History of Islamic Law, Edinburgh*, 1978, 174).

the regulations given in the Qur'an and the hadith, the norms of inheritance law had attained a legal rather than a religious character in Muslim consciousness.[8] The circumstance that the implementation of inheritance law had always been under the jurisdiction of the Shari'a courts certainly contributed to this, as it represented the only possible way to secure a legally valid division of assets. Moreover, during the interwar period in Yugoslavia, it was the Shari'a justices who had the greatest expertise in Shari'a law. Most imams were poorly acquainted with the regulations of the *Farâ'id*, while the public generally had no familiarity with it at all.

A second aspect that requires attention in discussing Muslim attitudes to Shari'a law and the courts is that no single significant spiritual or political current amongst the Muslim population took any form of principled public stand against the implementation of Shari'a at this time. Whenever Shari'a law found itself criticised in the press beyond the narrower Muslim community, it would be defended in the civil Muslim press, regardless of political orientation.[9]

At the same time, there were public expressions of dissatisfaction at certain of the formulae of traditional Shari'a legal doctrine. Reform was sought of the Shari'a law that would, amongst other things, sweep away the potential for abuse of its legal institutions.

One finds this viewpoint expressed at the Congress of Muslim Intellectuals in Sarajevo in 1928 that sought to adderss the causes of Muslim backwardness and find ways of dealing with them. Thus the Congress passed a resolution on the woman question, stressing the need to take action to prevent abuses of Shari'a law that affected women in particular.[10] The position that the endowment funds required modernisation to be made fit to serve the contemporary needs of the Muslim community entailed changing a number of traditional rules within Shari'a law (the inviolability of the legator's intention, the principle of the inalienability of

8 The territories of Mali Zvornik and Sakar were cited in the contemporary press as exceptions where Muslims under the influence of Christian neighbours did not apply Shari'a to the inheritance rights of female children. When a girl was married, her brother outfitted her, but if she wanted a dowry she had to address the district public court which then ruled on the basis of standard civil law. Even before World War I, the Supreme Muftî for Serbia advised these Muslims to follow Shari'a inheritance law, as their religious duty, but they refused. See A. Gemić, "Je li nadležan Maseni sud u porodičnim odnosima muslimana," *Islamski svijet,* no. 133, March 15, 1935.

9 Such writings were published en masse in the JMO paper (*Pravda*), as well as in the press of the Muslim supporters of the January 6 dictatorship (*Novo vrijeme*). See *Novo vrijeme*, no. 26, July 11, 1931.

10 Ibrahim Kemura, "Kongres Muslimana intelektualaca u Sarajevu 1928," *Prilozi Instituta za istoriju* (Sarajevo), XVII/1980, 182-183.

endowment property, the question of depositing endowment funds with banks at interest, etc.). It was typical that the Congress agenda envisaged a simple report, without discussion, on the Shari'a courts, which is in and of itself illustrative of the attitude taken by Muslim intellectuals of all political and national orientations towards the institution.

The publicist Maxim Svara was practically alone in his objection to Muslim intellectuals that they had not sought in a single resolution or address to the Congress in Sarajevo the removal "of the most antiquated and barbaric provisions of Shari'a," referring primarily to polygamy and the marriage of minors.[11]

For the most part, Muslim intellectuals refrained from such descriptions of Shari'a legal institutions. On the other hand, the reform position regarding Shari'a regulations was both accepted and publicly advocated not just by the secular intelligentsia but even by members of the religious hierarchy and leading experts in Shari'a legal studies and practice. One consequently finds, in a range of writings, the outlawing of polygamy (except in cases of the absolute incompetence of the first wife and the proven capacity of the husband to maintain a second in addition) both mooted and approved, as was limiting the husband's right to unilateral dissolution of the marriage.[12] The marriage of minors was not practised in Bosnia and Herzegovina.

In 1928, *Reform*, the short-lived mouthpiece of the Organisation of Progressive Muslims, argued the positions that Shari'a law remained the most appropriate marital law for followers of Islam and for the most part comprised norms that were perfectly unobjectionable. However, they recognized that some of the regulations were such that they allowed room for abuse, therefore avenues towards abuse that needed to be closed off.[13]

On another occasion, Dževad Sulejmanpašić, himself an advocate of the Muslim reform movement, initiated a polemic against the thesis that Muslim progress would only be possible after full and complete "social de-islamification," which would no doubt involve doing away with Shari'a law. He asked how one was supposed to "de-Islamify socially" without "de-islamifying" entirely.[14]

A statement by an author from 1938 is of some interest for the attitudes of educated Muslims to Shari'a. He said that, to the best of his knowledge, no Muslim public official had ever publicly stressed a need to make

11 M. Svara, *Emancipacija muslimanke u svijetu i kod nas*, Sarajevo, 1932, 49.
12 H. A. Bušatlić, "Pravni položaj supruge u bračnom, imovinskom i nasljednom pravu," *Spomenica za II kongres pravnika Kraljevine SHS*, Zagreb, 1927, 195-196.
13 H. H. Efendić, "*Šerijatsko bračno pravo*," *Reforma*, March 30, 1928.
14 Dž. Sulejmanpašić, "Proskribovana knjiga," *Gajret*, 1926, 91.

civil marriage available to Muslims, no doubt referring to a mandatory civil marriage ceremony, which would have crowded out the Shari'a one.[15]

Once in a while, one could find people who supported possibility that Shari'a law might be done away with altogether. These people were largely from the ranks of Muslim intellectuals who found inspiration in the forced secularisation then being implemented in Turkey by Mustapha Kemal Pasha.

Writing on the history of the Ottoman state, Edhem N. Bulbulović stated his view that "the legal regulations of Islam should have been given the status of transitional orders and not eternal and universal rules, as was done."[16] The writer did not, however, apply his views on Shari'a law and the courts in Turkey consistently to the Yugoslav Muslims, at least in the texts available to us.

The publicist Mustafa Mulalić was somewhat more definite, writing "it is possible to accommodate Shari'a law to the spirit of the times, without affecting the Qur'anic foundations, if there is a sentimental need to resist the modern imperative of simply doing away with it."[17]

Under circumstances, however, where even a *Grand Muftî* was subject to attack by conservative religious circles for his freethinking interpretations of Islam and where the moderate reform movement ceased publishing its paper after just 11 issues, there was little chance that calls to secularise marital law would have much impact on the traditionalist Muslim masses. Most Muslim intellectuals took the view, whether from personal conviction or for reasons of opportunism, that the future of Shari'a law and the institutions of the Shari'a courts should be left to the forces of social evolution.

b) The application of Shari'a law and Muslim marital and family life

Hundreds of years of Shari'a law had left a visible mark on personal and property relations within the Muslim family.

How deep this impact was in practice could only be determined by sociological research. The only systematic research into the Muslim family during this period that we are aware of was carried out by Vera Erlich,

15 Ćamić J. Avdić, "Problem reforme braka u vezi s ženskim pitanjem," *Glasnik VIS*, no. 9/1938, 342.

16 Edhem N. Bulbulović, *Turci i razvitak turske države sa uvodom u kulturnu i političku povijest islama*, Sarajevo, 1939, 129.

17 M. Mulalić, *Orijent na Zapadu*, 155-156.

a professor at the University of Zagreb, very shortly before the Second World War.[18] There are however other works from the time that deal with then current issues of Shari'a family and inheritance law and Shari'a judicial practice and that provide partials insight into how Shari'a law was applied and the consequences of it.

We will here turn our attention to the impact of Shari'a law on the general concept of marriage amongst the Muslim population, the legal status of the spouses (with a focus on the wife), the durability of marriage, and the nature of the legal regulation of family and inheritance relations.

The impact of Shari'a law on all of this was of course determined by how it was applied by the Shari'a courts. In this regard, it is interesting to ask what the consequences for Muslim marital and family life were of the poorly fitting models of traditional Shari'a legal doctrine, as compared to the consequences of its ineffective application or of the superimposition of tradition and custom over Shari'a law, more properly understood.

Erlich found that in Bosnia and Herzegovina where the Muslim population comprised 32% of the total population in 1931, that there was a transition in family relations from patriarchal severity towards new forms of discourse. She recorded the impact of Islam on family relations, from such religious features as the veiling of women and the rigid separation of the sexes to a resistance to birth control.[19]

The principle of endogamy or marriage within the Muslim group certainly seems to have been fundamental to the general concept of Muslim marriage during this period.[20] Two institutions of Shari'a law fostered this. First, there was the rule forbidding Muslim women to marry non-Muslim men, which remained valid throughout the period of Shari'a law's application. Muslim men could marry Christian and Jewish women. This rule did break down to some degree the strictly endogamous nature of Muslim marriage and the number of mixed marriages increased during the interwar period. Consequently, in 1931, some 8,166 marriages were performed on the territory of the Ulam*â* Council in Sarajevo in which both partners were of the Islamic faith, while there were 102 marriages of Muslim men to non-Muslim women.[21] In such cases, even if the non-Muslim wife did not convert, all legal aspects of the marriage were subject to adjudication under Shari'a law and within the jurisdiction of the Shari'a courts. This

18 Vera S. Erlich, *Porodica u transformaciji*, Zagreb, 1964, 490.
19 Ibid., 432.
20 Muhamed Hadžijahić, "Bračne ustanove bosanskih Muslimana prije 1946," *Prilozi za orijentalnu filologiju* (Sarajevo), XXX/1982, 158-159.
21 M. Begović, *Šerijatsko bračno pravo*, 52-53.

entailed a legal block to the marital partners inheriting from each other, as Shari'a law considers difference in faith (*ikhtilâf al-dîn, disparitas cultus*) an absolute obstacle to inheritance. Even these mixed marriages were forbidden, however, by the well-known decision of the *Grand Muftî*'s Full Council of December 21, 1938.

There was a second Shari'a institution – *kufw*, or spousal worthiness – that limited the the choice of marital partners within the Muslim group. This rule stipulated that marriage should only be contracted between individuals of the same or equally valuable social status. It was particularly common for the wealthier strata of the Muslim middle class and landowning class and naturally led to these strata becoming closed to social mobility.

Another consequence for the general concept of Muslim marriage of applying Shari'a law that is worth mentioning was the potential for contracting polygamous marital relations. This institution was among the most commonly critiqued aspects of Shari'a law, even if it was rarely applied in practice in the southern Slavic lands, particularly in Bosnia and Herzegovina. This fact had been noted by Western travellers passing through Bosnia and Herzegovina during the 19th century.[22] The area in Bosnia and Herzegovina with the most polygamous marriage was the Cazin frontier marches, largely as a result of the specific historical circumstances of life in a border area (the high mortality of young men, the impact of Circassians and Tartars, who made up part of the troops stationed there, etc.).

Polygamous marriages were also subject to limitations imposed by the practice of the Shari'a courts and by government measures (the imposition of a tax on a second marriage in the *Law on taxation* of October 25, 1923, under an interpretation of the criminal ban on bigamy). These measures only lasted a short time, however, and the Shari'a regulations on polygamy remained in force for as long as Shari'a law itself in the southern Slavic lands. Resistance to government measures limiting polygamy was motivated by the need to defend an institution whose legitimacy was based on Islamic teaching than by any real social significance.

One reason for the weak presence of polygamy amongst the Muslims of Yugoslavia is, perhaps, that as an institution it did not have the same roots in tradition in these regions as it had in the Near East. The same was true of marriage to one's father's brother's daughter (cross-cousin marriage), which Shari'a law allows, but which the Muslim population, partic-

22 See further, Abduselam Balagija, "Poligamni brakovi u Cazinskoj krajini," *Pregled* (Sarajevo), no. 4/1981, 467-480.

ularly in Bosnia and Herzegovina, not merely did not practice, but considered tantamount to sin.

Shari'a law also dealt with the personal status and property rights of the female spouse in a marriage. In popular works on the subject, and even a significant proportion of the academic literature, this status is described by the deployment of commonplaces, without entering into the legal aspects of the problem or the question of how Shari'a law norms were realised in practice.

The status of the wife under Shari'a family and inheritance law actually offered a number of advantages to women over the other legal systems in the Yugoslav lands.[23] For example, under Shari'a law, Muslim women enjoyed full legal agency in business, something which was limited under the Austrian civil code, Serbian civil code, and Austrian property law. The principle of separate property of spouses was valid under Muslim law, and the wife was not required to carry any of the expenses of maintaining the family. Under the Austrian civil code, the husband had the right o use and manage peripheral goods, with the assumption that any increase in property held over the period of the marriage belonged to the husband.[24] Under Shari'a inheritance law, the wife had her place in the order of privileged inheritance (*ashâb al-farâ'id*), in principle receiving an inheritance portion half that of a male relative of the same degree of kinship. Marital partners could inherit from each other legally as long as both partners were Muslim. This approach was considerably more favourable than systems where female descendants had no right of inheritance, just the right to a home, while the female spouse had only a widow's right of use (as in the Serbian civil code and Austrian property law). Generally, one may make the case that the legal status of women and the Shari'a law was characterised by economic independence and personal subordination.

A woman's social standing also affected the degree to which her rights could be realised. For the mass of peasant Muslim women, the economic independence envisaged under Shari'a law was at best illusory. Lack of education and the traditional isolation of Muslim women had similar consequences for their free agency in business terms, as they were very rarely in a position to take advantage of their preferential legal situation.

23 In this regard, one may accept Dragiša N. Lapčević's claim that according to the provisions in the Qur'an "Muslim women enjoy more rights and any of their Balkan fellows." (D. Lapčević, *O Muslimanima – sociološke i etnografske beleške*, Belgrade, 1925, 19).

24 Cf. Ana Božić, *Položaj žene u privatnom pravu kroz istoriju do danas*, Belgrade, 1939, 101, 155-156, Bertold Eisner, "Privatno-pravni položaj žene po današnjem pravu Jugoslavije i njegovo uređenje u jedinstvenom Građanskom zakoniku za Jugoslaviju," *Spomenica Mauroviću,* I, Belgrade, 1934, 327-419.

Patriarchal attitudes and tradition also often undermined the implementation of Shari'a law, particularly in those parts of it where women were relatively favoured.[25] In Macedonia, Muslim women made little use of their rights, often forgoing any inheritance because of environmental pressures. Female children had to be happy with the provision of a home. In Bosnia and Herzegovina, the situation was somewhat different. A money-based economy and declining political fortunes had undermined the patriarchal Muslim family. In some places one still found the understanding that female kin should not take their share in inheritance. For the most part, however, women did receive their inheritance in accordance with Shari'a regulations with the proviso that it was sometimes the custom to take it in money rather than as land in order to ensure that possession of the land remained in the hands of the male descendants.

Shari'a regulations allowed the husband to dissolve an existing marriage with a unilateral declaration (*talâq, repudium*). As Shari'a was taught, however, this possibility was hedged around by considerations of religion and morals, an effective defence against abuse of the right to unilateral dissolution of the marriage, and the conditions of a stable patriarchal way of life. As Muslim traditional structures and consciousness weakened, so did the effectiveness of this mechanism.

There was an evident upward trend towards the dissolution of marriage in the interwar period. Between 1931 and 1941, 7,118 marriages and 1,854 divorces were performed in front of the Shari'a court in Sarajevo which meant approximately one in four marriages ended in dissolution.[26] The crisis in Muslim marriage manifested itself in other ways too via the phenomenon of so-called "wild marriages" (concubinage) which were rare before 1918. In 1937, the local religious authorities recorded 271 cases of such relationships on the territory of the Ulamâ Council in Sarajevo.[27] One reason for this was the fact that under the rules of the *Hanafî madhab* and consequently in the practice of the Shari'a courts, the wife had no right to request a judicial divorce of the marital union on the grounds of abuse by the husband. In such cases where the husband would not accept an agreed dissolution of the marriage, women often abandoned the marital union *de facto* returning to their families and contracting a new marriage after a certain period of time without dissolving the first one.

25 V. Erlich, op. cit., 173-175.
26 Kasim Kadžić, "Razvodi braka kod nas," *El-Hidaje*, no. 4/1942, 76.
27 Abduselam Balagija, "Konkubinati (divlji brakovi) kod muslimana," *Kalendar Gajret*, 1938, 109.

The weaknesses of the traditional development and partial application of Shari'a law and the procedural shortcomings of the Shari'a courts come to the fore particularly in the problem of the rising frequency of divorce. According to the traditional interpretation of Shari'a, the wife has the right to dissolve the marital relationship (*tafwîd al-talâq*). Where the woman was independent (financially) and had some knowledge of her Shari'a law rights and the Shari'a justices took an active role, it was possible to act upon this option. Under the concrete circumstances of the Yugoslav Muslims, given the situation of most Muslim women and that a significant number of marriages were contacted by proxy, i.e. without the woman being personally present, this possibility, offered by Shari'a law in principle, was very rarely deployed. The supreme Shari'a courts, moreover, lacked the necessary inventiveness to introduce a practice of inserting grounds into the marriage contract, given its private legal character, that Shari'a legal science may not have stipulated explicitly, but that would have allowed the wife to request and receive a dissolution.[28] Shari'a practice could have taken a different path. A. Bušatlić proposed reducing the husband's right to unilateral dissolution to cases clearly stipulated in law or when the marriage was contracted, as for the wife.[29] This proposal was not accepted in practice.

The Shari'a courts opted for a technical measure instead – drawing out the divorce proceedings. It was, after all, obvious that the simple and swift nature of the procedure offered by the Shari'a courts was contributing to the rising number of divorces.[30] In practice, it was enough for the husband to declare, orally or in writing that he was leaving his wife and that act would have Shari'a consequences to follow. The Shari'a courts considered a written submission of such a declaration to be a relevant legal document to which one might connect dissolution of the marital union, but not as grounds for initiating divorce proceedings.

The Shari'a courts' permissiveness regarding the dissolution of marriage and their procedural simplicity had positive results in at least one exceptional case. The race laws in Germany coincided with a rise in the number of Jewesses with German citizenship getting married to Muslim husbands at Shari'a courts as a way of attaining Yugoslav citizenship and

28 The publicist Maksim Svara addressed such an objection to the Supreme Shari'a Courts in his book *Emancipacije muslimanke u svijetu i kod nas*, 28.

29 H. A. Bušatlić, "Pravni položaj supruge u bračnom, imovinskom, i nasljednom pravu," *Spomenica za III kongres pravnika Kraljevine SHS*, Zagreb 1927, 196.

30 Kasim Hadžić, "Za usporavanje brakorazvodnog postupka pred šeriatskim sudovima," *Kalendar Narodna Uzdanica*, XIII/1945, 99.

escaping Nazi persecution. The marriage would subsequently be dissolved by a simple declaration by the husband.

This was a matter of taking advantage of Shari'a law under concrete circumstances rather than any conscious activity on the part of the Shari'a courts. As early as August 25, 1938, the Supreme Shari'a Court in Sarajevo had already sent a circular to its constituent Shari'a courts ordering them not to conduct such weddings since marriages that did not involve a lasting commitment to a common life were not valid under Shari'a law. The Ministry of Justice also sent a warning to the Shari'a courts to similar effect.[31]

Shari'a judicial practice utilized a number of measures to slow down the divorce process that included requiring counselling for the husband to encourage him to rethink his intentions, proposals to accept a consensual dissolution of the marriage, or issuing a demand that the husband make immediate payment to the wife the marital portion (*mahr* or dower) and a month's alimony on receipt of the declaration dissolving the marriage.[32] The dower to be paid back in the case of a dissolution of marriage was normally agreed or set at a relatively symbolic level, in the practice of Yugoslav Muslims, reducing the effectiveness of such economic measures. The Shari'a courts continued to neglect the institution of marriage contracts, whereby the property relations of the spouses could be defined, and which had the potential to mitigate significantly the unfavourable position of women after dissolution of marriage.

The fact that Shari'a law was applied, at best, only partially also contributed to the ineffectiveness of the legal protection offered to the wife. A husband who neglected his marital obligations, insulted, beat, or otherwise abused his wife was, according to the teachings of the *Hanafî madhab* was subject to monetary fines, corporal punishment, or prison, at the discretion (*ta'dhîr*) of the *qâdî*. The Shari'a courts in Bosnia and Herzegovina had lost the right to impose such sanctions at the very beginning of Austro-Hungarian rule, but the Shari'a legal compendia did not give the *qâdî*s the right to dissolve the marriage by judicial decision in such cases either. Shari'a legal practice struggled to find effective measures both globally and, in this case, even though certain individual *qâdî*s did come up with interesting solutions.

For example, in cases where the wife accused the husband of abuse or of drunkenness, the husband might be called to make a statement into the record that he would no longer drink or beat his wife and that were he to break his word that would in and of itself be considered sufficient to liberate his

31 H. Muradbegović, *Tumač šeriatskih propisa*, 80.
32 H. A. Bušatlić, *Šeriatsko-sudski postupak*, 73, 129.

wife. All the Islamic legal schools recognised this legal recourse under the name of *ta'lîq al-talâq*. It was a matter of "the dissolution of marriage by means of deferred conditions." The divorce is triggered by the appearance of the circumstance the wife wishes to protect herself from. As the husband would in this case be the one determining the survival of the marriage, the wife would receive a court decision on dissolution of the marital union on the first occurrence of the required conditions.[33]

The lack of proper solutions for these problems in marital law and the patchiness of Shari'a judicial practice meant that in extreme cases individual women of the Islamic faith had to be labelled immoral or change their religion in order to free themselves from their marital connections.

The Supreme Shari'a Court in Sarajevo dealt with a case of the first type in judgement no. 472 of November 11, 1922.[34] A woman who was generally of good moral character had to give into a dissolute lifestyle essentially to spite her unfaithful husband who nonetheless refused to agree to her request for a dissolution of their marital union. Even in the case of her husband's infidelity, a woman would not be granted a dissolution of marriage simply on her own request. The traditional interpretation of Shari'a considered the husband's infidelity a criminal act, giving rise to *ta'dhîr* sanctions. However, it was not a valid reason for dissolving an existing marriage. In this specific case, in order for the woman to free herself from an intolerable marriage, she was forced to disqualify herself personally and morally thus forcing her husband to end the marriage himself. To add to the irony of all this, the husband then went on to contest his former wife's right under Shari'a to bring up the children. He claimed she was a woman whose behaviour ran contrary to the laws of Islam and therefore she was not fit to raise children. Thanks to the fair mindedness of the Supreme Shari'a Court in Sarajevo which investigated the reasons for the wife's bad behaviour, she was not fated to become a double victim – first of the rigid interpretation of Shari'a and then of a seeminly unreasonable formal verdict. The court assigned the mother the right to raise her children (*haqq al-hidâna*), starting from the position that the most important thing in raising underage children was "softness of heart," a character that belongs primarily to the mother and which she does not lose either through bad behaviour or by being of a non-Islamic faith.

Another woman decided to change her religion in order to rid herself of an intolerable husband and remarry. While the Shari'a law governing leaving the faith (*ridda*, apostasy) did not envisage so much the annul-

33 Ali Riza Prohić, *Šta hoće naša muslimanska inteligencija*, Sarajevo, 1931, 18-19.
34 *Mjesečnik*, no. 10/1923, 444-445.

ment of marriage (*fash*) as separation from table and bed (*firqa*), this was a way for an individual of the Islamic faith to renounce their personal status and exit from under the jurisdiction of the Shari'a courts.[35]

By addressing itself to a wide circle of male and female kin of a deceased legator, the Shari'a law of the *Hanafî madhab* led to fragmentation of the estate. That fact that the lion's share of cultivable land was exempt from the application of Shari'a law (*arâdî miri*) helped alleviate the harmful consequences that property parcelization might have had for agriculture and livestock rearing.

Shari'a inheritance law was applied to houses, garden land, and movable possessions and involved two tendencies: the circle of individuals called to inherit tended to expand under the regulations on kinship, while the breaking up of property ensured an economic basis for the independent survival of smaller families. The predominance of individual families and so-called paternal cooperatives (father and married sons) amongst the Muslim population in Bosnia and Herzegovina was a concrete expression of these regulations.[36]

The limited application of Shari'a law in the area of inheritance allowed people to manipulate the regulations and goals of the Shari'a legislators. Shari'a law did not allow gift-making under conditions of or in the case of death with the intention of protecting the legal heirs. These Shari'a legal institutions did not, however, apply to Muslims in Yugoslavia, because the significance and validity of gifts or presents was dealt with under the regulations of the civil code. So, for example, while still alive, the legator could use such gifts to exclude individuals (particularly female) who would otherwise have been called to inherit under Shari'a.[37]

Certain relations in the family and forms of personal behaviour shaped over the course of the historical development of Muslim society were stubbornly retained regardless of not having the sanction of Shari'a and of being essentially outside the jurisdiction of the Shari'a courts.

A good illustration of the first type of phenomenon is the so-called *plita* in Macedonia and Kosovo. This was the custom of the bridegroom or his family paying the parents of the bride a sum on the occasion of the wedding as compensation for the costs. As the parents retained part of this sum for themselves, the whole thing was somewhat reminiscent of

35 A. R. Prohić, "Jedan šeriatsko-pravni problem," *Islamski svijet*, no. 126, January 25, 1935.
36 M. Hadžijahić, *Bračne ustanove bosanskih Muslimana*, 159.
37 M. Begović, "Položaj žene i ženskih srodnika u šerijatskom nasljednom pravu," *Arhiv*, no. 5/1938 (vol. XXXVII/LIV), 398, fn. 13.

the ancient custom of brideprice. Representatives of the Shari'a courts, in consultation with the elders of the Islamic Religious Community denounced the custom as contrary to Shari'a and took steps to suppress it. This was an example where Shari'a did not succeed in doing away with the institutions of customary tribal law.[38]

The best example of the second type is the veiling of Muslim women or the wearing of the headscarf and niqab. During the interwar period, this question dominated public life in Bosnia and Herzegovina as part of a larger problematic of the emancipation of Muslim women. There was a strong current amongst Muslim intellectuals whose ranks included prominent individuals from the Islamic Religious Community (especially the *Grand Muftî*, Džemal Čaušević) and the Shari'a courts (A. Bušatlić) who advocated for uncovering women's faces and introducing European styles of dress that nonetheless satisfied the religious requirements of Islam, as well as schooling, employment, and generally improving the status of Muslim women. On the other side stood the conservative current in the Ulam*â*, the *qâdî*s, and the representatives of the Muslim middle classes, who enjoyed the practically absolute support of the masses. This current qualified practically any request for change in traditional forms of behaviour as heresy or an attack on the freedom of the Islamic religion.

The issue of Muslim women's clothes was outside the jurisdiction of the Shari'a courts but was liable to the sanction of traditional Muslim public opinion. Individual representatives of the Shari'a legal disciplines, like M. Begović, proved that Shari'a law did not require the veil or *feredža* (*niqâb*), and that it was imposed by the traditions of Muslim society.[39]

These interpretations were not, however, accepted by the Muslim masses, and traditional norms used to separate or isolate women from public life, particularly those related to traditional costume, were clung to with more devotion and vigour than the regulations of Shari'a law proper.

c) A critical review of opinion on the application of Shari'a law and its role in Yugoslav Muslim social life

There is still not really good and comprehensive legal treatment of the implementation of Shari'a law for the Muslim population in interwar Yu-

38 M. Begović, *Šerijatsko bračno pravo*, 89-90.
39 M. Begović, "O emancipaciji muslimanke," *Pravna misao* (Belgrade), no. 11-12/1936, 236-254.

goslavia. With no pretensions to offer one here, we would nonetheless like to provide an outline of some of the circumstances that any such account would have to take into account.

A law abolishing the Shari'a courts in Bosnia and Herzegovina was passed on March 5, 1946.[40] Critical reviews began to be published that touched upon the content and application of Shari'a law. The Minister of Justice in Bosnia and Herzegovina, Hamdija Ćemerlić, pointed out in a statement to mark passage of the law that Shari'a law regulations on marital relations had placed women in a subordinate position to men, but that implementation of the law had made their situation even more difficult than Shari'a law itself required.[41]

Zaim Šarac gave the problem a bit more attention in one of his articles.[42] He wrote that Shari'a law also disadvantaged the woman within marriage regarding inheritance, but that her position in all these areas was only made worse by backwards implementation and imprecise interpretation. Thus, for example, under Shari'a regulations the survival of the marriage did not depend on the whims of the male, as the wife could retain her right to divorce during the ceremony or while making the marriage contract. Polygamy was not ordained, but merely allowed under conditions which were quite difficult to meet. The author held the practice and procedures of the Shari'a courts responsible for worsening the position of women, although he did accept that major errors had been relatively rare in the more recent past. In any case, he felt that had the material provisions been properly implemented, Shari'a marriage would have been very close to modern civil marriage. The same was true of inheritance law. From the point of view of inheritance, a Muslim woman's *mulk* property was not merged with her husband's, but in other legal areas women were in a far worse position. From this it followed that the Muslims of Bosnia and Herzegovina had the least to fear as a result of changes to marital and inheritance affairs and the introduction of new legal principles in socialist Yugoslavia.[43]

One may note that most of the objections to the content of Shari'a law related to regulations and institutions for whose reform representatives of Shari'a legal studies and practice had long been calling. In the interwar state, there had been some hesitation on the part of government and political actors over the mandatory nature and scope of Shari'a law, legal

40 *Službeni list*, NR BiH, no. 10, March 6, 1946.
41 *Sarajevski dnevnik*, March 9, 1946.
42 Zaim Šarac, "Položaj Muslimana u vjerskom pogledu u vezi s odvajanjem vjerskih organizacija od države." *Preporodov almanah-kalendar*, Sarajevo, 1946, 76-80.
43 Ibid., 80.

regulation of the Shari'a court system had only come after a fairly long period, and the idea of codifying Shari'a family and inheritance law in Serbo-Croatian was only just beginning to be irrelevant. This had made it impossible to identify a legislative framework for reform. Clearly enough, the Shari'a judiciary did introduce positive novelties into the application of Shari'a law through practice, but they could have made considerably greater steps in this area. One should remember that such activities would have required a stable institutional base for the Shari'a courts, and this only came to pass half-way through the interwar period.

Moreover, the judiciary was not itself the determining factor in the application of given law. The courts were called in only when their participation was needed to get certain types of job done or deal with conflict situations. Beyond that, it was the social position and consciousness of the people norms were addressed to that determined how and when a given right would be realised, including Shari'a ones. Yugoslav Muslims, particularly those in Bosnia and Herzegovina, had shown a marked resistance to innovation through history, even if it came from the Islamic authorities themselves. This is a common characteristic for populations in border areas between different cultures, exposed frontiersmen who are afraid of losing the big along with the small, as Eastern wisdom puts it. This is why no major reforms capable of transforming centuries-old practice were to be expected in the barely two decades of interwar Yugoslavia.

S. Culja dealt with certain aspects of Muslim attitudes to Shari'a law in his treatment of the Shari'a courts.[44] He contended that under the *Law on Shari'a courts* Muslims had been given the position of either a ruling caste or a disregarded minority, relegated to a reservation. As the Muslims were a constituent part of the Yugoslav national being, they could not be accorded privileges, but neither should the principles of colonial policy be applied to them. Starting from the unitarist understanding that Yugoslavia's historical mission was to create a single Yugoslav nation from the multifarious tribes, separated by history, cultural influences, and foreign rule, the author evaluated the institution of Shari'a courts as a truly major deviation from the goal and one that needed to be rectified as soon as possible. The Shari'a courts should, like the other spiritual courts, be limited to their own natural field, the inner religious life, leaving external legal relations between citizens to national or state law.

While we cannot accept S. Culja's position without reservation, as we start from the position that Shari'a law, even if inspired by religion and

44 S. Culja, *Građansko procesno pravo Kraljevine Jugoslavije*, I, 165-166.

implemented in principle on a religious basis, did serve the Muslims of the Yugoslav region as their civil law through history. It was in this sense that its application was demanded in the Yugoslav state from 1918 to 1941. The principles of this law had, alongside other factors and through long-term application, shaped the legal consciousness of the Muslim population, so that they had passed over into custom and tradition. Regardless of the extent to which the legal views and customs of the other Yugoslav peoples were reflected in codes of civil law (the Serbian civil law code, the Austrian property law) and consequently upheld in judicial practice, this was no argument for not respecting the legal views and customs of the Muslim population. This is particularly so because Shari'a law was implemented by state courts and not bodies of the religious community. This meant that the law they applied received, *ipso facto*, the status of a civil code for Muslims.

2. The Application of Shari'a in light of the general condition of Yugoslav Private Law

Just as the Shari'a courts were structurally and functionally a part of the judicial system of the interwar Yugoslav state, Shari'a law became, by *de facto* government sanction, a part of the government legal system. In this way, it reflected the situation in one area of Yugoslav private law, while also having an impact on developments in that sphere. One may see this best from an analysis of the general condition of the marital law of the time and attempts to bring it into line with civil law.

a) Implementing Shari'a as an expression of and factor in the confessionalisation of Yugoslav marital law

A fundamental principle of public law in modern European states, namely that belonging or not belonging to a given religious faith is indifferent to one's legal standing, did not hold in interwar Yugoslavia.[45] Even though it did ascribe to the constitutional principle that marriage was under the protection of the state, interwar Yugoslavia forbore from declaring its own sovereignty in this area and so taking family law fully into its own hands, whether in de-

45 M. Bartoš, "Bračna pravila pojedinih crkava," *Arhiv*, no. 1/1934 (vol. XXVIII/XLV), 59.

termining norms or the role of the judiciary in civil areas. Instead, it declared that in areas of marital law, jurisdiction, and procedure, it was retaining the regulations previously in force in the various parts of the country.

Under the concrete conditions of interwar Yugoslavia, this meant sanctioning a multitude of concepts of marriage and a wide range of bodies with responsibility for dealing with marital issues. The broad range of valid solutions stretched from civil marriage and the exclusive jurisdiction of the regular civil courts to exclusively religious marriage and the jurisdiction of the spiritual courts. Both civil and religious marriage coexisted on the territory of the same state, but the latter form was dominant over a larger part of that territory.

The application of confessional marital law, the existence of spiritual courts, and the recognition of their decisions in the civil sphere gave the recognised religious communities influence over their faithful then went beyond the persuasiveness of their religious teachings to that of government coercion. Since civil marriage was not available throughout the territory of the state, citizens had no choice but to belong to some religious community. The lack of government registers (of births and deaths) further contributed to this.

One consequence of this confessionalisation of marital law in a multifaith (and multinational) community was a significant variance in marital regulations resulting from oppositions in principle between the teachings of the various faiths.[46] This was made more complicated by the existence not just of a variety of Christian churches, but also of non-Christian religious affiliations. The ways marital law was applied shows how tempestuous the process of acculturation was in the first Yugoslav state. The beneficent results of melding various traditions faded in the face of increasingly marked intolerance and growing distrust and conflict.[47]

The different approaches taken by the religious systems of law to particular marital issues and proselytism on the part of certain religious circles resulted in frequent conflict over jurisdiction between the spiritual courts themselves, as well as between the spiritual and the civil courts, so that it became necessary to pass a so-called inter-confessional law to make clear the provisions of inter-religious law.

The confessionalisation of marital law caused problems in discussing the consequences of mixed marriages. Under the governing principle of

46 "Odnos državnog i crkvenog zakonodavstva, naročito s obzirom na zaključenje braka, referat Matije Belića," *Spomenica VI Glavne skupštine Kongresa pravnika Kraljevine Jugoslavije u Zagrebu dana 7-9. IX 1934*, Zagreb, 1934, 16.

47 V. Erlich, *Porodica u transformaciji,* 417-419.

parity, the state should have treated all recognised religions equally. On the other hand, the teachings of the different faiths had quite contrary provisions on mixed marriages.[48] What they had in common was that each religious community tried to ensure the dominance of their own flock in any mixed marriage, opening the door to their own spiritual domination of the children from that marriage.

The phenomenon of so-called 'conversion without conviction,' which is characteristic of states where religious law is in force, had even heavier consequences.[49] The condition of marital law and civil legislation allowed individuals to change religion in order to free themselves from an earlier marriage and marital obligations, particularly in cases where the rules of the faith the marriage was originally contracted in made it either impossible or very difficult.[50] The most common form of conversion without conviction was from Christianity to Islam. A female Christian who wanted to get out of an existing marriage that was considered, under the principles of her faith, indissoluble, could accept Islam and, calling on the obligatory nature of Shari'a law for Muslims, seek dissolution of her earlier marriage because of differences in religion, which are considered an absolute obstacle to the survival of the marital relationship under Shari'a. She could then contract a new marriage with an individual of the Islamic faith or with another individual of the Christian faith, after re-converting to Christianity. A male Christian could simply convert to Islam and seek a new marriage with a woman of Islamic, Christian, or Jewish religion, because Muslim men were allowed polygamy or he could simply end a marriage that had become intolerable to him for whatever reason by a unilateral declaration.

Some spiritual courts, and indeed some of the first instance Shari'a courts, showed frequent disregard for the regulations on jurisdiction and celebrated new marriages for such converts without even bothering to deal with their existing marital relations. This led to tensions in inter-religious circles,

48 M, Belić, op. cit., 17.

49 Modern Muslim countries that have retained Shari'a law for issues of personal status face the same problem. To prevent abuse of conversion to Islam, particularly by foreigners, the Egyptian judiciary has established the practice of applying the rules of the petitioner's national system of law, rather than Shari'a, when a convert seeks dissolution of a marriage by unilateral declaration. Since the national law applicable to Europeans (who tend to be in question) does not recognise repudiation, insincerely changing one's religion is no longer a path to a quick divorce. See Herbert J. Liebesny, "Religious Law and Westernization in the Moslem Near East," *AJCL*, no. 4 (autumn 1953), 502.

50 See further Živojin M. Perić, *Lično bračno pravo*, 70ff., Dragoljub Aranđelović, "Može li suprug koji je napustio hrišćansku vjeru tražiti na osnovu toga razvod braka," *Pravosuđe*, no. 1/1935, 1-5, M. Begović, "Može li prelaz na islam poslužiti kao uzrok za razvod braka," *Arhiv*, no. 5-6 (vol. XXXVIII/LV), 1-4.

though such conversions did nothing to increase the strength of the individual religious communities, serving only to demonstrate that anything can be used to further personal interests, including religious teachings.

This state of affairs made clear the need for measures to prevent abuses of the increasingly common phenomenon of religious conversion. With regard to the Shari'a courts, this was done by interpreting the *Law on Shari'a courts* so as to remove these courts' role in annulling or dissolving marriages where one of the spouses had converted to Islam. They also forbid women who converted to Islam from contracting marriages in a Shari'a court before their previous marriages had been annulled or divorced by the relevant authorities.[51] Shari'a legal experts did not oppose this since they considered the state to possess the requisite authority to issue regulations to its own agencies. In this case, the Shari'a courts, on the scope of their work, even if this went contrary to how the matter had traditionally been dealt with in Shari'a legal studies, as was the case here.

A conclusion of the *Grand Muftī*'s Grand Council, dated December 22, 1938, on withholding approval for conversion to Islam from individuals converting for speculative reasons was a further contribution to the fight against abuses of Shari'a law.[52]

One may conclude that implementation of Shari'a law via state Shari'a courts was an expression of the principle of confessionalisation that so dominated the marital law of the interwar Yugoslav state. One should, however, note the different basis on which the Shari'a and the spiritual courts operated. The spiritual courts based their jurisdiction on the teaching of marriage as a sacred mystery and the need for a religious form of the celebration of marriage, allowing in the final analysis for a non-confessional marital and property law. The Shari'a courts based their jurisdiction and authority on the religious need to implement a separate and religiously inspired law in marital and family affairs, without requiring any particular religious forms or rituals. This distinction was particularly evident in attempts to harmonise Yugoslav civil law.

b) Applying Shari'a and the attempt to harmonise Yugoslav civil law

The harmonisation of marital law first appeared to be a necessary measure aimed at removing the negative consequences of legal particularism in this area and so allowing consistent implementation of the modern government

51 M. Begović, "Može li prelaz na islam poslužiti kao uzrok za razvod braka," 4.
52 *Glasnik VIS*, no. 2/1939, 60.

principle whereby marriage is considered essentially a legal institution. Under circumstances where different religious understandings of marriage exist, there is no way to harmonise regulations in this field without laicising marriage. The liberal democratic Yugoslav state was not ready to fully embrace this principle. A number of international obligations regarding the implementation of different forms of marital law (the *Saint Germain treaty* and the Concordats) stood in the way of introducing a mandatory civil form of marriage. The major religious communities also overwhelmingly such measures as acts against religion, a sentiment shared by most of the population (only 0.008% of the population declared itself of no religious affiliation in the government statistics of March 31, 1931). Finally, there was the negative experience with civil marriage on former Hungarian territory to consider.[53]

The prototype of the Civil code for the Kingdom of Yugoslavia did accept a non-confessional marital law, but it also retained the religious form of conducting a marriage. With one eye to the Austrian system, which was still valid in Slovenia and Dalmatia, the religious form was declared mandatory in principle, however, a civil marriage was allowed in exceptional cases where absolutely necessary (in cases where the marriage was between individuals neither of whom had any religion or where one came from a religion that did not allow mixed marriages).[54]

The question of the future of Shari'a was raised during this work on harmonising marital law. The rule of accepting a non-confessional marital law while retaining the religious form could not be applied in this case. Shari'a does not require a particular religious form to carry out a marriage.[55] Marriage is a form of private legal contract, the main elements of which are the proposal and its acceptance by the marital partners or their representatives. The only requirement that makes any reference to a religious context is that the witnesses must be Muslims. The presence of the Shari'a justice is only required for the purposes of registering the marriage. A marriage contracted outside a Shari'a court room that meets the material requirements set down by Shari'a law is considered valid from a religious point of view (*diyâneten*), but only takes on its full civil and legal weight (*qadâ'en*) after legalisation and registration with a Shari'a justice.

Losing its civil and legal weight would have meant the regulations of Shari'a family, and even more especially, inheritance law, would have lost all

53 M. Belić, op. cit., 21, Seregej Toicki, *Da li pojedini crkve imaju pravo zakonodavstva u bračnim poslovima*, 8-10.

54 B. Eisner, M. Pliverić, *Mišljenja o Predosnovi Građanskog zakonika za Kraljevinu Jugoslaviju*, Zagreb 1937, 120-121.

55 See further M. Begović, "Forma islamskog braka," Arhiv, no. 1/1935 (vol. XXX/XLII), 51-57.

practical significance since neither a legal form nor the participation of any legal body was required for the validity of legal acts or actions in this field. For Muslims, Shari'a law did not derive its significance from teachings on the sacramental character of human actions. Respect for it was a remnant of the understanding of the all-embracing nature of Islamic teachings and its realisation as simultaneously religion, state, and civilisation. Under the circumstances of interwar Yugoslavia, there was no way to respect this argument, given that other social, political, and legal relations and principles were now dominant. At the same time, Shari'a law could not morph itself into a set of norms with exclusively spiritual sanction proclaimed by ecclesiastical authorities. It could only either be retained as a form of law with government civil-legal sanction or abolished altogether.

The Yugoslav state was not ready to take this latter step even during its attempt to harmonise the civil code. There were too many legal and political reasons against it.[56] The first included the interpretation of article 10 of the Treaty on the protection of minorities and article 100, item 4 of the imposed constitution. Reasons of the second sort included the religious views and conservatism of the Muslim masses, as stressed by experts in the legal and political conditions of the day. The demand in Muslim circles to retain Shari'a law came from politicians and religious leaders. In document no. 843 from July 14, 1937, the Supreme Religious Council of the Islamic Religious Community called on the Justice Ministry to make perfectly clear in any future civil law code that its provisions did not hold for Muslims in matters of personal, marital, and inheritance law, where the provisions of Shari'a continued to hold sway.[57]

A provision to this effect was envisaged for prominent inclusion in the enabling law for the civil law code or in the explication of the law code itself. This would have confirmed the understanding of Shari'a law as *ius singulare* for the Muslims of Yugoslavia. As such, the law continued to be valid and to be applied through government courts right up to the revolutionary transformation of Yugoslav society.

The Shari'a courts in Bosnia and Herzegovina were abolished when the principle of one law valid for all similar cases was introduced under a law passed on March 5, 1946. In the other parts of Yugoslavia, there were no laws doing away with the Shari'a courts, but there too they ceased to

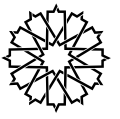
56 B. Eisner, "Šerijatsko pravo i naš jedinstveni Građanski zakonik," Pravosuđe, no. 6/1936, 11ff., Toma Pavlović, "Odnos državnoga i crkvenoga zakonodavstva, naročito s obzirom na zaključenje braka," *Spomenica VI Glavne skupštine Kongresa pravnika Kraljevine Jugoslavije*, 71-71.

57 *Glasnik VIS*, no. 3/1938, 133.

function. Matters that had previously been within their remit were now handed over to the regular civil courts. Thus, the Muslim population in Yugoslavia found itself subject to the general civil code in matters of personal and family status and of inheritance as well.

After abolition of the government Shari'a courts, no attempts were made by the Islamic Religious Community to establish courts equivalent to the spiritual courts of the other religious communities for the simple reason that Shari'a law does not recognise such fora or any spiritual sanctions they might have issued. Under conditions of the separation of the religious communities from the state, religious officials were authorised to conduct weddings in accordance with Shari'a regulations, but these acts now had a purely religious and ritualistic character. Weddings continued to be carried out in the form of Shari'a legal contracts, but for all intents and purposes, the obligations thus accepted were without practical consequence. Agreements were still made over dowries or *mahr* in cases of divorce, but the obligation was not admissible in court (and could not be sued for in court). Unlike weddings which took place after the civil marriage, no forms of the dissolution of marriage took place before the bodies of the Islamic Religious Community. This perhaps should have been expected given that marriages were still contracted in accordance with Shari'a regulations.

This all goes to show that validity in the civil and legal sphere provided for in the interwar Yugoslav state through the institution of government Shari'a courts was actually a necessary condition for the survival of Shari'a law. Without it, Shari'a law proved poorly suited to adapt itself to a system of norms with only spiritual or ecclesiastical sanction and found itself more or less transformed into a set of moral and customary rules.



Conclusions

1. Shari'a law is a set of regulations contained in the sources of Islamic teaching or derived from those sources with the sanction of the legal authorities on a given territory and so established as legal norms which are, as a rule, applied with the aim of regulating relations between followers of the Islamic faith.

   In the interwar Yugoslav state, Shari'a law was applied on a personal basis to the Muslim population in matters related to personal and family status, inheritance, Islamic endowments or trust funds, and a number of other issues. The validity of Shari'a law in this domain was due to the nexus between legal and political circumstances of both a domestic and international character.

   The Kingdom of the Serbs, Croats, and Slovenes took on an international obligation to apply Shari'a law under the Treaty for the protection of minorities signed at Saint Germain. This was just one in a series of obligations accepted by European countries from the mid-19th century onwards with regard to the Muslim populations in areas where Ottoman rule was coming to an end. Under these treaties, Shari'a law was considered part of the Islamic religion. Consequently, the application of Shari'a law to the Muslims of Yugoslavia was placed within the framework of the group's specific religious rights. This was true even in the case of the *Saint Germain treaty* on the protection of minorities. These international guarantees of the specific character of religious minorities, amongst whom the Muslims of Yugoslavia were now included, were the culmination of multiple political interventions as well as of the generally accepted principle in international relations after World

War I that all groups that are connected nationally, culturally, or religiously with a state system that has withdrawn from or ceded a particular territory must enjoy international protection for their survival. The international obligation regarding application of Shari'a law was introduced into the domestic legal system of interwar Yugoslavia in the form of a constitutional provision for which appropriate executive legislation had then to be passed. It has been shown in this work that the persistence of the strongest bourgeois Muslim party, the Yugoslav Muslim Organisation (JMO), followed to a certain degree by the *Džemijjet*, was key to realising this constitutional guarantee.

2. Constitutional provisions guaranteed the jurisdiction of state Shari'a justices over the family and inheritance affairs of Muslims. This determined the way in which Shari'a law was to be applied in interwar Yugoslavia: as part of the jurisdiction of the government authorities rather than of ecclesiastical bodies. This was the same case for members of the other recognised religions at least when it came to marital law. The obligation to establish state Shari'a courts was not itself contained within the international guarantee. This solution was accepted largely as a result of historical tradition carried over from the period of Ottoman rule in the southern Slavic lands. The experience of the Austro-Hungarian authorities in Bosnia and Herzegovina had shown that applying Shari'a law to Muslims through state Shari'a courts did not harm the interests of the state but rather offered ways to consolidate the state's imperium within the private sphere of the Muslim citizenry. Moreover, Muslim political and religious actors saw in this approach to applying Shari'a law their best legal guarantee for the continued religious existence of that Muslim citizenry and for practical implementation of the provisions of the Treaty on the protection of minorities in the most consistent way possible.
3. From an administrative point of view, the Shari'a courts in interwar Yugoslavia were departments of the regular civil courts, but in practice they comprised an entire system of government bodies independently applying a separate system of law to a limited circle of Yugoslav citizens. In terms of their organisational structure, character, personnel, and judicial practice, these courts belonged amongst the ranks of modernised judicial institutions of a sort then beginning to come into existence in Muslim countries. Compared to the institutions applying Shari'a law in other Balkan countries, the Shari'a courts in Yugoslavia were the best organised. This should not be surprising given the size of the Muslim community, its potential for train-

ing religious officials and scholars, and its nearly half a century of encounter with European administration.

4. Shari'a law, as applied by the Shari'a courts, took the form of a particular civil law of the first Yugoslavia, given that the legal authorities both recognised and accepted Shari'a legal norms not just tacitly, but explicitly, both in constitutional texts and in individual legal and other regulations. The institution of state Shari'a courts allowed Shari'a legal norms immediate validity in the civic forum and in legally stipulated areas of life. Since Islamic doctrine does not recognise ecclesiastical organisation or any specific consequences of legal norms' validity for the ecclesiastical realm, the validity of Shari'a law had to take on such a form if Shari'a was to be retained as a positive form of law in Yugoslavia.
5. The application of Shari'a law in interwar Yugoslavia may be viewed as expressing the well-known law in political and legal history that forms of law survive even after the disappearance of the state within which it first developed. In our case, the situation is the more interesting because Shari'a law and the basic legal principles of the bourgeois Yugoslav state had very different social, cultural, and historical starting points. One finds that the preconditions nonetheless existed within both Islamic teachings and the structure of the legal system of interwar Yugoslav state for the phenomenon to emerge.
   On the one hand, this meant the function of the state was limited through the application of a form of law given authoritatively in the sources of Islamic teaching, which opened up the possibility for applying Islamic law even in the absence of Islamic state or government institutions. On the other hand, the heterogeneity and particularism of the private law of interwar Yugoslavia allowed Shari'a law to be applied within a concrete governmental and legal framework without creating an exclusive precedent to the benefit of Muslims.
6. The historical legal literature tends to emphasise that giving a particular national, religious, or linguistic group special guarantees or rights indicates that its position in a given state is not an equal one. Under such circumstances, international guarantees do give a certain legal security and offer prospects for the survival and preservation of identity. It is in this light that one should consider the international guarantee for the application of Shari'a law, which could only be realised in a state which had not carried out full secularisation of the law and under conditions where the unequal position of the Muslim population was simply a part of social reality.

The social, governmental and legal development of the Yugoslav state, however, followed a path in which the autonomy of one part of the population with regard to its personal or status law could last only for a limited period of time. That period overlapped with a period when the other recognised religious communities also enjoyed certain rights *vis-à-vis* issues of personal or status law.

In a multireligious and multinational country, the coming process of secularisation would have had to be carried out even-handedly with regard to all the religious communities. Here lay the historical limitation to applying Shari'a law in government courts in Yugoslavia. An institution that represented a remnant of the understanding of Islam as a model of society would simply have no place in a governmental and legal order based on the principle of absolute secularisation and of religion as a private matter for the individual.

7. The institution of the Shari'a courts and the application of Shari'a law in interwar Yugoslavia were subject to powerful political and legal criticisms. Prominent interwar legal authors convincingly argued that applying Shari'a law through state courts was a legal anachronism in a modern European state. Viewed from the additional temporal distance of the present, this critical argument deserves our full attention and proves very difficult to contest. Viewed historically, however, within the legal system of the Yugoslavia of 1918 to 1941, not yet based on equal and generally accepted principles, Shari'a law and state Shari'a courts may reasonably appear, in a certain sense, to have been both a political and legal necessity, and they should be accepted as such.
8. Because of the range of cultural values and the protections they were given, along with their different structures and general concepts, there was little deeper interaction between Shari'a law and the other legal regulations in use around Yugoslavia. Due its sources and historical roots, Shari'a law was considered a foreign law and few have asked how it might contribute to enriching the legal heritage of the Yugoslav peoples. The fact that it has overwhelmingly tended to be designated by the vague term "religious law" has certainly contributed to this, as has the mortgage of how it functioned in past ages of the history of the Yugoslav Peoples.

   Even long after the state Shari'a courts were closed, the content of some Shari'a legal institutions and regulations continues to persist in the form of the religious and moral principles and customs of the southern Slavic Muslims.

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On March 5, 1946, the authorities of socialist Yugoslavia abolished the Shari'a courts in Bosnia and Herzegovina. This watershed moment marked the end of centuries of the application of Islamic law in this part of Europe. Over the preceding five centuries, Islamic law had formed an integral part of the legal systems of the Ottoman Empire, Austria-Hungary, and the Kingdom of Yugoslavia.

The focus of this book is on how a non-Muslim state, the Kingdom of Yugoslavia, applied Shari'a law in relation to its Muslim minority under the jurisdiction of its own courts. First published in 1986, during the final years of socialist Yugoslavia, this book was the first comprehensive study of this phenomenon and is now available in English.

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